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II. Feedback from CAS & UEFA

- “Future contracts” and entitlement to compensation
 - Player loans and training compensation
 - Unrequested joinder to FIFA proceedings
 - Admission of two identically branded clubs into the UEFA Champions League
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Dear ECA Members and Colleagues,

It is our pleasure to present to you the 2017 edition of the ECA Legal Bulletin.

Prior to addressing the topics of this year's edition of the Bulletin, we wish to highlight the first joint ECA-UEFA Legal Workshop, organised exclusively for ECA Member Clubs in Marseille last June. The event provided an ideal platform for members to meet and discuss the latest legal and regulatory developments affecting European club football.

With this in mind, we would like to take this opportunity to thank all participants, as well as Olympique de Marseille, for their contribution in making the Workshop a great success!

As in previous editions, the last season has seen several high profile cases being adjudicated by the sports judicial bodies, some of which are dealt with in this Bulletin.

The first chapter of this Bulletin is fully dedicated to the topic of international transfers of minor football players, a topic on which the ECA Legal Department still receives many questions from Member Clubs. Keeping in mind these questions and the developing jurisprudence, the key legal particularities affecting the international registration of a minor player are summarised in this Bulletin.

The second chapter is devoted to case summaries of some of the most interesting decisions rendered by the Court of Arbitration for Sport (CAS) and UEFA over the course of last season.

Finally, chapter three deals with a Swiss Federal Tribunal case on the consequences of a party failing to timely pay the advance of costs in a CAS appeals procedure.

As a concluding remark, we would like to thank all ECA Members and LAP Members in particular, for consulting and sharing their knowledge with the ECA Legal Department on a regular basis. In addition, we would like to thank Wouter Lambrecht (ECA Head of Legal) and Daan de Jong (ECA Legal Counsel), for their efforts in putting together this valuable publication.

We wish you a pleasant read and all the best for the 2017/18 football season!

Sincerely,



Michele Centenaro
ECA General Secretary



José María Cruz
Chairman of the ECA Legal Advisory Panel
and CEO Sevilla Fútbol Club

I. Transfer of Minors

1 Introduction

Pursuant to the agreement concluded between FIFA, UEFA and the European Commission in the aftermath of the *Bosman* case, the 2001 edition of the FIFA Regulations on the Status and Transfer of Players ('FIFA RSTP') witnessed the introduction of a general prohibition of the international transfer of minors (i.e. players under the age of 18). According to this principle, the international transfer or first registration¹ of a minor is only allowed in cases where certain conditions are fulfilled.

The background to the general prohibition was, and still is, to ensure the well-being of all young players, to prevent abuse and exploitation of minors, as well as providing minors a stable environment for training and education.

At first, the national association intending to register the minor for one of its affiliated clubs was responsible for ensuring that the provisions concerning the protection of minors were respected when registering the minor.

With the aim of better monitoring the observance of the rules on minors, FIFA changed this approach in October 2009. Following which, moving forward, the Sub-Committee appointed by the FIFA Players' Status Committee would be in charge of examining and approving every international transfer of a minor.

Ever since the Sub-Committee commenced its role in relation to the protection of minors, jurisprudence, both at the FIFA level and at the Court of Arbitration for Sport ('CAS'), further specified the interpretation of the RSTP provisions dealing with the protection of minors.

Against this background and following a vast amount of questions received from ECA Member Clubs, this article, by no means exhaustive, aims to clarify the interpretation of the current Regulations.

The first part of this article will focus on the various exceptions to the prohibition of the transfer of minors, whereas the second part deals with some practical suggestions and guidelines with respect to the registration process of a minor.

2 Main rules & regulatory exceptions to the general prohibition

According to Article 19.1 FIFA RSTP, the international transfer of a player is, in principle, only permitted if the player is over the age of 18, the so-called "general prohibition".

As an exception to the general prohibition, Articles 19.2 & 19.3 FIFA RSTP stipulate that a minor player may nevertheless be registered with a foreign club if one of the following conditions are met:

- a. The player's parents move to the country in which the new club is located for "reasons not linked to football";
- b. The transfer takes place within the EU/EEA and the player is aged between 16 and 18. Under those conditions, the club must prove that it provides the player:
 - Adequate football training in line with the highest national standards;
 - Educational training in addition to his football training, which allows the player to pursue a career other than football; and
 - Optimum living standards by placing him with a host family or in club accommodations and by appointing him a mentor.
- c. The player lives, and the new foreign club is located, no further than 50km from the national border and the maximum travel distance between the two is 100km (so-called "cross-border transfers");
- d. The minor player has lived continuously for at least the last 5 years in the country in which he wishes to be registered (the so-called "5-year rule").

¹ The registration of a player in a country of which he does not hold the nationality.

With hundreds of different reasons why a minor would be seeking to be registered in a new country, it is often unclear whether a specific case relating to a minor could fall within one of the exceptions listed above and how some of the notions contained in these exceptions are to be interpreted. Consequently, it is not always easy for clubs intending to register a minor to determine whether an individual application meets the requirements.

Therefore, a detailed explanation of the different exceptions in light of the jurisprudence will be provided throughout the paragraphs that follow.

2.1 Minor application – Age limit

As a preliminary remark, it is emphasized that, in accordance with Article 9.4 FIFA RSTP (2015 & 2016 edition), an International Transfer Certificate ('ITC') is required for any player as of the age of 10, whereas previous editions of the FIFA RSTP made an ITC mandatory as of the age of 12.

Back in 2009, the Sub-Committee clarified that, for the purpose of the international transfer/first registration of a minor, a club wishing to register a minor aged under the age limit for the purpose of the ITC was not required to submit an application for the approval of the registration of such minor with the Sub-Committee.

Against this background, it has been heavily debated in the past whether clubs intending to register such minor were nevertheless required to comply with the prerequisites contained in Article 19 FIFA RSTP, or alternatively, could freely proceed registering such minor.²

Following different cases at CAS, FIFA once and for all explicitly clarified, by means of FIFA Circular no. 1468,³ that although the approval of the Sub-Committee is not required when a minor under the age of 10 is transferred abroad, clubs must nevertheless comply with the requirements set forth in Article 19 FIFA RSTP when registering a player under the age of 10.

Consequently, in those cases, clubs must provide their respective national association with the relevant information, thereby enabling the latter, opposed to the Sub-Committee, to verify if the requirements indeed are met.

2.2 Player's parents moving for reasons not related to football

Article 19.2(a) – *The player's parents move to the country in which the new club is located for reasons not linked to football.*

For a club to rely on the exception above, it needs to establish that the player's parents moved to the country in which the new club is located for "reasons not linked to football".

This raises questions with respect to how strictly the notion "player's parents" is to be understood and what reasons for the player's parents to move are considered to be unrelated to football.

2.2.1 "Player's parents"

According to the interpretation of the Sub-Committee, the notion "parents" primarily relates to the biological parents of a player. Only in a limited amount of cases, other persons may be considered as being the player's "parents" under the FIFA RSTP:

PLAYERS MOVING WITH ONLY ONE OF THEIR PARENTS

It may occur that only the player's father or mother immigrates with the player to a new country of residence (e.g. as result of a divorce or for economic reasons). Albeit the notion "parents" suggests that both parents need to accompany the player abroad, the Sub-Committee takes into account the reality of marriages ending in a divorce or families living in separate countries for a variety of reasons.

² Cf. CAS 2016/A/4785 Real Madrid Club de Fútbol v. FIFA, CAS 2014/A/3793 Fútbol Club Barcelona v. FIFA & TAS 2011/A/2494 FC Girondins de Bordeaux c. FIFA.

³ FIFA Circular no. 1468 – Amendments to the Regulations on the Status and Transfer of Players; and the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber.

Against this background, the Sub-Committee allows the registration of a player emigrating with only one of his parents, as long as the parent accompanying the player holds custody of the player and/or is granted the authorization of the non-moving parent.

DELEGATED CUSTODY OR GUARDIANSHIP

It also occurs that the player's biological parents delegate custody or guardianship of a minor to a third party, and that the player starts to live with his legal guardian abroad.

In principle, such would result in the rejection of the minor's application. This would be regardless of whether the third party is another family member (e.g. aunt or brother), a (foreign) state authority or the new club itself.

Only if both of the player's parents are deceased, following which a state court/authority grants parental authority to a third party (either located in or moving abroad), the Sub-Committee will consider this third party as the "player's parents" for the purpose of the Regulations.

2.2.2 "Reasons not linked to football"

In addition to the requirement that the player's parents move to a new country (in which the new club is located), it needs to be established that the rationale for the player's parents' move abroad is for "reasons not linked to football". In other words, the parent's decision to move abroad may not be based on the (prospective) football career of the youngster.

