



No 2 SEP 2012

-
- I. **Economic and so-called “Federative rights”**

 - II. **Feedback from FIFA’s Judicial Bodies & CAS**

 - III. **Questions and Answers**

Annexe

TABLE OF CONTENTS

Introduction p.3	
I.	Economic and so-called “Federative Rights” p.4
II.	Feedback from FIFA’s Judicial Bodies & CAS p.9
RECENT JURISPRUDENCE	
1	Training compensation p.9
1.1	Special provisions for the EU/EEA p.9
1.1.1	<i>Prerequisites</i> p.9
1.1.2	<i>Exception to the exception</i> p.10
1.1.3	<i>Training period and development period</i> p.11
1.2	Pase Libre – waiver? p.11
1.3	Loan prior to definitive transfer p.12
1.4	National Transfer p.13
1.5	Calculation of training compensation p.13
2	Service agreement – jurisdiction p.14
GENERAL REMARKS AND TIPS	
1	Clubs in administration p.14
2	Overdue payables p.17
3	Breach of contract and training compensation p.18
III.	Questions and Answers p.19
1	Solidarity clauses p.19
2	Notification p.20
3	Penalty clauses p.21
4	Field of play p.22
5	FIFA jurisdiction – Forum Clauses & Lack of Competence p.23
6	Scope of Appeal p.24
Annexes p.26	
Bibliography p.28	



Dear ECA Members and Colleagues,

The 2011/2012 football season has been a challenging one from a legal point of view, as numerous high profile cases were brought before the CAS in relation to alleged match fixing, transfer bans and club licensing and overdue payables.

Within the scope of the ECA Legal Services, a legal workshop was organized in May 2012 at which these topics and many others were presented and discussed.

As our first legal bulletin showed, and the workshop confirmed, it is critical for clubs to understand the international regulatory and legal environment in which they operate. We have therefore developed these themes in our second legal bulletin.

As with the first bulletin, this bulletin is based on your input and shaped by your needs. Its main aim is to provide you practical information. Building upon the vast experience gained last season supporting our clubs, we seek to explain some of the recurrent issues our club representatives deal with at the FIFA Dispute Resolution Chamber with regards to training compensation, and we aim to answer some of your most frequently asked questions.

In addition, in response to many questions from members, there is a chapter dedicated to economic and so-called federative rights. Third party ownership is also an area that FIFA and UEFA are very keen to regulate more closely in the future.

Finally, this bulletin provides some general tips and remarks, taken from a creditor's point of view, on how to deal with clubs that have entered into administration.

As it would be difficult to create this legal bulletin without the members making use of our legal services, we would like to thank you for your trust in consulting the ECA. Similarly, we thank Wouter Lambrecht (ECA Legal Services Manager) for his efforts in putting together this valuable publication.

We hope this bulletin will be as well received as the first edition 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. Economic and so-called “Federative Rights”

By Wouter Lambrecht and Dr. Jan Råker¹

Third party investments in players’ economic rights are becoming more and more common, not only in South America but also in Europe. Consequently, ECA member clubs now often face a situation whereby they are interested in acquiring the services of a player whose rights are held in part or in full by an investor or whereby investors approach the club to negotiate an investment in their own players.

This situation leads to frequently asked questions, which have been posed on numerous occasions.

In order to clarify the basic concepts of economic and federative rights, we have developed the below Q&A.

For the sake of clarity, within this Q&A we have referred to economic rights, but these economic rights are also often referred to as Third Party Ownership rights and/or Third Party Player Ownership rights.

Question 1 **Where do economic rights originate from?**

Economic rights are not expressly governed in the football statutes and they derive from the registration of a player for a club in accordance with article 5 of the FIFA Regulations on the Status and Transfer of Players (FIFA RSTP). More precisely, in order to play for a club, a player must be registered for that club by the national FA; the right to register a player often referred to as the federative rights.

Given that for professional players, the registration with the national FA takes place pursuant to the conclusion of an employment contract, FIFA only recognizes the employment contract and does not recognize the existence of federative rights. Consequently, as they are not recognized, it is more correct to refer to so-called federative rights.

Keeping in mind that an employment contract can only be terminated upon its expiry or by mutual consent, a transfer of a contract player requires the consent of his club.

The consent of a club to terminate the employment relationship will depend on whether or not they agree with the transfer fee being proposed. It is actually this transfer fee which constitutes the economic value of a player.

Whereas it is clear that only clubs can register a player, the entitlement to receive part of the transfer fee can be fractioned amongst several persons. It is exactly this entitlement which is referred to as the economic rights. More precisely, if party X has 20% of the economic rights of a player, it will be entitled to receive 20% of the transfer fee.

Economic rights are inherently connected with both the registration of a player and an employment contract and can only be granted either by clubs who hold the so-called federative rights or by someone who obtained them from a club in a chain of cessions.

¹ Wouter Lambrecht, LL.M., is the ECA Legal Manager. Dr. Jan Råker, former ECA representative of Hamburger SV and in this capacity member of the ECA Legal Advisory Panel and the ECA Institutional Relations working group, is an attorney at Prinz Neidhardt Engelschall in Hamburg, Germany.

Which parties can hold economic rights?

Question 2

Whereas it is often thought that economic rights are held exclusively by companies investing in clubs and/or players directly, several economic rights holders are to be distinguished.

That is to say, besides companies, players and/or former clubs by means of a sell-on clause can be entitled to receive a percentage of a future transfer fee and are thus to be considered as economic rights holders.

Who owns the 'economic rights' in players who are out of contract or whose contract expires?

Question 3

Economic rights only exist when a contract is in place and a player is registered for an FA. If there is no club holding the registration of a player (so-called federative rights), there can be no claims for a transfer fee and thus no economic rights.

As a free agent/out of contract player is not registered for any club, nobody holds any so called federative rights over the player and consequently no economic rights exist either. Therefore, a player also cannot assign any economic or federative transfer rights to any third party while being a free agent.

As a club interested in acquiring the services of a free agent, one may thus be faced with a market-dependent claim to pay a signing bonus and/or a larger agent's remuneration, but one should be wary when being faced with a claim to pay a transfer fee to anybody.

Are third party investments in economic rights legal?

Question 4

In general, clubs are entitled to enter into agreements with third party investors with respect to the economic rights of their players. These agreements serve as financial tools just like e.g. the factoring of future sponsorship revenues and are considered to be a new source of revenue. They can allow a club to secure/finance a player and/or help a club to keep a player in the way that if a third party invests in a player by paying a percentage of a transfer fee and or his salary, they will receive economic rights on the player and thus a part of his future transfer fee.

However, a club must be aware that for investments in economic rights some restrictions apply with respect to the matter and the handling of such agreements. Any violations may lead to sanctions being imposed on the clubs by FIFA.

Which restrictions apply for these economic rights investments?

Question 5

The main restriction to the possible scope of any agreement with respect to economic rights is stipulated in Art. 18 bis of the FIFA RSTP.

