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DEAR ECA MEMBERS...

It has been six months since the relaunch of the ECA Legal Journal; six months during which ECA has progressed many of our key strategic projects for this cycle including the adoption of the new UEFA Financial Sustainability Regulations and of the reforms to the men's European club competitions "Post 2024".

Post 2024" has been one of the most important projects for the ECA during the past three years and signifies an opportunity for European club football to enter into a period of stability, sustainability and success in terms of governance and decision-making. "Post 2024" will also bring new corporate venturing and commercial opportunities, improved diversity, inclusion, social impact, club services and development.

Sadly, the last six months have also seen the beginning of a devastating armed conflict in Ukraine. It is not clear how and when such conflict will end. However, what is clear is that the human suffering it has caused is enormous. As we hope for peace to come as soon as possible, ECA wants to play its part in seeking to provide some relief to the situation and has therefore made available a EUR 1,000,000 financial contribution to support the efforts of all ECA Members in implementing initiatives to assist the Ukrainian people.

Alongside these major projects, ECA has continued to develop its legal services offering for clubs. I am proud to say that over this period we have assisted a significant number of clubs reach positive outcomes in regulatory, contractual and disciplinary cases. Also in this context, we are pleased to issue the second edition of ECA Legal Journal.

In this second issue, you will find a piece about transfer market trends in the post-pandemic world including which types of contractual clauses are becoming standard among clubs in order to provide more legal certainty to their contractual relationships.

In addition, I am sure you will enjoy a very interesting article about the impact of ESG ("Environmental, Social and Governance" factors) in football, which explains the importance for clubs of having a thorough, comprehensive, and organised ESG plan, essential for the proper running of a club in the years ahead.

On a more technical side, clubs will also find articles about i) sporting succession and bankruptcy proceedings, topics which continue to be high on the agenda due to the financial difficulties that many clubs have been experiencing; and ii) contractual negotiations with particular reference to pitfalls that clubs should avoid when having pre-contractual discussions and arrangements on the transfer of players.

Finally, in the jurisprudence section, you will find an overview of the most interesting and relevant decisions for European football clubs recently rendered.

I trust that the second issue of the ECA Legal Journal will be of interest and added value to you. As always, ECA's Legal Department remains at your entire disposal to assist your clubs in any way we can.

Yours sincerely,

CHARLIE MARSHALL

CEO, ECA

LEGAL COMMENTARY

JURISPRUDENCE

LEGAL COMMENTARY

TRANSFER MARKET TRENDS

A RETURN TO NORMALCY OR MORE UNCERTAINTY AHEAD?

By Matthew Bennett, Penri Jones and Tom Simpson[1]

1 INTRODUCTION

The football transfer market was, like many other international trade markets, adversely impacted by the COVID-19 pandemic. Clubs understandably became extremely cautious in transfer related spending as revenues were diminished following the curtailment / suspension of competitions and the consequent reductions in sponsorship, broadcasting and match-day revenues. Whilst the football transfer market did not completely grind to a halt during the last two years, the amount spent by clubs did significantly reduce, with spending on international transfers in the 2020 summer transfer window falling by 30% compared with the corresponding window in 2019[2].

HOWEVER, THE INTERNATIONAL TRANSFER Snapshot report published by FIFA following the January 2022 transfer window suggests that confidence in the global transfer market is returning as we emerge from the pandemic[3] . A total outlay of US$1.03M was agreed between clubs on international transfers - an increase of 74% compared to the total outlay in January 2021[4] .

The European market is also simultaneously responding to the post Brexit effects of changes to the recruitment practices of UK clubs following the introduction of new UK immigration rules for football players and the inability of UK clubs to acquire minors from the EU/EEA between the ages of 16 and 18 pursuant to the exception afforded in Article 19(2)(b) of the FIFA Regulations on the Status and Transfer of Players (the 'FIFA Regulations').

Clubs will also be very much aware of the imminent implementation of FIFA's new Football Agent Regulations which have been on the horizon for a number of years, but which will finally enter into force in the coming months albeit, it appears, not for the summer 2022 window – the significant changes that the new regulations will herald will have a material impact on the market and the way in which clubs structure their agency arrangements.

Additionally, the war in Ukraine is also likely to resonate in the market with the movement of players driven by non-footballing factors and clubs will no doubt be aware of the new Annexe 7 of the FIFA Regulations and implications that will have.

These various contextual factors have combined to create a period of 'flux' within the transfer market with new practices developing and governing bodies trying to regulate in shifting sands like never before.

In the context of these geopolitical and economic events, we consider in this article: (i) issues and market trends which are commonly arising during the negotiation of transfers/transfer documentation; and (ii) certain regulatory developments that are impacting upon football transactions.

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[2] FIFA International Transfer Market Snapshot 2020..

[3] FIFA International Transfer Market Snapshot - January 2022. [4] ibid, page 4.

2 ISSUES AND MARKET TRENDS

A. PAYMENT SECURITY

With a reduction in revenues and ever-increasing pressures on cash flow for clubs across the globe and at all levels of the football pyramid because of the Covid-19 pandemic, we have seen an increase in clubs defaulting on payment obligations under transfer agreements which has also resulted in an increase in claims brought before the FIFA Football Tribunal (the 'FFT') for overdue payables[5]. We have therefore seen an increase in the inclusion of payment security provisions in transfer documentation, particularly where selling clubs have concerns over the liquidity of a buying club. Examples of such provisions include:

PAYMENT ACCELERATION

These clauses provide that if a buying club defaults on any instalment of a transfer fee, the entire transfer fee shall then become immediately due and payable. This then entitles the selling club to take steps to recover the entire transfer fee (and interest) without having to wait until the remaining instalments fall due. In our experience, the effect of such clauses is to focus minds and to encourage buying clubs to take necessary steps to avoid defaulting on the payment of a transfer fee instalment.

BANK GUARANTEE

Whilst it is possible to make transfer agreements conditional upon a buying club providing a selling club with a bank guarantee and we have seen an increase in the use of bank guarantees in transfer agreements since the start of the pandemic, in our experience, buying clubs resist this and often are simply unable to obtain such a guarantee either in the required timescales or at all.

DEFAULT PAYMENT/INTEREST

Whilst different jurisdictions may limit/restrict the ability of clubs to include default payment/interest provisions in transfer documentation, for international transfers that are governed by the FIFA Regulations, the position under Swiss law is somewhat more flexible allowing clubs to include: (i) penalty clauses provided they are not "grossly excessive" – typically up to 50% of the principal amount outstanding is permissible; and (ii) default interest provisions provided they do not exceed an interest rate of 18% per annum.

There are also other protections/enforcement methods available to selling clubs. For example, in the event of default by a buying club, selling clubs may be able to approach domestic leagues and/or UEFA (if applicable) to request such bodies withhold central funding from the defaulting club to first discharge any of its overdue payables to the buying club.

In addition to the contractual options available to clubs, in the event of a payment default by a buying club, Article 12bis of the FIFA Regulations contains a mechanism for the enforcement of contractual debts on an expedited basis. Upon receipt of a valid claim, the FFT has the power to order payment (plus interest and costs) by a set deadline (usually 45 days) as well as to impose additional sanctions on defaulting clubs, including warnings, fines and registration bans. Typically, if a defaulting club fails to comply with the terms of the FFT's decision a registration ban for three consecutive registrations periods (or until the overdue payables are paid, if sooner) will be imposed on such defaulting club.

[5] FIFA Players' Status Department Report 2020/2021

B. TRANSFER RECEIVABLES FINANCING

Whilst the market for transfer receivables financing appeared to stall at the start of the pandemic, as confidence in the transfer market has gradually returned, we are increasingly being asked to advise on such transactions as third-party financial institutions return to the market.

An acceleration of transfer fee instalments typically involves a selling club using a third-party financial institution to 'accelerate' the payment of transfer fee instalments, usually at a discount. Whilst selling clubs 'sell' transfer fee receivables at a discount, there is a clear cash flow benefit in that they receive a lump sum up front rather than waiting a number of years to receive full payment of the outstanding transfer fee instalments.

Whilst acceleration of transfer fee instalments involves the payment of transfer compensation to a 'third party' (i.e. the financial institutions), and therefore, at first glance may appear to be in breach of Article 18ter of the FIFA Regulations, it is understood that FIFA's current position is that such transactions do not breach Article 18ter as they relate to existing claims in relation to already agreed transfers (i.e. not future transfers) and therefore do not represent a threat to sporting integrity in the manner that typical third party ownership arrangements do.

Clubs looking to accelerate the receipt of transfer receivables should have the above regulatory regime in mind – particularly ensuring that any such agreement with a third-party financial institution is entered into after the transfer has actually occurred to avoid a breach of Article 18ter of the FIFA Regulations.

In addition, if clubs are minded to enter into the transfer receivables market, they may wish to consider making provision for the same in the underlying transfer agreement – for example, obliging the buying club to enter into any documentation required to facilitate any such assignment and dealing with the question of which party is liable for the associated professional and banking costs. In addition, there may also be national regulations applicable to any such transaction that will need to be adhered to. For example, in England, depending on the identity of the third-party financial institution involved, such transactions may require the prior approval of the Premier League and The FA and, in all cases, will involve the lodging of transaction documents with The FA once completed (by both the selling club and the buying club).

C. SEQUENCING OF TRANSFERS/ CONDITIONALITY CONTAINED IN TRANSFER AGREEMENTS

When approaching any transfer, whether domestic or international, clubs should firstly consider the applicable approach rules to avoid any disciplinary action. In this regard, it is worth noting that the rule contained in Article 18(3) of the FIFA Regulations in relation to concluding a contract with a player who is in the last six months of his existing contract does not mean that acquiring clubs are exempt from the first part of Article 18(3) (i.e. it must notify the player's current club in writing of its intention to negotiate an employment contract with the player)[6].

In addition to the above, the pandemic and Brexit have clearly affected the timing and sequencing of transfers – particularly international transfers – given clubs now face logistical difficulties in relation to, for example, conducting medical appointments and arranging visa appointments (if applicable). This may have a knock-on effect on any transfer/payment conditionality under a transfer agreement. In this regard, clubs should consider how conditionality is incorporated under a transfer agreement to avoid any unnecessary risks or at least mitigate any such risks through additional protections.

By way of example, a selling club must consider the implications of payment conditionality being linked to, for example, the grant of a visa in the player's new country given this shouldn't impact on a player's ability to be registered with a new club (albeit they may not be eligible to play until such visa is granted) as such process could take a number of weeks in which time the selling club would have already relinquished the player's registration so there is no practical way to 'unravel' the transaction at this point.

[6] Page 196, Commentary on the FIFA Regulations on the Status and Transfer of Players

D. TEMPLATE DOCUMENTATION

The approach of clubs to conducting due diligence on potential target players also changed during the pandemic due to difficulties arranging international travel for medicals and physical testing, scouting trips and whilst international travel routes are generally returning to normal, some of the pandemic practices and restrictions remain.

As such, including key protections within transfer agreements has become increasingly important for buying clubs. This could include warranties from the selling club with regards to the player's medical background (including providing for the disclosure of medical records), his anti-doping compliance record and criminal/disciplinary background. Each of these elements can have a material impact on whether a player can actually play for a buying club so are of crucial importance.

It is also important for clubs to seek protection from any potential adverse football regulatory implications in respect of the transfer. In this regard, clubs should seek protection from a player's current club in relation to the player's playing history to assess: (i) whether they will incur any Training Compensation and/or Solidarity liability pursuant to the FIFA Regulations (as further detailed below); and (ii) whether the player has recently been registered with any other club which could potentially result in the presumption of a bridge transfer as per Article 5bis of the FIFA Regulations or in some cases, an inability to play the player following the transfer due to the application of Article 5(4) of the FIFA Regulations (and the so called "3+2" rule which permits players to be registered with three clubs in one season but only play for two such clubs). However, with regards to Article 5(4) of the FIFA Regulations, any player who has moved clubs under the auspices of the recently introduced Annexe 7 of the FIFA Regulations (dealt with in more detail below) and whose previous registration was held by a club affiliated to the Ukrainian Association of Football or the Russian Football Union may be registered with a maximum of four clubs during the applicable season and is eligible to play official matches for three different clubs[7].

Given the importance of including such contractual protections in transfer agreements, we have found clubs favouring the use of their 'template' document which can often lead to a 'battle of the forms' as both clubs to a transaction each try to impose their own standard agreement on the other which are often 'one-sided' in nature. In practice, this has led to compromise having to be made with clubs accepting the introduction of provisions into their 'template' and 'middle ground' positions being agreed to ensure that an agreement can be concluded quickly.

E. SELL-ON CLAUSES

According to the 2021 FIFA Global Transfer Report, 53.7% of international transfers in 2021 contained a sell-on clause[8]. It is clear, therefore, that sell-on clauses have become standard terms in transfer agreements and are often heavily negotiated by buying and selling clubs.

The precise sell-on mechanism used in transfer agreements varies on a case-by-case basis although, typically, we often see the following provisions negotiated by parties:

> Whether the sell-on percentage applies to the gross transfer compensation received from a subsequent disposal of the player or only that subsequent transfer compensation that is in excess of the sums paid by the buying club to the selling club under the initial transfer agreement (or, more generally, the sums paid by the buying club in connection with the initial transfer agreement including, for example, Solidarity under the FIFA Regulations);

> Whether all forms of subsequent transfer compensation (i.e. contingent as well as guaranteed and compensation in cash or in kind) are to be considered when calculating the applicable sell-on fee; and

> Whether the sell-on fee applies to future temporary as well as permanent transfers.

