ECA | Legal Bulletin

EUROPEAN CLUB ASSOCIATION

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Dear ECA Members,

With the aim of providing additional and useful services to all our member clubs, the ECA has taken a significant step in the creation of the ECA Legal Services paired with the establishment of the Legal Advisory Panel (LAP).

Although only just established, these services including ECA Mediation, Legal Advice and Alignment of club representatives at FIFA Judicial Bodies are up and running and judging from the immediate response we are having from many members, we realise that they are addressing a real need of the clubs and will certainly become an asset of our association.

As part of the ECA Legal Services, a legal publication was recommendable to logically complete its core competences and it is with pleasure and pride that we are now able to provide you with the first edition of the ECA Legal Bulletin.

A bulletin which does not want to be 'fancy' but rather aims at providing you with practical knowledge based on our members' participation in the FIFA Dispute Resolution Chamber as well as sharing best practises through the questions and inputs we receive from our member clubs.

I would like to thank all LAP members and particularly its Chairman Ivan Gazidis as well as its Vice-Chairman Michael Gerlinger for their invaluable knowledge and enthusiasm. And a special mention goes to Wouter Lambrecht, our Legal Services Manager, who is at the heart of this legal bulletin.

We hope that this bulletin will become a well recognized source of information for all member clubs and a useful support to all club lawyers.

Sincerely,

Michele Centenaro
General Secretary

Dear Colleagues,

As Chairman of ECA's Legal Advisory Panel, I am delighted to be introducing our new ECA Legal Bulletin.

Football continues to develop at a dramatic pace and the business aspects of the game are becoming ever more important. Increasingly, we clubs are realising the need for a better understanding of the regulatory and legal environment if we are to protect our individual interests adequately. It is also critical that our collective interests are well represented if we are to have an effective voice at the table with players' unions, our National Associations and the international governing bodies.

The ECA Legal Advisory Panel was formed to assist individual clubs in navigating this increasingly complex landscape, to improve communication between clubs regarding the issues they face and vigorously to represent clubs' common interests in the legal debates within the game.

We want this bulletin to be shaped by your needs and to be a practical and useful aid.

In this first bulletin, based on the input we have had from you, we seek to explain some of the topical legal issues in the game, to update you on developments at FIFA's Dispute Resolution Chamber which have a direct impact on how all of us operate, and to answer some of your most frequently asked questions.

Additionally this bulletin focuses on a newly issued FIFA Circular Letter greatly influencing the inclusion of forum clauses in football related contracts.

I hope you will find it useful and we would welcome your feedback.

This is a new era in club cooperation and representation and the ECA Legal Advisory Panel will be an active participant in helping to shape a positive environment for our members.

With best wishes to you all for the forthcoming season,

Ivan Gazidis
Chairman of the ECA Legal Advisory Panel
and CEO Arsenal Football Club

I. FIFA Circular Letter no. 1270[1]

IN BRIEF Following a recently adopted FIFA Circular Letter, FIFA Disciplinary Committee will no longer enforce awards rendered by the Court of Arbitration in Ordinary Procedure. This change in scope of enforcement has serious consequences on how contractual forum clauses should be drafted.

On the 21st of July 2011, FIFA issued a circular informing its associations of several amendments that were made to the FIFA Disciplinary Code (FDC) during the FIFA Executive Committee on the 30th of May.

Although it is presented as *"the amendments to the FDC concern mainly grammatical adaptations in the case of the English and French version as well as an adaptation of the FDC to the jurisprudence"*, the adaptation to its "jurisprudence" has far reaching consequences on how employment contracts or transfer contracts should be drafted.

More precisely, in reality the adaptation has no outstanding with FIFA's jurisprudence but has everything to do with a change to the scope of enforcing awards rendered by the Court of Arbitration for Sport (CAS) by the FIFA Disciplinary Committee.

According to the circular letter and the newly adopted FDC edition 2011, the FIFA Disciplinary Committee will, as of the 1st of August 2011, solely enforce awards relating to cases that have been previously been dealt with by a body or Committee of FIFA (CAS Appeal awards).

In other words, awards rendered by CAS in Ordinary Proceeding will no longer be enforced by the FIFA Disciplinary Committee.

In order to make the consequences of this amendment more concrete, please find below **an example.** The below mentioned example being easily interchangeable by a trainer or club breaching a contract prematurely without just cause.

Club X and Player Y have signed or sign an employment contract containing a valid forum clause installing direct jurisdiction on CAS. After X years of contract, the player breaches the employment contract without just cause and the club is entitled to damages. Consequently, acting in compliance with the forum clause, the club initiates the ordinary procedure at CAS in order to establish the breach of contract and to obtain damages. Several months down the road, CAS renders its award stating that the club is entitled to X amount of damages.

Prior to this adaptation, the club, in case of failure of the player and or his new club to comply with the award, could start a case at the FIFA Disciplinary Committee to seek enforcement of CAS Award rendered in ordinary procedure. However, following the newly adapted FDC, the FIFA Disciplinary Committee will no longer enforce this award implying that enforcement will need to be sought through the "normal" legal channels.

More precisely, a club seeking to obtain the money due to them under CAS Ordinary award will need to go to a country where the player and or his new club have assets and this in line with the "New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards"[2] and national private law.

According to the New York Convention, the recognition and enforcement of the award may be refused at the request of the party against whom it is invoked (in our example the player or his new club), if that party proves that for example:

- the subject matter of the dispute is not capable of settlement under arbitration under the law of that country; or
- if the award would be contrary to public policy.

