ECA | Legal Bulletin

EUROPEAN CLUB ASSOCIATION

SEP 2013 No 3

TABLE OF CONTENTS

No 3
SEP 2013

Dear ECA Members and Colleagues,

It is our pleasure to present to you the third edition of the ECA Legal Bulletin.

In common with previous sporting seasons, season 2012/13 has seen several high profile cases being initiated at the sports judicial bodies, some of which are dealt with in this bulletin.

Keeping in mind the positive feedback received on the previous bulletins, the structure of this edition has remained unchanged and its main aim is to provide you with practical information in relation to the most recent decisions and tendencies in the world of sports law.

Building upon the many decisions taken by UEFA and CAS with regards to the overdue payables rule in the last year, the first chapter of this bulletin aims to give an overview of a number of decisions taken so far. This chapter briefly sets out the regulatory framework, provides a table on different decisions taken and contains several conclusions with regards to how the judicial bodies have interpreted and/or dealt with certain arguments of clubs and/or UEFA. The most recent decisions taken by the UEFA Club Financial Control Body setting certain probation terms for sanctions to become effective provide an insight into how Financial Fair Play infringements may be dealt with.

The second chapter of this bulletin deals with some recent decisions taken by the FIFA DRC and the Court of Arbitration for Sport and the first article actually follows up on a topic previously touched upon in the first ECA Legal Bulletin; more precisely the enforcement of CAS awards rendered in ordinary procedures. Further, chapter two contains an interesting article on the de novo principle and how this has been applied in a restrictive manner by a CAS panel in a recent case.

Finally, the third chapter provides some general tips and remarks with regard to penalty clauses and the release of players, both being recurrent topics in relation to which many members consult the ECA Legal Services. This chapter also provides an overview of how the FIFA Sub-committee for minors has applied the provisions relating to the protection of minors.

As this legal bulletin also marks the end of the cycle of the ECA Legal Advisory Panel, we would like to thank all LAP members for their active support, knowledge sharing and enthusiasm whilst dealing with legal matters of interest to clubs. In addition, we would like to thank Wouter Lambrecht, our Legal Services Manager, who is at the heart of this legal bulletin.

We hope this bulletin will be of interest to you and we welcome your feedback.

Sincerely,

Michele Centenaro
General Secretary

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

I. Overdue Payables

1 Introduction & legal framework

Having in mind the increased number of decisions from the UEFA Judicial Bodies and/or the Court of Arbitration for Sport with regards to overdue payables, this article aims at giving an overview of the main conclusions that can thus far be drawn from existing case law.

However, before doing so, it seems desirable to briefly recall the basic rules relating to overdue payables, as it appears that these (sometimes) create confusion when it comes to the sanctions handed down.

As commonly known, in order to be eligible to participate in an UEFA competition, one must have **obtained a license issued by the competent national body** in accordance with the UEFA Club Licensing and Financial Fair Play Regulations, hereinafter "CL/FFP regulations"[1].

One of the **licensing requirements**[2] laid down by these regulations is that a club applying for a license (license applicant) must prove that, as of 31 March, it has no overdue payables outstanding, either:

- vis-à-vis its employees or the social/tax authorities, resulting from contractual and legal obligations towards its employees that arose prior to the previous 31 December, or
- vis-à-vis football clubs with reference to transfer activities that occurred prior to 31 December; therein including training compensation and solidarity contributions (see infra);

failing which, a license should be refused.

Additionally, those clubs that received a license from the competent national body on the national level must, as part of the monitoring process, prove to UEFA that they have no overdue payables outstanding vis-à-vis employees, the social/tax authorities, and other football clubs on 30 June of the year in which the UEFA club competition commences.

If there is any doubt as to whether a club has fulfill(ed) the admission criteria, this case can be referred to the UEFA Club Financial Control Body (CFCB), which will decide on the admission.

Should overdue payables be revealed **during the monitoring process**, a club shall then be requested to provide evidence that it has no overdue payables on 30 September, failing which, disciplinary proceedings may be opened.

This being noted, it is important to stress the difference between overdue payables during the licensing process and overdue payables during the monitoring process. Overdue payables during the licensing process (on 31 March) should, in principle, always lead to the refusal of a license, whereas overdue payables during the monitoring process are subject to be sanctioned by a variety of penalties.

This implies that the exclusion (from a future UEFA competition a club qualifies for), in case of overdue payables during the monitoring process is not a given.

[1] There are two parts to the UEFA CL/FFP regulations. One part deals with the issuing of yearly licenses by national associations; the second deals with the monitoring process for all licensees during the year

[2] Article 49 and 50 of the UEFA CL/FFP regulations edition 2012

2 Case law overview

Infringement	*Judging Body*	*Final Decision*
RCD Mallorca		
Breach of licensing requirements: Overdue payables on 31 March/ going concern	UEFA CDB[3] UEFA AB[4]	– License granted incorrectly by RFEF; – Not admitted to participate and replaced by Villareal CF.
Panathinaikos FC		
Breach of licensing requirements: Overdue payables on 31 March/ going concern	UEFA CFCB	– License granted incorrectly by HFF; – Not admitted to participate.
PAOK FC		
Breach of monitoring process: overdue payables on 30 September	UEFA CDB	– Fine of EUR 250,000 of which EUR 200,00 is suspended for a probationary period of 3 years; – Exclusion from one UEFA club competition for which it qualifies in the next 3 seasons, suspended for a probationary period of three years; – Proof that on 30 June 2012 it has no outstanding overdue financial obligations vis-à-vis employees, tax/social authorities, or other clubs, incurred prior to 30 June 2012.
Györi ETO FC		
Breach of licensing requirements: failure to disclose correct and accurate payables & overdue payables on 31 March	UEFA CDB UEFA AB The CAS[5]	– License granted incorrectly by HUF; – Fine of EUR 50,000; – Suspension from the UEFA club competitions for the 2011-12 and 2012-13 season in case it qualifies.
Bursaspor Kulübü Dernegi		
Breach of monitoring requirements	UEFA CDB UEFA AB The CAS	– Excluded from one UEFA competition for which it qualifies in the next four seasons. This exclusion is suspended for a probationary period of three years; – Fine of EUR 250,000.
Beşiktaş JK		
Breach of licensing and monitoring requirements: failure to disclose correct and accurate payables/overdue payables on 31 March and on 30 June and 30 September	UEFA CDB UEFA AB The CAS	– License granted incorrectly by TFF; – Excluded from next two UEFA Club seasons for which it qualifies in the next 5 seasons, the second season exclusion suspended for a probationary period of 5 years; – Fine of EUR 200,000 of which EUR 100,000 is suspended for a probationary period of 5 years;