This article states:

“No club shall enter into a contract which enables any other party to that contract or any third party to acquire the ability to influence in employment and transfer-related matters its independence, its policies or the performance of its teams.”

The main consequence is that clubs must not grant any third party the right to decide about the consent to a transfer of a player. The decision must remain at the club's discretion in full. So, even if for example an investor owns 100% of the economic interest in the transfer compensation, he must not decide on the execution of a transfer.

As this obviously jeopardizes the economic interests of investors, investors may demand certain clauses which mitigate their danger and secure their return on investment.

However, keeping in mind that article 18bis prohibits 'influence', clubs must be extremely careful about what kind of clauses could be in violation of the provisions.

Additionally, one must be careful when payments are being made to third parties. That is to say, according to Annexe3 of the RSTP, clubs, when undertaking the ITC request through the TMS, need to click a third party payment declaration box. According to this declaration, clubs need to confirm that no part of any transfer and or training compensation made as part of a transfer has been or will be paid to any other party than the club, the player or the Association.

It is evident that this clause causes considerable problems with regards to third parties owning economic rights and is not in line with the reality of the economics in today's football.

Keeping in mind the provisions of the English FA, which obliges clubs to buy-out third parties as third party economic rights are prohibited, one could think of paying the FA, as allowed by the third party payment declaration, which would then in turn forward the money to the concerned third party. This is the way payments to third parties are made under the English FA rules.

Finally, for those clubs applying for a UEFA License to participate in the UEFA Competitions, there is an additional obligation. More precisely, according to the UEFA Licensing and Financial Fair Play Regulations edition 2012, clubs will now need to disclose for any player of which they do not fully own the economic rights of, the name of the player and the percentage they hold both at the beginning of the period and at the end of the period.

Question 6

What clauses are inadmissible due to illegal third party influence?

Due to a lack of jurisdiction on article 18bis of the RSTP, it is unclear what should be considered to constitute "third party influence". More, it is even unclear who should be considered to be a third party, keeping in mind the remarks made under point 2 and who carries the burden of proof of a breach of article 18bis; would FIFA have to prove such influence or would there be a rebuttable presumption for the club in case an economic rights contract would exist.

Few definite statements can be made about which clauses would exactly violate article 18bis. Any evaluation of risks becomes even more difficult due to the fact that some cases of influence, like minimum-fee release clauses in player contracts, are widely accepted as legitimate. Furthermore, even the mere obligation to forward at least part of a transfer fee to a third party has an influence on clubs' transfer decision in itself. The term 'influence' should therefore be interpreted in a restrictive manner, focusing on the freedom of the club to take decisions on transfer and transfer policies.

It is clear that clubs should definitely not sacrifice their power of discretion in their transfer decisions to any third party. Thus, clauses transferring this power to an investor in any way can be deemed illegal.

The same is likely to be true for clubs to include certain clauses or conditions in their transfer contracts when selling a player. This could well constitute an illegal influence of the club's policies as well.

Even though the effects equal the ones of a legitimate buy-out clause, it is also not advisable to agree on any clause which obliges the club to transfer a player in case an offer is made purporting to a certain amount. In such event the club could no longer freely decide whether or not to accept a transfer offer due to restrictions imposed by a third party.

The threshold between legal and illegal clauses can probably be found near the content of a clause by which a club retains the sole right to accept or refuse a transfer offer for a player. But in case an offer is made of a certain amount, the club has to pay the investor his part of the economic rights as if the offer was accepted.

While leaving the transfer decision with the club, this clause may in some cases assume a decisive degree of influence by putting so much economic pressure on the club that accepting the transfer offer remains the only real option. Clubs agreeing to this option must be aware of the risk associated to doing so.

In any case, clubs are advised to carefully examine any clause agreed with investors in the respective agreements with respect to the kind and degree of influence it may have on them at a later point in time.

Do the same restrictions also apply to transfer contracts between clubs? And what about 'minimum fee release clauses' in players' contracts?

Question 7

Article 18bis of the RSTP refers to third parties and as such also covers the selling club's influence.

However, the restrictions contained in article 18bis of the RSTP are mainly designed to protect the integrity of the 'football family' against third parties. Agreements between two clubs are therefore likely to be subject to a more lenient application of article 18bis.

The same is true for minimum fee release/buy-out clauses. These clauses can be considered standard clauses in employment contracts and in some jurisdictions even mandatory parts thereof. Even though clubs relinquish some of their discretion in transfer matters this way, Art. 18bis FIFA RSTP was not designed to prohibit this.

Question 8 **(How) Can a third party investor be involved in the negotiations about a transfer?**

The RSTP does not prohibit a third party investor to be involved in the negotiations of a transfer. However, the investor's role in the negotiations must be carefully watched with respect to not violating the requirements of article 18bis of the RSTP.

This means that as a buying club, if the investor represents the selling club, one must remain aware that the transfer contract must and can only be concluded with the selling club itself, as only the selling club can hold the so-called federative transfer rights to the player.

Any kind of influence the third party investor may have on the selling club's decisions does not need to be a pressing concern for the buying club as only the selling club would be guilty and sanctionable for a violation of article 18bis of the RSTP.

Please be reminded that the transfer fee must be paid to the club and not to any third party as already set out under point 5.

Question 9 **Is an economic right contract void for illegality or is there any other element which affects its enforceability?**

With the above question, it is basically asked whether a club can challenge the validity of an economic rights contract and escape for example from paying a third party, based on article 18bis of the RSTP.

In this respect it is important to note that even if an economic rights contract is caught by article 18bis of the FIFA Regulations, the consequences for clubs will be disciplinary in nature. The RSTP does not make reference to the contract being void etc.

Hence, regardless of any violation of article 18bis as a result of an economic rights contract, such contract and any contract based thereon (transfer agreement), are not prevented from being valid and enforceable between the parties. Moreover, under Swiss law², which will be similar to contract law in many other jurisdiction, a contract will only be invalid/void if it is impossible to perform, illicit or contrary to good customs. An economic rights contract does most definitely not fall within one of these three categories and is therefore fully valid between the parties.

Note however that FIFA will not take jurisdiction over disputes resulting from economic rights if the third party to the contract is not a member of FIFA (by means of a registration with its national FA). It is clear that investment companies are not affiliated to a football association and thus neither to FIFA.

² Article 20 paragraph 1 of the Swiss Code of Obligations

II. Feedback from FIFA's Judicial Bodies & CAS

The agenda of the FIFA Dispute Resolution Chamber hearing consists of the following three kinds of dispute: labour disputes, training compensation cases and solidarity contribution claims.

Whereas most of the cases dealt with relate to breaches of contract, the rules governing these cases are clear and discussions mostly centre on the consequences of such breaches, i.e. the damage payable and possible disciplinary sanctions.

Given that damages are to be established on a case-by-case basis, it is hard to provide feedback on these specific cases.