[1] Cfr. Annexe 1

[2] United Nations Conference on International Commercial Arbitration, "Convention on the Recognition and Enforcement of Foreign Arbitral Awards", Ney York, United Nations, 1958;

Having said this, it is to be noted that according to laws of many countries, employment related disputes cannot be settled under arbitration but fall under the exclusive jurisdiction of the national labour courts. Moreover, certain awards by which a player is ordered to pay a substantial amount of damages (cfr. Chelsea FC/Mutu) might be seen as being contrary to public policy due to its impediment of free movement of workers.

Consequently, in addition to having an award that is not enforceable at FIFA level, you can now, following this adaptation, also have an award which is not enforceable at national level.

Hence you would have an award but no possibility to obtain your money and seeking to obtain the recognition and enforceable, regardless of whether it will be accepted, will be time and money consuming. The system of private enforcement within the world of football being one of the key elements for the success of sports arbitration; i.e. clubs/players need to pay their debt to continue participating in official competitions.

Needless to say that this adaptation to the FDC has serious consequences as to the desirability of adding a forum clause to a contract. Additionally, this adaptation also effects existing contracts containing a forum clause installing direct jurisdiction on CAS.

More precisely, where we would have encouraged clubs in the past to add clauses installing direct jurisdiction on CAS Ordinary Procedure we would now strongly discourage clubs to add these kinds of forum clauses.

Moreover with regard to existing contracts containing such forum clauses, we would advise clubs to initiate proceedings at FIFA level and see whether or not the other party to the dispute would contest FIFA's jurisdiction in favour of CAS.

Additionally, if you already have a case pending at CAS under the Ordinary Procedure and you are bound to receive an award, we would still recommend addressing the FIFA Disciplinary Committee to seek enforcement of the award in case of non-compliance by the other party. In doing so, you could argue that the recent amendment is contrary to the FIFA Statutes, the FIFA Statutes superseding the FDC.

In the event that your club is in this situation we would kindly invite you to inform ECA so that we can follow this up and advise you where possible.

We will keep you updated and informed on any developments in this respect.

II. The Liquidated Damages Clause

IN BRIEF A liquidated damages clause is a useful contractual provision to establish the monetary consequences of a premature breach of contract without just cause. This inclusion of such clauses are allowed by art. 17 point 2 of the FIFA Regulations on the Status and Transfer of Players.

Following several questions we received with regards to the liquidated damages clause, we found it desirable to analyse this legal figure whilst referring to CAS awards who dealt with this matter. Additionally, we shall endeavour to explain the difference between a liquidated damages clause and a termination clause or buy-out clause.

To start, it is to be recalled what a liquidated damage clause actually is. In this respect a liquidated damage clause can be defined as:

> *"a mutually agreed upon contractual clause that allows the parties to establish in advance in their contract the amount to be paid by either party in the event of unilateral, premature termination without just cause".*[3]

The FIFA Regulations on the Status and Transfer of Players, hereinafter "the RSTP", foresee in the possibility of having a liquidated damages clause as article 17 point 2 of the RSTP reads:

> *"If a professional is required to pay compensation, the professional and his new club shall be jointly and severally liable for its payment. The amount may be stipulated in the contract or agreed upon between the parties".*

Having said this, please find below **several questions** we have received from member clubs with regards to liquidated damages clauses.

Question 1: Does a liquidated damages clause provide the player with the right to terminate his contract without any further (sporting) consequences?

As set out in the definition above, a liquidated damages clause is a clause by which both parties to a contract have agreed upon the damages payable in case of a premature termination without just cause. Consequently, it is to be noted that a liquidated damages clause does not provide for the right to terminate a contract but merely provides for damages to be paid in case of premature termination.

Hence, a liquidated damage clause does not entitle a contractual party to terminate the contract but merely refers to the damages to be paid if a party to the contract decides to prematurely terminate the contract without just cause.[4]

Consequently, as there is no right to terminate the contract, a player in addition to paying damages as foreseen by the liquidated damages clause, shall also be subject to sporting sanctions if that breach occurred in the protected period. More precisely, although a liquidated damage does not mention the imposition of disciplinary sanctions in case of a breach of contract this is not a reason to exclude the application of sporting sanctions.

Hence the new club of the player shall equally face sporting sanctions if they are found to have induced the player to terminate his contract.

[3] CAS 2008/A/1519-1520 FC Shakhtar Donetsk v. Matuzalem Francelino da Silva & Real Zaragoza SAD and FIFA, paragraph 67;

[4] CAS «2009/A/1909 RCD Mallorca SAD v. FIFA & UMM Salal SC;

Question 2: I have been contacted by an agent informing me that a player he represents has an employment contract containing a liquidated damages clause. If I am willing to pay this amount to the club, does the club has to release/transfer the player?

As already set out above, a liquidated damages clause does not provide a player with the right to terminate his contract but merely provides for the damages payable. Consequently, this clause does not constitute a transfer clause by which a club would have to release its player if another club would come and pay the damages payable according to the liquidated damages clause.

A transfer clause being different from a liquidated damages clause in that it envisages a situation in which a transfer of the player may take place and not a situation of premature unilateral termination.

Additionally, it is to be noted that providing players with the money to pay their old club the amount foreseen in the liquidated damages clause triggers serious tax issues to be dealt with. More precisely, the money given to the player in order to pay the liquidated damages is taxable income for the player. This means that the player should receive the amount of the liquidated damages clause + the amount corresponding with the applicable tax rate.

Needless to say that, the final amount to be paid by the club to the player will be more (possible 30% to 50%) than the initial amount foreseen by the liquidated damages clause.

Question 3: Can liquidated damages clauses be reduced?

Not often are liquidated damages clauses completely disproportional in that the amount for prematurely breaching the contract does not reflect the value of the contract nor the services of the player. The employment contracts of Spanish football players being the best known example. These penalty clauses more commonly known as the "Spanish-clause".