[7] Article 5(1), Annexe 7 FIFA Regulations

[8] Page 12, 2021 FIFA Global Transfer Report

In addition to the above, when negotiating the inclusion of a sell-on clause within the transfer agreement, selling clubs need to take into account the identity of the buying club and its wider corporate structure and, in particular, whether they form part of a multi-club network. In such a scenario, selling clubs may wish to insert protection in the sell-on clause against any subsequent sale of the player to a related club at an undervalue to ensure that their sell-on entitlement is not diminished due to inter-group transfers of a particular player.

Consideration should also be given to FIFA's regulatory approach to sell-on clauses where there is a different rate applicable depending on the identity / location of the next buying club. FIFA has imposed disciplinary sanctions on several clubs in respect of such contractual provisions on the basis that the same breach Article 18bis of the FIFA Regulations. However, in keeping with its wider approach to the application of Article 18bis, the Court of Arbitration for Sport (the 'CAS') has diverged from FIFA's approach to sell-on clauses in two separate recent rulings in which it has held that such clauses should be reviewed on a case by case basis to assess the materiality of the influence allegedly exerted, taking into account: (i) the parties' freedom of contract and relative bargaining power; and (ii) whether the clauses affect the sporting integrity of any competition.

F. TRAINING COMPENSATION AND SOLIDARITY

In the time sensitive environment of transfer negotiations, Training Compensation and Solidarity liabilities can often be overlooked as parties focus on negotiating the key commercial terms.

However, a failure to consider potential Training Compensation and/or Solidarity exposure can prove, in some cases, to be a costly oversight for buying clubs as the transfer may then be followed by unexpected (and unaccounted for) claims which are 'set in stone' once the transfer agreement is agreed and signed. In addition, the scope for buying clubs incurring liability in respect of Solidarity has increased now that it is payable on domestic transfers where any of the player's training clubs is affiliated to an alternative national association. Common issues we see with clubs in relation to Training Compensation and Solidarity are:

> Whilst according to FIFA case law[10], unless expressly indicated otherwise in the relevant transfer agreement, it is presumed that any agreed transfer compensation includes any Training Compensation due to the selling club (and this is often made explicit in the transfer agreement itself), clubs may not consider additional claims for Training Compensation which may be brought by clubs to which the player was temporarily transferred whilst registered with the selling club[11] ; and

> Where a selling club insists that it receives 'net' sums under a transfer agreement, according to CAS and FIFA case law[12], such sums must then be grossed up to calculate the buying club's liability to pay Solidarity (i.e. so called "100 + 5" cases) rather than Solidarity being calculated by reference to such sums alone (i.e. the typical "100 - 5" cases).

Ultimately, the issues above are usually linked to buying clubs having a lack of clarity on its liability to pay training rewards at the time of the transaction. It is precisely this lack of clarity (and the fear that training clubs are missing out on training rewards) that has led FIFA to create the Clearing House which will automate the payment of Solidarity and Training Compensation pursuant to a system based on electronic player passports which may go some way towards avoiding future Training Compensation and Solidarity disputes between clubs. However, FIFA has made clear that such Clearing House will not be in operation for the 2022 summer transfer window and so clubs should still be wary of potential Training Compensation/Solidarity liabilities when negotiating transfer agreements to avoid any unexpected liabilities later arising. In this regard, buying clubs could request player passports as part of the negotiation process or insert protection from selling clubs within the transfer agreement as to the identity of a player's training clubs (whilst this would not necessarily prevent any claims arising from third party clubs, it could at least provide the buying club with recourse against the selling club should any later unexpected claims arise). Consideration should also be given to 'future proofing' clauses that deal with the administration of Training Compensation and Solidarity liabilities in the event these are no longer permitted when the Clearing House becomes operational.

3 REGULATORY CONSIDERATIONS

IN ADDITION TO THE ABOVE MARKET TRENDS, BROADER regulatory considerations (both within football but also at a macroeconomic level) continue to affect the structuring of transfers and, with new football regulations on the horizon and continuing geopolitical tensions, this is set to continue for the foreseeable future.

FINANCIAL FAIR PLAY RULES

One aspect that we continually see driving the structuring of transfer arrangements is financial fair play regulations (both at a national and confederation level).

This is particularly the case with regards to clubs' use of loan arrangements. Whilst according to the latest FIFA International Transfer Snapshot, the number of loan agreements in the latest transfer window actually fell compared with January 2021, in our experience, selling clubs are more likely to consider loans than in the past (even with regards to 'high profile' players), given the accounting advantages of temporarily removing a player from its wage bill.

In addition, we are seeing an increasing number of transfers structured as initial loans with an option in respect of the future purchase of a player. Again, this structure has a clear benefit from an accounting perspective for acquiring clubs as the transfer outlay can be pushed into the following accounting year. To offer certainty to selling clubs regarding the exercise of the underlying option, agreements are often drafted so that the option is automatically exercised (or the loaning club has the obligation to exercise the option) upon the occurrence of events that are likely to happen during the loan period. However, when providing for such automatic options or 'soft' conditions, clubs should assess whether the same are permissible under the applicable national regulations as from experience we understand that national associations take different approaches on such provisions.

Even with the phased abandonment by UEFA of its current financial fair play regulations in favour of its new financial sustainability regulations which contain a more generous 'football earnings' ratio compared with the current break-even requirement, we anticipate that such issues will continue to impact the structuring of transfer arrangements for the foreseeable future.

NEW LOAN RESTRICTIONS

FIFA's restrictions on loans, announced pre-pandemic, are finally due to come into force on 1 July 2022 (subject to approval from the FIFA Council). Once in force, these will limit a club's total number of international loans per season, starting at eight in and eight out in the 2022/2023 season, eventually reducing to six in and six out in the 2024/2025 season and beyond. Players aged 21 and younger, and who are club trained players, are to be exempt from these limitations.

The loan market has been harnessed by several leading clubs to develop young players (whilst also increasing their market value) and this player trading model will be severely impacted by the new restrictions. However, because of the imposition of the above limitations, we anticipate there will be an increase in the use of matching rights and buyback rights by clubs when selling players (particularly young players that they may have otherwise loaned out) to ensure that they have 'first refusal' over any future transfer of the player and such players do not completely 'slip through the net'.

Buyback/matching rights can be complex bespoke provisions within transfer agreements with clarity required with regards to their operation. For example, in a buyback scenario, there should be clarity on the total compensation package (including amounts (guaranteed and/or contingent) and payment dates). In addition, when considering granting a buyback/matching right, clubs should seek to limit the window in which such rights become applicable to avoid, for example, the same being exercised during the last days of a registration period which would clearly have a knock-on effect on squad planning.

[9] CAS 2020/A/7417 – Arsenal FC v FIFA ; TAS 2020/A/7158 Real Madrid CF v FIFA
[10] DRC decision of 26 September 2019, no. 09191934-E; CAS 2004/A/785 Strømsgodset IF Toppfotball v. Liebherr GAK [11] DRC decision of 22 September 2019, no. 09190767-E
[12] CAS 2015/A/4137 Lyon v. AS Roma; DRC decision of 26 August 2019, no. 08192031-E

UK IMMIGRATION RULES – IMPACT ON TRANSFER MARKET

England and English clubs have, in recent times, been the strongest 'buying' market within world football and this trend continued in 2021 as English clubs spent more than double their nearest counterparts on international transfer fees during 2021[13].

2021 was also the first year in which UK clubs had to deal with the implications of Brexit, including the introduction of the post-Brexit point-based system for governing body endorsements ('GBEs') which are required for a player to obtain a visa to work in the UK.

The point-based system is based on several objective criteria including: (i) the player's international appearances; (ii) the player's appearances for his current club in domestic league and continental cup competitions; (iii) the league position of his current club in the season before the relevant GBE application is made; (iv) his current club's recent progression in a continental competition; and (v) the quality of the domestic league in which his current club participates. 'Exceptions Panels' (where clubs can present more subjective arguments to The FA in favour of players obtaining a GBE) are also available in certain cases (particularly cases involving 'youth players' (i.e. those born on or after 1 January 2000 at the time of writing)).

In addition, as mentioned above, UK clubs are now no longer able to acquire minors from the EU/EEA between the ages of 16 and 18 pursuant to the exception afforded in Article 19(2)(b) of the FIFA Regulations.

The implications of Brexit continue to affect transfers within the wider global transfer market in addition to the squad planning of UK based clubs and we have noted the following general themes arising from the post-Brexit footballing immigration landscape in the UK:

> Whilst EU/EEA players are no longer automatically entitled to be employed by clubs in the UK, in general, if a player is an international for a leading country and/or is a first team regular in one of Europe's leading leagues, they will obtain sufficient points to obtain a GBE;

> The introduction of a uniform points-based system that applies to the purchase of the registration of any player outside the UK has opened up certain markets for UK clubs which, under the previous regime, were difficult to access (for example, under the new points based system, the Campeonato Brasileiro Série A is banded higher than the Danish Superliga and the Copa Libertadores has the same banding as the UEFA Champions League);

> However, the ability of UK clubs to sign EU/EEA players from outside Europe's leading leagues or youth players from the EU/EEA has been significantly impacted. For example, if the current rules were in place in 2014, Leicester City would not have been able to obtain a GBE for Riyad Mahrez when acquiring his registration from Le Havre without a favourable decision from an Exceptions Panel which would have been unlikely given his lack of international experience at the time and the fact that Le Havre played in Ligue 2; and

> Now that clubs in the UK no longer benefit from the exemption set out in Article 19(2)(b) of the FIFA Regulations with regards to the transfer of 16 to 18 year olds from the EU/EEA,[14] youth players in markets with historic ties to the UK (e.g. the Republic of Ireland) are choosing to move to clubs in the EU/EEA under the exemption set out in Article 19(2)(b) to further their footballing development at youth level. UK clubs are limited to moving players between 16 and 18 between the national associations of the UK only (as per the additional exception that was added to Article 19(2)(b) of the FIFA Regulations).

[13] Page 26. FIFA Global Transfer Report 2021. English clubs spent $1.3682 billion on transfer fees in 2021 with Italian clubs spending $667.7m.

[14] Notable examples in this regard include: (i) Cathal Heffernan, aged 16 (Cork City to AC Milan); and (ii) Kevin Zefi, aged 16 (Shamrock Rovers to Inter Milan).

SANCTIONS & ANNEXE 7 OF THE FIFA REGULATIONS

Clearly, the recent sanctions regime imposed against many Russian individuals and entities is unprecedented and will have a significant effect on the upcoming summer transfer window if such sanctions are still in force given the involvement of several such entities in football.

Questions remain unanswered as to how the sanctions regime affects payments that are due to clubs whose owners/ownership entities are currently under sanction (or even Solidarity liabilities to other clubs that are based on the future payment of transfer instalments to such clubs). However, if entering the transfer market this summer, clubs will need to carry out due diligence on potential counterparty clubs to avoid dealing with sanctioned individuals/entities. In this regard, clubs may wish to seek protection within the transfer agreement itself regarding the ownership structure of the counterparty club.

The urgent introduction of Annexe 7 of the FIFA Regulations to assist players playing in Ukraine and Russia showed that FIFA can respond quickly to world events and to that extent, should be welcomed. It is understood that it enabled many players to move internationally outside the registration periods to exit the war zone in Ukraine or simply leave Russia. Whilst, as set out above, Annexe 7 makes clear that Article 5(4) of the FIFA Regulations will be tailored for those players who move clubs under its auspices, the provisions in Annexe 7 do not necessarily provide a clear way forward for affected players from July 2022 and FIFA will therefore need to issue further regulations / guidance in due course. For example, from the cases we have been advising on, there is concern from clubs about recruiting players who may wish to terminate unilaterally their existing contracts and how FIFA will deal with such cases given the potential implications of Article 17(2) to 17(4) of the FIFA Regulations. Clubs should therefore proceed with caution and take advice if considering entering into a contract with a player in this position which will endure beyond 30 June 2022.

4 CONCLUSION – BE PREPARED

THE TRANSFER MARKET IS SHOWING STRONG signs of recovery as the data from FIFA's International Transfer Snapshot certainly indicates.

It is anticipated that the coming European summer market will see this recovery continue as clubs will have greater confidence in investing in their playing assets with squad turnover likely to be greater than in recent years as players find more opportunities to move on after a few years of limited options.

Clubs are therefore advised to prepare themselves for the anticipated increase in activity so they can operate effectively and gain an advantage in a competitive market. Clubs should ensure that the transfer documentation they are using, which may need to be drafted and negotiated in time pressured situations, contain all necessary protections and are also clear in their terms to avoid disputes or unanticipated consequences emerging later down the line. It is therefore recommended that clubs review their template documentation in advance of the window to ensure they are up to date from both a market and regulatory perspective considering the key points highlighted in this article.

Internal processes regarding decision making, risk assessments and financial controls/approvals may also need to be revised to take account of regulatory compliance issues not least in relation to financial fair play regulations at both a national and confederation level.

If the past few years tell us anything, new issues and trends will certainly emerge and clubs will need to be resourceful, creative in their thinking and adapt to a changing market so they can function as effectively as possible within their financial means and regulatory frameworks.

The lawyers at Centrefield have over 20 years' experience in advising on high value, high profile and record-breaking transactions all over the world and can assist clubs navigate through often complex and frantic transfer windows to ensure deals are done efficiently, with up to date market intelligence and in a regulatory compliant

We are also a multi-lingual team with French and Spanish speakers. If you therefore need any assistance in relation to any of the issues raised above, please contact us: **info@centrefield.law.**

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SPORTING SUCCESSION VS INSOLVENCY

ADVANTAGE FOR WHOM?

