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 - Relocating players to a club's reserve team
 - Depression and contractual stability
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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.

Last December, a first and successful meeting of the ECA Legal Advisory Panel (LAP) was organized in Sevilla for the 2015-17 ECA Cycle during which fruitful discussions took place on, amongst others, some of the topics presented in this year's Bulletin

In this respect, we would like to take this opportunity to thank all LAP Members for participating in this meeting as well as for sharing their knowledge in a broad range of legal matters of interest to clubs throughout the season.

The first chapter of this Bulletin contains a full analysis of the concept of solidarity contribution payments related to the transfer of a player. Whilst the concept of the solidarity mechanism appears to be straightforward, the ECA Legal Department still receives many questions from member clubs. Keeping in mind these questions and developing jurisprudence on this topic, it is noted that this mechanism is surrounded by various legal particularities, which are summarized in this Bulletin.

The second chapter is fully devoted to case summaries of some of the most interesting decisions rendered by the Court of Arbitration for Sport (CAS) over the course of last season, cases which are of practical interest to many ECA Member Clubs. The summaries relate to a case which sets the boundaries that clubs should respect when demoting a player, liquidated damage clauses, and the so-called "unilateral extension options" that allow clubs to extend the employment relationship beyond the initially agreed employment period.

Finally, chapter three contains a case analysis of a decision rendered by the Swiss Federal Tribunal dealing with the consequences of a party failing to duly follow the contractually agreed conciliation proceedings prior to lodging arbitration proceedings after a dispute had arisen.

As a concluding remark, we would like to thank all ECA Members for consulting the ECA Administration on legal matters and thank Wouter Lambrecht (ECA Head of Legal) 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 forthcoming season!

Sincerely,



Michele Centenaro
General Secretary



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

I. Solidarity Contribution – Case Law Analysis

1 Introduction

In line with the 2001 Agreement concluded between FIFA and the European Commission, the 2001 edition of the FIFA Regulations on the Status and Transfer of Players (“FIFA RSTP”) witnessed the introduction of the solidarity mechanism.

The rationale behind the solidarity mechanism was, as it still is today, to ensure a redistribution of a proportion of income to the clubs involved in the training and the education of young players, including amateur clubs. More precisely, the solidarity mechanism is intended to foster the training of young players by awarding all clubs that trained the player throughout his career (e.g. grassroots clubs) by letting them partake in the possible financial rewards of a transfer of the Player at a later moment in his career.

Whereas the solidarity percentage of 5% that applies to every transfer fee may be considered by some to be rather low, the financial returns for a grassroots club may in their turn be thought to be rather high when looked at from the perspective of a grassroots club involved in the training and education of players. One can, for example, think of the case of the German club Rot Weiss-Essen that according to media resources received an amount of EUR 600.000 in solidarity payment, and this in relation to the transfer of one of its former players, namely Mesut Özil from Real Madrid CF to Arsenal FC in the summer of 2013.

Keeping in mind the potential windfalls, one would reasonably assume that clubs are fully familiar with the concept of solidarity mechanisms as set out in the FIFA RSTP, be it both in relation to their entitlements under the mechanism and also in relation to their obligations.

However, and similar to the rationale behind publishing an extensive article on training compensation mechanism in the 2014 edition of the ECA Legal Bulletin, we, the Legal Department of the ECA, often receive questions relating to the solidarity mechanism, and cases on solidarity contribution regularly feature on the agenda of the FIFA Dispute Resolution Chamber.

The questions we receive are often linked to specific issues for which one cannot find the answer in the 4 articles contained in the regulations that govern the solidarity mechanism.¹

Consequently, it is vital to have some understanding of the jurisprudence developed by the FIFA Dispute Resolution Chamber and the Court of Arbitration for Sport, and it is exactly this understanding that this article aims to provide.

Although by no means exhaustive, this article aims to provide an overview of existing jurisprudence with regards to specific issues relating to the transfers of players and corresponding claims for solidarity contribution.

2 Main rules

Before touching upon the jurisprudence, it seems useful to briefly revisit the rules governing the solidarity mechanism.

According to the rulebook, irrespective of the age of the transfer of the player, if a professional moves during the course of his contract between two clubs belonging to a different association, be it on loan basis or on a permanent basis pursuant to a transfer agreement, any club that has contributed to his education and training shall receive a proportion of the compensation paid to his former club (solidarity contribution).

More precisely, 5% of any compensation paid to the former club (excluding training compensation) shall be deducted from the total amount of compensation payable by the new club for the transfer of the player and shall be distributed by the new club as a solidarity contribution to the club(s) involved in his training and education over the years.

¹ Article 10, 21 and Annex 5 of the FIFA Regulations on the Status and Transfer of Players, ed. 2016

It is the responsibility of the new club to retain, calculate the solidarity in line with the player passport, and distribute the corresponding amounts to the training clubs.

Where the clubs that have educated the player between the sporting seasons of his 12th to his 15th birthday are entitled to receive 5% of the total solidarity fee to be withheld, the clubs that have trained a player between the sporting seasons of his 16th to his 23rd birthday are entitled to receive 10% of the total solidarity fee to be withheld.

Finally, it should be noted that solidarity should be paid by the new club no later than 30 days following the player's registration, or in case of contingent payments (instalments) of the transfer fee, after the date of such payments. Lacking payment by the new club, the clubs who are allegedly entitled to receive solidarity contribution have a period of two years to lodge a complaint at FIFA level, failing which their entitlement/claim becomes time-barred.

3 Example of calculation

Below is a functional example of how solidarity is to be calculated:

TRANSFER ON 18 AUGUST 2016 - Registration by European Club Association

Registering Club	European Club Association	Player	Daan Lambrecht
Former Club	Club the Netherlands	D.O.B	14.02.86
Transfer Fee	3.500.000.00	Currency	EUR
95% due to Selling Club	3.325.000.00	Solidarity	175.000.00

Season of Birthday	Club	% due	Amount	Season
Season of 12 th Birthday	Club Belgium	5.00%	8.750.00	1997-98
Season of 13 th Birthday	Club Belgium	5.00%	8.750.00	1998-99
Season of 14 th Birthday	Club Belgium	5.00%	8.750.00	1999-00
Season of 15 th Birthday	Club Belgium	5.00%	8.750.00	2000-01
Season of 16 th Birthday	Club Belgium	10.00%	17.500.00	2001-02
Season of 17 th Birthday	Club Belgium	10.00%	17.500.00	2002-03
Season of 18 th Birthday	Club Belgium	10.00%	17.500.00	2003-04
Season of 19 th Birthday	Club Belgium	10.00%	17.500.00	2004-05
Season of 20 th Birthday	Club Belgium (121 days)	3.32%	5.810.00	2005-06
	Club the Netherlands (244 days)	6.68%	11.690.00	2005-06
Season of 21 st Birthday	Club the Netherlands	10.00%	17.500.00	2006-07
Season of 22 nd Birthday	Club the Netherlands	10.00%	17.500.00	2007-08
Season of 23 rd Birthday	Club the Netherlands	10.00%	17.500.00	2008-09

TOTAL 175.000.00

Totals		Pro-rata calculation of days	
Club	Amount	Enter Days	
Club Belgium	110.810.00	365	
Club the Netherlands	64.190.00	10	
TOTAL	175.000.00	Pro-rata %	6.68

4 Specific issues / questions

Having briefly set out the purpose and the key concepts, we can now address a couple of specific issues/questions.

4.1 Mandatory documents - checklist

When submitting a claim for solidarity, clubs often forget to add the correct documents in order to allow the FIFA Administration to process the claim and forward the claim to the other party. In this respect, it should be reminded that, when lodging a case at FIFA, the claim for solidarity should be accompanied by a document (preferably from the concerned FAs) indicating the start and end dates of their respective sporting seasons for which solidarity is being claimed, as well as a player passport clearly indicating the start and the end date of the latter's registration with a club. Failure to provide these documents when lodging the complaint leads to unnecessary delays, entirely attributable to the clubs themselves.

4.2 Time limitation of two years

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

Often we witness that clubs wait until the very end of the prescription period to lodge their complaint for solidarity contribution, sometimes due to unsuccessful negotiations with the club from which they are seeking payment.

In this respect, when lodging a complaint it is important to keep in mind and understand what the notion "event giving rise to the dispute" means in order to ascertain whether a potential claim is prescribed.

According to the provisions on solidarity contribution, the new club shall pay the corresponding amounts no later than 30 days after the player's registration. In case of contingent payments, solidarity contribution must be made 30 days after the date of such payments.²

The question that the DRC has had to deal with repeatedly over the past years is whether:

- it is the actual registration of the player that is the event giving rise to the dispute; or
- it is the non-payment of solidarity contribution on the 31st day after the registration that is to be seen as the event giving rise to the dispute;

and, as such, as to when the 2-year prescription period should be counted from.

In these cases, the DRC holds that the event giving rise to the dispute is the non-payment by the 30th day, which implies that the time limit of 2 years to lodge a complaint only starts running as of the moment of non-payment.

However, when it comes to seeking reimbursement of solidarity contribution payments which a new club / buying club is ordered to pay by the FIFA DRC, the prescription period starts running from a different moment in time. In order to not overcomplicate matters from the start, this specific issue is further specified under infra 4.8.

² FIFA DRC, 26 February 2010, N°210179

4.3 Advance of costs & unknown transfer fee

With regards to the possible “Advance of Costs” to be paid when lodging a claim with FIFA for the solidarity contribution, we have received several questions as to what a club has to do in case the transfer fee has not been publicly disclosed. That is to say, according to the Rules Governing the Procedures of the Players’ Status Committee and the Dispute Resolution Chamber, the advance of costs is to be calculated on the amount in dispute.