When having a dispute at FIFA or CAS it is to be noted that for all matters not provided for in the Regulations, Swiss law applies subsidiarily[5].

Consequently, reference is made to the applicable provisions of the Swiss Code of Obligations[6], hereinafter "Swiss CO". A liquidated damages clause to be qualified as a penalty clause in the sense of articles 160 to 163 of the Swiss CO.

According to these articles, the Court, in the case that it considers penalties to be excessive (disproportionate), can reduce the penalties.

The discretion granted under these articles to a Court to reduce the damages payable under a liquidated damage clause has been exercised on multiple occasions by the DRC and CAS.[7]

[5] CAS 2008/A/1544 award of 13 February 2009;

[6] Loi Federale du 30 mars 1911 complétant le code civil Suisse, Code des obligations.

[7] TAS 2006/A/1104 Valladolid c. Barreto Caceres & Cerro Porteno; TAS 2005/A/902-903 Mexès & AS Roma c. AJ Auxerre;

Question 4: In what sense does a buy-out clause differ from a liquidated damages clause?

Reference is yet again made to the definition of a liquidated damages clause in that it merely foresees in the damages to be paid if a party prematurely breaches the contract without just cause.

In case of a buy-out clause, it stands to reason that this clause envisages a situation by which one party to a contract gives the other party to the contract the right to put an end to the contract if a certain prerequisite is met (payment of a certain amount of money). This prerequisite having been mutually agreed to.

Hence, the grounds of termination have been agreed upon in the contract which implies that using one's contractual right to termination is not to be seen as a breach of contract but as a mutual termination.

Needless to say that whether or not a clause will constitute a liquidated damages clause or a buy-out clause, greatly depends on the way the clause is drafted and thus.

A liquidated damages clause, possible being *"if the contract is terminated without just cause prior to the expiry of the contract or without mutual agreement, the player will pay the club damages in the amount of X Euro."*, while a buy-out clause could be drafted as: *"The player may terminate his contract if a third club undertakes to pay X Euro"* or as *"Each party to the contract explicitly acknowledges that the other party to the contract has the right to terminate the contract by the paying the lump sum amount of X Euro".*

III. Feedback from the FIFA Dispute Resolution Chamber

IN BRIEF This section aims at providing you with some updates on recent developments in the jurisprudence of the FIFA Dispute Resolution Chamber (DRC), as well as with some remarks and points of attention drawn from the close cooperation we have established with our club representatives at the DRC.

A RECENT JURISPRUDENCE

1 Deregistration of a player during his injury & non- EU Players

In several European countries, the number of extra EU football players is limited either by national law or sporting regulations. This implies that those clubs can only sign and/or field a certain amount of extra EU players.

In this respect, we have seen a trend that clubs operating under these limitations of foreign players have deregistered players in case of an injury enabling them to sign another non-EU player.

However, according to the DRC's latest jurisprudence, such deregistration, preventing a player to take part in national competitions until he is reregistered, equals a breach of contract without just cause by the club.

More precisely, the DRC holds that being able to participate in national competitions is one the essential components of the employment relationship and any disrespect of this equals a premature termination of contract without just cause.

Although always dependant on the fact specifics of the case, **we would strongly discourage clubs to deregister their players in case of an injury. If a player, however, is injured for over a year, preventing him to participate in any form of competition, such deregistration could be envisaged, but this should in any case be agreed to by the player.**

2 Payments to third parties

Looking at the reality surrounding the negotiations and conclusions of transfers, it must be said that frequently third parties are involved in such negotiations and often payments are being made to third parties.

In this respect, it is to be noted that, according to Annexe 3 of the FIFA RSTP, which deals with the Transfer Matching System (TMS), payments to third parties are prohibited.

More precisely, according to the TMS, each club must tick of a "third party payment declaration" box which reads as follows:

> *"I confirm that no part of any transfer or training compensation made as part of this transfer has been, or will be paid to any other than the Club, the Player or the Association mentioned above and that any possible Solidarity Contribution has been or will be paid to the training club(s) concerned."*

If one wants to comply with the above provision whilst dealing with third parties [e.g. investors and third party economic right holders], payments should always be made to the other club involved in the transfer or to one's association. The latter mentioned would then have to deal with the actual payment to third parties.

Besides facing disciplinary sanctions in case of disrespect for the abovementioned provision, payments to third parties can also have serious consequences in case of a breach of contract by the player.

That is to say, according to recent DRC jurisprudence, payments made to third parties are not recognized as a damage head in case of breach of contract by the player without just cause.

Consequently, if for example a club has paid USD 3,000,000 in order to obtain the economic and federative rights of a player, and that player would, without just cause, breach a five year employment contract after only two years, the DRC, for the time being, will not recognize the non-amortized transfer fee (equalling 3/5 of USD 3,000,000) as a damage head.

Hence, the transfer fee paid to obtain the services of the player will not be reimbursed in case of a breach of contract without just cause by the player.

In this respect, if payments are made to third parties, be it either through the association and or by the other club involved in the transfer, it would be advisable to foresee a liquidated damages clause in the contract which stipulates the amount of damages payable by the player in case of a premature breach of contract without just cause.

3 Joint and several liability for breach of contract

According to article 17 point 2 of the FIFA RSTP, *if a professional is required to pay compensation, the professional and his new club shall be jointly and severally liable for its payment.*

Thus, whenever a player has to pay compensation to his former club, the new club, i.e. the first club for which the player registers after the contractual breach, shall be jointly and severally liable for the damages payable. This obligation to pay being irrespective of whether or not the new club induced the player to breach his contract.

However, in several cases at the DRC, clubs stated and provided evidence that they had received written confirmations by players as well as by their agents that the player was a free agent.