By Marc Cavaliero[15]

1 INTRODUCTION

Sporting succession has become a source of debates and more importantly of disputes before FIFA bodies and the Court of Arbitration for Sport (CAS). Despite the numerous decisions now passed on the matter, the concept of sporting succession remains complex and a source of controversies.

FIFA bodies, and in particular the FIFA Disciplinary Committee, and CAS have been confronted with numerous cases related to the application of sporting succession in contractual and disciplinary matters. Several of these cases concerned a previous debtor club, which had faced (or was facing) insolvency or bankruptcy proceedings. However, is the concept of sporting succession applicable at all when the original debtor faced or is facing insolvency or bankruptcy proceedings?

Let us dive into some subjectively chosen CAS awards.

A. CONCEPT OF SPORTING SUCCESSION

Sporting succession used to be a jurisprudential notion at first[16], until FIFA decided to codify it into the FIFA Disciplinary Code (FDC), edition 2019. Sporting Succession is codified[17] in art. 15 governing the "enforcement" of FIFA Decisions, more precisely in its par. 4, as follows:

"THE SPORTING SUCCESSOR OF A NON-COMPLIANT PARTY SHALL ALSO BE CONSIDERED A NON-COMPLIANT PARTY AND THUS SUBJECT TO THE OBLIGATIONS UNDER THIS PROVISION. CRITERIA TO ASSESS WHETHER AN ENTITY IS TO BE CONSIDERED AS THE SPORTING SUCCESSOR OF ANOTHER ENTITY ARE, AMONG OTHERS, ITS HEADQUARTERS, NAME, LEGAL FORM, TEAM COLOURS, PLAYERS, SHAREHOLDERS OR STAKEHOLDERS OR OWNERSHIP AND THE CATEGORY OF COMPETITION CONCERNED."

The Regulations on the Status and Transfer of Players (RSTP), edition 2022, contains a similar provision at art. 25 par. 1[18] which governs the implementation of decisions and confirmation letters. More precisely, the criteria to assess in a dispute before the Football Tribunal whether an entity is the sporting successor or a different entity are identical in the RSTP and the FDC.

Thus, a sporting successor of a former, no longer existing, club can be liable for financial obligations of that former club, although it was not a party to the agreement in question, pursuant to which the financial obligation arose.[19]

Or as explained by a CAS Panel: "This sporting succession rule aims to provide legal protection to sports creditors who, from

a certain moment, due to the submission of the debtor club to insolvency/bankruptcy, extinction or simple dissipation of assets, no longer enjoy FIFA protection for the collection of its credits owed by the Old Club. In this regard, with the sporting succession concept that was firstly recognized by the FIFA and CAS jurisprudence and finally expressly included in the FDC itself, FIFA intends to avoid that a new club can benefit from the sporting assets that define and distinguished the old club without having to comply with its sporting pending and recognized liabilities.

Therefore, the implementation of the sporting successor concept provides a sporting creditor with efficient means to obtain the payment of monetary claims against the "sporting successor" of a non-compliant debtor and intends to protect football stakeholders by preventing the non-compliance of the football club's financial obligations towards them." [20]

The analysis to determine whether a club shall be considered as a sporting successor is made on a case-by-case basis.

As one can note, FIFA – understandably – wishes to ensure that its decisions are being enforced and implemented by a debtor party and simultaneously to avoid that parties take advantage of assets of an old debtor without liability.

B. INSOLVENCY / BANKRUPTCY

It is interesting to note that the FDC does contain a provision, which refers to bankruptcy, namely art. 55 lit. b FDC.

More precisely, the legislator foresaw that proceedings may be closed when "a party is under insolvency or bankruptcy proceedings according to the respective procedures provided for by the relevant national law"[21].

Thus, if a debtor club finds itself in insolvency and/or bankruptcy, FIFA is in a position – without any regulatory obligation – to close any disciplinary proceedings initiated on the basis of art. 15 FDC directed against such club.

As put by CAS, "the key idea behind Article 107 FDC is not so much because FIFA wants to do its bit towards safeguarding the equal treatment of creditors principle (which probably does not form part of the Swiss international public policy). Instead, the central aspect of the consideration is that the enforcement measure, i.e. the threatened "detriment", is a disciplinary measure that is punitive in nature.

The latter, however, not only requires fault on the part of the judgement debtor but also that the non-payment is in fact attributable to the person concerned. If, however, the insolvency debtor can no longer manage and no longer dispose of his assets as of the opening of insolvency proceedings and if the liquidator is bound by strict rules how to distribute the estate (subject to criminal sanctions), then it is not possible for fault to be attributed to either the liquidator or to the Respondent if they do not comply with the (possible) award (see also CAS 2015/A/4162 para. 79). In the face of such impossibility to freely dispose of the estate it would be contrary to public policy to sanction the debtor (or liquidator) for not complying with a CAS award (cf. also SFT (27.3.2012) 4A_558/2011). Therefore, no sanction can be imposed according to the FIFA Disciplinary Code to enforce any CAS award. This finding is also supported by CAS jurisprudence (CAS 2012/A/2750 para. 121).[22]

In this same line of thoughts, another CAS Panel underlined that "FIFA is obliged to take into consideration and respect the decisions of the national State Courts as well as the laws of the States regarding bankruptcy proceedings, since the said proceedings are within the exclusive jurisdiction of the State Court."[23]

It has been customary for FIFA to indeed close such cases, although FIFA has discretion on this issue,[24] as long as the claim was acquired prior to the opening of insolvency and is subject to the enforcement restrictions.[25]

That being said, a successor club is by essence not under insolvency or bankruptcy proceedings. Consequently, from a strict legal standpoint, art. 55 FDC does not find application in such constellation and disciplinary proceedings do not need (legally or customarily) to be closed on that purpose.[26]

That said, the question that needs to be answered is whether the concept of sporting succession shall transcend insolvency and bankruptcy law. In other words, does insolvency/bankruptcy prevent a judging body from considering a new club a sporting successor of an insolvent/bankrupt club? In the negative, does insolvency/bankruptcy law put some limits to the application of the concept?

2 DOES INSOLVENCY/BANKRUPTCY PREVENT SPORTING SUCCESSION?

IN CAS 2020/A/6884, THE SOLE ARBITRATOR considered that "even if bankruptcy proceedings took place, sporting succession can still exist".[27] Furthermore, the Sole Arbitrator underlined that:

> Bankruptcy and sporting succession are different concepts;

> Not all cases of sporting succession are triggered by the inability of a club to face its financial obligations;

> The fact that bankruptcy proceedings are not mentioned in art. 15 par. 4 FDC does not mean that this provision is not applicable to sporting succession following bankruptcy;

> While art. 15 par. 4 FDC was created to avoid abuse of clubs trying to escape from financial obligations, that provision can still apply even if no abuse can be demonstrated. [28]

In CAS 2020/A/6831, the Panel recalled that art. 15 par. 4 FDC does not explicitly address how and in which manner the (sporting) succession has occurred. Simply put, art. 15 par. 4 FDC does not distinguish between different ways of succession, which can happen through direct purchase of the assets or following bankruptcies.[29] Thus, art. 15 par. 4 FDC concerns all cases of sporting succession.[30]

In analysing the rationale of that provision, the Panel understood that sporting succession aimed at protecting contractual stability, equality of competitive conditions and even the competitions.[31]

After applying the criteria enumerated in a non-exhaustive manner in art. 15 par. 4 FDC, the Panel considered in that specific case that the new entity was the sporting successor of the original debtor.[32]

Similar conclusions can be found in CAS 2020/A/7504, where the Panel confirmed that nothing in the FIFA's regulatory framework seems to prevent FIFA or CAS from analysing and imposing the consequences of sporting succession when the new club is considered the sporting successor of a bankrupt club.

In short, "The FIFA Regulations do not expressly or indirectly exclude from the sporting succession rule the cases in which bankruptcy proceedings occur."[33]

Based on these considerations, insolvency or bankruptcy proceedings at state level do not seem to prevent the application of the concept of sporting succession. Thus, disciplinary proceedings can be opened against a successor club for a debt that was not paid by the original debtor. That being said, it is interesting to note that this last decision was passed by majority and was not unanimous.

As it will be elaborated below, some CAS Panels added an extra element in their analysis of sporting succession following insolvency/bankruptcy, namely the idea of an abuse behind the insolvency proceedings.

[15] Attorney-at Law and Founding Partner at Cavaliero and Associates (www.cavaliero-associates.com)
[16] Ex multis CAS 2007/A/1355 FC Politehnica Timisoara v. FIFA & Romanian Football Federation (RFF) & Politehnica Stintia 1921 Timisoara Invest SA ; CAS 2011/A/2646 Club Rangers de Talca v. FIFA.[17] CAS 2020/A/7092, consid. 64.[18] This provision had already been inserted in art. 24ter para. 1 of RSTP, 2021 Edition.
[19] CAS 2018/A/5618.[20] CAS 2020/A/7423, consid. 181-182 [21] Prior to the entry into force of the current version of the FDC, the ancestor of art. 55 FC, i.e. art. 107 FDC, edition 2011, referred to bankruptcy only. CAS confirmed that art. 107 FC concerned all "collective enforcement proceedings, i.e. proceedings that – in principle – prevent creditors to individually pursue / enforce their individual claims against the debtor, provide for seizure of the debtor's assets, are triggered by financial difficulties of the debtor and foresee some kind of supervision by state authorities." CAS 2020/A/6900 & 6902, consid. 122 [22] CAS 2017/A/5054, consid. 83. [23] CAS 2013/A/3321, consid. 8.11. [24] CAS 2012/A/2750, consid. 156. [25] CAS 2015/A/4162, consid. 81.
[26] CAS 2020/A/7423, consid. 174. [27] CAS 2020/A/6884, consid. 148. [28] Ibid., 148 – 149. [29] CAS 2020/A/6831, consid. 108. [30] Ibid., consid. 111. [31] Ibid., consid. 116 et sequ. [32] Ibid., consid. 127. [33] CAS 2020/A/7504, consid. 168.

3 IS THE CONCEPT OF SPORTING SUCCESSION LINKED TO ABUSE?

WHILE THIS DOES NOT SEEM TO BE THE majority view (at least up until now), some CAS Panels considered that the concept of sporting succession had to be interpreted even more restrictively.

A. CAS 2020/A/7092 PANATHINAIKOS FC V. FIFA & CLUB PARMA CALCIO 1913

In that case, the original debtor, Parma FC fell into bankruptcy. Panathinaikos FC requested the initiation of disciplinary proceedings on the basis of art. 15 FDC against Parma Calcio 1913, a newly created club, claiming that the latter was the sporting successor of Parma FC, and thereby liable for its debts.

Following the decision of the FIFA Disciplinary Committee to dismiss all claims against Parma Calcio 1913,[34] Panathinaikos FC appeal and a CAS Panel was tasked to answer, among others, whether Parma Calcio 1913 was the sporting successor of the original debtor, Parma FC.[35]

In this context, the Panel submitted that the concept of sporting succession was "mainly implemented in order to avoid abuse"[36] and referred to that purpose to the FIFA Circular No. 1681.

Against this background, the Panel assessed whether the bankruptcy of Parma FC and the creation of Parma Calcio 1913 was a "set-up to avoid their financial responsibility".[37]

In doing so, the Panel assessed each individual criteria mentioned in art. 15 par. 4 FDC as well as others referred by the respective parties (to either create a link between Parma FC and Parma Calcio 1913 or on the contrary to disprove such link). [38]

Overall, and after an extensive detailed analysis of all the relevant criteria individually, the Panel found that "on balance, Parma Calcio 1913 is not to be regarded as the sporting successor of Parma FC". [39]

Take-aways of this Award are for the purpose of this analysis that:

> The Panel referred to the notion of abuse and set-up. More precisely, it considered that the concept of sporting succession had been created to avoid abuse, in the sense that a new club had to be created to enjoy the assets of a bankrupt club without taking over its liabilities;

> Bankruptcy proceedings did not prevent the Panel from analysing whether a new club could be considered as the sporting successor of a bankrupt club.

[34] CAS 2020/A/7092, consid. 20. [35] Ibid,, consid. 73. [36] Ibid., consid. 75. [37] Ibid., consid. 77 et sequ. [38] Ibid., consid. 73-74. [39] Ibid., consid, 154.

B. CAS 2020/A/7183 SOFIANE MOUSSA V. ACS PETROLUL 52 PLOIESTI & FIFA[40]

Similarly to the 7092 matter, the Sole Arbitrator in the 7183 case established that the concept of sporting succession had to be applied "carefully" and "only in a restrictive way"[41] and was implemented to avoid abuses "consisting to set up a new entity in order to avoid financial responsibility."[42]

Interestingly, the Sole Arbitrator pushed his reasoning further and expressly considered that "[i]n the present case, there is no evidence to support a finding that the New Club breached any provision and rule and/or harmed any protected interests by its actions. In this respect, none of the Parties suggested that the Old Club/New Club tried to "clean its balance sheet" or committed some kind of abuse or fraud."[43]

In other words, the concept of sporting successor (which is purely objective) shall not rely exclusively on appearances. [44]

Overall, while considering among others that there was no indication that the new club was set up "with the specific purpose of escaping the obligations entered into by the Old Club",[45] the Sole Arbitrator concluded that the new club in that case could not be considered as a sporting successor. As part of other elements, the Sole Arbitrator referred to the more objective elements, as mentioned under art. 15 par. 4 FDC, underlining that the new club did not replace the previous club in the championship or never acquired any right from the old club.[46]

In this case as well, the mere fact that the original debtor found itself under bankruptcy did not prevent the concrete assessment whether a new club could be considered as a sporting successor. However, an additional element – the existence of a possible abuse ¬– became part of the assessment.

