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Dear ECA Members and Colleagues,

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

As you are aware, the 2014/15 football season was, on a regulatory level, marked by the introduction of the FIFA Regulations on Working with Intermediaries, as well as the 2015 edition of the FIFA Regulations on the Status of Players, including, amongst others, the new provisions concerning TPO related agreements and a new article addressing overdue payables.

Besides these regulatory developments, the judicial bodies of FIFA and CAS rendered some interesting new decisions, some of which are addressed in this bulletin.

The first chapter is fully dedicated to so-called “sell-on clauses” in transfer contracts. While such clauses appear to be rather straightforward, its interpretation often leads to disputes between clubs, either as a result of its unclear wording or because of failure to take due account of some unexpected events.

Chapter two of the bulletin is devoted to the latest decisions from FIFA’s judicial bodies and the Court of Arbitration for Sport (CAS). Amongst others, the validity of penalty clauses is touched upon and an extensive case summary is provided of the most recent CAS award in the Mutu saga.

The third chapter, titled “General remarks and tips”, addresses some more practical matters, such as the use of relegation clauses in employment contracts and the issue of undistributed solidarity contribution in relation to an international transfer of a player.

As this bulletin marks the end of the cycle of the ECA Legal Advisory Panel (LAP), we would like to take this opportunity to thank all LAP members for their valuable contributions by sharing their knowledge in a broad range of legal matters of interest to clubs.

In addition, we would like to thank Wouter Lambrecht (ECA Legal Manager) and Daan de Jong (ECA Legal Counsel) for their efforts in putting together this publication.

We hope you have a pleasant read and wish you all the best for the 2015/16 season!

Sincerely,



Michele Centenaro
General Secretary



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

I. The sell-on clause

1 Introduction

It is safe to say that sell-on clauses in transfer contracts have during the last couple of years gained prominence and often play an important role in, and constitute a serious consideration for, clubs agreeing to transfer one of their players.

The ratio legis behind a sell-on clause can be summarised as follows:

“to agree on a sell-on clause [...] is quite a standard practice in the world of professional football. It is in particular often used in transfers [...] involving a club of the level of the Appellant, on one side, and a club like the Respondent that is a member of a major league, on the other side. Such transfers of a fairly unknown player from a “small league” to a “top league” club give a chance to the players’ talents to be put in evidence and to increase accordingly his market value. Under such circumstances, transferring clubs are often willing to accept a rather small “fixed price” if they are given through a sell-on clause, the possibility to benefit from a later increase in the value of the player. The sell-on clause also allows the receiving club not to pay at once a too high transfer fee in case the player gets injured or his talent does not develop as expected.”¹

Although commonly used and appearing to be a rather straightforward contractual clause, its interpretation has elicited many questions during the last transfer period.

For that reason, we have found it desirable to address some of the main pitfalls we came across when advising our member clubs on the wording of sell-on clauses. As with any contractual clause, the wording of a sell-on clause will be of paramount importance.

We will endeavour to explain these pitfalls by referring to the relevant jurisprudence from the FIFA Players’ Status Committee (“PSC”) and/or the Court of Arbitration for Sport (“CAS”), as the case may be. However, before doing so, we would like to provide some regulatory background information as well as a definition of a sell-on clause.

Keeping in mind the negative obligation contained in the FIFA Regulations on the Status and Transfer of Players (“RSTP”) when it pertains to so-called “Third Party Ownership agreements”, it should be noted that sell-on clauses fall outside the scope of article 18ter² FIFA RSTP.

As such, the negatively worded article 18ter of the RSTP can be used to construe a positively worded definition of a sell-on clause:

“A sell-on clause is a contractual clause in a transfer contract whereby the selling club is entitled to participate in compensation payable in relation to the future transfer of the player from the buying club to a third club.”

Therefore, a standard sell-on clause could be worded as follows:

“In case of a transfer of the player during the term of the employment contract, Club X will be entitled to receive 15% of the transfer fee which exceeds the original transfer fee of USD 500,000 already paid to Club X pursuant to this contract”

Keeping in mind the above-worded sell-on clause, about which we were asked to provide feedback by one of our member clubs, we will analyse the following situations:

- Event triggering the sell-on clause
- Loan v. definitive transfer
- Unilateral termination by a player
- Mutual termination
- (Free) exchange of players
- Gross v. net transfer fee
- Actual payment of the transfer fee

¹ CAS 2007/A/1219 Sekondi Hasaacas FC v. Borussia Mönchengladbach, para. 15

² Article 18ter FIFA RSTP: No club or player shall enter into an agreement with a third party whereby a third party is being entitled to participate, either in full or in part, in compensation payable in relation to the future transfer of a player from one club to another, or is being assigned any rights in relation to a future transfer or transfer compensation.

2 Event triggering the sell-on clause

Since contractual obligations pursuant to a sell-on clause depend on the occurrence of an uncertain eventuality in the future³, it is important to properly define what the triggering events might be.

In the example given, the sell-on clause would become effective when the following three cumulative conditions are met:

- a subsequent transfer;
- during the term of the employment contract;
- for a transfer fee exceeding USD 500,000.

In relation to most transfer operations, this standard clause would not cause any problems. However, the following examples will illustrate that failure to consider certain actions when drafting a sell-on clause could have knockdown effects on a club's entitlement pursuant to a sell-on clause.

Before addressing the situations, it is of paramount importance that the club which is entitled to a performance under the sell-on clause ascertains that it receives the correct information from the selling club.⁴

3 Loan v. definitive transfer

With the above in mind, imagine that, rather than selling a player, a club decides to loan a player to a third club for an amount exceeding USD 500,000.

That is to say, it is questionable whether the terms "transfer" and "future transfer fee" in the standard sell-on clause also encompass loans and the loan-fees.

More precisely, it could be argued that the notion "transfer" is a generic term and includes both loans and definitive transfers; nevertheless, it could likewise be argued that a transfer and a transfer fee solely relate to the definitive transfers of players.

Unfortunately, most clauses we have seen are not sufficiently clear on this.

In the following case⁵, the FIFA Players' Status Committee had to analyse whether, by adding the wording "*any departure of the player before the expiration of his employment contract*", the parties intended to include or exclude loans from the application of the sell-on clause.

In its considerations, the Single Judge held the following opinion:

"10. First of all, with regard to such loan transfers, the Single Judge emphasized that, as a general rule, the club of origin intends to recover the services of the player at the end of the loan period, given that, usually, the employment contract it signed with the player is still valid. In other words, the employment contract between the club of origin and the player is not terminated by merely temporarily suspended

11. [...] the player was transferred on loan to club L in August 2013 when he still had a valid employment contract with the Respondent until 30 June 2016. In view of the foregoing, the Single Judge held that the loan transfer of a player cannot be considered a "departure" triggering the payment of the conditional fee [...]."

This reasoning is in line with another case⁶ where a player was sent on loan twice before being transferred on a definitive basis to the same club for an amount lower than the combined loan-fees.

³ Condition precedent: Condition precedent (CP) refers to an event or state of affairs that is required before something else will occur. In contract law, a condition precedent is an event which must occur, unless its non-occurrence is excused, before performance under a contract becomes due, i.e., before any contractual duty exists.

⁴ CAS 2013/A/3054 Club Atlético River Plate v. US Città di Palermo: "Where two clubs share the economic rights over a player and are supposed to share the sell-on fee, the club which maintains the registration of the player and who is the one actually having control on the transfer [...] has a heavy degree of responsibility of information with regards to the terms and conditions of the transfer, in view of the financial profit-sharing rights of the previous club, and the fact that the latter is a remote party to the transfer [...]."

⁵ FIFA PSC, 7 May 2014, N°0514303

⁶ CAS 2008/A/1793 Villarreal CF SAD v. CD El Nacional

In this respect, the CAS Panel had to decide whether the loans and its corresponding fees were to be excluded in establishing the entitlement under the sell-on clause the latter clause reading as follows:

“In case of a future transfer between Villarreal and another sports entity, the club Deportiva El Nacional will receive 30% of the value of the transaction, as of USD 1,500,000.”

Having analysed the case, the Panel held that, based on the wording of the clause, the intention of the parties, and customary practice in negotiating transfers in the world of football, it could not conclude that temporary transfers or loans were meant to be included in the notion “future transfer.”

Keeping the above in mind, it is important that, in the drafting of a sell-on clause, this clause clarifies what financial compensation paid for the services of the player will be taken into account for calculating the sell-on percentage.

One would then usually add or exclude loan fees, but it might likewise be important to clarify whether other bonuses such as, for example, appearance bonuses or bonuses for qualifications to UEFA club competitions are to be taken into account.