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

The advance of costs is calculated according to the value of the dispute as follows:

Amount in dispute	Advance
Up to CHF 50.000	CHF 1.000
Up to CHF 100.000	CHF 2.000
Up to CHF 150.000	CHF 3.000
Up to CHF 200.000	CHF 4.000
From CHF 200.001	CHF 5.000

In this respect, it is the consistent practice of the FIFA Players’ Status that, if a club is faced with such an issue, it is sufficient to mention this in one’s submission and request to be provided with a copy of the contract / financial details of the transfer at stake.

Consequently, the FIFA administration will either address the Defendant to request the transfer contract or will provide the Claimant with the financial details mentioned in the contract uploaded in FIFA TMS. When provided with the financial information of the transfer at stake by FIFA, the case handler will typically grant the claimant the possibility to adjust or specify the claim for solidarity contribution as well as, if necessary, invite the claimant to pay the advance of costs.

Additionally, please note that no advance of costs is to be paid if the claim for solidarity contribution does not exceed CHF 50.000.

4.4 National Transfer v. International Transfer & domestic solidarity mechanisms

It would appear that clubs are sometimes confused as to what should be considered as an international transfer and, in doing so, mistake the notion of “international transfer” with the notion of “international dimension” of a dispute.

More precisely, the notion “international dimension” is a decisive element to be considered as to when the FIFA DRC is competent to deal with employment related disputes; an international dimension is present when a player is registered and playing for a club in a country of which he does not hold the nationality. For example, in case of a dispute between an Argentinean player playing in Portugal and his Portuguese club, FIFA could be competent to deal with the case due to the international dimension.

However, for solidarity to be due, that Argentinean player would need to transfer from a Portuguese club to a club belonging to a different association, whereas a transfer of the same Argentinean player between Portuguese clubs) would not give rise to solidarity contributions due to the lack of an international transfer (even though there be an international dimension present).

Having clarified that the solidarity mechanism contained in the FIFA RSTP only applies to the international transfer of a player between two clubs belonging to a different association, some clubs have also sought to claim solidarity in relation to a domestic transfer, and this based on national regulations of the country involved.

Whereas the entitlement of a foreign club to solidarity contribution under a domestic scheme would very much depend on the wording of such domestic regulations, FIFA does not consider itself competent to deal with such cases.³

In a specific case, the DRC had to assess a claim of a club registered with the Serbian FA, which invoked the internal regulations of the Dutch FA to obtain solidarity contribution following an internal transfer in the Netherlands.

Whereas previously the DRC held that, in case an association decided to implement a domestic set of regulations on solidarity contribution, the pertinent system would also have to be applied to training clubs belonging to a different association,⁴ the more recent jurisprudence of the DRC takes a different position. That is to say, according to the most recent jurisprudence, 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 with that association.

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

It should be noted that the CAS⁵ came to the same conclusion in a case involving a Uruguayan club claiming solidarity in relation to a domestic transfer in Italy. Moreover, the Panel held that the fact that the domestic solidarity mechanism did work to the benefit of foreign clubs was not discriminatory, nor did it constitute a restriction of competition⁶ under EU law.

4.5 Selling club and training club at the same time

According to RSTP provisions on solidarity, the new club is obliged to withhold 5% from the compensation and distribute it to the clubs involved in the training and education of the player between his 12th and 23rd birthday.

Furthermore, more often than not, a club that is selling a player is also the club at which the player was trained and educated during the period mentioned above. Another example could be the transfer of a player at the age of 21, which implies that part of the 5% cannot be fully attributed as there is no club which trained and educated the player during the season of his 22nd and 23rd birthday.

As such, it is sometimes unclear for clubs as to whether part of the 5% of solidarity that is to be withheld either accrues to the buying club or to the selling club, and this in case of a transfer of, for example, a 21-year-old player or where a selling club was also the training club of the player.

In order to answer this question, it is sufficient to look at the above paragraph which states that the amount to be deducted is to be paid to the clubs involved in the training and education of the Player. 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 involved in the training of the player is to receive its corresponding

³ FIFA DRC, 1 February 2012, N°2121218

⁴ FIFA DRC, 21 November 2006, N°116132

⁵ CAS 2007/A/1287 Danubio FC v. FIFA & Internazionale Milano S.p.A.

⁶ In this case, it was argued that foreign clubs would be at a disadvantage compared to domestic clubs in Italy when wanting to sign a player from an Italian club, as the solidarity mechanism only applies to international transfers and, therefore, makes the transfer 5% more expensive for the foreign clubs

part of the solidarity mechanism and that the amount withheld by the buying club as solidarity should be paid to the club receiving the 95% of the transfer fee in case it was involved in the training and education.⁷

Moreover, if a player has not been trained by any other club during a certain amount of time between the seasons of the player's 12th to 23rd birthday, or if the player has not yet attained an age for which solidarity contributions are due, the corresponding portion of the solidarity contribution cannot benefit the player's new club and must be paid to the other party as part of the transfer compensation.⁸ *This basically implies that for a player who is transferred in the season of his 21st birthday, the relevant percentage to be withheld will be 80% of 5%, i.e., 4% of the compensation paid for the transfer of the player.*⁹

4.6 Waiver of solidarity contribution

It has come to our attention that some clubs are adding clauses to their loan agreements whereby the club receiving the player on loan waives its entitlement to solidarity:

“Club Z hereby agrees and acknowledges that it shall have no future claims for Solidarity and or Training Compensation pursuant to the FIFA Regulations on the Status and Transfer of Players in respect of the Player's registration. For the purposes of calculating future entitlements to Solidarity and/or Training Compensation Club Y shall be deemed as having held the Player's registration for the Temporary Transfer Period and any rights to Solidarity and/or Training Compensation during the period shall accrue solely for the benefit of Club Y.”

In this regard, we have been contacted by some member clubs to inquire whether such a waiver would indeed be valid and/or whether a third party, due to make solidarity payments, would be able to rely on an agreement to which it was not a party.

As to the possibility to waive one's right to solidarity, it should be understood that such is indeed possible. In a case¹⁰ adjudicated by the FIFA DRC, the panel had to analyze a waiver whereby a Greek club had *“waived its rights to receive 10% of the transfer sum and a proportion of the solidarity contribution by receiving EUR 600.000 in connection with a transfer of the player from FC Y to FC M.”*

In this case, the DRC, in line with the principle of contractual freedom, recognized the waiver and rejected the complaint.

Whereas it appears that waivers can indeed be validly agreed upon, it is questionable whether clubs can contractually agree that the right to receive solidarity can accrue to a third club (club sending the player on loan) that is, in fact, not training or educating the player at that moment in time.

4.7 Contractual clauses whereby the selling club is obliged to distribute solidarity payments

According to the regulations, it is the obligation of the new club to retain, calculate, and distribute the solidarity contributions to the training clubs. However, over time – the payment of solidarity contribution has become part of the transfer negotiations between clubs, whereby the buying club / the player's new club puts the burden of distributing the solidarity contribution on the selling club.

In this respect, Parties contractually agree that the transfer fee includes all solidarity payments and that the selling club shall be liable to cover any claims for solidarity contribution by third clubs.

Similar to the situation above, when faced with claims by third parties, sometimes a buying club / new club simply omits to retain the solidarity contribution from the transfer fee.

Moreover, when third clubs address the new club, the reaction of the new club is to refer the third clubs to the former club of the player, either due to the contractual clause in the

⁷ FIFA DRC, 13 June 2008, N°3881052

⁸ FIFA DRC, 24 January 2011, unpublished

⁹ FIFA Commentary on the RSTP, explanation Article 1 para 4, p 129

¹⁰ FIFA DRC, 15 June 2011, N°611870

contract or because they omitted to deduct the corresponding amount of solidarity from the transfer fee.

It should be noted that when faced with these kinds of cases, the DRC consistently holds that the third clubs are not a party to the transfer contract and that, therefore, the new club, pursuant to the regulations, is still liable to pay solidarity to the third clubs.

“In this respect, the DRC Judge was eager to emphasize that the solidarity mechanism is a principle well-established in the Regulations, from which the parties signing a transfer-agreement cannot derogate through the contents of a contract. In other words, the obligation to distribute solidarity contribution cannot be set aside by means of a contract concluded between the clubs involved in a player’s transfer. [...] At the same time, the player’s former club is ordered to reimburse the same proportion [...] that it received from the player’s new club.”¹¹

The same goes for cases in which the new club omitted to retain (part of) the solidarity contribution.

*“In view of the above, the Chamber referred to its well-established jurisprudence applied in similar cases, in accordance with which the player’s new club is ordered to remit the relevant proportion(s) of the 5% solidarity contribution to the clubs involved in the player’s training [...]. **At the same time, the player’s former club ordered to reimburse the same proportion(s) of the 5% of the compensation it received from the player’s new club.** The said jurisprudence is based on the fact that there is no contractual link between the training club claiming solidarity contribution and the player’s former club. Therefore, the relevant claim against the former club would not find a contractual basis.”¹²*

It is important to remind clubs that when they are faced with this situation at FIFA DRC level, the new club, which either omitted to deduct the solidarity or relies on a contractual clause, can seek reimbursement when submitting its position to FIFA. Such claim for reimbursement¹³ can either be made in the same case at FIFA level initiated by the club claiming solidarity, or one could initiate a separate procedure once the DRC has ordered the new club / buying club to pay solidarity contribution.

Furthermore, if a new procedure would be initiated by the new club against the former club following the decision of the DRC, seeking reimbursement, one should be mindful of the prescription period that applies. It is reminded that according to the regulations, the FIFA judicial bodies shall not hear any case subject to regulations of FIFA if more than two years have elapsed since “the event giving rise to the dispute.”

