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DEAR ECA MEMBERS...

2023 is another important year for ECA. Not only does it mark the start of a new cycle but it is also a year in which we will continue forging the ECA that our members need and deserve – a place where delivering unique and relevant services, which our clubs truly value, is at the heart of what we do. This means the right content, connections, conversations, advice, education, knowledge exchanges, research and insights.

Within that context, ECA continues to develop its legal services offering for clubs, an area at the heart of strategies, challenges and, of course, opportunities for many clubs across Europe. With so many different national and local contexts across Europe, ECA's job is always to try to find common ground, to identify unifying strategies, to propose areas of compromise – all in the service of ensuring that European football remains at the pinnacle of global sports - which also means that it remains supported by a strong, stable pyramid.

I am proud to mention that, during 2022, the ECA Legal Department fulfilled over 100 requests for legal advice from over 40 clubs, covering a wide range of topics spanning sports regulatory to commercial matters. Our main objective since launching our revamped ECA legal services is to become the first point of contact for our member and network clubs in need of legal advice, and we will continue to work tirelessly to achieve that objective in line with the growth of ECA's services portfolio.

I am therefore delighted to share issue 3 of the ECA Legal Journal.

In this issue, we start with a commentary from our ECA Legal Department on the fundamental principles of v*enire contra factum proprium* and *estoppel* and how they can be a solid defense in proceedings before FIFA's decision-making bodies and the Court of Arbitration for Sport.

Thereafter, you will find two articles from external contributors touching on topics not often addressed, but nonetheless important: i) a practical guide to clubs' best practices when facing the unfortunate situation of one of their players being at risk of facing jail time; and ii) an exhaustive explanation of how clubs **can** become liable for any match-fixing entered into by their players or officials and how to best manage such risk.

The jurisprudence in this issue is interesting. In particular, an overview of the decision by which CAS has exhaustively addressed, for the first time, the obligations that a player on loan continues to have towards his/her parent club.

In addition, it was impossible not to report on the quite unfortunate matter related to the late Emiliano Sala, which has noteworthy considerations on the jurisdiction of FIFA's deciding bodies.

Finally, we report on two awards which provide very important considerations on contractual clauses commonly used by clubs in transfer agreements: i) sell-on clauses, ii) purchase options; and iii) purchase obligations.

I trust that the third issue of the ECA Legal Journal will be of interest and added value to you. Please do not hesitate to reach out to me with any feedback or suggestions on the Journal. As always, ECA's Legal Department remains at your entire disposal to assist your clubs in any way we can.

Yours sincerely,

CHARLIE MARSHALL

CEO, ECA

LEGAL COMMENTARY

JURISPRUDENCE

LEGAL COMMENTARY

THE PRINCIPLES OF ESTOPPEL AND VENIRE CONTRA FACTUM PROPRIUM IN FIFA AND CAS DISPUTES

By ECA Legal Department

I GENERAL CONSIDERATIONS

The purpose of this article is to offer a brief introduction to the doctrines of venire contra factum proprium and estoppel (jointly referred to as the "Doctrines") which can be useful as a defence mechanism to clubs involved in a dispute. This analysis will be carried out with specific focus on the case law of FIFA's deciding bodies, namely the Dispute Resolution Chamber ("DRC") and the Players' Status Chamber ("PSC"), and the Court of Arbitration for Sport ("CAS").

THE PRINCIPLE OF VENIRE CONTRA FACTUM proprium is widely recognised in most national legal frameworks, particularly in civil law systems. According to this principle, the conduct of a party who takes a position contrary to one it has previously taken may constitute an abuse of rights if the other party has relied to its detriment on the original position. It follows that a party should not be allowed to assert a right or challenge the right of an opposing party if, in so doing, it acts to the detriment of the opposing party in contradiction to its previous conduct.

The above principle is often applied in litigation and arbitration irrespective of the industry of which the parties in dispute operate. For instance, **Principle I.1.2 of the Trans-Lex Principles**[1] provides as follows:

a) A party cannot set itself in contradiction to its previous conduct vis-à-vis another party if that latter party has acted in reasonable reliance on such conduct…

b) Violation of this Principle may result in the loss, suspension, or modification of rights otherwise available to the party violating this Principle or in the creation of rights otherwise not available to the aggrieved party.

In that regard, it is further explained that: This Principle follows from the general Principle of good faith and fair dealing. The other party's reliance may be based on a specific act, a statement or on the silence of the party. The conduct must be related to the contractual relationship existing between the parties.

Irrespective of the basis for the other party's reliance, the application of the Principle is limited by the standard of reasonableness. The other party must have acted in reasonable reliance on the first party's previous behavior…

Meanwhile, the closely related principle of estoppel is a doctrine that principally emanates from common law jurisdictions and basically prevents a party from acting inconsistently. There are various applications of this principle, making it more accurate to speak of "estoppels" in the plural.[2] In the singular, however, estoppel perhaps most accurately refers to "a *bar that prevents one from asserting a claim or right that contradicts what one has said or done before or what has been legally established as true*".[3] Understood in this manner, estoppel is analogous to corollary principles of good faith, abuse of rights and waiver found in many legal traditions and recognised by both national and international courts and tribunals.[4]

[1] Which contains 120 principles and rules of transnational law supported by references to academic texts, court decisions, national legislation, international conventions and model laws.

[2] See, for example, Chitty on Contracts (33rd Ed), and its various explanations of estoppels.

[3] See Bryan A. Garner, Black's Law Dictionary (10th Ed) (Thomson Reuters, 2014), at pp. 667-668.

[4] In international arbitration, institutional rules commonly contain rules on waiver preventing a party from acting inconsistently. See Rule 27 of the ICSID Rules or article 40 of the ICC Rules.

The majority of sporting bodies, particularly the FIFA DRC/PSC and the CAS, have recognised that the Doctrines apply to disputes brought before it. As explained by the arbitral tribunal in **CAS 98/200** AEK Athens and SK Slavia Prague / UEFA:

156... The Panel is of the opinion that all sporting institutions, and in particular all international federations, must abide by general principles of law (...) the substantive and procedural rules to be respected by international federations cannot be reduced only to its own statutes and regulations and to the laws of the country where the federation is incorporated or of the country where its headquarters are (emphasis added).

Since then, the application of the Doctrines as *lex sportiva* has been wide, all the way from anti-doping cases to contractual and governance matters.

To our knowledge, one of the first times that the Doctrines were recognised as part of the so-called *lex sportiva* was the above-mentioned matter **CAS 98/200** where, on the basis of the Doctrines, the arbitral tribunal reversed a decision taken by the UEFA Executive Committee which would have prevented both Appellant clubs to participate in UEFA club competitions due to a multi-club ownership rule which had been given retroactive effect by UEFA.

The applicability of the Doctrine in cases of retroactive application or sudden change of a rules by an international federation was later confirmed in the matter **CAS 2008/O/1455** Boxing Australia v/AIBA, where the arbitral tribunal held that:

an attempt to alter the Olympic qualification process with retrospective effect (...) a few months before the Olympic Games would violate the principle of procedural fairness and the prohibition of venire contra factum proprium (the doctrine, recognized by Swiss law, providing that where the conduct of one party has induced legitimate expectations in another party, the first party is estopped from changing its course of action to the detriment of the second party).

The Doctrines have also been material to the merits of anti-doping cases. For instance, in its decision in Association of Tennis Professionals (ATP) v. Bodhan Ulihrach of 7 July 2003, the ATP Tour Tribunal held that the doctrine of estoppel prevented the relevant anti-doping rule violation from being retained, as the positive test had been caused by certain pills supplied by an ATP trainer and which the ATP (implicitly) represented were acceptable for use under its anti-doping rules.[5]

Due to their qualification as fundamental principles of law, the practical usefulness of the Doctrines for parties in proceedings before the FIFA DRC/PSC or the CAS is vast and some of the principal scenarios where they can amount to a solid defence are explained below.

II SELECTED JURISPRUDENCE WHERE THE DOCTRINES PLAYED A FUNDAMENTAL ROLE

A PARTIES' PROCEDURAL CONDUCT

I) CHOICE OF FORUM

One of the most common applications of the Doctrines occurs in cases where the (lack of) jurisdiction of the FIFA DRC/PSC to adjudicate on a matter is raised for the first time at an appeal proceeding before the CAS.

Thus, for instance, in the matter **CAS 2011/A/2375** FK Dac 1904 a.s. v. Zoltan Vasas, the arbitral tribunal held that, on the basis of the Doctrines, the acceptance by a party to proceed before the FIFA DRC without contesting its jurisdiction shall preclude this party from contesting such jurisdiction in the proceedings before CAS. Such position was later confirmed by the tribunal in **CAS 2015/A/3883** Al Nassr Saudi Club v. Jaimen Javier Ayovi Corozo:

The fact that a party participated in the proceedings before the DRC without raising any jurisdictional objection and resorting to that defence only in the appeal proceedings also violates the principle of "venire contra factum proprium.

[5] For another anti-doping decision in which an argument on the basis of the Doctrines was upheld see CAS 2002/O/401International Amateur Athletics Federation (IAAF) v. USA Track & Field (USATF).

The above notwithstanding, it is important to underline that the Doctrines do not apply whenever a party remains silent during the FIFA proceedings. Indeed, in CAS 2014/A/3656 Olympiacos Volou FC v. Carlos Augusto Bertoldi & FIFA,[6] the tribunal clarified – while quoting the Swiss Federal Tribunal – that in cases where the Respondent fails to appear before FIFA, the Doctrines do not prevent it from raising a plea of FIFA's lack of jurisdiction for the first time before the CAS.

At FIFA level, the Doctrines are also applied in relation to the procedural conduct of the parties. For instance, in its decision **Player A vs Club C** of 24 November 2016, the FIFA DRC declared inadmissible a claim of a player, who had first sought recourse before the national dispute resolution chamber of a national association:

Furthermore, the members of the Chamber wished to emphasise that, even if the player appeared to have objected the competence of the NDRC of the Football Federation E, at the same time, he lodged a counterclaim against Club C within said proceedings requesting the exact same amounts he is herein requesting. In the Chamber's view, these actions of the player are a violation of the principle venire contra factum proprium. Indeed, it is inconsistent for a party to claim that the deciding-body before which it lodged a claim, or as in the present case a counterclaim, was not competent to adjudicate it as to the substance.

The same reasoning was applied in the DRC decision 0617784 of 15 June 2017, where the claim of a player, who had first filed a claim before a national dispute chamber, was also declared inadmissible.

The same approach is taken by FIFA whenever parties appear before ordinary courts of law, just to thereafter seek recourse before FIFA. For instance, in its decision **FPSD-6063** of 3 August 2022, the DRC held as follows:

the Single Judge deemed important to underline that in the spirit of the applicable regulations, a player – or a club – who actively decides to bring forward a dispute before a local deciding body, rather than making use of the alternative dispute resolution process proposed within the legal framework of FIFA, must demonstrate consistency in relation to the choice of the course of action. Accordingly, the Single Judge cannot condone the attitude of a party who at first decides to submit a labour dispute to a competent, specific, local deciding body, and subsequently decides to submit this very same dispute (between the same parties, based on the same legal framework) to FIFA; the same is to be noted if the party submits a claim before FIFA and thereafter seeks to lodge the same claim in front of different national bodies…

The above shows that the Doctrines are constantly applied by both the FIFA DRC/PSC and the CAS when it comes to the procedural conduct of a party. Indeed, if with its conduct a party shows that it considers a specific body competent to adjudicate a matter – particularly by addressing the substance of a matter without objecting to such body's jurisdiction – the Doctrines will prevent such party from changing its conduct at a later stage.

One quite relevant case in which the Doctrines were decisive is the Sion matter.[7] A dispute was triggered as a result of FC Sion and a player concluding an employment contract and jointly asking FIFA to issue a provisional International Transfer Certificate ("ITC") that would allow the international transfer of the Player from the Egyptian Football Association to the Swiss Football Association, particularly given the employment-related dispute between the player and his former Egyptian club, Al-Ahli. On 11 April 2008, a Single Judge of the PSC allowed the provisional registration of the Player with the Swiss Football Association, thereby permitting the issuance of the relevant ITC, allowing the Player to be registered as a professional footballer and to perform his services for FC Sion.

The matter became relatively complex since, at some point, there were pending disputes not only before the FIFA DRC and the CAS, but also before the Zurich Cantonal Court. One of FC Sion's and the player's main arguments was precisely the lack of FIFA's – and thereby of CAS' – jurisdiction to hear the claim/appeal due to the pending dispute before the Zurich Cantonal Court.

One of the arbitral tribunal's principal reasons to reject such argument was precisely on the basis of the Doctrines:

[6] Unpublished

[7] 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

The Respondents are right in pointing out that it would be an extraordinary case of venire contra factum proprium if the Player were allowed to submit to the rules and authority of FIFA with respect to the ITC and to reject such rules and authority with respect to the other side of the same coin, i.e. the dispute concerning his status as a free agent or not at the moment of signing the contract with FC Sion and the disciplinary consequences thereof.

Put differently, the arbitral tribunal considered that a party can accept the jurisdiction of FIFA, not only in the context of a dispute, but also via other administrative proceedings such as that related to the provisional registration of a player. That is particularly relevant given that if the player's former club instructs its national association to refuse the delivery of the player's ITC, the new club cannot register him unless it requests from FIFA his provisional registration, thus accepting the latter jurisdiction and thereby being unable to challenge it at a later stage.

II) NOTIFICATION OF DECISIONS AND DEADLINE TO APPEAL

The Doctrines can also become material when it comes to meeting deadlines, for instance that to appeal a decision if the latter is not properly notified.

In particular, CAS tribunals have concluded that a party cannot claim that its deadline to appeal did not start to run because the relevant decision was not properly notified to the party concerned, if it can be established that the party had anyway become aware of the relevant decision.

As put by the arbitral tribunal in CAS 2016/A/4817 Tetiana Gamera v. IAAF & UAF:

In particular circumstances a party may be estopped from availing itself of the fact that a deadline did not start to run (…) This is particularly so in view of the principle of good faith. A party is estopped from lodging an appeal where the other stakeholders involved could legitimately rely on the (federation's) measure in question to be final and binding. Thus, for example, if an appellant has taken note of a decision (in some other way) the latter is under a duty to make enquiries within certain limits as far as is reasonable and within his realms of possibility (…) If the party fails to do so, he or she would act in bad faith when arguing that the time limit had not yet begun to run..

The above is a confirmation of the well-established principle that the time limit to appeal before the CAS starts to run when the party has become aware of the decision. That is to say, when the decision has entered into the party's "sphere of control", regardless of whether the decision was officially notified to the party by the relevant federation.[8]

B IMPACT OF DOCTRINES ON SUBSTANTIVE MATTERS

The jurisprudence of the FIFA DRC/PSC and CAS also seems to indicate that the Doctrines can be used to protect the legitimate expectation of parties when it comes to the merits of the case, particularly in the face of a specific conduct.

I) ENFORCEMENT OF CONTRACTUAL PENALTIES IN TRANSFERS

For instance, in the matter **FPSD-5777** Olympiacos FC v. Sporting Gijón, the clubs concluded a transfer agreement which included a penalty fee in case of delayed payments. Sporting Gijón paid all the principal however with several months of delay. In particular, the transfer fee should had been entirely settled by July 2020, however it was not done so until almost a year later, in June 2021.

Olympiacos FC thus put Sporting Gijón in default of payment of the penalty, however in February 2022 only, ie 8 months after Sporting Gijón had settled all its dues.

The PSC Single Judge in charge of deciding the matter rejected Olympiacos FC's claim for the penalty on the following basis:

the Single Judge was not convinced that the Claimant was clear enough to exercise its right. Quite the contrary, as she concurred with the Respondent's position according to which the Claimant's inertia could reasonably generate the legitimate expectative that the agreement had been properly fulfilled (venire contra factum proprium). In this respect, she gave particular weight to the fact that the Claimant did not advance any proof that it had tried to reach the Respondent after the last payment, let alone that it had ever claimed to be

[8] See, for instance, CAS 2007/A/1413 World Anti-Doping Agency (WADA) v. Fédération Internationale de Gymnastique (FIG) & Nadzeya Vysotskaya and CAS 2016/A/4814 Free State Stars Football Club v. Daniel Agyei

entitled to any additional amount. Put simply, following the Respondent's payment of the last instalment of the transfer fee, the Single Judge considered that the Claimant's prolonged silence amounts to its (tacit) recognition that the transfer agreement had been fulfilled, and therefore that the Claimant was estopped from later changing its position.

Whilst the reasoning of the Single Judge is very questionable (one could easily argue that failure to exercise a right should be controlled only from a statute of limitations perspective which in FIFA's case is 2 years) and that, in any event, silence as an element to assess venire contra factum proprium should be construed narrowly, it represents yet another illustration of how careful parties must be with the potential impact of their actions (or inactions) on the legitimate expectations of the counterparty and, therefore, on the merits of the case.

II) TRAINING COMPENSATION

In the context of training compensation, the Doctrines have also been material on various occasions. Thus, in **CAS 2006/A/1189** IFK Norrköping v. Trinité Sports FC & Fédération Française de Football (FFF), IFK Norrköping alleged that its registration of the player as a professional did not trigger training compensation payments given that it had repudiated the employment contract concluded with the player.

The arbitral tribunal dismissed such defence on the following basis:

Norrköping acted as if the Employment Agreement was fully in force and, thus, as if it was prepared to accept the payment of training compensation to Trinité. In order to act coherently with its submission, the Appellant should not have requested an ITC and should not have registered the Player with the SFF until it was in possession of an irrefutable written pledge by Trinité to waive its right to the training compensation. However, this is not the course of action taken by Norrköping.

Therefore, in the Sole Arbitrator's view, the Appellant is estopped from contending that the Employment Agreement did not enter into force and that it never had any right over the Player.

III) LABOUR MATTERS - OVERDUE PAYABLES & JUST CAUSE FOR TERMINATION

Similar approaches have been applied also in the context of labour disputes. For instance, the DRC Single Judge in the matter FPSD-5954 rejected the claim of a player because "*the player waited more than one year to seek relief before FIFA – inducing the legitimate expectation of acceptance of the club's position (venire contra factum proprium)*".

Related to the above and as has been previously mentioned, the Doctrines are closely connected to the concept of an abuse of right.[9] In this regard, in at least two occasions – albeit in obiter – CAS tribunals have concluded that a termination of a contract for late payments can, in some circumstances, be an abuse of a legal right "*if the player gives the club the impression that he will accept late payment. This is so because if an employee gives the impression that he will accept late payment, then there is an absence of the breach of confidence that is required for termination without notice, which would make continuation of the employment relationship unreasonable*".

III. LIMITS TO THE APPLICATION OF THE DOCTRINES

All the above notwithstanding, existing case-law has also set some limits to the application of the Doctrines.

I) CAS' DE NOVO POWER OF REVIEW

For instance, CAS tribunals have consistently held that that the prohibition against venire contra factum proprium should not preclude a party from tendering new evidence or raising new arguments in an appeal arbitration proceeding, even is such evidence/arguments were not raised at FIFA level.[10] Indeed, the CAS Code grants the tribunal the full power to review the facts and the law of the case. It follows from this broad power of review that the parties in dispute should not be restricted to the evidence adduced, or bound by the arguments advanced, in first instance proceedings[11]

[9] See, for instance, decision of the Swiss Federal Tribunal 4C.133/2001: Contradictory conduct (venire contra factum proprium) is one of the cases of abuse of rights sanctioned by art. 2 para. 2 CC.

[10] Except perhaps in cases of bad faith and on the basis of Article R57 of the CAS Code.

[11] See, for instance, CAS 2000/A/274 S. / Fédération Internationale de Natation (FINA) or CAS 2008/A/1482 Genoa Cricket and Football Club S.p.A. v. Club Deportivo Maldonado

II) CONCRETE DAMAGE/DISADVANTAGE REQUIREMENT

In CAS 2007/A/1396 & 1402 WADA and UCI v. Alejandro Valverde & RFEC, the tribunal clarified that the Doctrines only apply (particularly venire contra factum), "*if the previous conduct gave rise to a trust which is worthy of protection and led to actions which, given the new situation, result in a damage*".

From the above it follows that in order for the Doctrines to configure pursuant to CAS case-law, it is not sufficient that a party changes its conduct. Rather, the conduct must also have generated a mutual trust between the parties and its change must have generated a damage on the party who relied on the breaching party's initial behaviour.

The above understanding was confirmed by the tribunal in **CAS 2017/A/5306** Guangzhou Evergrande Taobao FC v. Asian Football Confederation (AFC) where a defence based on the Doctrines was rejected because "*the Respondent (..) has suffered no discernible procedural prejudice. Further, the Respondent has not identified any detriment from the Appellant's change in position*".

The above approach also seems to be in line with the Swiss Federal Tribunal Jurisprudence which dictates that: [12]

According to the case law, there is no principle that one is indissolubly bound by one's own conduct. If there is a contradiction with previous conduct, the rules of good faith are only violated if the conduct in question has given rise to a trust worthy of protection, which is then disappointed by subsequent acts. The person who relies on an act must have taken measures in consideration of the trust created. This applies to actions that subsequently prove to be detrimental, for example, because the person concerned has allowed time to expire during which he could exercise a right, or because he has taken procedural steps that he would not have taken had it not been for the climate of trust created by his partner

III) CONTRIBUTORY CONDUCT

Furthermore, in **CAS 2011/A/2473** Al-Shabab Club v. Saudi Arabian Football Federation (SAFF), the arbitral tribunal rejected a defence grounded on the Doctrines because the injured party "contributed to the general confusion of the parties". That is also in line with the conclusion of the arbitral tribunal in **CAS 2018/A/5552** Kenneth Joseph Asquez v. FC Manisaspor K.D. & Fédération Internationale de Football Association (FIFA), where it was held that the Doctrines "cannot be invoked by a party that did not act in good faith".