Keeping in mind that this section wants to provide updates on recent developments which are of general interest, no feedback on labour disputes will be given.

IN BRIEF This section aims at providing you with updates on recent developments in the jurisprudence of FIFA's judicial bodies and subsequent CAS appeals. It also aims at giving some general remarks and some points of attention are drawn from the knowledge obtained by the cooperation with our club representatives at the DRC.

RECENT JURISPRUDENCE

1 Training compensation

1.1 Special provisions for the EU/EEA

1.1.1 Prerequisites

Following up on the dedicated section to training compensation in the September 2011 ECA Legal Bulletin³, the most recent jurisprudence of CAS has taken a different direction than the one of the DRC when it comes to interpreting article 6 of Annexe 4 of the FIFA Regulations on the Status and Transfer of Players (RSTP).

The wording of this article is:

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

The prerequisites: offer in writing via registered mail and 60 days prior to the expiry of the old contract, are at the heart of many disputes of clubs' entitlement to receive training compensation.

Whereas the most recent jurisprudence from the DRC showed more flexibility⁴ when it came to interpreting the prerequisite “an offer in writing” and “60 days prior to the expiry”, the Court of Arbitration for Sport⁵ (CAS), dealing with such a DRC decision on appeal, took a different approach.

Firstly, with regards to the interpretation of the prerequisites, the Panel noted that its role was not to revise the content of the applicable rules but only to interpret and apply them. As the prerequisites for training compensation are clearly worded, they are not open to interpretation nor can flexibility be granted in its application.

With regards to meaning of the prerequisite “in writing”, the Panel relied on Swiss law, as the RSTP does not contain a definition of what constitutes “in writing”; Swiss law applying in complimentary order for all matters not provided for in the RSTP.

³ Title III point 6, Training Compensation, ECA Legal Bulletin No 1 SEP 2011

⁴ FIFA DRC: the prerequisite “in writing per registered mail” is there to help a club prove that an offer was actually made; this can also be proven by different means.

⁵ CAS 2011/A/2682 Udinese Calcio S.p.A. v. Helsingborgs IF

In doing so, reference was made to article 13, 14 and 16 of the Swiss Code of Obligations which states that a contract (including offers) is deemed to be made “in writing” when it is signed with the original signature of the party or the parties that are contractually bound by the document.

Important to note is that the Panel stated that it was irrelevant that a valid offer had been made under national law. More precisely, the Panel held that the terms of the regulations are meant to be independent from the governing law of the existing professional contract, the final objective being that all interested parties, coming from different countries, can rely on one and one definition only of the terms.

Consequently, when making an offer to a player, it would be advisable that clubs make such offer according to the above information and thus make an offer in writing which is signed with the original signature of an individual who has the power to represent a club.

1.1.2 *Exception to the exception*

If a club does not meet all prerequisites for being entitled to training compensation, article 6 of Annexe 4 to the RSTP states that a club can nonetheless still receive training compensation **if it can justify** that it should be entitled to such compensation. This is called the exception to the exception.

However, it is unclear what is meant or what a club must do in order to justify its entitlement.

In the previous mentioned CAS award, the Panel stated:

*“the aim of sporting justice shall not be defeated by an overly formalistic interpretation of the FIFA Regulations which would deviate from their original intended purpose”*⁶, i.e. that a club which trained a player should be compensated for its training efforts.

Whereas FIFA introduced some flexibility as to the prerequisites for awarding training compensation, CAS, albeit coming to the same result, introduced flexibility by means of the exception to the exception, i.e. justification to entitlement notwithstanding failure to comply with the prerequisites.

If a professional club has demonstrated that it had started negotiations, for example one year prior to the expiry date of the contract, that several offers had been made, be it by e-mail or during meetings, that these offers were of greater value than the existing contract and that these offers were binding according to the national law, a club is considered to have justified its entitlement.

More precisely, by acting in such a manner, a club had shown **a bona fide and genuine interest** in keeping the services of the player. This bona fide and genuine interest allows a club to benefit from the exception to the exception.

As such, when dealing with training compensation, it is not only important to verify whether a club offered a contract according to the prerequisites, one should also try to verify with a player whether or not his previous club had shown a bona fide and genuine interest to continue the relationship with the player.

However, whereas FIFA introduces an extent of flexibility on the prerequisites from which clubs benefit automatically, CAS actually requires a club to discharge its burden of proof as to its bona fide interest in keeping the player.

⁶ CAS 2009/A/1757 MTK Budapest v. FC Internazionale Milano S.p.A

1.1.3 *Training period and development period*

According to article 1 paragraph 1 of Annexe 4 to the RSTP, the amount of training compensation payable shall be based on the years between 12 and 21, unless it is “evident” that a player has already terminated his training period before the age of 21.

However, when can one say that it is evident that a player has terminated his training period? Clubs often try to invoke this argument but without discharging the burden of proof required by FIFA.

This question has been dealt with by several DRC panels and CAS awards and, in line with its recent jurisprudence, the DRC confirmed the earlier jurisprudence in which it is held that a distinction must be made between the training period and the development of a player; the training period is covered by the regulations, the subsequent development is not.

In the case at hand, reference was made to an earlier CAS award⁷.

The main objective criteria taken into account in all cases is the amount of matches a player played with the A-team. If he becomes a regular player for his team, it can be considered that the player has completed his training and has entered the development period.

Furthermore, if the Player, after his transfer, does not play for the A-team of his new club, this, according to the Panel would not imply that a player has not terminated his training period. On the contrary, it should be interpreted in a way that his non-appearance in the A-team is because his development as a football player is not complete.

Interesting to note is that, whereas in older jurisprudence the fact that a player played for national youth teams was withheld as an element to establish that the training period was over, the Panel in a recent CAS award⁸ explicitly held the contrary. Playing with the national youth teams shows that a player is one of the best in his youth category but holds no indication as to whether or not a player has finished his training period.

The application of this exception will depend on the fact specifics of each case and on the elements invoked by the party trying to decrease the amount of training compensation payable.

1.2 **Pase Libre – waiver?**

Recently, the DRC dealt with several cases in which Argentinian clubs were claiming training compensation from European clubs following the conclusion of an employment contract between amateur players and a European club.

In every single case, when faced with the claim for training compensation, the European club invoked a document provided by the Argentinian club to the player titled “Pase Libre”, which can be translated as “free transfer”.

In this “Pase Libre”, it is stated that the player may register and play for the club of his choice without any further intervention from the club of origin.

As such, the European clubs, also based on representations from the concerned players and the agents involved, understood that the concerned Argentinian clubs had waived their right to receive training compensation.

⁷ CAS 2006/A/1029 Maccabi Haifa FC v. Real Racing Club Santander

⁸ CAS 2011/A/2682 Udinese Calcio v. Helsingborgs IF

However, when developing this argumentation at the DRC, the DRC took a different view. That is to say, the DRC did not interpret the “Pase Libre” as an explicit waiver to receive training compensation but followed the reasoning of the Argentinian clubs stating that the “Pase Libre” should be interpreted in a way that the player was free of contract and had no obligations towards the club.