4 Unilateral termination by a player

When drafting a sell-on clause, clubs often ignore the possibility that the player to whom the sell-on clause applies may unilaterally terminate his employment contract, be it either with or without just cause. Such a termination may even take place pursuant to a buy-out clause stipulated in the relevant employment contract.

Similar to what has been noted above, it is important to define what kind of financial compensation will, and can, be taken into account in light of the sell-on clause.

4.1 A termination by the player without just cause

In this respect, reference may be made to the Sevilla v. Lens case⁷, whereby both parties had agreed on the following sell-on clause:

“Profit-sharing : In case of a resale of the player Seydou Keita by Sevilla FC to another club, Racing Club de Lens shall receive : - 10% of the capital gain between EUR 4,000,000 and EUR 8,000,000 – 15% beyond EUR 8,000,000 – These amounts may be cumulated.”

In this case, the player terminated his contract with Sevilla in May 2008 by invoking a unilateral termination clause which stated that *“in line with the Spanish Royal Decree and for the purpose of indemnification, if the player were to terminate his contract unilaterally, he would pay Seville EUR 14,000,000 if the termination took place before 15 February 2009 and EUR 10,000,000 if the termination took place after that date”*. Such payment was made to Sevilla by means of a deposit with the Spanish League.

In light of this, Lens requested its percentage pursuant to the sell-on clause, a request which was rejected by Sevilla since, according to the latter, the player had not been transferred by Sevilla but had *terminated his contract unilaterally*.

In analysing the arguments of both sides, the CAS Panel noted that it had to explore the “real and common intentions of the parties” beyond the literal meaning of the words of the sell-on clause as well as of any other contractual provision relevant to the clause.

⁷ CAS 2010/A/2098 Sevilla FC v. RC Lens

In this respect, the Panel clarified that a sale/resale of a player is a transaction affecting the employment relations between a player and a club, which always requires the consent of the transferred player and his club. Although a transfer of a player can take place outside the scope of a sale/resale of a player, i.e., by means of a unilateral termination or on expiry of the contract, a sale requires the consent of the club employing the player. As such, the Panel concluded that the notion “re-sale” as contained in the sell-on clause did not include other forms of transfers occurring outside a contractual scheme.

Keeping the above example in mind, it may be important to clarify that the damages paid by a player and/or third club following a unilateral termination by a player without just cause are taken into account in terms of a sell-on clause.

4.2 Termination with just cause by the player

Unlike the above mentioned situation, in case a player terminates his contract with just cause, e.g., due to outstanding salaries, no financial compensation will be payable to his club. It goes without saying that such a termination will also have a negative effect on the sell-on clause a negative effect which could be addressed by means of a diligently drafted sell-on clause.

In this respect, one could think of adding a penalty provision to a sell-on clause stating that if the new club has created a situation enabling the player to terminate his contract with just cause, a certain amount of damages will be payable by the new club.

It should be noted that this situation is not unusual as evidenced by the following case⁸. During the transfer window in January 2005, FC Metz and Galatasaray SK agreed to transfer Frank Ribéry for an amount of EUR 2,000,000 + a sell-on clause which provided that:

“Galatasaray SK will pay FC Metz a percentage of 20% of the amount surpassing EUR 2,000,000 in relation to a possible future transfer of the player to a third club.”

During the summer of 2005, the player terminated his contract due to 4 months of outstanding salary and joined Marseille, only to be transferred later on from Marseille to FC Bayern Munich in the summer of 2007 for an amount of EUR 20,000,000.

Faced with the termination, FC Metz contacted FIFA, which rejected its claim on the contention that:

- *If the player had been transferred for a transfer compensation below EUR 2,000,000, or if the player had been transferred at the end of his employment contract, Metz would as well not have received any compensation;*
- *Metz did not lose anything in this matter, since it had gambled on a hypothetical gain; that is a gain based on a condition. The Single Judge insisted that it is in the nature of a sell-on clause that the parties have to assume a financial risk.*

This decision was later overturned by the CAS which, applying the Swiss Code of Obligations⁹, held that Galatasaray had “*the obligation to make its best efforts in order to preserve the validity of the employment contract with the player Frank Ribéry. As the existence of this employment contract was crucial to the possibility of transferring the Player to a third club, with the obtention of a transfer compensation, it is obvious that the respect of the good faith principle implied the good performance of the contract with the player*” and that “*one of the core obligations of an employer is to pay its employees. Failing to have respected this obligation towards the player, Galatasaray cannot pretend that the condition of bad faith is not met.*”

⁸ CAS 2009/A/1756 FC Metz v. Galatasaray SK

⁹ Art 156 Swiss Code of Obligations (CO): A condition is deemed fulfilled if its occurrence has been prevented by one party acting in bad faith. Art 156 CO is based on the general principles preventing the abuse of rights (nemo auditor propriam turpitudinem allegans).

Whether or not Galatasaray also lost the benefit of a transfer indemnity was not withheld as an argument by the Panel and as such it was ordered to pay damages to FC Metz.

The above-mentioned case illustrates that, when drafting a sell-on clause, it would be desirable to foresee the consequences of a unilateral termination with just cause by a player by means of adding a penalty clause, and even more so to keep in mind the contradicting decision of the FIFA PSC and the CAS in this respect.

5 Mutual termination

Going into detail on unilateral terminations, one should not forget that a club and a player can also decide to terminate their contract by mutual consent, a mutual termination also impacting on the sell-on clause.

A dispute resulting from such a situation was filed with FIFA in October 2007 and was appealed to the CAS in November 2012 by CA Boca Juniors.^{10 11}

Boca had sold the player Carlos Tevez to SC Corinthians Paulista and had agreed, besides a transfer fee, to a sell-on clause which stated that *“in case of a future transfer of the Player by Corinthians to another club or sporting company, Boca will have the right to obtain 20% of the exceeding amount which is over the sum of USD 35.000.000.”*

However, on 28 August 2006, the Player, Corinthians and the administrator for Corinthians' sports matters, a company called MSI, executed a termination order of the employment contract. Subsequently, the Player entered into an employment contract with West-Ham, as a free agent, and MSI and West-Ham concluded a cooperation agreement. Faced with this, Boca requested damages to be paid by Corinthians, stating that *“even though Corinthians acknowledged the great value of the player, it surprisingly decided to terminate the employment relationship with him without receiving any financial compensation. There is no reasonable explanation other than a clear deception orchestrated by Corinthians and MSI in order to avoid their obligation vis-à-vis Boca.”*

Analysing the arguments of both sides, the Panel **highlighted that** *“it is not very common that a world class player with a valid employment contract is released by his club and immediately after, such a player is hired by a new club without paying any transfer fee”* but that *“there is no provision that prohibits the early termination of employment contract by mutual consent”*. **In the light of the article 156 Swiss CO**¹² *“the Panel considered that the occurrence of the condition was not prevented by Corinthians' early termination of the agreement because such termination was, at least from the evidence filed by the parties in this case, just the exercise of the parties' rights, to freely and early terminate a labor contract by mutual consent.”* and that as such, there being no breach of the good-faith principle, no damages were payable.

A similar outcome was reached by the FIFA PSC by means of a decision dated 18 March 2013¹³, where it had to deal with a claim from a Romanian club against a Spanish club in relation to the following sell-on clause:

“Club X undertakes to pay 15% to Club C at the moment the player or the third party pays the early termination clause in order to be transferred to another team or he is transferred by Club X to another team. Club C shall receive the minimum amount of EUR 125,000, in any of the mentioned events of early termination.”

¹⁰FIFA PSC, 26 March 2012, N°0312234

¹¹CAS 2012/A/3012 CA Boca Juniors v. SC Corinthians Paulista

¹²Ibid. footnote 8

¹³FIFA PSC, 18 March 2013, N°03133212

Analysing the case, the FIFA PSC held that

“it did not appear that the Respondent had, at any point in time, violated or breached the employment contract concluded with the player. Instead both [...] voluntarily and mutually agreed to prematurely put an end to their contractual relationship. [...] the respondent did not act in bad faith when it concluded a termination agreement with the player, the latter explicitly consenting to such termination. Having established that a transfer of the player against compensation [...] did not occur and that the respondent did not act in bad faith, the Committee concluded that the condition of [sell-on clause] was not met and that therefore the claimant is not entitled to receive compensation.”

Both cases indicate that, if one fails to anticipate the situation of mutual termination, a sell-on clause might be rendered without effect.

However, contrary to unilateral terminations, a mutual termination would normally only take place in instances where a player and a club agree that none of the parties are actually benefiting from a prolonged continuation of the employment contract and that they would be better off if the player continued his career elsewhere.