IV) CAUSALITY

Finally, in **CAS 2012/A/2836** Eintracht Braunschweig GmbH & Co. KG a.A. v. Olympiacos FC, an argument on the Doctrines was rejected because there was no connection between the change of conduct and the damage suffered. In particular, the Appellant argued that it had lost the services of a player because the Respondent had changed its conduct from initially declaring that it did not want to proceed with the transfer of the player, only to thereafter applying for the issuance of the player's ITC.

However, the arbitral tribunal found that the Appellant had not lost the player's services because of the Respondent's change of conduct but rather by the operation of a contractual clause contained in the employment contract between the Appellant and the player.

IV CONCLUSION

This brief note has intended to show the practical usefulness of the doctrines of venire contract factum and estoppel in proceedings before the FIFA DRC/PSC and the CAS. We have sought to achieve this by illustrating various types of matters where these principles were relied upon in the adjudication of the dispute. Indeed, the Doctrines are one of the most useful defence mechanisms when facing a claim from a party which has acted inconsistently.

The current jurisprudence shows that sporting deciding bodies are well acquainted with these principles and generally open to accept a defence on that basis, both for procedural matters, as well as for issues of substance.

However, case-law also shows that the application of the Doctrines has limits which sports tribunals have somewhat consistently respected and which parties should be aware of when assessing the merits of their positions. As mentioned by the tribunal in Asquez, the Doctrines "cannot be invoked by a party that did not act in good faith".

[12] Decision of the Swiss Federal Tribunal 4C.195/1999

WHAT TO DO WHEN A PLAYER IS ARRESTED

By Jonathan Goldsworthy and Charles Hill

INTRODUCTION

Issues of football player misconduct naturally draw an intense level of scrutiny from both the public and the media due to the high-profile nature of the sport; and no more so than when the misconduct results in a player being arrested. In such cases, it is easy for the media interest (both press and social channels) and commercial considerations (such as relations with club sponsors and investors) to cloud the fact that football players are, generally, employees of their respective clubs which affords them certain rights and protections irrespective of any Police/Court process.

AS SUCH, IN RESPONDING TO A PLAYER'S arrest (and, indeed, any other case of alleged serious misconduct), it is tempting for a club to be dictated to by external pressures and seek to distance itself from the player; for example, by publicly criticizing the player's behaviour as being contrary to the club's values or even terminating the relationship. However, it is essential that clubs do not act hastily and properly factor the underlying contractual relationship into any public and/or internal process. If a club loses sight of the nature of this relationship - and allows external factors to influence their process and decision-making - they can easily lose control over serious disciplinary situations, to the detriment of the player (and, in turn, the club). Indeed, failing to follow the correct process can result in penalties ranging from financial compensation (in the UK) to the enforced reinstatement of a player's contract (in Germany).

IN THIS ARTICLE WE WILL EXAMINE:

- **the importance of grounding a club's response to a player disciplinary issue with a legally compliant process;**
- **recommendations for dealing with the media and associated commercial pressures;**
- **what to consider when running a disciplinary process in parallel with criminal proceedings; and**
- **safeguarding considerations in relation to offences involving minors.**

THE IMPORTANCE OF PROCESS

The first step a club should take in response to a player being arrested (or, indeed, any disciplinary issue) is to consult the relevant legal framework governing the relationship between the club and the player. This will dictate both the rights afforded to the player and also the process which the club must follow with regard to any investigation, disciplinary procedure and (if necessary) dismissal.

In most countries, football players are employees of their respective clubs - something that is often overlooked because of the significant emphasis placed on the commercial terms of the player contract - but there are jurisdictions (such as Italy) where players have their rights and entitlements set out in a Collective Bargaining Agreement. Understanding the correct legal basis of the relationship is, therefore, critical.

For employees, the contract of employment (and any associated binding policies) should be the first port of call. However, most jurisdictions will also have labour law statues (and, potentially, related codes of practice) which will provide a framework and certain safeguards that must be assessed and complied with when deciding how to deal with the arrested player. Questions that a club will need to ask will include, for example, whether the club is legally entitled to suspend an arrested player from training and/or match duties and, if so, are there any particular terms that should be applied? Does it make a difference if the player committed the alleged misconduct on club "duty" (i.e. at a club event, in club uniform etc.) or was the offence committed on his own time (which may be relevant in jurisdictions with an increased demarcation between private and work life)? If the player is considered to have committed (gross) misconduct, what sanction(s) is the club permitted to impose?

Whilst "innocent until proven guilty" is a phrase usually trotted out in the criminal proceedings, it is of equal importance in an internal club process. Indeed, if a club behaves in a way to suggest that they have already decided that the player is guilty of the offence(s) of which they are charged, it is likely that the player will, in turn, argue that any internal process is predetermined and, therefore, unfair. Equally, public comments about the arrest/guilt could influence a jury's decision-making and prejudice the criminal proceedings.

Failure to understand the framework of the relationship (and properly follow all of the required steps of an investigatory and/or disciplinary process) can result in serious financial penalties in instances where a club acts unlawfully and is successfully sued as a result. For example, an Employment Tribunal in the UK can award compensation of almost £100,000 in a case of unfair dismissal. Whilst this amount may seem a drop in the ocean for a Premier League club that often pays out multiples of that sum in weekly wages, it would be a significant outlay for clubs in lower leagues. It should also be noted that dismissal proceedings are often only the initial claim that is pursued.

If it can be demonstrated that a club's failure to follow correct procedure when disciplining or dismissing a player constituted an act of unlawful discrimination or harassment, for example, the damages which an Employment Tribunal can award are uncapped. It is also possible that a player may use a judgment in their favour as a basis for legal action outside of the employment law arena; such as a claim for defamation or forfeited win/performance bonuses. In cases where damages are often assessed against the player's loss of earnings; and in a sport where a player's career is both lucrative and short-lived , clubs could have to pay an amount equating to multiple years' salary if a player successfully argues that they may never be able to play for a similar-level club again as a result of the club's behaviour.

HANDLING THE MEDIA

One benefit of a measured and legally-robust procedure is that it limits the extent to which external factors can distort and disrupt a club's handling of a player's arrest.

Due to the high-profile nature of the sport, perhaps the greatest challenge a club will face in handling player misconduct is the presence of the media and social media and the effect this has on magnifying the scrutiny of a club's actions in these situations.

Unauthorised statements from sources within or associated with a club can encourage rampant media speculation and easily prejudice internal disciplinary proceedings (as well as the underlying criminal trial). As above, this can, in turn, increase the risk of financial liability for the club. In a sensitive criminal investigation process, particularly those involving minors, legal requirements often mean that certain details about the arrested player (such as name, age, nationality or any other identifying characteristics) cannot be reported on, and those who do risk legal action.

The most prudent step that a club can take in respect of the media is, therefore, to make sure that roles and responsibilities are clear when it comes to public communications around misconduct scenarios. Individuals such as the player in question, their agent, the manager, or other staff members should be aware that they should not be commenting on the situation; either in direct statements to the media or by making direct or indirect comments on private social media channels. It should be made clear that any club employees or officials who breach imposed media bans may themselves be subject to disciplinary (and, in some countries, separate criminal) action.

Those at the club who will make comment - and it is recognised that such high profile matters cannot be ignored - should ensure that any statements are agreed with the club's PR or media officer and lawyers beforehand. This will help to avoid fuelling online speculation concerning the events and limit the scope for a 'trial by social media'. It will often be a careful balancing act between being clear that the club does not tolerate the offence(s) that has been alleged and not jumping the gun to publicly chastise the player in order to appease commercial partners and fans alike. If these actions are taken without consideration for the appropriate process, players may suffer potentially significant financial losses which they will look to recover from the club.

The process for ensuring anonymity extends beyond just public communications and statements to the media. Clubs need to understand that there are other ways in which a player's anonymity can be compromised; such as posting photos from training which show all of the squad other than the arrested player or prematurely removing the player from the club's website or marketing campaigns. If the arrested player has pre-existing non-playing commitments (such as punditry or promotional activities) care will need to be taken when arranging for the player to be withdrawn.

It is also important for clubs to take steps to mitigate against any wrongful speculation about players not involved in the proceedings. Often, when the police or media release limited information about the arrest, there is intense speculation (usually on social media) about the identity of the individual involved. This can then result in allegations against other players who have no involvement in the proceedings. Clubs need to brief all players on how to act in these situations as, whilst it is understandable that a player falsely associated with the arrest will want to clear their name, any public statement may result in legal repercussions.

RUNNING AN INVESTIGATION AND DISCIPLINARY PROCESS IN PARALLEL WITH A CRIMINAL INVESTIGATION

CRIMINAL VS. CIVIL STANDARDS OF PROOF

Where a player is arrested, more often or not there will be a lengthy criminal process which runs in parallel to any internal investigation. In some instances, criminal proceedings can last for longer than two years from a player's arrest to the point at which they are found guilty or not guilty in court. This can cause immense uncertainty when it comes to a club formulating their response and process. It may also be the case that the club and/or player will be the subject of an investigation and/or proceedings by the relevant league or football association that will need to be factored into any strategy.

Whilst clubs should ensure that their response to a player's arrest does not prejudice any criminal proceedings - for example by releasing statements detailing the events under criminal investigation - it is important to note that an internal disciplinary hearing and a criminal investigation/ trial are fundamentally different procedures, with different standards of proof used to establish wrongdoing.

In most jurisdictions, criminal guilt is determined if it can be proven "beyond all reasonable doubt" that the individual committed the offence in question. This is a high standard of proof to meet - understandably so as a person's life or liberty is usually at stake - and so may lead to a criminal acquittal even in circumstances where it is considered likely (possibly even highly likely) that the player committed the offence alleged.

However, the fact that a player may be acquitted of wrongdoing in criminal proceedings does not necessarily preclude a club from taking action against the player on a civil basis by terminating their contract or imposing a disciplinary sanction(s). The legal threshold for taking such action is, generally, that the club is satisfied that on the "balance of probabilities" (i.e. it is more likely than not) that the player has committed an offence. It should be noted that a civil sanction can be imposed not only as a result of the offence for which the player was arrested but for other related grounds such as bringing the club into disrepute, failing to comply with the club's code of conduct or where the relationship between the club/player has irretrievably broken down.

BAIL CONDITIONS

Where a player is arrested it is possible that the police will impose certain bail conditions to regulate/limit the player's activities whilst awaiting trial. This is particularly likely for allegations of violence and stalking. It is important to note that bail conditions are not, of themselves, an indication of guilt but clubs will, nevertheless, need to carefully consider how they may impact on a player's ability to continue to train or play in matches.

An example of this would be in an alleged assault where the perpetrator is often restricted from coming into close contact with the victim. In cases of assaults against teammates or other club employees (a sadly all too common occurrence, particularly after staff parties), if a player is restricted from coming into contact with another club employee, careful consideration will need to be given as to whether the arrested player is able to train/play.

SAFEGUARDING MINORS

Bail conditions are also extremely likely to be imposed in instances of alleged sexual misconduct involving minors. Again, there have been multiple high-profile and widely publicised cases of this. In these instances, bail conditions will be more stringent and, as well as restrictions on contact with the victim, will also prevent the player from having unsupervised access to minors generally.

In a training environment where a club's senior team often shares facilities with its youth teams, and on matchdays where games are attended by thousands of under-18-year-olds (both staff (such as ball-boys/girls, stewards etc.) and fans), if a player is banned from having unsupervised access to minors, this will clearly have a significant impact on their ability to do their job as they would likely have to stay away from both the training facilities and stadium under the terms of their bail conditions.

In instances where bail conditions affect a player's ability to train and/or play matches for the duration of a criminal investigation process, the club is potentially left with a significant expense for a player unable to play. In these instances, clubs should again refer back to the legal framework of the employment relationship to evaluate its options; which may include a temporary reduction in wages.

VISA ISSUES

Given the significant international talent pool in football, it is increasingly common for players to ply their trade outside of their country of origin and, therefore, have employment contracts that are conditional on a working or sporting visa. Clubs should, therefore, be aware that many countries' Immigration Rules provide the capacity for (and, in some cases, require) a visa to be cancelled in circumstances where a player is convicted of a criminal offence and/or shows a particular disregard for the law. Whilst a visa removal is most likely to occur post-criminal conviction, clubs will need to factor the possibility for a player to lose the right to lawfully live and work in a country into their internal decision making.

CONCLUSION

In conclusion, the trappings and pressures of the footballing world have the potential to rapidly escalate and complicate what may otherwise be a straightforward disciplinary scenario in instances where players are arrested. Additional considerations such as parallel criminal investigations and heightened media and public scrutiny increase the likelihood that clubs may trip up when handling these scenarios.

Clubs must therefore take specialist advice when a player is arrested and ground their response in a thorough process in order to avoid the potentially significant financial consequences of imposing disciplinary sanctions or unfairly dismissing a player without due process.

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STRICT LIABILITY IN MATCH-FIXING DISCIPLINARY PROCEEDINGS

By Ennio Bovolenta[12]

1. INTRODUCTION

One of the biggest threats to the integrity of sport has always been the manipulation of sport competitions, also known as "match manipulation" or "match-fixing".[13] according to one of its most complete and successful legal definitions:

"Manipulation of sports competitions" means an intentional arrangement, act or omission aimed at an improper alteration of the result or the course of a sports competition in order to remove all or part of the unpredictable nature of the aforementioned sports competition with a view to obtaining an undue advantage for oneself or for others ."[14]

We have witnessed different cases of match-fixing in football and other sports, nevertheless all of them sharing the very same character, namely the removal of the true essence of sport: the fairness of the competition and the unpredictability of the course of a match and/or its result. Given the gravity of this issue, lawmakers have intervened (and are still intervening) in order to tackle match-fixing, at various levels:

A **By means of international conventions: such as the United Nations Convention Against Corruption ("UNCAC"), the United Nations Convention Against Transnational Organized Crime ("UNTOC"), and more specific on match manipulation, the Council of Europe Convention on the Manipulation of Sports Competitions ("Macolin Convention");**

B **By means of national legislations: namely the state provisions criminalizing match manipulation in a constantly growing number of States;**

C **By means of sport regulations: such as the Olympic Movement Code on the Prevention of the Manipulation of Competitions and the regulations from international and national sport federations. Within football, regulations sanctioning match-fixing have been enacted by FIFA, UEFA and other confederations, and by the national football federations.**

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[13] For the purpose of the present article, we will not linger on the debated differences, if any (more academic than substantial), between the referred terms, but rather use them interchangeably in order to refer to the same phenomenon.

[14] (4) of the Council of Europe Convention on the Manipulation of Sports Competitions, commonly referred to as the "Macolin Convention".

Within the football private regulatory framework, FIFA and UEFA both address match-fixing in their disciplinary regulations, providing severe sanctions on any perpetrators. In some cases, said regulations even provide an automatic liability of the concerned clubs and/or associations when the sanctioned conduct is performed by their members. Such liability is defined as "strict", as it entails the possible imposition of sanctions on the association/club "even if the association or club concerned can prove the absence of any fault or negligence[15].

In the following paragraphs, we will first refer to the specific UEFA and FIFA regulations providing for a strict liability of football clubs in case of match manipulation and, eventually, analyse how said provisions have been applied in certain leading cases. Finally, based on such analysis, we will identify the key elements for the application of the strict liability rule.

2. MATCH-FIXING & STRICT LIABILITY IN THE INTERNATIONAL FOOTBALL REGULATIONS

As mentioned above, both UEFA and FIFA regulations sanction match-fixing in the respective disciplinary regulations.

At UEFA level, article 12 par. 1 of the UEFA Disciplinary Regulations ("UDR") provides as follows:

all persons bound by UEFA's rules and regulations must refrain from any behaviour that damages or could damage the integrity of matches and competitions and must cooperate fully with UEFA at all times in its efforts to combat such behaviour.

Paragraph 2 then adds that the integrity of matches and competitions is violated, for example, by anyone (emphasis added): a. who acts in a manner that is likely to exert an unlawful or undue influence on the course and/or result of a match or competition with a view to gaining an advantage for himself or a third party [16]

In the same vein, art. 18 par. 1 of the FIFA Disciplinary Code ("FDC")[17] states the following:

anyone (emphasis added) who directly or indirectly, by an act or an omission, unlawfully influences or manipulates the course, result or any other aspect of a match and/or competition or conspires or attempts to do so by any means shall be sanctioned with a minimum five-year ban on taking part in any football-related activity as well as a fine of at least CHF 100,000. In serious cases, a longer ban period, including a potential lifetime ban on taking part in any football-related activity, shall be imposed.

The above-mentioned provisions constitute the legal basis for UEFA and FIFA to determine whether those bound by the respective regulations have been involved in match-fixing. Interestingly, both regulations do not identify specific categories of persons who can carry out the incriminated conduct, but rather leave the door open to "anyone" (covered by the umbrella of the regulations) to commit a breach of the rules.

Consequently, the same sets of disciplinary regulations also expressly include the possibility that clubs are held liable for the violation of the aforementioned provisions by their players.

[15] Art. 8 (1), last par., FIFA Disciplinary Code

[16] In continuation, the same article adds that the integrity of matches and competitions is violated also by anyone: b. who participates directly or indirectly in betting or similar activities relating to competition matches or who has a direct or indirect financial interest in such activities; c. who uses or provides others with information which is not publicly available, which is obtained through his position in football, and damages or could damage the integrity of a match or competition; d. who does not immediately and voluntarily inform UEFA if approached in connection with activities aimed at influencing in an unlawful or undue manner the course and/or result of a match or competition; e. who does not immediately and voluntarily report to UEFA any behaviour he is aware of that may fall within the scope of this article.

[17] References to the provisions of the FDC are made with respect to the 2019 edition of the FIFA Disciplinary Code. On 16 December 2022, the FIFA Council approved amendments to the FIFA Disciplinary Code (also concerning fight to match manipulation and investigations) which came into force on 1 February 2023. In this latest version of the FDC, the numeration of some of the provisions quoted herein has changed, namely art. 18 turned into art. 20 and art. 71 into the new art. 75,

In that regard, art. 8 UDR provides a general rule on responsibility, indicating that, unless stipulated otherwise in these regulations, a member association or club that is bound by a rule of conduct laid down in UEFA's Statutes or regulations may be subject to disciplinary measures and directives if such a rule is violated as a result of the conduct of one of its members, players, officials or supporters or any other person exercising a function on behalf of the member association or club concerned, **even if the member association or the club concerned can prove the absence of any fault or negligence**

Likewise, a similar rule is enshrined in the FDC as well, with art. 8 par. 1 stating that, unless otherwise specified in this Code, infringements are punishable regardless of whether they have been committed deliberately or negligently.

In particular, associations and clubs may be responsible for the behaviour of their members, players, officials or supporters or any other person carrying out a function on their behalf **even if the association or club concerned can prove the absence of any fault or negligence (emphasis added).**

Both provisions clearly set a general strict liability rule, establishing that, inter alia, clubs might face disciplinary sanctions for the conduct of their members, players, officials or supporters (or anyone else carrying a function on their behalf) even in the absence of any fault or negligence by the club/association itself.

Furthermore, among the final provisions of the FDC, art. 71 par. 1 opens the door to the inclusion of a general strict liability rule also in the disciplinary codes of the national federations, by indicating that the associations are obliged to adapt their own disciplinary provisions to the general principles of this Code for the purpose of harmonising disciplinary measures.

On account of the above, it is possible to draw some first conclusions:

1 **In cases of match-fixing committed by their players, clubs might incur in the application of strict liability rule in accordance with the provisions of either the UDR or of the FDC[18];**

2 **the application of a strict liability rule, according to the UDR and FDC, is not automatic; and**

3 **both UDR and FDC do not indicate under which specific conditions the strict liability rule shall necessarily apply in connection with cases of match manipulation.**

Consequently, in order to understand which specific conditions could trigger the application of the "strict liability" rule by UEFA and FIFA, it is necessary to turn our attention to the cases in which such principle has been applied. As such, we will proceed to examine in the following paragraphs some important decisions where the application of the strict liability rule took place in connection with cases of match-fixing adjudicated under UEFA and FIFA disciplinary regulations respectively.

[18] Provided that a general strict liability rule is not already applied in the specific case by virtue of the national disciplinary regulations.

3. JURISPRUDENCE

3.1 A UEFA CASE: THE SKËNDERBEU "SAGA"

When we refer to the so-called Skënderbeu "saga", we indicate a sequence of proceedings which entailed the application of UEFA's anti match-fixing rules, the strict liability rule among them, on the Albanian club KS Skënderbeu.

In order to have a clear picture of the steps which led to the application of the strict liability rule, it is necessary to refer to a first award rendered by the Court of Arbitration for Sport (CAS)[19] on an appeal presented by the club Skënderbeu against a UEFA decision.

The decision in question, issued by the UEFA Appeals Body on 1 June 2016, established that the club had been involved in match-fixing activities, after the UEFA Betting Fraud Detection System ("BFDS")[20] had identified more than 50 matches involving the club where the results had been allegedly manipulated for betting purposes since 2010.

On account of the above, in accordance with the UEFA Champions League (UCL) regulations[21], the club had been declared ineligible to participate in one edition of the competition. The CAS confirmed the decision, and, in line with UEFA's approach, pointed out that the measure was of an administrative nature, reserving eventual disciplinary proceedings for a further stage[22].