Having sympathy for the good faith behaviour of the concerned clubs, the DRC nonetheless held that the new club was to be held jointly and severally liable for the damages payable.

Please note that, according to the newest jurisprudence, the fact that a club is to be held jointly and severally liable does not exclude that that club can seek redress against the concerned player and or player agent in front of the competent FIFA body. This principle is evidently also of relevance in cases where a player and his agent provided forged documents by which the player's previous team would have allegedly forfeited its right to receive Training Compensation.

Nonetheless, in the specific issue of misrepresentation of being a free agent, it is to be said that a club needs to act due diligently when signing a player. That is to say, the DRC noted that a club cannot merely rely on the statement of a player and his agent but should contact the old association and or club of the player to reassure itself of the contractual situation of the envisaged player.

4 Expiry of the contract – outstanding salary – sporting sanctions

Lately the DRC has rendered several decisions concerning identical claims lodged by players.

More precisely, after the natural expiry of the employment contract, several players addressed the DRC claiming for their outstanding salary as well as for sporting sanctions against their previous club for breach of contract.

By doing so, the players relied on article 17.4 of the RSTP which reads:

> *"In addition to the obligation to pay compensation, sporting sanctions shall be imposed on any club found to be in breach of contract […]"*

However, the DRC, in its latest deliberations, correctly decided that article 17 deals with the consequences of terminating a contract without just cause and that claiming outstanding salary after the expiry of the contract does not fall within this scope. The termination of contract upon its expiry date being different to the termination without just cause.

Therefore, if a contract takes an end upon its expiry, no sporting sanctions can be claimed, even if a player would still be owed salary after the expiry of the contract.

5 Expiry date of the contract during the sporting season

As stated in article 18 point 2 the FIFA RSTP, the minimum length of a contract shall be from its effective date until the end of the season, while the maximum length of a contract shall be five years or three years for players under the age of 18.

In a recent case at the DRC, the panel had to decide on the following issue:

A club and player had signed an employment contract that was bound to expire in October 2011 or in other words during the sporting season 2011/2012 of the national competition in which the club was participating.

According to the player and his new club, the player was allowed to terminate his contract at the end of the sporting season 2010/2011 as it would have been logical that contracts take an end at the end of a sporting season. The player held that any other interpretation would be against the freedom of work and prejudice him financially speaking as he would be impeded to play football until the next registration period of the club he would like to join.

In this respect, the DRC held that the FIFA Regulations were sufficiently clear in that they contained a minimum length and a maximum length, implying that a contract could take an end on any given day within this time frame.

The fact that the contract expires during a sporting season and as such impedes the player to register for another team up until the next registration period is something the player and or his agent should be aware of upon signing a contract.

Hence, given that the DRC accepts that contracts can expire during a sporting season, clubs could use this from a tactical perspective. More precisely, if a player is prevented from playing for one registration period upon the expiry of his contract, this could possibly enable clubs to negotiate the player's transfer for a (limited) transfer fee up to the very end of the player's contract.

6 Training compensation

6.1 Special provisions for the EU/EEA

Although article 6 of Annexe 4 of the FIFA RSTP is clearly worded, uncertainty remains as to when training compensation is payable. The wording of this article being:

> *"Inside the EU/EEA, if the former club does not offer the player a contract, no training compensation is payable unless the former club* ***can justify that it is entitled to such compensation.*** *The former club must offer the player a contract* ***in writing via registered post at least 60 days before the expiry of the contract.*** *Such an offer shall furthermore be at least of an equivalent value to the current contract."*

This uncertainty is due to the fact that both FIFA and CAS have rendered contra-dictory decisions with regards to the prerequisites mentioned and underlined in the above stated provision: *can justify, offer in writing via registered mail; an offer 60 days prior to the expiry of the old contract.*

In this respect, the latest jurisprudence of the FIFA DRC seems to be more flexible as to the prerequisite that an offer must be made in writing via registered mail. That is to say, if a club can prove that an offer has been made by other means, most commonly by email and thus in electronic version, this is accepted as well. The prerequisite of "in writing" and "per registered letter", interpreted as a provision that enables the club claiming training compensation to prove that an offer had actually been made. **Consequently, if one can prove such offer by other means, the DRC will accept that as well.**

With regards to the prerequisite of an offer made 60 days prior to the expire of the old contract, the latest jurisprudence, remains strict as that an offer, be it done by writing via registered mail, per fax, per email or in person against a confirmation of receipt, must be done 60 days prior to the expiry of the contract.

Finally, with regards to the first sentence of article 6.4 of Annexe 4., *"if no contract has been offered no training compensation is payable unless the former club can justify that it is entitled to such compensation"*, it is to be noted that this exception seems to be limited to situations in which a club can only register amateur players according to the rules of the national FA and as such cannot offer contracts.

6.2 Overlapping sporting seasons

According to the provisions on training compensation set out in Annexe 4 of the RSTP, training compensation is due when:

- A player is registered for the first time as a professional; or
- A player is transferred between clubs of two different associations (whether during or at the end of his contract)

...and this before the end of the sportive season during which the player turns 23.

In a recent case, the DRC had to decide on the issue of overlapping seasons.

More precisely, after the expiry of his contract in August 2009 with a Brazilian team, a player, born on the 14th of February 1986, was registered with a Dutch team.

According to the Brazilian team, training compensation was payable as the player was transferred to a club of a different association before the end of the sporting season of his 23rd birthday. The Brazilian sporting season following the yearly calendar and thus running from January 2009 to December 2009; February 2009 being the month in which the player turned 23.

According to the Dutch team no training compensation was payable due to the fact that the sporting season in Europe and the Netherlands runs from July to June of every year. The sporting season 2009/2010 for which the player was registered, being the season during which the player would turn 24, namely in February 2010.