It is safe to say that, in those situations, it is highly unlikely that a club would be able to sell a player to a third club and that a sell-on clause would remain without effect in any case.

6 (Free) exchange of players

Whereas most transfers of players are against the payment of a transfer fee, once in a while it happens that a transfer of a player involves a certain amount of money and/or one or two players make a transfer in the opposite direction as part of the same transaction.

For example, during the summer of 2014, the Premier League clubs Swansea City and Tottenham Hotspurs entered into three transfer agreements whereby Michel Vorm was transferred to Tottenham Hotspurs free of charge, with the inclusion of a contingent payment, and whereby Ben Davies and Gylfi Sigurdsson were transferred between both clubs for an identical transfer fee.

In this respect, the former club of Michel Vorm, FC Utrecht, had agreed to a sell-on percentage of 30% with Swansea City when it had previously had concluded a transfer agreement with the latter.

According to Utrecht, the actual value of the transfer of Michael Vorm was to be seen in the overall framework of the three agreements between Swansea City and Tottenham Hotspurs whereas Swansea held that it did not receive any transfer fee for the player and that although three transfers had taken place, these were to be seen as independent and separate from one another.

In June 2015, the FIFA PSC rejected the claim lodged by FC Utrecht¹⁴ and although the CAS may take a different stance on the matter should an appeal be lodged, this example once again evidences that a diligently drafted sell-on clause could have forestalled this problem.

In this respect, we have noted that some clubs have added the following clause to their transfer contracts:

*“If Club A receives some other form of consideration (including but not being limited to player exchange, the playing of a friendly match and/or percentage of future transfer) in return for the Player’s transfer, **the parties shall agree in good faith to an appropriate equivalent transfer fee to be received by Club A for the purposes of this clause.**”*

Whether or not this clause will prove effective enough remains to be seen, but it may be considered a good start to have such a clause already included into the transfer contract.

¹⁴FIFA PSC, 22 May 2015, FC Utrecht v. Swansea City (unpublished)

7 Gross v. net fee

Besides correctly defining the event triggering the transaction, it is also important for the buying club and the selling club to define on what amount the sell-on clause will be calculated.

Shall it be calculated on the gross future transfer fee or on the actual amount that the club selling the player will receive in the future?

If deductions are allowed, it is important to define what kind of expenses can be deducted and what kind of expenses cannot!

For example, in a case involving a Belgian club and a French club, the Single Judge of the FIFA Players' Status Committee¹⁵ had to analyse the following clause:

"L'Olympique de Marseille and Standard de Liège agree to equally share the possible transfer fee in case of transfer of the player Vedran Runje to a third club."

Following the transfer of the Player from Standard to a Turkish club, Marseille requested Standard to pay half the transfer fee. Standard agreed to such payment but stated that it would pay half after having deducted the transfer bonus it paid to the Player and the commission it had paid to the Player's agent.

Whereas Marseille argued that the clause did not allow for any deductions, Standard contended that the transfer would not have taken place without such payments and that, therefore, the equal share of the transfer should be calculated on the sum effectively received by Standard.

Faced with this case, the Single Judge held that it could not be concluded from the clause that deductions were either allowed or disallowed. Lacking such precision, it was considered equitable that the notion *"equally share the possible transfer fee"* should apply to the amount effectively received by the selling club, thus allowing the deductions.

There are several other cases where the same issue was in dispute between the contractual parties.

For example, in the case *River Plate v. Palermo*^{16 17}, it was debated between the parties whether the levies & taxes due to the Argentinian FA, the Argentinian Players' Union, the Argentinian Social Security System, etc., amounting to 24.5% of the transfer fee, were to be taken into account for the calculation of the sell-on clause percentage.

More precisely, River Plate had agreed on a transfer fee with Porto in addition to which Porto would assume the taxes and levies related to the player's transfer.

The CAS Panel concluded that Palermo should have been aware of such operational costs and that, consequently, those could be deducted in order to calculate the entitlement under the sell-on clause.

In the case *FC Metz v. Fulham FC*¹⁸, the parties had agreed that *"FC Metz shall receive as a once payment, a sum equivalent to 15% of any net fee received by Fulham over and above the sum of FF 20,100,00."*

Pursuant to this clause, Fulham FC argued that it would be necessary to take into account all of the costs and expenses associated with the employment of Mr Louis Saha, namely agent fees, the player's wages, bonuses, insurance, and the fixed amount already paid as a transfer fee, in order to establish the 15% of the net profit it realised.

Not surprisingly, the CAS Panel did not withhold this line of argumentation and only allowed Fulham to deduct the costs that it incurred in direct connection with the transfer of the player, namely the agent costs.

Keeping the above-cited examples in mind, it is important for both the selling and the buying club to be very clear as to which costs can, and which costs cannot, be deducted in terms of the sell-on clause.

¹⁵ FIFA PSC, 7 April 2010, *L'Olympique de Marseille v. Standard de Liège* (unpublished)

¹⁶ FIFA PSC, 11 May 2012, N°0512060

¹⁷ CAS 2013/A/3054 *Club Atlético River Plate v. US Città di Palermo*

¹⁸ CAS 2005/A/896 *Fulham FC v. FC Metz*

8 Actual payment

Whereas the previous examples tend to be more directed at clubs that are to benefit from a sell-on clause, the following is important for those clubs that would need to perform under a sell-on clause.

More precisely, for those clubs it would appear to be desirable to include a provision in the sell-on clause which states that its obligations pursuant to the sell-on clause would only be triggered upon effectively receiving the transfer fee or any other financial reward.

For example, in a case¹⁹ involving an Austrian and a Belgian club, the latter claimed that the Austrian club had failed to comply with its obligations under the payment plan whereas the Austrian club stated that it had not received the third transfer instalment itself due to bankruptcy of the club to which it sold the player.

Faced with the arguments of both parties, the Single Judge “*considered that he would need to determine whether the right to the sell-on clause would be fixed as of the conclusion of a new transfer or if such entitlement would be subject to subsequent events, such as the actual receipt of the transfer fee. Keeping in mind the wording of the sell-on clause “participate in the future transfer”, which implies the action of partaking in something, the Single Judge decided that in order to participate in a “transfer price” it is necessary that such transfer price is actually paid to the club which is originally entitled to receive the transfer compensation. Any other interpretation would even lead to double penalty of a club, where it is unable to collect its entitlements but would be compelled to pay a percentage on an amount it never received.*”

In a similar case²⁰, the Single Judge came to the same conclusion, as he ruled that “*any further claim lodged by the Claimant had to be rejected, since the relevant payments had not yet fallen due in accordance with the payment scheme agreed upon between Club F and the Respondent.*”

In another case²¹ involving a French and a Turkish club, the PSC had to analyse the following clause “*if the player is transferred to another club(s) during his contract(s) with club G, club G will pay to Club A 20% of the exchange financial value for each transfer. This (these) amount(s) are due to club A by the end of the 5th day after the date on which each transfer is approved.*”

According to the French club, its full entitlement under the sell-on clause became due at once, irrespective of the instalment schedule the Turkish club had agreed upon with the new club, with the Turkish club evidently arguing the contrary.

Although the clause seemed to give some more weight to the interpretation of the French club, the PSC accepted the Turkish club’s argument and held that the entitlement under the sell-on clause was to be aligned with the payment-schedule of the transfer.

Although common sense is applied by the FIFA PSC in these kinds of cases, it does not harm the concerned club to clarify this issue in the sell-on clause, hence to avoid unnecessary litigation.

¹⁹ FIFA PSC, 7 May 2014, N°0514799
²⁰ FIFA PSC, 23 April 2013, N°04132127
²¹ FIFA PSC, 19 March 2013 N°03132290

9 Conclusion

Having set out the above examples, it is clear that a well-drafted sell-on clause is necessary not only to protect one's legitimate expectations but also to avoid and prevent unnecessary litigation.

As an example, we submit the following corrected version of the standard sell-on clause used at the beginning and which we believe could be used by the member clubs.

"In case of a transfer of the player registration from Club X to a third new club, Club Y will be entitled to receive 15% of the net compensation effectively received by Club X over and above the amount of USD 500,000. Compensation in terms of this article can be, but is in no case limited to, for example, a transfer fee, a loan fee, bonus payments, money pursuant to a new sell-on clause, damages payable for breach of contract, training compensation, etc. All compensation is to be accumulated for reaching the threshold of USD 500,000 and calculating the actually amount payable whereas only those costs directly linked with the change of the player's registration can be deducted, i.e., solidarity contribution, mandatory taxes & levies. Payments to intermediaries and the player cannot be deducted.