Therefore, while the strict liability principle under art. 8 UDR was not applied in this first stage (being the proceedings at stake of an administrative nature), this award is nevertheless relevant as it takes position on the evidentiary value of the BFDS reports within match-fixing proceedings. In particular, the Panel observed that the analytical information derived from the BFDS is valuable evidence that, particularly if corroborated by further evidence, can be used in order to conclude that a club was directly or indirectly involved in match-fixing . As it will be illustrated, this reasoning was of crucial importance in the following disciplinary proceedings.

3.1.1 CAS 2018/A/5734 – SKËNDERBEU "II"

With this award, the two-stage process, which had started with the administrative proceedings mentioned above, was completed with the disciplinary stage . In this case, the club Skënderbeu in fact appealed the decision rendered by the UEFA Appeal Body on 26 April 2018, which confirmed the decision of the UEFA Chairman of the Control, Ethics and Disciplinary Board to exclude the club from participating in the next ten (10) UEFA club competitions for which it would otherwise qualify. In this award, as it will be described below, the Panel, after having concluded that the four matches under scrutiny were fixed , confirmed the application of the strict liability rule contained in the UDR. But let's proceed in order.

HOW DID THE PANEL COME TO THE CONCLUSION THAT THE MATCHES WERE FIXED?

First of all, the Panel did not depart from the consideration of the previous award (CAS 2016/A/4650) on the reliability of the BFDS as a valid tool contributing to the detection of match-fixing.

[19] CAS 2016/A/4650, award dated 21 November 2016

[20] For a brief explanation of the functioning of the BFDS system, please see the description provided by UEFA itself, reported in CAS 2016/A/4650, par. 81.

[21] UCL Regulations (2015-2018 Cycle, 2016/1017 edition) - art. 4.02 UCL Regulations 2016/2017: If, on the basis of all the factual circumstances and information available to UEFA, UEFA concludes to its comfortable satisfaction that a club has been directly and/or indirectly involved, since the entry into force of Article 50(3) of the UEFA Statutes, i.e. 27 April 2007, in any activity aimed at arranging or influencing the outcome of a match at national or international level, UEFA will declare such club ineligible to participate in the competition. Such ineligibility is effective only for one football season. When taking its decision, UEFA can rely on, but is not bound by, a decision of a national or international sporting body, arbitral tribunal or state court. UEFA can refrain from declaring a club ineligible to participate in the competition if UEFA is comfortably satisfied that the impact of a decision taken in connection with the same factual circumstances by a national or international sporting body, arbitral tribunal or state court has already had the effect to prevent that club from participating in a UEFA club competition.

[22] This is in line with UEFA's "two-stage approach" enshrined in art. 50 (3) of the UEFA Statutes, according to which the admission to a UEFA competition of a Member Association or club directly or indirectly involved in any activity aimed at arranging or influencing the outcome of a match at national or international level can be refused with immediate effect, without prejudice to any possible disciplinary measures. In the first Skënderbeu award (2016/A/4650), the Panel, in line with the previous CAS jurisprudence (CAS 2016/A/4650, paras 47 et seq., referring to CAS 2013/A/3258, para. 127; CAS 2014/A/3625, para. 122 of abstract published on the CAS website; CAS 2014/A/3628, para. 102 of abstract published on the CAS website; CAS 2013/A/3256, para. 164), confirmed that the two-stage approach was perfectly feasible and concluded that the proceedings under scrutiny were of an administrative nature, thus constituting the first stage of the process.

In particular, the Panel emphasised that, in order to come to the conclusion that a match is fixed, the analytical and mathematical information contained in the BFDS report needs to be supported by other, different and external elements which point in the same direction, i.e. a differentiation must be made between the so-called quantitative information and a qualitative analysis of the quantitative information, which is also needed . In other words, the presence of a mathematical deviation between the actual and the calculated odds in the betting markets is not sufficient, per se, to conclude that a match is fixed, but it must be supported by qualitative elements.

IN THE PRESENT CASE, SAID ELEMENTS WERE THE FOLLOWING:

- the fact that another betting monitoring operator reached the same conclusions contained in the BFDS reports;
- the suspicious performance of some players in the field of play;
- the vast "escalation history" of the club (i.e. the high number of matches played by the club in the past, which had been rated as "escalated" within the BFDS);
- the decision of a significant market operator offering matches for betting to exclude the club Skënderbeu from live markets;
- the lack of any compelling alternative explanation for the betting movements that are the basis of the match-fixing charges;
- the emergence of a betting pattern in respect of the club; and
- the consistent reaction of media news and the international perception of opponent players, supporters and betting operators[27].

What is more, the Panel considered particularly relevant that the evidence covered not only one match but four, offering a crescendo of evidence. However, this evidence would not, in the Panel's view, have been as compelling or conclusive in relation to only one match, where additional evidence could have been expected[28]. Therefore, the number of matches involved played a decisive role, as the Panel pointed out that the cumulative effect of the evidence, which was adduced applicable to this number of matches, points to the conclusion that match-fixing has occurred[29].

HOW DID THE PANEL INTERPRET THE STRICT LIABILITY RULE UNDER ART. 8 UDR?

It was contested by the club that art. 8 UDR established the necessity that at least one specific person was identified in order to trigger the club's strict liability. In other words, according to the club, it was necessary that at least one specific person belonging to the club was found to have breached the anti-match-fixing rule under art. 12 UDR (cf. par. 2 supra) in order to eventually apply the general rule under art. 8 UDR.

The Panel rejected the argumentations of the club arguing that art. 8 UDR was expressed in broad terms, as said rule only required that members, players officials or supporters of the club were involved in match-fixing. According to the Panel, this enlarged approach was consistent with the fact that the behaviours that are sanctioned (i.e. match-fixing and corruption) are concealed and wiretapping and other types of evidence available to state authorities that are useful

[23] CAS 2016/A/4650, par. 79.

[24] CAS 2018/A/5734, par. 149: Such a two-stage process, with an initial administrative measure, is justified because sport has a compelling interest to act immediately against undesirable behaviour that threatens its integrity. Thus, there is a need to have a procedure allowing immediate exclusion of a club from a competition, without prejudice to the possibility that later the same club can be made subject to a disciplinary sanction taking into account the nature of such behaviour and all the related circumstances. This need arises particularly in cases of match fixing to avoid the risk that a club might continue with match-fixing in the same competition (which also explains why the administrative measure has a duration of just one season irrespective of the gravity of the violation).

[25] The same four matches had also been at the basis of the previous case (CAS 2016/A/4650), all played in the 2015/2016 Champions League and Europa League season.

[26] CAS 2018/A/ 5734, par. 184

[27] CAS 2018/A/ 5734, par. 198

[28] CAS 2018/A/ 5734, par. 208: In such circumstances, the Panel would have expected UEFA to engage in further efforts to gather evidence beyond that which it has obtained in the present case, including by engagement with the relevant law enforcement authorities.

[29] CAS 2018/A/ 5734, par. 208

to unearth such misconduct, are not available to sports governing bodies, due to their limited coercive powers.[30]

In the Panel's view, art. 8 UDR does not require that a specific individual is identified but only that members, officials, supporters or players of the club are involved in match-fixing activities, in the sense that the Panel must be comfortably satisfied that people belonging to any of these groups and not to other groups alien to the Appellant (for instance referees), are the ones that committed the offence[31].

In the case at stake, the Panel considered that the "mistakes" had been made by the players of the Appellant only and, therefore, it could be excluded that other players, referees or other officials may have been involved. As such, based on the above, the Panel concluded that players of the club had violated art. 12 UDR and, consequently, confirmed the club's strict liability as per art. 8 UDR.

THE INTERPRETATION OF THE SWISS FEDERAL TRIBUNAL (SFT)

Eventually, the club appealed the abovementioned CAS award (CAS 2018/A/5734) before the Swiss Federal Tribunal and, amongst others, also the interpretation of art. 8 UDR made by the Panel in said award.

Interestingly, the SFT, with the decision SFT 4A_462/2019 rendered on 29 July 2020, adhered to the Panel's interpretation and confirmed that there was no need for a specific individual to be identified in order for art. 8 UDR to be applied, but it sufficed to establish that any of the members, officials, supporters or players of the club have committed the reprehensible actions ascertained, with the exception of external third parties to the club, such as the referees.

The SFT affirmed that such an interpretation is compatible with the text of the provision and is justified by the fact that the sanctioned behaviours, i.e. match-fixing and corruption, are essentially concealed. Moreover, the SFT stressed that, given the limited coercive power of the sports instances, they do not have the same investigation means as the State authorities allowing them to shed a light on such acts.

Having made the above considerations, the SFT concurred on the fact that only indiv iduals linked to the club (Skënderbeu) were involved in the manipulation of the matches under scrutiny and, thus, art. 8 UDR was correctly applied[32].

3.2 A FIFA CASE: ZOO FC

The case concerning the involvement of the Kenyan club Zoo FC in match-fixing has been the first-ever case in which FIFA judicial bodies applied the strict liability rule to a club within the context of match manipulation proceedings.

Differently from the Skënderbeu "saga" previously analysed, in this case we do not have a CAS award, however, the decision[33] is of particular importance as, by interpreting art. 8 and 18 par. 2 FDC in light of the aforementioned CAS and SFT jurisprudence, we have the imposition of sanctions on the club, for the first time at FIFA level, because of the involvement of their players in match manipulation.

THE FACTS

The proceedings started with an investigative report submitted by the FIFA Integrity department to the FIFA Disciplinary Committee, concerning the possible involvement of the club Zoo FC in the manipulation of some national matches. In particular, the investigation revolved around two "escalated" matches played by the club Zoo FC in the local first division in 2019 and 2020[34] respectively, followed by FDS [35] reports.

[30] CAS 2018/A/ 5734, par. 216

[31] CAS 2018/A/ 5734, par. 217

[32] SFT 4A_462/2019, par. 7.3 : [...]

[33] In the first instance, the FIFA Disciplinary Committee passed the decision on 23 April 2021 (FDD-6516), which was eventually confirmed by the FIFA Appeal Committee on 16 September 2021 (FDD-8729).

[34] Namely two matches played in the Kenyan Premier League: Sofapaka FC vs Zoo FC played on 27 January 2019 (3:2); Wazito vs Zoo FC played on 1 March 2020 (4:1).

[35] FDS («Fraud Detection System») is a betting monitoring system, similar to the BFDS, provided to FIFA by the same betting monitoring company providing the BFDS to UEFA. For more information on the two systems: FDS (https://www.fifa.com/legal/integrity/betting-fraud-detection-system), BFDS (https://www.uefa.com/insideuefa/news/0243-0f8e5ded692c-b45c308f173c-1000--integrity/)

THE FOLLOWING ELEMENTS WERE PRESENTED IN THE REPORT, SUPPORTING THE CONCLUSION THAT THE TWO MATCHES HAD BEEN MANIPULATED BY PLAYERS OF ZOO FC:

- **BETTING REPORTS:** the FDS reports found suspicious odds detected during the two matches, betting patterns in contrast with the logical expectations, with no legitimate and justifiable explanation. Moreover, this conclusion was drawn in the FDS reports not only on the basis of analytical data and the absence of any normal explanation, but also taking into account external factors that corroborated the theory that the abnormal betting behaviour was likely to be explained by match-fixing. Furthermore, additional reports from other two betting monitoring companies reached similar conclusions.
- **REMOVAL OF BETTING MARKETS:** some bookmakers removed all or some of their betting markets during the two matches.
- **HISTORY OF SUSPICIOUS MATCHES:** further reports regarding six additional matches played by the club, that were deemed to have been manipulated over the period 2018-2019, were submitted.
- **SUSPICIOUS BEHAVIOUR OF PLAYERS OF ZOO FC:** three different betting monitoring companies identified mistakes by various Zoo FC players in both the matches under scrutiny, whilst simultaneously, no relevant concerns regarding the performance of the players of the opposing teams were highlighted.
- **SUSPICIOUS CONNECTION ON SOCIAL MEDIA:** some Zoo FC players followed social media pages offering information on fixed matches and had connections with convicted match-fixers.
- **OPEN-SOURCE INFORMATION AND AFFIDAVIT FROM ZOO FC HEAD COACH:** various media outlets reported that various players were allegedly involved in match manipulation during their time at the club and had been sacked for that reason. Similar allegations were provided by the club's head coach to FIFA in an affidavit.
- **WITNESS STATEMENTS:** some officials and players of the club identified suspicious mistakes by some players of Zoo FC and acknowledged the possibility that the matches have been manipulated. In addition, they indicated that the lifestyle of some of the suspected players had changed considerably since they were at the club, with the opening of different businesses, thus raising suspicions about them given that, at that time, the club was not paying the salaries of the players due to financial problems.

These elements being incorporated in the proceedings, the adjudicating body went to analyse the applicable provisions of the FDC.

THE APPLICATION OF THE STRICT LIABILITY RULE

The FIFA Disciplinary Committee remarked that art. 8 (1) and 18 (2) FDC set out a strict liability rule, according to which the club or association is responsible for the misconduct of its players and officials, even if the club or association concerned is not at fault[36].

In continuation, the decision referred to the previously analysed CAS and SFT jurisprudence on strict liability (paras. 3.1 i) and ii) above), according to which the liability of a club can be established without the need to identify a specific perpetrator, as long as the offence is committed by individuals belonging to the club, such as its members, official supporters or players.

Although the provisions applied therein were different from those of the Skënderbeu case, the Committee nevertheless held that art. 8 of the UEFA Regulations provided for a strict liability rule, identical to art. 8 (1) FDC, and that art. 18 (1) FDC was drafted very similarly to art. 12 of the UEFA Regulations and had the common objective of sanctioning match-fixing related behaviour.

Based on these considerations, the Committee found that, in the case at stake, there was no reason to deviate from the approach adopted by CAS and SFT and concluded that, in the event of the breach of FDC rules by players of the club, the latter would be held liable (provided that no other group alien to the club was responsible for the same offence).

With the above in mind, the Committee examined whether players of Zoo FC had been involved in the manipulation of the two matches in question and, thus, had violated the relevant provision of the Disciplinary Code: art. 18 (1) FDC.

IN THIS REGARD, THE COMMITTEE HOLD THAT ONLY PLAYERS OF ZOO FC HAD BREACHED SAID RULE, BASED ALREADY ON THE FOLLOWING INFORMATION CONTAINED IN THE BETTING REPORTS ON FILE[37]:

- **the analytical information (i.e. the mathematical deviation of the odds from the expected patterns);**
- **the fact that those reports explicitly mentioned that the betting patterns detected were in contrast to logical expectations and that there was no legitimate and justifiable explanation for them, except the fact that the bettors knew the outcome of the matches in advance;**
- **the fact that betting websites removed all their markets or some of their markets during the matches; and**
- **the analysis of the performance of the players of Zoo FC, which identified several mistakes on the pitch and those actions were deemed to be linked to the suspicious betting.ey indicated that the lifestyle of some of the suspected players had changed considerably since they were at the club, with the opening of different businesses, thus raising suspicions about them given that, at that time, the club was not paying the salaries of the players due to financial problems.**

[36] FDD-6516, par. 30

[37] FDD-6516, par. 47

THEREFORE, AS THE INFORMATION CONTAINED IN THE BETTING REPORTS WAS ALREADY CONSIDERED SUFFICIENT IN ORDER TO ESTABLISH THE INFRINGEMENT OF ART. 18 (1) FDC BY THE CLUB'S PLAYERS, THE COMMITTEE CONSIDERED THAT THE ADDITIONAL EVIDENCE ON FILE STRENGTHENED THE SAME CONCLUSION[38], NAMELY:

- **the fact that six other Zoo FC matches were likely to have been manipulated;**
- **the witness statements of the club's officials, acknowledging that some players may have manipulated matches;**
- **media outlets reporting on potential match-fixing cases involving Zoo FC's players; and**
- **suspicious connections of some players with convicted match-fixers on social networks.**

Finally, the Committee pointed out that the evidence gathered demonstrated that no third party to the club was involved in the manipulation of the matches and, consequently, deemed that players belonging to Zoo FC illegally influenced the course and outcome of these two matches, thus violating art. 18 (1) FDC, even though it was not possible to conclusively identify which specific individuals of the club were responsible for match-fixing.

Therefore, based on art. 8 (1) read in conjunction with art. 18 (2) FDC, the Committee concluded that Zoo FC was responsible for the behaviour of its players and sanctioned it with the immediate expulsion from the Kenyan Premier League and the relegation of the club to FKF Division One for the following season (i.e. the 3rd tier of Kenyan football).

The decision of the FIFA Disciplinary Committee was eventually confirmed in its entirety, following the club's appeal, by the FIFA Appeal Committee.

4. KEY ELEMENTS

Based on the cases analysed in previous paragraphs, it is possible to shed light on the factors which played a decisive role in establishing the manipulation of a match and, consequently, the application of the strict liability rule under UEFA and FIFA disciplinary regulations.

Regarding the fundamental elements for the assessment of match-fixing, we can isolate the following, based on the cases analysed above:

1 WEIGHT OF THE BETTING REPORTS:

as underlined by the Swiss Federal Tribunal[39], sports organisations do not have the same means of investigation as the State authorities to bring to light match-fixing. Thus, as it occurred in the cases described above, converging reports of different betting monitoring companies constituted a fundamental block of evidence, whose reliability was also recognised by CAS[40], in contributing to the detection of match-fixing[41]. These reports contain not only the analytical and mathematical information on the odds and betting patterns, but often integrate further qualitative elements in order to corroborate the conclusions of the analytical analysis. Among these elements, an assessment of the performance of the players on the pitch can be included.

[38] FDD-6516, par. 54

[39] FT 4A_462/2019

[40] Cf. par.3.1. i) and ii) with reference to the role of the BFDS reports.

[41] FDD-8729, par. 76: one of the main tools that sports federations can rely on to detect such practices is the betting reports generated by companies that are, among other things, specialized in monitoring the betting market to detect suspicious betting patterns before and during a match

2 ASSESSMENT OF PLAYERS' PERFORMANCE:

the analysis of the performance of the players can be an indicator of possible match-fixing and play an important role, in particular, when it constitutes the explanation of betting patterns, arising out of the betting reports, which would be otherwise unjustifiable. However, contrary to the objective analytical analysis, it must be stressed that the assessment of the players' performance can be influenced by various subjective factors (such as the personal opinions of the experts and the quality of football analysed). Thus, this element should be considered carefully, in particular when the assessment of the performance is operated by the same subjects who effectuated the analytical analysis.

3 LACK OF ALTERNATIVE EXPLANATIONS:

the lack of a convincing alternative explanation for the betting movements that formed the basis of the match-fixing allegations.

4 REMOVAL OF BETTING MARKETS:

such a circumstance is particularly relevant, being indicative of the consideration of technical operators (i.e. the bookmakers) about the possible fixing of matches.

5 INTELLIGENCE GATHERED:

in these cases, we refer to the information available on open sources, suspicious connections on social media, witness statements and reactions of the media. While these elements, considered alone, were not conclusive in order to demonstrate match fixing, nevertheless they were taken into account for corroborating the decisions of the deciding bodies.

6 HISTORY OF SUSPICIOUS MATCHES:

the involvement of players and/or the clubs in previous suspicious matches. While these matches are simply labelled only as suspicious, they also played an important role when considered in a more global scenario.

7 NUMBER OF FIXED MATCHES:

in the cases previously considered, as also emphasised by CAS , the aforementioned elements would not have been as compelling or conclusive in relation to only one match, where additional evidence could have been expected. Thus, it is possible to conclude that, based on the current jurisprudence, further elements would be necessary in order to establish that only one match has been fixed, such as, as suggested by CAS in the Skënderbeu award, by engaging with law enforcement in order to prove criminal activity underlying the match manipulation.

After having established that some matches have been fixed, for the application of the strict liability rule under UEFA and FIFA regulations, as confirmed by CAS and the SFT and bearing in mind that such an application is not automatic, it is simply sufficient to establish that:

1 the matches were manipulated by individuals belonging to the club, with no need to identify any specific individual who committed the disciplinary violation (in these cases, any player of the club);

2 no people belonging to other groups alien to the club in question committed the offence such as, for example, players of another club or the referees.

Such a conclusion leads, however, to another issue to be considered: if the application of the strict liability rule might follow the manipulation of a match by unspecified individuals belonging to a certain club, what happens when one or more of said individuals are specifically identified? In other words, once the violation of the anti-match-fixing disciplinary rule by one or more specific individuals is ascertained, what is the probability that the relevant club(s) will be sanctioned pursuant to the strict liability rule under UEFA or FIFA's disciplinary regulations?

In order to answer this question, once again, we have to look into the relevant jurisprudence .

At FIFA level, the disciplinary decisions on match manipulation cases have been mostly focused on sanctioning natural persons (usually players, coaches, referees and officials), however without consequent sanctions on clubs and/or

[42] CAS 2018/A/5734, par. 208

member associations under the strict liability rule. Given the already analysed Zoo FC case has been, so far, the only case in which the aforementioned rule was applied as per the FDC, we have therefore to turn our attention to the UEFA's cases in order to seek some guidance.

While at UEFA level the number of decisions imposing sanctions on clubs is obviously higher (also due to the higher number of clubs competitions organised under UEFA's auspices), nevertheless also here the applications of the strict liability rule as per the UDR remain limited: most of the sanctions imposed on the clubs for match fixing are of an administrative nature and, even when a natural person is sanctioned for match fixing, often no application of the strict liability rule is made against the club and/or member association concerned .