Consequently, the Dutch team held that the player would have had to be registered for the season 2008/2009 in order for training compensation to be payable to the Brazilian team.

Subsequently, the DRC had to decide which sporting season should be taken into account in case of overlapping seasons. The Brazilian sporting season leading to the conclusion that training compensation would be payable, the Dutch sporting season leading to the conclusion that no training compensation would be payable.

Finally, the DRC decided that the sporting season to be taken into account for training compensation is the season of the old club. Any other interpretation, according to the DRC, would be contrary to the ratio legis of training compensation, namely to compensate clubs for training educating players.

It goes without saying that this inter-pretation is something to keep in mind when signing players coming from a competition that follows a different sporting season.

6.3 Newly issued player passports and training compensation

Before signing a player, most clubs ask and obtain a player passport in order to check the status of the player [(amateur/professional)/(free agent/contract] as well as to verify whether or not training compensation/solidarity contribution is payable and if so to which teams and for what amount.

The abovementioned is exactly what a Spanish club did prior to concluding a contract with an amateur player in 2010.

According the player passport issued at the point in time, there were several periods for which no records were found. Hence, a smaller amount of training compensation was payable.

5 months after the conclusion of the contract, the Spanish club received a letter from two clubs claiming their respective parts to training compensation for the periods indicated in the first player passport as “no records found”. Both clubs referring to a new player passport issued by their FA after the conclusion of the transfer.

Faced with this claim, the DRC had to decide whether such new player passport was acceptable and as such could lead to training compensation being payable.

In this respect, the DRC noted that when signing a player, the club must be able to rely on the player passport issued at that point in time. Allowing the second passport to be enforceable against the new club would be contrarty to the club’s legitimate interest and expectations.

Moreover, the DRC voiced the opinion that issuing a new player passport could even be in the interest of a national football association due to the fact that if the newly mentioned clubs on the second player passport do not claim their part of training compensation within the deadlines set by FIFA, the FA would be able to do so for its own account.

7 Time limitation of two years

According to article 25 of the Regulations on the Status and the Transfer of Players, *the Players' Status Committee, the Dispute Resolution Chamber, the single judge or the DRC judge shall not hear any case subject to regulations of FIFA* ***if more than two years have elapsed since "the event giving rise to the dispute."***

Recently the DRC had two occasions to clarify this concept as to the time limitation set by this article.

7.1 Event giving rise to the dispute

More precisely, with regards to the Solidarity Contribution the DRC had to decide on what must be seen as **"the event giving rise to the dispute"**.

That is to say, according to the provisions on solidarity contribution as well training compensation, **the new club shall pay the corresponding amounts no later than 30 days after the player's registration.** In case of contingent payments, solidarity contribution must be paid 30 days after the date of such payment.

The question at hand was whether the registration of the player as such or the non-payment on the 31st day after the registration had to be seen as the event giving rise to the dispute.

The latter interpretation meaning that the claim would have been filed timely.

Concurring with the interpretation of the Claimant, the DRC held that the event giving rise to the dispute was the 31st day after the registration implying that the time limitation only starts running as of that day. The logical reasoning hereto is that the amount is only disputable as of its non-payment on the 31st day after the registration.

7.2 Suspension of the time limit

More interesting is another recent decision in which a club had written a letter to another club, while putting FIFA in CC, by which it claimed its part of training compensation. This letter was sent to the club and FIFA within the time limit of two years following the event giving rise to the dispute.

Failing reaction to the letter, the club lodged an actual complaint at the FIFA DRC, this complaint however being lodged outside the time limit of two years following non payment of the training compensation.

In its submission, the club however held that the time limit had been suspended by the letter sent to both the other club and FIFA and that as such the actual complaint was lodged within the time limit set by the regulations.

In this respect, the DRC disagreed with the submission of the club and stated that a time limit could not be suspended by a simple letter. More precisely, the DRC held that a club or player always has to lodge a formal complaint with FIFA within the time limit, regardless of how many default notices would have been sent to the other party and to FIFA.

B GENERAL REMARKS AND TIPS

1 Interest on payables

According to the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber, the petition of the parties must contain the motion of claim.

In this respect, we have noted that many clubs or their external lawyers fail to ask interests on the damages payable as of the breach of contract.

Although interests start running automatically as of the deadline given by the decision to pay, one can also ask interest as of the day of breach of contract, these interests however not due if not requested.

Therefore, reference is made to article 73 of the Swiss Code of Obligations, Swiss law being the law applicable in subsidiary order to the FIFA Regulations. This article stating that:

> *"Where an obligation involves the payment of interest but the rate is not set by contract, law or custom, interest is payable at the rate of 5% per annum."*

Requesting interest is of importance, keeping in mind the time it takes to have a decision by FIFA.

2 Signing of contracts

On multiple occasions, the DRC has to deal with cases where a player claims that his employment contract or termination agreement:

- was forged;
- that he was tricked to enter into a new employment contract or termination agreement due to misrepresentations by the club; or
- that he was not able to understand the language

In this respect, and although most of the abovementioned claims by the players are disregarded by the DRC, it is advisable that clubs would add a clause to their contracts stating that the player fully understands and acknowledges the content of the contract and that it has been explained to him in person prior to the signing of the contract.

It could also be envisaged that each page of an employment contract and or termination contract is signed instead of simply the last page in addition to the fact it could also be helpful to sign contracts in the presence of a member of the FA or a witness who then also signs the contract.

These simple steps prevent a player from invoking whatever kind of excuse as to the binding nature of a contract during a procedure at the DRC and this in order to delay the procedure.

[8] Cfr. Annexe 2

IV. Questions and Answers

IN BRIEF This section aims at dealing with questions we received from individual member clubs; questions which in our opinion contained an issue that is of interest to all clubs.
Hence, by dealing with these questions in this section, members could "learn" from each other's questions.