According to the standing practice of the Sub-Committee, the player's parents' intentions for moving abroad constitute the key element to be considered.

In other words, for the application to be successful, in principle, the parents' move should be completely unrelated to football. Even if the football activities of their child is not the main objective behind the move but more of the secondary reason, such would be enough for the Sub-Committee to determine that the criterion is not met and result, in principle, in a rejection of the application.

In CAS 2015/A/4312,⁴ the Panel held that:

"it is not required that the parents' main objective in their decision to move is their child's football activity – it is rather sufficient that the move of the player's parents occurred due to reasons that are not independent from the football activity of the minor or are somehow linked to the football activity of the minor".

Against this background, existing jurisprudence shows that the Sub-Committee carefully and stringently analyses this criterion "moved for reasons not linked to football", and in doing so refuses applications, when:

- The player's parents only signed an employment contract after the new club already had shown interest in the player;
- Little time has elapsed between the player's parents' relocation to the new country and the club's request to register the player;
- The new club first established contact with the player before the player's parents' move (e.g. it observed the player during an international youth tournament);
- The player moved to the new country prior to his parents without any valid reason.

Conversely, in the following cases the Sub-Committee determined that the player's parents moved for reasons not linked to football, resulting in the approval of the application:

- The player's parents move abroad for employment-related reasons (e.g. international secondment, finding employment abroad);
- Medical reasons (e.g. treatment of a disease abroad);

⁴ CAS 2015/A/4312 John Kenneth Hilton v. FIFA.

- The player's parents return to the family's home country;
- One of the player's (separated) parents remarries to a national of the new country to which he/she relocates;
- In exceptional cases, CAS has allowed the registration of a minor after the player's wealthy family simply decided to move to the country in which the player's new club was located in order to gain international and cultural experience.⁵

2.3 The EU/EEA exception

Against the background of the 2001 EU Commission/FIFA/UEFA agreement, Article 19.2(b) FIFA RSTP provides for an exception in relation to the transfer of a minor "taking place within the territory of the EU/EEA" and this is with the aim of protecting the freedom of movement principle within the EU/EEA.

Article 19.2(b) — *The transfer takes place within the territory of the European Union (EU) or European Economic Area (EEA) and the player is aged between 16 and 18. In this case, the new club must fulfil the following minimum obligations:*

It shall provide the player with an adequate football education and/or training in line with the highest national standards.

It shall guarantee the player an academic and/or school and/or vocational education and/or training, in addition to his football education and/or training, which will allow the player to pursue a career other than football should he cease playing professional football.

It shall make all necessary arrangements to ensure that the player is looked after in the best possible way (optimum living standards with a host family or in club accommodation, appointment of a mentor at the club, etc.). (...)

2.3.1 "Transfers taking place within the territory of the EU/EEA"

As a preliminary point, it must be noted that players from countries that, strictly speaking, are not EU/EEA member states, but which have concluded a bilateral agreement with the EU on the free movement of workers (e.g. Switzerland), profit from the same conditions as players located in EU/EEA member states.⁶

Secondly, it needs to be emphasized that the jurisprudence of the Sub-Committee confirms that any transfer within the EU/EEA falls under the scope of the exception, and such, regardless of the player's nationality (e.g. a Brazilian minor moving between a Portuguese and an Italian club).

Furthermore, it follows from CAS jurisprudence and the standing practice of the Sub-Committee that players located outside the EU/EEA but in the possession of a European passport may rely on this exception.

More precisely, in TAS 2012/A/2862,⁷ the Panel held that although Article 19.2(b) FIFA RSTP contains a "territoriality criterion", rather than a "nationality criterion" relating to the player's nationality, the EU free movement principles could not be ignored.

The Panel held that, because the Sub-Committee already takes into account the free movement principles when assessing a transfer of an EU minor, an unwritten exception allowing a player with the nationality of one of the EU or EEA member states to invoke Article 19(2)(b) FIFA RSTP is to be accepted.

Consequently, clubs should be aware of the current⁸ possibility to register minors holding EU passports while residing outside Europe under the EU exception as stipulated in the regulations (e.g. a minor holding Italian nationality while playing for an Argentinian club and wishing to be registered in Germany).

⁵ CAS 2013/A/3140 A. v. Club Atlético de Madrid SAD & Real Federación Española de Fútbol (RFEF) & FIFA.

⁶ FIFA Commentary on the Regulations for the Status and Transfer of Players p. 59.

⁷ TAS 2012/A/2862 FC Girondins de Bordeaux c. FIFA.

⁸ Please note that the validity of the current approach is at stake in the CAS case CAS 2016/A/4903 Club Atlético Vélez Sarsfield v. The Football Association Ltd., Manchester City FC & FIFA, but that a decision in the aforementioned case has not been made public at the time of publishing this article.

2.3.2 Training of highest national standards

According to Article 19.2(b)(i) FIFA RSTP, one of the criteria to be fulfilled by EU/EEA clubs wishing to register a minor originating from another EU/EEA country, is that such club offers the player “football education and/or training of the highest national standards”.

The Regulations, however, do not provide a definition or guidelines of what constitutes “training of the highest national standards” (e.g. the Regulations do not outline the criteria applicable to the structure of youth football/academies of clubs).

As a rule of thumb, and whilst exceptions may still apply, to determine the quality of a club’s football education, the Sub-Committee, as a starting point, applies the categorization of clubs for the purpose of training compensation.

Based on this approach, it appears that, as a guideline, the Sub-Committee holds that the following football clubs offer “football education in line with the highest national standards”.⁹

	Clubs offering football education in line with highest national standards
NAs maintaining TC Categories 1–4	CAT 1 & 2 Clubs
NAs maintaining TC Categories 2–4	CAT 2 Clubs
NAs maintaining TC Categories 3–4	CAT 3 Clubs

Another criterion assessed by the Sub-Committee includes the hours of training provided to a player. For example, it appears that if a player is only participating in football in his spare time and/or is only provided with football training for a limited amount of time per week (e.g. 3 hours), such would not be deemed sufficient by the Sub-Committee.

2.3.3 Non-football education & optimum living standards

Besides the football education requirement, clubs relying on the EU/EEA exception are required to ensure that the player receives the appropriate training/education that would allow him to pursue a career other than football should he cease playing professional football.

In practical terms, this requires clubs to offer the player a weekly minimum of 8 hours of non football education, and such, regardless of whether the player, under national law, is no longer obliged to be enrolled in education.

The obligation of offering the player “optimum living standards” requires clubs, in case the player is not living with his parents, to provide him with host parents’ accommodation or supervised accommodation belonging to the club. It needs to be emphasized that merely providing the player with a hotel accommodation or unsupervised apartment is considered insufficient.

⁹ Cf. FIFA Circular no. 1582 – Regulations on the Status and Transfer of Players – Categorisation of clubs, registration periods and eligibility.

2.4 Cross-border transfers

Article 19.2(c) — *The player lives no further than 50km from a national border and the club with which the player wishes to be registered in the neighbouring association is also within 50km of that border. The maximum distance between the player's domicile and the club's headquarters shall be 100km. In such cases, the player must continue to live at home and the two associations concerned must give their explicit consent:*

In accordance with Article 19(2)(c) FIFA RSTP, a minor player may be registered with a foreign-based club whilst the player remains living at home, under the condition that the player and his new club are located close to each other and to the same national border.

It must be emphasized that these distance requirements are cumulative in nature. For example, the Sub-Committee has denied registrations of players domiciled within 100km of the new club due to the club being located further than 50km from the national border.

The Regulations do not clarify how the maximum distances should be calculated. However, based on the standing practice of the Sub-Committee, it can be assumed that the distance:

- between the player's domicile and his new club and the border is to be calculated as the "crow flies" (i.e. the most direct route between two places without any of the detours caused by following a road); and
- between the player's domicile and his new club is to be calculated based on the route of travel (e.g. the shortest travel distance between the two according to an online mapping service such as Google Maps).

2.5 The "5-year rule"

Article 19.3 — *The conditions of this article shall also apply to any player who has never previously been registered with a club, is not a national of the country in which he wishes to be registered for the first time and has not lived continuously for at least the last five years in said country:*

The last few years have seen an ever increasing trend in terms of mobility and of families migrating from one country to another (e.g. as a result of employment opportunities or for reasons in the private hemisphere).

As a result of this migration trend, a vast amount of children grow up and spend the majority of their lives in a country of which they do not hold citizenship.

Under the strict application of previous editions of the FIFA RSTP, those children were only allowed to be registered with a club in such country when the exceptions stipulated under Article 19 FIFA RSTP were fulfilled.