[3] UEFA Control and Disciplinary Body

[4] UEFA Appeals Body

[5] The Court of Arbitration for Sport/Tribunal Arbitral du Sport

Infringement	*Judging Body*	*Final Decision*
FK Partizan		
Breach of monitoring requirements: overdue payables on 30 June and 30 September	UEFA CFCB	– Fine of EUR 100,000; – Exclusion from next participation for which it would otherwise qualify in the next three seasons unless able to prove by 31 March 2013 that it has: ■ paid the overdue amounts on 30 September 2012; ■ paid the amount deferred between 30 September 2012 and the date of the decision and which be comes due prior to 31 March; ■ settled any payable that is due as of 31 December 2012 not previously established as overdue and which becomes due before 31 March 2013. – Prize money withheld by CFCB Chief Investigatory to be released.
Malaga CF		
Breach of monitoring requirements: overdue payables on 30 June and 30 September	UEFA CFCB The CAS	– Fine of EUR 300.000; – Excluded from next participation for which it would otherwise qualify during the next four seasons (i.e., (i.e., 2013/14, 2014/15, 2015/16, 2016/17); – Subsequent exclusion from participation for which it would qualify (during the next four seasons) unless able to prove by 31 March 2013, that: ■ it has no overdue payables vis-à-vis football clubs or vis-à-vis employees and/or social/tax authorities; – The prize money by the CFCB Chief Investigator (as a conservatory measure) will be released.

3 Trends

Keeping in mind the introductory remarks concerning the pertinent rules, as well as an overview of some of the decisions/awards, from which it is evident that sanctions may greatly differ, the aim of this section is to draw some main trends from the case law, and this without analyzing the fact specifics of each case.

3.1 Disclosure obligation

As a first remark, it may be noted that the disclosure obligation is of the utmost importance and essential for UEFA to assess the financial situation of a club. The disclosure of (overdue) payables must be correct and accurate, and any concealment in the transfer payables table, the employees table, or the social/tax table constitutes a practice that has been strongly condemned and sanctioned by the judging bodies.

3.2 National law

Although licenses are granted by domestic licensors, UEFA has the power to reassess whether such a license was granted in line with the CL/FFP regulations. In doing so, and whilst establishing whether or not an amount of money was overdue, the sole regulation to define whether a license was granted correctly is the applicable UEFA regulations. According to existing jurisprudence, **domestic laws are irrelevant in this respect and must not be taken into consideration in assessing issues related to the UEFA club licensing, in general, and for what constitutes an overdue payable, more specifically**. In other words, according to existing jurisprudence, whether an outstanding amount is not payable or enforceable or payable according to the national law of the country concerned is of no relevance and, most assuredly, not a reason to conceal information.

3.3 (Overdue) payables

While the CL/FFP regulations, by means of their Annex VIII, are clear as to when payables are to be considered as overdue, interesting remarks can be drawn from case law as well.

From Annex VIII, it may be noted that a payable is not overdue if:

- the relevant amount has been paid in full;
- if a legal claim has been lodged and deemed admissible by the competent authority;
- if a claim lodged against it has been contested and established reasons exist to do so;
- when a written agreement has been reached with a creditor to extend the deadline;

According to the same Annex VIII an amount of money will be considered overdue even if the creditor has not requested the payment.

With regards to an **agreement**, it may be noted that such agreements are to be made prior to the deadlines and that any agreement made after the deadlines (e.g., 31 March) will not be recognized in establishing whether an amount is considered overdue. The same ruling applies for payments made after 31 March and prior to the monitoring process by UEFA.

Furthermore, money deposits with a notary in favour of a creditor or by post-dated cheques submitted to a creditor and that cannot be cashed by the creditor before the agreed payment date, will still be considered overdue payables within the scope of the UEFA regulations.

With regards to what constitutes **amounts in dispute**, the clubs relying thereon must be able to prove that they have established reasons for their action. According to case law, labelling a payable in dispute, and therefore not overdue, will not be accepted if the club in question did not actively participate in a procedure and did contest a claim on its merits.

With regards to **lodging a legal claim that is deemed admissible,** following which a payable is considered not to be overdue, case law holds that this does not apply in instances where the claim lodged actually concerns a mere request for tax inspection. According to existing jurisprudence, if a club (taxpayer) should fail to pay by a due date and then gain extra time by simply requesting a tax inspection and, without any agreement with the tax authorities, consider the debt as not overdue, such an action would contravene the regulations.

Finally, it may be noted that the fact whether an overdue payable was notified to the national licensor and/or the national licensor erroneously granted a license does not prevent UEFA from taking disciplinary actions against the club. Furthermore, whether or not disciplinary sanctions are initiated against the domestic licensor who wrongly issued a license is of no relevance either as to the actions that UEFA can take against a club.

3.4 Sanctions, proportionality and mitigating factors

In most cases, clubs (rightfully?) have argued that a sanction is disproportionate. In doing so, the argument most often raised is that the overall financial situation of the club is a consequence of the previous owner's policy.

Although appreciating that the precarious financial situation of a club can be attributed to the previous management, existing jurisprudence holds that a club cannot circumvent its liabilities by changing its management team. However, reasonable steps undertaken by the new management to improve the finances of a club in order to comply with the CL/FFP regulations in the future may be considered as a mitigating factor or as a reason to give a sanction a suspensive effect.

In this respect, it is interesting to note that the CFCB has issued sanctions that become effective only in case a club would fail to meet established financial targets (cf. case of Partizan, Malaga, and PAOK in the overview above).