1 Release of Players

During the summer we received the same questions from several clubs as to whether they were obliged to release their players for the FIFA U-20 World Cup or the UEFA U-21 and U-19 EUROS.

From the series of questions we received, it appeared that the scope of the rules relating to the release of players is not well known by clubs. That is to say, most clubs were aware of the rules as such but did not know whether these rules equally applied to youth tournaments such as those mentioned above.

In this respect it is important to note **that the rules relating to the release of players apply to all matches (friendlies, qualifying matches) played by a representative team of an Association, be it the U-17, U-19, U-20, U-21 or the national A-team.** The FIFA Regulation on release of players do not foresee in a distinction between national A-team matches or matches played by other representative games.

However, having set out the scope of applicability, it is to be noted that the as a general principle the release of players is mandatory for matches:

- **on dates listed on the FIFA Coordinated International Match Calendar;**
- **for which a duty to release players exists on the basis of a special decision by FIFA Executive Committee.**

Consequently, if a player is called upon for a match not listed on the Coordinated International Match calendar or no such decision from the FIFA Executive Committee exists, **there is no obligation to release players for international duty**. For your convenience, please be so kind to find the Coordinated International Match Calendar in Annex to this bulletin.[8]

In the event that a match is indeed listed on the international match calendar or a decision taken by the FIFA Executive Committee exists, **an Association wishing to call up a player still needs to notify the club and player in writing 15 days in advance for the event for which the player is called up** (match or training camp prior to an international tournament). Although not completely clear from the wording of the regulations, this 15 days deadline applies to all players being called up, regardless if they are playing abroad or on the territory of the association for which they are eligible.

If an Association fails to timely notify a club of its wish to call up a player, a club is no longer under the obligation to release the player concerned.

Notwithstanding the clear cut nature of the abovementioned rules, we also became aware of problems arising with regards to the call up by National Associations of players playing on the territory of that same association (e.g. an English U-21 player playing in England). We believe that this problem will arise again in the near future keeping in mind the upcoming qualifications games for e.g. U-21 UEFA EURO Cup.

That is to say, most association have a regulation in place at national level which contains a rule that makes the release of players for the representative teams mandatory and this without any reservation or link to the applicable FIFA Regulations.

Consequently, these associations relied on the fact that due to the "internal" nature of the case (e.g. an English U-21 player playing for an English team), the rules of the association, obliging the release of players for any given match, applied. According to these associations, their own statutes superseded the rules of FIFA, which according to them, would only apply to the release of players who are playing abroad (e.g. an English U-21 player playing in Spain).

[8] Cfr. Annexe 2

However, it is of utmost importance to note that, due to the fact that the call up relates to an international match, associations cannot rely on their internal regulations to force a club to release its players.

As confirmed by FIFA, any other interpretation would be contrary to the principle of equal treatment as well as to the scope and rational of the rules relating to the release of players for international matches. Annex 1 to the RSTP, which sets out the rules relating to calling up of players, namely contains an obligation for all national association to implement these provisions without any modification at national level.

In conclusion it can be stated that if a match or tournament for which a player is being timely called up does not relate to a match or tournament listed on a date on the Coordinated International Match Calendar, there is no obligation to release.

In case of disputes, FIFA can be addressed in order to obtain a confirmation letter.

2 Solidarity Contribution and Training Compensation & No records found in the Player Passport

Based on some questions received from member clubs, it has come to our attention that the Brazilian Football Association[9] and other American National Associations have addressed several member clubs to obtain solidarity contributions following the transfer of a player whose' player passport contained an interruption. ***An interruption being the time period for which no records of registration with a club were found.***

Answering this question, it seems desirable to shortly recall the applicable provisions[10].

Solidarity contribution being definable as *the compensation payable to the clubs involved in a player's education and training if that player is transferred from one club to another club during the course of a contract. The compensation to be deducted and distributed by the new club equalling 5% of the total compensation paid to the old club to acquire the player.*

If a link between a professional player and any of the clubs that trained the player cannot be established within 18 months, the solidarity contribution shall be paid to the association(s) **where the professional was trained.**

In this respect, the Brazilian FA held that it was sufficient that no link could be established with a club within 18 months for them to be entitled to the pro-rata percentage of the solidarity contribution. Such entitlement was requested without having to prove that the player had actually been trained by a club affiliated to the FA.

Faced with such claims by National Associations, it of utmost importance to know that solidarity contribution is only due if evidence for the player's football training in the country of the National Association can be provided.

More precisely, it is a clear requirement that actual training in the country of the association must be provided in order to be entitled to a proportion of the solidarity contribution as during the period in the player passport referred to as "no records found" the player could for example have been playing table tennis.

[9] Confederação Brasileira de Futebol, CBF

[10] Annex 5, Solidarity Mechamism, of the FIFA Regulations on the Status and Transfer of Players.

Hence, and in conclusion, if a player passport contains a reference to no records found, an Association cannot claim the proportionate part of solidarity contribution nor of training compensation.[11, 12]

The ratio being that solidarity contribution has been put in place to reward the clubs investing in training and education of young players. If no proof of such training can be given, no compensation is payable.

3 ITC Request & FIFA Transfer Matching System – Eligibility of Players for UEFA Champions League or UEFA Europa League and registration deadlines

Facing difficulties with the obtainment of the international transfer certificate (ITC) many clubs contacted our services with regard to the eligibility of those players to participate in an UEFA Competition.

More precisely, they asked whether or not a player could be listed on the Player List if no ITC had yet been delivered prior to the deadline of submitting the player list.

This question is also important as to the deadlines set at national level for the registration of players for national competitions.