Faced with these cases, the Sub-Committee maintained a more pragmatic approach, holding that youngsters, from a sporting point of view, were to be considered nationals of the country in which they grew up and consequently may be registered freely with clubs in their country of residence after a passage of time.

Against this background, FIFA, by means of the 2016 edition of the FIFA RSTP, codified the existing practice of the Sub-Committee in that a minor who is not a national of the country in which he wishes to be registered for the first time, should be excluded from the conditions stipulated in Article 19 RSTP, in case he has continuously lived in the country in which he intends to be registered for at least 5 years.¹⁰

It needs to be emphasized that, in accordance with Article 19.4 FIFA RSTP, such registration remains subject to the approval of the Sub-Committee, which shall have to assess whether the player indeed continuously lived in the foreign country.

¹⁰Cf. FIFA Circular no. 1542 – Amendments to the Regulations on the Status and Transfer of Players.

2.6 Other exceptions

In addition to the exceptions contained in Article 19 FIFA RSTP, the Sub-Committee accepts the international registration of the minor in a limited amount of additional circumstances.¹¹

2.6.1 Exchange students

An increasing number of teenagers take advantage of the opportunity to study abroad as part of their (high school) studies. It also may occur that those minors seek to participate in organised football while being abroad as part of their experience.

Based on this reality, the Sub-Committee accepts the (temporary) registration of a minor player, who studies abroad, with a foreign **amateur** club having no links with a professional club,¹² if the following cumulative conditions are fulfilled:

- The maximum duration of the registration is one year, provided that the player immediately returns to his home country or turns 18 before the end of the educational program;
- Education must be the *primary* reason for spending a period abroad;
- The player lives with a host family during the exchange year; and
- The player's parents and the host parents agree to the registration of the player with the amateur club abroad.

2.6.2 Refugees

In recent times, there has been a large increase in (teenage) refugees fleeing abroad, either alone or with their parents, for humanitarian reasons and thereby seeking international protection. In such cases, the Sub-Committee may also recognize and accept the registration of a minor.

MINORS MOVING FOR HUMANITARIAN REASONS WITH THEIR PARENTS

If a minor, together with his parents, moves for humanitarian reasons to another country and subsequently wishes to be registered with a football club in said country, such situation is, in principle, covered by Article 19(2)(a) FIFA RSTP ("the player's parents move to the country of the new club for reasons not linked to football").

It is commonly known that asylum applications take a long time to be processed, in that following an application submitted by an asylum seeker, it may take several years for the national immigration services to provide a definitive decision on the application.

Aware of this reality, the Sub-Committee, in principle, would allow for the registration of such a minor if the application is supported by an official government document confirming the preliminary acceptance of the asylum seeker (e.g. a document confirming that the refugee may apply for admission to the country concerned).

MINORS MOVING FOR HUMANITARIAN REASONS WITHOUT THEIR PARENTS

Albeit not provided for in the Regulations, minors moving abroad for humanitarian reasons, but who are unaccompanied by their parents, may be registered with a football club abroad under the same conditions as if the player would move with his parents (see above).

In this respect, it must be emphasized that according to the standing practice of the Sub-Committee, these unaccompanied minor asylum seekers may only be registered with amateur clubs; the rationale behind it being to avoid the risk of any third party exploiting the refugee status of such minor player.

¹¹ Cf. FIFA.com "Minor Player Application Guide" or, alternatively, bit.ly/minorguide.

¹² E.g. partnership youth development programmes with a professional club.

2.6.3 Additional unwritten exceptions

The Sub-Committee frequently faces applications for the registration of a minor that do not meet (any of) the exceptions stipulated in Article 19 FIFA RSTP.

Against this background, it is heavily debated whether parties (successfully) may bring forward arguments that would allow the registration of the minor, albeit not explicitly provided for by the Regulations.

According to the standing practice of the Sub-Committee, the list of exceptions contained in the regulations is to be seen as exhaustive, thereby, in principle leaving no room for granting exceptions based on the specific facts of a case (except the exceptions granted outside those of Article 19 FIFA RSTP, i.e. exchange students and unaccompanied asylum seekers).

Contradictory CAS jurisprudence, however, exists and the following distinction can be witnessed:

- CAS jurisprudence confirming the standing jurisprudence of the Sub-Committee, according to which the prohibition of an international transfer of a minor is to be applied in the strict sense of the regulations; and
- CAS jurisprudence stating that the mechanical application of the regulations may contravene the interest of minor players and that an application is to be reviewed by looking at the facts and circumstances of each individual case.

To illustrate these divergent legal opinions, reference is made to two recent contradicting CAS cases.

CAS 2015/A/4178 ZOHRAN BASSONG & ANDERLECHT V. FIFA

CAS 2015/A/4178 dealt with a Canadian player moving to Belgium to live with his grandparents whilst his parents initially remained living in Canada. After an application was lodged to enable the registration of the Player with the Belgian Club Anderlecht, the Sub-Committee rejected the application for the reason that the Player moved abroad without his parents.

After this first rejection, the Player's mother also moved to Belgium, allegedly with the aim of regaining her Belgian nationality. A revised application was submitted, which eventually was rejected by the Sub-Committee holding that she did not move for reasons not related to football, given that she only moved to Belgium after her minor son was already living in Belgium.

The Player appealed the second rejection with CAS. The CAS ruled that the Player's mother indeed had moved to Belgium for reasons related to football, implying that the Player could not be registered with the Belgian club.

Nevertheless, such did not provide that the Player could not be registered with the Belgian club. More precisely, CAS referred to the objectives of the prohibition of transfers of minors (i.e. to protect the safety of minors and avoid them from any form of abuse) and assessed whether the Player in CAS' view was at risk.

In eventually coming to its conclusion, the Panel took into account:

- The family's positive economic situation, which minimized the risk of the Player's commercial exploitation;
- The fact that the Player enjoyed a proper football and academic education while living in Belgium;
- That the Player's father indicated that he would join and live with his family in Belgium in due course.

Against this background, CAS came to the understanding that a mechanical application

of the regulations, resulting in a rejection of the application, would be against the Player's best interests and consequently decided to approve the registration of the Player.

Concluding, rather than determining, whether any of the Article 19 FIFA RSTP exceptions criteria were fulfilled in the case at hand, CAS reviewed the application by assessing the facts and circumstances of the individual case in light of the rationale of Article 19 FIFA RSTP.¹³

CAS 2015/A/4312 JOHN KENNETH HILTON V. FIFA

The Player in the case at hand was an acknowledged talented youngster from the USA relocating with his mother to the Netherlands, and he intended to be registered with the Dutch football club, AFC Ajax. According to the Player, his move to the Netherlands was solely based on his mother's desire to set up her own business abroad and consequently should be seen independently of the Player's football career.

After the Sub-Committee rejected the approval of the transfer, the Player lodged an appeal with CAS. The Panel eventually was convinced that the Player's move to the Netherlands was mainly motivated by football reasons. In this respect, it stressed that even if "football" would be only one reason for the Player's relocation, such would have been sufficient to reject the application. As such, the Panel referred to the necessity to strictly apply the prohibition of an international transfer of a minor.

Rather than assessing the rationale of the regulations and determining whether the player's best interests were protected by the rejected application, the Panel ruled that:

"Article 19 FIFA RSTP sets key principles designed to protect the interest of minor players" which consequently requires "the need to apply the rules on the protection of minors in a strict, rigorous and consistent manner".

Referring to previous CAS jurisprudence,¹⁴ the Panel held that:

"Article 19 FIFA RSTP and its exceptions are clear and there is nothing else for the Panel but to apply them since this Panel does not have the task to legislate, but to apply the rules".¹⁵

Based on these contradicting recent awards, it will be interesting to see how CAS, in the long run, will adjudicate similar cases in the future. Will CAS panels apply the rationale behind the regulations to the facts and circumstances, or will they adhere to the grammatical and strict application of Article 19 RSTP as such.

3 Transfer of minors' application & registration – key pitfalls

3.1 Documents supporting the application

The ECA Legal Department is regularly contacted by its Member Clubs, enquiring why an application on the registration of a minor, which appears to meet the requirements stipulated in Article 19 FIFA RSTP, appears to be delayed.

Whereas the national association, shall, via the FIFA Transfer Matching System (TMS), submit the application for the approval of the international move of a minor, in practice, clubs present their respective national association with the relevant arguments and documents supporting their findings that a minor may be registered with the club.

¹³For additional cases in which CAS ruled that the list of exceptions stipulated in Article 19 are not exhaustive, reference is made to TAS 2012/A/2862 FC Girondins de Bordeaux c. FIFA and CAS 2008/A/1485 FC Midtjylland A/S v. FIFA.