In general, it may be noted that the Court of Arbitration for Sport has taken the position that a sanction imposed by a disciplinary body, in line with the discretion assigned to it by the relevant rules, can only be reviewed if the sanction is evidently and grossly disproportionate to the offence.

However, a sanction can also be considered disproportionate if its imposition diverts from previous and/or other decisions of similar facts and circumstances. This happened in the case of Bursaspor.

Finally, other arguments that have not been accepted as mitigating factors are, whether a club:

- comes from a small inexperienced country;
- was not correctly advised by the national licensor;
- was not aware of exclusion as a possible sanction for non-compliance with the CL/FFP regulations.

II. Feedback from FIFA's Judicial Bodies & CAS

RECENT JURISPRUDENCE

1 Enforcement of CAS ordinary awards by FIFA

1.1 Introduction

As explained in the ECA Legal Bulletin edition N°1[6], FIFA, in 2011, amended article 64 of its Disciplinary Code (FCD) by which the FIFA Disciplinary Committee, as of August 2011, would solely enforce awards relating to cases that have previously been dealt with by a body or committee of FIFA.

In other words, FIFA, since August 2011, only enforces awards rendered by the CAS in an appeal procedure and no longer enforces awards rendered in ordinary procedures[7].

As this amendment affected football stakeholders directly, it triggered strong reactions. More precisely, whereas parties would previously have been encouraged to add arbitration clauses in their contracts, assigning direct jurisdiction to the CAS, the addition of these kinds of clauses could have a contrary effect following the amendment, i.e., difficulties with the enforcement of such awards.

Furthermore, it was unclear what would happen with those disputes lodged directly at the CAS and based on a contract signed prior to the amendment to the FDC. In other words, would contracts signed prior to August 2011 be exempted from the application of this new rule given that, otherwise, clubs, licensed agents and/or players could be affected and lose the protection they had in mind at the moment they agreed to such an arbitration clause?

By its decision dated 21 June 2013, CAS made a ruling[8] on the above questions, and this in the dispute opposing Fenerbahçe SK versus FIFA and Roberto Carlos.

1.1 CAS 2012/A/2817 – case analysis

The main facts of this case are as follows:

- On 8 June 2011, the CAS issued a ruling ordering the player to pay the club the amount of EUR 1,000,000. The arbitration proceedings leading to the award were "ordinary procedures";
- On 20 July 2011 **(prior to the amendment in the FDC)**, the club informed the FIFA Disciplinary Committee that the player had not complied and asked for the appropriate disciplinary sanctions to be handed down;
- In a letter dated 30 January 2012, the FIFA administration informed the club that the FIFA Disciplinary Committee, **as a general rule**, is not in a position to enforce a decision rendered by the CAS in an ordinary procedure; this letter was later confirmed by an actual decision by the FIFA Disciplinary Committee, notified on 7 May 2012, by which **it declared the request inadmissible**.

In its decision, the FIFA Disciplinary Committee explained that, although the request by Fenerbahçe had been lodged prior to the 2011 FDC amendment, it was not admissible since this amendment merely codified a long-standing practice of the Committee. According to the decision, this long-standing practice is based on the notion that FIFA should be involved in the creation of jurisprudence related to the

[6] "FIFA Circular Letter no 1270", in ECA Legal Bulletin n°1 Sep 2011, pp. 4-5

[7] E.g., contractual disputes taken directly to the CAS based on an arbitration clause in a contract in favour of the CAS

[8] CAS 2012/A/2817 Fenerbahçe SK v. FIFA & Roberto Carlos da Silva

FIFA Regulations, this in order to safeguard the correct application of the rules, to guarantee equal treatment of the stakeholders, and to provide legal certainty.

In appealing to the CAS, the main argument of Fenerbahçe was that the Disciplinary Committee should have applied the 2009 FDC instead of the 2011 FDC, as the request for disciplinary sanctions was lodged prior to August 2011. Important to note is that, contrary to the 2011 FDC edition, the 2009 edition did not foresee a distinction between an award rendered on appeal and one following an ordinary procedure.

Defending its initial decision, FIFA relied on the same arguments at CAS level as set out in the decision of the Disciplinary Committee, while **the player, Roberto Carlos, did not actively partake in the proceedings at CAS level**.

> In its legal analysis of the merits of the case, the Panel examined *"whether, under article 64 of the FDC (2009 and 2011 editions), proceedings could be opened and measures taken, against a subject, in the event of a failure to comply with a CAS award in the context of ordinary arbitration proceedings […]".*[9]

As a first remark, the Panel noted that although article 64 of the FDC is of disciplinary nature, as it foresees in a fine to be paid to FIFA in case of failure to comply with an award, it also serves the interest of the creditor to which the payment is owed.

Dealing with the arguments of FIFA, CAS held that when one compares the wording of article 64 in the FDC edition 2011 with its wording in the 2009 edition, one finds that both are sufficiently clear and allow for no interpretation. As such, there would be no loophole that would need to be covered by a longstanding practice. Therefore, disciplinary sanctions could be requested under the FDC edition 2009 in case of the failure to comply with a CAS Ordinary award but not under the FDC edition 2011. The Panel also rejected the argument that there should be an exclusive link between the creation of a jurisprudence of the FIFA Regulations and the involvement of FIFA's bodies.

Notwithstanding the fact that CAS set aside most arguments of FIFA, the Panel continued by stating that such a conclusion did not necessarily lead to the conclusion that the decision of the Disciplinary Committee was to be set aside.

More precisely, the Panel held that the player's failure to comply with the CAS award was an infringement under the FDC edition 2009 but not under the FDC edition 2011, following which it analysed the *Lex Mitior* Principle.

In this respect, the Panel held that according to CAS jurisprudence this principle is recognized in the FIFA system and more precisely in article 4 of the FDC edition 2009 and 2011, which states:

> *"This code applies to facts that have arisen after it has come into force.* ***It also applies to previous facts if it is equally favourable or more favourable for the perpetrator of the facts and if the judicial bodies of FIFA are deciding on these facts after the code has come into force.*** *By contrast, rules governing procedure apply immediately upon the coming into force of this code".*

In making application to the above article, the Panel held that this article covers not only the measure of the sanction but also the definition of what constitutes an infringement. It continued by stating that the non-compliance by the player was of a permanent nature, started when the CAS award was issued but which, under application of the *Lex Mitior* Principle, ceased to be a disciplinary offence under the FDC edition 2011.