As such, based on the current case-law, it appears that the identification of one or more individuals as responsible for match manipulation infringements usually does not trigger the automatic application of the strict liability rule under UEFA or FIFA's disciplinary regulations. On the contrary, as analysed within the Skënderbeu and Zoo FC cases, it would appear that judicial bodies tend to opt for the application of the strict liability rule exactly when there are not sufficient elements in order to sanction specific individuals; thus, said rule seems more to constitute the last resource for prosecuting match fixing cases and imposing disciplinary sanctions when no other solution remains available.

5. CONCLUSION: WHAT SHOULD CLUBS DO?

Therefore, based on the above-mentioned considerations, and bearing in mind that the same refer to the application of the strict liability rule under UEFA and FIFA disciplinary regulations, and without prejudice to the possible application of the same rule under different disciplinary national regulations, what should a club do?

A PAY ATTENTION TO BETTING REPORTS:

as seen in the previous cases, the weight of the betting reports, associated to the lack of alternative explanations to irregular betting patterns, is decisive, even though not sufficient alone , to assess the manipulation of a match and eventually the possible strict liability of a club. Therefore, it is recommended that clubs do not underestimate the assessment contained in said reports and, in case, immediately intervene and conduct internal investigations in case a match is "escalated".

B ADOPT PREVENTIVE MEASURES:

as already observed, the imposition of sanctions on a club pursuant to the strict liability principle is not automatic and, as remarked by FIFA's Appeal Committee in the Zoo FC case, for example, the Judicial Body could decide not to impose sanctions if it is comfortably satisfied that the club responsible under the principle of strict liability took sufficient measures to deter or prevent the improper conduct from happening . Therefore, based on the above, the adoption of preventive measures by a club (for instance a prevention plan or educational / awareness-raising program) could, in principle, be particularly relevant in order to avoid the imposition of sanctions under the strict liability principle.

C KEEP ATTENTION LEVEL HIGH:

at all times, for instance by conducting background checks on new players about their involvement in previous suspicious matches, or by taking seriously news appearing on media outlets and/or social networks. As seen before, all these elements could be taken into account as pieces of evidence in subsequent disciplinary proceedings.

In conclusion, while a club, even in the absence of any fault, could be held liable for the involvement of its players in match-fixing, nevertheless it is also true that the adoption of the above-mentioned precautions could, de facto, limit, or even exclude, the possible impositions of sanctions on the club itself.

[43] For a comprehensive overview of CAS jurisprudence: DIACONU, M., KUWELKAR, S. & KUHN, A., The court of arbitration for sport jurisprudence on match-fixing: a legal update. Int Sports Law J 21, 27–46 (2021)

[44] For an overview of FIFA's leading cases: https://www.fifa.com/legal/integrity/leading-cases

[45] For an overview of UEFA's cases: https://www.uefa.com/insideuefa/disciplinary/cases/ and

[46] Such as, for instance in the cases where a club was sanctioned with the ineligibility to participate in one edition of the European competitions: amongst others Olympiakos Volou (TAS 2011/A/2528), Besiktas (CAS 2013/A/3258), Eskişehirspor (CAS 2014/A/3628), Sivasspor (CAS 2014/A/3625)

[47] In one of the very first UEFA match-fixing cases (CAS 2009/A/1920 FK Pobeda, Aleksandar Zabrcanec, Nikolce Zdraveski v. UEFA) the strict liability rule was applied against the club due to the conduct of his president and one player. While the player was eventually acquitted at the end of CAS proceedings, nevertheless an eight-year ban and a lifetime ban imposed on the club and its president respectively were confirmed.

[48] CAS 2018/A/ 5734, par. 192

[49] FDD-8729, par. 68. In continuation (par. 101), the Appeal Committee stressed that, in the case at stake, the fact that the club did not implement a prevention plan or any other relevant measures, illustrates that the Appellant did not take the problems that appear to be deeply rooted in the Club seriously enough.

JURISPRUDENCE

CAS 2021/A/8099

MÁLAGA CLUB DE FÚTBOL V. BRIGHTON & HOVE ALBION FC[50]

Payment of a sell-on fee in the case of an a-typical transfer

DATE OF THE AWARD:

10 January 2022

PANEL:

Mr Rui Botica Santos (President)

Prof Luigi Fumagalli

Mr Kepa Larumbe

MAIN TOPICS:

- Sell-on Clauses
- Interpretation of transfer agreements under Swiss law
- Concept of a transfer

DECISIONS DEALING WITH SIMILAR ISSUES:

- CAS 2005/A/896 Fulham FC (1987) Ltd. v. FC Metz
- CAS 2010/A/2098 Sevilla FC v. RC Lens
- CAS 2011/A/2356 S.S. Lazio S.p.A. v. CA Vélez Sarsfield & FIFA
- CAS 2016/A/4585 S.S. Lazio S.p.A. v. Al-Sadd Sports Club
- CAS 2019/A/6525 Sevilla FC v. AS Nancy Lorraine
- CAS 2020/A/7291 Club Atlético de Madrid & Sporting Clube de Portugal v. Clube Futebol Benfica

[50] This award has been published here. 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.

KEY CONCLUSIONS

> From an analysis of the FIFA Regulations on the Status and Transfer of Players and their Commentary, the following conclusions can be made: (i) a transfer can be simply defined as the movement of the Player's registration from an association to another or between clubs under the same association; and (ii) a transfer may be integrated in a contractual scheme or not, depending on the specific circumstances in which the movement of the registration occurs.

> Whenever the parties provide that a sell-on clause is triggered in case of the transfer of the player, without any further specification, there is no reason to think that the parties' intention was to limit the triggering of the sell-on clause to a specific type of transfer. As such, in that case, all that is needed is the movement of the player's registration from one association to another, from an international standpoint, or between clubs within a national association, from a national standpoint.

> The term "transfer fee" does not refer, per se, to a specific kind of contract or agreement and, as such, cannot be interpreted as a sum which is exclusively paid by virtue of a typical transfer agreement which may be defined as those agreements by which a club (the "former club") agrees to terminate its employment agreement with a player, the new club agrees to sign a new employment contract with him and the player himself consents to the movement.

> The material effects of a contract must impose themselves on any label which the parties choose for it. The general principle of good faith implies that the law aims to achieve concrete and effective results and that the material aspect always takes precedence over the formal aspect. This means, in essence, that contracts and other legal agreements are to be analysed essentially with respect to their content and material effects. It does not suffice to assess if there is formal compliance with the law in the actions of a person; rather, there must be a material assessment, so as to give importance and projection to the values which are effectively at stake and the consequences which they entail.

> A sell-on clause is usually used in professional football to allow the club which transfers a player to share in the benefits or profits of a future transfer of said player. Its purpose is to "protect" a club transferring a player to another club against an unexpected increase, after the transfer, in the market value of the player's services.

RELEVANT FACTUAL BACKGROUND

On 30 December 2016, Málaga Club de Fútbol **("Malaga")** and Brighton & Hove Albion FC **("Brighton")** concluded an agreement for the transfer of the player Jack Harper **(the "Player")** (the **"Transfer Agreement"**).

Pursuant to Clause 2.1 of the Transfer Agreement, Brighton transferred the Player to Malaga without payment. However, the Parties agreed that Brighton would be entitled to a percentage of any future transfer of the Player from Malaga to a third club, particularly Clause 2.2. of the Transfer Agreement (the "Sell-on Clause") stated the following:

2.2 Should the Player's registration be transferred on a permanent basis by Malaga at any time in the future then Malaga will pay to Brighton 12.5% (twelve and a half per cent) of any transfer fee received by Malaga (deducting the amount corresponding to solidarity contribution) up to a maximum sum of €750,000 (seven hundred and fifty thousand euros). If applicable, payment will be made by Malaga within 30 working days as from the moment Malaga receives the transfer fee of a third club, if the payment is made in several instalments by the third club, the payment to Brighton will be made in proportion to those instalments

On 20 April 2017, Malaga and the Player signed a contract **(the "Employment Agreement")** valid until 30 June 2019, with the possibility of being unilaterally extended for another three seasons **(the "Option Right Clause").**

On 22 February 2019, the Player sent to Malaga a letter informing it of his intention to negotiate with a new club once the Employment Agreement had ended. In addition to this, the Player also informed Malaga that, according to his legal advisors, the Option Right Clause was prohibited by Spanish Law and, as such, Malaga did not have any right to extend the Employment Agreement after 30 June 2019.

On 20 March 2019, Malaga and Getafe Club de Futbol, S.A.D **("Getafe")** reached an agreement by virtue of which the Option Right Clause would be waived by Malaga in exchange for a financial compensation (the **"Waiver Agreement")**. Clause I of the Waiver Agreement states the following:

By means of this contract, MALAGA CLUB DE FUTBOL, SAD undertakes to waive its right to extend the employment contract of PLAYER JACK HARPER in order to enable him to sign a contract with GETAFE CLUB DE FUTBOL, S.A.D., as he is a free agent.(...)

GETAFE shall pay to MALAGA, for the waiver of the option to extend the contract of the PLAYER and provided that the PLAYER is hired by GETAFE as a free agent with an effective date of July 1, 2019, the amount of ONE MILLION FIVE HUNDRED THOUSAND EUROS (€1,500,000) plus VAT.

On 8 July 2020, Brighton enquired with Malaga about the terms of the Player's transfer to Getafe and whether a payment was due from Malaga to Brighton.

In that email exchange, after confirming that the Player had become a free agent on 1 July 2019, a Malaga's official provided the below explanations, as is relevant, of the agreement between Malaga and Getafe:

Jack Hamper's intention to leave Malaga as a free agent on July 1, 2019 was notified to the club by communication from the player himself dated February 22, 2019. Therefore, the player fit/filled the entire duration stipulated in his contract and was linked to Malaga until June 30, 2019. As a result of the above, on July 1, 2019, the player negotiated his incorporation to a new club as free agent.

Therefore, we proceed to confirm that Malaga did not transfer the player's registration on a permanent basis at any time to Getafe. In other words, Malaga CF did not receive any money from Getafe CF for the registration of Player Jack Hamper. Malaga agreed with Getafe to receive the amount of one million five hundred thousand euros (1,500,000.- €) as compensation for the withdrawal of the right to renewal included in clause tenth of the Jack Harper player contract...

On 3 March 2021, Brighton lodged a claim before the FIFA Players' Status Chamber ("PSC") and requested the payment of the amount of EUR 187,500, plus THE applicable interest, as a sell on fee.

On 9 June 2021, the FIFA PSC accepted Brighton's claim and on 29 June 2021, Málaga filed an appeal against it.

LEGAL CONSIDERATIONS

To correctly interpret the meaning of the Sell-on Clause, it is necessary to clarify the meaning of the concept of "transfer" in the legal world of football.

According to the definition provided in the RSTP, to which CAS jurisprudence closely abides (see CAS 2019/A/6525 Sevilla FC v. AS Nancy Lorraine), the transfer of the Player is the equivalent to the movement of the registration of said player, whether to a different association or to a different club "under" the same association. Therefore, the general meaning of the concept of "transfer" is not strictly linked to a specific legal or contractual framework.

From the above, the Panel concludes that (i) a transfer can be simply defined as movement of the Player's registration from an association to another or between clubs under the same association and that (ii) a transfer may be integrated in a contractual scheme or not, depending on the specific circumstances in which the movement of the registration occurs.

HOW SHOULD THE SELL-ON CLAUSE BE INTERPRETED?

The Panel starts by recalling the specific wording of the Sell-on Clause:

Should the Player's registration be transferred on a permanent basis by Malaga at any time in thefi1ture then Malaga will pay to Brighton 12.5% (twelve and a half per cent) of any transfer fee received by Malaga (deducting the amount corresponding to solidarity contribution) up to a maximum sum of €750,000 (seven hundred and fifty thousand euros) (emphasis added by the Panel)

The main controversy between the Parties resides in knowing what types of transfer the Sell-on Clause encompasses.

Following the applicable Swiss Law, the Panel needs to interpret the Sell-On Clause by seeking the real and common intent of the Parties, considering the clues which were made available to it. These kinds of clauses have also been deeply analysed by the CAS:

The Sell-On Clause contains a well-known mechanism in the world of professional football: its purpose is to "protect" a club (the "old club") transferring a player to another club (the "new club") against an unexpected increase, after the transfer, in the market value of the player's services; therefore, the old club receives an additional payment in the event the player is "sold" from the new club to a third club for an amount higher than that one paid by the new club to the old club. In transfer contracts, for that reason, a sell-on clause is combined with the provision defining the transfer fee: overall, the parties divide the consideration to be paid by the new club in two components, i.e. a fixed amount, payable upon the transfer of the player to the new

club, and a variable, notional amount, payable to the old club in the event of a subsequent "sale" of the player from the new club to a third club. (CAS 2010/ A/2098).

The Sell-on Clause is undoubtedly a "sell-on ". Indeed, the main intent of the Parties when they agreed to it would be to protect Brighton (the "old club") from an increase in the value of the Player which would lead to him being transferred to another club by Malaga (the "new club") for a reasonable sum.

In the case at hand, it is important to notice that the wording of the Sell-On Clause refers to the "transfer" of the Player's registration; however, no restriction or limitation regarding the meaning of a "transfer" was inserted in the Transfer Agreement. Naturally, this forces the Panel to abide by the concept of "transfer" which has been explained above.

In light of the above, the logical conclusion regarding the interpretation of the Sell-On Clause must be that said provision does not limit its applicability to the conclusion of a "transfer" in a specific manner or under a specific legal framework, instead it is only required that this movement of the Player's registration carried out by Malaga acquires a permanent nature.

On the other hand, Malaga is obliged to "pay to Brighton 12,5% (twelve and a half per cent) of any transfer fee received (...)". The wording clearly indicates that the Parties intended the Sell-on Clause to be applicable only in those cases in which the Appellant received a "transfer fee".

While the Parties have conflicting views over the meaning of the expression "transfer fee", the Panel is of the opinion that the Parties were essentially concerned to establish that the Sell-on Clause could only operate when Malaga received a sum for the transfer of the Player. In addition, the term "transfer fee" does not refer, per se, to a specific kind of contract or agreement and, as such, cannot be interpreted as a sum which is exclusively paid by virtue of a typical transfer agreement which may be defined as those agreements by which a club (the "former club") agrees to terminate its employment agreement with a player, the new club agrees to sign a new employment contract with him and the player himself consents to the movement.

Therefore, the Panel is now able to clearly determine the conditions necessary to trigger the Sell-on Clause:

1 **The Player's registration must be transferred, on a permanent basis, by Malaga - however, this operation does not have to be concluded by virtue of a classic tripartite agreement; and**

2 **Malaga has to receive a sum in exchange for the conclusion of the transfer operation mentioned in 1).**

DOES THE MOVEMENT OF THE PLAYER FROM MALAGA TO GETAFE CF CONSTITUTE A "PERMANENT TRANSFER" IN THE SENSE OF THE SELL-ON CLAUSE?

Having established how the Sell-on Clause operates, the Panel must now to turn to assess if the Waiver Agreement may or not be considered as capable of triggering the application of that provision.

To begin understanding the nature of the Waiver Agreement, it is crucial to be aware of the circumstances which gave rise to this contractual framework.

The Employment Agreement between Malaga and the Player established an option right which allowed the Appellant to extend the Employment Agreement unilaterally. However, on 22 February 2019, the Player expressly informed the Appellant that he and his legal advisors considered that the Option Right Clause was prohibited under Spanish Law. Consequently, the Player decided that he would leave the club at the end of the contractual period (30 June 2019).

Therefore, the legality of the Option Right Clause was put at stake and it is clear that both the Player and Malaga had different views regarding the possibility of it being exercised. This created a situation whereby the Appellant and the Player were very likely faced with conflicting legal opinions and uncertainty regarding the future of their labour relationship.

Seeing that Getafe was interested in acquiring the Player's services for the following season, Malaga decided to enter into an agreement with said club. At this point, Malaga was likely faced with a complex situation: if it exercised the Option Right Clause (as it said it would in the Appeal Brief) the Player would have left at the end of the season anyway, as he said he would, and Malaga would be forced to enter into a legal dispute to try and obtain compensation for the Player's breach of contract, the result of which might not have been predictable.

In this context, the Waiver Agreement likely appeared as the logical solution to the Malaga's problem, since (i) the sporting season was already close to its finale and (ii) Getafe would likely be very willing to pay a small sum for the Player to avoid any liability arising from a potential future dispute regarding his breach of contract with Malaga, in case he joined Getafe after 30 June 2019 and Malaga duly exercised the Option Right Clause.

In essence, the Panel is reasonably satisfied, in light of the evidence, that the conclusion of the Waiver Agreement can be simply explained as an agreement which greatly benefited Malaga (allowing it to profit with the inevitable Player's departure), Getafe (allowing it to avoid any future liability by paying a reasonable sum) and the Player (allowing him to leave Malaga in "good spirits" and avoid any future legal dispute over any possible breach of contract).

Having established the above, the Panel notes that, unlike a "typical" transfer agreement, the Waiver Agreement provides that a compensation is due in exchange for the non-exercise of a contractually agreed right of renewal. However, the amount due under the Waiver Agreement must also be considered as a prima facie compensation for the loss of the Player.

The main issue, however, resides in knowing if (i) the Waiver Agreement operated a permanent transfer of the Player's registration and (ii) if the fee received under that contract constitutes or not a "transfer fee".

While the Panel agrees that the Waiver Agreement does not resemble a classic transfer agreement, there is no doubt that its operation raises doubts as to knowing if a transfer in the sense of the Sell-on Clause did or not occur.

In the present case, there remains no doubt that the movement of the Player's registration from Malaga to Getafe was indeed a "transfer" in the meaning of the Sell-on Clause, which does not limit that concept to any specific contractual framework or scheme. Both Parties ended up referring, in their submissions, to this movement of the Player's registration as a "transfer" in a broad sense. However, even though the Appellant argues that the Player moved to Getafe as a free agent, there are striking resemblances between the Waiver Agreement and a typical transfer agreement:

1 **Much like in typical transfer agreements, the Waiver Agreement was signed by the Player, Malaga and Getafe (hence, it was a tripartite agreement).**

2 **When the Waiver Agreement was signed, the Player was still under contract with Malaga and the possibility of this contract being extended had to be considered.**

3 **By virtue of the Waiver Agreement, Malaga allowed the Employment Agreement to expire at the end of the season (which was only three months away), a situation which is not materially much different from agreeing to the termination of a contract.**

4 Malaga acted as the party in control of the Player's registration. In particular, Malaga considered that by not exercising the Option Right Clause, it was allowing the Player to move to Getafe.

5 The Waiver Agreement was conditioned to the signing of a new employment agreement between the Player and Getafe.

6 The Player waived its right to receive any compensation provided for in Article 13.a) of the Royal Decree 1006/85 and in Article 17.3 of the Collective Bargaining Agreement signed between the Spanish Professional League and the Spanish Players' Union.

The Panel also notes that the Parties' common intention did not deviate from that of a classic transfer agreement since the Waiver Agreement created a situation which, given the circumstances, generated similar effects to that of a typical transfer agreement. Therefore, the Panel is of the opinion that both the form and content of the Waiver Agreement allow for it to be considered as a "transfer agreement".

Furthermore, the Panel is of the firm opinion that the material effects of a contract must impose themselves on any label which the Parties choose for it. The general principle of good faith implies that the Law aims to achieve concrete and effective results and that the material aspect always takes precedence over the formal aspect. This means, in essence, that contracts and other legal agreements are to be analysed essentially with respect to their content and material effects. In fact, the Panel shares the understanding that "good faith" requires that the exercise of legal positions be carried out in terms of material truthfulness. It does not suffice to assess if there is formal compliance with the law in the actions of a person; rather, there must be a material assessment, so as to give importance and projection to the values which are effectively at stake and the consequences which they entail.

Considering the above, the Panel unanimously considers that the Waiver Agreement has produced essentially the same effects that a standard transfer agreement would and, as such, there remains no doubt that the Player was indeed transferred and that this operation still falls under the wording of the Sell-on Clause.

In light of the above and considering that Malaga was supposed to receive a sum of EUR 1,500,000, it would be against the principle of good faith to consider that such amount does not constitute a "transfer fee" in the sense of the Sell-on Clause. In fact, by considering that the Waiver Agreement created a situation similar to a "typical" transfer, the Panel would be going against its own rationale if it did not consider that the sum received by Malaga by virtue of such contract fell under the scope of the Sell-on Clause.

Therefore, considering that a transfer of the Player occurred and that a fee was received by Malaga in respect to that operation, the total sum of EUR 1,500,000 can be considered as a "transfer fee". In reality, the Panel notes that much like a common transfer agreement, the sum paid to Malaga by virtue of the Waiver Agreement was essentially a compensation for that club's agreement regarding the expiry of an employment agreement and its loss of the Player's services; in fact, in the present circumstances, allowing a contract to expire is not much different from agreeing to its mutual termination.

Finally, as both conditions set out by the Parties for the activation of the Sell-on Clause were fulfilled, Brighton is entitled to receive 12.5% of the total sum received by Malaga by virtue of the Waiver Agreement.

CAS 2021/A/7815

PLAYER S & CLUB L VS CLUB P[51]

A default notice is fundamental to establish just cause

DATE OF THE AWARD:

10 May 2022

SOLE ARBITRATOR:

Mr Manfred Nan

MAIN TOPICS:

- Termination of a contract by the player without just cause
- Obligation of parties to provide a warning before terminating a contract
- Parties' ultimate responsibility for the documents that they sign
- Alleged violation of personality rights
- Calculation of compensation due to a club.