¹⁴CAS 2007/A/1403, RC Racing de Santander SAD v. Club Estudiantes de la Plata.

¹⁵For additional cases in which CAS confirmed the strict application of Article 19 FIFA RSTP, reference is made to TAS 2012/A/2787 Villarreal CF c. FIFA, TAS 2011/A/2494 FC Girondins de Bordeaux c. FIFA & CAS 2011/A/2354 Elmir Muhic v. FIFA.

¹⁶Article 5.2 Annexe 2 FIFA RSTP: If an obligatory document is not submitted, or if a translation or an official confirmation is not submitted in accordance with article 7 below, the applicant will be notified accordingly in TMS. An application will only be processed if all obligatory documents have been submitted (...).

¹⁷Article 7 Annexe 2 FIFA RSTP: If a document is not available in one of the four official languages of FIFA, the association shall also submit either a translation of the document in one of the four official languages of FIFA (English, French, German and Spanish), or an official confirmation of the association concerned that summarises the pertinent facts of each document in one of the four official languages of FIFA. Failure to do so may (...) result in the sub-committee disregarding the document in question.

From our experiences, delays are frequently caused by the fact that in the majority of applications, the FIFA Administration is forced to request the engaging national association to provide (additional) documentary evidence¹⁶ and/or the translation of documents.¹⁷

Such evidently provides for a delay in the minor application procedure and might even result in the rejection of the application in the case. Albeit being requested to provide additional documents, the national association sometimes fails to upload the documents as requested by FIFA.

In order to avoid this unnecessary delay, and against the background of clubs not always being fully aware of the documents which need to accompany an individual minor's application, FIFA has issued the "Minor Application Guide".¹⁸ This guide outlines the specific documents to be included in the application depending on the circumstances surrounding the move of the minor (e.g. the exception which is allowing the registration of the minor).

3.2 Registration of a minor – ITC procedure

It should be stressed that obtaining the Sub-Committee's approval merely concerns the first step in the registration process of the player.

Similar to that of any other player transferring between two associations, the Player's new club and its association still need to perform a series of administrative requirements in order to obtain the player's ITC, which eventually allows the player to be registered with his new club.

In line with the principle that players may only be registered during one of the two annual transfer registration periods fixed by the National Association,¹⁹ Article 8.1 para. 3 Annexe 3 FIFA RSTP requires the ITC to be requested by the new association in TMS on the last day of the registration period of the new association at the latest.

Given the (possible) time lapse between the submission for the approval of the minor application and the approval of such request by the Sub-Committee, there is an unwritten exception with regards to the transfer of a minor.

In case the request for the approval is made prior to the end of the relevant registration window and the Sub-Committee only approves the registration of a minor player outside of the registration period, the player may still be registered with his new club outside the registration period.

However, for such registration to be possible outside the transfer window and for a national association to initiate the procedure to request the ITC, a club must have entered and uploaded all compulsory data and documentation in TMS **before the closing of its transfer window**.²⁰

Whereas for the purpose of the ITC, FIFA, in the past, allowed clubs intending to register a minor to upload all compulsory data and relevant documents in TMS once the FIFA Sub-Committee had approved the registration, this has now changed.

More precisely, as of the 2016/17 winter transfer window, FIFA changed its approach and clubs wishing to register a minor must, as of January 2017, always enter and upload all compulsory data and documentation in TMS prior to the end of the transfer window and do so regardless of the pending approval of the Sub-Committee on the minor application.²¹

¹⁸ Cf. FIFA.com "Minor Application Guide" or, alternatively, bit.ly/minorguide

¹⁹ Article 6.1 FIFA RSTP.

²⁰ Article 8.2 para. 1 Annexe 3 in conjunction with Article 4 pars 2 & 3 Annexe 3 FIFA RSTP.

²¹ Cf. FIFA Circular 1587 – International transfers of professional minor players.

II. Feedback from CAS & UEFA

1 “Future contracts” and entitlement to compensation

1.1 Introduction

This article summarizes a recent case of the Court of Arbitration for Sport (CAS) in which the Panel had to decide whether a player’s new club would be entitled to a penalty clause contained in the employment contract concluded with the player, which was triggered after the player had failed to join his new club.²²

The interesting point of this case lies in the fact that the player’s new club had concluded an employment contract with the player while he still had a valid contract with his former club for more than 6 months, which consequently provided that the new club acted in breach of Article 18.3 FIFA RSTP²³ when signing the player.

According to the standing practice of the FIFA Dispute Resolution Chamber (DRC), a club failing to correctly ascertain the contractual situation of a player and disrespecting the FIFA Regulations, such as the club in the case at hand, is not entitled to any compensation in accordance with the *nemo auditur propriam turpitudinem allegans* principle (i.e. nobody can benefit from his own wrong).²⁴

In this case, however, CAS held the opposite, as it entitled the player’s supposed-to-be new club to (contractual) compensation, regardless of the fact that the club incorrectly assessed the player’s contractual status with his current club when contracting the player.

1.2 CAS 2016/A/4495-4535

MAIN FACTS OF THE CASE

The main relevant facts of the case can be outlined as follows:

Hakan Çalhanoğlu (‘Player’) performed his activities as a football player with the German club Karlsruhe Sport Club (‘Karlsruhe’) under a ‘development contract’. This contract was valid as of 1 July 2009 until 30 June 2012 and entitled the Player to a monthly salary of EUR 250–400 (depending on the sporting season).

In April 2011, i.e. more than one year prior to the expiry of the contract with Karlsruhe, the Player and the Turkish club Trabzonspor Kulübü (‘Trabzonspor’) reached a ‘preliminary agreement’ to enter into an employment relationship.

According to this agreement, the parties would enter into an employment contract valid from the 2012/13 football season until the end of the 2016/17 season.

At the same time, the agreement contained a penalty clause according to which the Trabzonspor would be entitled to EUR 1m in case the Player would fail to sign an actual employment contract with the club at the beginning of the 2012/13 football season and/or would sign a contract with another club.²⁵

On an unknown date, the Player and Trabzonspor concluded an employment contract valid as of 1 July 2012 until 31 May 2017, containing an almost identical penalty clause as stipulated in the preliminary agreement.

Regardless of having signed a contract with the Turkish club, the Player entered into a new (and simultaneous) employment contract with Karlsruhe, valid as of 1 July 2012 until 20 June 2016 and subsequently failed to join Trabzonspor at the start of the 2012/13 football season.

Faced with the Player’s breach of contract, Trabzonspor filed a claim against him with the FIFA DRC.

The DRC eventually concluded that the Player terminated his employment contract with Trabzonspor without just cause; and, in accordance with Article 17.3 of the FIFA Regulations on the Status and Transfer of Players (‘FIFA RSTP’), banned the Player from playing

²² CAS 2016/A/4495 Hala Calhanoğlu v. Trabzonspor FC & FIFA and CAS 2016/A/4535 Trabzonspor FC v. Hakan Calhanoğlu.

²³ Article 18.3 FIFA RSTP: A club intending to conclude a contract with a professional must inform the player’s current club in writing before entering into negotiations with him. A professional shall only be free to conclude a contract with another club if his contract with his present club has expired or is due to expire within six months.

²⁴ Cf. FIFA DRC, 27 November 2014, No1114239, PFC CSKA Sofia v. Said Husejinović & GNK Dinamo Zagreb.

²⁵ The full penalty clause read as follows: “If the Player will not sign the agreement which is going to be registered with the Turkish Football Federation at the beginning of the 2012/13 season and/or signs another employment contract which will register him to another club, then the Player accepts and undertakes to pay EUR 1,000,000 (the down payment which is going to be paid after signing of this Preliminary Agreement is also included and this penalty clause is valid only if this down payment is made). The Player irrevocably declares that this amount is not excessive”.

in any official matches for four months. In line with its vast practice, the DRC however rejected the claim on damages as claimed by Trabzonspor.

Unsatisfied with the outcome of the FIFA proceedings, both the Player and Trabzonspor appealed the decision with CAS.

1.3 Considerations of the Panel

I. THE AMATEUR/PROFESSIONAL STATUS OF THE PLAYER

Trabzonspor argued that the Player was an amateur when he was playing with Karlsruhe under the development contract and, consequently, was not at fault when signing the Player.

The Panel, however, held the opposite as it concluded that, albeit receiving a low monthly salary, the Player still received more remuneration than the expenses he incurred.²⁶ Consequently, CAS confirmed the applicability of the FIFA RSTP to the situation in which Trabzonspor contracted the Player, albeit still being under contract with his previous club.