When faced with a request for reimbursement, the pivotal question is what moment is to be regarded as the event giving rise to the dispute as of which the 2-year prescription period should be counted. This could either be:

- The moment when the transfer fee payment took place by the new club but in doing so omitted to deduct the 5%;
- The non-payment by the new club of solidarity contribution;
- The moment when the original claim for solidarity contribution was lodged against the new club;
- The decision of the FIFA DRC whereby the new club is ordered to pay solidarity contribution.

It is quite clear that, depending on the answer to the above question, the time to seek reimbursement differs significantly.

It should be noted that the jurisprudence so far is not completely aligned in this respect and that in a case at CAS¹⁴, FIFA held that the event giving rise to the dispute should be that moment in time when the club omitted to withhold the 5% solidarity contribution when making the payment.

¹¹FIFA DRC, 18 March 2014, N°03142763a

¹²FIFA DRC, 27 August 2009, N°89898

¹³Statement of Defence to include a request for joinder against the former club

¹⁴CAS 2015/A/4105 PFC CSKA Moscow v. FIFA & FC Midtjylland A/S

The CAS, on the contrary, held that pursuant to the contractual agreement between the parties,¹⁵ the event giving rise to the claim was that moment in time when FIFA obliged the club to pay solidarity.

Since it appears that the interpretation of the “event giving rise to the dispute” depends very much on case by case analysis in this specific issue, clubs are advised to act carefully and seek the joinder of the former club in the claim for solidarity rather than waiting until a formal decision has been taken in order to seek reimbursement. This proactive attitude would benefit procedural economy and as the adage says, *better safe than sorry*.

4.8 Net amounts

Whereas the DRC jurisprudence is quite clear that clubs cannot deviate from the principles of solidarity contribution in issues affecting third parties, the financial consequences of contractually agreeing upon a transfer fee net of solidarity contribution is sometimes more problematic.

That is to say, according to the prevalent (but erroneous) jurisprudence at DRC level – such net transfer fee clauses need to be disregarded as they would derogate from the solidarity mechanism provisions which state that 5% of any compensation paid to the former club shall be deducted from the total amount of compensation payable by the new club for the transfer of the player.

Therefore, when faced with such kind of net clauses, the prevalent jurisprudence of the DRC simply disregards this net clause and in turn applies the regulations, whilst at the same time, if requested so by the club involved, ordering the former club to reimburse the corresponding amount to the selling club:¹⁶

“8. Having established the above, the DRC judge took note that, on the one hand, Club G stated that it had not retained 5% of the relevant transfer compensation and that it, thus, had paid the total amount of USD 3.000.000 to Club D. In other words, Club G asserted that it omitted to deduct 5% of the relevant transfer compensation relating to the distribution of the solidarity contribution. On the other hand, the DRC judge noted that Club D asserted that it was entitled to the “net” amount of USD 3.000.000, as stipulated in the transfer agreement.

*9. In this context, the DRC judge referred to art. 21 and art. 1 of Annex 5 of the Regulations which stipulate that “if a professional moves during the course of a contract, 5% of any compensation, not including training compensation paid to his former club, **shall be deducted** from the total amount of this compensation (...)” (emphasis added by FIFA DRC).*

*10. In this respect, the DRC judge was eager to emphasize that the solidarity mechanism is a principle well-established in the Regulations, from which the parties signing a transfer agreement cannot derogate through the contents of a contract. In other words, the obligation to distribute solidarity contribution cannot be set aside by means of a contract concluded between the clubs involved in a player’s transfer. Thus, as for the distribution of the solidarity contribution, **the amount to be taken into account when calculating the solidarity contribution payments due to the club(s) involved in the player’s education and training, is the amount actually agreed upon as the compensation payable by the new club to the former club.**”*

Based on the above, it is clear that the DRC:

- considers the net clause to be invalid since it contravenes the regulations;¹⁷
- considers the transfer amount mentioned in the contract, albeit stipulated as net, to be the gross amount;

¹⁵ Article 4.3.: *In the event that a club(s) is entitled to receive solidarity compensation payment under this agreement, make a claim to FIFA for payment and FIFA obliges GSKA to pay to that club(s), Midtjylland shall pay CSKA the amount claimed*

¹⁶ FIFA DRC, 18 March 2014, N° 0314276

¹⁷ FIFA PSC, 21 November 2011, N°1111159

- takes this “gross amount” as the amount from which the 5% solidarity contribution should have been deducted and calculated;¹⁸
- allows the new club to seek reimbursement,¹⁹ not so much because of the agreement between the parties, but because the new club omitted to deduct 5% from the transfer fee as provided for by the Regulations.

Although the DRC’s approach does not change the final outcome as to who finally carries the burden of paying the solidarity contribution, as the approach allows to seek reimbursement on the grounds that the new club omitted to deduct 5%, it does differ as to what amount of solidarity contribution is payable/claimable.

More precisely, if the DRC would recognize net transfer clauses, the transfer fee agreed between the Parties only amounts to 95% of the transfer fee and the solidarity contribution would need to be grossed up vis-à-vis the contractually agreed transfer fee rather than being deducted according to the current practice of the DRC.

In a recent case²⁰, the CAS had the opportunity to analyze the approach of the DRC to disregard the contractual agreement between the Parties. In his findings, the Single Judge held the following:

“101. Coming back to the DRC’s argument in the appealed Decision that football parties cannot derogate from the regime of the RSTP, the Sole Arbitrator deems that he does not have to decide whether this is indeed correct, because contrary to the view of the DRC and that of the Respondent, the Sole Arbitrator is convinced that there is no derogation from the RSTP in the case at hand.

103. [...] The wording of the RSTP does not prohibit that the amount specified in a transfer contract represents only 95% of the gross value, as long as solidarity contribution in the end is still deducted from the gross transfer value and distributed in conformity with the wording of Article 1 Annex 2 of the RSTP.

105. Furthermore, if solidarity contribution had been paid correctly by the Respondent, the Transfer Agreement would have rather enhanced the solidarity system as the training clubs should have received more money from the Respondent.”

Keeping the above CAS decision in mind, clubs seeking solidarity contribution based on net transfer fees should be aware that the net amount is to be grossed up²¹ when calculating their entitlements.

If solidarity is calculated in line with the CAS award mentioned above, the difference in the overall amount of solidarity for a transfer EUR 5.000.000 net would amount to EUR 13.158.

As a concluding remark, it may be noted that contrary to the previous jurisprudence of the DRC, the CAS does indeed recognize *“internal agreements whereby the Parties decide which club shall finally pay the solidarity contribution and considers that the parties are free within the framework of contractual freedom to agree on a shift of the final financial burden of solidarity contribution.”*²²

4.9 Notion “any compensation” payable

Clubs entitled to solidarity contribution might readily think that the amount of contribution is only calculated on the basis of the transfer sum being paid by a buying club in relation to the transfer. However, in doing so, clubs face the risk of shorting themselves. More precisely, the amount of solidarity contribution is not only to be calculated on the basis of the mere transfer sum but on “any compensation” paid to the player’s former club

¹⁸FIFA DRC, 26 January 2011, N°111492

¹⁹Either the new club joins the former club in the DRC procedure or it has to initiate a separate case with the FIFA Players’ Status Committee based on article 22 f) of the FIFA RSTP

²⁰CAS 2015/A/4137 Olympique Lyonnais v. AS Roma

²¹Gross transfer fee = contractual agreed transfer fee / 95 x 100

²²CAS 2015/A/4105 PFC CSKA Moscow v. FIFA v. FC Midtjylland A/S

Such has been confirmed in the vast jurisprudence of the FIFA DRC, from which it may be derived that the solidarity contribution is to be calculated on the actual payment of **any amount of compensation**, which may be defined broadly as it could include amongst others:

- Amounts received by the selling club in relation to a sell-on clause triggered when the buying club transfers the player to a third club;²³
- Bonus payments payable by the buying club in case certain sporting achievements are met;²⁴
- Buy-out clauses stipulated in the employment contract;²⁵
- Exchange of players (see point 4.11);²⁶
- Friendly games (i.e., entitling the selling club to all box office receipts in relation to such games).

Bearing this in mind, it is of paramount importance that the clubs be aware of the full financial details of the transfer agreement and keep an eye on any events that may trigger the activation of the variety of clauses entitling a club to additional amounts of solidarity.

4.10 Amended transfer fee

It is well known that the payment of transfer fees in instalments is a common practice in the world of football. Generally, a transfer clause in those instances would state that the transfer fee amounts to, for example, EUR 1.000.000, while the payment is to be made in 4 equal instalments of EUR 250.000 on dates X, Y, Z, Q.

According to the regulations concerning solidarity, in case of contingent payments, solidarity payments are only due 30 days after the date of such contingent payments. Therefore, the corresponding amount of solidarity would fall due 30 days after payment dates X, Y, Z, Q.

Moreover, the Parties to a transfer agreement or a loan agreement sometimes amend the initial financial terms of their contract and, for example, may:

- agree on a reduced payment, but for such payment to be made in a shorter time period;
- prematurely cancel a loan-agreement and, as such, also waive the remaining part of a loan fee.

The question that has been asked on some occasions is how this impacts one's entitlement to solidarity contribution.

In this regard, it should be made clear that, in cases where the parties to an agreement have changed the initial financial terms of the agreement, the DRC²⁷ does in principle respect that and, as such, takes into account the amended financial terms in order to determine the solidarity contributions due.

4.11 Exchange of players

Whereas most transfers of player are made against the payment of a transfer fee, it also may occur that the transfer involves one/or more players making a transfer in the opposite direction as part of the same transaction.

Albeit difficult to ascertain the transfer value when the transfer at stake involves an exchange of players, according to the standing practice of the DRC such does not affect

²³ FIFA DRC, 26 April 2012, N°0412514

²⁴ FIFA DRC, 15 June 2011, N°611870

²⁵ FIFA DRC, 24 April 2015, N°04151496

²⁶ Unclear is whether the player's former clubs are entitled to solidarity contribution in the situation in which a player terminates the employment without just cause. More precisely, whether solidarity is calculated on the compensation payable to the player's former club as a result of the breach.