More, it was held that the Pase “Libre” was a document between the player and the Argentinian clubs from which the European clubs could not benefit and in no way was a waiver, let alone an explicit waiver, to receive training compensation from a third club.

Consequently, when faced with this situation and the production of a similar document, a club should act due diligent and it is advisable to always contact the concerned club who issued (or would have issued – misrepresentation) a document which could purport to a waiver in order to avoid unpleasant surprises.

1.3 Loan prior to definitive transfer

Often, the entitlement to training compensation in combination with a previous loan causes problems.

More precisely, uncertainties seem to arise as to whether a club that accepts a professional on loan is entitled to receive training compensation when, after the expiry of the loan, the professional player returns to his club of origin, and, thereafter, transfers (be it upon the expiry of contract or against a transfer fee) from the club of origin to a club belonging to another association before the end of the season of the 23rd birthday.

The problems results from article 3 paragraph 1 of Annexe 4 to the RSTP, which states that in case of a subsequent transfer of a professional player, training compensation will only be owned to the “former club”.

It is clear that a club which received a player on loan is not the former club if that player only transferred to a new club after the player returned from loan to his club of origin. As such, many clubs at the DRC assume that the club who accepts a player on loan will not be entitled to training compensation.

However, the jurisprudence is somehow different.

A recent DRC decision from March 2012 confirms previous DRC decisions^{9,10} and a CAS award¹¹, according to which:

“all clubs which have in actual fact contributed to the training of a player as from the age of 12, are in principle, entitled to receive training compensation for the timeframe that the player was effectively registered for them.”

The jurisprudence holds that the nature of the player’s registration, i.e. on a definite or on a temporary basis, is in fact irrelevant with respect to the question as to whether such club would be entitled to receive training compensation for the period of time the player was effectively trained by that club.

More precisely, within the frameworks of loans, the jurisprudence holds that the period of time the player was registered with the club of origin and with the club accepting the player on loan, should be considered as **one entire time frame**.

As such, also the club which accepted a player on loan is, in principle¹², entitled to receive training compensation.

⁹ Decision of the FIFA Dispute Resolution Chamber dated 23 March 2006 with n. 36928

¹⁰ Decision of the FIFA Dispute Resolution Chamber dated 6 August 2009 with n. 891179

¹¹ CAS 2004/A/560 AC Venezia v. Club Atlético Mineiro & AS Roma

¹² Exceptions exist, e.g. completion of training period prior to loan. Art 1 of Annexe 4 to the FIFA RSTP

Consequently, when signing a player at the expiry of his contract or even against a transfer fee, clubs should be aware that training compensation might also be due to clubs which accepted a player on loan; this in addition to a possible transfer fee.

1.4 National Transfer

Whereas it is clear that the provisions of the FIFA RSTP with regards to training compensation and solidarity contribution only apply in case of an international transfer, the DRC¹³ recently had to deal with a claim whereby solidarity contribution was claimed based on national regulations.

More precisely, a club, registered with the Serbian FA, invoked the internal regulations of the Dutch FA to obtain solidarity contribution following an internal transfer in the Netherlands.

Whereas previously the DRC¹⁴ held that in case an association would decide to implement at national level its own regulations on solidarity contribution (training compensation), the pertinent system would also have to be applied to training clubs belonging to a different association, the most recent decision took a different direction.

That is to say, according to the most recent decision, it would be incompatible with the general principles of association law, in particular with the right of freedom of association by which one can accept or refuse any applicant's membership, if the rules of that association would also apply to an entity not affiliated to that association.

Hence, a club affiliated to a third association is not entitled to benefit from rules and regulations of an association to which it is not affiliated and as such cannot claim solidarity and/or training compensation based on national regulations, at least at FIFA level.

1.5 Calculation of training compensation

When it comes to the calculation of training compensation different parameters are to be taken into account and the training compensation payable can differ depending on whether:

- the transfer takes place between two clubs in the European Union/EEA¹⁵ or whether one non-EU/EEA club is involved; and
- the event giving rise to the right to training compensation occurs before the end of the 18th birthday.

With regards to latter point, article 5 of Annexe 4 to the RSTP, states that in order to ensure that training compensation for young players is not set at an unreasonable high level, the training costs for players for the seasons between their 12th and 15th birthdays shall be based on the training costs of category 4 clubs. However, if the right to receive training compensation occurs before the end of the season of the player's 18th birthday, the above exception does not apply and the training compensation will be based on the category of the new club.¹⁶

Keeping the above in mind, it is clear that the financial implications of signing a professional contract with a player before he turns 18 or shortly after can differ significantly from a training compensation point of view. By introducing this exception to the exception, FIFA wanted to further protect and limit the transfer of minors.¹⁷

¹³ Decision of the FIFA Dispute Resolution Chamber dated 1 February 2012 with n. 2121218

¹⁴ Decision of the FIFA Dispute Resolution Chamber dated 21 November 2006 with n. 116132

¹⁵ Article 6 of Annexe 4 to the FIFA Regulations on the Status and Transfer of Players

¹⁶ Article 5 paragraph 3 of Annexe 4 to the FIFA Regulations on the Status and Transfer of Players

¹⁷ FIFA Circular Letter dated 20 May 2009 No.1190: Revised Regulations on the Status and Transfer of Players - Protection of minors

¹⁸ Decision of the FIFA Dispute Resolution Chamber dated 1 February 2012 with n. 2122003

However recently, the DRC had to deal with an interesting interpretation as to the application of this exception to the exception.

More precisely, the DRC noted that this rule had only entered into force on the 1st of October 2009, and found that it could not apply this exception to the exception to the years of training and education of the player that occurred prior to the entry into force of this rule.¹⁸

Consequently, the training compensation for the training and education of a player between the season of his 12th and 15th birthday which occurred prior to the 1st of October 2009, is still to be based on the amount of category 4 club instead of the category of the new club.

2 Service agreement – jurisdiction

Most contractual relationships between players and clubs are governed by an employment contract. However, some are also governed by a service agreement.

Recently, the DRC had to deal with a case where a club was challenging the jurisdiction of the FIFA DRC since the club and the player had signed a service agreement. More precisely, the club held that the DRC is only competent to hear disputes between clubs and players resulting from an employment relationship and as such, keeping in mind that a service agreement had been signed, was not competent.

Dealing with this question, the DRC made reference to article 22 of the RSTP “Competence of FIFA” which states that FIFA is competent to hear **employment related disputes** between a club and player of an international dimension.

Keeping in mind the wording “employment related disputes”, the DRC held that this had to be interpreted as disputes with respect to a contract, which aims at setting out the conditions for a player to play for a certain club and this regardless of its legal qualification. Any contract containing such rights and obligations to be qualified as an employment related agreement.