DECISIONS DEALING WITH SIMILAR ISSUES:

- CAS 2020/A/7175 Al-Arabi Sporting Club v. Juan Ignacio Martínez
- CAS 2016/A/4884 FC Ural Sverdlovsk v. Toto Tamuz
- CAS 2017/A/5366 Club Adanaspor v. Mbilla Etame Serges Flavier
- CAS 2015/A/3922 Robson Vicente Gonçalves v. Hapoel Keter Tel Aviv FC

[51] 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.

KEY CONCLUSIONS

> According to CAS settled case-law, a valid reason to unilaterally terminate a contract is considered to be, in particular, any circumstances under which, if existing, the terminating party can in good faith not be expected to continue the employment relationship. Particular importance is thereby attached to the nature of the breach of obligation.

> In principle, according to CAS jurisprudence, and in accordance with Swiss law, for a party to be allowed to validly terminate an employment contract with immediate effect, it must have warned the other party, in order for the latter to have the chance, if it deemed the complaint legitimate, to comply with its obligations. Consequently, absence such warning, a player will not have just cause to terminate a contract, even if the club had outstanding salaries towards him.

> It is doubtful whether a party can invoke before the FIFA DRC and CAS arguments justifying the unilateral termination of an employment contract, which were not brought in the termination letter itself.

> As repeatedly confirmed by CAS, the list of criteria set out in Article 17(1) RSTP is illustrative and not exhaustive. Other objective factors can and should be considered, such as the loss of a possible transfer fee or replacement costs, provided that there exists a logical nexus between the breach and loss claimed. CAS precedents also indicate that, in the analysis of the relevant criteria, the order by which those criteria are set forth by Article 17 (1) FIFA RSTP is irrelevant and need not be exactly followed by the judging body.

>the "specificity of sport" criterion is not an additional head of compensation, nor a criterion allowing to decide ex aequo et bono, but a correcting factor which allows CAS tribunals to take into consideration other objective elements (chiefly of sporting nature) which are not envisaged under the other criteria of Article 17 RSTP.

RELEVANT FACTUAL BACKGROUND

On 29 January 2019, Club Two offered Player S (the "Player"), who was under contract with Club One, an employment contract for four and a half seasons (the "Offer"). According to the offer, during the first 18 months of the contract, the Player would be loaned to another club, Club Three.

On the same date, Club One, Club Two and the Player concluded a transfer agreement (the "Transfer Agreement"), whereby Club One agreed to transfer the Player to Club Two against payment.

According to the Player, on 30 January 2019, he signed a blank copy of an employment contract without financial details. However, according to Club Two, the Player signed an employment contract (the "Employment Contract") valid as of such date until the end of the 20222/2023 season with the following financial conditions:

- **National Currency (NC) 80,000 for the season 2018/2019, payable in 4 instalments:**
- **NC 100,000 for the season 2019/2020, payable in 12 instalments;**
- **NC 120,000 for the season 2020/2021, payable in 12 instalments;**
- **NC 140,000 for the season 2021/2022, payable in 12 instalments;**
- **NC 160,000 for the season 2022/2023, payable in 12 instalments.**

Immediately upon registration with Club Two, the Player was loaned for the second half of the 2018/19 season to Club Three, as was established in the Offer. The Player was further sub-loaned to yet another club (Club Four) from September to December 2019.

On 15 January 2020, the Player submitted a letter to FIFA which provided, as is relevant, as follows:

"RE: TERMINATION OF CONTRACT DUE TO FAILURE OF PAYING SEVEN MONTHS SALARY

I would like to inform you that I was registered as a player to [Club Two] for 2 years from 2019 to 2020 but they never pay me a signing fee nor salary. They did not pay me salary for Seven months (7) now. They signed me various dubious contracts with [foreign] language that I don 't understand without even giving me a copy. I would like to request your good office to help me on solving this issue so that I can proceed with my career of playing football. I need to go back to my former club [Club One] so that I can continue with my carrier.

On 20 January 2020, the Player and Club One concluded an employment contract, valid as from the date of signing until 30 June 2020, by means of which the Player was entitled to a monthly salary of USD 2,000 plus a signing fee of USD 10,000 as well as a commission fee of USD 5,000.

On 29 April 2020, Club Two lodged a claim before the FIFA Dispute Resolution Chamber (the "FIFA DRC") against the Player and Club One for breach of the Employment Contract

On 24 November 2020, the FIFA DRC rendered its decision (the "Appealed Decision") whereby it found that the Player had terminated the Employment Contract without just cause and condemned the Player to pay to Club One compensation for breach of contract, with Club Two being jointly and severally liable for its payment.

Club One and the Player then filed an appeal before the Court of Arbitration for Sport ("CAS").

LEGAL CONSIDERATIONS

THE MAIN ISSUES TO BE RESOLVED BY THE SOLE ARBITRATOR ARE:

- **When was the Employment Contract terminated and by whom?**
- **Was there just cause for the termination of the Employment Contract?**
- **What are the consequences thereof?**

WHEN WAS THE EMPLOYMENT CONTRACT TERMINATED AND BY WHOM?

The Sole Arbitrator notes that there is no termination letter on file, by means of which either the Player or Club Two terminated the Employment Contract. It is nonetheless clear that the employment relationship between the Player and Club Two came to an end.

The Player maintains that he terminated the Employment Contract by means of a termination letter dated 15 January 2020.

The Sole Arbitrator finds that the Player's letter dated 15 January 2020 is not a termination letter, as it was not addressed to Club Two, but to FIFA. Nonetheless, the Sole Arbitrator finds that the Employment Contract was implicitly terminated by the Player by signing a new employment contract with Club One while his Employment Contract with Club Two had not yet expired.

Article 5(2) RSTP provides as follows:

A player may only be registered with one club at a time.

Furthermore, Article 18(5) RSTP provides as follows:

If a professional enters into more than one contract covering the same period, the provisions set forth in Chapter IV shall apply.

The Player does not deny having concluded an employment contract with Club One on 20 January 2020, but he maintains that he was entitled to do so, because he had just cause to terminate his Employment Contract with Club Two.

The arguments of the Player with respect to the termination of the Employment Contract will be addressed in more detail below, but the Sole Arbitrator finds that three reasons for termination can be derived from this letter:

DID THE PLAYER TERMINATE THE EMPLOYMENT CONTRACT WITH OR WITHOUT JUST CAUSE?

Given that the Player is held to have terminated the Employment Contract, he carries the burden of proof to establish that he had just cause to do so at such moment in time.

In this respect, the Sole Arbitrator considers it relevant which arguments the Player invoked in his letter dated 15 January 2020, even if such letter was not delivered to Club Two, as it is contemporaneous evidence of the Player's position at the relevant point in time.

THE MAIN ISSUES TO BE RESOLVED BY THE SOLE ARBITRATOR ARE:

- **Club Two's failure to pay the Player for 7 months;**
- **Club Two's signing of "various dubious contracts with [foreign] language" with him that he did not understand;**
- **A pressing need for Player to return to Club One.**

Before addressing these arguments in turn below, the Sole Arbitrator wishes to set out the relevant regulatory framework against which the Player's allegations are to be assessed.

First, the Sole Arbitrator refers to Articles 14 and 14bis RSTP which detail, in general that a contract can only be unilaterally terminated when there is a just cause to do so and provide a circumstance in which a just cause will exist, respectively.

The Sole Arbitrator observes that the FIFA Commentary on the RSTP provides general guidance as to when an employment contract is terminated with just cause in the context of Article 14(1) RSTP:

The definition of just cause and whether just cause exists shall be established in accordance with the merits of each particular case. In fact, behaviour that is in violation of the terms of an employment contract still cannot justify the termination of a contract for just cause. However, should the violation persist for a long time or should many violations be cumulated over a certain period of time, then it is most probable that the breach of contract has reached such a level that the party suffering the breach is entitled to terminate the contract unilaterally.

In this regard, the Sole Arbitrator also notes that in CAS 2006/A/1180, a CAS panel stated the following:

…an employment contract which has been concluded for a fixed term, can only be terminated prior to expiry of the term of the contract if there are "valid reasons" or if the parties reach mutual agreement on the end of the contract (…) A valid reason is considered to be, in particular, any circumstances under which, if existing, the terminating party can in good faith not be expected to continue the employment relationship". According to Swiss case la-w, whether there is "good cause" for termination of a contract depends on the overall circumstances of the case (…) Particular importance is thereby attached to the nature of the breach of obligation. The Swiss Federal Supreme Court has ruled that the existence of a valid reason has to be admitted when the essential conditions, ·whether of an objective or personal nature, under which the contract was concluded are no longer present (…) According to Swiss law, only a breach which is of a certain severity justifies termination of a contract without prior warning (…) In principle, the breach is considered to be of a certain severity when there are objective criteria which do not reasonably permit an expectation that the employment relationship between the parties be continued, such as a serious breach of confidence…

The Sole Arbitrator fully adheres to such legal framework, which is still applied in recent CAS jurisprudence and will therefore examine whether Club Two's conduct was of such a nature that the Player could no longer be reasonably expected to continue the employment relationship.

CLUB P'S ALLEGED FAILURE TO PAY SALARY TO THE PLAYER

The Sole Arbitrator notes that it remained undisputed that from September to December 2019 the Player was out on loan to a third club. On this basis, it is to be presumed that such third club was required to pay salary to the Player during the period of the loan rather than Club Two. This is acknowledged by the Player.

While Club Two appears to maintain that it paid several amounts to the Player, it did not provide evidence of any such payments. However, the Sole Arbitrator ultimately does not consider this to be pertinent, because he finds that the Player in any event did not establish that he was entitled to seven months' salary from Club Two at the time of termination of the Employment Contract.

The Player also did not provide evidence of having issued a default notice to Club Two with respect to the alleged outstanding salary.

In that regard, the Sole Arbitrator also observes that in principle, according to CAS jurisprudence, and in accordance with Swiss law, for a party to be allowed to validly terminate an employment contract with immediate effect, it must have warned the other party, in order for the latter to have the chance, if it deemed the complaint legitimate, to comply with its obligations.

Consequently, the Sole Arbitrator finds that the alleged outstanding salaries did not provide just cause to the Player to terminate the Employment Contract.

CLUB TWO'S SIGNING OF "VARIOUS DUBIOUS CONTRACTS WITH [FOREIGN] LANGUAGE" WITH THE PLAYER THAT HE DID NOT UNDERSTAND

The Sole Arbitrator finds that the Player's reasoning in this respect is somewhat unclear. The Sole Arbitrator understands the core of the Player's argument to be that he signed a blank employment contract, that Club Two promised the Player that it would fill out the terms in accordance with the terms of the Offer, but that Club Two did not keep its promise and filled out terms that were less favourable to the Player.

The Sole Arbitrator finds that the Player did not prove that he was somehow pressured or tricked into signing a blank employment contract, as a consequence of which it is to be assumed that he did so voluntarily. The Player's accusation that Club Two forged the Employment Contract by adding financial terms that were not in accordance with the Offer and their alleged oral agreement requires evidence. Forgery is a serious allegation with potential criminal law repercussions.

However, even accepting the Player's argument that he signed a blank employment contract, in doing so, he gave Club Two a free pass to fill out the terms of the employment to their liking and, in the absence of evidence that the terms would reflect the terms set forth in the Offer, took the risk for granted that the terms would be less favourable than those set forth in the Offer.

The Sole Arbitrator notes that, according to the Player, the value of the Offer of USD 435,000 differs significantly from the value of the Employment Contract of NC 600,000 (approx. USD 38,000) and that the Player would never have accepted such 90% reduction in salary within one day.

However, the Sole Arbitrator does not accept that Club Two offered the Player a salary of USD 435,000 in its Offer but finds that the confusion derives from Club Two's use of the symbol "$" in the Offer, without explicitly defining which currency the symbol represents.

In any event, the Sole Arbitrator finds that there is insufficient evidence to determine that the Player did not voluntarily accept the terms of the Employment Contract, - which contract specifically refers to salary being paid in NC, which was apparently never objected to by the Player.

In addition, given that upon conclusion of the Employment Contract, the Player was immediately loaned for the second half of the 2018/19 season, the Player effectively never played for Club Two and it is not clear whether Club Two was ever required to pay salary to the Player. Accordingly, it is not established that the Player ever suffered any negative consequences from the alleged forgery of the Employment Contract.

Furthermore, and most relevant of all, the Player maintains in his written submission that Club Two had not adopted the financial terms set out in the Offer in the Employment Contract and that this "became evident only after having analysed the copy of the [Employment Contract], provided by [Club Two] before the FIFA DRC". Accordingly, the Player found out that he had allegedly been deceived by Club Two only after he had already terminated the Employment Contract, as a consequence of which such alleged deception could not have been the reason of his termination.

Finally, insofar the Player maintains that the Offer was the relevant binding agreement between him and Club Two rather than the Employment Contract, because the former allegedly already contained all the essentialia negotii of the employment relationship, this argument is to be dismissed because the Offer was novated by the Employment Contract, as a consequence of which any potential binding legal force of the Offer was lost once the Player and Club Two agreed on the terms of the Employment Contract.

Consequently, the Sole Arbitrator finds that the alleged signing of "various contracts with [foreign] language" that he did not understand did not provide just cause to the Player to terminate the Employment Contract.

A PRESSING NEED FOR THE PLAYER TO RETURN TO CLUB ONE

As to the third reason invoked by the Player to legitimise the termination of the Employment Contract, the Sole Arbitrator finds that the Player failed to establish why there was a pressing need for him to return to Club One, and even less why this should allow him to terminate the Employment Contract with Club Two.

VIOLATION OF THE PLAYER'S PERSONALITY RIGHTS

While the Player's termination letter only referred to the aforementioned reasons to justify his termination of the Employment Contract, in the proceedings before the FIFA DRC and in the present proceedings before CAS, the Player invokes additional arguments as to why he was allowed to terminate the Employment Contract, related to his personality rights

The Sole Arbitrator finds it doubtful whether such arguments are admissible because the termination letter should in principle set out the reasons for termination. This notwithstanding and given that the termination letter was not effective anyway because it was never served on Club Two, the Sole Arbitrator addresses the additional arguments invoked by the Player as well.

The Player argues that, in the context of his loan during the second half of the 2018/2019 season, he was forced to go on loan to a third division club. Club Three. However, the Player failed to prove that he was "forced' to go on loan to such club. The Sole Arbitrator would at the very least expect the Player to testify about the alleged circumstances under which this took place, but the Player did not. In the absence of such evidence it is to be assumed that the Player voluntarily consented to being loaned.

Consequently, also the aforementioned reasons are insufficient to conclude that the Player had just cause to terminate his Employment Contract. As such, the Sole Arbitrator finds that the Player did not have just cause to terminate the Employment Contract on 20 January 2020.

WHAT ARE THE CONSEQUENCES THEREOF?

As the Sole Arbitrator finds that the Player had no just cause to terminate the Employment Contract, the Sole Arbitrator must now address the financial consequences of such termination

In accordance with CAS jurisprudence, a party who terminates a contract with just cause pursuant to Article 14 RSTP is entitled to compensation from the breaching party pursuant to Article 17(1) RSTP, which determines the financial consequences of a premature termination of a contract.

As repeatedly confirmed by CAS, the list of criteria set out in Article 17(1) RSTP is illustrative and not exhaustive. Other objective factors can and should be considered, such as the loss of a possible transfer fee and the replacement costs, provided that there exists a logical nexus between the breach and loss claimed. CAS precedents also indicate that, in the analysis of the relevant criteria, the order by which those criteria are set forth by Article 17 (1) FIFA RSTP is irrelevant and need not be exactly followed by the judging body.

The Sole Arbitrator further observes that, according to CAS jurisprudence, it is for the judging authority to carefully assess, on a case-by-case basis, all the factors and determine how much weight, if any, each of them should carry in calculating compensation under Article 17(1) RSTP. In particular, CAS precedents indicate that while each of the factors set out in Article 17(1) RSTP or in CAS jurisprudence may be relevant, any of them may be decisive on the facts of a particular case. According to said CAS case- law, while the judging authority has a "wide margin of appreciation" or a "considerable scope of discretion", it must not set the amount of compensation in a fully arbitrary way, but rather in a fair and comprehensible manner. At the same time, as the CAS Code sets forth an adversarial rather than inquisitorial system of arbitral justice, a CAS panel has no duty to analyse and give weight to any specific factor listed in Article 17(1) FIFA RSTP or set out in the CAS jurisprudence if the parties do not actively substantiate their allegations with evidence and arguments based on such factor.

The Sole Arbitrator also observes that there is an established consensus in CAS jurisprudence that the "positive interest" principle must apply in calculating compensation for an unjustified, unilateral termination of a contract under Article 17(1) RSTP.

One of the factors under Article 17(1) RSTP is the "remuneration element" which gives an indication of the value of the Player's services to Cub Two.

In this respect, the Sole Arbitrator observes that apparently, immediately after concluding the Employment Contract, the Player was loaned. Then the Player's loan period was apparently prematurely terminated for unknown reasons, and then the Player was loaned out again to a third division club.

The decline in the value of the Player's services is also reflected in what happened after the premature termination of the Player's loan. In fact, after such fact, the Player's value, in both economic and sporting terms, continued to drop, as may be inferred from the fact that the Player resorted to play for a third-division club. On this basis, the Sole Arbitrator considers that the Player's value at the time of the termination had dropped even more.

However, the amounts due to the Player under his employment contract with Club One after termination of the Employment Contract increased, which suggests an increase of the Player's market value.

Aside from the aforementioned elements, the Sole Arbitrator observes that Club Two does not appear to have attributed much value to the Player's services at the time of the Player's termination. This is demonstrated by Club Two' s lack of interest in the Player from a sporting perspective. In fact, Club Two showed little or no interest in the Player by placing him out on loan to the third division club, taking no action to ensure that it was protecting its investment.

Club Two also did not provide any evidence of requesting the Player to report himself to the club's premises for training, not even when the Player signed an employment contract with Club One.

Consequently, the Sole Arbitrator finds that Club Two did not attribute any meaningful value to the Player's services at the time of the breach. On this basis, the remaining value of the Employment Contract were costs saved by Club Two, rather than a basis to determine the damages incurred due to the Player's early termination of the Employment Contract.

Another factor to be potentially considered is any loss that Club Two may have suffered because of the Player's breach of contract, derived from its inability to secure a transfer fee for the Player. Serious offers received from third parties may give an indication of the market value of the Player's services.

However, the Sole Arbitrator finds that there is no evidence of offers received by Club Two to acquire the services of the Player. As such, the Sole Arbitrator finds that there is no lost earning to take into account in the present case.

Another factor potentially to be considered are the "acquisition costs", i.e. the expenses paid or incurred by Club Two for acquiring the Player's services, as amortized over the term of the Employment Contract.

The Sole Arbitrator observes that Club Two paid a transfer fee of USD 85,000 to Club One to acquire the services of the Player. Since the Employment Contract was valid for a period of four and a half years from 30 January 2019 until the end of the 2022/23 season, the amount paid must be considered as amortized in equal portions over that four and a half-year term. This linear amortization means that USD 65,000 (as determined by the FIFA DRC and not disputed by the Parties) remained unamortized when the Employment Contract was terminated after nearly one year after its entry into force.

While the Sole Arbitrator finds that Club Two was not particularly interested in the Player's services at the time of the breach, this does not change the fact that it invested the aforementioned sum and made a loss on such investment, at least partially due to the Player's breach of the Employment Contract.

While there are multiple ways to determine the amount of compensation to be paid, considering the specific circumstances of the present case and the evidence on record, the Sole Arbitrator finds it reasonable and fair that this amount, i.e. USD 65,000, is to be considered as damages incurred by Club Two as a consequence of the Player's breach of the Employment Contract.

However, the Sole Arbitrator recalled that the Player's salaries with Club Two shall be considered as costs saves.

The residual value of the Employment Contract at the time of the termination was NC 466,666,66 in total, which roughly corresponds to USD 29,000. In the circumstances of the present case, the Sole Arbitrator considers it reasonable and fair that an amount of USD 29,000 is deducted from the aforementioned amount of damages of USD 65,000.

The Sole Arbitrator finds that this sequence of events indicates that the value of the Player's services, at least as far as Club Two was concerned, had declined somewhat since the start of the Employment Contract.

Finally, the Sole Arbitrator referred to the "specificity of sport" which is not an additional head of compensation, nor a criterion allowing to decide ex aequo et bono, but a correcting factor which allows the Sole Arbitrator to take into consideration other objective elements (chiefly of sporting nature) which are not envisaged under the other criteria of Article 17 RSTP.

However, the Sole Arbitrator sees no reason to use the "specificity of sport" as a correcting factor in the matter at hand.

Finally, the Sole Arbitrator notes that Club One argued that it should not be held jointly and severally liable for any compensation awarded to Club Two, because it did not induce the Player into prematurely terminating his employment relationship with Club Two as it allegedly believed that the Player was a free agent.

CAS jurisprudence has repeatedly confirmed that Article 17(2) FIFA RSTP requires that the new club, so long as it is identified as such, be held jointly and severally liable with the player for the payment of any compensation awarded against the player under Article 17(1) RSTP, regardless of whether there is evidence that it was involved in or induced the player to breach his contract, unless there are truly exceptional circumstances.

Such truly exceptional circumstances do not exist in the present matter, because the Sole Arbitrator concurs with Club Two that Club One should have known that the Player was still under contract.

Under these circumstances, if Club One had wanted to exclude any risk of signing an employment contract with a player that may be registered with another club, it should have sought to obtain assurances from Club Two directly, or seek guidance from the relevant national football associations prior to signing an employment contract with the Player, which it failed to do.