II. THE VALIDITY OF THE AGREEMENTS CONCLUDED BETWEEN THE PLAYER AND TRABZONSPOR

Given that the Player was a minor the moment he concluded the two agreements with Trabzonspor, and which would bind the Player with Trabzonspor for 5 seasons, he argued both agreements were null as they violated Article 18.2 FIFA RSTP, according to which minors may not sign professional contracts for a term longer than three years.²⁷

The Panel, however, rejected the Player's position, as it noted that Article 18.2 FIFA RSTP only provides that, if a club concludes a contract with a minor in excess of 3 years, the enforceable duration of such contract would be reduced to the maximum duration of 3 years rather than resulting in the invalidity of the contract as such.

The Player further asserted that the Preliminary Agreement contained an excessive penalty clause and condition precedent (the requirement of a medical check-up), which breached Article 18.4 FIFA RSTP.²⁸

The Panel noted that regardless of an excessive penalty amount, such may only lead to the reduction of such amount but does not render the contract invalid. Equally with regards to the provision of the medical examination condition, the Panel stressed that, albeit such provision may be invalid, such does not render the entire contract invalid.

In addition, the Player held the contract not to be enforceable, given that the contract was never registered with the Turkish football federation, albeit being a prerequisite stipulated in the employment contract.

The Panel, however, held that, as Trabzonspor made the down payment of EUR 100,000, which was subsequently retained by the Player, Trabzonspor and the Player gave effect to the contract and effectively waived this condition precedent.

III. BREACH BY THE PLAYER AND THE CONSEQUENCES THEREOF

By entering into a new agreement with Karlsruhe covering the same period as the contract concluded between the Player and Trabzonspor, the Panel held that the Player had signed two simultaneous contracts and in doing so had violated Article 18.5 FIFA RSTP.²⁹

As the Player failed to adhere to terms of the agreements with Trabzonspor, the Panel quickly concluded that the player terminated the preliminary agreement and employment contract without just cause and continued to determine the consequences of the breach.

²⁶ Cf. Article 2.2 FIFA RSTP.

²⁷ Article 18.2 FIFA RSTP: Players under the age of 18 may not sign a professional contract for a term longer than three years. Any clause referring to a longer period shall not be recognised.

²⁸ Article 18.4 FIFA RSTP: The validity of a contract may not be made subject to a successful medical examination and/or the grant of a work permit.

²⁹ Article 18.5 FIFA RSTP: If a professional enters into more than one contract covering the same period, the provisions set forth in Chapter IV (note: including the consequences of terminating a contract without just cause) shall apply.

Following the conclusion of the preliminary agreement, Trabzonspor processed the payment for the first instalment due to the Player in the amount of EUR 100,000.

Trabzonspor held that, as a result of the breach, they were entitled to the reimbursement of the advance payment of EUR 100,000 and compensation in the amount of EUR 1,000,000 corresponding to the penalty clause stipulated in the two agreements it had concluded with the Player.

As a starting point, the Panel however held the claim for the return of the advance payment to be included in the amount of the penalty clause, which read that “the down payment was included in the penalty amount”. Consequently, the Panel held that the claim on the advance payment could not be considered as a separate claim.

The Panel consequently had to determine the validity of the Penalty clause as such. In this respect it referred to Article 163.3 CO, according to which penalties may be reduced when excessive in nature. Besides, the Panel referred to the standing CAS jurisprudence, according to which panels should consider the degree of fault, the economic situation of the parties,³⁰ the nature and duration of the contract,³¹ and the lack of reciprocity, to determine whether a penalty is excessive in nature.

Against this background, the Panel held that:

- Trabzonspor should have considered the Player a professional and consequently should have contacted Karlsruhe prior to concluding a contract with the Player;
- The penalty clause solely favoured Trabzonspor;
- Trabzonspor concluded contracts with a minor player for a period longer than 5 years.

Based on these circumstances, CAS reduced the penalty for breach of contract to be paid by the Player to EUR 100,000 (i.e. the same amount the player already had received as an advanced payment!).

At the same time, the Panel confirmed the proportionality of the sporting sanctions imposed by the FIFA DRC, i.e. the ban from playing in any official matches for four months.

1.4 Conclusion

Contrary to the standing practice of the FIFA DRC, the Panel in the case at hand, albeit being very fact specific, confirmed the entitlement of the Player’s new club to a penalty clause, despite not having acted with due diligence when contracting with the player.

Conversely, the way the Panel analysed the proportionality of penalty clause is questionable, in that penalty clauses should only be reassessed if they are excessive. The Panel’s argumentation as to why the clause was excessive lacks sufficient reasoning, in addition to which the award also lacks reasoning as to why the penalty would then need to be brought down to 1/10th of the agreed penalty.

³⁰Cf. CAS 2015/A/4057 Maritimo da Madeira Futebol SAD v. Al-Ahli Sports Club.

³¹Cf. CAS 2010/A/2202 Konyaspor Club Association v. J.

2 Player loans and training compensation

2.1 Introduction

In accordance with Article 3 Annexe 4 FIFA RSTP:

- Training compensation is payable to every club with which the player has previously been registered when a player signs his first professional contract;
- In the case of subsequent transfers of the professional, training compensation will only be owed to his former club each time the professional is transferred between clubs, either during or on expiry of his contract, until the end of the season of his 23rd birthday.

From the vast case law of the FIFA DRC and CAS, it follows that clubs receiving a player on loan are also entitled to training compensation, although not being the player's 'former club' strictu sensu, in case the player, after the expiry of the loan, returns to his club of origin and thereafter permanently transfers abroad before the end of his 23rd birthday.³²

The rationale behind the approach is that, if the opposite were true, it would entail that clubs accepting a player on loan would never be entitled to receive training compensation, albeit having contributed to the training and education of the player.

Contrary to the standing practice of the football adjudicatory bodies, a Sole Arbitrator in a recent CAS decision, held the opposite by concluding that the FIFA RSTP provisions do not entitle clubs having registered a player on a loan basis to training compensation in case of a subsequent permanent transfer.³³

2.2 CAS 2016/A/4823

MAIN FACTS OF THE CASE

The player, Uroš Ćosić ('Player'), was registered as an amateur player with the Serbian club Crvena Zvezda ("Red Star"), after which he was transferred to the Russian club PFC CSKA Moscow ('CSKA') in the summer of 2009, with which the Player became registered as a professional for the first time.

The Player was subsequently loaned (back) to Red Star for periods from January 2011 until June 2012.

After the Player returned to CKSA, the latter club subsequently loaned the Player to the Italian club Delfino Pescara 1936 ('Pescara') for the 2012/13 season. As part of the loan arrangement, the clubs agreed to a definitive transfer option allowing Pescara to transfer the player on a permanent basis, as of 1 July 2013, in return for a payment of EUR 1,000,000.

Pescara triggered the definitive transfer option on 23 May 2013, following which the Player was registered with Pescara as a "permanent player" on 28 May 2013.

As a result of the permanent transfer, Red Star, on 30 July 2015, successfully filed a claim for training compensation with the FIFA DRC for the period it had received the Player on loan.

Pescara subsequently filed an appeal against the DRC decision with CAS, in doing so it, however, only summoned Red Star and not FIFA.

In the appeal proceedings, the CAS Sole Arbitrator had to determine if:

- The appeal against the DRC was inadmissible in light of the fact that Pescara failed to summon FIFA in the proceedings ('standing to be sued');
- Red Star's claim on training compensation with the DRC was time-barred; and
- Red Star was entitled to training compensation for the period during which the Player was registered with the club on a loan basis.

³² Cf. ECA Legal Bulletin 4, September 2014, FIFA DRC 1 March 2012, no. 3121474 and CAS 2013/A/3119 Dundee United FC v. Club Atlético Vélez Sarsfield.

³³ CAS 2016/A/4823 Delfino Pescara 1936 v. FK Crvena Zvezda.

2.3 Considerations of the Sole Arbitrator

I. STANDING TO BE SUED

During the CAS proceedings, Red Star argued that, on the basis of Article 75 of the Swiss Civil Code ('SCC')³⁴ and earlier jurisprudence of the Swiss Federal Tribunal³⁵ and CAS,³⁶ it did not have standing to be sued independently of FIFA.

More precisely, Red Star considered an appeal against the DRC as a challenge to a decision of an association, which, in the eyes of the club, implied that the association, i.e. FIFA, needed to be sued by Pescara in order for the appeal to have merit.

In analysing this issue, the Sole Arbitrator acknowledged that the resolution of FIFA's reciprocal rights and obligations under the FIFA RSTP indeed involves FIFA's interest in upholding and enforcing its transfer and (training) compensation regime.