That being recalled, the need for the condition of abuse to exist does not seem to be supported by the majority view.

[40] See also CAS 2020/A/6873 Benjamin van den Broek v. FIFA & FC Universitatea Cluj, which provides for a similar reasoning. In fact, the Sole Arbitrator in matter 7183 acted as President of a 3-member Panel in the case 7183.

[41] CAS 2020/A/7183, consid. 111. [42] Ibid., consid. 112.m[43] Ibid., consid. 113. [44] Ibid., consid. 116 and 118. [45] Ibid., consid. 121. [46] Ibid.

4 ARE THERE ANY LIMITATIONS TO THE APPLICATION OF SPORTING SUCCESSION TO AN INSOLVENT/ BANKRUPT CLUB?

A. NATIONAL INSOLVENCY/ BANKRUPTCY LAW

The Panel in CAS 2020/A/6831 made an interesting consideration: even if it is established that a club is a sporting successor of another club, it may still decide that it should not bear any liability for all or part of the debts incurred by the original debtor.[47]

More precisely, if a club is the sporting successor of another club, does it "automatically entail that it must be held liable for all the debts incurred by the old [club], irrespective of the manner in which succession has occurred?"[48]

While the Panel acknowledged that sporting succession entails economic succession, it considered that "the amount of liabilities will be decided by the law applicable in the specific case. In the present case, the Majority of the Panel is of the opinion that it is for Bulgarian laws to decide on the extent of liability of the old [club]. [New club], the sporting successor of the old [club] is under the obligation by fiat of the FIFA Statutes and more specifically, Article 15 (4) of the FIFA FDC (2019 Edition), to honour the liabilities incurred by its predecessor. It is Bulgarian law that decides the level of the liability (and the ensuing amount of debt of the [sporting successor] to the Player)."[49]

In other words, the majority of the Panel concluded that the amount of liabilities shall be defined by the national bankruptcy law.

These considerations confirm the principle that in insolvency/ bankruptcy cases, the transfer of assets is transparent and at arm's length thereby avoiding (in principle) any type of abuse, as everything is done under supervision of not only the creditors but also the insolvency court. It is unclear whether this line of jurisprudence (limiting the liability of a successor club) will be applied to future potentially similar cases.

In particular, some subsequent CAS Panels – in majority – decided to expressly ignore this precedent: "In addition, the majority of the Panel is of the opinion that it is not the bankruptcy entity in Bulgaria the one that has to establish to what extent is the [sporting successor] liable for the sporting decisions that were not complied with by the old [club]. The Panel does not intend at all to interfere in the bankruptcy proceedings open in Bulgaria and considers these CAS proceedings regarding the [sporting successor] as a parallel proceeding to the one initiated in Bulgaria and will potentially affect a new entity that is not a party in the bankruptcy proceedings."[50]

In other words, the majority of the Panel considered that the extent of liability of the sporting successor was to be established by the decision to be enforced without any involvement of the national bankruptcy law ("with the exception of those case in which the sporting creditor has explicitly or tacitly accepted or agreed a different amount in the bankrupt proceeding").[51]

[47] CAS 2020/A/6831, consid. 111. [48] Ibid., consid. 112. [49] Ibid., consid. 157, emphasis added. [50] CAS 2020/A/7504, consid. 205. [51] Ibid., consid. 209

B. THE CREDITOR'S DILIGENCE

That said, another limitation to the liability of a sporting successor of an insolvent/bankrupt club exists: the diligence of the creditor.

This principle derives from one of the first sporting succession cases, CAS 2011/A/2646.

In a nutshell, numerous CAS Panels consider that it is necessary to analyse the degree of diligence of the creditor in the bankruptcy proceedings "as it considers that this is relevant issue that has to be taken into account in the decision on whether to continue with the disciplinary proceeding arising out of Article 64 of the 2017 FDC or to close them, and that a careless and negligent performance of the creditor may lead to the discontinuation of the disciplinary proceeding."

Diligence is not defined in the FDC. It is thus yet unclear what degree of participation is necessary to comply with that requirement.

In particular, FIFA and CAS have accepted that creditors who actively participated in the insolvency/bankruptcy proceedings were as diligent as other creditors who remained passive but were nonetheless included ex oficio in the list of insolvency creditors in the domestic proceedings.[53]

Moreover, while it has been considered that any creditor who knew about the existence of the insolvency/bankruptcy proceedings (regardless of the official means of notification not being respected) should have been diligent,[54] in certain cases it was decided that a creditor could have hardly known that insolvency/bankruptcy proceedings existed and have therefore left out this criterion when evaluating a particular dispute. [55]

This criterion will necessarily be determined on a case-by-case basis after an evaluation of the specific circumstances of a given case as "there is no blanket rule".[56]

5 CONCLUSION

THESE CONSIDERATIONS WERE PRESENTED AS AN overview of the existing landscape of some cases of sporting succession of an insolvent/bankrupt club. It seems that all Panels agree that insolvency/bankruptcy law does not prevent the existence of a finding of sporting succession.

However, some Panels want to restrict the application of this concept to cases of abuse.

As to the extent of liability, the majority of the Panels do not seem prepared to limit the liability of a sporting successor to amounts set in the insolvency/bankruptcy proceedings.

Nevertheless, there is little doubt that future Panels will be confronted with the assessment made in CAS 2020/A/6831 and it will be interesting to analyse future decisions.

Moreover, the degree of diligence of creditors in the context of insolvency/bankruptcy proceedings appears to require a more streamlined approach to provide legal certainty in situations coupling insolvency/bankruptcy and sporting succession.

Overall, while some legal certainty appears warranted, one can expect some more legal discussions around this factually and legally complex concept.

[53] CAS 2020/A/7505, consid. 213. See CAS 2020/A/7504, consid. 132 et sequ.
[54] CAS 2020/A/6884, consid. 158-163.
[55] CAS 2020/A/6745, consid. 88.
[56] CAS 2019/A/6461, consid. 59.

WHAT IS THE IMPACT OF ESG IN FOOTBALL?

By Carol Couse and Neil Pearson[57]

1 INTRODUCTION

ESG stands for "Environmental, Social and Governance" - a broad set of issues which underpin the move away from a "profit-at-all-costs" model to one that considers the longer-term impact of an organisation's actions on all of its stakeholders (particularly people and planet). Or, more bluntly, it's shorthand for a way in which all businesses and other organisations can be "better" citizens.

THIS IS NOT NEW. WHILST THE TERM "ESG" WAS first coined in 2005 in a study from the UN Global Compact on socially responsible investment, the issues underpinning it are not. The first warning of greenhouse gases came in 1896[58], and the wider societal issues facing football, such as racism and inequality, have been around for a long time.

But what has changed is the focus on ESG, and ever-increasing demands for businesses to change for the better, which is coming from a variety of stakeholders – customers, employees, suppliers, lenders, investors and sponsors, not to mention wider societal movements which can quickly galvanise public sentiment for, or against, high profile organisations.

ESG is, therefore, not merely a new version of reputational risk management. It is an irreversible shift in the way we think about, and do, business.

And football clubs are affected just like any other business. In some ways the issues for football clubs are greater. Leading clubs across Europe have a huge public profile and are constantly under the spotlight of media and regulators. Consequently, football clubs may pay more dearly than other businesses for mistakes made around ESG strategy. But the flipside is also true. A club that develops a strong sustainable and long-term ESG strategy, is transparent about its efforts to improve, and which ultimately delivers on its commitments can reap huge benefits – as well as knowing it has done the right thing.

In this article we explore how ESG impacts on football clubs, why ESG should be at (or, at least, very near) the top of the agenda for clubs and what issues should be addressed in a successful and credible ESG strategy.

SO WHAT DOES ESG MEAN FOR A FOOTBALL CLUB?

In simple terms:

ENVIRONMENTAL

"Environmental" issues relate to a club's effect on the planet (climate change and biodiversity)

SOCIAL

"Social" factors are primarily those that will arise in the relations between a club and its employees, and the society or community in which it operates;

GOVERNANCE

Governance" is all about the systems in place to make sure that the "E" and the "S" happen, to embed ESG into the way a club acts – and when high profile mistakes happen, we often see a link back to poor governance structures.

We look at each of these, in turn, in more detail.

2 ENVIRONMENTAL

SINCE THE 2021 UN CLIMATE CHANGE CONFERENCE in Glasgow ("COP 26"), sport's role in tackling climate change is increasingly coming under scrutiny. As we all know, the world is warming (it is about 1.2c warmer than it was in the 19th century – and the amount of CO2 in the atmosphere has risen by 50% [59]). And this is why "net zero" targets are so important.

NET ZERO – WHY DOES IT MATTER?

"Net zero" refers to the point at which the emission of greenhouse gases (primarily, carbon dioxide (CO^2) and chlorofluorocarbons (CFCs)) are balanced by their removal or absorption from the atmosphere in equal measure. The term net zero is important because – for CO^2 at least – this is the state at which global warming reduces. The European Commission, as part of its 'Green Deal' has adopted a set of proposals to make the EU's climate, energy, transport and taxation policies fit for reducing net greenhouse gas emissions by at least 55% by 2030 with the aim of becoming net carbon by 2050.[60]

WHY DOES NET ZERO MATTER TO SPORT & SPECIFICALLY, FOOTBALL?

The challenges posed by climate change are not unique to sport - it is a global problem permeating all sectors of society.

INCREASING INCIDENCE OF EXTREME WEATHER CONDITIONS:

We can already see the impact of climate change in the extreme weather patterns of recent years. Clubs will only be too aware of matches being cancelled or postponed due to snow, storms and floods. At the grassroots level in the UK alone, a 2021 study found that approx. 62,000 football matches a year were called off due to adverse weather conditions – 42% more than in 2016. Such disruption is a cause for concern about future participation levels[61]. That is not to say the higher leagues are immune from the effects of climate change - on the contrary, it is estimated that by 2050, almost 25% of grounds in the English Football League can expect flooding every year[62].

NEGATIVE PUBLICITY:

Off the pitch, now more than ever, football clubs, and particularly the likes of those within the membership of the ECA, are very visible entities and subject to increasing public scrutiny. Therefore, when their activities (or in some cases inactivity), around environmental issues come under the spotlight, the repercussions for the clubs concerned can be significant. This will not only generate bad PR, but criticism by its fans and other stakeholders, who are increasingly becoming more socially and environmentally conscious.

FINANCES AND PARTNERSHIPS:

Ultimately, any shortcoming on a club's environmental strategy (and in fact, ESG generally) will impact on a club's bottom line – it's investors, sponsors and partners. Every company, financial firm, bank, insurer and investor is recognising the need to change and as such, are developing/have developed their own ESG policies. As the environment features higher on the corporate agenda, we are seeing that these institutions will not be prepared to invest and/or support those clubs who do not share their own ESG values, or at least demonstrate a firm commitment towards high ESG standards.

[57] Both Carol and Neil are Partners at Mills & Reeve LLP. Neil is also the firm's Head of ESG and Social Value (https://www.mills-reeve.com/) [58] "On the Influence of Carbonic Acid in the Air upon the Temperature of the Ground" (April 1896) by Prof. Svante Arrhenius [59] BBC, "What is climate change? A really simple guide", published on www.BBC.com, 13 October 2021, accessed online: https://www.bbc.co.uk/news/science-environment-24021772. [60] A European Green Deal | European Commission (europa.eu)

WHAT ARE THE KEY ENVIRONMENTAL INITIATIVES THAT MIGHT APPLY TO FOOTBALL CLUBS?

GREEN FINANCE

> One of the key outcomes of COP 26 was 'green finance' for the net zero economy. Financial institutions with a combined USD 130 trillion in assets have formed the Glasgow Financial Alliance on Net Zero (GFANZ) to fund the 2050 net zero target. As such, green finance provided by markets, banks and insurers and institutional investors will play an increasingly important role in driving climate change.

> From a practical perspective, we are seeing banks and institutional funds factoring ESG considerations into credit ratings for borrowers. If a club does not have clear and transparent environmental policy and net zero target, this will impact on its ability to access credit. Given the strain that the football economy has felt in the aftermath of the Covid pandemic, club executives will need to have their environmental policies in order (and not simply play lip service to these but enact the policies and live by these values).

> Those poor performing clubs with regards to ESG ratings may even see debt finance costs increasing. We know from first-hand experience of debt facilities being available to clients now, but when up for renewal in 5 years' time, will not be available unless strict ESG requirements are adhered to. Football clubs have a short window of opportunity to get their houses in order, failing which, they may face serious difficulty in securing new, or refinancing existing, debt finance.

INTERNATIONAL SUSTAINABILITY STANDARDS BOARD (ISSB):

> The formation of the ISSB was announced at COP26 to develop – in the public interest – a comprehensive global baseline of high-quality sustainability disclosure standards[63].

> In the UK, climate risk disclosures are mandatory for financial institutions, listed companies, large companies (500 employees and £500m turnover) and private companies from 2022 and for all companies by 2025. Under new legislation, large businesses are required to disclose their climate risks and opportunities[64].