Therefore, the CAS Panel concluded that a disciplinary procedure cannot be opened against the player and, hence, the claim by Fenerbahçe was dismissed.

[9] Paragraph 100 of CAS 2012/A/2817

1.3 Conclusion

Keeping in mind that the failure to comply with a CAS "Ordinary" award no longer allows for disciplinary sanctions against the concerned club, player etc., even if that award was rendered prior to the entry into force of the FDC edition 2011, it may be noted a fortiori that all contracts signed prior to 1 August 2011 and containing an arbitration clause assigning direct jurisdiction on the CAS, are affected.

> In this respect, the Panel observed that *"clubs, players, coaches etc. might have included such clauses in their contracts, having in mind that the possibility that disciplinary procedures could be opened by FIFA in case of non-compliance and that such possibility was lost as result of the change leaving them without the protection expected, but that the principle of* Lex Mitior *takes precedence over the (legitimate) expectations a party may have had with regards to FIFA's assistance in securing compliance".*[10]

However, it is also important to note that, whereas individuals/clubs will no longer face disciplinary sanctions from FIFA, the Associations with which such players and/or clubs are affiliated remain subject to such disciplines.

More precisely, FIFA, when asked to enforce an ordinary award, has taken the position that federations, according to the FIFA Statutes, are obliged to ensure that their registered members comply with awards rendered by the Court of Arbitration for Sport, failing which the federation itself may face disciplinary sanctions. **As such, ordinary awards (not taking into account the New York Convention) might still be enforced through FIFA, albeit by means of sanctions against federations, which thereby have a strong incentive to compel their members to comply.**

Although the current practice of FIFA in addressing the federations is to be greatly welcomed, as a concluding remark to this article it may be noted that the CAS Panel deftly observed[11] that the validity of the amendment to article 64 of the FDC edition 2011, as such, was not challenged by Fenerbahçe. This could possibly allow for a new challenge in the future in the light of the conformity of article 64 of the FDC with the FIFA Statutes.

2 Solidarity contribution and amended transfer fee

According to the FIFA Regulations on the Status and Transfer of Players, hereinafter the "RSTP", if a professional player moves during the course of a contract, 5% of any compensation, not including training compensation, paid to his former club shall be deducted from the total amount of compensation and be distributed by the new club as solidarity contribution to those clubs involved in the training and education of the player over the years.

Recently, the FIFA Dispute Resolution had to deal with a case where a club was requesting solidarity contribution over a transfer amount agreed upon but not entirely paid.

More precisely, the transferring clubs had rescinded the transfer agreement and agreed that the concerned player would return to his original club, following which the outstanding instalments, payable according to the transfer agreement, were no longer due.

Analyzing this case, the Panel made reference to article 2 of Annex 5, titled Payment Procedure, which states that in case of contingent payments (instalments), a solidarity contribution shall be paid 30 days after the date of such payments.

[10] Paragraph 124, slightly amended, CAS 2012/A/2817

[11] Paragraph 108 CAS 2012/A/2817

Interpreting this article, the Panel concluded that the main requirement for a solidarity contribution to be distributed was that a transfer fee was actually being paid. A fortiori, if a transfer fee, payable in instalments, was initially agreed upon, but both transferring parties, in good faith, amended the terms of the transfer agreement by which outstanding payments were no longer due, no solidarity contribution would be payable either.

As such, the claim of the club was rejected.

3 Payments by or in favour of third parties

Whereas, in theory, all employment contracts and/or transfer agreements would be concluded between football clubs and/or players, it sometimes happens that a player is paid his salary by an external company, that a clubs needs to buy-out a third party that partially holds the economic rights to a player, or that a club is being paid part of a transfer fee by a third party.

In a recent case, the FIFA Dispute Resolution Chamber had to deal with a case in which a player was claiming damages for the unilateral breach of contract by the club on the grounds of outstanding salaries.

However, pursuant to the terms of the employment contract, the player and the club had agreed that the former would not be paid by the club but by a company Y.

Now, faced with this claim, as well as a counter-claim by the club, the FIFA Dispute Resolution decided to reject the player's claim as well as the club's counter-claim.

More precisely, the DRC held that it had no jurisdiction to adjudicate the case since the dispute originated from a side agreement between the player and a company/third party. According to the DRC, it only could exercise jurisdiction over disputes originating from contracts between members of the football family, i.e., individuals or clubs registered with a national federation, but not over disputes related to contracts involving third parties.

Although questionable, this decision may be considered similar to a previous decision of the DRC whereby payments (transfer fees) made by a club to third parties are not recognized as a damage head for breach of contract by a player without just cause.

4 The *"de novo"* principle

It is commonly known that a CAS Panel dealing with a case on appeal possesses full power to review the facts and the law and may issue a new ruling to replace the challenged decision.[12]

More precisely, during an appeals procedure, a CAS Panel hears a case *de novo,* which implies that any violations of the principles of due process or the right to be heard may be cured. More precisely, *"the virtue of a system which allows for a full rehearing before an arbitration Panel is that issues relating to fairness of the hearing before the federation body fade to the periphery (CAS 98/211)".*[13]

Hence, keeping the *de novo* principle in mind, it has often happened that parties have amended their claim for damages on appeal. For example, where a club or a player would have asked FIFA to award them EUR 1,000,000 for a breach of contract by the other party, they would request to be awarded EUR 1,500,000 based on new damage heads on appeal.

[12] R57 of the CAS Code of Sports-related Arbitration Rules

[13] CAS 2012/A/2836 Eintracht Frankfurt Braunschweig v. Olympiacos FC

In a recent decision,[14] the CAS found itself confronted by a player requesting compensation for several additional damage heads that had not been requested at FIFA level.

In this respect, the Panel noted that ***"it cannot go beyond the scope of the previous litigation and that although it is true that claims maintained in a statement of appeal may be amended in an appeal brief, such amended claims may however not go beyond the scope and the amount of the previous litigation that resulted in the appealed decision".***

Consequently, the Panel held that any new claims advanced in appeal are in principle inadmissible, with an exception for those claims that could, for legitimate reasons, not have been advanced in the previous litigation (e.g., an instalment falling due during the initial procedure).