In case of a mutual termination of the employment contract by the club and the player and/or a unilateral termination by the player with just cause, liquidated damages for the amount of USD 1,000,000 will be payable to Club Y within 30 days of the termination.

*If Club X receives some other form of consideration (including, but not being limited to, player exchange, the playing of a friendly match) in return for the Player's transfer, **the parties shall agree in good faith to an appropriate equivalent transfer fee** to be received by Club Y for the purposes of this clause, which in any case shall not be lower than USD 1,000,000.*

Club X shall provide Club Y with all necessary information in relation to establishing the entitlement pursuant to the sell-on clause, including, but not limited to, providing a copy of the transfer & loan contracts, termination letter & agreements, etc"

We fully appreciate that the wording of a sell-on clause, like many other clauses will, in fact, depend on the bargaining power of the parties, but this article and the examples above at least shed some light on what could, or ought to, be taken into account.

Finally, for those who are interested in perusing through some more reading materials dealing with simulations and attempts to circumvent the application of a sell-on clause, we refer you to the following²² CAS awards.

²² Cf. CAS 2004/A/701 Sport Club Internacional v. Galatasaray SK, CAS 2012/A/2733 Stichting Heracles Almelo v. FC Flora Tallinn, CAS 2014/A/3508 FC Lokomotiv v. Football Union of Russia & FC Nika

II. Feedback from FIFA's judicial bodies & CAS

1 Penalty clauses

Both the second²³ and third edition²⁴ of the ECA Legal Bulletin dedicated an article on so-called penalty clauses, which may be defined as a contractual clause that imposes a penalty in case of a non- or defective performance by one of the parties to a contract.

According to Swiss Law, an adjudicatory body may reduce a penalty fee if it is considered excessive in nature²⁵. However, a penalty should not too readily be reduced and the principle of contractual liberty has always to be given priority in case of doubt.²⁶

1.1 Limits to a contractual penalty

Both the FIFA Players' Status Committee (PSC) and CAS have adjudicated various cases in the past in which the debtor club claimed that the amount of the penalty due as per the contractual clause ought to be dismissed as being obviously abusive and excessive.

In judging the validity of a penalty clause, CAS, *inter alia*, takes the following elements into account²⁷:

- i. The creditor's interest;
- ii. The severity of the breach;
- iii. The debtor's fault and intentional failure to execute the main obligation;
- iv. The business experience of parties.

When establishing a penalty clause, the following table, which is derived from CAS jurisprudence, can provide some guidance. However, it is emphasised that what constitutes an acceptable penalty clause will very much depend on the above-mentioned criteria, which can, and will, differ in each individual case:

Principle amount	Penalty	Validity
EUR 1,050,000	EUR 1,000 for every day in delay	Reduced to 10% of the transfer fee ²⁸
EUR 5,000,000	20% (EUR. 1,000,000)	Valid ²⁹
EUR 150,000	EUR 100,000	Valid ³⁰

Having compared the jurisprudence of CAS to that of FIFA, it is to be noted that the standing practice of the FIFA PSC provides for a somewhat different appreciation of what are valid penalty clauses.

More precisely, analysing the jurisprudence of the PSC, it can be seen that the PSC holds the opinion that any penalty clause exceeding the amount of 18% per annum is considered abusive.³¹

Such conclusion is often reached without performing a case-by-case analysis applying the criteria established by the CAS.

Moreover, and maybe more importantly, also the consequences of an excessive penalty clause are differently adjudicated by, respectively, the PSC and the CAS.

Whereas CAS, in accordance with Article 163 of the Swiss Code of Obligations (CO), reduces an excessive penalty clause to an "acceptable rate"³², thereby maintaining the clause as such, the PSC takes a somewhat different approach.

That is to say, if the FIFA PSC deems a penalty clause excessive, it does not reduce a penalty clause but simply disregards it and only entitles the creditor to the standard annual interest rate of 5%.³³

²³ECA Legal Bulletin 2, September 2012, p. 21

²⁴ECA Legal Bulletin 3, September 2013, p. 16

²⁵Article 163 para. 3 Swiss Code of Obligations: At its discretion, the court may reduce penalties that it considers excessive.

²⁶CAS 2014/A/3858 Beijing Guoan v. FIFA, André Lima & Clube Vitória

²⁷Cf. CAS 2012/A/2847 Hammarby Fotboll AB v. Besiktas Futbol Yatirimlari Sanayi ve Ticaret A.S.

²⁸CAS 2010/A/2317 & CAS 2011/A/2323 SC Fotbol Club Timisoara SA v. FC Slovan Liberec. When CAS adjudicated the case, 3 ½ years had passed since the principle amount became due. Providing that the penalty amount, if awarded in full, exceeded the principle amount.

²⁹CAS 2014/A/3664 Al-Ittihad Club v. Club de Regatas Vasco da Gama

³⁰CAS 2012/A/2847

³¹FIFA PSC, 15 January 2014, N°01142777

³²Cf. CAS 2010/A/2317- 2011/A/2323

³³Article 73 Swiss Code of Obligations

1.2 Penalty fees combined with interest rates

Another interesting issue regarding the use of penalty clauses is whether, in addition to the penalty in case of non-performance agreed, a creditor is also entitled to a default interest rate on the outstanding amounts.

Although we have noted that during proceedings many clubs claim both the contractual penalty and default interests, it should be emphasised that, according to FIFA PSC jurisprudence, a contractually agreed penalty for late payment cannot be claimed together with a default interest rate.³⁴

Notwithstanding this, it should be noted that interests and a penalty are not mutually exclusive!

That is to say, parties can agree upon a contractual interest rate in addition to a penalty fee.³⁵ This has been confirmed by CAS, which held that *"if the contract is clear in determining that both (interest rate and penalty fee) can be awarded complimentary, nothing prevents an adjudicatory body from awarding both."*³⁶

2 Simultaneous employment contracts

Generally speaking, clubs and players are familiar with the legal consequences of a player terminating an employment contract without just cause and subsequently signing with a new club. However, less known are the consequences of a player entering into more than one contract with different clubs covering the same period of time.

Recently, such situation was adjudicated by the DRC³⁷ and the facts of the case can be summarised as follows:

Following the course of events, the player Said Husejinović signed the following overlapping contracts:

Club	Contract signed	Contract period
FK Sarajevo	Unknown	15 March 2012 – 15 March 2013
CSKA Sofia	27 December 2012	8 January 2013 – 30 June 2015
GNK Dinamo Zagreb	4 January 2013	4 January 2013 – 31 December 2013

In January 2013, CSKA Sofia became aware that, although having signed a contract with the Player, the latter did not intend to start his activities as a football player with the club. The Player had, in fact, decided to join Dinamo Zagreb after the latter club had concluded a transfer agreement for the Player with FK Sarajevo.

Consequently, CSKA Sofia filed a claim with FIFA in which it claimed compensation as a result of the contractual breach by the Player. Furthermore, it requested sporting sanctions to be imposed on the Player as well as on Dinamo Zagreb for allegedly having induced the contractual breach.

In the proceedings, the Player initially challenged the validity of the employment contract he had concluded with CSKA Sofia; inter alia arguing that he had never been registered with the Bulgarian Football Union, and that CSKA Sofia never had requested the relevant documentation in order to register the Player with its Football Union. The DRC, however,

³⁴ Cf. FIFA PSC, 30 January 2012, N°1121193

³⁵ Cf. FIFA PSC, 23 September 2014, N°08143368 & FIFA PSC, 15 January 2014, Club de Regatas Vasco da Gama v. Al Ittihad Club (unpublished)

³⁶ CAS 2014/A/3664 para. 71

³⁷ FIFA DRC, 27 November 2014, N°1114239, PFC CSKA Sofia v. Said Husejinović & GNK Dinamo Zagreb

rejected the Player's line of reasoning. More particularly, it held that, in line with its vast jurisprudence, the validity of an employment contract as such cannot be made conditional upon the execution of (administrative) formalities such as the registration procedure in connection with the international transfer of a player. It is noted that clubs often mistakenly invoke this argument, believing that without a registration or the issuance of an ITC an employment contract is not valid or binding. Rather the contrary is true.

Thus, after the Chamber ruled that the Player and CSKA Sofia had concluded a valid employment contract, it further decided that the Player had breached the employment contract with the latter club by not joining the team. As to the consequences of such actions, the Chamber referred to Article 18 Para. 5 FIFA RSTP, which states that: "*If a professional enters into more than one contract covering the same period, the provisions set forth in Chapter IV (IV. Maintenance of contractual stability between professionals and clubs) shall apply.*"

Next, the Chamber established that the contractual breach had occurred within the protected period, for which it sanctioned the Player with a restriction of four months on his eligibility to participate in official matches.