With regards to the registration for the UEFA Competitions, an UEFA Circular Letter clarifies the situation. **According to the circular, the Player List to be submitted may contain the names of players for which an ITC has not yet been created, but for whom an ITC was requested.**

Consequently, it is to be noted that a difference is made between the "ITC Creation" and the "ITC Request".

However, **confusing seems to exist between the *"ITC Request Date"* and the *"ITC Instruction Date",*** both concepts being mentioned on the TMS extract.

The "Instruction Date" is definable as the date on which the Club, through TMS, gave the instruction to its National Association to request the ITC. The "ITC Request Date", is the day on which the National Association requested the ITC and this following the instruction given by the club.

It is important to note that the instruction date and the ITC request date are not the same, and that **the "ITC Request date" is the sole date taken into account by UEFA when examining the permissibility of listing a player on the player list, as well as by the National Association to have a player dully registered for the national competition.**

Normally, the date on which the ITC instruction is given by the club and the day on which the ITC request is made by the FA of the new club should fall together.

However, this is not always the case as we received several complaints from members during the qualifying rounds whereby their FA was taking a long time to do the actual ITC request *(verifiable on TMS),* preventing them to put newly signed players on the player list. The same possibly happened for the deadline on the 1st of September (24 H CET) to deliver the player list for the UEFA Champions or Europa League.

[11] Decision of the FIFA Dispute Resolution Chamber dated 19 February 2009 with n. 29108;

[12] Decision of the FIFA Dispute Resolution Chamber dated 27 August 2009 with n. 89221;

In this respect, we have advised our members that if they feel that, due to the FA's lack of action, a request for an ITC would not have been timely made by the FA, FIFA TMS can and should be contacted directly. FIFA TMS is able to assist clubs, in case of urgencies, to request ITC's and or deliver where possible.

The emergency number on which FIFA TMS can be reached is 0041.43.222.5400.

With respect to the registration of players to participate in national competitions, it is to be noted that the same applies as mentioned directly above. That is to say, it is sufficient that the ITC has been requested prior to the transfer window deadline set by the registering football association.

The mandatory documents to be uploaded into TMS in order for the football association of the new club to request the ITC being[13]:

- a copy of the employment contract;
- a copy of the transfer agreement, if applicable;
- copy of proof of the player's identity, such as passport or identity card;
- copy of proof of the birth date of the player (certificate);
- proof of player's last contract end date.

Finally, it is to be noted that a player for whom an ITC had been requested will only be eligible to play for his new club once the actual ITC is created and delivered or if a decision is taken by the FIFA Players' Status Committee authorizing the registration of the player.[14]

4 Advance of costs & unknown transfer fee

With regards to the possible "Advance of Costs" to be paid when lodging a claim at FIFA for solidarity contribution, we received several questions as to what a club had to do in case the transfer fee had not been publicly disclosed.

That is to say, according to the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber, the advance of costs is to be calculated on the amount in dispute.

The amount in dispute for cases involving solidarity contribution is however in direct correlation with the transfer fee. Hence, if one does not know the transfer fee, one does not know the amount in dispute (solidarity contribution) and thus cannot calculate the advance of costs payable.

In this respect, it is the consistent practice of the DRC that if a club is faced with such issue, it is sufficient to mention this in one's submission.

Consequently FIFA will address the defendant and ask them to provide the transfer contract after which FIFA will grant the claimant the possibility to adjust or specify the claim for solidarity contribution as well as, if necessary, invite the claimant to pay the advance of costs.

Additionally, please note that the advance of costs does not need to be paid if the claim for solidarity contribution does not exceed CHF 50,000.

[13] Note that a work permit or a valid permit of stay are not mandatory documents that need to be uploaded in order for the ITC to be requested by the new national association association.

[14] For more details: Point 8 of the UEFA Circular Letter no. 21/2011 on UEFA Champions League and UEFA Europa League Player Eligibility 2011/2012.

5 Withdrawal of a case at FIFA & advance of costs

As the Rules governing the Procedures of the Players' Status Committee and the Dispute Resolution remain silent on this issue, several clubs expressed doubts as to whether advance of costs paid would be reimbursed if a case was settled before a decision was taken by FIFA.

In this respect, it is to be noted that advance of costs, contrary to a withdrawal in front of CAS, are not automatically reimbursed.

That is to say, in order to be reimbursed the advance of costs paid to FIFA, this has to be explicitly requested and you should provide FIFA with your bank details.

6 Protected period & breach before the entry into force of the contract

We received many questions as to whether a club could face or claim sporting sanctions from or against a player and or club inducing the breach, if the breach occurred prior to the date of entry into force of the employment contract.

For example if a player would sign a contract with club X on the 4th of April 2012 to take effect as of the 1st of July 2012 and later in May signs a contract with another club also taking effect on the 1st of July 2012.

According to the FIFA RSTP, in addition to the obligation to pay damages, players or clubs to be found in breach of contract or clubs that have induced a breach of contract shall also be imposed sporting sanctions if the breach occurred during the protected period.

The protected period being defined in the FIFA Regulations *as a period of two/three entire seasons or two/three years whichever comes first, following the entry into force of a contract, where such contract was concluded respectively prior or after the 28th birthday of the player.*

Given that from a the literal wording of the definition of the protected period, the protected period does not cover the period between the signing of the contract and the entry into force of the contract, one could have reasoned that no sporting sanctions could be imposed.

However, according to a FIFA DRC decision, later confirmed by CAS, **an employment contract is binding on the parties as of its signature even if an initial deadline is set for its applicability. A breach before that deadline (e.g. the day before), depriving the other party of the expected performance promised by the other party in breach, is not less serious than a breach after (e.g. the day after) the deadline: The rationale underlying the concept of the "Protected Period", i.e. to reinforce contractual stability in the first years of contract, applies to both breaches.**

Disclaimer

This ECA Legal Bulletin was elaborated by Wouter Lambrecht, ECA's Legal Services Manager.