GENERAL REMARKS AND TIPS

1 Clubs in administration

According to the recent practice of FIFA’s judicial bodies, FIFA no longer takes jurisdiction over, nor enforces decisions against clubs who have entered into administration.

That is to say, when a case is initiated against a club who has entered into administration, the **FIFA Administration** sends a generic letter stating that:

“we must inform you that, as a general rule, our services and decision-making bodies (i.e. the Players’ Status Committee, Dispute Resolution Chamber as well as the Disciplinary Committee) cannot deal with cases of clubs which are in bankruptcy proceeding, i.e. inter alia under administration. As consequence, we regret having to inform you that we do not appear to be in a position to further proceed with the case at hand.”

The letter continues by inviting the concerned club to address the competent national authorities and takes an end by stating that the letter is of “general nature and without prejudice whatsoever”, this in order to defend that it does not constitute a final decision which can be appealed to CAS¹⁹:

In a recent case, CAS²⁰ had the opportunity to deal with an appeal against such a letter whereby FIFA had refused to enforce a previous decision from the DRC against Albacete FC.

In this case, CAS dealt with two interesting issues:

- whether a letter from FIFA constitutes a final decision which can be appealed, and if so;
- whether FIFA could refuse to enforce the decision due to the entry into administration of Albacete FC.

As to the first question, reference was made to a decision from the Swiss Federal Tribunal²¹ which defines “a decision” as:

“an act of individual sovereignty to an individual, by which a relation of concrete administrative law, forming or stating a legal situation, is resolved in an obligatory and constraining manner. The effects must be directly binding both with respect to the authority as to the party who receives the decision”

Keeping this definition in mind, the Panel concluded that the letter was to be seen as a decision since FIFA informed the Appellant of its decision not to intervene in a specific procedure, rejected a specific request and resolved the situation of the appellant in a mandatory manner by referring him to the national competent authorities.

Additionally, the Panel made an important observation in that decisions with such important consequences could not be taken by FIFA’s secretariat or by an administrative decision, but should be taken by the competent FIFA judicial bodies. Consequently, should you receive a letter as described above, one would have to insist on having a formal decision taken by the competent body; motivated decisions by the DRC, PSC and/or the DC²² would provide useful information and possibly clarify the current situation to a certain extent.

When dealing with the second question, as to whether there is an obligation for FIFA to open disciplinary cases and seek enforcement of decisions against clubs who entered into administration, the following was taken into account.

Firstly, the Panel referred to article 107 b) of the FIFA Disciplinary Code which states that a proceeding **may be closed** if a club has declared bankruptcy.

The Panel continued by referring to a decision of the Commercial Court of First Instance No. 003 of Albacete, Spain, which stated that the club had entered into the procedure of bankruptcy, be it voluntary bankruptcy.

Based on this, the Panel stated that FIFA, keeping in mind the decision of the Spanish judge and article 107 b) of the Disciplinary Committee, could refuse to enforce the decision; the latter article providing FIFA with a power of discretion.

In this respect, the Panel also rightly pointed out that FIFA, pursuant to Spanish law (Ley Concursal), is prevented from forcing Albacete to pay the amount owed as it is clear that Albacete is prevented from doing so due to an imperative act.

¹⁹ R47 of the Code of Sports-related arbitration implies that for an appeal to be admissible, there needs to be, amongst other things, a decision taken by a federation, association or sports related body

²⁰ CAS 2011/A/2343 CD Universidad Católica v. FIFA

²¹ ATF 101 Ia 73

²² FIFA Players’ Status Committee and FIFA Disciplinary Committee.

Finally, the Panel also noted that the club seeking enforcement had also submitted a claim for payment of the debt to the Spanish Judge. The Panel considered this to be an important element for FIFA not to enforce the decision, as it in a way confirmed the acknowledgement of the appellant of the feasibility to seek redress before the Spanish Judge and its will to take this course of action as its willingness to be subject to it.

Keeping the current jurisprudence in mind, clubs might want to consider all their options and indeed address the national competent courts.

However, it is important to note that differences should be made with regards to different creditors. More precisely, bankruptcy law in all countries foresees in different kinds of creditors, depending on their status but also on the date on which their credit is established or falls due.

That is to say, distinctions are made between creditors who have an established credit before the entry into administration of a club and creditors who's credit becomes due after the court resolution by which a club is declared to be in administration.

More than often, bankruptcy law only foresees in a protection for/suspension of debts that arose prior to the entry into administration pursuant to a court resolution and not for those debts which arose after such a resolution.

What is very clear is that when faced with a club in administration and a letter from FIFA denying either jurisdiction or enforcement, one should contact a specialized lawyer in the country of the club facing administration.

Important to ask and establish here is:

- what the nature of your credit is (before or after the entry into administration), in which category of creditors you fall and as such whether your credit is suspended pursuant to the entry into administration of the club;

Depending on the answer to the questions above, different options could exist.

More precisely, you would either have to announce your credit to the administrators dealing with the administration procedure or you could try to pursue your case at FIFA.

As already stated, credits which fall due after the entry into administration of a club are not, according to most bankruptcy acts, suspended nor are they taken into account for the collective debt agreement to be agreed upon between the club and its creditors. In this case, you should stress the nature of your credit explicitly in your request to FIFA and seek the continuation of your case at FIFA DRC/PSC or DC level.

However, if your credit was due before the entry into administration, it would appear that you would have to communicate your credit to the competent body and or appear in front of that body. This must be done in order to be kept informed by the administrators on the procedure of the administration and also to be able to appeal, in court, a decision of the administrators by which they would challenge the amount and or nature of your credit. Note that if you would fail to appear and or notify your credit, you might forego the right to your credit.

Finally, for the sake of completeness, please note that entering into agreements with clubs that are already in administration should not cause any problems as these clubs are run by administrators appointed by a judge. Such administrator is only allowed to conclude contracts which a club/enterprise can comply with.

2 Overdue payables

Since the entry into force of the rules on overdue payables as set out in the UEFA Club Licensing and Financial Fair Play Regulations, many clubs have started to use this provision as a strong argument in obtaining outstanding payments from others club subject to these regulations.

More precisely, according to the overdue payables' rule²³, a license applicant (club) must prove that:

- as at 31 March preceding the license season, it has no overdue payables to other clubs that refer to transfer activities that occurred prior to the previous 31 December;
- it has no overdue payables towards its employees as well as social/tax authorities as a result of contractual and legal obligations towards its employees that arose prior to the previous 31 December.

In case of overdue payables, a license applicant should be refused a license to compete in UEFA competitions.²⁴

When it comes to the definition of overdue payables, often questions are posed as to what constitutes an overdue payable and misunderstandings do arise.²⁵

In this respect, it is very important to keep in mind Annex VIII of the UEFA Club Licensing and Financial Fair Play Regulations which defines the notion "overdue payables".