²⁷ FIFA DRC, 29 July 2016, unpublished

a club's entitlement to solidarity contribution. More precisely:

“an exchange of players implies indirectly a financial agreement, i.e. an agreement with a monetary component, due to the fact that the relevant qualities of the players have an economic value in the football employment market (...) the provisions regarding the solidarity mechanism cannot be circumvented by means of an exchange of players.”²⁸

Being entitled to solidarity contribution is one thing: it is another to establish the transfer value based on which the solidarity is calculated in the event of an exchange of players. Since the burden of proof lies with the club claiming solidarity, such club shall need to establish the value of the exchange of players.

In doing so one could think of, and look into, the following indicative elements:

- The previous transfer compensation paid in relation to the exchanged players;²⁹
- A possible buy-out/liquidated damages clause stipulated in the employment and/or transfer contract;³⁰
- The value of a contract from a salary perspective;

The following case³¹ serves as an example of how the FIFA DRC takes into account the previous transfer compensation paid when assessing solidarity in relation to an exchange of players. In this case, Player J's former club (Club S) had filed a claim for solidarity contribution against another club (Club R) after the latter had transferred the Player B on a loan basis to another club (Club A) in exchange for transferring the Player J on a loan basis to Club R.

“14. The Chamber reiterated that in exchange for the loan of the player J from club A to the Respondent, the latter had “paid” club A with the player B. Hence, the Chamber stressed that it had to determine the market value of the player B, since the player B has to be considered as the “compensation paid” for the loan of the player J from club A to the Respondent.

15. The Chamber noted that the player J had been previously transferred from the Claimant to club A for a transfer compensation amounting to EUR 22.500.000, whereas the player B had been previously transferred from the Claimant to the Respondent for a transfer compensation amounting to EUR 24.500.000, including contingent payments. Consequently, the Chamber determined that to establish the basis for the assessed transfer value of the player B, it should take into account the transfer compensation paid by the Respondent to the Claimant for the transfer of the player B, i.e. EUR 24.500.000.

16. The Chamber further took note that upon signing the player B, the Respondent and the player had concluded an employment contract for the duration of 5 years.

17. In continuation, and establishing the compensation on a pro rata basis, the Chamber concluded that the amount of EUR 24,500,000 should be divided by 5 years and that, thus, the starting point in order to determine the most appropriate value in order to calculate the relevant solidarity contribution shall be calculated on the basis of the assessed transfer compensation of EUR 4.900.000 (EUR 24.500.000 / 5 = EUR 4.900.000).

18. Having established the above, the Chamber deemed that the amount of EUR 4.900.000 should be further reduced, considering that the present matter concerns a transfer on a loan basis and not a transfer on a permanent basis and that, thus, the player returned to his club of origin after expiry of the 11/13 loan period. Therefore, the Chamber deemed it appropriate to further reduce the assessed transfer compensation with 40%³², which results in the amount of EUR 2.940.000 (EUR 4.900.000 - 40% = EUR 2.940.000).”

²⁸ FIFA DRC, 17 August 2012, N°812019

²⁹ *idem*

³⁰ FIFA DRC, 12 January 2007, N°17630

³¹ FIFA DRC, N°812019

³² The Chamber unfortunately did not further elaborate as to how it exactly arrived at the reduction rate of 40%

II. Feedback from CAS

1 UEFA decision – standing to sue

1.1 Introduction

According to Article 62 of the UEFA statutes:

1. Any decision taken by a UEFA organ may be disputed exclusively before the CAS in its capacity as an appeals arbitration body, to the exclusion of any ordinary court or any other court of arbitration.
2. Only parties directly affected by a decision may appeal to the CAS [...]

As the notion “directly affected” has not been defined under the UEFA Statutes, various CAS cases in the past have dealt with the question when a (third party) club is directly affected by a UEFA decision and consequently may appeal such decision with the Court of Arbitration for Sport (CAS).

In CAS 2008/A/1583³³, it was held that:

“When a third party, who is himself not the addressee of the measure taken by an association is directly affected and therefore has a right of appeal, is a question of the facts of the individual case. (...) Where the third party is affected because he is a competitor of the addressee of the measure /decision taken by the association, - unless otherwise provided by the associations’ rules and regulations – the third party does not have a right of appeal. (...) If however, the association disposes in its measure/decision not only the rights of the addressee, but also of those of the third party, the latter is directly affected with the consequence that the third party then also has the right of appeal.”

In a recent case³⁴, lodged by Panathinaikos FC against an UEFA Appeals Body decision admitting another Greek club, Olympiacos Piraeus, to participate in the UEFA Champions League.

It is noted that clubs participating in the same competition are always somehow affected by a decision related to the admission of clubs to the competition. However, the question that needed to be answered by the Panel pertained to when a club is considered to be “directly” affected by such decision and, consequently, would have the proper standing to appeal the decision with CAS.

1.2 CAS 2015/A/4151- Main facts of the case

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

By virtue of winning the 2014/15 edition of the Greek Superleague, Olympiacos Piraeus (“Olympiacos”) directly qualified to the group stage of the 2015/16 edition of the UEFA Champions League (UCL).

As is required for any club to be able to participate in one of the two UEFA Club Competitions (either the UCL or UEFA Europa League), Olympiacos submitted the UEFA Admission Criteria Form prior to the start of the 2015/16 football season. This form requires clubs to inform UEFA on any football-related procedure opened by a state authority against a club, its players or officials.

As domestic accusations related to match-fixing investigations had been levelled against its president, Olympiacos duly disclosed this issue to UEFA. (Note: for the sake of clarity, it needs to be emphasized that, on 10 July 2015, the accusations were eventually dropped due to the lack of proof).

Following this disclosure, the UEFA General Secretary referred the admission form to the UEFA Control, Ethics and Disciplinary Body (CEDB). At the same time, the General Secretary requested the UEFA Ethics and Disciplinary Inspector to conduct an investigation into the admission of Olympiacos to the 2015/16 UCL.

³³ CAS 2008/A/1583 Sport Lisboa e Benfica Futebol SAD v. UEFA & FC Porto

³⁴ CAS 2015/A/4151 Panathinaikos FC v. Union des Associations Européennes de Football (UEFA) & Olympiacos FC

After investigating the matter, the Inspector requested that Olympiacos be provisionally admitted to the 2015/16 UCL, following which the Chairman of the CEDB referred the case to the UEFA Appeals Body, due to the urgency of the matter³⁵.

The Appeals Body decided to provisionally admit the Club into the 2015/16 UCL and, consequently, to suspend the proceedings against Olympiacos related to the admissions criteria as it did not feel comfortably satisfied that Olympiacos had been involved in match-fixing. At the same time, it ordered Olympiacos to update UEFA on the proceedings taking place at the national level.

Faced with this decision, Panathinaikos FC lodged an appeal against the decision of the UEFA Appeals Body with the CAS, requesting that it declare Olympiacos ineligible to participate in any of the 2015/16 UEFA Club Competitions.

Panathinaikos had finished second in the 2014/15 ranking table for the Greek Superleague, as a consequence of which it would have to start in the third qualifying round in order to qualify for the 2015/16 UCL main tournament. By appealing the UEFA decision, the club aimed to replace Olympiacos as a direct qualifier to the UCL group stage.

1.3 CAS Proceedings

POSITION OF THE PARTIES

Panathinaikos held that it had proper standing to appeal the decision since it had finished second in the 2014/15 Greek Superleague and would automatically replace Olympiacos in the Group Stage of the 2015/16 UCL if the Appeals Body would have taken the correct decision in declaring Olympiacos ineligible to participate in the UCL. In doing so, the club relied on Article 4.08 of the UCL Regulations (UCLR) which states:

A club which is not admitted to the competition is replaced by the next best placed club in the top domestic championship of the same association, provided the new club fulfils the admission criteria. In this case, the access list for the UEFA club competitions (see Annex A) is adjusted accordingly.

UEFA and Olympiacos held the opposite, namely that Panathinaikos lacked standing to appeal the decision with CAS as, even if Olympiacos would have been found ineligible, Panathinaikos would not automatically replace the club in the 2015/16 UCL Group Stage.

More precisely, UEFA claimed that Article 4.08 UCLR is only applicable when the competition has not yet started and that since, at the time of the appeal, the UCL had already started, there would be no automatic replacement. UEFA held that, in those cases, it would be up to the Emergency Panel to determine the replacement issue on the basis of Article 81.01 UCLR³⁶.

UEFA then referred to the standing practice of the Emergency Panel in dealing with similar matters in the past and explained that the Panel would more than likely replace the ineligible club by a draw amongst the participants in the Champions League play-off round and that such a procedure would not include those clubs eliminated in the first three qualifying rounds (note: at the time of the CAS hearing, Panathinaikos had lost to the Belgian side Club Brugge in the 3rd Qualifying Round of the 15/16 UCL).

CONSIDERATIONS OF THE PANEL

The Panel firstly emphasized that, in order to have proper standing to sue, Panathinaikos would have to establish that it would indeed replace Olympiacos in the Group Stage of the 2015/16.

³⁵ Cf. UEFA Disciplinary Regulations Article 23 Para. 3: The Control, Ethics and Disciplinary Body has jurisdiction to rule on disciplinary issues and all other matters which fall within its competence under UEFA's Statutes and regulations. In particularly urgent cases (especially those relating to admission to, or exclusion from, UEFA competitions), the chairman may refer the case directly to the Appeals Body for a decision.

³⁶ Article 81.01 UCLR: Any matters not provided for in these regulations, such as cases of force majeure, will be decided by the UEFA Emergency Panel or, if not possible due to time constraints, by the UEFA President or, in his absence, by the UEFA General Secretary. Such decisions are final.