As to possible sporting sanctions to be imposed on Dinamo Zagreb, the Chamber considered that the latter club had not induced the Player to breach the contract, as it had concluded a transfer agreement with the former Club of the Player (FK Sarajevo), and lacking any proof that it had been aware of the contractual situation between the Player and CSKA Sofia.

With regards to the compensation requested by CSKA Sofia, the Chamber noted that the Player had a valid employment contract with FK Sarajevo until the 15th of March 2013. The Chamber subsequently held that, prior to signing the Player on 27 December 2012, CSKA Sofia had not taken the necessary measures to establish whether the Player was still contractually bound to FK Sarajevo and for what length of time. Therefore, it had failed to exercise due diligence in order to inform itself as to the Player's contractual situation.

Consequently, the Chamber held that CSKA Sofia was not entitled to any compensation in accordance with the *nemo auditur propriam turpitudinem allegans* principle (i.e., nobody can benefit from his own wrong) because the latter club was itself at fault when concluding the contract with the Player.

3 The consequences of not summoning FIFA and the withdrawal of a party in CAS appeal proceedings

When someone is not satisfied with the outcome of a decision rendered by the FIFA Dispute Resolution Chamber (DRC) or the Players' Status Committee (PSC), he or she may appeal such a decision to the Court of Arbitration for Sport (CAS).

When doing so, it is important to consider which parties you want to summon at the CAS level as Respondents and what specific attention should be paid to the FIFA body that rendered the decision under appeal.

Furthermore, it should be remembered that if one of the appealing parties eventually withdraws from the CAS proceedings, for example due to the fact that it lacks sufficient funds to pay its share of the advance of procedural costs, this is not done without consequences.

As both situations have legal implications, we believe it to be of interest to outline the consequences of these procedural events.

3.1 Not summoning FIFA as a respondent party in CAS appeal proceedings

In the recent CAS case CAS 2014/3489-3490³⁸, the CAS panel had to determine the consequences for a club that had failed to summon FIFA as a respondent party in the CAS appeal proceedings against a FIFA DRC decision.

The facts of the case may be summarised as follows: following a contractual dispute with the player David Braz, the Brazilian club Palmeiras instituted an action with the FIFA DRC, claiming compensation and the imposition of sporting sanctions on the Player as well as on his new club, Panathinaikos. In its decision³⁹, the DRC found for Palmeiras in the matter of compensation but rejected the imposition of sporting sanctions on the Player.

Palmeiras appealed the FIFA decision to the CAS, seeking a higher amount of compensation and the imposition of sporting sanctions on the player and his new club.

In doing so, Palmeiras however omitted to summon FIFA to the proceedings and addressed its suit only to the Player and Panathinaikos as the respondents.

The main consequences of neglecting to issue a proper summons can be summarised as follows (see supra):

- The FIFA DRC decisions remain unaffected and the CAS award is, in principle, not enforceable against or by FIFA;
- CAS is not competent to impose (review) sporting sanctions.

Although quite specific and technical, the following arguments and reasoning as advanced by the parties and the CAS clearly explain how the Panel arrived at those two conclusions.

ARGUMENTS AND REASONING

During the CAS proceedings, Panathinaikos argued that on the basis of Article 75 of the Swiss Civil Code (CC)⁴⁰, the Player and Panathinaikos herself did not have standing to be sued independently by FIFA.

More precisely, according to Panathinaikos, an appeal against a DRC decision is to be considered as a challenge to a decision of an association, implying that the association needs invariably to be sued by the appealing party in order for the appeal to have merit.

The CAS Panel assessed the issue as follows. In the first instance, the Panel acknowledged that no decision of an association may be set aside without the association being summoned and, thereby, being given the right to take part in the proceedings in casu. In this respect, the Panel made reference to case law of the Swiss Federal Tribunal (SFT)⁴¹, in which it is held that a party seeking to set aside a FIFA decision is obliged to summon FIFA as a respondent in the CAS appeal proceedings.

The Panel noted, however, that when it concerns a horizontal dispute adjudicated by a FIFA body, which is defined as a dispute between direct or indirect FIFA Members (such as clubs and players) not involving FIFA's disciplinary powers, CAS nonetheless remains in the position to examine and adjudicate the dispute, even when FIFA is not summoned to the appeal proceedings.

The Panel held that a FIFA decision dealing with a dispute between two members constitutes a decision of an association and is not to be considered as an award but, rather, as an act that possesses *contractual value* for the members of the association. As contended by the SFT⁴², such a decision constitutes “*only a simple expression of will by the association concerned; such decisions are acts falling within the scope of administration and not judicial acts. Therefore it is not possible to consider them as arbitral awards*”. This distinction makes a big difference, also in terms of, for instance, the issue of *res iudicata*.⁴³

³⁸ CAS 2014/A/3489 Sociedade Esportiva Palmeiras v. David Braz de Oliveira Filho & Panathinaikos FC, CAS 2014/A/3490 Panathinaikos FC v. Sociedade Esportiva Palmeiras & FIFA & David Braz de Oliveira Filho

³⁹ FIFA DRC, 30 August 2013, N°08133453, Sociedade Esportiva Palmeiras v. David Braz de Oliveira Filho & Panathinaikos FC

⁴⁰ Article 75 Swiss Civil Code: 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.

⁴¹ SFT decision 4A_490/2009, 13 April 2010, reported in ATF 136 III 345

⁴² SFT decision 4P.217/1992, 15 March 1993, reported in ATF 119 II 271

⁴³ Cf. CAS Legal Bulletin 2015/1 – Res iudicata in sports disputes and decisions rendered by sports federations in Switzerland, Despina Mavromatis, for background information as to how *res iudicata* may not apply to FIFA decisions.

The Panel continued by stating that a FIFA decision modifying the contractual relationship between two parties in a horizontal dispute may be dealt with by CAS, even if FIFA is not summoned since, similar to the FIFA decision, a CAS award merely decides on the reciprocal rights and obligations between those parties themselves, without any interest of FIFA at stake.

CONSEQUENCES

Notwithstanding the above, CAS outlined that failing to summon FIFA in an appeal against a DRC decision can have the following two consequences.

First, failing to summon FIFA implies that the FIFA DRC decision remains unaffected and that, in principle, the CAS award, albeit enforceable between two parties in the dispute, is not enforceable against, or by, FIFA. Although rather a serious consequence, it nonetheless should be nuanced since, in practice, FIFA, by means of its Statutes and Disciplinary Code, enforces CAS awards regardless.⁴⁴

Secondly, with regards to the sporting sanctions, the Panel noted that a disciplinary sanction does not concern the contractual relationship between the parties but actually concerns the hierarchical relationship between FIFA and its members and their compliance with the FIFA rules and regulations.

This implies that disciplinary sanctions and sporting sanctions can only be imposed and/or reviewed by the CAS if FIFA is summoned as a party in the appeal procedure.

3.2 Withdrawal of a party to the dispute

The possible consequences of an appellant/counter-claimant withdrawing from an arbitration procedure are perfectly illustrated by the proceedings in a case involving a contractual dispute between the clubs Birmingham City and Boca Juniors and the player Lucas Castromán. The facts of the case were as follows: in DRC proceedings, lodged by Birmingham City as a result of an alleged contractual breach by the Player, Birmingham City was awarded GBP 400,000 as compensation payable by the Player, and Boca Juniors was held jointly and severally liable for the payment of this amount.⁴⁵

Both Boca and the Player appealed the decision with CAS. However, at a certain point in time, the Player withdrew his appeal since he did not have the financial means to pay the advance of costs. As a result of this withdrawal, CAS issued a termination order in the appeal lodged by the Player.⁴⁶

CAS, however, upheld the appeal lodged by Boca Juniors as it set-aside the DRC decision and referred the case back to the DRC, based on the fact that Boca's right to be heard had been violated. According to the Panel, the Argentinian FA had never served the claim lodged by Birmingham to its member club, which as a consequence was not able to argue its position during the FIFA proceedings.

More importantly, the Panel held the FIFA DRC proceedings to be null and void against all the parties involved in the dispute, regardless of whether or not the Player appealed the decision himself.

Faced with this decision, Birmingham City filed an action for annulment with the Swiss Federal Tribunal against the CAS award, claiming that CAS did not have jurisdiction to annul the decision in relation to the Player, for the reason that the latter failed to appeal the decision himself.

In its decision, the SFT held⁴⁷ that the claim lodged by Birmingham against Boca and the Player ought, from a procedural point of view, to be regarded as two individual claims against two different respondents. Although FIFA, as a customary practice, joins both claims and adjudicates them together, the fact that they are to be seen as two separate claims does not preclude the DRC from adjudicating them individually, and thus also differently!