More precisely, the following three provisions of Annex 8 should be kept in mind when dealing with this matter:

- In general it can be noted that payables are not considered overdue if the relevant amount has been paid in full or when an agreement has been concluded in writing with the creditor to extend the deadline;
- The fact that a creditor may not have requested payment of an amount does not constitute an extension of the deadline;
- The fact that an overdue payable is being contested in front of a competent authority is not sufficient to conclude that it does not concern an overdue payable. That is to say, a club will need to be able to demonstrate to the comfortable satisfaction of the relevant decision making bodies (licensor and/or UEFA CFCB) that it has established reasons for contesting the claim. If the CFCB finds the reasons for contesting the claim manifestly unfounded, the amounts will still be considered as an overdue payable.
- Non-paid training compensation and solidarity contribution are also considered to be an overdue payable.

Additionally, keeping in mind the UEFA Club Licensing and Financial Fair Play Club monitoring process toolkit for the 2012/2013 license season, the following points with regards to overdue payables are to be taken into account as well:

- post-dated cheques submitted by the creditor in which a future date is entered, and, therefore, the cheques cannot be cashed by the creditor before the agreed payment date, are not considered as a settlement and the relevant amount will be considered an overdue payable;
- money deposits with a notary in favour of a creditor following which the creditor has a certain time limit according to national law to claim the overdue from the notary will still considered to be overdue payables within the scope of the UEFA regulations.

²³ Articles 49 and 50 of the UEFA Club Licensing and Financial Fair Play Regulations edition 2012

²⁴ CAS 2012/A/2702 Györi ETO FC v. UEFA

²⁵ CAS 2012/A/2821 Bursaspor Kulübü Derneği v. UEFA

With the entry into force of the enhanced overdue payables' rule, clubs should also be careful when it comes to stipulating the payment dates of a transfer fee payable in instalments.

That is to say, according to the enhanced overdue-payables' rule²⁶, a licensee must prove that it, as at 30 June of the year of the UEFA Club Competitions, has no overdue payables towards clubs, employees and social/tax authorities relating respectively to transfer activities undertaken up to 30 June or stemming from contracts or legal obligations towards its employees that arose prior to 30 June.

Keeping this paragraph in mind, clubs, when stipulating payment dates for transfer fee instalments, should ideally put these payment dates before 30 December and 30 June.

3 Breach of contract and training compensation

Although the DRC deals with many breaches of contract cases, only some of them involve players who have not yet reached the age of 23.

In this respect, clubs signing an U23 player and/or clubs facing a breach of contract by an U23 player without just cause, should be aware that in addition to the compensation for breach of contract, training compensation can be claimed/is payable.

Although the wording of article 17 paragraph 1 of the RSTP is clear, many clubs omit to ask for training compensation in such cases or believe, when faced with such a claim, that the compensation for breach of contract also covers the training compensation.

²⁶ Articles 65 and 66 of the UEFA Club Licensing and Financial Fair Play Regulations edition 2012.

III. Questions and Answers

1 Solidarity clauses

The solidarity mechanism can be described as following:

When a player is transferred for a transfer fee between two clubs registered with a different association, 5% of any compensation, not including training compensation, is to be deducted from the total amount of compensation to be paid. This amount is then to be distributed by the new club to the clubs involved in the training and education of a player between the seasons of his 12th and 23rd birthday.

Although the rules relating to the solidarity mechanism are straight forward, the following questions have been posed from time to time.

According to our transfer contract the other team had to deduct and distribute the corresponding amount of solidarity contribution to the clubs involved in the training of the player; our club being one of them. However, this club, albeit having paid us the transfer fee – minus the solidarity contribution, is not willing to award us the part of solidarity contribution corresponding to the period the player was trained by our club: are we entitled to this money?

In order to answer this question, it is sufficient to look at the paragraph above which states that the amount to be deducted is to be paid to the clubs involved in the training and education. The regulations do not make a distinction between the club transferring the player and other clubs involved in the training and education of the player. This implies that any club which was involved in the training of the player is to receive its corresponding part, even the club receiving the transfer fee.²⁷

Moreover, if a player has not been trained by any other club during a certain amount of time between the seasons of player's 12th to 23rd birthday, the corresponding portion of solidarity contribution cannot benefit the player's new club and must be paid to the other party as transfer compensation.²⁸

Am I entitled to receive solidarity contribution if a former player I trained between the sporting season of his 12th and 23rd birthday has transferred to another club, be it as part of an exchange of players.

In answering this question, one would have to look at the jurisprudence of the FIFA DRC as according to the regulations solidarity contribution appears only to be payable if compensation has been paid; this is not the case when it concerns a pure exchange of players.

However, keeping in mind the ratio legis of the solidarity mechanism which is to reward clubs for training and educating players over the years and as such support grassroots football, it would appear that some flexibility would need to be shown.

IN BRIEF This section aims at dealing with questions we received from individual member clubs; questions which in our opinion contained an issue that is of interest to all clubs.

Question 1

Question 2

²⁷ Decision of the FIFA Dispute Resolution Chamber dated 13 June 2008 with n. 3881052

²⁸ Decision of the FIFA Dispute Resolution Chamber dated 24 January 2011, unpublished

Analysing the jurisprudence of the DRC²⁹, the following can be said:

- Any transfer contract represents a bilateral agreement which requires the exchange of obligations and rights;
- The exchange of two players implies an indirect financial agreement and foresees in obligations and rights keeping in mind that sporting qualities of players have an economical value in the football market;
- The article on solidarity mechanism should be analysed in its overall aim and a literal interpretation of its wording would not reflect the ratio legis, i.e. to foster the training and education of players and reward training clubs;
- By consequence, the solidarity mechanism cannot be circumvented by means of an exchange of players.

Based on this argumentation, the DRC feels that, in principle, solidarity contribution is payable when players have been exchanged rather than sold for a transfer fee.

However, it is one thing to be entitled to solidarity contribution; it is another thing to actually be awarded solidarity contribution following an exchange of players.

That is to say, in order to be entitled to solidarity contribution, the DRC needs a value on which this can be calculated.

Keeping in mind that the burden of proof lies with the one who claims, a club claiming solidarity contribution will have to establish, at least to a certain extent, the value of a player.

In establishing a value, one could envisage the value of the contract from a salary perspective, the value of the player in the accounts of the concerned club, a buy-out clause and/or liquidated damage clause foreseen in the new contract, etc.

More precisely, any element which shades a light on the economic value attributed to the player by the new club can and should be used when claiming one's part of solidarity contribution.

2 Notification

Whereas it is clear that a club wishing to conclude an employment contract with a player must inform the player's current club in writing prior to such negotiations, there appear to be some doubts when it comes to a player whose contract is bound to expire.

That is to say, a player is free to conclude a new contract with another club if the contract with his present club is due to expire in 6 months. As such, it is often questioned whether a notification must still be given to the player's current club if his contract is bound to expire.

In this respect, it is important to note that the obligation to notify the other club in writing is irrespective of the expiry date of an employment contract and as such should always happen.