As a first step, the Panel focused its attention on the interpretation of Article 4.08 UCLR and whether it would still apply in case the UCL had already started, albeit the Panel noted that the drafting of the provision could be clearer and agreed with UEFA that the provision loses its applicability once the competition has started.

The Panel supported its findings on the grounds that:

- *“A distinction is to be drawn between the admission phase and the competition phase of the tournament which starts with the qualifying stages, when considering the practicalities in organizing the UCL tournament. After the competition starts, any “issues” in competition matters are disruptive and “such disruptions are the domain of the Emergency Panel to deal with and to deal with in a way to protect the smooth running and integrity of the competition;”*
- *“Contrary to Article 4.08 UCLR, various sub-articles of Article 4 explicitly stipulate that they remain valid even after the admission phase ends³⁷.”*

However, the Panel stressed that in order to have standing to sue, a club has to submit proof that it would directly replace a club and not *“by the means of possibly being entered into a draw along with a number of other clubs or by a possible one-off decision that the Emergency Panel might take”*.

In this respect, the Panel held that, although it could not second guess what the Emergency Panel would do following the exclusion of a team to the competition, it would not be illogical, based on its practice in the past, for the Panel to decide to replace the team by either the team that was knocked out by the excluded team during the qualifying round or by means of a draw amongst all teams eliminated in the play-off round, thus randomly selecting the team that would replace the team excluded from the competition.

As an example, reference was made to a decision taken in relation to the 2013/14 UEFA Europa league³⁸, in which, following the exclusion of Fenerbahçe from the tournament, the Emergency Panel decided to hold a draw amongst all teams eliminated in the play-off round of the UEFA Europa League to randomly select the team to replace Fenerbahçe, and as such did not rely upon Article 4.08 UCLR.

In conclusion, as the Panel decided that Article 4.08 UCLR loses its applicability once the competition started and it had not de facto been established that the outcome of an Emergency Panel decision would be the election of Panathinaikos as the replacement of Olympiacos should the latter be held inadmissible, it ruled that Panathinaikos had no standing to sue and accordingly dismissed its appeal.

1.4 Conclusion

It should be reminded that, whereas all clubs in a competition can be affected by an UEFA decision concerning the competition, this does not necessarily mean that a club is “directly affected”, which would give a club the right to appeal such a decision. For further reading on the notion “directly affected”, reference is made to:

- CAS 2015/A/3874 Football Association of Albania v. UEFA & Football Association of Serbia;
- CAS 2013/A/3301 FC Red Bull Salzburg v. UEFA, Arsenal London FC & Fenerbahçe Spor Kulübü, and;
- CAS 2008/A/1583 Sport Lisboa e Benfica Futebol SAD v. UEFA & FC Porto

³⁷ E.g. Article 4.06 UCL Regulations “(...) UEFA may carry out investigations at any time (even after the end of the competition) to ensure that these two admission criteria are or have been met until the end of the competition

³⁸ CAS 2013/A/3322 Bursaspor Kulübü Derneği v. UEFA

2 Relocating players to a club's reserve team

2.1 Introduction

The ECA Legal Bulletin 2014 contained an analysis of a FIFA DRC case³⁹ dealing with the relegation of a professional player from a club's 1st team roster to its reserve team and how this does not automatically provide a player with a just cause to terminate the employment contract.

In the meantime, a similar case has been adjudicated by CAS⁴⁰, which, as set out below, provides some further guidance as to how a judicial body may analyze a demotion of a player and when such demotion would constitute a breach of one's obligations under the employment contract.

2.2 CAS 2014/A/3642

FACTS OF THE CASE

The facts of the case can be summarized as follows: the Russian club FC Arsenal Tula ("Club") and the Slovenian player Erik Salkic ("Player") concluded an employment contract valid from 22 March 2013 until 30 June 2015.

On 22 January 2014, the Club decided to relegate the Player to its reserve team for the pre-determined period of 22 January to 5 March 2014 (i.e., 43 days). In doing so, the Club relied upon a contractual clause allowing the latter to assign the Player to the reserve team⁴¹.

The Player, not happy with his (temporary) relegation, informed the Club that, in his opinion, the move constituted a breach of contract and requested the Club to remedy this alleged breach.

Lacking any response from the Club, the Player terminated the employment contract a mere 7 days following the Club's decision to relegate him to the reserve team. Subsequently, both the Player and the Club lodged a claim with the Russian Football Union DRC (NDRC), which ruled that the relegation did not give him a just cause to terminate the employment contract and, as a result thereof, awarded compensation to the Club. After the Russian Players' Status Committee confirmed this decision on appeal, the Player lodged an appeal with CAS.

CONSIDERATIONS OF THE PANEL

The first question the Panel addressed was whether the relegation of a player to a club's reserve team - with the consequence of him being prevented from training with the first team - amounts to a violation of a player's right in principle. In other words, whether a player has a legal right to be part of, and perform in, the first team.

In this respect, the Panel held that: "*players and clubs can expressly agree for a player to play in a certain team, but if the contract is silent, then players in principle have certain fundamental rights, such as his "personality" rights" but that a coach and the club also have the right, in certain sporting circumstances, to move players between the first team and other teams.*"

CAS held that these rights may conflict, and when they do, based on previous CAS jurisprudence⁴², that the following points ought to be reviewed to determine whether the club had violated the Player's rights.

³⁹FIFA DRC 28 March 2014, Ze'ev Haimovich v. FC Terek Grozny, N°0314734

⁴⁰CAS 2014/A/3642 Erik Salkic v. Football Union of Russia & Professional Football Club Arsenal

⁴¹The clause reads as follows: "*The Player agrees that upon the decision of the Club, he may be assigned to the backup team of the Club's football team for the performance in football matches of lower sporting level without affecting the substantial terms and conditions of this contract*"

⁴²Cf. CAS 2013/A/3091 FC Nantes v. FIFA & Al Nasr Sports Club & CAS 2013/A/3092 Ismaël Bangoura v. Al Nasr Sports Club & FIFA & CAS 2013/A/3093 Al Nasr Sports Club v. Ismaël Bangoura & FC Nantes

I. The wording of the contract

The Player had signed a contract with the Club as a “professional player”. According to the Player, this meant that by relegating him to the reserve team, the Club had breached the contract. The Panel, however, did not concur with this line of reasoning as it held that “labelling” a player as a professional in his contract does not mean that a player can only play for the first team.

The Panel then stressed that a distinction must be made between a “*club’s right to assign a player to play matches with the second or backup team and a club’s right to prevent a player from training with the first team.*”

In this respect, it held that a measure to prevent a player from training with the first team could seriously prejudice the Player’s future perspective with the first team, since such measure is more of a definitive nature than merely obliging the player to participate in second team matches. Nevertheless, the Panel stressed that there could or might be valid reasons, such as for the purpose of recovering from an injury, which may dictate that a player train away from the first team and which would need to be reviewed in each individual case.

According to the Panel, irrespectively of the contractual clause, a coach could issue instructions to the Player to train with the reserves, but held that such instructions must be reasonable and can only be taken if the specific circumstances of the case justify it, e.g., in order to recover from an injury.

Subsequently, the Panel focused on the limits and effects of the assignment as such.

II. Was the player still being paid his full wage?

The Panel held that, although by playing for the reserve team the Player could miss out on certain bonuses, the primary concern is whether the relegation would affect the player’s basic salary. In the present case, the Panel held that the Club would have to continue to pay the Player’s basic wage.

III. Could the player enjoy adequate training facilities while being with the reserve team/did the player have to train alone or with a team?

In present case, the club’s reserve team, similar to its first team, allowed the Player to train in a team environment accompanied by duly qualified coaches. Consequently, the Player’s relegation did not prevent him from enjoying adequate training facilities.

IV. Length of the relegation

The Panel noted that the term of the relegation (in other words, whether it is to be of a permanent or temporary nature) is relevant to determine whether the measure infringes upon the rights of a player. However, the Panel highlighted that it could not state that a certain number of days infringes on a player’s rights as, in every case, the context surrounding the relegation is of key importance.

In this case, the Panel held that the relegation was a temporary measure, since it took place during the winter break (during which no games were played) and the Player would have been allowed, according to the club, to re-join the first team after he had finished his (43 days) training assignment with the reserve team.

V. Why was the player dropped to the reserve team?

According to the Club, it relocated the Player to its reserve team as the Club's head coach deemed it necessary for the player to improve his fitness level. The Player, on the other hand, argued that the only reason for the Club to assign him to the reserve team was to force him to leave the club.

As neither party could provide sufficient evidence confirming its statements, the Panel eventually left it moot as to whether the Club had valid sporting reasons to assign the Player to its reserve team.

In conclusion, the Panel held that the question whether or not the Club could legitimately assign the Player to train with the reserve team had to be left unanswered as, even assuming that such a measure would constitute a breach of contract by the Club, this breach was not of such a severity that it would have allowed the Player to terminate the employment contract with just cause after 7 days. In keeping with established jurisprudence, the Panel stressed that a breach should persist over such a period of time that it could no longer be reasonably expected from the player to continue the employment relationship with the club.

BREACH OF CONTRACT BY THE PLAYER – NO COMPENSATION PAYABLE IF THE CLUB NO LONGER VALUED HIS SERVICES

Moreover, even though the CAS concluded that the Player had terminated the agreement without just cause, it held that no damages were to be awarded to the Club as a result of the breach of contract.

More precisely, CAS explained to have serious doubts as to whether the relegation of the Player was done for pure sporting reasons or whether there were also some other, more economic motives for doing so. In this respect, the Panel held to the belief that the Club, before the Player had breached his contract, had in fact offered the player to mutually terminate the employment contract without any amount payable by either party. Therefore, the Panel held that the Club did not value the services of the Player and could not be awarded compensation as a result of the contractual breach by the Player.