Applying the above, the Panel refused to award damages for the costs incurred by the player for his flight tickets and his costs incurred in his search for new employment, as those had not been requested at FIFA level.

At the same time, the Panel also refused to grant the player 6 months' worth of salary as damages under the specificity of sport, as only 3 months' had been requested at FIFA level. Also here, the Panel considered that the claim of the player was inadmissible insofar as it superseded what had been claimed before the FIFA DRC:

Keeping the above in mind, it is clear that parties will need to be very careful and attentive when lodging their initial claim for damages.

5 Agent fees

Ever so often, players' agents and clubs agree that a players' agent is entitled to receive a percentage of a future transfer fee, and this notwithstanding the provisions of the FIFA Players' Agent Regulations, edition 2008.

More precisely, according to the article 20 point 5 of these regulations:

> *"A player's agent who has been contracted by a club shall be remunerated for his services by payment of a lump sum that has been agreed upon in advance."*

Whereas article 29 states that:

> *"No compensation payment, including transfer compensation, training compensation or solidarity contribution, that is payable in connection with a player's transfer between clubs,* ***may be paid in full or part, by the debtor club*** *to the players' agent, not even to clear an amount owed to the players' agent by the club by which he was engaged in its capacity as a creditor. This includes, but is not limited to, owning, any interest in any transfer compensation or future transfer value of a player."*

According to well-established FIFA jurisprudence, a clause by which **a licensed agent** would be entitled to receive a percentage of a future transfer fee is therefore invalid, a position also confirmed by a CAS award[15]. In this case, the Single Judge stated that these sets of rules *"reveal that they are intended to minimize and/or avoid situations where agents would be in a position to have control over players and clubs through their contractual interests in the re-selling phase"*.

[14] CAS 2012/A/2874 Grzegorz Rasiak v. AEL Limassol

[15] CAS 2009/O/1938 Cabral, Cipriano e Alves v. Lokomotiv Mezdra AD

However, in a recent award[16], a CAS Panel interpreted the validity of such a clause differently.

In doing so, the CAS Panel was bound to take into account the players' agent regulations edition 2001[17] rather than the 2008 edition, even though conclusions can also be drawn from the 2008 edition.

Accordingly, whereas both editions differ to the extent that the 2008 edition is more explicit when it states that a player's agent cannot own an interest in any transfer compensation or future transfer value of a player, they are similar to the extent that **it only contains a prohibition on the debtor club (e.g., the buying club) to make such payment to the player's agent.**

This being said, the Panel held that a strict interpretation of the 2001 edition did not go as far as prohibiting an agent from being entitled to a lump sum proportion of the fee, i.e., **if that fee was paid from club to club and then distributed to the agent by the receiving club**.

Furthermore, the Panel, without clearly motivating this, also held that a percentage of a future transfer fee was in line with the provision that a club and a player's agent must agree in advance, and in writing, upon a lump sum payment. More precisely, *it was held that a percentage of a future transfer fee is a lump sum proportion agreed upon in advance, be it of an undetermined amount.*

Although it is not clear whether a next CAS Panel would feel inclined to follow the established FIFA jurisprudence and the 2009/O/1938 award or whether it would follow the 2011/A/2660 award, also keeping in mind the differences between the 2001 and 2008 edition of the Players' Agent Regulations, the following should nevertheless also be taken into account.

The Players' Agent Regulations state that sanctions may be imposed on any players' agent and/or clubs that violate the regulations, but **they do not explicitly state that such clauses shall be considered null and void.**

Until this is clearly worded in the players' agent regulations, and until the rule that prohibits debtor clubs to pay a percentage of a future transfer fee is also extended to creditor clubs, the enforceability of such clauses remains plausible.

6 UEFA whereabouts rules

Although the whereabouts rules set out in the UEFA Anti-Doping Regulations[18], hereinafter "ADR" are less commonly known to the wider public than, for example, the UEFA Disciplinary Regulations or the UEFA Club Licensing and Financial Fair Play Regulations, they are of major importance to both clubs and players.

With regards to clubs, it may be said that all clubs that form part of the UEFA testing pool must submit whereabouts information to UEFA with regards to their players. This in order to allow out-of-competition doping control programmes to be conducted.

More precisely, according to the regulations and the notifications sent in connection with these regulations, clubs in the testing pool are required to provide UEFA every week with their training and competitions schedule by noon (12.00 CET) on the Friday of the preceding week.

The information to be provided must include the date, start and finish time, and the specific location of the training session, as well as the name of the players absent from any training session included in the whereabouts admission.

[16] CAS 2011/A/2660 X. v. Z

[17] Article 18 par. 3 of the 2001 edition states: a club which pays another club compensation shall pay it directly to the beneficiary club. **It is strictly forbidden for the club making the remittance to pay any amount**, either partially or wholly, to the players' agent, not even as remuneration

According to article 9 of Appendix E of the ADR Regulations:

> *"Whereabouts information must be accurate and up to date at all times. Should a team's or player's plans change from those originally indicated in their whereabouts information, the team must* **immediately** *send updates of all information required.*

Now in a recent case, the CAS[19] had to decide how to interpret the wording "immediately" with regards to the obligation to update UEFA concerning changes to the originally submitted information.

In doing so, the Panel decided that it was obliged to interpret the rules in question in keeping with the perceived intention of the rule-maker and held that the term 'immediately' from a legal perspective entails that the 'taking of action must be within a short time frame at some speed and without intervening time or space and without delay or intervention'.

Consequently, in the case at hand, the Panel held that, keeping in mind how notifications are possible via text messages, fax, and e-mail, a change in the whereabouts information should be notified within 10 to 15 minutes after a club has become aware of a player's sick-report.