⁴⁴ Article 13 para. 1 FIFA Statutes (Members' obligations): Members have the following obligations: a) to comply fully with the Statutes, regulations, directives and decisions of FIFA bodies at any time as well as the decisions of the Court of Arbitration for Sport (CAS) passed on appeal on the basis of art. 66 par. 1 of the FIFA Statutes.

⁴⁵ FIFA DRC, 15 June 2011, Birmingham City FC v. Lucas Martín Castromán & Club Atlético Boca Juniors (unpublished)

⁴⁶ CAS 2012/A/2916 Lucas Castromán v. Birmingham City FC

⁴⁷ SFT Decision 4A_6/2014, 28 August 2014, reported in ATF 140 III 520

Keeping the above in mind, the SFT ruled that, since the Player had failed to appeal the DRC decision, it had acquired final binding force upon him and that the CAS was therefore wrong to annul the “entire” DRC decision and to refer it back to FIFA for a new decision against “all parties.”

A more recent CAS award⁴⁸ picked up on this SFT ruling which dealt with an identical situation as the previous case discussed.

More precisely, the Player had withdrawn his appeal whereas his new club, Club Jeanne d’Arc Drancy, successfully argued that its right to be heard had been violated at FIFA level. In this respect, the Panel held:

“136. That said, as mentioned above, the DRC’s decision is only annulled with respect to the Appellant Club, since the Player’s counterclaim has not been admitted.

*137. Thus, **unless** for any reason the Respondent Club decided to withdraw its underlying claim against the Appellant Club, **the DRC of FIFA must serve process on the Appellant Club again in a manner which meets due process and give it a full opportunity to be heard in a fair manner throughout the renewed proceedings, before making a new decision on the merits of the Respondent Club’s claim against the Appellant Club.** Furthermore, the DRC’s new decision on the merits must be entirely based on the allegations made and evidence adduced by the parties in the renewed proceedings without regard to the content of its decision of 27 February 2013 which is being annulled.”*

With the above in mind, one could picture a position where two conflicting decisions exist, i.e., one against the player and another one against his new club, which, in turn, could lead to the potential situation in which FIFA would have to enforce a DRC decision and a contradicting CAS award dealing with the same contractual dispute.

4 **CAS 2013/A/3365-3366 Juventus FC, A.S. Livorno Calcio S.p.A v. Chelsea FC**

INTRODUCTION

On the 21st of January 2015, CAS issued its latest decision in the on-going legal saga involving the player Adrian Mutu, his old club Chelsea FC, and his new clubs A.S. Livorno and Juventus FC.

In this latest episode, CAS had to determine whether the player’s new club could, under the 2001 FIFA RSTP, be held jointly and severally liable for the payment of compensation awarded to the former club as a result of a termination with just cause by the player.

Before analysing the latest CAS ruling in detail, it seems desirable to quickly recall the facts and different decisions that were issued in this dispute over the last decade:

After a positive drug test in October 2004, Chelsea decided to terminate the employment contract with the Player.

Following his forced departure from England, Mutu was registered with Livorno on 29 January 2005 and subsequently registered with Juventus a mere couple of days later, on 31 January 2005. The underlying reason for this transaction was that Juventus was prevented from signing another non-EU player directly, as it had reached its quota of non-EU players who could be recruited from outside Italy, as established in the Italian regulations.

Following these events, no fewer than four CAS decisions have been rendered (including the present case). In addition hereto, the Player appealed a CAS award with the Swiss Federal Tribunal, albeit unsuccessfully, and lodged an application before the European Court of Human Rights. The latter case is currently still pending.

⁴⁸CAS 2013/A/3155 Club Jeanne d’Arc Drancy v. FC Sheriff Tiraspol, Amath André Dansakho & FIFA

FIFA DRC DECISION OF 25 APRIL 2013

After being awarded compensation as a result of the breach and trying to enforce this decision on the Player, Chelsea eventually filed a petition with the FIFA DRC in which it requested the latter to hold both Livorno and Juventus jointly liable for the payment of the compensation awarded to Chelsea.

In doing so, Chelsea based its request on Article 14.3 of the Regulations governing the Application of the RSTP 2001, which reads as follows:

“If a player is registered for a new club and has not paid a sum of compensation within one month time limit referred to above, the new club shall be deemed jointly responsible for payment of the amount of compensation.”⁴⁹

In its decision, the DRC held that under the clear wording of the afore-mentioned provision, the Player’s new club would automatically be jointly responsible for the payment of the awarded compensation should the latter fail to fulfil his obligations within a month of notification of such a decision. According to the DRC, the provision did not make a distinction between the consequences of a termination of the contract by a player without just cause and the termination of a contract by a club with just cause.

The DRC furthermore held that the registration of the Player with both Livorno and Juventus was so closely connected that, given the *exceptional circumstances*, both clubs were to be considered as the player’s “new club” for the purpose of Article 14 RSTP 2001.

APPEAL TO THE CAS - ARGUMENTS

Both Livorno and Juventus appealed the DRC decision to the CAS, and in addition to raising several arguments related to violations of due process and their right to be heard, they contended that Article 14.3 of the RSTP ed. 2001 did not imply an automatic joint liability of the Player’s new club in case the former club terminated the contract with just cause.

More precisely, both clubs claimed that the scope of the provision setting out the joint and several liability was limited to those situations in which the player himself withdrew from the contract without just cause and NOT to those situations in which the player’s former club itself (with just cause) terminated the contract.

Bearing this in mind, the key question which the Panel had to answer was how to interpret Article 14.3 FIFA RSTP ed. 2001.

As a first step, the Panel had to establish the legal nature of article 14.3 in order to determine the method of interpretation. Depending on the legal qualification of this article, it would have to be interpreted either according to the general rules of interpretation of contracts or according to the interpretation of statutes and bylaws of legal entities, such as the FIFA regulations.

According to Chelsea, the liability for a new club established in Article 14.3 arises from a *contractual relationship* between the parties based on the membership of clubs in the FIFA system. Juventus and Livorno, on the other hand, noted that they never entered into a contract regarding the Player with Chelsea and that the fact that the parties are indirect FIFA members does not provide for a contractual relationship amongst them.

The Panel concurred with the position of Juventus and Livorno and held that there was no contractual relationship between the appellants and Chelsea.

It noted that by obtaining membership to an organisation (such as FIFA) “*the exchange of mutual and concordant assents constitutes a contract, the scope of which is limited to the acquisition of membership. As soon as the applicant acquires the status of member, it is no longer bound to the association by a contractual relationship, but by a specific relationship, associative in nature.*”

⁴⁹Please note that the current Article 17 para. 2 as mentioned in the 2015 RSTP contains a similar wording: 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 between the parties.

Subsequently, the Panel noted that *“If there is no contractual relationship between an indirect member (i.e., any of the parties and a sport federation (i.e., FIFA), the conclusion should be the same as regards the relationship between two indirect members of the same federation.”*

Therefore, the Panel determined that the provision was to be interpreted according to the method of interpretation applicable to the interpretation of Statutes and by-laws of legal entities.

As a starting point, the Panel attempted to interpret the provision according to its wording (*the literal interpretation*), but concluded that this did not provide for a solution as it held that *“Article 14.3 is not as unambiguous as either the Appellants or Chelsea want the Panel to believe. Although “shall be deemed” may be reduced to “is”, that depends on whether the conditions that require the deeming have been met – which is the central question of this case. Under these circumstances, it is necessary to look beyond the wording of this provision.”*

The Panel held that context surrounding the implementation of the 2001 RSTP was of key importance in the interpretation of the provision at issue (*contextual approach of interpretation*).

In this respect, the Panel referred to the paramount role of EU law and, in particular, to the Bosman Judgment, which triggered FIFA to amend its rules on transfers of players, which eventually led to the introduction of the 2001 RSTP, whose main objective was, and still is, to protect contractual stability in the world of football.

Therefore, the discussion amongst the parties centred on the rationale of Article 14.3 and the concept of contractual stability, it being questioned whether a new club was to be held jointly responsible for paying damages if the former club itself had terminated the employment contract with the player.

According to Chelsea, the provision ensured that a new club would not be able to benefit from acquiring the services of a player for free following a contractual breach by the player.

Juventus and Livorno, on the other hand, claimed that the FIFA RSTP, and in particular Article 14.3, are not aimed to protect the *“bad investment”* of a club but only serves to *“ensure contractual stability, i.e., to avoid players terminating their contracts without just cause to move to another club”*, which in turn implies that it does not serve to *“compensate a club that has decided to unilaterally terminate a player.”*

CONSIDERATIONS BY THE PANEL

In its determination, the Panel held that, while the player was fully responsible for the breach of contract justifying the contractual termination by the club, the *“Club was not required to terminate the employment contract if they still valued his services and preferred to hold him to his contract. The Club was entitled, not obliged, to dismiss him.”*

This consideration, according to the Panel, was the essential difference in assessing the position of a player’s subsequent employer.