Consequently, the Sole Arbitrator finds that Club One is jointly and severally liable with the Player to pay compensation for breach of contract to Club Two.

In view of all the above, the Sole Arbitrator considers it reasonable and fair that the Player and Club One are jointly and severally liable to pay the amount of USD 36,000 to Club Two as compensation for the Player's breach of the Employment Contract.

CAS 2019/A/6594

CARDIFF CITY FOOTBALL CLUB LIMITED V. FOOTBALL CLUB DE NANTES[52]

FIFA's jurisdiction to deal with set-off claims

DATE OF THE AWARD:
26 August 2022

PANEL:
Prof. Ulrich Haas (President)
Mr Andrew de Lotbinière McDougall QC
Mr Nicholas Stewart QC

MAIN TOPICS:

- Durisdiction of FIFA's deciding bodies to deal with set-off claims
- Applicable law to the validity of transfer agreements
- Conditions precedent

DECISIONS DEALING WITH SIMILAR ISSUES:

- CAS 2011/A/2539 Borussia VfL v. Boca Juniors & FIFA
- CAS 2014/A/3647 Sporting Clube de Portugal SAD v. SASP OGC Nice Côte d'Azur
- CAS 2016/A/4581 Apollon Football Ltd. v. Partizan FC & FIFA
- CAS 2017/A/5104 Apollon Limassol v. UC Sampdoria

[52] 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.

KEY CONCLUSIONS

> Article 22(f) of the FIFA Regulations on the Status and Transfer of Players (RSTP), which grants the FIFA Players' Status Chamber (PSC) the competence to adjudicate a dispute between two clubs, needs to be read in light of Article 1(1) RSTP. This means that FIFA's dispute resolution mechanism does not simply serve the interests of parties to get their disputes resolved. Instead, the dispute resolution mechanism provided by FIFA also serves FIFA's own interests. Through its adjudicatory bodies FIFA seeks to enforce its standards in the international football industry. Such interests of FIFA, however, are obviously limited to disputes that have a close connection to the football industry and that are decided in application of its rules and regulations.

> It does not appear procedurally efficient to entrust the FIFA PSC with the adjudication of a complex tort claim that is governed by domestic law only. The FIFA PSC is not the proper forum for such disputes.

> The applicable FIFA procedural rules seek to resolve football-related disputes quickly and inexpensively. This purpose would be undermined if the FIFA PSC were competent to adjudicate a complex set-off claim. For instance, pursuant to Article 16(10) and (11) of the FIFA Procedural Rules, the time limits for filing an answer and a potential second round of written submissions are 20 days. These deadlines may be extended once only for another 10 days. These procedural rules are wholly inadequate to address a complex set-off defence.

> Potentially different laws may be applicable to different legal aspects in the same dispute arising from the same contract, i.e. dépeçage, depending primarily on the question of whether the issue addressed in the clause concerned is governed by the FIFA RSTP. If it is, Swiss law may be applied on a subsidiary basis. If it is not, then the law chosen by the parties may be applied.

> From a regulatory standpoint, a transfer is considered executed and finalised once a player is registered with the new association. This is only possible when the new association has received the player's international transfer certificate (ITC) from his former association. Thus, unless it clearly and unambiguously transpires otherwise from the parties' intention, whenever the validity of a transfer agreement is subject to the player's registration, this means registration with the relevant national association, and not that related to compete in a specific championship. That is specially the case when the parties to the transfer agreement are experienced stakeholders in the world of football.

RELEVANT FACTUAL BACKGROUND

On 19 January 2019, the Welsh club, Cardiff City FC **(CCFC)** and the French club, FC Nantes concluded an agreement **(the "Transfer Agreement")** to transfer the Player from FC Nantes to CCFC, which included certain conditions precedent. In particular, the Transfer Agreement was conditional upon:

2.1.1. the player completing successfully medical examination with [CCFC];

2.1.2. FC Nantes and the Player agreeing all the terms of a mutual termination of FC Nantes contract of employment with the Player;

2.1.3. the mutual termination of FC Nantes contract of employment with the Player is registered by the LFP;

2.1.4. the LFP and the FAW have confirmed to [CCFC] and FC Nantes that the Player has been registered as a [CCFC] player and that the Player's International Transfer Certificate has been released.

2.2 Both parties shall use all reasonable endeavours to ensure that the conditions are satisfied no later than 22 January 2019. If the conditions are not fulfilled within this period then this Transfer Agreement shall be null and void.

On 19 January 2019, the Parties uploaded the Transfer Agreement and the employment contract concluded between the Player and CCFC **(the "CCFC Contract")** into FIFA's Transfer Matching System **(TMS)**.

On 21 January 2019, the Football Association of Wales **(FAW)** sent a request to receive the Player's ITC in TMS from the French Football Federation **(FFF),** which was issued by the FFF and confirmed receipt by the FAW on the same day.

In the night between 21 and 22 January 2019, the Player tragically died in a plane crash over the English Channel.

On 26 February 2019, FC Nantes lodged a claim with FIFA against CCFC and claimed the first instalment of the transfer fee in the amount of EUR 6,000,000, plus interest as per 27 January 2019.

In its reply, CCFC objected to the jurisdiction of the FIFA PSC and requested a stay of the proceedings until the publication of (i) the final report of the Air Accidents Investigations Branch **(AAIB)** on the crash; (ii) the conclusion of all criminal investigations and prosecutions in connection with the crash; and (iii) the conclusion of any civil law claim pursued by CCFC in either England or Wales or France against FC Nantes in relation to the organisation of the flight operated by a Mr Willie McKay and the company Mercato.

CCFC also objected to the substance of the claim filed by FC Nantes and requested that it be dismissed. Finally, CCFC maintained that FC Nantes was responsible for the circumstances leading to the Player's death and that "in the unlikely event that [the FIFA PSC] considered that the transfer had been completed and that [the Player] has become a [CCFC] player", FC Nantes was to be held liable for the damages caused to CCFC by the Player's death; and that the amount of those damages (which it considered to be EUR 17,000,000) should be deducted from any sums otherwise due from CCFC to FC Nantes.

On 25 September 2019, the FIFA PSC rendered a decision ordering CCFC to pay to FC Nantes the first instalment of the transfer fee in the amount of EUR 6,000,000. In particular, the FIFA PSC held as follows:

[...] [T]he Bureau was eager to underline that, despite the tragic passing of the player as well as the criminal and civil liability developments it may possibly trigger, the dispute lodged before FIFA by [FC Nantes] remains of a purely contractual nature.

In other words, even though the circumstances surrounding the player's tragic passing in a plane accident may activate criminal proceedings and civil actions regarding [FC Nantes'] possible liability before local courts, the Bureau

was of the opinion that those proceedings should be settled by the local courts and not by FIFA. If the local courts would determine any criminal or civil liability on the side of [FC Nantes], it is also for the local courts to determine the consequences of such liability. The Bureau held that [CCFC] had not been able to prove that the outcome of those local proceedings would be relevant for the outcome of the dispute pertaining to whether or not a transfer fee is due.

The Bureau established that it is not in a position to consider the allegations of [CCFC] as to [FC Nantes'] alleged civil liability towards it as they lie outside of its competence.

Finally, the FIFA PSC reasoned that all the conditions precedent of the Transfer Agreement had been met.

CCFC appealed the FIFA PSC decision before the Court of Arbitration for Sport (CAS).

LEGAL CONSIDERATIONS

THE MANDATE OF THE PANEL TO ADJUDICATE THE SET-OFF CLAIM

The main issue to be resolved in the present arbitration is whether, at the time of the Player's death, the Player had been definitively transferred from FC Nantes to CCFC, triggering a payment obligation of CCFC to FC Nantes of a transfer fee of EUR 17,000,000 (the first EUR 6,000,000 instalment of which has been awarded by the FIFA PSC and which forms the matter in dispute in this appeal). If no payment obligation exists, the case ends there.

According to CCFC, prior to considering the substance of CCFC's civil tortious claim against FC Nantes, the Panel needs to consider whether (i) CAS has jurisdiction to hear CCFC's tort claim; and (ii) whether a tortious liability can be offset against a contractual liability under the applicable law. CCFC maintains that these requirements are complied with, regardless of the law to be applied.

FC Nantes, however, submits that such requirements are not fulfilled.

THE SPECIFICS OF APPEALS ARBITRATION PROCEEDINGS

Whether the Panel has a (procedural) mandate to hear CCFC's set-off claim depends on whether the FIFA PSC had a mandate to decide on the set-off claim. The procedure at hand is an appeal arbitration proceeding. Consequently, the mandate of this Panel cannot, in principle, exceed the mandate of the first instance. This view of the Panel is also backed by the submissions of the Parties. At the hearing, both Parties expressly acknowledged that this Panel is only empowered to decide upon the substance of the tort claim if the FIFA PSC was competent to do so, and vice versa, that this Panel cannot adjudicate the substance of the tort claim if the FIFA PSC lacked the requisite mandate.

CAS proceedings before the Appeals Arbitration Division are to be distinguished from those before the Ordinary Arbitration Division in the sense that the scope of the former is limited to issues that fell within the competence of the first instance proceedings, while in ordinary arbitration proceedings there has been no previous instance.

THE AUTONOMY OF FEDERATIONS

Swiss law provides ample freedom for private associations to determine the content of their Statutes, which is, in principle, only limited by the mandatory provisions of Article 63(2) of the Swiss Civil Code (SCC). Private associations therefore have a wide discretion to determine what types of disputes and between which persons/entities those disputes shall be submitted to its internal dispute resolution bodies.

For the avoidance of doubt, it does not follow from the above that this Panel is bound by any conclusion of the FIFA PSC. If the Panel finds that the FIFA PSC wrongly applied the applicable provisions in denying its mandate to adjudicate and decide on the substance of CCFC's set-off claim, the Panel is, pursuant to Article R57 CAS Code, free to either adjudicate and decide on the civil liability of FC Nantes itself or to refer the case back to the previous instance.

FIFA'S LEGISLATIVE AND REGULATORY FRAMEWORK

Neither the FIFA RSTP the FIFA Procedural Rules specifically deal with the question whether and to what extent the FIFA

adjudicatory bodies have a mandate to decide on set-off claims.

The FIFA Procedural Rules foresee the possibility of filing counterclaims without any particular prerequisites (other than jurisdiction) but set-off claims and counterclaims are two distinct concepts. Provisions concerning set-off claims do not apply to counterclaims and vice versa. This follows, inter alia, from Article 377 Swiss Code of Civil Procedures (CCP) which – in the ambit of domestic arbitration – clearly distinguishes between a set-off (para. 1) and counterclaims (para. 2).

At the hearing, both experts on this topic – Prof. Rigozzi and Prof. Müller – confirmed that Article 22 FIFA RSTP only addresses the competence of the FIFA adjudicatory bodies with respect to the main claim (or counterclaim) and not in relation to set-off claims.

THE PRINCIPLE OF "LE JUGE DE L'ACTION EST LE JUGE DE L'EXCEPTION"

The above maxim describes a legal principle whereby the judge that is competent for the main action is also competent to decide on objections thereto, irrespective of whether the issue raised as an objection falls within the competence of another judge. The aforementioned principle applies in court proceedings before Swiss state courts. As a consequence, a claim can be raised by set-off as a defence against a main action filed in court even if another court would be competent to decide on that claim if the latter was filed separately. The question is whether this principle applicable before state courts also applies to proceedings before the FIFA adjudicatory bodies.

CCFC is of the view that the above principle is of a general nature. According to CCFC, the principle not only applies in state court proceedings but also in the context of alternative dispute resolution (including proceedings before association tribunals). CCFC refers insofar to Article 377(1) CCP. This provision – according to CCFC – is not only applicable in domestic arbitration proceedings, but also in international arbitration proceedings by analogy. CCFC argues that since clause 8(2) of the Transfer Agreement provides that the dispute shall ultimately be resolved by arbitration, the contents of Article 377(1) CCP shall apply also before the FIFA PSC.

The FIFA PSC is a (very) specialised dispute resolution body. This follows when looking at the jurisdiction ratione materiae (subject-matter jurisdiction) of the FIFA PSC. This follows from Articles 22 and 23 RSTP which, even if they do not seem to limit the competence of the FIFA PSC, they nevertheless have to be analysed under the light of Article 1(1) RSTP. This restricted subject-matter competence of the FIFA adjudicatory bodies is further supported when looking at the purpose of FIFA's dispute resolution mechanism. The latter does not simply serve the interests of parties to get their disputes resolved. Instead, the dispute resolution mechanism provided by FIFA also serves FIFA's own interests. Through its adjudicatory bodies FIFA seeks to enforce its standards in the international football industry. Such interests of FIFA, however, are obviously limited to disputes that have a close connection to the football industry and that are decided in application of its rules and regulations.

In view of the above, it does not appear procedurally efficient to entrust the FIFA PSC with the adjudication of a complex tort claim that is governed by domestic law only. The FIFA PSC is not the proper forum for such disputes, since as a free-standing claim CCFC's tort claim would fall outside FIFA's subject-matter (ratione materiae) jurisdiction. If CCFC had filed its tort claim separately and not in the context of a set-off defence, the FIFA PSC would have correctly declined its competence to adjudicate the matter. The tort claim would have no connection whatsoever to the areas regulated in the RSTP. CCFC's claim is based on the application of domestic tort law in which FIFA's specialised adjudicatory bodies have insufficient expertise and in which there is no interest of FIFA in its governing and regulatory capacity.

The Panel also finds that the procedural rules applicable before the FIFA PSC are not designed to adjudicate CCFC's tort claim. The applicable procedural rules before FIFA seek to resolve the football-related dispute quickly and inexpensively. This purpose would be undermined if the FIFA PSC were competent to adjudicate such a set-off claim. Furthermore, the Panel observes that the costs of the proceedings before the FIFA PSC are capped at CHF 25,000 (Article 18(1) FIFA Procedural Rules); and that the advance of costs to be paid is capped at CHF 5,000 (Article 17(4) FIFA Procedural Rules). Such relatively low amounts correspond to a speedy and not overly complex dispute resolution mechanism and are entirely inadequate to cover the costs of adjudication of a full-fledged cross-border tort claim involving a significant number of legal and aviation experts, not to mention large multi-firm legal teams on each side.

Likewise, pursuant to Article 16(10) and (11) of the FIFA Procedural Rules, the time limits for filing an answer and a potential second round of written submissions are 20 days. These deadlines may be extended once only for another 10 days. These procedural rules are wholly inadequate to address a complex set-off defence such as filed by CCFC in these proceedings. This is demonstrated by the numerous requests for significant extensions of the respective filing deadlines before CAS in these proceedings, which in part were necessary to collect relevant expert evidence.

Furthermore, while oral hearings are possible before the FIFA PSC (Article 11 FIFA Procedural Rules), the general rule is that proceedings are conducted on written submissions only (Article 8 FIFA Procedural Rules). Such procedure is inadequate to deal with the type of dispute in question here. CCFC acknowledged this and submitted that if its tort claim were filed in the English courts several days, if not weeks, would be set aside to hear that claim.

All of the above confirms that the applicable procedural regulations before the FIFA PSC are not designed to deal with CCFC's complex cross-border tort claim. Consequently, it would neither be procedurally efficient nor in the interests of justice to entrust the FIFA PSC with the adjudication of CCFC's tort claim.

In light of the above exceptions, it is evident to the Panel that there is an implicit understanding both between the Parties and also by FIFA that the FIFA adjudicatory bodies are not competent to deal with CCFC's tort claim. By agreeing to submit disputes arising out of the Transfer Agreement to FIFA's tribunals the Parties have implicitly accepted that claims outside the jurisdiction of FIFA cannot be submitted to the adjudicatory body by way of set-off.

It is not for this Panel to examine or to conclude what is the competent forum outside the two-stage procedure (FIFA association tribunal, then CAS appeals arbitration procedure), i.e. whether CAS is competent to adjudicate CCFC's alleged tort claim in an ordinary arbitration procedure or whether the claim needs to be filed with a state court. What is relevant for the Panel in the present proceeding is that there is an implicit understanding that in a litigation before the FIFA PSC no set-off claim can be admitted to the proceeding that is not governed by the FIFA rules and regulations.

Even assuming that the FIFA PSC would have the discretion to adjudicate on the set-off claim, the Panel emphasises that the tort alleged by CCFC's would not be a breach of the Transfer Agreement. The set-off claim is not linked to the breach of contract. The only arguable nexus is the crude and obvious causal one: if there had been no transfer, then there would not have been a plane crash. However, there is no substantive link between the two matters. Indeed, the tort claim is arguably not even related to sport and can be decided completely independently from the Transfer Agreement, since the Transfer Agreement placed no responsibility on FC Nantes for the transportation of the Player to CCFC during the negotiations or after completion of the transfer.

VALIDITY OF THE TRANSFER AGREEMENT

THE APPLICABLE LAW

The Parties put great emphasis on the question of what law applies to the interpretation of the conditions precedent in the Termination Agreement. CCFC on the one hand advocates for the application of English law which gives preference to an objective interpretation, whilst according to Swiss law, Article 18 SCO seeks first and foremost to establish the subjective intention of the parties and – in case the latter cannot be determined – falls back on an objective interpretation of the contract.

The Panel finds that the differences between contractual interpretation under the law of England and Wales and Swiss law, however, do not come into play in the case at hand, since the Panel finds that no clear subjective intention can be inferred and, thus, also from a Swiss law perspective, the objective interpretation prevails. While the nuances in contractual interpretation obviously differ, the rationale is the same.

Potentially, different laws may be applicable to different legal aspects in the same dispute arising from the same contract, i.e. dépeçage, depending primarily on the question of whether the issue addressed in the clause concerned is governed by the FIFA RSTP. If it is, Swiss law may be applied on a subsidiary basis. If it is not, the law of England and Wales may be applied, following the Parties' choice of law.

Because the Panel finds that the question of whether the interpretation of clauses 2.1.2 and 2.1.3 of the Transfer Agreement is governed by Swiss law or the law of England and Wales is not decisive, the Panel leaves this issue open. Both Parties agree that the outcome should be the same regardless of the law to be applied.

IS THE CONDITION PRECEDENT IN CLAUSE 2.1.2 OF THE TRANSFER AGREEMENT FULFILLED?

As set forth above, the condition precedent set forth in clause 2.1.2 of the Transfer Agreement provides as follows:

FC Nantes and the Player agreeing all the terms of a mutual termination of FC Nantes contract of employment with the Player

The Panel finds that the wording of clause 2.1.2 of the Transfer Agreement is – objectively – clear in that the condition precedent requires that there is an agreement between FC Nantes and the Player on all the terms of a mutual termination of the FC Nantes employment contract with the Player. CCFC wishes to read into this provision that the termination – in addition – must have been validly executed according to French law. The Panel does not agree with such contention.

Nothing in the text of clause 2.1.2 of the Transfer Agreement points in this direction, and CCFC's reading requires additional wording to be read into clause 2.1.2 of the Transfer Agreement.

FC Nantes' consent to the transfer was obviously required, and the mutual termination of the FC Nantes Employment Contract was a relevant aspect in this respect. The RSTP do not require that the mutual termination agreement is validly enforced, but simply that it is agreed upon. The Panel finds that the Player was transferred permanently to CCFC, the FFF issued the Player's ITC to the FAW, and the FAW registered the Player as a CCFC player, as a consequence of which the conditions precedent in the Termination Agreement were fulfilled on 21 January 2019.

IS THE CONDITION PRECEDENT IN CLAUSE 2.1.3 OF THE TRANSFER AGREEMENT FULFILLED?

As set forth above, the condition precedent set forth in clause 2.1.3 of the Transfer Agreement provides as follows:

[T]he mutual termination of FC Nantes contract of employment with the Player is registered by the LFP.

The Panel finds that also the wording of clause 2.1.3 of the Transfer Agreement is clear: the agreement to mutually terminate the employment relationship between FC Nantes and the Player was to be registered/homologated by the LFP, i.e. the LFP was to verify the legality of the Termination Agreement. It is not required that LFP assess or examine whether the terms of the Termination Agreement were actually complied with.

It is undisputed that the LFP registered/homologated the Termination Agreement. Whether such registration was correct or not, is immaterial, since it is the registration that was provided for under the Transfer Agreement, and no more. This is logical, as it provided CCFC with the legal certainty that when contracting with the Player it would not be facing any claims from the Player and/or FC Nantes for allegedly inducing the Player to breach his contract with FC Nantes.

IS THE CONDITION PRECEDENT IN CLAUSE 2.1.4 OF THE TRANSFER AGREEMENT FULFILLED?

As set forth above, the condition precedent set forth in clause 2.1.4 of the Transfer Agreement provides as follows:

[T]he LFP and the FAW have confirmed to [CCFC] and FC Nantes that the Player has been registered as a [CCFC] player and that the Player's International Transfer Certificate has been released.

The Panel notes that both Parties acknowledge that the wording of clause 2.1.4 of the Transfer Agreement is not entirely clear and requires interpretation.

The Panel finds that CCFC's business common sense interpretation of clause 2.1.4 of the Transfer Agreement is flawed. CCFC is relying on an interpretation that such clause meant that the Player should have been registered by the Premier League. Such interpretation makes business common sense to CCFC (after the death of the Player), but not to FC Nantes. From FC Nantes' perspective the most business common sense is to transfer the Player to CCFC and leave it to the latter to decide in which competitions the Player shall be registered. This is all the more so considering that FC Nantes had no influence whatsoever where and when CCFC would register the Player with a specific national league.