2.3 Conclusion

In conclusion, whilst a club has more freedom in obliging a first team player to participate in matches played by a club's reserve team whilst still being allowed to join first team training sessions, it is likewise more restricted in preventing such a player from participating in first team training sessions by obliging him to train with a club's reserve team.

Clubs should be aware that obliging a first team player to train with the reserves is a measure that is not to be taken lightly, that such measure should only be taken when valid reasons for such instruction exist, and should bear in mind the limits and effects of such assignment as analyzed in the case above.

3 Depression and contractual stability

3.1 Introduction

It is commonly known that professional football players regularly suffer from injuries which prevent them from participating in first team activities such as matches and training sessions.

Injuries, and especially those injuries that prevent players from performing football activities for a prolonged period of time, are often associated with substantial (monetary) losses on the side of the club; injured players have to undergo costly medical treatments and, during the time of injury, a club cannot depend on the services of the player, albeit having to pay his salary. This is all the more true in case a club did not take out an insurance policy covering such expenses.

In order to avoid having to bear such losses, clubs have, in various cases adjudicated by the FIFA Dispute Resolution Chamber, claimed to be entitled to terminate an employment contract as a result of a prolonged injury. However, according to the standing practice of the Chamber, an injury suffered by a player does not, in principle, constitute just cause for the club to terminate the employment contract⁴³. Such is even the case if the parties to the contract have stipulated a clause in the contract according to which a Club may terminate the contract in case of a (prolonged) injury⁴⁴.

Whilst the great majority of injuries faced by players are of a physical nature, the existence of which is relatively easy for a club to verify, it may also occur that a player is prevented from providing his services as a result of a disorder of a psychological nature, such as depression.

Although depression, also in professional football, is to be considered as an extremely serious issue, it is difficult for a club to ascertain whether a football player is truly suffering from a depression or has other reasons for his absence, e.g., in order to force a departure or suffering from so-called “transferitis”.

A recent decision rendered by CAS⁴⁵ provides some guidelines as to what can be expected from a player who suffers from a depression and what actions a club may take when it does not believe the existence of genuine depression. More precisely, whether a club may demand access to the player’s medical file and request a player to undergo medical examinations or is prevented from doing so due to the principle of medical secrecy.

In the case at hand, the player claimed to be suffering from a severe depression which prevented him from participating in first team activities for a prolonged period of time. The club, on the other hand, contested the validity of these claims, which eventually resulted in the termination of the employment contract by the club.

3.2 CAS 2015/A/4094

As a preliminary note, it needs to be mentioned that, in the proceedings, the Panel had to deal with a multitude of arguments brought forward by both the club and the player to justify their actions. However, this article purely focuses on the allegation of the player that he was truly suffering from a depression, which would justify his absence from the club.

⁴³ FIFA DRC, 13 May 2005, N°55230

⁴⁴ FIFA DRC, 10 December 2009, N°129881

⁴⁵ CAS 2015/A/4094 Player X v. Club Y

In analyzing these alleged justifications, the Panel carefully studied the following points:

EXPERTISE OF MEDICAL EXPERTS CONSULTED BY THE PLAYER

Faced with the alleged depression, the Player first went to see a general practitioner, after which he started to see a relatively young and inexperienced psychologist.

In this respect, the Panel held it to be unusual that a highly paid football player, allegedly suffering from a severe depression and able to have recourse to the best available medical treatment, would first visit a general practitioner and subsequently an inexperienced psychologist rather than consult an experienced psychiatrist.

COURSE OF THE DISEASE

When examining the course of the disease, it appeared that the Player claiming to be suffering from severe depressions on one day, consequently claimed that he had recovered well enough to return to the club after a 3 session-treatment with a psychologist.

The Panel, however, stressed that a severe depression is a debilitating illness that not only requires significant treatment but is also a long-lasting one. Although the Panel noted that they were not medical experts, they considered it to be highly unlikely that a player could suffer from severe depression and recover from it after just a few sessions with a psychologist over a period of 2 weeks.

PROVIDING A CLUB WITH MEDICAL UPDATES AND UNDERGOING A MEDICAL EXAMINATION

At one point in time, the club informed the player that it either wanted a detailed medical report including the treatments and a list of medicines that had been taken by the player or the opportunity to conduct their own medical examinations of the Player.

In this respect, the Panel stressed that, in the world of football where athletes are subject to regular doping tests, which, if they fail, would have dire consequences for a club and player, it does not seem unreasonable for a club to ask the player what medication(s) he is taken.

Furthermore, it held that it is not unreasonable for a club, faced with a player suffering from a depression, to subject the player to a thorough medical examination before allowing a player to return. Should the Player feel uncomfortable in performing these examinations, he simply should have provided a detailed medical report from his own doctors.

Consequently, the Panel held that the Club did not act inappropriately in demanding either a detailed medical report or in conducting its own medical examinations

In conclusion, the Panel held not to be convinced that the player was suffering from a severe depression that would justify his absence from the club. This, in combination with other circumstances surrounding the contractual dispute between the parties, provided the Club, in the eyes of the Panel, with just cause to terminate the employment contract.

3.3 Conclusion

Clubs are advised to take a proactive approach in ascertaining the situation in which a player claims to suffer from depression. This entails that, within certain limits, clubs should not be reluctant in requesting an allegedly troubled player to provide them with a detailed medical report and, should a player fail to do so, ask to conduct their own medical examinations by either a club psychiatrist or independent physician in order to assess the situation.

Moreover, it is also advisable, within the limits of the national law, to add a clause to an employment contract whereby a player agrees to subject himself to medical examinations conducted by the club or an independent practitioner and share the outcome thereof with the club!

4 Unilateral option clause

4.1 Introduction

In various cases submitted to the FIFA DRC and CAS, players have claimed the invalidity of “unilateral option clauses”, which allow one party to the contract (often being the club) to extend the original duration of the contract for an additional pre-agreed term.

In the recent CAS case, CAS 2014/A/3852⁴⁶, CAS once again had to consider the validity of these clauses.

At the same time, the Panel had to determine whether a club, being declared bankrupt and losing its membership with the FA after filing a claim with the FIFA DRC, could still file an appeal against such a decision to the CAS.

4.2 CAS 2014/A/3852

FACTS OF THE CASE

The Senegalese player Papa Waigo N’Diaye (“Player”) and the Italian football club Ascoli Calcio 1898 (“Club”) concluded an employment contract valid for the period August 2011 until 30 June 2012. During this period, the Player was earning an annual salary of EUR 90.000 net.

The contract contained an option clause which allowed the Club to extend the employment relationship until 30 June 2014 (i.e. an additional two seasons). If the Club would exercise this option, the Player would receive a substantially higher salary for the 2012/13 & 2013/14 seasons (i.e., respectively EUR. 240.000 net if the Club would play in the Italian Serie B and EUR 490,000 net if the club would participate in the Serie A during these seasons).

Satisfied with the Player’s performances, the Club notified the Player by registered letter in May 2012 that it would exercise the option to extend the contract.

The Player however decided to ignore the extension as he left the club and subsequently signed a contract with Al-Wahda FC in July 2012. Faced with the Player’s departure, Ascoli filed a claim with the FIFA DRC against the Player and his new club for breach of contract.

The DRC eventually rejected the claim lodged by the Club, as it held that the latter failed to duly exercise the option (issue of valid notification of the extension), after which the Club appealed the decision to CAS.

Interestingly, before the DRC rejected the claim lodged by the Club, the latter entered into bankruptcy proceedings on 17 December 2013 and ceased to be a member of the Italian Football Federation (FIGC).

CAS PROCEEDINGS

The main issues that needed to be considered by the CAS Panel were:

- I. The impact of Ascoli’s bankruptcy on the competence of CAS;
- II. The validity of the option clause;
- III. If valid, whether the Club had correctly exercised the option;
- IV. Consequences of the Player’s departure.

⁴⁶CAS 2014/A/3852 Ascoli Calcio 1898 S.p.A. v. Papa Waigo N’diaye & Al Wahda Sports and Cultural Club

I. The impact of Ascoli's bankruptcy on the competence of CAS

The Panel stressed that the Club had filled its claim with FIFA before it entered into bankruptcy proceedings and held that, although the DRC eventually rendered its decision after the Club had lost its membership to the FIGC, neither the FIFA Statutes nor the RSTP require "specific qualifications" to file an appeal⁴⁷.

CAS held that, only at the time of determining the DRC's jurisdiction does it have to be ascertained whether parties to a dispute are members of FIFA as the FIFA Statutes and RSTP provide a right to appeal the FIFA decision to CAS.

More precisely, the Panel held that *"to reject the right to appeal to a party that was a party before the DRC, but for whatever reason has been excluded from FIFA, would mean to effectively eliminate the appeal procedure specifically established by FIFA in its Status and accepted by all FIFA members and parties submitting to the DRC. Absent specific wording in this regard, the Panel cannot interpret the FIFA Statutes to justify such an exclusion"*.

Consequently, the Panel ruled that CAS had jurisdiction to decide on the dispute.

II. The validity of the option clause

As a preliminary note, the Panel repeated its extensive jurisprudence in that unilateral extension clauses **are not invalid per se**.