Keeping in mind that a whereabouts violation occurs in case of any late filing, and that the sanctions for a whereabouts violation are as follows:

- First team whereabouts violation: a warning is sent to the team.
- Second team whereabouts violation: target testing is systematically conducted on the team and its players.
- Third team whereabouts violation: all the team's players are included individually in UEFA's testing pool and must provide partial individual whereabouts information to UEFA.
- Fourth and further team whereabouts violations: UEFA may ask FIFA to include some or all of the team's players in the FIFA International Registered Testing Pool (IRTP). However, if included in FIFA's IRTP, the team and player(s) concerned remain in UEFA's testing pool and continue to be required to provide whereabouts information to UEFA accordingly.

clubs should exercise great care in keeping UEFA up to date on any player's absence from training or changes in the schedules that have been communicated to UEFA on the Friday of the preceding week. This is especially important, since any such violation is referred to the UEFA Disciplinary Committee for the appropriate sanctions to be imposed.

Moreover, the fact that a player who was absent but not reported as such by the club presented himself in timely fashion to a doping control does not alter the violation by the club of the whereabouts rule stipulating that changes must be notified immediately.

[18] Appendix E – Whereabouts Rules of the UEFA Anti-Doping Regulations

[19] CAS 2012/A/2762 X v. UEFA

III. General Remarks and Tips

1 Penalty clauses

In a recent case[20], a CAS Panel has taken a more reserved approach with regards to reducing a penalty fee freely agreed upon between both contracting parties.

In the case at hand, the parties had renegotiated the initial transfer fee from EUR 400,000 to EUR 300,000, to be payable in two equal instalments of EUR 150,000. In case of failure to pay the second instalment on the due date, a penalty fee of EUR 100,000 would be payable.

Absent the second payment, a FIFA procedure was initiated and, whilst the procedure was pending, the full transfer amount was paid. In its final decision, the Single Judge considered that the penalty clause was disproportionate as it equalled 2/3 of the instalment, following which he awarded 5% default interest on the amount paid late.

Now, faced with the appeal, the CAS Panel took an approach different from the one taken by the FIFA Single Judge and made an in-depth analysis as to whether the penalty clause could be considered excessive and, if so, ought to be reduced, this in accordance to Swiss law.

In doing so, the Panel considered the following four criteria :

- Creditor's interest;
- Severity of the breach;
- Debtor's fault and intentional failure to execute the main obligation
- The business experience of the parties

With regards to the third criteria, the Panel noted that **the intentional failure to execute the main obligation** constitutes an aggravating circumstance which **shall in principle prevent any reduction of the penalty fee.**

In this respect, it may be noted that an outstanding payable is mostly related to the intentional failure of a club to pay (to win time)

Furthermore, the Panel concluded that the apparent disproportion in value of a penalty and a transfer fee is not in itself sufficient to trigger the reduction of a penalty fee but that a thorough analysis should be made in every case.

In doing so, the Panel hopefully started a new trend and recognized that it is appropriate in international football to recognize the enforceability of mutually and freely agreed upon penalty clauses, as it reinforces the basic principle of *pacta sunt servanda.*

[20] CAS 2012/A/2847 Hammarby Fotball AB v. Beşiktaş Futbol Yatirimlari Sanayi ve Ticaret A.S

2 Transfer of minors[21]

Since October 2009, the international transfers of minors[22] are dealt with by the FIFA Sub-Committee of Minors.

In doing so, the committee applies article 19 of the FIFA RSTP, which contains the exceptions under which the transfer of minors is allowed.

The present article aims at providing an update with regards to how article 19 has been applied and interpreted by the Sub-Committee vis-à-vis specific cases, and this by giving a detailed analysis per paragraph, where necessary.

> ***Art.19 – Protection of Minors***
>
> ***Art.19 point 1***
>
> *International transfers of players are only permitted if the player is over the age of 18*

As the title of article 19 refers both to minors and the age of a player (18), and keeping in mind that the notion minor, from a legal perspective, does not always relate to the age, the Sub-Committee had to decide whether a youngster who enjoys his full civil rights by means of an act of emancipation would still be considered a minor in the sense of article 19.

Referring to the objectives pursued by the principles relating to the protection of minors, the Sub-Committee held that any player younger than 18 shall be considered a minor in the sense of the RSTP, and this irrespective of being emancipated or not.

> ***Art.19 point 2a***
>
> *The following three exceptions to this rule apply:*
>
> *The player's parents(i) move to the country in which the new club is located for reasons not linked to football (ii)*

For this exception to apply, two prerequisites (i) & (ii) are to be met cumulatively.

With regards to the prerequisite that the player's **parents** have moved (i), some questions arose in cases where both of the parents were not making the move together owing to, for example, factual or legal divorces/separations, passing away, etc.

In these situations, it may be noted that the Sub-Committee has interpreted this provision mindful of today's realities and has shown leniency in applying the rule.

For example, according to existing jurisprudence, this prerequisite would be considered fulfilled if the parent moving has the custody over the child and/or has the approval of the other parent.

However, what has never been accepted under this exception is a situation where the legal custody or guardianship over the player would be delegated to a third party in another country.

With regards to the prerequisite "moved for reasons not linked to football" (ii), existing jurisprudence shows that the Sub-Committee is doubtful when:

- not much time has elapsed between the move of the parents and a professional football club's request to register the player;
- the contact between the club and the player appears to have occurred prior to the move of the parents.

[21] FIFA Document: Protection of Minors – jurisprudence of the sub-committee appointed by the Player's Status Committee

[22] This both for the first registration of a player in case of a request for registration for a first team in a country of which he does not hold the nationality as well as for any other international transfer of minors

However, cases where the move was linked to medical reasons, employment-related, involved family reunification, the return to one's home country, or marriage to a national of the new country have been accepted by the Sub-Committee as falling under this exception.

> ***Art.19 point 2b***
>
> *The transfer takes place in the European Union/European Economic Area and the player is between the age of 16 and 18. In this case the new club must fulfil the following minimum obligations:*
>
> *i Provide adequate football education in line with the highest national standards;*
>
> *ii Guarantee academic/school/vocational training that allows the player to pursue a career outside of football:*
>
> *iii Shall make all necessary arrangements to ensure that the player is looked after*
>
> *iv Provide proof to the relevant association of compliance with the above*

First of all, it should be noted that the jurisprudence holds that any transfer in the EU/EEA falls within the scope of this exception and this **regardless of the player's nationality**. For example, also an Australian national registered in Belgium could transfer to a club in Italy under this rule. Moreover, this exception has also been extended in some cases to countries that have a bilateral agreement with the EU on the freedom of movement of workers.