From a regulatory standpoint, a transfer is considered executed and finalised once a player is registered with the new association. This is only possible when the new association has received the player's ITC from his former association. The Panel finds that the Parties to the Transfer Agreement did not deviate from this approach. The Panel interprets the word "registered" in clause 2.1.4 as referring to registration by the FAW. Being registered with a national association, however, is the prerequisite for a player to play in national competitions. Thus, clause 2.1.4 does not provide any basis to suggest that the Player was to be registered by the Premier League as well as by the FAW. The Panel need not decide whether it is possible within the regulatory framework of the RSTP to condition the transfer of a player upon the latter being registered with a specific national league. The Transfer Agreement

does not contain any such condition precedent, either explicitly or implicitly. Nothing on file and even less so in the wording of the Transfer Agreement indicates that FC Nantes accepted the risk of the Player potentially not being registered by the Premier League after the completion of the transfer.

There is no reasonable objective construction of clause 2.1.4 of the Transfer Agreement that the completion of the transfer required the registration of the Player with the Premier League. It is undisputed that the Player was registered with the new association on 21 January 2019, i.e. before the Player's death. Upon registration, the Player was at the disposal of the CCFC (and no longer at the disposal of FC Nantes). It is telling that CCFC did not inform or contact FC Nantes when the Premier League refused to register the CCFC Employment Contract. It would have been business common sense for CCFC to do so if such registration had been a condition precedent to the Transfer Agreement. Although not relevant to the interpretation of the contract, the Panel further notes that until FC Nantes lodged its claim before FIFA, CCFC never claimed that the Transfer Agreement was conditional upon the Player being registered with the Premier League.

This interpretation is not contradicted by the fact that the requirement for registration is followed by the wording "and that the Player's ITC has been released". The release of the ITC and the registration of a player are two sides of the same coin. The same approach is applied in Article 8(2)(5) of Annex 3 to the FIFA RSTP, which provides as follows:

Once the ITC has been delivered, the new association shall confirm receipt and complete the relevant player registration information in TMS.

The Panel notes that the language used in clause 2.1.4 of the Transfer Agreement reflects the relevant provision in the FIFA RSTP. Since both Parties are experienced stakeholders in the world of football, it is reasonable and fair to interpret objectively that clause 2.1.4 of the Transfer Agreement refers to the factual matrix and the standing practice of the football industry.

Furthermore, although CCFC was not scheduled to participate in FA Cup matches or UEFA competitions at the time of or shortly after the transfer, it remained undisputed between the Parties that CCFC could hypothetically have fielded the Player in such competitions, even if the Premier League would not register the CCFC Employment Contract. While it was clearly CCFC's intention to field the Player also in Premier League matches, the Panel considers the possibility of fielding the Player in FA Cup matches and UEFA competitions a clear indication that the Player had become a "[CCFC] player".

Consequently, the condition precedent in clause 2.1.4 of the Transfer Agreement has also been satisfied.

Since the Player's transfer from FC Nantes to CCFC was completed and because all conditions precedent in clause 2.1 of the Transfer Agreement were satisfied prior to the Player's death, CCFC's payment obligations towards FC Nantes are triggered, as recorded in the Transfer Agreement.

CAS 2021/A/7180

CLUB R VS PLAYER C[53]

Contractual duties and obligations owed by a loaned player to his parent club

DATE OF THE AWARD:

20 September 2022

PANEL:

Mr Luigi Fumagalli (President)

Mr Wouter Lambrecht

Mr Manfred Nan

MAIN TOPICS:

- Termination of a contract by a parent club while the player is on loan
- Contractual duties and obligations owed by a loaned player to his parent club
- Breach of duty and care of loyalty by a player
- Principle of immediate reaction and the period of reflection
- No damages suffered by a club due to a breach of contract

DECISIONS DEALING WITH SIMILAR ISSUES:

- CAS 2009/A/1856 Fenerbahçe Spor Kulubu v. Stephen Appiah
- CAS 2014/A/3643 Club Pachuca v. Facundo Gabriel Coria & FIFA
- CAS 2014/A/3707 Emirates Football Club Company v. Hassan Tir, Raja Club and FIFA
- CAS 2016/A/4408 Raja CA de Casablanca v. Baniyas FSC & Ismail Benlamalem
- CAS 2019/A/6463 Saman Ghoddos v. SD Huesca & Östersunds FC & Amiens Sporting Club

[53] 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.

KEY CONCLUSIONS

- Not all of the player's duties and obligations under an employment contract are suspended as a result of the player's loan. Some of the player's subsidiary duties and obligations towards the parent club survive during the loan period. In particular, the player continues to have the duty of care and loyalty towards his parent club, a duty embodied under Article 321a(1) of the Swiss Code of Obligations ("SCO").
- Consequently, in principle, the player's parent club has the right to consider events occurring during the loan of the player in determining whether it has just cause to terminate its employment contract with the player. It would indeed be irrational if a parent club, who still holds, in principle, a legitimate interest in a loaned player, had no right to terminate an employment relationship during the player's loan period.
- A player breaches its fundamental obligation of loyalty and duty of care towards his parent club if it continuously lies and misrepresents a personal situation which directly impacts his health and thus his ability to provide his services as a professional football player.
- The jurisprudential principle of "immediate reaction" provides that a party only has a short period of reflection of two to three days to terminate a contract upon its counterparty's breach thereof. However, the reflection period to take a well-informed decision only starts once the time required to conduct an investigation has come to an end, allowing the employer to fully understand the facts based on which it would take the decision to terminate (or not).
- A club suffers no damage due to a player's breach of contract if its savings resulted from such breach are higher than the damages it has managed to prove.

RELEVANT FACTUAL BACKGROUND

In June 2017, Club R **(the "Appellant Club")** acquired the services of Player C **(the "Player")** by concluding an onerous transfer agreement with the Player's former club and an employment contract with him **(the "Contract")**.

On 3 January 2018, the Player was loaned out to Club One until 3 January 2019 (the **"Loan"**), both parties also entering into an employment contract (the **"Club One Contract")**

On 11 May 2018, Club One sent a letter to the Player (with the Appellant Club in copy), in which it notified him the termination of the Club One Contract with immediate effect on the basis of some issues related to a certain behaviour of the Player (the **"Behaviour Issue"**), whilst also instructing him to immediately report back to the Appellant Club.

On the same day, Club One sent a letter to the Appellant Club with practically the same content and informing it about the early termination of the Loan.

On 14 May 2018, one of the Player's agents, Mr L (with his partner Mr N in copy) sent an email to the Appellant Club explaining that they had received the termination letter from Club One and wishing to know when the Player should report back. There was no mention in this letter of the reasons for the termination of the Club One Contract.

On 15 May 2018, the Appellant Club replied requesting more information about the grounds on which the Club One Contract and the Loan had been terminated.

Also on 15 May 2018, the Player sent an email to the Appellant Club asking again when he should report back.

On or around the end of May 2018, the Player started to address the Behaviour Issue.

On 5 June 2018, the Appellant Club, Club One and the Player signed a "Variation Deed" of the Loan in order to allow the sub-loan of the Player from Club One to Club Two. The next day, on 6 June 2018, an agreement to sub-loan the Player from Club One to Club Two until 3 January 2019 was signed, together with a contract between Club Two and the Player (the **"Club Two Contract"**).

On 31 October 2018, Club Two and the Player signed an agreement to terminate by "mutual agreement" and for "mutual benefit and interest" the Club Two Contract.

On 13 November 2018, Club One sent an email to an official of the Appellant Club informing him that Club One had "become aware through several news and articles in the national press" that the Player was still incurring in the Behaviour Issue and that it would "touch base with [Club Two] to understand the details of the situation…"

On 20 November 2018, an official of Club Two sent a letter to an official of Club One, reporting what had happened with the Player. In a nutshell, the letter reported that the Behaviour Issue had been present during the sub-loan.

Club One forwarded this letter to the Appellant Club on 26 November 2018. In the transmission letter, Club One also made reference to: (i) some press articles reporting certain problems occurring at the end of April and May 2018 related to the Behaviour Issue; and (ii) a public interview in which the Player acknowledged that the Behaviour Issue was present even before his loan to Club One.

On the same day, an Appellant Club's official sent a letter to Mr N, one of the Player's agents, expressing the Appellant Club's concern that neither he nor the Player had contacted the Appellant Club with the "details of the [Behaviour Issue] and/or any other issues affecting his ability to fulfil his contract with [the Appellant]". He requested that they provide the full details of the Player's discussions with Club One and Club Two concerning the Behaviour Issue and the treatment provided.

Mr N replied to the Appellant Club's official on the same day with the following communication:

The player ended his loans with both [Club One] and [Club Two] in the best of terms, all payments were covered by the clubs and they have been very helpful and kind with [the Player].

About the issues that you mention both [Club One] and [Club Two] help[ed] him with this and supported him with personal coaching, a 24 hour person to strength[en] his mind and be in his best physical shape (…) Let me be very clear about this, the player at all time[s] has been training, playing official matches and fulfilling his contract with either [Club One], [Club Two] and the [Appellant Club] in which we still have an active contract and the player is very motivated to fulfil it. Since [Club Two] did not make it to the playoffs the player was released and [is] awaiting for instructions from the [Appellant Club] since both the Loan and Sub-Loan have ended and the players contract is active with the [Appellant Club] from January 2019.

The next day, on 7 December 2018, the Appellant Club's official replied to Mr N, expressing the Appellant's concern that (i) the information he had provided was inconsistent with the reports received from Club One and Club Two suggesting that the Player had been dismissed for misconduct related to the Behaviour Issue, and (ii) if in fact the Player's contract had been terminated by Club Two prematurely due to the Behaviour Issue, this would make it the second time in a span of less than 6 months that that had happened. The Appellant Club's official requested "total transparency" from Mr N and the Player, and asked them to provide certain information, inter alia, on his whereabouts, whether he was training, whether he was receiving counselling as well as the status of the Behaviour Issue.

Later that same day, Mr N replied explaining that: (i) the Player had ended the sub-loan with Club Two because the team had failed to qualify for the playoffs; (ii) since the end of the sub-loan he had been staying with his family; (iii) he had been training with a personal trainer to stay in shape; (iv) he had been working with a personal coach to keep himself motivated and focused on his career; (iv) he had not enter into any conduct which would worsen the Behaviour Issue. Mr N stressed, as he had done before, that the Player "left both clubs in the best of terms and completed his loan successfully".

Further exchanges of correspondence occurred during December 2018, with the Appellant Club trying to have a full picture of the reasons behind the termination of the Loan, the Sub-Loan as well as of the Player's contracts with Club One and Club Two.

On 7 January 2019, the Appellant Club terminated the Contract on the basis that the Player continued to downplay the significance of the Behaviour Issue and that he had showed no signs of being committed to address it. The Appellant Club considered that it simply could not ignore "your persistent and material breaches of the Contract in order for you to attempt to continue to overcome [the Behaviour Issue]".

On 12 March 2019, the Player filed a claim before the FIFA Dispute Resolution Chamber (**"DRC"**) against the Appellant Club alleging that it had terminated the Contract without just cause and requested the payment of compensation plus interests.

On 9 April 2020, the FIFA DRC passed its decision whereby, by majority, it held that the Appellant Club had terminated the Contract without just cause and granted the Player compensation for breach of contract on the basis of Article 17 of the FIFA Regulations on the Status and Transfer of Players (**"RSTP"**).

The Appellant Club then filed an appeal before the Court of Arbitration for Sport (**"CAS"**).

LEGAL CONSIDERATIONS

BURDEN AND STANDARD OF PROOF

The Panel notes that neither the FIFA RSTP nor the FIFA Procedural Rules set the standard of proof in a breach of contract dispute. It is well-established under CAS jurisprudence that, when the regulations of a sports organization do not provide the applicable standard of proof, the CAS must determine it. When dealing with Article 17 RSTP cases, CAS panels have on several occasions applied the standard of "comfortable satisfaction", which falls in between "beyond a reasonable doubt" and "balance of probabilities" on the standard of proof spectrum. The Panel finds that, accordingly, the applicable standard of proof to apply in the present case is "comfortable satisfaction". The Panel notes however that the conclusions reached in this Award would not change even if the higher standard of "strict evidence" were applied, as argued by the Player.

THE CONCEPT OF JUST CAUSE

Considering the constant jurisprudence of FIFA's deciding bodies and the CAS, the Panel must determine whether the grounds relied on by the Appellant Club for terminating the Contract was so severe that it could not have reasonably been expected to continue the employment relationship with the Player.

CONTRACTUAL DUTIES AND OBLIGATIONS OWED BY A LOANED PLAYER TO HIS PARENT CLUB

The Parties dispute whether the events occurring while the Player was on loan with Club One and Club Two can be taken into account by the Appellant Club in deciding whether to terminate the Contract and, in turn, by the Panel in determining whether there was just cause for termination.

The Appellant Club argues in the affirmative. It claims that the loan agreement is a "secondment agreement" under Swiss law (which it describes as "an amendment to the main employment contract, with the purpose to adapt the labour relationship during the temporary assignment of the employee"), and, as such, the Player's subsidiary duties and obligations (whether express or implied) resulting from the Contract, in particular his duty of care and fidelity provided under Article 321a of the SCO, survived and remained in force while he was out on loan. The Appellant Club maintains that only the Player's primary duties and obligations (i.e., providing footballing services for the Appellant Club) were suspended during the loan period.

The Player, on the other hand, argues in the negative, citing that while the Player was out on loan, the Contract was suspended and, as a result, all the Player's rights and obligations towards the Appellant Club, whether primary and subsidiary, including duties of care and fidelity, were also suspended. It is the Player's belief that during the loan period, the Player only had duties and obligations towards the loanee clubs (i. e. Club One and then Club Two) since those were the clubs for which he was then rendering his services. In support, the Player argues that the employment relationship cannot be "duplicated", as it would run contrary to Article 5 of the FIFA RSTP, which prohibits a player from registering with more than one club at a time, and Article 321a(3) of the SCO which states that "for the duration of the employment relationship the employee must not perform any paid work for third parties in breach of his duty of loyalty, in particular if such work is in competition with his employer".

The Panel recognizes that while the Player was on loan, his primary obligation of rendering his services as a professional footballer to the Appellant Club under the Contract was suspended. Indeed, the Appellant Club suspended the Player's registration and temporarily granted until 3 January 2019 the Player's registration to Club One, which undertook to pay the Player's salary and applicable bonuses during the loan period in exchange for his services. Through the Sub-Loan Agreement, the Player was then sub-loaned with the consent of the Appellant Club to Club Two until 3 January 2019.

However, not all of the Player's duties and obligations under the Contract were suspended as a result of the loan. The Panel finds that some of the Player's subsidiary duties and obligations towards the Appellant Club survived during the loan period. In particular, the Player continued to have the duty of care and loyalty towards the Appellant Club, a duty embodied under Article 321a(1) SCO which reads: "[t]he employee must carry out the work assigned to him with due care and loyally safeguard the employer's legitimate

interests". This is inter alia because unless and until Club One exercised its definitive purchase option, the Player was to return to the Appellant Club following the loan period. The Appellant Club thus held the Respondent's long-term definitive registration rights and, as a result, continued, in principle, to have a legitimate interest in him. In this case, the parent club's interest was even recognized and reflected in the Loan Agreement with Club One whereby the Appellant Club was granted with certain rights related to the Player (eg the Appellant Club's consent was required in order for the Player to undergo any surgical procedures).

As the Player continued during the loan period to owe his parent club the duty of loyalty and care, the Appellant Club, in principle, had the right to consider events occurring during that time in determining whether it had just cause to terminate the Contract upon the end of the loan period. It would indeed be irrational if a parent club, who still holds, in principle, a legitimate interest in a loaned player, had no right to terminate an employment relationship when during the loan period the player commits such a serious offense that causes the parent club to consider in good faith that it cannot resume the employment relationship after the loan period (e.g., a serious doping, match-fixing or criminal offense, to cite just a few non-exhaustive examples).

THE TERMINATION OF THE CONTRACT

According to the Appellant Club, it terminated the Contract with just cause because the Player had committed persistent and material breaches of the Contract. More specifically, the Appellant Club claims that the Player's repeated dishonesty towards the club is a breach of the duty of care so severe that it, on its own, justifies the termination of the Contract under Article 14 RSTP. As its secondary case, it submits that any and all of the Player's dishonesty, his persistent misconduct and involvement in public scandals and the failures consequent upon his inability to address the Behaviour Issue, constitute just cause for the early termination of the Contract.

The Player, on the other hand, argues that the Appellant Club terminated the Contract without just cause since there is no proof that he was dishonest or committed any of the alleged misconduct or breaches of contract. The Player is of the belief that the Appellant Club simply wanted to get rid of the Player to avoid having to continue to pay his high salary and, as a result, found an ungrounded and unsubstantiated excuse to dismiss him.

The Panel observes that pursuant to Clauses 7.1.5 of the Schedule 2 of the Contract, the Player explicitly agreed that the Appellant Club would be entitled to terminate the Contract if he "commit[ted] an act of dishonesty". This duty to act honestly — which goes to the root of an employment contract and is necessary for the employer to conduct its business properly — is also entrenched in Article 321a(1) SCO. That provision requires an employee to "carry out the work assigned to him with due care and loyally safeguard the employer 's legitimate interests", i.e., it imparts the duty of care and loyalty on an employee.

The majority of the Panel finds that the Player, in violation of his duty of care and loyalty under the Contract and Swiss law, was dishonest towards the Appellant Club on fundamental matters related to his health and well-being and circumstances surrounding the early termination of his employment relationship with Club One and Club Two. More specifically, during the investigation carried out by the Appellant Club, the Player was dishonest by: denying that the Behaviour Issue was a problem and downplaying its nature, denying that his employment contracts with Club One and Club Two were both terminated because of the Behaviour Issue and not being upfront about the reported incidents related to the Behaviour Issue while on loan.

The Player denied that the Behaviour Issue was a problem at the meeting of 14 December 2018. However, after the Appellant Club communicated to the Player on 18 December 2018 that it was investigating the matter and considering terminating the Contract, the Respondent admitted otherwise.

Despite this admission, the Player's agents continued to deny at the hearing the Behaviour Issue. When asked by counsel why the Player admitted otherwise in his letter of 19 December 2018, it was claimed that the Player only meant he had problems with press misreporting. The Panel does not find the Player's agents statement credible in the face of the Player's unequivocal statement of 19 December 2018.

Based on the foregoing, the majority of the Panel is thus convinced that the Player's denial of the Behaviour Issue was an intentional misrepresentation and a breach of the duty of care and loyalty to the Appellant Club.

The Panel also finds that the Player misrepresented the nature of the treatment he undergone during the Sub-Loan with Club Two. At the meeting of 14 December 2018, the Player claimed to have undergone such treatment only to repair his image. However, the Player later admitted, in his letter of 19 December 2018, that the treatment was directly related to the Behaviour Issue.

The Panel also finds that the Player continuously misrepresented the nature of his contracts' termination with Club One and Club Two. The Panel is convinced, however, that the employment relationships with such clubs actually ended on bad terms. The Panel recognizes that both clubs and the Player ultimately formalized the termination of the employment contracts through "mutual agreements"; nevertheless, it is clear that behind those agreements was the Clubs' decision to terminate the agreement based on incidents related to the Behaviour Issue.

The Panel finds, by majority, that the Appellant Club could not in good faith and objectively have been expected to continue the employment relationship when the Player had continuously been dishonest about the aforementioned fundamental issues related to his health and well-being and the circumstances surrounding the early termination of his employment relationship with Club One and Club Two. The majority of the Panel is of the view that through such dishonesty, the Player violated the duty of care and loyalty which is at the root of an employment contract and which he was required to uphold pursuant to the Contract and Swiss law. That violation was sufficiently severe to reasonably lead the Appellant Club to lose confidence in resuming its employment relationship with the Player upon expiration of the loan period, in particular because, irrespective of whether the breach concerned aspects of his private life, it affected directly his relations with the Appellant Club and regarded a matter (the Player's health and well-being) that was fundamental to providing his services.

The Panel endorses the well-established CAS jurisprudence according to which the premature termination of an employment contract is an ultima ratio. The majority of the Panel, however, does not agree with the Player that the Appellant Club has violated this principle. It considers that a more lenient measure or sanction would not have been sufficient to rebuild the Appellant Club's lost confidence in the Player — which again is the foundation of an employment relationship — or establish a belief that he would act honestly for the remainder of the employment relationship.

The Player argues that the Appellant Club did not comply with the short period of reflection to terminate the employment relationship, which it points out under Swiss law is determined on a case-by-case basis but is generally of two to three working days. It is Player's belief that the Appellant Club waited too long (19 days after receiving the Player's letter of 19 December 2018) to communicate the termination of the Contract and, as a result, it violated the principle of immediate reaction recognized under Swiss law and CAS jurisprudence.

The Panel accepts that in terminating an employment agreement, the principle of (reasonably) immediate reaction should be followed. However, the Panel finds that due to the specific circumstances of the matter at hand, the Appellant Club did not violate this principle

KEEPING IN MIND LEGAL LITERATURE, THE PANEL OBSERVES THAT:

- the general period of reflection is not established by law, but rather by jurisprudence;
- the general period of reflection differs from case to case and can be extended when particular circumstances so require, for example if a decision must be taken in a legal entity following an internal process;
- considering the far-reaching consequences of a decision to terminate, an employer cannot be deprived of the necessary time to reach a well-informed decision;
- the reflection period to take a well-informed decision only starts once the time required to conduct an investigation has come to an end, allowing the employer to fully understand the facts based on which it would take the decision to terminate (or not);
- in case the employee is absent, the necessity to take a quick decision as per the principle of immediate reaction is less pressing;
- only working days should be considered when analyzing the general reflection period; and
- the "reflection period" must be distinguished from the notification period, which means that a decision must be taken within what is the general reflection period and that it can be communicated, be it without delay, shortly afterwards.