> Similarly, in the EU, Directive 2014/95/EU requires large public interest companies with more than 500 employees[65], to publish information related to environmental matters, social matters and treatment of employees, respect for human rights, anti-corruption and bribery and diversity on company boards. We also anticipate the development later this year of a comprehensive set of EU sustainability reporting standards [66]

[61] Wales Online, "62,000 grassroots football matches a year cancelled because of climate change", published on www.walesonline.co.uk, 18 September 2021. Accessed online: https://www.walesonline.co.uk/news/uk-news/62000-grassroots-football-matches-year-21608421.
[62] Mat McGrath, "Climate change: Sport heading for a fall as temperature rise", published on www.BBC.co.uk, 20 June 2020. Accessed online: https://www.bbc.co.uk/news/science-environment-53111881. [63] IFRS, "IFRS Foundation announces International Sustainability Standards Board, consolidation with CDSB and VRF, and publication of prototype disclosure requirements", available on: www.ifrs.org. Accessed online: https://www.ifrs.org/news-and-events/news/2021/11/ifrs-foundation-announces-issb-consolidation-with-cdsb-vrf-publication-of-prototypes/ [64] UK Government Press Release, "UK to enshrine mandatory climate disclosures for largest companies in law", available on www.gov.uk. Accessed online: https://www.gov.uk/government/news/uk-to-enshrine-mandatory-climate-disclosures-for-largest-companies-in-law [65] Directive 2014/95/EU of the European Parliament and the Council, dated 22 October 2014. Available on: www.eur-lex.europa.eu. Accessed online: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0095 [66] European Reporting Lab, "Proposals for a relevant and dynamic eu sustainability reporting standard setting (europa.eu)", February 2021. [67] Accessed online.

SO, WHAT SHOULD FOOTBALL CLUBS DO?

In short, reduce their negative environmental impact. One of the most impactful ways for clubs to do this is by reducing their carbon footprint. The starting point for this is monitoring carbon emissions. Carbon emissions are responsible for 81% of overall Green House Gas Emissions (GHG). According to the leading GHG Protocol Corporate Standard[67], GHG emissions should be categorised as Scope 1, Scope 2 and Scope 3. Scope 1 and 2 are mandatory to report in the UK and Scope 3 is voluntary and the hardest to monitor. However, companies succeeding in reporting all three scopes will gain a sustainable competitive advantage.[68]

WHAT ARE SCOPE 1, 2 & 3 EMISSIONS?

SCOPE 1:

Emissions are direct emissions from company owned and controlled resources. This includes fuel and heating sources, vehicles owned or controlled by the company, emissions from refrigeration and air conditioning units.

SCOPE 2:

Indirect emissions from the production of purchased energy.

SCOPE 3:

This is the most difficult to ascertain. These are the emissions associated, not with the company itself, but that the organisation is indirectly responsible for up and down its supply chain. e.g, from buying products and services from a club's suppliers and from a club's products and services when consumers use them, including the impact of player, officials and fan travel to and from matches.

Emissions covered under Scope 3 are likely to be the most significant for clubs whether through the emissions caused by the large number of people that regularly travel to matches or the production and supply chains of merchandise globally.

ONCE A CLUB HAS ESTABLISHED WHAT ITS GHG EMISSIONS ARE – WHAT CAN BE DONE?

Look for solutions to deliver net zero for scope 1 and 2 emissions. A few initiatives clubs might consider include:

A Using **renewable** electricity/renewable gas;
B Moving to **electric vehicles** for staff and players;
C Developing/re-developing **eco-friendly real estate/ facilities** with reliance on renewable energy and sustainable materials;
D Official travel (whether to away games for the players or on business for staff) **by more environmentally friendly means** (e.g., travelling by train as opposed to planes, where possible).

However, for many businesses, **scope 3 emissions could contribute towards more than 70% of its carbon omissions.**

Clubs might therefore wish to consider a number of factors to attempt to trace and reduce scope 3 emissions:

A What requirements are made of the club's suppliers/ partners and how does the club police these standards? Clubs are high profile clients for these suppliers and generally will **have the negotiating strength to require their suppliers to reduce their own GHG emissions in their own purchasing, manufacturing and design choices.**
B What initiatives can the club take to ensure its

[68] Plan A Academy, "What are Scopes 1, 2 and 3 of Carbon Emissions?". Available at www.plana.earth. Accessed online: https://plana.earth/academy/what-are-scope-1-2-3-emissions/

partners are responsible for the **most sustainable and environmentally friendly products and services** provided to its fanbase?

C Can the club incentivise fans to act in an environmentally friendly way around matches and other club related activities? Can the club encourage and facilitate its fans' use of **public transport/sustainable transport t**o matches?

Forest Green Rovers, playing in the EFL's League Two (i.e. the fourth tier of English professional football) is leading the way in that it's model is based around being a sustainable football club. For example[69]:

A The club is powered 100% by **green energy.**

B The grass on its pitch is **sustainable** – free from pesticides.

C They cut their grass with a GPS-directed s**olar powered lawnmower.**

D They collect rainwater and use it to irrigate the pitch.

E They recommend and support **sustainable travel** to all games, with electric car charge points for their supporters.

F They are **100% vegan.**

G They have plans to build 'Eco Park' – **the world's greenest football stadium.**

Despite the limited resources available to Forest Green, it is a great example of what can be achieved when a holistic sustainable approach is adopted to ESG. In 2017, FIFA described the club as 'the greenest football club in the world' and is the first to be certified as carbon neutral by the United Nations.

VfL Wolfsburg with its ambitious 2025 net carbon target also provides a great example of what can be done in elite football[70]. In fact, the Bundesliga and Bundesliga 2 have recently become the first major professional football leagues to include binding sustainability guidelines in their club licensing regulations, therefore requiring clubs to evidence their environment and sustainability strategy, before being permitted to participate in domestic competition.

[69] Forest Green Rovers – Another Way. Accessed online: https://www.fgr.co.uk/another-way [70] Forliance, "Making football carbon neutral – VfL Wolfsburg opens up about the football club's climate journey". 13 December 2021. Accessed online: Making football carbon neutral – VfL Wolfsburg opens up about the football club's climate journey - Forliance

WHAT ARE THE RISKS OF GETTING THIS WRONG?

One would hope that football clubs would want to act as responsible corporate citizens and make a positive environmental impact, but this is new territory for many and there are risks in getting this strategy wrong .

GREENWASHING:

This is a phrase to describe situations where a club is 'economic' with the truth and uses advertising and public messaging to try to appear environmentally sustainable and 'green' – greener than it really is. Fans/consumers are increasingly more concerned about making environmentally friendly purchasing decisions. So, there is a financial incentive to appear sustainable and socially conscious.

An example of greenwashing is Ryanair, which claimed to be offering 'low CO2 flights' (which is not possible). Their advertising was banned by the ASA in February 2020[71]. They called themselves 'Europe's lowest emission airline' and a 'low CO2 emissions airline', and the ASA said that these claims were 'misleading' and 'couldn't be substantiated.'"

REGULATORY BREACH:

We anticipate that the EU will soon introduce more stringent disclosure obligations relating to environmental impact. Breach of such regulations are likely to bring significant fines and negative publicity. We can expect more regulation in this space[72, 73] and an increased focus on enforcement of the regulations when they are brought in. Although targeted at forcing full disclosure, it's not hard to see that many larger businesses (including football clubs) need to get their act in order before the regulatory framework tightens.

REPUTATIONAL DAMAGE:

Whilst clubs may not be prime polluters or guilty of mass fossil fuel consumption, they are very high-profile entities, with the potential to influence millions globally with their policies and actions. In the event that clubs were found wanting in this regard, there is no doubt they would be considered to be a prime target for activists, leading to reputational damage.

3 SOCIAL

MOVING TO THE 'S' OF ESG, THE SOCIAL ASPECTS of a club's operation: what are the football industry's considerations and what sorts of issues does the rather nebulous concept of 'Social' capture? The general understanding is that 'Social' is an umbrella term which incorporates (i) the **communities the club serves** or operates in (which for many ECA clubs may be a global as well as a domestic fanbase); and (ii) t**he people who work at the club** including players and coaches.

This is one of the most pervasive ESG pillars and a wide range of different social factors can affect a club's performance, which can be both short and long term challenges, depending on the socio-political climate and the pressing issues of the day.

COMMUNITY ENGAGEMENT

As football clubs become more successful on and off the pitch, there is the risk that the pursuit of silverware and/or revenue come at the detriment of the club's link to its local fan base and its heritage, values and traditions.

Some fan groups claim the ties to the traditional lifeline of a club (its local community and fanbase) are threatened as the disconnect grows between football's elite and its stakeholders. So how do ECA clubs address these challenges? Many professional clubs have **separate charities and foundations** and are active in their local communities. In the Premier League for instance, the Standard Professional Playing Contract prescribes that **players should spend up to 3 hours per week** on their club's community and PR activities, which is laudable. However, in an era when elite players may earn in one week or month what a working-class fan may earn in a lifetime, how do we meaningfully engage players with the concerns and values of society, when he operates for much of his career in a football 'bubble'.

PLAYER POWER

The Manchester United player, **Marcus Rashford**, is a fantastic example of the power of football to effect positive change in his work around food poverty (something he has personally experienced). Also, the efforts of Premier League players to **donate millions of pounds of their own money to NHS Charities** during the Covid pandemic is to be applauded[75]

SOCIO POLITICAL ACTIVISM

As society as a whole becomes more socially aware, elite football clubs are under increased scrutiny to be more transparent and accountable about their social values and credibility and the activities of their players will inevitably reflect on this.

DO THE VALUES OF YOUR CLUB AND ITS PLAYERS/ BOARD AND OFFICIALS ALIGN WITH MODERN SOCIETY AND WHAT ACTIVE STEPS DOES YOUR CLUB TAKE TO ADDRESS SOCIAL ISSUES?

There is more pressure on football's stakeholders to take positive stances on key issues of the day. Football, along with other sport has been quick to respond to the situation in Ukraine and there is an (almost) unified approach to sanction Russian sporting entities in international competition, notwithstanding the collateral damage inevitably caused to innocent Russians in doing so.

[71] ASA Ruling on Ryanair Ltd t/a Ryanair Ltd, 5 February 2020, Accessed online: https://www.asa.org.uk/rulings/ryanair-ltd-cas-571089-p1w6b2.html

[72] ESMA, "Sustainable Finance Roadmap 2022-24", 11 February 2022. Accessed online: ESMA prioritises the fight against greenwashing in its new Sustainable Finance Roadmap (europa.eu);

[73] The UK Government published 'Greening Finance: A Roadmap to Sustainable Investing', https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1031805/CCS0821102722-006_Green_Finance_Paper_2021_v6_Web_Accessible.pdf [74] Sky Sports, "Marcus Rashford: Man Utd forward awarded MBE for campaign to end child food poverty", 9 November 2021. Accessed online. [75] England players to donate millions in Euro 2021 prize money to NHS heroes | Evening Standard

However, often socio-political issues are divisive and polarise views.

SO, HOW SHOULD CLUBS RESPOND TO FAST MOVING ISSUES THAT AFFECT ITS COMMUNITY AND FAN BASE, WHETHER AT A NATIONAL OR INTERNATIONAL LEVEL?

Clubs, player associations and competition organisers need to be sufficiently agile to respond to issues with clarity of thought and speed, when urgent responses are required.

In the wake of the **'Black Lives Matter'** movement, teams 'taking the knee' before kick-off has become commonplace, as is the case with national teams – such as The Netherlands, Germany and Norway – taking stands against **alleged human rights abuse in Qatar,** which FIFA have sought to address highlighting steps taken to ensure better working conditions for migrant labourers[76]. This is demonstrative of the fact that football is a platform to highlight and address socio-political issues, whilst trying to avoid falling foul of the IFAB Laws of the Game, FIFA's Disciplinary and Ethics Code[77].

Indeed, clubs that fail to address socio-political issues run the risk of adverse publicity, and so it is important that clubs are able to formulate a strategy, adopt a stance and act as a vehicle for positive change, whilst at the same time remaining compliant with the regulations they are subject to.

What are some of the current social challenges in the game? Depending on the territory in which your club is based, these may be violence, racism, sexism or corruption and human rights amongst others. How do football stakeholders address these issues and which are of particular concern to your club?

HUMAN RIGHTS

Press reports around preparations for the World Cup in Qatar have raised the wider question of how the industry treats its employees (not just players).

DOES EVERY CLUB PAY A FAIR LIVING WAGE TO ITS NON-PLAYING STAFF ?[78] DOES IT REQUIRE ITS CONTRACTORS (CLEANERS, SECURITY, CATERING STAFF ETC.) TO DO LIKEWISE?

Given the scandals of the 2000s linked to worker exploitation in relation to football kit manufacture[79], there are several instruments in place at an international level to eliminate child labour and protect young persons. However, there is still work to be done in this area, and clubs must continue to police the good practice of its supply chain.

EQUALITY, DIVERSITY AND INCLUSION

> SEXUAL DISCRIMINATION/ HARASSMENT/ ABUSE

Equality, diversity and inclusion (EDI) is an equally important governance issue, as it is a social one (of which more later).

The sustainability criteria in the Bundesliga (and Bundesliga 2) club licensing regulations require clubs to establish a code of conduct for employees and clearly distance themselves from all types of discrimination .