Failure to give notification might lead to "appropriate" disciplinary sanctions as stipulated by article 18 paragraph 3 of the RSTP.

However, what is considered to be an appropriate sanction?

In establishing a possible sanction, a distinction must be made between a non-notified negotiation which concretizes into a breach of contract or a non-notified negotiation which does not lead to a breach of contract.

²⁹ Decision of the FIFA Dispute Resolution Chamber dated 9 January 2009 with n. 19442a

In case of a breach of contract, the failure to have given a notification will be dealt with in the overall amount of damages to be paid, whereas in those cases where no breach of contract occurs, fines might be imposed.

According to a FIFA Circular Letter³⁰, the fine for non-compliance with the obligation to notify the club of the player will result in a fine of no less than CHF 50,000.

When it comes to these fines, please note that fines are of disciplinary nature and as such will need to be paid to the regulator, i.e. FIFA. Hence, they will not be to the benefit of club “suffering” the unlawful approach of their player.

3 Penalty clauses

Currently, the majority of transfer contracts foresee a penalty clause for delays in payments.

In this respect, many questions have been posed as to whether FIFA and/or CAS have the power to reduce a contractual penalty clause and if yes under what circumstances.

As the FIFA regulations do not contain a provision dealing with penalty clauses and keeping in mind that Swiss law applies in subsidiary order for all matters not provided for in the Regulations, the answer lies in the Swiss Code of Obligations (C.O.).

According to article 160 C.O., parties to a contract can freely agree on a penalty clause in case of non-performance. When the contract foresees a given deadline for performance, parties may even agree on penalty fees for each day during which the debtor is in default.

The principle of contractual freedom for including a penalty clause is however limited to a certain extent. That is to say, according to article 163 paragraph 3, a judge shall reduce an excessive penalty.

However what is considered to be an excessive penalty and to what extent can a judge reduce them?³¹

In this respect, it **is to be noted that a penalty can only be reduced if a penalty is abusive at the time of the judgement**; abusive being an amount which is unreasonable and exceeds the balance of justice and equity.

Establishing the abusive nature of a penalty clause is done by taking into account the balance of interest between the creditor and debtor, the seriousness of the breach, the debtor's fault and his financial situation along with the financial situation of the creditor.

Keeping the above in mind, it is clear that the abusive nature of a penalty clause will depend on the elements at hand in each case as well as on the time of judgement. Note that, in a recent decision from the Swiss Federal Tribunal, it was held that a penalty clause of 20% was abusive as it had no relation with the damages suffered by the creditor.

Nonetheless, including a penalty clause is always to be encouraged because even if considered abusive by a judging authority, a reduced penalty will still be awarded and will be due.

³⁰ FIFA Circular Letter dated 24 August 2001 No. 769: Revised FIFA Regulations for the Status and Transfer of Players

³¹ CAS 2010/A/2317, 2011/A/2323 SC Fotbal Club Timisoara SA v. FC Slovan Liberec

4 **Field of play**

With high interests at stake during the UEFA Champions league and Europe league games, clubs are often not happy with certain decisions taken by referees and sometimes they even consider lodging a protest. One can consider for example the cases where clubs feel that a goal was scored from offside, that a red-card was completely unjustified or that a penalty should or should not have been awarded, etc.

However, when it comes to what legal options a club has at its disposal, these are very limited.

More precisely, clubs often want to lodge a protest; protest being governed by the regulations of the concerned competition as well as by article 43 of the UEFA Disciplinary Regulations.

Whereas protests can be lodged against breaches of the rules, the same article states that protests may not be lodged against factual decisions taken by the referee.

Consequently, the question is what constitutes a factual decision and what constitutes a breach of the rules.

In doing so, it comes down to differentiating between facts and norms.

Concrete events on the field of play correspond to facts whereas the incorrect application of the rules to established facts constitutes a breach of the rules.

What matters in terms of application of the rules and examining whether the rules have been breached is the subjective assessment of the referee. For example, if a referee awards a penalty and cautions a player with a red card, this is a binding factual decision, even if the established facts are not objectively true. For example, the player was not brought down by his opponent but made a dive. This would be erroneous factual decision but not a breach of the rules of the game.

What would be a breach of the rules of the game is if a referee decided that a player did not bring down his opponent but still awards a penalty and cautions the other player with a card.³²

As such, decisions taken by the referees, whether or not correct according to the facts, are final and binding and its consequences cannot be altered. Other decisions which constitute a breach of the rules can be protested against.

Keeping in mind that based on the above factual decisions are final and will not be open to a protest, it is important to note that the disciplinary consequences stemming from such final factual decision may be reviewed by the UEFA Disciplinary bodies.

Important to note is that this procedure is to be seen as a different procedure than a protest procedure and relates to the report of the disciplinary inspector whereby a club is informed that the automatic suspension will apply and/or an additional sanction will be sought.

In this respect, article 20 of the Disciplinary Regulations states that the disciplinary

³² UEFA Appeals Body decision
2 October 2001, Celtic F.C. & Joos
Valgaeren v. UEFA

consequences of a decision taken by a referee may be reviewed in cases where such decision has involved an obvious error, such as mistaking the identity of the person penalised.

As such, one could try and mitigate the consequences of a red card/yellow card, e.g. suspension, if it was made in obvious error. Failing a definition of what constitutes an obvious error it will be up to the club to discharge the burden of proof by using all elements at its disposal such as video images.

Whilst pursuing this procedure and trying to mitigate the disciplinary consequences of a factual decision, it is advisable that one always request the suspensive effect of the disciplinary measure.

5 FIFA jurisdiction – Forum Clauses & Lack of Competence

Whereas many, if not all, employment contracts foresee a clause stating that the national employment tribunals or the judicial bodies of a concerned FA will be competent to hear a dispute, clubs often fail to invoke this argument at FIFA level.

More precisely, clubs remain silent on the forum clause and only when faced with a (negative) decision of the FIFA DRC and or PSC, the lack of jurisdiction is raised.

Subsequently, this issue is raised with the CAS and many people think that given that the CAS deals with a case de novo³³, it will annul the decision of FIFA based on the lack of competence of the FIFA DRC or PSC.

In this respect, it is very important to note that **a plea of lack of jurisdiction must be raised prior to any defence on the merits failing which a party will be considered to have accepted the jurisdiction of that body tacitly.**

Consequently, CAS, when faced with this argument, does not accept that a party entering into the merits before FIFA, without raising objection to jurisdiction, could object to the jurisdiction of FIFA in a subsequent CAS procedure.

Please note that when invoking the competence of a national dispute resolution chamber for employment related disputes, documentary evidence should be provided.

From these documents, it should be evidenced that the body at national level:

- is construed out of equal representation (employee/employer representatives);
- acts as an independent and impartial tribunal;
- respects the principle of a fair hearing;
- respects the right to contentious proceedings;
- respects the principle of equal treatment.