Referring to its previous jurisprudence⁴⁸, the Panel applied the following criteria to analyze the validity of the extension clause stipulated at hand.

a. The potential maximal duration of the labor relationship should not be excessive, the extension period should be proportional to the main contract and it is advisable to limit the number of extension options to one

The Panel held that the potential maximum duration of the contract (3 years) was a reasonable duration considering that the maximum duration of a contract under the FIFA RSTP is, in principle, set at 5 years⁴⁹. The Panel furthermore noted that the two-year extension is understood to be reasonable, even if the original duration was for only one year, and emphasized that the contract only provided for one a single extension.

b. The salary reward deriving from the option right should be defined in the original contract/compensation for extension

The Player's salary for the extended period was clearly identified in the contract. Special attention was given to the fact that, upon the exercise of the option by the Club, the Player's salary would significantly increase from EUR 90.000 net to respectively EUR 240.000 net if the Club would play in the Italian Serie B and EUR 490,000 net if the club would participate in the Serie A. In this respect, the Panel referred to the CAS 2005/A/973 case⁵⁰, in which it was held that an important remuneration increase, linked to the extension of contract, must be considered as the price paid by a club to the player for the right to exert the option. A player is contractually rewarded with a substantial increase in salary in consideration of the right of granting the unilateral option to a club.

⁴⁷Article 24.2 FIFA RSTP simply states: "(...) Decisions reached by the Dispute Resolution Chamber or the DRC judge may be appealed before the Court of Arbitration for Sport (CAS)".

⁴⁸CAS 2013/A/3260 Grêmio Football Porto Alegrense v. Maximiliano Gastón López

⁴⁹Art. 18 para. 2 FIFA RSTP: "The minimum length of a contract shall be from its effective date until the end of the season, while the maximum length of a contract shall be five years. Contracts of any other length shall only be permitted if consistent with national laws.(...)"

⁵⁰CAS 2005/A/973 Panathinaikos Football Club v. S.

c. One party should not be at the mercy of the other party with regard to the contents of the employment contract and the option should be clearly established and emphasized in the original contract so that the player is conscious of it at the moment of signing the contract

The content of the subsequent employment contract was clearly identified in the original contract and the option clause was clearly identifiable as it was stipulated in the second clause of the employment contract. The option was worded in such a manner as to be easily understandable by any lay person.

Consequently, the Panel considered that the option granted to the Club was valid.

III. Did Ascoli validly exercise the extension option?

According to the employment contract, the Club would have to exercise the option via certified mail before the 25th of June 2012. While Ascoli sent a registered letter to the Player's address indicated in the employment contract, this letter could not be delivered to the Player as it appeared that he had changed his address in the meanwhile.

The employment contract, however, provided that, should the Player change his address, he would duly have to notify and inform the Club of such a change. As the Player failed to do so, the Panel held that the exercise of the option was done in accordance with the employment contract.

IV. Consequences of the Player's departure

Based on the above analysis, the Panel ruled that the club had duly exercised a valid unilateral option and that the Player had terminated the employment contract without just cause by signing with his new club. Consequently, the Panel focused its attention on determining the amount of compensation payable by the Player to his former club as result of the contractual breach.

In doing so, the Panel referred to an exchange of emails between the Player's agent and the Club back in July 2012, from which it could be derived that the Club was willing to transfer the Player for a fee of EUR 500.000.

As a consequence, the Panel established the amount of compensation at the amount indicated above and held that the Player and his new club, Al Wahda FC, were jointly and severally liable for the payment of this amount.

4.3 Conclusion

This case is important for clubs since it confirms that unilateral options can be valid if certain conditions are met. Hence, when drafting such a clause, clubs should take these conditions into account if they want the provision to be enforceable. Furthermore, clubs are advised to ensure the compatibility of such clauses with the provisions regarding unilateral extensions which may be included in the applicable Collective Bargaining Agreement at national level.

5 Contractual penalty and termination of contract if a player fails to return from a loan

5.1 Introduction

This article summarizes a recent CAS case⁵¹, in which the Panel had to ascertain the validity of a penalty clause stipulated in a loan agreement concluded between a player, his permanent club, and a third club in order to facilitate the loan of the player.

According to this loan agreement, the player was obliged to return to his permanent club following the loan period prior to a specified date and the club with which the player was on loan was required to complete all the procedures to facilitate the player's timely return. Failure to do so would trigger two individual penalty clauses awarding damages to be paid by the player and his temporary club to the club sending the player on loan.

Faced with the situation of the player failing to return to his permanent club before the agreed date, CAS had to determine whether the penalty clauses stipulated in the loan agreement were triggered and whether the penalty amounts in these clauses were deemed valid in light of Swiss law.

At the same time, the Panel had to determine whether the player's permanent club had a just cause to terminate the employment contract when the player still had not returned to the club one month after the agreed return date.

5.2 CAS 2014/A/3858

MAIN FACTS OF THE CASE

The player André Lima ("Player") concluded an employment contract with the Chinese club Beijing Guoan valid as from 15 February 2013 until 31 December 2014. Six months later, the latter two parties agreed with the Brazilian club Vitória that the Player would join Vitória on a loan basis for the period 15 July 2013 until 31 December 2013.

The contract defined that:

- Following the expiry of the loan period, the Player would have to return to Beijing Guoan before the 10th of January 2014, failing to do so would entitle Beijing Guoan to USD 1.200.000 as compensation;
- Vitória would have to complete all the procedures to ensure the player's timely return; failing to do so would entitle Beijing Guoan to USD 900.000 as compensation.

After the loan period came to an end, the Player failed to return to the Chinese club, as a result of which the latter terminated the employment contract on 10 February 2014.

Subsequently, and in keeping with the terms of the loan agreement, Beijing Guoan filed a claim with FIFA against Vitória and the Player for damages, claiming the amount stipulated in the penalty clause.

In addition, Beijing Guoan claimed damages from the Player under the terms of the employment contract, contending it had terminated the employment contract with just cause due to the Player's failure to return to the club following the loan.

The DRC eventually dismissed the respective claims and awarded the Player with the residual value of his employment contract based on a counterclaim of the latter.

⁵¹CAS 2014/A/3858 Beijing Gouan FC v. FIFA, André Luiz Barretto Silva Lima & Club Esporte Clube Vitória

Beijing Guoan subsequently appealed to CAS, which needed to answer the following questions:

- Did the Player and/or Vitória breach the loan agreement and what were the financial consequences?
- Did Beijing Guoan terminate the employment contract with just cause and what were the financial consequences?

I. The breach of the loan agreement

First, the Panel examined Vitória's obligations to facilitate the Player's return to China following the expiry of the loan agreement. In this respect, the Panel noted that the only procedure that Vitória could have undertaken to facilitate the Player's return was to enter into the TMS the instructions for the issuance of an ITC.

However, since Beijing Guoan failed to duly request the issuance of such ITC in the FIFA Transfer Matching System (TMS), no procedure could be completed by Vitória and, consequently, the Panel held that the club was not to blame for the fact that the Player failed to return to China.

Whilst the Panel reached the conclusion that Vitória did not breach the loan agreement, it reached a different conclusion with regards to the Player.

The Panel highlighted that, contrary to the claim by the Player, Beijing Guoan never explicitly authorized the Player to stay absent from the club as a result of an injury.

Furthermore, the Panel stressed that, although Beijing Guoan failed to duly insert the TMS instructions, such could not be understood as a confirmation that the Player was allowed to remain in Brazil, since such instructions could also be inserted in TMS after the physical return of the Player.

Consequently, the Panel held that the Player breached the loan agreement, after which it had to determine the consequences of the breach.

II. Financial consequences as a result of the breach of the loan agreement

The loan agreement contained a penalty clause according to which the Player would be liable to compensate Beijing Guoan with the sum of USD 1.200.000 in the event of his failing to return to China before 10 January 2014. In addition, the contract stipulated that the Player was obliged to pay a daily penalty of USD 10.000, for every day he would delay the payment of the contractually agreed penalty.

In determining the validity of the penalties stipulated in the loan contract, the Panel stressed that, under Swiss law, parties are free to determine the amount of the contractual penalty but that a court may at its discretion reduce penalties it considers excessive⁵². In doing so, it was reminded that the judge should not readily reduce a penalty and the principle of contractual liberty should always be given priority in case of doubt⁵³.

Furthermore, the Panel held that it may reduce a penalty when it is *"unreasonable to an extent which cannot be justified"* and that in its assessment, the following criteria ought to be taken into account:

1. the creditor's interest in the performance of the main obligation and in the sanctioning of the default;
2. The gravity of the debtor's fault, from an objective and subjective standpoint;
3. The parties' financial situation.

In applying these criteria to the case at hand, the Panel concluded that the contractual penalties were excessive compared to the breach by the Player and the interest of the Club to secure performance of the breached obligation. More precisely, it held that there was a *"patent disproportion between the penalty set (...) and the damage caused by the Player's failure to comply with the obligation to return to the Chinese club before 10 January 2014"*.

⁵² Article 163 Swiss Code of Obligations: 1. The parties are free to determine the amount of the contractual penalty. (...) 3. At its discretion, the court may reduce penalties that it considers excessive.

⁵³ Mooser, *commentaire Romand du Code des obligations*, Basel, 2003, n. 7 ad art. 163 ; Couchepin, *op. cit.*, para. 934

In this respect, the Panel noted that the amount of USD 1.200.000 was equal to another liquidated damages clause stipulated in the loan agreement which would be triggered should Vitória transfer or loan-out the player without the consent of Beijing Guoan.

In other words, the amount of USD 1.200.000 was considered as the parties' evaluation of the Player's transfer value and, awarding such amount would be an excessive compensation for the loss of services of the Player for one month. Especially since in January 2014, when the Player was absent, he was still injured and no-official matches were played by the Chinese club.

Consequently, the Panel focused on determining an adequate level of compensation and awarded the Club USD 90.000, which equaled nearly one monthly salary.

The Panel, bearing in mind that the Player was injured when he was to return to the Club, held this amount to be an:

“adequate compensation in light of the fact that the main interest of Beijing Guoan in the presence of the Player during the unwarranted extension of his absence from Beijing Guoan lay in the instruction and supervision of the final part of the Player's medical rehabilitation process the violation of such interest is deemed to be worth less than the value of a month's full services which is represented in the agreed monthly wage. Despite such lower value, the adequate compensation is still set at a value very close to the monthly wage amount in recognition of the deterrent purpose of the penalty clause”.