Besides, existing jurisprudence also teaches us that the dominant position with regards to EU minors looking to transfer from outside the EU/EEA to a club in the EU/EEA, irrespective of whether it is to a club of the country of which they held the identity, is acceptable under this exception.

As to the obligations under point (i) and (ii), the Sub-Committee appears to analyse these on a case by case basis, but it has been questioned whether a club of the third division could offer football education in line with the highest standards and whether 3 hours of football training and/or less than 8 hours of school per week would be sufficient in this respect.

In another interesting decision, the Sub-Committee held that the fact whether or not a player would have fulfilled his compulsory education within the law of his country is not relevant to compliance with obligation (iii). As such, a player should always be provided with educational/vocational/school training.

> ***Art.19 point 2c***
>
> *The player lives no further than 50km from a national border and the club with which the player wishes to be registered in the neighbouring country is also within 50 km of that border. The maximum distance between the player's domicile and the HQ of the club is 100 km, the player must continue to live at home and the two associations concerned need to give their explicit consent.*

With regards to the distance requirements, existing jurisprudence shows that the Sub-Committee applies these in a very strict manner. All requirements should be met at the same time and the registration of a player living 5 km from the border, with a club having its HQ 70 km from the border, for example, was not accepted.

Furthermore, as the regulations do not express how the distance should be calculated between the player's home and the HQ of the club, existing jurisprudence shows us that it is the distance per actual road rather than the distance from point to point ("as the crow flies") that is taken into account to see whether this exception can apply.

All in all, it can be concluded that the article 19 has been strictly applied, necessary in view of its objectives, but that it has been interpreted and applied to the extent of taking into account the realities of the current society.

Furthermore, and as a closing remark, it may be noted that, should a club deem that there exist particular circumstances that would justify the registration of a minor but they do not fall under the exceptions described in article 19, the association of the club concerned can submit a formal request.

This request should be made in writing to the Sub-Committee, needs to specify the circumstances, and be submitted with the necessary documents. Although very rare, it can be established that such exceptions were mostly accepted if there was no doubt that the motivation of the minor to move was not linked to football: for example, minors studying abroad for a limited time or minors with refugee status

In a very rare couple of cases, the Sub-Committee has allowed exceptions linked to football, be it on the basis of cooperative agreements signed between the association of origin of a player and the concerned club. In such cases, the academic and/or school education of the minor should still form an essential part, the duration of exchange should be limited, and the authorization of the parents would be indispensable.

3 Release of players

The basic principle with regards to the release of a player to association teams is that the release be mandatory for those matches:

- that are to be held on dates listed in the coordinated international match calendar;
- for which a duty to release players exists on the basis of a special decision of the FIFA Executive Committee[24].

However, what is less commonly known is that an association needs to comply with certain deadlines if it wants to call up a player. More precisely, according to article 3, Annex 1 of the RSTP, an association wishing to call up a player must notify the club and the player in writing at least 15 days before the day of the match for which he is required. If it concerns the call-up for a final competition of an international tournament, the player and the club must be notified at least 15 days prior to the 14-day preparation period.

If these deadlines are not respected by an association, a club, in principle, would not be under the obligation to release the concerned player.

[23] FIFA Circular 1356: Introduction of new article 1 as of 1 August 2014 and this line with the 2012 UEFA & ECA Memorandum of Understanding. The new article 1 no longer allows the FIFA Executive Committee to take special decisions making the release mandator

Disclaimer & Reproduction notice

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

The materials contained in this bulletin are for general information purposes only and are not offered as, nor constitute legal or any other advice on any particular matter.

ECA has made every attempt to ensure the accuracy and reliability of the information provided in this bulletin. However, the information is provided "as is" without warranty of any kind and ECA does not accept any responsibility or liability for the accuracy, content, completeness, legality, or reliability of the information contained in the bulletin.

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 +41 22 761 54 43.

Annexe – FIFA Circular Letter no.1356

FIFA®

For the Game. For the World.

TO THE MEMBERS OF FIFA

Circular no. 1356

Zurich, 13 May 2013
SG/mav/oon

Regulations on the Status and Transfer of Players – Release of players to association teams

Dear Sir or Madam,

On the occasion of its meeting on 29 March 2012, the FIFA Executive Committee decided to accept the new concept for the international match calencar for the 2015-2018 period. The relevant principles shall be applied as of August 2014, i.e. following the completion of the 2014 FIFA World Cup Brazil™. Please be informed that the updated international match calendar comprising the dates for the period second half of 2014 until 2018 in accordance with this new concept is available on our official webpage, FIFA.com.

We would now like to inform you that following the above-mentioned decision, on the occasion of its meeting held on 20/21 March 2013, the FIFA Executive Committee adopted the necessary amendments to Annexe 1, art. 1 and Annexe 1, art. 3 par. 2 of the Regulations on the Status and Transfer of Players, which are required in order to provide the adequate regulatory basis in support of the release of players to association teams in line with the new concept. Please find enclosed a copy of the relevant provisions for your perusal.

As mentioned above, the new principles will apply as of August 2014. Consequently, the amended provisions concerned will only come into effect as of 1 August 2014. The new Regulations on the Status and Transfer of Players booklet will be released on time.

Finally, and for the sake of good order, we would like to emphasise that the new concept and amended provisions only concern the release of male players to their association teams. The FIFA women's international match calendar and the respective release rules will thus not be affected.

We thank you for your kind attention to the above and remain at your disposal should you have any queries in this regard.

Yours faithfully,

FÉDÉRATION INTERNATIONALE
DE FOOTBALL ASSOCIATION

Markus Kattner
Deputy Secretary General

Fédération Internationale de Football Association
FIFA-Strasse 20 P.O. Box 8044 Zurich Switzerland Tel.: +41-(0)43-222 7777 Fax: +41-(0)43-222 7878 www.FIFA.com

FIFA®

For the Game. For the World.