However, the Sole Arbitrator held the decision on training compensation, not to be:

"wholly analogous to the protection of member rights under Article 75 SCC which would require the joinder of FIFA as a Respondent in contrast to a contractual dispute which does not put the direct interests of FIFA at stake".

In doing so, the Panel referred to CAS 2008/A/1517³⁷ in which the Panel, in a contractual (horizontal) dispute between a player and a club, held that:

"A dispute between two football clubs, i.e. two association members, (...) is not a dispute which can be appealed against under Art. 75 Swiss Civil Code (...). The sports association taking a decision is not doing so in a matter of its own, i.e. in a matter which concerns its relationship to one of its members, rather it is acting as a kind of first decision-making instance, as desired and accepted by the parties".

In addition, the Sole Arbitrator felt the need to emphasise that, in accordance with the CAS Code,³⁸ FIFA's interest had been duly respected throughout the CAS proceedings since FIFA:

- Had received a copy of the statement of appeal and appeal brief and, in line with Article R41.3 of the CAS Code, had been given the opportunity to participate in the proceedings as an interested third party; and
- Expressly renounced its right to participate in the CAS proceedings.

Consequently, the Sole Arbitrator concluded that not summoning FIFA did not impact the admissibility of Pescara's appeal.

II. TIME LIMITATION OF THE CLAIM ON TRAINING COMPENSATION

In accordance with Article 25.5 FIFA RSTP, the FIFA DRC shall not hear any case if more than 2 years have elapsed since the event giving rise to the dispute.

Pescara held Red Star's claim lodged with the DRC on 30 July 2015 to be considered time-barred by claiming that the 2-year period of limitation for Red Star's claim was, at the latest, to be calculated as from 30 days after the Player had been registered as a permanent player of Pescara, i.e. 28 May 2013.³⁹

The Sole Arbitrator stressed that regardless of the fact that Pescara exercised the option to transfer the Player on a permanent basis on 23 May 2013, resulting in the permanent registration with the club on 28 May 2013, the permanent transfer only took effect on 1 July 2013.

This date was in accordance with the "definitive option" and matched with the opening of the summer registration window as maintained by the Italian Federation and consequently considered to be the date as of which the 2 years + 30 days period of limitation for claiming training compensation was to be calculated.

Against this background, the Sole Arbitrator held that Red Star had timely filed its claim on training compensation with the FIFA DRC on 30 July 2015.

³⁴ Article 75 SCC: Any member who has not consented to a resolution which infringes the law or the articles of association is entitled by law to challenge such resolution in court within one month of learning thereof.

³⁵ SFT decision 4A_490/2009, 13 April 2010, reported in ATF 136 III 345.

³⁶ CAS 2014/A/3489 Sociedade Esportiva Palmeiras v. David Braz de Oliveira Filho & Panathinaikos FC and CAS 2014/A/3490 Panathinaikos FC v. Sociedade Esportiva Palmeiras & FIFA & David Braz de Oliveira Filho.

³⁷ CAS 2008/A/1517 Ionikos FC v. C.

³⁸ Article R52.2 CAS Code.

³⁹ Article 3.1 Annexe 4 FIFA RSTP: On registering as a professional for the first time, the club with which the player is registered is responsible for paying training compensation within 30 days of registration to every club with which the player has previously been registered.

III. ENTITLEMENT TO TRAINING COMPENSATION FOR HAVING RECEIVED THE PLAYER ON LOAN

The most interesting aspect of the case at hand actually lies in the fact that the Sole Arbitrator, after having confirmed the admissibility of the appeal, eventually held that Red Star was not entitled to any amount of training compensation despite having trained and educated the Player while he was on loan with the latter club.

More precisely, the Sole Arbitrator set aside the DRC decision, disregarding previous and extensive case law on the topic as well as the rationale behind the entitlement to training compensation for clubs having received players on a loan basis.

In this respect, it must be emphasized that the CAS award, unfortunately, lacks a clear and understandable reasoning and motivation based on which the Sole Arbitrator made its assessment. More precisely, various arguments maintained by the Sole Arbitrator in arriving to its final assessment lack clarity, both in terms of language and rationale:

- The strict wording of Article 3 Annexe 4 FIFA RSTP states that, in case of a subsequent transfer, only the player's former club is entitled to training compensation. Under the FIFA RSTP, the "player's former club" is defined as "the club that the player is leaving".⁴⁰
- The notion of "the player's former club" does not entail more than one club may claim training compensation in case of a subsequent transfer. If the opposite were true, the Regulations could have clarified this.
- Therefore, the literal interpretation of the notion "former club" in Article 3 Annexe 4 FIFA RSTO is unlikely to be interpreted as "his former club and in a case where his former club loaned the player, any club taking the player on loan from his former club".
- *"To entitle a borrower club to training compensation against a new club purchasing from a professional player's parent club, would seem likely to create confusion and anomaly. It would require training compensation to be paid to several clubs which are expected to reckon these financial aspects in their arrangements inter se and thus ignore the arrangements between the parent and borrower clubs, which might include financial adjustments already reflecting the borrower's contribution to training. (sic – paragraph 63)*
- *"whilst not seeking to undermine the principle that a "former" club which had the player on loan should not be excluded from compensation merely because they trained the player whilst he was on loan, it does not follow that the clear meaning of Article 3 of Annexe 4 RSTP (...) should be substituted by the converse proposition – that a club who borrows a professional should always be entitled. In addition to the parent club which is the "former club" which sells the player, to training compensation from a subsequent club for their relevant period of training." (sic – paragraph 66)*

2.4 Conclusion

In the eyes of the author, and leaving in the middle whether the CAS award as such is correct or not as to its findings, lacking an understandable and well-reasoned motivation leading to the CAS award at hand, the outcome is truly a missed opportunity. Moreover, keeping in mind the vast amount of existing jurisprudence existing at DRC level, entitling clubs to training compensation for having received players on loan, it remains to be seen what the approach of the DRC and the future CAS panel will be in relation to future claims on training compensation.

Nonetheless, it should indeed be appreciated that the RSTP provisions in relation to the entitlement to training compensation of clubs having received a player on loan are unclear,

⁴⁰ FIFA RSTP Definitions.

both for clubs claiming training compensation and those faced with such claims. This award should serve as a “wake-up call and invitation” to discuss the policy regarding this topic and subsequently clarify this issue once and for all by making the required regulatory changes in the FIFA RSTP.

3 Unrequested joinder to FIFA proceedings

3.1 Introduction

In the case of a breach of contract by a player, it is commonly known that, on the basis of Article 17.2 FIFA RSTP, the player’s new club may be held jointly and severally liable for the payment of the amount of compensation payable by the player to his former club because of a contractual breach.⁴¹

Regardless of this provision, a club claiming compensation from its former player may omit to summon the player’s new club to the proceedings and/or fail to request the FIFA DRC hold the new club jointly and severally liable for the payment of compensation.

Irrespective of such a fact, FIFA, as a standing practice, nevertheless, *ex officio*, involves the new club in the proceedings. Consequently, the FIFA DRC might hold a player’s new club jointly and severally liable for the payment of compensation awarded to the player’s former club, albeit not being demanded by the latter.

In a recently rendered CAS case, the Panel had to determine the legal validity of this approach.

3.2 CAS 2015/A/4176⁴²

MAIN FACTS OF THE CASE

Following a contractual dispute between the Argentinian football player, Iván Díaz (‘Player’), and the Slovakian club, AS Trenčín, the latter club filed a claim with the FIFA DRC against the Player for the breach of contract.

Trenčín exclusively directed its claim against the Player as it failed to summon the club the Player joined after breaching the contract with Trenčín, Club Atlético River Plate (‘River Plate’), to the proceedings.

Regardless, FIFA, in line with its standing practice, sent a letter to River Plate by means of which it informed the club on the pending proceedings and that it requested the club to present its input relating to the dispute at hand.

Responding to FIFA’s request, River Plate explicitly informed FIFA that it was not a party to the proceedings given that Trenčín never had lodged a claim against it.

Nonetheless, while eventually awarding AS Trenčín EUR 200,000 as compensation based on the Player’s breach of contract, the DRC held River Plate jointly and severally liable for the payment of this amount by effectively involving River Plate as a party to the dispute.

River Plate subsequently lodged an appeal against the FIFA decision with CAS, where it primarily submitted that it was to be exempt from the joint and several liability of the payment of compensation because of not being summoned by Trenčín in the FIFA proceedings.

⁴¹Article 17.2 FIFA RSTP: Entitlement to compensation cannot be assigned to a third party. 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.

⁴²CAS 2015/A/4176 Club Atlético River Plate v. AS Trenčín & Iván Santiago Díaz.