III. Breach of the loan agreement - not automatically a just cause to terminate the employment contract

While the Panel concluded that the Player had breached the loan agreement, it did not conclude that this breach was sufficiently severe to provide the Club with a just cause to terminate the employment contract.

More precisely, the Panel held that, although the Player breached the loan agreement by not directly returning to the Club upon the expiry of the loan, such violation was not serious enough to justify the Club to terminate the employment contract.

In reaching its conclusion, the Panel relied on the following facts of the case:

- The Club failed to provide sufficient evidence confirming that the Player had been warned of a possible termination of the employment contract;
- Whilst the Player was absent from the Club, he was still undergoing a period of medical rehabilitation. Only upon termination of that period would the Player be available to join and play for the Club;
- The Player had informed the Club of his readiness to fulfill the contract upon his full recovery from the injury;
- According to the employment, more lenient measures could have been taken in the event of non-participation of the player in the Club's training activities (e.g., fines).

Consequently, and with regards to the unlawful termination by the Club, the Panel confirmed the compensation awarded to the Player by the DRC, which amounted to the residual value of the employment contract.

5.3 Conclusion

This case indicates that even if a player does not respect the terms of a loan agreement, such a failure does not necessarily imply that a breach of the employment contract allowing a club to terminate the employment relationship took place. Both contracts are independent and clubs should proceed carefully when contractual issues arise with a player on loan.

III. Binding nature of mediation provisions at arbitration level

1 Introduction

If a contractual problem arises, it is rather common that the parties to a contract aim to solve these disputes amicably before initiating arbitration or court proceedings. To this extent, the parties often include a general article in their contract.

One of the tools used by parties to facilitate the amicable settlement of disputes is mediation, which can be defined as an alternative dispute resolution method where a neutral and impartial third party, the mediator, facilitates the dialogue between the parties in a structured process to help parties in reaching a conclusive and mutually satisfactory agreement.

Examples of mediation services in the world of football include the ECA Mediation Services, which has been active since 2011 and provides a tool for ECA Member Clubs to amicably settle any dispute of a financial nature⁵⁴, as well as the mediation services offered by the Court of Arbitration of Sports (CAS)⁵⁵.

Mediation proceedings can, in principle, be lodged at any time after a dispute has arisen and do not necessarily require a contractual provision beforehand⁵⁶. It is often understood that, even though parties have agreed to submit a dispute to mediation, be it on the basis of a contractual clause or by means of an agreement concluded after a conflict has arisen, parties at any stage and for any reason whatsoever can terminate the mediation proceedings without any legal consequences.

Following a recent decision of the Swiss Federal Tribunal⁵⁷ it can, however, be derived that agreeing to settle a dispute amicably may provide more consequences than initially anticipated by the parties. More precisely, depending on the wording of a mediation clause/agreement, parties cannot always terminate mediation proceedings without facing some sort of legal consequences.

2 Swiss Federal Tribunal 4A_628/2015⁵⁸

FACTS OF THE CASE

Two commercial companies (hereinafter referred to as “Party X” and “Party Y”), active in the petroleum sector, had entered into various cooperation agreements, all of which contained the following dispute resolution clause:

“All differences arising between the Parties [...] that cannot be resolved under the ADR by the Parties, shall in the first instance be the object of an attempt of conciliation under the ADR (Alternative Disputes Resolution Rules) of the International Chamber of Commerce (ICC). All differences between the Parties [...] not resolved by conciliation shall be decided as a last resort by way of arbitration according to the UNCITRAL Arbitration Rules (...).”

Following a dispute that arose between the two parties, Party Y, in accordance with the above-cited clause, agreed to initiate conciliation proceedings with the ICC International Centre for ADR⁵⁹.

After the parties failed in their attempt to hold a first conference call on the matter, Party Y lodged a request for Arbitration and informed the Conciliator that, in its view, the conciliation had failed. Party X on the other hand, informed the conciliator that there were no reasons for allowing the closure of the proceedings.

⁵⁴ Please contact the ECA Legal Department should you require more information on the mediation services offered to ECA Member Clubs

⁵⁵ Cf. the CAS Mediation Rules, which can be consulted on: <http://www.tas-cas.org/en/mediation/rules.html>

⁵⁶ A clause by means of which parties stipulate that prior to submitting the dispute to a competent judicial body, they will aim to amicably solve the dispute by mediation. E.g., by concluding a mediation agreement after a problem has arisen.

⁵⁷ Swiss Federal Tribunal Decision 4A_628/2015 of 16 March 2016

⁵⁸ For the purpose of writing this article, use has been made of the article: Dr. Hansjörg Stutzer et al., *Don't jump the gun! Lack of jurisdiction in case of failure to comply with pre-arbitration dispute resolution provision*, Arbitration Newsletter Switzerland, 8 April 2016

⁵⁹ Conciliation and mediation appear to be similar in interchangeable terms and both depend on the willingness of the parties to settle the dispute by the assistance of a neutral, there is subtle difference between the two in that in conciliation, the conciliator, in theory, plays a more direct role in the actual resolution of a dispute by advising parties on certain solutions by making proposals for settlement. Not the parties but the conciliator often develops and proposes the terms of a settlement agreement.

Faced with the request, the conciliator held that the proceedings could not be closed prior to the parties having a discussion on the settlement technique to be used and the specific ADR procedure to be followed⁶⁰.

Notwithstanding the position taken by the mediator, Party Y reiterated that the conciliation had ended, following which the conciliator and the ADR Center had no other option than to inform the parties that it considered Party Y to have withdrawn from the conciliation and consequently terminated the proceedings.

In the ensuing arbitration proceedings, whilst Party X objected to the jurisdiction of the Arbitration Tribunal due to Party Y's failure to comply with the pre-arbitration dispute resolution provision in favor of conciliation, the Arbitration Tribunal held to have jurisdiction. Consequently, Party X challenged this decision on jurisdiction with the Swiss Federal Tribunal.

CONSIDERATIONS OF THE TRIBUNAL

As a first step, the SFT referred to the dispute resolution clause stipulated in the contract and held that, according to this clause, it was clear that the parties wanted the recourse to arbitration to be conditional on the prerequisite that conciliation in line with the ADR rules had taken place.

Secondly, the SFT examined whether conciliation proceedings had been correctly conducted in line with the ADR rules. In this respect, it held that no party could terminate the conciliation proceedings prior to having a discussion on the settlement technique to be used and the specific ADR procedure to be followed. The SFT held that since the parties had failed to organize a discussion in respect thereof, the pre-arbitral conciliation procedure had not been correctly conducted.

As a third step, the Tribunal held that it would have to examine whether Party X in good faith objected to the jurisdiction of the arbitral tribunal or that its objection was to be considered as an "abuse of right"⁶¹.

An abuse of right might have been the case if Party X were to invoke the failure to submit to mandatory preliminary conciliation in an appeal against the award if it had failed to conciliate the dispute before the arbitration proceedings. In this respect, the Tribunal held that Party X had actively taken part in the conciliation proceedings and had immediately objected to the jurisdiction of the arbitration tribunal after Party Y had lodged arbitration proceedings. Consequently, the Tribunal ruled that Party X had not abused its right when objecting to the arbitral tribunal's jurisdiction.

As a last step, the Tribunal had to determine the consequence of not respecting the ADR clause. In this regard, it held that the best possible solution would be to stay the arbitration until the parties completed the conciliation proceedings in compliance with the ADR rules.

Interestingly enough, as to defining the terms of the stay, and in particular the appropriate time limit to be provided to the parties to conduct the conciliation proceedings, the Tribunal held that the Arbitral Tribunal would have to set a time limit within which the parties should complete the conciliation procedure, since this body "*has better knowledge than anybody else of the whys and wherefore of the case submitted to its review*".

⁶⁰ Cf. ADR Rules of the International Chamber of Commerce (2001) Article 5 para 1: The Neutral and the parties shall promptly discuss, and seek to reach agreement upon, the settlement technique to be used, and shall discuss the specific ADR procedure to be followed.

⁶¹ Cf. Article 2 Swiss Civil Code: 1) Every person must act in good faith in the exercise of his or her rights and in the performance of his or her obligations. 2) The manifest abuse of a right is not protected by law.

3 **Different mediation clauses/agreements – different consequences**

Based on the case analyses above, clubs are advised to take caution when agreeing to the wording of a mediation agreement/clause. More precisely, the wording of a mediation agreement/clause depends on the degree to which parties wish to be bound in following the correct mediation procedures,

In this respect, reference is made to mediation clauses differentiated by the International Chamber of Commerce (ICC) for parties wishing to use the proceedings under the ICC Mediation Rules⁶²:

- I. Clauses according to which the parties have an option to conduct mediation;
- II. Clauses according to which parties have the obligation to consider mediation;
- III. Clauses according to which the parties have the obligation to refer to mediation while permitting parallel arbitration proceedings if required;
- IV. Clauses obliging parties to refer disputes to mediation prior to lodging arbitration/court proceedings by arbitration if required.

If a party aims to fully to preserve its freedom in being able to reject the initiation of mediation proceedings or to be able to terminate the proceedings at any time after the mediation proceedings kicked off, it should aim to use a clause which reflects the spirit of clause I, II, or III.

On the other hand, should a party wish to conduct mediation in a more formalized/binding way, parties should aim to use a clause reflecting the spirit of clause IV.

⁶² Cf. <http://www.iccwbo.org/Data/Documents/Buisness-Services/Dispute-Resolution-Services/Mediation/Suggested-clauses/Suggested-ICC-Mediation-clause-in-ENGLISH/>

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