Annexe 1, art. 1 of the Regulations on the Status and Transfer of Players

Annexe 1, article 1

1. Clubs are obliged to release their registered players to the representative teams of the country for which the player is eligible to play on the basis of his nationality if they are called up by the association concerned. Any agreement between a player and a club to the contrary is prohibited.
2. The release of players under the terms of paragraph 1 of this article is mandatory for all international windows listed in the international match calendar (cf. paragraphs 3 and 4 below) as well as for the final competitions of the FIFA World Cup™, FIFA Confederations Cup and of the championships for "A" representative teams of the confederations, subject to the relevant association being a member of the organising confederation.
3. After consultation with the relevant stakeholders, FIFA publishes the international match calendar for the period of four or eight years. It will include all international windows for the relevant period (cf. paragraph 4 below). Following the publication of the international match calendar only the final competitions of the FIFA World Cup™, FIFA Confederations Cup and of the championships for "A" representative teams of the confederations will be added.
4. An international window is defined as a period of nine days starting on a Monday morning and ending on Tuesday night the following week, which is reserved for representative teams' activities. During any international window a maximum of two matches may be played by each representative team, irrespective of whether these matches are qualifying matches for an international tournament or friendlies. The pertinent matches can be scheduled any day as from Wednesday during the international window, provided that a minimum of two full calendar days are left between two matches (e.g. Thursday/Sunday or Saturday/Tuesday).
5. Representative teams shall play the two matches within an international window on the territory of the same confederation, with the only exception of inter-continental play-off matches. If at least one of the two matches is a friendly, they can be played in two different confederations only if the distance between the venues does not exceed a total of five flight hours, according to the official schedule of the airline, and two time-zones.
6. It is not compulsory to release players outside an international window or outside the final competitions as per paragraph 2 above included in the international match calendar. It is not compulsory to release the same player for more than one "A" representative team final competition per year. Exceptions to this rule can be established by the FIFA Executive Committee for the FIFA Confederations Cup only.
7. For international windows, players must be released and start the travel to join their representative team no later than Monday morning and must start the travel back to their club no later than the next Wednesday morning following the end of the international window. For a final competition in the sense of paragraphs 2 and 3 above, players must be released and start the travel to their representative team no later than Monday morning the week preceding the week when the relevant final competition starts and must be released by the association in the morning of the day after the last match of their team in the tournament.
8. The clubs and associations concerned may agree a longer period of release or different arrangements with regard to paragraph 7 above.

FIFA®

For the Game. For the World.

9. Players complying with a call-up from their association under the terms of this article shall resume duty with their clubs no later than 24 hours after the end of the period for which they had to be released. This period shall be extended to 48 hours if the representative teams' activities concerned took place in a different confederation to the one in which the player's club is registered. Clubs shall be informed in writing of a player's outbound and return schedule ten days before the start of the release period. Associations shall ensure that players are able to return to their clubs on time after the match.
10. If a player does not resume duty with his club by the deadline stipulated in this article, at explicit request, the FIFA Players' Status Committee shall decide that the next time the player is called up by his association the period of release shall be shortened as follows:
    a. international window: by two days
    b. final competition of an international tournament: by five days
11. Should an association repeatedly breach these provisions, the FIFA Players' Status Committee may impose appropriate sanctions, including but not limited to:
    a. fines;
    b. a reduction of the period of release;
    c. a ban on calling up a player(s) for subsequent)representative teams' activities.

Annexe 1, art. 3 par. 2 of the Regulations on the Status and Transfer of Players

Annexe 1, article 3, par. 2

2. Associations wishing to call up a player must notify the player in writing at least 15 days before the first day of the international window (cf. Annexe 1, article 1 paragraph 4) in which the representative teams' activities for which he is required will take place. Associations wishing to call up a player for the final competition of an international tournament must notify the player in writing at least 15 days before the beginning of the relevant release period (cf. Annexe 1, article 1 paragraph 7). The player's club shall also be informed in writing at the same time. Equally, associations are advised to copy the association of the clubs concerned into the summons. The club must confirm the release of the player within the following six days.

3

Bibliography

Regulations

– FIFA Regulations for the Status and Transfer of Players ed. 2012

– FIFA Disciplinary Code eds. 2009 and 2011

– FIFA Players' Agent Regulations eds 2001 and 2008

– UEFA Club Licensing and Financial Fair Play Regulations ed. 2013

– UEFA Anti-Doping Regulations ed. 2013

Jurisprudence

Court of Arbitration for Sport

– CAS 2011/A/2660 X. v. Y

– CAS 2012/A/2702 Györi ETO FC v. UEFA

– CAS 2012/A/2754 UC Sampdoria v. Club San Lorenzo de Almagro & FIFA

– CAS 2012/A/2762 X. v. UEFA

– CAS 2012/A/2817 Fenerbahçe SK v. FIFA & Roberto Carlos Da Silva

– CAS 2012/A/2821 Bursaspor Kulübü Dernegi v. UEFA

– CAS 2012/A/2824 Beşiktaş JK v. UEFA

– CAS 2012/A/2847 Hammarby Fotboll AB v. Beşiktaş Futbol Yatirimlari Sanayi ve Ticaret A.S.

– CAS 2012/A/2862 FC Girondins de Bordeaux v. FIFA

– CAS 2012/A/2874 Gregorz Rasiak v. AEL Limassol

UEFA

– Appeals Body decision in case RCD Mallorca v. UEFA & Villareal FC dated 30 July 2010

– Control and Disciplinary Body decision PAOK FC v. UEFA dated 10 January 2012

– Appeals Body decision in case UEFA v. Beşiktaş JK dated 30 May 2012

– CFCB decision in case AC-02/2012 FK Partizan dated 8 November 2012

– CFCB decision in case AC-03/2013 Panathinaikos v. UEFA dated 26 June 2013

Others sources

– UEFA Whereabouts Guide 2012-2013 season

– FIFA Document Protection of Minors – Jurisprudence of the sub-committee appointed by the Players'

Rte de St-Cergue 9 CH-1260 Nyon
www.ecaeurope.com

WASSMER GRAPHIC DESIGN CH-1260 NYON PHOTOGRAPHY: © ALAIN VERMEULEN – FOTOLIA.COM