If these minimum requirements³⁴ are not met by the NDRC, FIFA will not recognize the forum clause installing jurisdiction on the national FA and will take jurisdiction over the case.

³³ De novo: implies a full review of the facts of a case by which all procedural flaws at first level are cured.

³⁴ FIFA Circular Letter dated 20 December 2005, No. 1010, "Art. 60, par. 3 (c) of the FIFA Statutes – independent and duly constituted arbitration tribunal".

6 **Scope of Appeal**

When faced with a decision from the FIFA DRC, it is often questioned whether the appeal, if any, should also be directed against FIFA or merely against the other party to the dispute, e.g. player and/or third club.

To answer this question, it is important to keep in mind that a decision from the DRC addresses issues, rights and obligations of a different legal nature.

That is to say, when the DRC deals with a termination of contract, it draws consequences on both a contractual and disciplinary level. The consequences on contractual level are the relationship between the two contractual parties and the damages that may be payable. The consequences on disciplinary level are the possible sanctions taken against either party, e.g. suspension, registration ban, etc.

If an appeal is only directed against a player/club and thus not against FIFA, one can only appeal the contractual consequences of a decision and not the disciplinary consequences of that decision. More precisely, a player and/or club do not have standing to be sued when it comes to appealing disciplinary sanctions; inflicted by FIFA. As such, if you want to appeal the disciplinary consequences of a decision, the appeal should be directed against FIFA as well.

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.

Reproduction of part or all of the contents in any form is prohibited other than for individual use only and may not be recopied and shared with a third party without the written authorization of ECA. The permission to recopy by an individual does not allow for incorporation of material or any part of it in any work or publication, whether in hard copy, electronic, or any other form.

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.



To the members of FIFA
and the confederations

Circular no. 1010

Zurich, 20 December 2005

Art. 60, par. 3 (c) of the FIFA Statutes – independent and duly constituted arbitration tribunal

Dear Sir or Madam,

FIFA is frequently asked by its members which criteria must be fulfilled for an arbitration tribunal to be classed as independent and duly constituted under the terms of art. 60, par. 3 (c) of the FIFA Statutes (previous version: art. 60, par. 2 (c)).

FIFA has consequently addressed these queries and determined that the terms 'independent' and 'duly constituted' in accordance with art. 60, par. 3 (c) of the FIFA Statutes require that an arbitration tribunal meet the minimum (international) procedural standard as laid down in several laws and rules of procedure for arbitration tribunals. This **minimum procedural standard** comprises the following conditions and principles:

- **Principle of parity when constituting the arbitration tribunal**

The parties must have equal influence over the appointment of arbitrators. This means for example that every party shall have the right to appoint an arbitrator and the two appointed arbitrators appoint the chairman of the arbitration tribunal. The parties concerned may also agree to appoint jointly one single arbitrator. Where arbitrators are to be selected from a predetermined list, every interest group that is represented must be able to exercise equal influence over the compilation of the arbitrator list.

- **Right to an independent and impartial tribunal**

To observe this right, arbitrators (or the arbitration tribunal) must be rejected if there is any legitimate doubt about their independence. The option to reject an arbitrator also requires that the ensuing rejection and replacement procedure be regulated by agreement, rules of arbitration or state rules of procedure.

- **Principle of a fair hearing**

Each party must be granted the right to speak on all facts essential to the ruling, represent its legal points of view, file relevant motions to take evidence and participate in the proceedings. Every party has the right to be represented by a lawyer or other expert.



- **Right to contentious proceedings**

Each party must be entitled to examine and comment on the allegations filed by the other party and attempt to rebut and disprove them with its own allegations and evidence.

- **Principle of equal treatment**

The arbitration tribunal must ensure that the parties are treated equally. Equal treatment requires that identical issues are always dealt with in the same way vis-à-vis the parties.

The members of FIFA and the confederations are obliged to ensure compliance with the foregoing minimum standard at all times when establishing or recognising an arbitration tribunal in accordance with art. 60, par. 3 (c) of the FIFA Statutes. Members may, of course, provide for additional requirements with a view to reinforcing the independence and due constitution of the arbitration tribunal.

In certain cases, FIFA reserves the right to examine the minimum procedural standard required for arbitration tribunals in view of art. 60, par. 3 (c) of the FIFA Statutes.

Please do not hesitate to contact FIFA if you have any further queries concerning the independent and duly constituted arbitration tribunal.

Thank you for giving your attention to the foregoing and, where necessary, carrying out appropriate adaptations.

Yours faithfully,
FEDERATION INTERNATIONALE
DE FOOTBALL ASSOCIATION



Urs Linsi
General Secretary

cc:- FIFA Executive Committee

Bibliography

Legislation

- RS 220 Loi fédérale du 30 mars 1911 complétant le code civil suisse (Livre cinquième: Droit des obligations)

Regulations

- FIFA Regulations for the Status and Transfer of Players, editions 2009 and 2010
- UEFA Club Licensing and Financial Fair Play Regulations edition 2012

Jurisprudence

Court of Arbitration for Sport

- CAS 2004/A/560 AC Venezia v. Club Atlético Mineiro & AS Roma
- CAS 2006/A/1029 Maccabi Haifa FC v. Real Racing Club Santander SAD
- CAS 2009/A/1757 MTK Budapest v. FC Internazionale Milano S.p.A.
- CAS 2010/A/2317-2323 SC Fotbal Club Timisoara SA v. FC Slovan Liberec
- CAS 2011/A/2343 CD Universidad Católica v. FIFA
- CAS 2011/A/2682 Udinese Calcio S.p.A. v. Helsingborgs IF
- CAS 2012/A/2702 Györi ETO v. UEFA
- CAS 2012/A/2821 Bursaspor Kulübü Dernegi v. UEFA

FIFA Dispute Resolution Chamber

- Decision 36928 dated 23 March 2006
- Decision 116132 dated 21 November 2006
- Decision 3881052 dated 13 June 2008
- Decision 19442a dated 9 January 2009
- Decision 891179 dated 6 August 2009
- Unpublished Decision dated 24 January 2011
- Decision 2122003 dated 1 February 2012
- Decision 2121218 dated 1 February 2012

UEFA

- UEFA Appeals Body decision dated 2 October 2001, Celtic F.C. & Joos Valgaeren v. UEFA

Other sources

- FIFA Circular Letter dated 24 August 2001 No. 769: Revised Regulations of the Status and Transfer of Players
- FIFA Circular Letter dated 20 December 2005 No. 1010 Art. 60, par. (3) of the FIFA Statutes – independent and duly constituted arbitration tribunal
- FIFA Circular Letter dated 20 May 2009 No. 1190: Revised Regulations of the Status and Transfer of Players – Protection of Minors
- ECA Legal Bulletin No1 SEP 2011
- UEFA Club Licensing and Financial Fair Play Monitoring process Toolkit 2012/2013 License season



ECA
EUROPEAN CLUB ASSOCIATION

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