3.3 Considerations of the Panel

As a starting point, the Panel referred to Article 9 of the FIFA Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber ('Procedural Rules'), setting out the requirements of petitions and statements in FIFA proceedings:

"Petitions shall be submitted in one of the four official FIFA languages via the FIFA general secretariat. They shall contain the following particulars:

- a) the name and address of the parties;
- b) the motion or claim;
- (...)
- f) the name and address of other natural and legal persons involved in the case concerned (evidence) (...)"

The Panel held that this provision requires claimants themselves to determine the parties' *casu quo* respondents in the FIFA proceedings. The Panel, however, pointed out there was no evidence confirming that Trenčín indeed determined River Plate as a respondent in the proceedings. In arriving at its understanding, the Panel referred to the following observations:

- Prior to filing its claim with FIFA, Trenčín was already informed that the Player engaged in football activities with River Plate. Nevertheless, Trenčín exclusively directed the claim against the Player and failed to request FIFA to consider River Plate as a party to the proceedings; and
- FIFA only included River Plate in the proceedings after the Player himself informed FIFA that he had joined the club following the contractual dispute with Trenčín.

The Panel then assessed whether FIFA, opposed to Trenčín, established River Plate as a party to the proceedings and if it was entitled to do so.

Notwithstanding that the Panel observed that FIFA had notified the club of the proceedings by means of a letter, it maintained that this letter merely served to notify River Plate on the existence of the procedure and to invite the latter to provide any comments it may have in relation thereto.

Furthermore, the Panel clarified that, in accordance with the Procedure Rules, FIFA, in any case, would not have the power to call the club a party, this being the sole obligation of a claimant to name the respondent(s) in a procedure.

In addition, the Panel stressed that, in accordance with the *non ultra petita* principle⁴³, which, albeit not explicitly contained in the Procedural rules, are considered implicit in FIFA's regulations, any possible liability for River Plate derived from the FIFA proceedings could only have been established from a specific and previous claim of Trenčín.

The Panel concluded that as Trenčín failed to lodge a claim against River Plate with FIFA, FIFA did not have the power to implicate the club as a party. Seeing that the Panel held that River Plate was never deemed to be a party to the proceedings, it decided that the FIFA DRC had no power to hold the club jointly and severally liable for the payment of the compensation awarded to the Player's former club and consequently upheld the appeal lodged by River Plate.

3.4 Conclusion

Moving forward and following the recent CAS award as analysed herein, it will be interesting to see if, in similar cases, the FIFA DRC changes its approach in actively involving the player's new club as a party to the proceedings when they are not requested to be by the claiming party.

⁴³A jurisdictional body may not award a party more than or different from what the party has requested.

4 Admission of two identically branded clubs into the UEFA Champions League

4.1 Introduction

The UEFA Champions League ('UCL') and UEFA Europa League ('UEL') Regulations contain a broad variety of criteria aimed at ensuring the integrity of the UEFA Club Competitions which deal, amongst others, with the issue of common/cross ownership of clubs participating in UEFA Club Competitions.

In this regard, these regulations *inter alia* prohibit clubs participating in a UEFA club competition, to be involved in the management, administration and/or sporting performance of, or to hold a stake in, any other club participating in a UEFA club competition.⁴⁴

At the same time, the regulations prohibit any other legal entity (i.e. not being a club) to have control or influence over more than one club participating in a UEFA club competition by, amongst others, holding a majority of the shareholders' voting rights or by being able to exercise by any means a decisive influence in the decision-making of the club.⁴⁵

In a recent decision of the UEFA Club Financial Control Body Adjudicatory Chamber ('CFCB AC'),⁴⁶ the latter had to determine whether these regulations prevented two Red Bull branded clubs – RasenBallSport Leipzig ('RB Leipzig') and FC Red Bull Salzburg ('FC Salzburg') – from simultaneously participating in the 2017/18 UCL.

4.2 UEFA CFCB AC AC-01/2017

MAIN FACTS OF THE CASE

Based on their final ranking in the 2016/17 season of, respectively, the German and Austrian Leagues, both RB Leipzig and FC Salzburg qualified for the 2017/18 edition of the UCL.

Upon a request from the UEFA General Secretary, who was concerned that the two clubs might not satisfy the UCL integrity criteria, the UEFA CFCB opened an investigation on the two clubs.

Following its investigation, the CFCB Investigatory Chamber ('IC') eventually concluded that the clubs could not simultaneously participate in the 2017/18 UCL.

More precisely, the CFCB IC held that given the existence of several links between the legal entity Red Bull GmbH and both clubs, as well as between the Clubs themselves, Red Bull would have decisive influence over each RB Leipzig and FC Salzburg, thereby violating Article 5.01(c)(iv) UCL Regulations ('UCLR').

Based on its findings, the CFCB IC subsequently referred the case to the CFCB Adjudicatory Chamber ('AC') for a formal decision on the eligibility of the two clubs.

In its submission, the CFCB IC held that RB Leipzig should be denied access to the 2017/18 UCL, whereas FC Salzburg would be given access to the competition given that it was the best-ranked club in the 2016/17 domestic competition.⁴⁷

4.3 Considerations of the CFCB Adjudicatory Chamber

DEFINING THE NOTION 'DECISIVE INFLUENCE IN THE DECISION-MAKING OF A CLUB'

Given that the Regulations do not define when a legal entity is able to exercise a 'decisive influence in the decision-making of a club', the CFCB AC had to interpret the notion and its scope prior to applying it to the case at hand.

The CFCB AC held that the notion 'decision making' being under scrutiny, should be limited to those decisions having an impact on the integrity of a competition, i.e. decisions relating to matters affecting the performance of a club in a competition.

⁴⁴ Article 5.01(a) Regulations of the UEFA Champions League 2015–18 Cycle, 2017/18 Season ('UCLR') & Regulations of the UEFA Europa League 2015–18 Cycle, 2017/18 Season ('UELR').

⁴⁵ Article 5.01(c) UCLR & UELR.

⁴⁶ UEFA Club Financial Control Body Adjudicatory Chamber AC-01/2017 RasenBallSport Leipzig & FC Red Bull Salzburg.

⁴⁷ Article 5.02(b) UCLR: If two or more clubs fail to meet the criteria aimed at ensuring the integrity of the competition, only one of them may be admitted to a UEFA club competition, in accordance with the following criteria (applicable in descending order):

- the club which qualifies on sporting merit for the more prestigious UEFA club competition (i.e., in descending order: UEFA Champions League and UEFA Europa League);
- the club which was best-ranked in the domestic championship giving access to the relevant UEFA club competition;
- the club whose association has the highest association coefficient ranking.

Consequently, the CFCB AC held that the ‘decision making’ relating to generic corporate, commercial, financial decisions, not affecting the sporting performance of a club, are not to be scrutinized under this notion; given that the UCLR aims at protecting the integrity of clubs rather than regulating clubs’ commercial or financing aspects!

The CFCB AC noted that the ‘decisive influence’ criteria is a high threshold to meet. More precisely, the Chamber *inter alia* referred to the other criteria enshrined in Article 5.01 UCLR, which provide more formalistic prohibited mechanisms.

These mechanisms include the prohibition of a legal entity to hold, in more than one club, a majority of the shareholders’ voting rights or to have the right to appoint or remove a majority of the members of the administrative, management or supervisory body of the club.

The CFCB AC concluded that the benchmark for satisfying the ‘decisive influence’ criteria, aimed at capturing attempts to circumvent the (formalistic) integrity rules stipulated in the Regulations, should consequently be interpreted just as strictly.

Interestingly, in coming to its conclusion, the CFCB AC furthermore, as a guidance, referred to European law, in particular the EU Merger Regulation (EC 139/2004) and held that under this Regulation *“decisive influence arises where a party acquires the ability to determine an undertaking’s commercial strategy. There is no defined shareholding level at which decisive influence arises in this context and, depending on the circumstances (including the size of other shareholdings and the existence of veto rights and other powers granted to shareholders), the acquisition of a minority shareholding in another undertaking may confer the possibility of exercising decisive influence (in particular, if the minority shareholder acquires the ability to block strategic commercial decisions or the appointment of key management)”*.

BURDEN OF PROOF

Before analysing the notion in the circumstances of in the case at hand, the CFCB AC held that, based on the wording of Article 5.01(c)(iv), the burden of proof to prove that Red Bull had decisive influence over both clubs lied with the CFCB IC. More precisely, it held that *“from a practical point of view, although it might be argued that a club should be required to prove that a third party does not have decisive influence over itself, it would be impossible for a club to perform an assessment of such third party’s relationship with another club given that it would lack any access to evidence. This is an examination that can only be carried out by the UEFA Administration and the CFCB Chief Investigator”*.