However, these policies are not in place across the board. A recent Football Supporters Association survey found that **one in five women suffer unwanted physical attention**

[76] Qatar World Cup: Germany, Norway and Netherlands players voice human rights concerns | Football News | Sky Sports
[77] Politics and protest in sport: Have FIFA's rules changed? | Reuters
[78] New rules for fair minimum wages in the EU | News | European Parliament (europa.eu)
[79] Child labour scandal hits Adidas | UK news | The Guardian
[80] Survey reveals increase in female football fans being harassed at games | Football | The Guardian
[81] Women in Football - Women in Football launch new phase of growth as two thirds of members working in the industry report gender discrimination
[82] Premier League's No Room For Racism Action Plan

at football matches, [80] whilst a Women in Football survey found that two-thirds of women working in football have experienced gender discrimination in the workplace, and only 12% of incidents were reported[81]. Social activism like the **#Metoo movement** has raised awareness about what type of behaviour is unacceptable, but there are still challenges in what continues to be a male dominated sport and industry. It is vital that robust governance is in place to report and address these challenges. The need for diversity at a Board and senior management level is vital to address these social issues (see more in the 'Governance' section, below).

> RACISM

Racism is something which continues to blight football in a number of countries. Whilst advances have been made in this area, the three England players who missed penalties in the UEFA Euro 2020 Final were subject to horrific racist on-line abuse from supporters after the game. Such on-line abuse is all the more difficult to tackle and pressure has been exerted on the likes of Twitter and Facebook to take proactive steps to remove discriminatory abuse and to delete accounts of offenders.

At a league level, the **Premier League's 'No Room for Racism'**[82] campaign is multi-faceted and urges fans to challenge and report racism wherever it takes place, encouraging behavioural change in football and wider society. In practical terms, it provides education within Premier League community programmes targeting primary and secondary school children, and within academies as well as supporting fan education programmes. It also provides an online abuse reporting system to support players, managers and their families who have been victims of discriminatory abuse, including taking legal action where required.

In the UK the **On-line Safety Bill** went before Parliament in March 2022[83]. In practical terms the Bill will force social media companies to react more quickly to content on their site that is illegal (such as discriminatory abuse). Failure by those companies to adhere to these new rules would result in fines or imprisonment in some cases. An independent regulator would oversee and enforce compliance with the duty.

> LGBTQ PLUS

Whilst the women's game is more open, in a global sport, it is surprising, to say the least, that **there are only a handful of openly gay male professional footballer in 2022**[84]. Although sexuality may be considered a uniquely private matter, statistically there are likely to be many more gay players in the game.

ARE THERE PLAYERS WHO WOULD LIKE TO BE OPENLY GAY BUT DO NOT FEEL THE PROFESSIONAL FOOTBALL ENVIRONMENT IS AMENABLE TO THIS[85]?

Notwithstanding the efforts of clubs to make EDI advances, until gay men feel comfortable to 'come out' whilst still playing at the highest level, the perceived 'taboo' will remain and the game cannot be considered fully inclusive.

As awareness of gender identity evolves, so too do the myriad of terms that may be used to describe a person's gender identity[86].

AS INCLUSIVE EMPLOYERS ARE YOUR CLUBS EQUIPPED TO DEAL WITH THESE SENSITIVE AND COMPLEX ISSUES?[87]

[83] Regulating online harms - House of Commons Library (parliament.uk) [84] Evra: There are at least two gay players at every football club | Marca
[85] Football agents advise gay players not to come out publicly, former Premier League super-agent claims (inews.co.uk) [86] List of LGBTQ+ terms (stonewall.org.uk)

We have first-hand experience of advising on transgender issues in sport and the competing interests of recognition of an athlete's transition to a different gender, whilst safeguarding the integrity of the sport. Given the scarcity of empirical evidence at an elite level, it is still unclear whether testosterone suppressants used by transitioning male to female athletes are adequate to guarantee fair competition between transgender women and natal females, which has sparked fierce public debates.

As can be seen from the case of transgender swimmer Lia Thomas, the top ranked NCAA US Swimmer , and the case of transgender Welsh cyclist Emily Bridges, these are contentious issues that polarise opinion[88].

FIFA has "gender verification" regulations dating back to 2011 but they make no mention of trans-women[89]. The Regulations allow national associations to issue a request to FIFA that a gender test should be performed on a female footballer. If the request is approved, and after consideration of medical advice, FIFA's Chief Medical Officer determines that further physical investigation is required, if the player concerned refuses the physical examination, they are automatically suspended. We understand that the regulations have been under review since late 2020.

RATHER THAN ACTING REACTIVELY TO AN INDIVIDUAL POLEMIC ISSUE WHICH IS LIKELY TO ARISE IN THE FUTURE, CAN FOOTBALL STAKEHOLDERS ESTABLISH TRANSPARENT PROCESSES, CHECKS AND BALANCES TO ENSURE FAIR AND ROBUST GOVERNANCE OF THESE COMPLEX AND FAST EVOLVING ISSUES?

Clearly, clubs need to be joined up with the league, federation, players' union, fan groups and police to ensure regulatory and legal actions is effective in dealing with these challenging issues.

By way of illustration, the Premier League introduced its **Equality, Diversity and Inclusion Standard**[90] in 2021, which covers (i) a club's culture, policies, leadership and people and (ii) the work clubs do to encourage people from all communities to participate in all activities. It provides a framework to help clubs progress EDI across all areas of their business, with a senior member of staff responsible, with executive support and the club's Equality Working Group, for driving EDI forward. Others like the Scottish Football Association include EDI criteria in its club licensing regulations [91] .

3 GOVERNANCE

FINALLY, THE 'G' OF ESG RELATES TO GOVERNANCE and, in short, is about the mechanism to ensure that environmental and social targets are achieved (which turns on the effectiveness of a club's policies and practices).

Policies should be relevant, properly enforced, and made known to all employees, who must understand why those policies are important and the harms that those policies seek to prevent or address.

Governance considerations may exist at a micro or macro level:

A INTERNAL GOVERNANCE: Does your club operate at the highest governance standards and if not what could be done to address this?

B EXTERNAL GOVERNANCE: What are the key governance challenges which are likely to be high on the environmental and social agenda?

We do not propose to deal with the plethora of considerations that could relate to each of these pillars in this article. However, we set out below some of the illustrative examples of issues to which a club's ownership and management will need to be alive.

A INTERNAL GOVERNANCE

Do you have a Board and Executive which reflects the community in which the club is based? What is the gender balance/ diversity of your Board and executive for example?

A recent report commissioned by Fair Game, 'The Gender Divide that Fails Football's Bottom Line, concluded[92] that **gender diversity at board (and senior management) level improves financial performance** in sport and across other industries.

Whilst there is empirical evidence to support this, it is also reasonable proposition that a decision-making process which incorporates a range of different perspectives is likely to reach a sounder outcome than a homogenous Board which operates as an echo chamber (the same strong point can be made for an ethnically diverse Board).

From a football perspective, a decision reached by the Board which is reflective of the wider community they serve, which in most countries is a diverse one (and certainly not solely male given that 51% of communities are made up of women).

Despite this, only **11.1% of board members at Premier League clubs are women** and two thirds of England and Wales' top clubs (and 40% of Premier League Boards have all-male boards). This compares to 39.1% of female board members across FTSE 100 companies[93].

SO HOW DOES FOOTBALL ADDRESS THIS?

Female leaders in sport are still in the minority and are facing too many obstacles. On average, women occupy only **14% of all top decision-making positions in European Union Member States.**

In March 2022, the High-Level Group on Gender Equality in Sport put forward an action plan and recommendations for the European Commission, EU Member States, national and international sports bodies and grassroots organisations achieve a more equitable gender balance in sport, ensuring

[86] List of LGBTQ+ terms (stonewall.org.uk) [87] Lia Thomas becomes first known transgender athlete to win NCAA swimming title - BBC Sport
[88] Prime Minister Boris Johnson says transgender women should not compete in women's sport - BBC Sport
[89] FIFA Gender Verification Regulations, 2011. Accessed online: https://digitalhub.fifa.com/m/3950e57162ea513d/original/ihf3yx6kw3insqt6r0i6-pdf.pdf
[90] Equality, Diversity & Inclusion - Premier League Equality, Diversity and Inclusion Standard - PLEDIS
[91] scottish-fa-club-licensing-manual-2022.pdf (scottishfa.co.uk)

dedicated budgets to gender equality, all stakeholders integrating gender into their actions and men in decision making positions engaged to create change[94]. Proposals include a 50% representation quota for women in all decision-making bodies and fix term limits.

In October 2020, **The FA launched its Football Leadership Diversity Code**[95]. By signing up to the Code, clubs pledge to create an equality, diversity and inclusion plan which applies hiring targets in senior management and coaches who are Black, Asian or Mixed Heritage and separate targets for female hires. The plan does not set quotas, but advocates recruitment on merit (rather than the outdated approaches of personal networks).

Some of the key targets are that in Senior Leadership and Teams Operations, 15% of new hires will be Black, Asian or of Mixed-Heritage or a target set by the club based on local demographics. With respect to coaching, women's football clubs will look to hire 50% females and 15% will be Black, Asian or Mixed-Heritage. The positive action goes one step further and shortlists for interview will have at least one male and one female Black, Asian or of Mixed-Heritage candidate, if applicants meeting the job specifications apply.

Similarly, the Bundesliga and Bundesliga 2 seeks to address this issue by requiring clubs evidence their commitment to equality, diversity and inclusion as a pre-condition to being granted club licenses. The criteria also place reporting requirements on clubs with respect to the number of females they employ and how many management and board positions are held by women .

STAKEHOLDER ENGAGEMENT

As we have seen at a global level in football, with the advent of the Football Stakeholder Committee, there is a recognition that an effective system of governance incorporates inclusive decision-making process, involving negotiation and consultation with interested parties, rather than imposition of rules upon them.

Practices such as stakeholder engagement and transparency have long since been hallmarks of good governance. However, there is now an increasing pressure upon clubs and governing bodies to take decisions that are representative of those who support and work for them, through engagement with players, fans and their communities. Could the Bundesliga 50+1 rule be replicated elsewhere in the future? [96]

By way of illustration, in the UK, the Government's response to the Super League project was to commission a Fan Lead Review of Football Governance[97]. The recommendations included he creation of a new independent regulator, that fans should be consulted on all key off-field decisions through a shadow board and a new corporate governance code should be set up. It is to be seen whether the Government will accept these recommendations and legislate for this, but traditional football governance models are under increasing scrutiny and challenges will be inevitable.

[92] Microsoft Word - Fair Game Gender Equality Report FINAL v2.docx (squarespace.com) [93] New Research Reveals Women Make Up Just 11.1% of Board Members at Premier League Clubs (versus.uk.com) [94] Towards more gender equality in sport - Publications Office of the EU (europa.eu) [95] The FA's Football Leadership Diversity Code launched [96] 50+1 rule: How the fan ownership model works in Germany and if it could be replicated in UK (inews.co.uk) [97] Fan-Led Review of Football Governance: securing the game's future - GOV.UK (www.gov.uk)

B EXTERNAL GOVERNANCE

Numerous high-profile sports have been impacted by integrity related 'scandals' (going to the heart of 'S' of ESG) which undermine the very foundations of the sport, its integrity, safety and long-term sporting and commercial viability.

Take for example, the historic doping offences in cycling and wrestling, sexual abuse scandals in gymnastics and football, allegations of institutional racism in English cricket, financial irregularities across numerous football stakeholders. All of these cases have seen extensive and costly investigations, the demise of senior officials, loss of substantial commercial revenue and public confidence and often a root and branch overhaul of the organisations and its constitution. Such high-profile cases have brought a laser focus on integrity issues across all sport.

In these circumstances, **it is crucial not only that club representatives are seen to live and breathe the governance values of the club, but that processes and procedures are in place to deal promptly and comprehensively when problems inevitably arise.**

Certainly, in the case of abuse and discrimination, clubs which have effective training of employees and match day staff on ESG policies, and reporting, investigation and enforcement of the same through whistle blowing and disciplinary policies will be best placed to mitigate the damage caused to the sport.

A great example of good governance is UK Sport, which funds Olympic and Paralympic sport in the UK. It has recently introduced **'Sport Integrity',** which will provide an independent and confidential reporting line and an independent investigation process, free of charge, to deal with relevant allegations of bullying, harassment, discrimination, or abuse[98].

Going forward, to ensure action and accountability, it is advisable that someone at Board level has overall responsibility for ESG. Many companies outside of football are establishing ESG sub-committees to report to the main Board in order to drive the ESG agenda forwards. Clubs should look at their incentive arrangements and give consideration to bonus schemes for senior management around non-financial targets around ESG (on the understanding that what gets rewarded gets done).

GENERAL TAKEAWAYS

Wherever your club is on the ESG spectrum (just getting to grips with these issues, or having ESG firmly embedded within the DNA of the club), ESG is here to stay. We predict that it is a matter of time before ESG targets will legislated by state and/or prescribed by football regulatory bodies.

Getting ahead of the curve on this is not just the right thing to do as a high-profile football stakeholder, but potentially has a huge positive ripple effect on your fans and the wider community.

Advances in ESG now can also give your club a commercial advantage when dealing with commercial and state partners and funders, who will demand total transparency and accountability in ESG targets and outcomes.

To summarise some high-level take aways, we would suggest that any ESG strategy requires a holistic, cross departmental approach in order to make any strategy successful.

So we have suggested some obvious steps to develop a club's ESG strategy and help embed ESG within the organisation:

[98] Sport Integrity: A new independent disclosure and complaints service for Olympic & Paralympic sport | UK Sport

1 FIGURE OUT WHERE YOU ARE NOW:

You won't know what needs to improve without some kind of ESG audit – this will help you focus on areas where you need to improve, and also highlight the things you're doing well already.