The Panel noted that the moment when Chelsea itself terminated the employment contract with the Player, in fact no issue of contractual stability was at stake, thereby noting that it *“strains logic for the club now to contend that the Appellants somehow enriched themselves by acquiring an asset (the player) which it chose to discard.”*

The Panel explained that the contractual stability was in fact not at stake for the following reasons:

- When Chelsea terminated the employment contract with the Player, its claim was solely directed against the Player and *“Chelsea would have never been compensated, given the plain likelihood that the Player would never be able to pay the awarded amount;”*

-
- Bearing this in mind, the Panel found it “hard to understand, how, in the name of contractual stability, Chelsea’s claim (...) against the Player is to be borne jointly and severally by the new club, which (...), had nothing to do with the Player’s contractual breach, and was not even called to participate in the proceedings, which established the awarded compensation”. Chelsea “took the risk of bearing the damage resulting from the contractual breach” and held that “it seems incongruous for Chelsea to try to seek an advantage from the fact that the New Club benefits from the Player’s services, whereas Chelsea was no longer interested in his services.”

The Panel held that if Chelsea had, in fact, attributed value to the Player, it would have attempted to conclude a possible transfer agreement with another club willing to pay for the latter’s services instead of terminating the employment contract following the Player’s contractual breach.

Bearing this in mind, the Panel held that Chelsea’s conduct only appears to have had the purpose to increase its chances for greater financial compensation and cannot be “said to embody the pursuit of contractual stability”, which is the objective of the provision at stake.

In line with the concept “contractual stability”, the Panel stated that one needed to strike a balance between a player’s fundamental right to free movement and the principle of contractual stability. In the light of finding such a balance, it would appear unreasonable to impose the joint and several liability on the new club in the absence of evidence of the latter having induced the player or of being otherwise at fault, and irrespective of the manner in which the employment contract was terminated.

The Panel noted that the aimed deterrent effect in such a provision, i.e., that a club will induce a player to breach his contract, has no purpose when a club itself had terminated the employment contract with a player, provided that a player has no option other than to find employment elsewhere. In such a scenario, the Player would be hindered from finding employment elsewhere.

The Panel added that, if a new club in such a case were to be held liable to pay compensation, it “would bring the matter back into pre-Bosman times, when transfer fees obstructed the Player’s freedom of movement”, which, as such, would pass beyond the objective of protecting contractual stability.

CONCLUSION

Although the rule of *stare decisis & doctrine of precedent*⁵⁰ does not apply at CAS, it goes without saying that this case is and will be leading case going forward.

It may be noted that, although the wording of article containing joint & several liability in the 2001 edition of the RSTP differs slightly from the 2015 edition of the RSTP, the background as to why this article was introduced remains the same.

Although each case will have to be analysed independently, clubs acting prudently should assume that, if they decide to terminate a contract with a player for just cause, damages can still be claimed from the concerned player, but possibly no longer from his new club.

However, at the same time one might assume that a different outcome would be reached in those cases where the player suffers from “transferitis” and, by his behaviour (for example, refusing to return) forces his club to terminate his contract in order to enable him to join a new club.

Finally, it should be noted that EU law has played a predominant role in the interpretation of the FIFA regulations and that it will be interesting to see how this will be dealt with in future cases at FIFA and CAS.

⁵⁰Latin for “to stand by that which is decided”. The principle that the precedent decisions are to be followed by the courts, e.g., to abide by, or adhere to, decided cases. It is a general maxim that when a point has been settled by decision, it forms a precedent from which ought not to be departed afterwards.

III. General Remarks and Tips

1 Relegation clauses in employment contracts

Clubs, especially those operating in the lower regions of the league, often aim to limit their financial risks as a result of relegating to a lower division. A relegation clause is a popular tool widely used by those clubs with the aim to protect themselves from irresponsible wage burdens as a result of relegating.

Depending on the wording of such a clause, it provides that the contract with a player can be terminated or loses its validity should the club be relegated to a lower division.

At the same time, it is to be noted that the use of relegation clauses does not only benefit clubs but that also players can use such a clause to their advantage. That is to say, players themselves also find it desirable to include these clauses in employment contracts in order to protect their sports career, in that they would not be obliged to play in lower level competitions.

However, the validity of relegation clauses has been the subject of discussion in numerous cases adjudicated by the FIFA DRC.

Before providing an overview of the most relevant case-law, it is important to differentiate two frequently used clauses.

- the relegation clause according to which the club is entitled to terminate the employment contract in case of relegation⁵¹;
- the relegation clause according to which the employment contract automatically loses its validity should the club be relegated.⁵²

This distinction is important since both clauses are treated differently.

A clause which allows a club to terminate an employment contract in case of relegation implies that the club retains full discretion as to whether the employment relationship with the player will continue or will come to an end following a regulation of the club.

According to the DRC⁵³, this kind of regulation clause is to the benefit of the club only and, therefore, has a unilateral character. On that ground, the DRC declared such a relegation clause to be invalid.

However, the validity of a clause providing for an automatic termination in case of relegation, meaning that such termination is not depending on the club's discretion, has been adjudicated differently.

According to the standing practice of the DRC⁵⁴:

*"Parties to an employment contract may agree that the anticipated termination of a short-term employment contract is subject to the fulfilment of a condition, as long as such condition is not of a potestative nature (...) The condition of the relegation of a club is certainly not a potestative condition, since such relegation is depending on other circumstances than the will of a party to the contract. In fact it has to be presumed that the will of clubs and players is always to avoid relegation. The fulfilment of the condition of relegation is thus solely depending on sporting circumstances. In other words the condition of relegation is a casual condition and not a potestative condition"*⁵⁵

Following an appeal by the player against the above decision, the CAS Panel⁵⁶ confirmed the DRC's line of reasoning and furthermore noted that *"relegation clauses are mainly a way of protecting the players' careers, as their employment opportunities and market values would be reduced by playing in lower divisions during their short-term careers."*⁵⁷

Bearing the above in mind, clubs are advised to carefully consider the wording of a relegation clause should they wish to include such a clause in the employment contract.

⁵¹ E.g. "The Club has the right to terminate the employment contract should the Club be relegated to any lower division"

⁵² E.g. "The employment contract is only valid in the event that the club plays in the highest division"

⁵³ FIFA DRC, 10 May 2012, N°5121239

⁵⁴ FIFA DRC, 18 June 2009, N°69311

⁵⁵ FIFA DRC, 10 August 2007, N°87677, E. against Diyarbakirspor Kulübü

⁵⁶ CAS 2008/A/1447 E. v. Diyarbakirspor Kulübü

⁵⁷ CAS 2008/A/1447 para. 38

2 Training compensation in relation to minors

The 2014 edition of the FIFA Regulations on the Status and Transfer of Players (RSTP) contained a major change with regards to the amount of training compensation payable when transferring a minor. This amendment is also included in the 2015 edition of the FIFA RSTP, which entered into force on 1 April 2015.

As a general rule, training compensation shall be calculated by taking into account the training costs of the new club (corresponding category), multiplied by the number of years of training⁵⁸.

In order to ensure that training costs for players between their 12th and 15th birthday not be fixed at an unreasonably high level, they shall be based on the training and education costs of a category 4 club⁵⁹.

Whereas the 2009, 2010 & 2012 editions of the RSTP contained an exception to the above rule, according to which this rule would not apply in case the event giving rise to training compensation occurred prior to the end of the season of the player's 18th birthday ("exception to the rule"), this exception was deleted in the 2014 edition of the RSTP.

Consequently, as of 2014, the training costs for the seasons between the 12th and 15th birthday will always be based on the costs of a category 4 club, whether or not the event giving rise to such entitlement occurs before the end of the season of the player's 18th birthday.

The removal of the exception, however, has led to a lot of legal debate. More precisely, the debate centres on the question whether or not the amendment also affects training years that took place prior to the entry into force of the 2014 RSTP, i.e., 1 August 2014.

According to Article 26 paragraph 1 & 2 RSTP, disputes regarding training compensation shall be assessed according to the regulations **that were in force when the contract at the centre of the dispute was signed, or when the disputed facts arose**.