ANALYSIS OF THE CASE AT HAND

The CFCB AC eventually concluded that Red Bull did not have a decisive influence on both clubs and resembled only a standard sponsorship relationship. In coming to its conclusion, the CFCB AC held in respect of Red Bull’s influence over FC Salzburg,⁴⁸ that:

- FC Salzburg removed individuals who were allegedly linked to Red Bull and RB Leipzig from the General Assembly of its association;
- An individual linked to Red Bull had resigned from his position as Chairman of FC Salzburg’s association Board;
- Loan agreements between FC Salzburg and Red Bull had been terminated; and
- An earlier concluded co-operation agreement between RB Leipzig and FC Salzburg had been terminated.

It must be noted that some of these changes had been implemented following the issues raised by the CFCB IC based upon which the AC proceedings were opened. Subsequently, the CFCB Chief Investigator himself withdrew his objections to the admission of both clubs to the 2017/18 UCL during the AC proceedings.

Against this background, the CFCB admitted both teams to the 2017/18 edition of the UCL.

⁴⁸ As the CFCB AC concluded that Red Bull did not have a decisive influence over FC Salzburg, it no longer needed to assess Red Bull’s influence over RB Leipzig, given that the Regulations only prohibit control or influence of a legal entity over more than one club participating in a UEFA club competition.

III. Late payment of CAS advance of costs

1 Introduction

When lodging an appeal with the Court of Arbitration for Sport (CAS) advance of costs are to be paid in order to have the arbitration proceed.⁴⁹

Should a party, bearing the burden, fail to pay its advance of costs on time or substitute for the advance of costs of the counter-party, such in principle will lead to the termination of the procedure in accordance with Article 64.2 of the CAS Code of sports-related arbitration ('CAS Code').⁵⁰

In a recent decision rendered by the Swiss Federal Tribunal ('SFT'), the Tribunal considered an application to set aside a CAS "award" which had terminated the appeal proceedings because the appealing party had failed to pay the full advance of costs of the proceedings in to the provided deadline.

2 Swiss Federal Tribunal 4A_692/2016⁵¹

MAIN FACTS OF THE CASE

After the United States Anti-Doping Agency (USADA) accused an American gymnast of an anti-doping violation, the latter concluded an 'acceptance of sanction agreement' with USADA with the aim of avoiding further prosecution.

The World Anti-Doping Agency (WADA) challenged this agreement with CAS as it did not agree with its content.

After receiving the appeal, CAS informed the parties on the advance of costs to be paid in respect of the procedure. More precisely, it informed WADA that it would have to pay CHF 18,000, whereas both USADA and the athlete would have to pay CHF 9,000 each.

After both the athlete and USADA subsequently informed CAS that they would refuse to pay their share of the advance of costs, CAS informed WADA to pay the full amount of the advance of costs in line with Article R64.2 of the CAS Code, and such, by 20 September 2016. At the same time, CAS informed WADA that failing to pay the advance would result in the termination of the appeal proceedings.

Due to an administrative oversight, WADA only paid half of the advance before the expiry of the deadline. After WADA was informed of this by CAS, it transferred the remaining outstanding advance after the deadline had expired.

Following WADA's late payment of the advance, USADA and the athlete requested CAS to terminate the arbitration proceedings in accordance with Rule 64.2 of the CAS Code.

Responding thereto, WADA acknowledged its mistake but requested CAS to continue the proceedings regardless of the late payment, as it had always been willing to pay the advance and the delayed payment was caused by a purely administrative error, which was promptly restored upon discovery.

Against this background, WADA held that the termination of the proceedings would constitute excessive formalism.

Regardless the arguments presented by WADA, CAS closed the proceedings by means of issuing a 'termination order', holding that the clear wording of Rule 64.2 of the CAS Code obliged CAS to terminate the proceedings as a result of the late payment.

Faced with the terminated proceedings, WADA filed a request to set aside the termination order with the SFT, arguing the following:

- I. CAS violated WADA's rights to be heard in coming to its decision to terminate the arbitration proceedings; and
- II. By closing the arbitration proceeding due to the late payment, CAS acted excessively formalistic and consequently violated Swiss public policy.

⁴⁹With the exception of proceedings relating to appeals against decisions which are exclusively of a disciplinary nature and which are rendered by an international federation or sports body, which shall be free. Cf. Article R65 CAS Code.

⁵⁰Article R64.2 CAS Code: (...) The advance shall be paid in equal shares by the Claimant(s)/Appellant(s) and the Respondent(s). If a party fails to pay its share, another may substitute for it; in case of non-payment of the entire advance of costs within the time limit fixed by the CAS, the request/appeal shall be deemed withdrawn and the CAS shall terminate the arbitration (...).

⁵¹For the purpose of writing this article, use has been made of the article: Prof. Dr. Nathalie Voser and Dr. Philip Wimalasena, Termination of proceedings for failure to pay advance, not excessively formalistic, Switzerland 23 May 2017.

3 Considerations of the Tribunal

POSSIBILITY TO APPEAL THE TERMINATION ORDER

As a first step, the Tribunal had to determine whether the termination order as such was to be considered an award against which setting aside proceedings with the SFT may be lodged.⁵²

The Tribunal held that, albeit not being titled as an ‘award’, a request to set aside the termination order rendered by CAS may nevertheless be lodged with the SFT. The reason behind it being that the order contained a final and substantive decision containing the irrebuttable presumption of the withdrawal of the appeal and amounting to a decision on inadmissibility on procedural grounds.

Although the CAS President, rather than an Arbitration Panel, issued the order, the Tribunal explained that this did not prevent it from being a decision appealable to the SFT.

VALIDITY OF THE TERMINATION ORDER

I. Right to be heard

The Tribunal went on by assessing whether CAS had violated WADA’s right to be heard, for failing to assess the reasons for the late payment as brought forward by WADA and for failing to substantiate whether the strict application of Article 64.2 of the CAS Code was justified given the circumstances of the case.

The SFT, however, held that the right to be heard principle does not imply an arbitral decision to contain a list of reasons based upon which the decision had been rendered, especially not when it concerns a termination order issued *Ipsa Jure*.⁵³

The Tribunal held that the principle merely entails that an arbitral tribunal shall, in coming to its decision, have to consider the main arguments and evidence as brought forward by the parties. In the case at hand, however, which concerns a ‘penalty’ for a party having failed to comply with a procedural rule, an arbitration tribunal is not required to dedicate a sincere amount of time to its assessment, given that procedural rules leave the Arbitration Tribunal little room for deviation.

Since CAS had given WADA the opportunity to determine the consequences of the late payment of the advance, and in its termination order enumerated the arguments brought forward by WADA, the Tribunal concluded that CAS sufficiently adhered to the right to be heard principle.

II. Excessive formalism

WADA furthermore held that, by closing the arbitration proceeding due to the late payment, CAS acted excessively formalistic, thereby violating Swiss public policy principles.⁵⁴

Lacking any relevant legal doctrine on the matter, the SFT left it undecided whether the prohibition of ‘excessive formalism’ is covered under the notion of public policy. Nonetheless, the Tribunal held there to be no need to pursue the issue further as it concluded that CAS, by no means, showed excessive formalism towards WADA.

⁵² Cf. Article 190-191 Swiss Federal Act on Private International Law (‘PILA’).

⁵³ A legal consequence that occurs by the act of the law itself.

⁵⁴ Article 190.2 PILA: The award may only be annulled (e): if the award is incompatible with public policy.

More precisely, the Tribunal held that formalism in applying procedural rules is only to be qualified as excessive when:

- I. The strict application of the procedural rules is not justified by an interest worthy of protection;
- II. Becomes an end in itself; and
- III. Complicates the realization of substantive law in an unsustainable way; or
- IV. Restricts access to the courts.

The Tribunal subsequently held that, in the case at hand, the consequence to the failure to duly pay the advance of costs does not arise from excessive formalism, provided that the parties had been duly notified on the amount to be paid, the time limit of such payments, and the consequences in case of not observing the time limit.

4 **Conclusion**

It goes without saying that clubs should be fully aware of and adhere to the deadlines presented by the CAS Court Office, or any other adjudicating body for that matter, applicable to the payment of the advance of costs.

As can be clearly derived from this Swiss Federal Tribunal case, regardless of the reason one may have for delaying the advance of costs payments, you will likely be faced with the termination of such procedure, thereby unequivocally losing your opportunity to appeal an unfavourable decision of a first instance body.

In this respect, it should also be noted that one may always seek an extension of the deadline to pay the advance of costs to the CAS Court Office.

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