2 IDENTIFY WHO IS ULTIMATELY RESPONSIBLE:

Embedding ESG won't happen unless it has buy-in from the top, and a clear line of authority with a director, or Board committee, having responsibility to drive ESG strategy forwards.

3 ENGAGE WITH YOUR STAKEHOLDERS:

Your staff are key to making it work. But you need to know what all your stakeholders think. Not only will this make sure that your strategy is fit for your purpose, but you'll also get some really good ideas. So speak to your employees, fans, bank or investors, and ask the local communities what they think.

4 DEVELOP YOUR STRATEGY, THEN PUBLISH IT:

Once you've spoken to your stakeholders, set out the key areas you want to make a difference on. That's your strategy and will enable you to get moving.

5 BE TRANSPARENT:

Reporting (honestly) is key. Set some milestones, and then each year report on progress. You may be subject to formal disclosure requirements, but remember you want your fans, and your employees, to read it –make the report user-friendly. And be honest – none of us get everything right, so where you still need to improve, admit it and explain how you'll improve.

6 GOVERNANCE IS KEY:

It's not the most exciting area – and often the least discussed. But robust decision-making processes that put ESG at the centre, policies that work and that people understand (and that you are willing to monitor and enforce) will really help make a difference in driving the ESG agenda forwards.

7 USE YOUR BUYING POWER:

Remember that other businesses want to be associated with football clubs. So you can use your buying power for good in two ways. First, it will improve your own ESG credentials. Secondly, you can use it to drive best practice in your suppliers and contractors – so insist that they adopt net zero strategies, insist that they pay a fair living wage, insist that they also take steps to promote diversity and inclusion. It will make a difference.

8 AND FINALLY...SMALL CHANGES MATTER:

You may be a big club, with an international presence, but any change for the better is worth doing. Removing single use plastics on match day, more vegetarian catering options, incentives to use public transport. They all make a difference. And some of the "small" changes are very visual reminders of what the club is trying to achieve.

Our dedicated ESG team at **Mills & Reeve is happy to offer all ECA club members and initial consultation, free of charge,** to explore your club's current approach to ESG nd identify any potential development areas to ensure that your club excels in the fast moving and challenging ESG landscape. Please contact our Carol Couse and Neil Pearson if of interest.

PRE-CONTRACTUAL NEGOTIATIONS IN FOOTBALL

HOW TO PREVENT UNINTENDED LIABILITY

By ECA Legal Department [99]

1 INTRODUCTION

Even though contractual negotiations in football[100] may typically not be as complex as negotiations of deals in certain other industries, it is nonetheless relatively frequent for parties to want to document certain arrangements or discussions prior to a final deal being concluded. Indeed, this may be useful in order to enable the parties to progress to the following stages of negotiation with a higher degree of trust in their mutual expectations and intentions.

HOWEVER, IF NOT CORRECTLY MANAGED, pre-contractual discussions, negotiations or documentation can result in a contract being formed inadvertently. That may entail that parties become contractually bound to certain terms and obligations even though it was never their intention for that to be the case. This, in turn, can lead to a situation where a party may end up finding itself facing significant financial – and perhaps even sporting – liabilities which it did not foresee. The present article aims at assessing these risks in pre-contractual negotiations specifically with regard to international contracts under FIFA[101] and CAS jurisdiction, notably by analysing how these two entities have been examining and deciding these issues in disputes submitted for their adjudication. It will also seek to provide some advice as to how to potentially minimise any such risks.

[99] The opinions expressed in this article are those of the ECA Administration. They do not purport to reflect the opinions or views any ECA member.

[100] We refer here mainly to transfer agreements between clubs and employment contracts between clubs and players.

[101] Namely, the Dispute Resolution Chamber (DRC) and the Players' Status Chamber (PSC) of the FIFA Football Tribunal.[102] See Article 1 of the FIFA Statutes

[103] See Article 3 of the Procedural Rules Governing the Football Tribunal. Also, FIFA's deciding bodies have continuously held that it should not apply the law of any particular country, but rather the RSTP, general principles of law and its jurisprudence (See DRC Decision 04191330 of 1 April 2019). In some cases however the FIFA DRC has made explicit reference to Swiss law (See, for instance, decision 20-1043 of 22 September 2020).

2 THE GENERAL APPROACH FOLLOWED BY FIFA AND CAS

FIFA IS AN ASSOCIATION ESTABLISHED UNDER THE laws of Switzerland[102]. As such, even if, in principle, Swiss law does not apply to proceedings before the DRC or the PSC[103], the laws of that country nevertheless play a relevant role in their decision-making process.

It is therefore pertinent to briefly address how contracts are interpreted under such law. In a nutshell, Swiss law follows a "subjective" interpretation approach where the true and common intention of the parties prevails over the wording of the contract. If such common intention cannot be undisputedly established, then the deciding body should resort to an objective interpretation based on the "principle of trust"[104] which basically dictates that a contract must be interpreted in the sense in which an objective third person could and should have understood the contract in dispute, taking into account the wording, the context as well as the overall circumstances.[105]

The DRC and the PSC have had to establish on a number of occasions whether a pre-contractual document was binding on the parties. The generally held view is that a document is binding if it contains the so-called essentialia negottii, namely i) a clear indication of the parties to the contract; ii) the duration of the contractual relationship; and iii) the financial conditions (eg in an employment contract, the remuneration payable) if any. There also has to be some indication as regards the parties' consent (eg their signature). [106]

CAS has also confirmed such jurisprudence on a few occasions.[107]

As such, as a general rule, whenever a pre-contractual document contains the elements mentioned above, in principle, a deciding body will conclude that it constitutes a binding agreement, the breach of which would generate liability for the non-compliant party. [108]

However, real life cases are rarely that simple and it may be that, in some instances, even if a pre-contractual document contains all the essentialia negottii, it is clear that the true and common intention of the parties was not to conclude any type of binding agreement. It is important to point out again that the approach followed by Swiss law (adopted by FIFA's deciding bodies and the CAS) is that, in cases of inconsistency, the common intention of the parties prevails over the wording of a document.

With the above in mind, we will proceed to analyse a few cases where the essentialia negottii approach has clashed with the clear intention of the parties and which are the lessons to learn therefrom. In particular, the analysis will focus on two main aspects, namely the relationship of pre-contractual documentation with i) Article 18(4) RSTP; and ii) the parties' behaviour.

On the contrary, at CAS level, due to Article 56(2) of the FIFA Statutes, Swiss law does apply subsidiarily to the FIFA Regulations.

[104] See Swiss Federal Tribunal decision 4A_124/2014 of 7 July 2014.

[105] See CAS 2019/A/6286 Guizhou Hengfeng FC v. Bubacarr Trawally, CAS 2019/A/6569 FC Würzburger Kickers AG v. Elia Soriano, Korona Spolka Kielce & FIFA and CAS 2019/A/6525 Sevilla FC v. AS Nancy Lorraine

[106] See, for example, DRC decision 07161204 of 29 July 2016

[107] See CAS 2006/A/1024 FC Metallurg Donetsk v. Leo Lerinc and CAS 2016/A/4709 SASP Le Sporting Club de Bastia v. Christian Koffi N'Dri Romaric

[108] For the differences between a pre-contract and a final contract, see section X below.

3 PRE-CONTRACTUAL DOCUMENTATION AND THE PASSING OF A MEDICAL EXAMINATION

ARTICLE 18(4) RSTP EXPLICITLY PROVIDES that the validity of an employment contract cannot be made subject to the Player's passing of a medical examination. Conversely, it is settled case-law that transfer agreements can be subject to such condition.

However, what is the position as regards pre-contractual documentation?

As we will show in the cases that follow the answer is: it depends.

A DRC DECISION OF 24 OCTOBER 2011 **Player J v. Club D.**

The Parties signed a "pre-contract" valid as from 1 February 2011 until 30 June 2011.Pursuant to the "pre-contract":

...THE VALIDITY OF THIS PRECONTRACT WILL BE SUBJECTED TO THE PASSING OF MEDICAL CHECK ON THE PLAYER. IF THE PLAYER FAILED TO PASS THE MEDICAL CHECK WHEN HE ARRIVES IN COUNTRY C, THIS PRECONTRACT WILL BE VOIDED AUTOMATICALLY (SIC).

THE PRE-CONTRACT IS TEMPORARILY AGREEMENT, AN OFFICIAL EMPLOYMENT CONTRACT WILL BE SIGNED WHEN THE PLAYER ARRIVES IN COUNTRY C AND PASSES THE MEDICAL CHECK (SIC).

A dispute arose and the player filed a claim alleging that the club had breached the "pre-contract". Such claim was rejected by a DRC Judge who, in spite of questioning whether the validity of the "pre-contract" could have been made subject to the Player passing the medical exams, nevertheless concluded as follows:

> Notwithstanding, the DRC judge was equally eager to stress that the pre-contract, according to the explicit wording of its par. 4, is a temporary agreement and that such condition was known to the Claimant by the time of its signature. By having agreed to sign the pre-contract, the player also accepted the condition of its provisory nature and of its possible, but not necessary, conversion into a permanent employment relationship with the Respondent, in case certain pre-requisites should be fulfilled.

> Bearing in mind the aforementioned principles as well as the particular circumstances of the present case, the DRC judge observed that neither the Respondent nor the Claimant have been able to prove their legitimate intention to create legal relations with their counterparties.

B DRC DECISION OF 17 MAY 2018

Player A vs Club C

The Parties signed a "pre-contract" which was meant to lead to the signing of a "player contract". The "player contract" was supposed to have a period of validity of one year, with the option to extend it for one more year. Parties also detailed in the "pre-contract" the financial conditions that the "player contract" would have.

The "pre-contract" also provided that the conclusion of the "player contract" will be "subject to medical test result".

A dispute arose and the Player filed a claim against the Club before the FIFA DRC. In this decision, the FIFA DRC explicitly rejected the notion that a "pre-contract" could subject the conclusion of a final contract to the successful passing of a medical examination by the Player. In particular, the FIFA DRC held that "the contents of art. 18 par. 4 of the Regulations are of mandatory nature and cannot be contractually amended or circumvented."

C DRC DECISION OF 6 MAY 2021

Player A vs Club B

The Club sent a "Proposal letter" to the Player which was countersigned by the latter. The Proposal detailed the conditions of a future employment relationship between the parties, including period of validity, salary, bonuses and other benefits.

The Proposal also stated that

"THE OFFICIAL CONTRACT (COUNTRY B-LEAGUE STANDARD CONTRACT) WILL BE SIGNED BY PARTIES ONLY AFTER THE PLAYER IS APPROVED ON MEDICAL TEST AND OTHER MANDATORY PROCEDURES"

On an unspecified date, the Club sent a letter to the Player stating

"... I DEEPLY THANK YOU FOR YOUR POSITIVE RESPONSE TO OUR TEAM´S PROPOSAL. SADLY, [THE CLUB] IS ABOUT TO CANCEL THE PROPOSAL AS THE CLUB´S FINANCIAL SITUATION HAS DETERIORATED SHARPLY FOLLOWING THE CORONAVIRUS ..."

The Player filed a claim against the Club before the FIFA DRC, which was upheld. In particular, the FIFA DRC considered unquestionable that the detailed Proposal contained all the essential elements to be considered a binding contract and that, as such, its validity could not be made subject to the Player passing a medical examination, as per Article 18(4) RSTP.

D.DRC DECISION OF 15 JULY 2021

Persatuan BNJ v. Camilo da Silva and Mazatlan FC

The Parties concluded a "pre-contract" by which they agreed to conclude a definitive employment contract in the future and subject to the Player passing the medical examinations. The "pre-contract" already contained the financial conditions of the eventual employment contract and provided for a payment to be made to the Player.

A dispute arose between the parties and the Club requested compensation for breach of contract from the Player.

Even though the FIFA DRC agreed that the "pre-contract" contained all the essential elements to be considered binding on the parties, it nevertheless rejected the Club's claim on the basis that the Club did not invite the Player to do the medical examinations or paid the amount which was already due as per the "pre-contract".

E LESSONS TO BE LEARNT

The above precedents show that the question of whether a pre-contractual document can make the conclusion of a future employment contract subject to the Player's medical examination is still a matter of debate. While it appears that the FIFA DRC is not ready to accept such condition precedent, the matter Persatuan BNJ v. Camilo da Silva and Mazatlan FC (section 3D) implicitly suggests that, if the Club would have invited the Player to the relevant medical tests, a different outcome may have been reached.

[109] See also TAS 2006/A/1082 & 1104 Real Valladolid CF SAD c. Diego Daniel Barreto Càceres & Club Cerro Porteño

Also, the matter Player J v. Club D. (section 3A) is an odd one given that, even if the FIFA DRC apparently did not accept the clause related to Article 18(4) RSTP, it accepted the "termporary nature" of the pre-contractual document.

In fact, it is worth pointing out that in recent decisions the FIFA DRC seemed to have adopted a contrary approach (see Section 4A and 4D below). Crucially, in CAS 2016/A/4489 Beijing Renhe FC v. Marcin Robak the arbitral tribunal held as follows[109]:

WHEREAS IT IS CLEAR WHY DEFINITE EMPLOYMENT CONTRACTS CANNOT BE MADE SUBJECT TO A SUCCESSFUL MEDICAL EXAMINATION (IN ABSENCE OF OBJECTIVE CRITERIA THE FULFILMENT OF THIS CONDITION IS ARBITRARY BECAUSE IT CAN BE UNDULY INFLUENCED BY THE CLUB AT WILL), THE PANEL FAILS TO SEE WHY A "PRE-CONTRACT" CANNOT BE MADE SUBJECT TO SUCH CONDITION

As such, it seems that a CAS tribunal will be more open than the FIFA DRC to accept the notion of a pre-contractual document making the conclusion of a future contract subject to the Player's passing of a medical examination.