The materials contained in this bulletin are for general information purposes only and are not offered as legal or any other advice on any particular matter.

In case you want to obtain additional information with regards to one of the topics covered in this bulletin, please contact Wouter Lambrecht on wouter.lambrecht@ecaeurope.com or by phone on 0041.22.761.54.43.

Annexe 1

FIFA Circular Letter no. 1270

FIFA®
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To the members of FIFA
and the confederations

Circular no. 1270

Zurich, 21 July 2011
SG/mca

Amendments to the FIFA Disciplinary Code

Dear Sir or Madam,

We wish to draw your attention to the following amendments that were made to the FIFA Disciplinary Code (FDC) during the FIFA Executive Committee meeting in Zurich, Switzerland, on 30 May 2011.

The amendments to the FDC concern mainly grammatical adaptations in the case of the English and French versions as well as an adaptation of the FDC to the jurisprudence. Some amendments to the content of the FDC were also adopted, in particular the following:

Art. 61 of the FDC

As it might sometimes not be possible to identify the natural person that committed an act of forgery, the new FDC now gives the FIFA Disciplinary Committee the possibility to sanction the association or the club held liable for an act of forgery committed by one of its officials and/or players.

Art. 64 of the FDC

Besides an adaptation to the jurisprudence in regard to the fine, the range of application of art. 64 of the FDC concerning the enforcement of decisions rendered by the Court of Arbitration for Sport (CAS) is now exclusively limited to those cases that had previously been dealt with by a body or a committee of FIFA.

Furthermore, in view of the fact that not only natural persons and clubs but also member associations may be considered as offenders, the new FDC now has an explicit provision applicable to associations.

Finally, in order to extend the responsibility for enforcing decisions to the associations, a provision has been added to the FDC, according to which the association of the deciding body shall bear the responsibility for enforcing any financial or non-financial decision that has been pronounced against a club by a court of arbitration within the relevant association or by a National Dispute Resolution Chamber (NDRC), both of which must be duly recognised

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by FIFA. The same principle applies to a financial or non-financial decision pronounced against a natural person, with the slight but crucial difference that should the natural person be registered (or otherwise have signed a contract in the case of a coach) with a club affiliated to another association in the meantime, the new association shall bear the responsibility for enforcing the pertinent decision.

Procedure before the FIFA Appeal Committee

Finally, the FDC has been amended in such a way that the proceedings before the FIFA Appeal Committee may be undertaken – where appropriate – in a more expedited manner (cf. new art. 120 par. 4 and art. 123 par. 1 of the FDC), as for example during final tournaments.

The new FIFA Disciplinary Code will take effect on 1 August 2011.

Thank you for your kind attention to the foregoing.

Yours faithfully,

FÉDÉRATION INTERNATIONALE
DE FOOTBALL ASSOCIATION

Jérôme Valcke
Secretary General

Encl. FIFA Disciplinary Code

Cc: FIFA Executive Committee
FIFA Disciplinary Committee
FIFA Appeal Committee
CAS

Legal

Annexe 2

International Match Calendar

Fixed dates for "A" matches

Year	Date(s)	Official matches (release period for players: 4/5 days)	Friendly matches (release period for players: 48 hours)	Number of match dates
2011	7-29 January	AFC Asian Cup – Qatar		
	9 February	-	1	1
	25-29 March	2	-	2
	April	-	-	-
	May	-	-	-
	1 June	-	1	1
	3-7 June	2	-	2
	5-25 June	CONCACAF Gold Cup		
	3-24 July	CONMEBOL *Copa América* – Argentina		
	10 August	-	1	1
	2-6 September	2	-	2
	7-11 October	2	-	2
	11-15 November	2	-	2
	December	-	-	-
	Total	**10**	**3**	**13**

Year	Date(s)	Official matches (release period for players: 4/5 days)	Friendly matches (release period for players: 48 hours)	Number of match dates
2012	21 January – 12 February	CAF Africa Cup of Nations – Gabon/Equatorial Guinea		
	29 February	-	1	1
	March	-	-	-
	April	-	-	-
	May	-	-	-
	1-5 June	2	-	2
	8-12 June	2	-	2
	8 June – 1 July	UEFA EURO 2012 – Poland-Ukraine		
	July	-	-	-
	15 August	-	1	1
	7-11 September	2	-	2
	12-16 October	2	-	2
	14 November	-	1	1
	December	-	-	-
	Total	**8**	**3**	**11**

Year	Date(s)	Official matches (release period for players: 4/5 days)	Friendly matches (release period for players: 48 hours)	Number of match dates
2013	January	-	-	-
	6 February	-	1	1
	22-26 March	2	-	2
	April	-	-	-
	May	-	-	-
	4 June	-	1	1
	7-11 June	2	-	2
	14-18 June	2	-	2
	15-30 June	FIFA Confederations Cup Brazil 2013		
	July	-	-	-
	14 August	-	1	1
	6-10 September	2	-	2
	11-15 October	2	-	2
	15-19 November	2	-	2
	December	-	-	-
	Total	**12**	**3**	**15**

Year	Date(s)	Official matches (release period for players: 4/5 days)	Friendly matches (release period for players: 48 hours)	Number of match dates
2014	January	-	-	-
	February	-	-	-
	5 March	-	1	1
	April	-	-	-
	May	-	-	-
	June/July	2014 FIFA World Cup Brazil™		
	13 August	-	1	1
	5-9 September	2	-	2
	10-14 October	2	-	2
	19 November	-	1	1
	December	-	-	-
	Total	**4**	**3**	**7**

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