According to DRC jurisprudence, under "disputed facts" one could understand the years during which the training was provided. This was confirmed by the CAS case CAS/2014/A/3500⁶⁰, in which it was ruled that:

"48. The seasons on which the Player trained with FC Hradec that give the right to the Appellant to claim training compensation, had, at the time of entry into force of the amended Regulations, already elapsed. They were therefore, to the effect of application of said amendments, events that had already been completed before the entry into force of the amendment. Applying the amended regulations to seasons that had already elapsed upon their entry into force would be contrary to the prohibition of retroactive application of the law.

(...)

50. (...) the amount of training compensation must be determined by the regulations that were in place at the time during which a player trained with his club of origin, irrespective of future changes (...) time elapsed in training is an accomplished fact and compensation for said training cannot change because amendments are introduced after the player finished his training. It is true that the right to claim for compensation is only eventually born because of a future event, but it is configured in anticipation of that moment when the player trains as an amateur with its club of origin.

51. Indeed, time elapsed in training is an accomplished fact and compensation for said training cannot change only because amendments are introduced after the player finished his training. It is true that the right to claim for compensation is only eventually born because of a future event, but it is configured in anticipation of that moment when the player trains as an amateur with its club."

⁵⁸ Article 5 para. 2 Annexe 4 FIFA RSTP

⁵⁹ Article 5 Para. 3 Annexe 4 FIFA RSTP

⁶⁰ CAS 2014/A/3500 FC Hradec Kralove v. Genoa Cricket and Football Club

However, in the recently published CAS case TAS 2014/A/3652⁶¹, dealing with a similar issue, the Panel took a different approach.

In this case, the relevant consideration of the Panel is set out in paragraph 34 juncto paragraphs 56 & 57 by which the Panel held that, in accordance with article 26 of the RSTP, disputes relating to training compensation shall be decided upon pursuant to the rules that were in place when the contract, possibly giving rise to training compensation, was signed: more precisely, it pertains to the contract between LOSC Lille Métropole and the player M. Divock Origi, signed in August 2011.

As the rules in force at that particular moment, more precisely in the RSTP edition 2010, included the specific provision in article 5 paragraph 3, training compensation was to be calculated according to this rule.

Thus, according to the approach taken in this case, it appears that if a contract entitling a club to training compensation is signed on, or after, 1 August 2014, i.e., when the 2014 RSTP entered into force, the training compensation for the seasons between a player's 12th and 15th birthday is always calculated on the basis of the education costs of category 4 clubs, even though the years of training occurred during the years in which the previous regulations were still in force.

Needless to say that the conflicting jurisprudence does not benefit the legal certainty and provides difficulties for clubs in ascertaining the amount of training compensation due in relation to the transfer of a minor. **Forewarned is forearmed.**

3 Undistributed Solidarity Contribution

It is commonly known that if a player is transferred between two clubs belonging to different associations, 5% of the transfer compensation shall be deducted from the total amount of compensation and distributed by the new club as a solidarity contribution to the club(s) with which the player was registered between the seasons of his 12th and 23rd birthday.⁶²

However, sometimes it happens that the player's new club deducts the 5% of the transfer compensation in line with the above provision but does not distribute the full 5% to the clubs that trained the player. For example, a club may not distribute the full 5% in case the player passport does not contain a comprehensive overview on the player's history.

According to the established jurisprudence of the FIFA Players' Status Committee (PSC), the fact that the player's new club does not distribute any solidarity contribution, or only a partial one, does not provide that the new club can retain this amount for its own purposes. On the contrary, the jurisprudence provides that it is the club that has sold the player which is entitled to the remaining, undistributed money.⁶³

Furthermore, it has to be noted that, according to the PSC, it is the new club that bears the burden of proof to establish that the 5% of the transfer compensation withheld has, in fact, been distributed to the player's former club(s), which makes it easier for selling clubs to claim any undistributed solidarity contribution.

Selling clubs should be attentive in this respect and double-check the player's passport when 5% is withheld. In their turn, buying clubs regularly participating in UEFA competitions should also be alert, keeping in mind the notion of overdue payables.

⁶¹ TAS 2014/A/3652 KRC Genk c. Losc Lille Métropole

⁶² Article 1 Annexe 5 FIFA RSTP

⁶³ Cf. FIFA PSC, 18 March 2013, N°0313798 & FIFA PSC, 30 January 2012 N°01121201



Bibliography

Laws & Regulations

- Swiss Civil Code
- Swiss Code of Obligations
- FIFA Statutes
- FIFA Regulations on the Status and Transfers of Players, editions 2001, 2012, 2014 & 2015

Jurisprudence

Court of Arbitration for Sport

- CAS 2004/A/701 Sport Club Internacional v. Galatasaray SK,
- CAS 2005/A/896 Fulham FC v. FC Metz
- CAS 2007/A/1219 Sekondi Hasaacas FC v. Borussia Mönchengladbach
- CAS 2008/A/1447 E. v. Diyarbakirspor Kulübü
- CAS 2009/A/1756 FC Metz v. Galatasaray SK
- CAS 2008/A/1793 Villarreal CF SAD v. CD El Nacional
- CAS 2010/A/2098 Sevilla FC v. RC Lens
- CAS 2010/A/2317 SC Fotbal Club Timisoara SA v. FC Slovan Liberec & CAS 2011/A/2323 FC Slovan Liberec v. SC Fotbal Club Timisoara
- CAS 2012/A/2733 Stichting Heracles Almelo v. FC Flora Tallinn
- CAS 2012/A/2847 Hammarby Fotboll AB v. Besiktas Futbol Yatirimlari Sanayi ve Ticaret A.S
- CAS 2012/A/2916 Lucas Castromán v. Birmingham City FC
- CAS 2012/A/3012 CA Boca Juniors v. SC Corinthians Paulista
- CAS 2013/A/3054 Club Atlético River Plate v. US Città di Palermo
- CAS 2013/A/3155 Club Jeanne d’Arc Drancy v. FC Sheriff Tiraspol, Amath André Dansakho & FIFA
- CAS 2013/A/3365-3366 Juventus FC, A.S. Livorno Calcio S.p.A. v. Chelsea FC
- CAS 2014/A/3489 Sociedade Esportiva Palmeiras v. David Braz de Oliveira Filho & Panathinaikos FC & CAS 2014/A/3490 Panathinaikos FC v. Sociedade Esportiva Palmeiras & FIFA & David Braz de Oliveira Filho
- CAS 2014/A/3500 FC Hradec Kralove v. Genoa Cricket and Football Club
- CAS 2014/A/3508 FC Lokomotiv v. Football Union of Russia & FC Nika
- TAS 2014/A/3652 KRC Genk c. Losc Lille Métropole
- CAS 2014/A/3664 Al-Ittihad Club v. Club de Regatas Vasco da Gama
- CAS 2014/A/3858 Beijing Guoan v. FIFA, André Lima & Clube Vitória

FIFA Dispute Resolution Chamber

- Decision 87677 dated 10 August 2007
- Decision 69311 dated 18 June 2009
- Unpublished decision dated 15 June 2011, Birmingham City FC v. Lucas Martín Castromán & Club Atlético Boca Juniors
- Decision 5121239 dated 10 May 2012
- Decision 08133453 dated 30 August 2013
- Decision 1114239 dated 27 November 2014

FIFA Players' Status Committee

- Unpublished decision dated 7 April 2010, l'Olympique de Marseille v. Standard de Liège
- Decision 01121201 dated 30 January 2012
- Decision 1121193 dated 30 January 2012
- Decision 03133212 dated 18 March 2013
- Decision 0313798 dated 18 March 2013
- Decision 03132290 dated 19 March 2013
- Decision 0312234 dated 26 March 2012
- Decision 0512060 dated 11 May 2012
- Decision 04132127 dated 23 April 2013
- Unpublished decision dated 15 January 2014, Club de Regatas Vasco da Gama v. Al-Ittihad Club
- Decision 01142777 dated 15 January 2014
- Decision 0514303 dated 7 May 2014
- Decision 0514799 dated 7 May 2014
- Decision 08143368 dated 23 September 2014
- Unpublished decision dated 22 May 2015, FC Utrecht v. Swansea City

Swiss Federal Tribunal

- Decision 4P.217/1992 of 15 March 1993, reported in ATF 119 II 271
- Decision 4A_490/2009 of 13 April 2010, reported in ATF 136 III 345
- Decision 4A_6/2014 of 28 August 2014, reported in ATF 140 III 520

Others sources

- ECA Legal Bulletin 2, September 2012
- ECA Legal Bulletin 3, September 2013
- CAS Bulletin 2015/1

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If you wish to obtain additional information with regards to one of the topics covered in this bulletin, please contact Wouter Lambrecht at wouter.lambrecht@ecaeurope.com or by phone at +41 22 761 54 43.



ECA
EUROPEAN CLUB ASSOCIATION

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