Considering the above elements, the Panel observes that the Player was not due back to the Appellant Club until 3 January 2019; until then, he continued to be under loan to Club One and sub-loan to Club Two, hence softening the principle of immediate reaction. Moreover, the Panel must add that until 2 January 2019 the Appellant Club was investigating the matter. Indeed, it had sent letters on 17 December 2018 to both Club One and Club Two urgently requesting further details of the circumstances that had led to the termination of the employment contracts and the reply from Club Two did not arrive until 2 January 2019. Therefore, it is from this date onwards, i.e. 3 January 2019, that one must assess whether the principle of immediate reaction was respected.

COMPENSATION DUE UNDER ARTICLE 17 OF THE FIFA RSTP

Finally, the Panel decided not to grant any compensation due to the Appellant Club, principally on the basis that the value of the player's services have considerably decreased since the termination of the Contract.

Likewise, the Panel held that the Appellant Club, in not having to pay the Player's residual salary, saved an amount equal to or more than the combined value of the fees and expenses it incurred.

CAS 2021/A/8229

LEEDS UNITED FOOTBALL CLUB LIMITED V. RASENBALL-SPORT LEIPZIG[54]

Purchase obligations and the complementary contractual interpretation

DATE OF THE AWARD:

4 November 2022

PANEL:

Mr Manfred Nan (President)

Mr Mark Andrew Hovell

Mr Ulrich Haas

MAIN TOPICS:

- Purchase options and purchase obligations in a loan agreement
- Application of the complementary contractual interpretation
- Force majeure and rebus sic stantibus

DECISIONS DEALING WITH SIMILAR ISSUES:

- CAS 2010/A/2144 Real Betis Balompié SAD v. PSV Eindhoven
- CAS 2015/A/4057 Maritimo da Madeira Futebol SAD v. Al-Ahli Sports Club
- CAS 2016/A/4858 Delfino Pescara 1936 v. Envigado CF
- CAS 2016/A/4588 FC Internazionale Milano v. Sunderland AFC

[54] The award has been published in the CAS website. 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.

KEY CONCLUSIONS

> In the absence of any guidance in the FIFA Regulations on the Status and Transfer of Players ("RSTP") as regards the interpretation of contracts, CAS tribunals should resorts to Swiss law, particularly to Article 18 of the Swiss Code of Obligations ("SCO") which seeks first and foremost to establish the intent of the Parties and – in case the latter cannot be determined – falls back on an objective interpretation of the contract.

> The principle of "complementary contractual interpretation" or "ergänzende Vertragsauslegung" is recognised under Swiss law and dictates that whenever parties unintentionally did not consider an issue which affects their contractual relationship that later materialised, it must be examined what the parties reasonably and in good faith would have agreed, if they actually had considered the issue they unintentionally omitted to regulate.

> There is no room for the application of concepts of force majeure or rebus sic stantibus when there is no evidence that the unforeseen event had such a negative impact on the financial situation of a party that would make it possible for it to comply with its contractual obligations.

RELEVANT FACTUAL BACKGROUND

On 25 January 2020, RB Leipzig, Leeds United FC (**"LUFC"**) and the Player concluded a Loan Agreement, by means of which they agreed that the Player would be transferred temporarily from RB Leipzig to LUFC until 30 June 2020. The Loan Agreement contained a "Purchase Option" and a "Purchase Obligation", which provide, as is relevant, as follows:

"9. Purchase Option: [LUFC] shall be entitled (notwithstanding the case stipulated in clause 10 when [LUFC] shall be obliged) to permanently transfer the Player to [LUFC] with effect as of July 1, 2020 by unilateral, written declaration, which shall be submitted to [RB Leipzig] by May 30, 2020 at the latest.

In this case, a transfer fee in the amount of € 21,000,000 (in words: twenty-one million Euro) shall become due. This amount shall be paid to [RB Leipzig] less any solidarity contribution due to any other club(s) under Annex 5 of the FIFA RSTP (the "Deductions") in three instalments as follows:

€ 7,000,000 (in words: seven million Euro) less any Deductions as of September 30, 2020

€ 7,000,000 (in words: seven million Euro) less any Deductions as of September 30, 2021

€ 7,000,000 (in words: seven million Euro) less any Deductions as of September 30, 2022.

10. Purchase Obligation: The abovementioned Purchase Option according to Clause 9 shall be considered to be automatically executed by [LUFC] without a respective notice being required, if and when the following condition precedent occurs:

The [LUFC] 1st men's team is promoted to the Premier League at the end of the 2019/2020 season and thus qualifies for participation in the Premier League in the 2020/2021 season.

If the aforementioned condition precedent occurs, the Purchase Option shall be triggered without any additional declaration and the Player shall be permanently transferred to [LUFC] with effect as of July 1, 2020.

In this case the transfer fee in the amount of € 21,000,000 (in words: twenty-one million Euro) shall become due and shall be paid to [RB Leipzig] less any Deductions within the abovementioned due dates."

On 13 March 2020, the EFL Championship was suspended due to the outbreak of COVID-19.

On 24 April 2020, LUFC sought, via the agent of the Player (the "Player's Agent"), an extension of the Loan Agreement.

On 13 June 2020, LUFC sent an email to RB Leipzig, which, inter alia, provides as follows:

"I refer to the [Loan Agreement], which is due to expire on 30 June 2020.

We had indicated in an email to [the Player's Agent] on 24 April that we may seek to an extension of the loan and an agreement to vary the terms of the Loan Agreement. However nearly two months passed since the email without receiving a response before today. We have since changed our position and no longer wish to extend the loan or amend the Loan Agreement…

I am therefore writing to formally notify you that [LUFC] will not be seeking an extension of the Loan Agreement beyond 30 June 2020.

On 15 June 2020, RB Leipzig sent a letter to LUFC, which, inter alia, provides as follows:

"[W]e would like to draw your attention to the fact that – contrary to the Purchase option set out in clause 9 of the Loan Agreement – the Purchase Obligation set out in its clause 10 does not leave discretion to [LUFC] whether or not to apply it as the Purchase Obligation applies "automatically". The Purchase Obligation is linked to the condition precedent that [LUFC] is promoted to the Premier League at the end of the 2019/2020 season. It is not determined that this condition must be fulfilled until a certain date. As far as you might invoke that according to the further wording of clause 10, the permanent transfer

based on the Purchase Option shall take place with effect on July 1, 2020, this does not support the conclusion that [LUFC] can withdraw from it.

On 15 June 2020, RB Leipzig sent a letter to LUFC, which, inter alia, provides as follows:

"[W]e would like to draw your attention to the fact that – contrary to the Purchase option set out in clause 9 of the Loan Agreement – the Purchase Obligation set out in its clause 10 does not leave discretion to [LUFC] whether or not to apply it as the Purchase Obligation applies "automatically". The Purchase Obligation is linked to the condition precedent that [LUFC] is promoted to the Premier League at the end of the 2019/2020 season. It is not determined that this condition must be fulfilled until a certain date. As far as you might invoke that according to the further wording of clause 10, the permanent transfer based on the Purchase Option shall take place with effect on July 1, 2020, this does not support the conclusion that [LUFC] can withdraw from it.

On 20 June 2020, i.e. approximately three months after its suspension, the EFL Championship resumed.

Multiple letters were subsequently exchanged between the Parties. However, their diverging positions regarding the interpretation of the Loan Agreement remained unaltered.

On 30 June 2020, the EFL Championship was originally scheduled to finish.

Also on 30 June 2020, the Player's registration with LUFC came to an end.

On 13 July 2020, RB Leipzig inserted a FIFA TMS instruction to complete the permanent transfer of the Player to LUFC. LUFC did not enter the necessary counter- instruction.

On 22 July 2020, LUFC finished first in the EFL Championship and on 6 August 2020 LUFC was promoted to the Premier League at the English Premier League Annual General Assembly.

On 17 August 2020, counsel for RB Leipzig sent an invoice to LUFC for the amount of EUR 6,740,174. No payment was received.

On 11 November 2020, RB Leipzig filed a claim against LUFC before the FIFA Players' Status Committee (the **"FIFA PSC"**), requesting that LUFC shall be ordered to pay an amount of EUR 7,000,000, corresponding to the first instalment of the fee for the permanent transfer of the Player due as of 30 September 2020, less any applicable deductions for solidarity contribution, but with 5% interest per annum as from 1 October 2020.

On 1 June 2021, a Single Judge of the FIFA PSC rendered a decision (the **"Appealed Decision"**) ordering LUFC to pay the relevant transfer fee to RB Leipzig, which then filed an appeal before the Court of Arbitration for Sport.

LEGAL CONSIDERATIONS

The main issues to be resolved by the Panel are the following:

1 Is the Purchase Obligation triggered?

2 What are the consequences thereof?

IS THE PURCHASE OBLIGATION TRIGGERED?

The Panel finds that the dispute between the Parties boils down to the question at what moment did the Purchase Obligation have to be complied with in order to oblige LUFC to acquire the services of the Player from RB Leipzig for a transfer fee of EUR 21,000,000.

If the decisive moment was 1 July 2020, as argued by LUFC, the Purchase Obligation would not have been satisfied. However, if the decisive moment was the end of the 2019/20 season, as argued by RB Leipzig, the Purchase Obligation would have been satisfied.

To answer this question, Clause 10 of the Loan Agreement requires interpretation.

In the absence of any guidance in the FIFA RSTP, the Panel resorts to Swiss law for the principles applicable to interpretation of contracts. In this respect, Article 18 SCO seeks first and foremost to establish the intent of the Parties and – in case the latter cannot be determined – falls back on an objective interpretation of the contract:

The Panel commences its analysis with the wording of the actual condition precedent in Clause 10 of the Loan Agreement, which provides as follows:

"The [LUFC] 1st men's team is promoted to the Premier League at the end of the 2019/2020 season and thus qualifies for participation in the Premier League in the 2020/2021 season."

The Panel observes that this provision does not refer to the date of 1 July 2020. However, other parts of the Loan Agreement and related contracts do refer to 30 June and/or 1 July 2020. The references considered most relevant by the Panel in this respect are paraphrased here below.

Clause II.5 of the Loan Agreement provides, inter alia, as follows:

The Player herewith explicitly undertakes and confirms: (...)

c. that he agrees with the terms of the permanent transfer contemplated by this Agreement and in the event that the Purchase Option is exercised or the Purchase Obligation triggered, he shall enter into a full employment contract with [LUFC] at the earliest opportunity permitted by the relevant football regulations (and in any event before 1 July 2020).

Clause II.7 of the Loan Agreement provides, inter alia, as follows:

Any contractual amendments to the Employment Agreement shall be limited in time for the Loan Period. Unless the Purchase Option in accordance with clause 9 below is exercised or the Purchase Obligation according to Clause 10 is triggered, the Employment Agreement shall be reinstated as of July 1, 2020 for the future in its original version.

Clause II.9 of the Loan Agreement provides, inter alia, as follows:

[LUFC] shall be entitled (notwithstanding the case stipulated in clause 10 when [LUFC] shall be obliged) to permanently transfer the Player to [LUFC] with effects as of July 1, 2020 by unilateral, written declaration, which shall be submitted to [RB Leipzig] by May 30, 2020 at the latest.

Clause II.10 of the Loan Agreement provides, inter alia, as follows:

If the aforementioned condition precedent occurs, the Purchase Option shall be triggered without any additional declaration and the Player shall be permanently transferred to [LUFC] with effect as of July 1, 2020.

Clause II.11 of the Loan Agreement provides, inter alia, as follows:

[RB Leipzig] and the Player declare that the Employment Agreement shall be terminated early with effect as of June 30, 2020 in the event that the abovementioned Purchase Option is exercised or the Purchase Obligation is triggered.

Clause II.12 of the Loan Agreement provides, inter alia, as follows:

[RB Leipzig] and [LUFC] agree that in the event that the Purchase Option is exercised or the Purchase Obligation is triggered, they shall take all necessary steps to transfer the Player's permanent registration to [LUFC] and ensure that the Player receives international clearance as soon as reasonably practicable and in event before 1 July 2020.

The Panel infers from the above citations that the Parties clearly had in mind that the 2019/20 season would finish before 1 July 2020, but that the condition precedent itself does not refer to such date.

Due to the unusual circumstances related to COVID-19, the EFL Championship did not finish by 1 July 2020, but only on 22 July 2020, at least this was the date that LUFC secured its promotion to the Premier League, which was subsequently formalised at the English Premier League Annual General Assembly on 6 August 2020.

Neither of the two interpretations advanced by the Parties is perfect and the two interpretations cannot be reconciled. Either the date of 1 July 2020 would have to be read into the condition precedent while it is not there, or the condition precedent does not align with other clauses in the Loan Agreement referring to 30 June or 1 July 2020.

At the outset, the Panel considers it relevant that the Purchase Obligation is a provision that mainly protects the interests of LUFC in that it would be relieved of the duty to acquire the services of the Player on a permanent basis if it would not be promoted to the Premier League. At the same time, even if the Purchase Obligation would not be triggered, LUFC could still invoke the Purchase Option and acquire the services of the Player for the 2020/21 season without requiring RB Leipzig's consent and for the same transfer fee of EUR 21,000,000. The combination between the Purchase Option and the Purchase Obligation thereby provided LUFC with a significant degree of certainty and flexibility.

If the Purchase Option would be invoked or the Purchase Obligation triggered, RB Leipzig would not be in a position to block the permanent transfer of the Player or (re)negotiate the transfer fee of EUR 21,000,000.

By agreeing to the Purchase Obligation, LUFC accepted a serious financial commitment, solely dependent on its promotion to the Premier League. The Purchase Obligation did not leave LUFC any discretion to step away from its commitment based on circumstances other than a potential failure to be promoted to the Premier League. For example, if LUFC felt that the Player would not live up to the expectations or if he sustained a serious injury, this would not allow LUFC to step away from its commitment.

An important element in the Panel's analysis is that the condition precedent not only refers to "the end of the 2019/2020 season" as the triggering element, but also indicates that LUFC "thus qualifies for participation in the Premier League in the 2020/2021 season".

The Panel infers from this that the goal of the Parties when executing the Purchase Obligation was to primarily enable LUFC to field the Player in the 2020/21 Premier League season. This would in principle only be possible if the condition precedent would be valid until the end of the 2019/20 season and not only until 1 July 2020, because under the latter interpretation, despite LUFC's promotion at the end of the 2019/20 season and LUFC's participation in the Premier League in the 2020/21 season, the Purchase Obligation would normally not be triggered (unless perhaps LUFC would secure promotion at a very early stage in the 2019/20 season). The Panel finds that this latter interpretation could not reasonably have been the intention of the Parties when concluding the Purchase Obligation and, furthermore, such interpretation goes against the raison d'être of the Purchase Obligation.

The Panel has no doubt that, had the Parties known at the time of conclusion of the Loan Agreement that the EFL Championship would not finish by 1 July 2020, but only on 22 July 2020, they would have amended the various terms of the Loan Agreement in such a way as to enable the Player's registration with LUFC at such later date prior to the start of the 2020/21 season.

The Panel considers this to be in line with the principle of "complementary contractual interpretation" or "ergänzende Vertragsauslegung".

As put by RB Leipzig, this principle applies whenever the parties unintentionally did not consider an issue that later materialized. In that case, it must be examined what the parties reasonably and in good faith would have agreed, if they actually had considered the issue they unintentionally omitted to regulate.

While the threshold for the application of "complementary contractual interpretation" is relatively high, the Panel finds that the circumstances in the matter at hand justify such conclusion and meet the threshold invoked by LUFC:

[…] the complementary contractual interpretation of the contract must result as a compelling, self-evident consequence from the entire context of what was agreed, so that without the supplement made the result would be in obvious contradiction with what was actually agreed according to the content of the contract […]

The Panel finds that LUFC did not put forward any convincing reasoning as to why the date of 1 July 2020 was of particular importance to it, other than it simply being the date usually dividing two football seasons.

LUFC's official's explanation that the date of 1 July 2020 "was specifically intended to tie the purchase obligation to the date on which the Loan Agreement was due to expire, so that it could not be triggered after the player's employment with RB Leipzig was reinstated" is – in the view of the Panel – not convincing, because the reinstatement of the Player's employment relationship with RB Leipzig as from 1 July 2020 did not prevent the Player from transferring to LUFC on a permanent basis on a later date, i.e. the Purchase Obligation survived the Player's loan to LUFC.

In other words, the Parties' primary intention was that the Player would transfer from RB Leipzig to LUFC if the latter would be promoted to the Premier League at the end of the 2019/20 season. When this would exactly happen was only ancillary to the primary intention.

This may have been different if the end of the EFL Championship would have been postponed for a significant period of time (e.g. many months), or the start of the 2020/21 Premier League season would have been delayed significantly. However, a delay of only 22 days is insignificant and does not appear to cause any meaningful prejudice to LUFC. To the contrary, LUFC would save itself about three weeks of salary due to the later entry into force of the employment contract with the Player.

As to LUFC's argument that, had it known about the COVID-19 pandemic and the impact thereof on its financial situation, it would not have concluded the Loan Agreement at all, the Panel finds that this argument must be dismissed. While COVID-19 undoubtedly had a negative impact on LUFC's financial situation, the extent thereof is unclear.

The Panel also considers the timing relevant, in particular that LUFC proposed to RB Leipzig on 24 April 2020 to extend the term of the Loan Agreement and the Purchase Obligation "in the event that [the current season] is extended beyond 30th June 2020", for the same transfer fee of EUR 21,000,000, but subject to a delayed payment schedule.

In this respect, while LUFC's official testified that such proposal was made "only on the basis that we could renegotiate down the transfer fee, in light of the changes in the Club's financial circumstances", the Panel notes that LUFC did not attempt to renegotiate the transfer fee of EUR 21,000,000, but that it only sought to delay the payment terms.

While this offer of LUFC was ultimately declined by RB Leipzig, the Panel considers it telling that, when the EFL Championship was already suspended since 13 March 2020 due to the outbreak of COVID-19, more than a month later, in a period of deep uncertainty as to how COVID-19 would impact on the football industry, LUFC was still prepared to extend the Loan Agreement and reconfirmed its commitment to the Purchase Obligation for the same transfer fee, only subject to a delayed payment schedule.

In such circumstances, the Panel finds that LUFC's argument that it would not have extended the deadline of 1 July

2020 to a later date at the moment of conclusion of the Loan Agreement had it foreseen the impact of COVID-19 unconvincing, as it proposed just that at a moment when the outbreak of COVID-19 had already evolved into a pandemic.

As already indicated, it is not a problem for the Panel that the Player's loan stint with LUFC already ended on 30 June 2020, as a consequence of which the Player's employment contract with RB Leipzig resumed. The mere fact that the Player's registration may have returned to RB Leipzig or that the Player's employment contract with RB Leipzig resurrected does not mean that the Player could not be definitely transferred to LUFC after 1 July 2020 in accordance with the Purchase Obligation.

The Panel also finds that LUFC's reliance on the legal concept of contra proferentem is of no particular relevance for the interpretation of the Purchase Obligation and does not warrant drawing any particular inferences against RB Leipzig, not least because when LUFC first expressed its interest in the services of the Player on 23 January 2020, it proposed, inter alia, that such arrangement would involve an "[o]bligation to buy the player at the end of the season on the condition that [LUFC] is promoted to the Premier League for €21,000,000", i.e. without making reference to the specific date of 1 July 2020, which wording was simply repeated in the Loan Agreement. Accordingly, while RB Leipzig may have drafted the Loan Agreement, since LUFC was the original author of the Purchase Obligation, if the principle of contra proferentem were to be given any relevance, the Panel finds that it would have to be applied against LUFC.

The Panel finds that there is no room for the application of the concepts of force majeure or rebus sic stantibus. Indeed, LUFC did not provide any evidence establishing that the consequences of the COVID-19 pandemic had such a negative impact on its financial situation that it would be impossible or unreasonably burdensome for LUFC to comply with the Purchase Obligation as set forth in the Loan Agreement. As to the impossibility of executing the Player's transfer to LUFC on 1 July 2020, the Panel finds that this is to be resolved by "complementary contractual interpretation" or "ergänzende Vertragsauslegung" as set forth supra, not by extinguishing the entire Purchase Obligation.

Finally, as to the late rejection by RB Leipzig of LUFC's offer to extend the Purchase Obligation and LUFC's argument that RB Leipzig's two-months delay in responding created the impression on LUFC that RB Leipzig was not willing to extend the Purchase Obligation, the Panel finds that also this argument is to be dismissed.

RB Leipzig's two-month silence may have been caused by a myriad of reasons, not least the fact that LUFC did not approach RB Leipzig directly with its offer, but that it presented its offer to the Player's Agent as a consequence of which it is not clear when LUFC's offer reached RB Leipzig.

Consequently, for all the above reasons, the Panel finds that the Purchase Obligation was triggered.

WHAT ARE THE CONSEQUENCES THEREOF?

Considering that the Panel finds that the condition precedent in Clause 10 of the Loan Agreement is satisfied, the Panel finds that LUFC is obliged to permanently acquire the services of the Player from RB Leipzig for a transfer fee of EUR 21,000,000, "less any deductions" payable in three instalments of EUR 7,000,000.

Based on the foregoing, the Panel confirmed the Appealed Decision in full.

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