4 PRE-CONTRACTUAL DOCUMENTATION AND THE PARTIES' BEHAVIOUR

AS MENTIONED ABOVE, THE TRUE AND COMMON intention of the parties can sometimes prevail over the fact that a pre-contract provides for all the essentialia negottii. In particular, the FIFA DRC seems to be ready to accept that whenever the content of a pre-contractual document in combination with the parties' behaviour show that they did not consider themselves bound by the pre-contractual document, then the FIFA DRC will not enforce it even if such document contains all the essential elements of an eventual final contract.

A DRC DECISION OF 29 JANUARY 2020

Darren Mcintosh-Buffonge v. Genoa Cricket and Football Club

The Player and the Club signed a document named "Proposal for an Employment Contract" (the "Proposal").

The Proposal set out the financial terms and conditions of "an eventual Employment Contract" over 5 years (salary and bonuses) and concluded with the mention:

Subject: Without prejudice proposal for an Employment Contract

ACCEPTANCE OF THIS PROPOSAL **DOES NOT CONSTITUTE A VALID AND BINDING AGREEMENT** AND SHALL BE REGARDED AS CONFIRMATION THAT GENOA AND PLAYER ARE WILLING TO CONCLUDE AN EVENTUAL EMPLOYMENT AGREEMENT IN COMPLIANCE WITH THE FIFA/FIGC REGULATIONS, **ONLY UPON THE MEDICAL TESTS**

Thereafter, the Club cancelled the medical test and informed the Player that "*due to recent changes in the Technical Area, the player is no longer part of the Club's technical program*".

The Player filed a claim against the Club in front of the FIFA DRC on the basis of the Proposal, which was rejected on the following basis:

> The Chamber noted that the Proposal contained a date, the name of the parties, the duration, the amount of remuneration and the signature of the parties. Therefore, the Chamber considered that the proposal presented all the essential elements of an employment contract, i.e. the essentialia negottii.

> [However], the Chamber took note of the explicit disclaimers and specific wording used in the proposal. In this regard, the Chamber observed in particular the following disclaimers and wording...

> In light of the above, it appeared clear to the Chamber that it was the parties' intention to include the said disclaimers and specific use of words, in order to ensure the non-binding effect of the proposal.

The Chamber considered that said wording reflected the clear intention of the parties as this wording would not have been included if the parties had wished to confer a binding legal effect to the document (emphasis added).

In this case, the explicit and detailed content of the "Offer" was key in order for the FIFA DRC to conclude that it was not the parties' intention to be bound by such. Indeed, the reference of the FIFA DRC to the "explicit disclaimers" and "specific wording" of the Offer were key in rejecting the Player's claim. By this decision, the FIFA DRC also seems to have accepted that a pre-contractual document, in casu the Proposal, may subject the conclusion of the eventual employment contract to the Player's successful passing of the medical exams.

B DRC DECISION OF 17 JANUARY 2020

Player Reiner Alvey vs Nantong Zhiyun FC

The Parties signed a "pre-contract" which provided a defined period of validity, ie the years 2019 and 2020 and what would be the Player's total annual salary, ie USD 360,000.

However, the pre-contract also provided that "this Employment pre-contract is by no means representing as official signed employment contract".

During the month of January, further negotiations were held between the Parties whereby the Club offered to extend the contractual relationship to 3 years instead of two but slightly reducing the Player's salary to USD 300,000. Also, the Club invited the Player to do a medical exam and a "trial" "in order to potentially sign the formal employment contract".

In or around the same time, the Club and a third club signed a transfer agreement for the Player.

Thereafter, even if the Player travelled to China to do the medical examination, negotiations fell apart and no employment contract was signed. The Player then filed a claim against the Club before the FIFA DRC, which upheld the claim.

In particular, the FIFA DRC considered that the "pre-contract" contained all the essential elements to be considered a final employment contract and that "the denomination of a contract is not an element of validity". The FIFA DRC ended up condemning to pay the Club over USD 1,000,000 to a Player who never actually joined the Club.

Interestingly, the FIFA DRC did not make any consideration as regards the mention that the "the pre-contract is by no means representing as official signed employment contract". It is unclear whether the FIFA DRC simply considered irrelevant such phrase or if it implicitly determined that the parties' intention was to already bind themselves by the "pre-contract".

It would seem that the FIFA DRC gave more weight to the behaviour of the Club which not only provided the Player with flight tickets and invited him to do a "trial", but that it even concluded a transfer agreement with the Player's previous club.

It is also worthy of mention that the Proposal provided that an "official contract Country B-League Standard Contract)" would be signed a later stage, which seems to suggest that the parties considered the Proposal simply as an "unofficial" contract.

C DRC DECISION OF 2 MARCH 2017

Player A v. Club C

The Club sent to a third club an offer (the "Offer") co-signed by the Player which read as follows:

I AM CONTACTING YOU TO EXPRESS OUR INTEREST TO YOUR PLAYER (...) BORN ON 22/07/1993. ON THIS BASIS, WE WOULD LIKE TO TAKE THE PLAYER ON LOAN FOR ONE YEAR WITH THE FOLLOWING CONDITIONS: - **1 SEASON STARTING ON 1ST JULY TILL 30TH JUNE 2017;** - €50.000 OF LOAN FEE; - **THE CLUB WILL SUPPORT THE PAYMENT** OF

THE JOB ACCIDENT INSURANCE; - THE PARTIES AGREE THAT THE CLUB HAS THE OPTION RIGHT FOR A PERMANENT TRANSFER (...) - **€135.000 SALARY - €3500** SUBSIDY FOR HOME

Thereafter, the third club, the Club and the Player signed an agreement for the loan of the Player from 1 July 2016 until 30 June 2017.

Clause 7 of the loan agreement stipulated the following:

THIS AGREEMENT IS SUBJECT TO THE SIGNING OF AN EMPLOYMENT CONTRACT BETWEEN THE [CLAIMANT] AND [THE RESPONDENT] FOR THE SEASON 2016/2017 AT LATEST ON OR BEFORE 25 JULY 2016.

THE EFFECTIVENESS OF THIS TEMPORARY ASSIGNMENT IS SUBJECT TO THE EFFECTIVENESS AND VALIDITY OF THE EMPLOYMENT CONTRACT BETWEEN THE [CLAIMANT] AND [THE RESPONDENT], GETTING THIS TEMPORARY ASSIGNMENT WITHOUT EFFECT, IF THE EMPLOYMENT CONTRACT IS TERMINATED WITH JUST CAUSE

At a later date, the Club sent a letter to the Player informing him that it had decided to put an end to the trial tests and that no employment contract would be signed.

The Player then filed a claim against the Club before the DRC on the basis of the Offer, alleging that it contained all the essentialia negottii to be considered a contract.

The DRC rejected the Player's claim on the basis that, as per the clear content of Clause 7 of the loan agreement, it was clearly and unambiguously established a deadline in the future where the parties would sign an actual employment contract. The FIFA DRC further held that:

IN THE CHAMBER'S OPINION, THE INSERTION OF SUCH A SPECIFIC CLAUSE IN THE LOAN AGREEMENT DEMONSTRATES THAT WHEN SIGNING THE LOAN AGREEMENT ON 13 JULY 2016, THE CLAIMANT AND THE RESPONDENT DID NOT CONSIDER THEMSELVES BOUND BY ANY EMPLOYMENT CONTRACT.

Just as in the matter Darren Mcintosh-Buffonge v. Genoa Cricket and Football Club (Section 4A above), the wording of the loan agreement together the parties' behaviour was fundamental in order for the FIFA DRC to determine that the Parties did not consider themselves bound by a binding contract.

D DRC DECISION OF 21 FEBRUARY 2020

Al Dhafra v. Sheraldo Rudi and 1 FC Union Berlin

The Club sent an offer to the Player with the following content (the "Offer"):

Al Dhafra FC offers your client, the player, Sheraldo Rudi Salomo Willem Becker [...] to joining Al Dhafra FC Club during summer transfer window for the sport season of 2019-2020 on a basis according to the following terms and conditions:

*The acquiring of the player's Federative rights on a permanent basis for the seasons 2019/2020 – 2020/2021 and 2021/2022. The full amount of the agreement and the employment agreement for every sporting seasons above will be equal to: USD 1,200,000 [...] that will be divided as bellow: - As advanced contract for the player USD 200,000 [...]. - Amount USD 1,000,000 [...] divided as monthly salary. - The contract isn't included: net of taxes.*Furthermore, the Offer contained the following paragraph:

> Kindly be informed that this offer shall not cause any contractual liability on Al Dhafra FC at any stage unless the player successfully passes all the required medical tests, sign the Agreement and the Employment Agreement in respect of the aforementioned terms and conditions, and Al Dhafra FC receives the ITC from his Club (emphasis added).

According to the Club, once the Player arrived at the UAE on the Club's expense in order for the medical exams and the subsequent conclusion of a contract, he left the country on 22 May 2019 without prior notice.

Thereafter, the Club filed a claim against the Player and his new club for breach of contract.Even if the DRC held that the offer contained all the essentialia negottii to be considered a contract, it nevertheless rejected the Club's claim because:

THE OFFER IS CONDITIONED AND IF THE ABOVE-MENTIONED REQUIREMENTS WOULD NOT BE FULFILLED (...) **THE CLAIMANT COULD NOT BE HELD LIABLE AND IN ANALOGY, ALSO NOT THE FIRST RESPONDENT.** THE CHAMBER ACKNOWLEDGED THAT NO EMPLOYMENT CONTRACT WAS SIGNED AND THEREFORE THE CONDITION OF THE OFFER WAS NOT FULFILLED. THEREFORE, NO FURTHER EXAMINATION OF THE OFFER AND ITS ALLEGED ACCEPTANCE, WAS NECESSARY

The outcome of this matter seems to have driven by a sense of equity by the FIFA DRC. Indeed, the unilateral expression contained in the Offer whereby "shall not cause any contractual liability" was given a bilateral meaning by the FIFA DRC ("the Claimant could not be held liable and in analogy, also not the First Respondent").

This is an interesting example which shows that pre-contractual documentation which are only unilaterally binding are difficult to enforce. Nevertheless, an implication of the FIFA DRC's finding in this case is that, indirectly, it recognised that Article 18(4) RSTP does not necessarily apply to pre-contractual documentation.

E DRC DECISION OF 10 DECEMBER 2020

CA Paranaense / Felipe dos Reis / Udinese Calcio / FC Grozny

On 31 December 2019, Club Athletico Paranaense (CAP), the Player and Udinese concluded an agreement for the loan of the Player from Udinese to CAP from 1 January 2020 until 31 December 2020.

Equally, CAP and the Player signed a document titled "Proposta de Contrato de Trabalho" (the "Offer"), which was valid for the same period. The Offer read, as is relevant, as follows:

> (i) Term: 01.01.2020 to 31.12.2020;

> (ii) Monthly Remuneration: BRL 300,000 (three hundred thousand Brazilian Reais), being 60% (sixty percent) paid in accordance with the Brazilian Consolidated Labor Laws (CLT) and 40% (forty percent) paid as Image Rights;

> (iii) Bonus of BRL 20,000 (twenty thousand Brazilian Reais) for every 5 (five) games in which you play at least 45 (forty-five) minutes, paid as Image Rights;

> (iv) Match bonus in accordance with what was agreed with all the players;

> (v) Qualification bonus of 30% (thirty per cent) of the net amount received by the club in connection with the qualification, shared between all the players, in the basis of the collective bargaining;

> (vi) Bonus of USD 50,000 dollars in the event you score 10 goals this year;

> (vii) Additional Bonus of USD 100,000 dollars in the event you score 10 more goals this year, totalizing 20 goals in the year

Thereafter, the Player sent a letter to CAP with the following content:

I, FELIPE DOS REIS PEREIRA VIZEU DO CARMO, BY MEANS OF THIS E-MAIL AND IN ABSOLUTE RESPECT OF THE GOOD RELATIONSHIP MAINTAINED WITH CAP, INFORM THAT I WILL BE UNABLE TO PROCEED WITH THE SIGNING OF THE EMPLOYMENT CONTRACT WITH YOUR CLUB. [...]. I CLARIFY THAT THIS IMPOSSIBILITY IS DUE TO THE RECEIPT BY UDINESE OF A PROPOSAL FROM AN EUROPEAN CLUB, BEING IN THE INTEREST OF UDINESE TO ACCEPT SUCH PROPOSAL, IN ADDITION TO THE POSSIBILITY OF ACHIEVING MY DREAM OF OBTAINING SPORTING SUCCESS IN EUROPEAN FOOTBALL.

CAP then filed a claim against the Player, Udinese and the Player's new club, FC Grozny on the basis of the Offer.

Surprisingly, the DRC rejected CAP's claim on the following basis:

> As to the Offer, the DRC noted that it contains the necessary elements of a contract, i.e. the essentialia negottii (...) Nevertheless, stressed the Chamber, it is to be noted that, in the Offer, it is stated that CAP "expresses its interest in signing an employment contract with you under the following conditions" which also leads to the interpretation that the said document was closer to a Letter Of Intent (LOI), which –by definition– is not binding on the parties in their entirety, rather than to a contract stricto sensu.

In this respect, the Chamber pointed out that, prior to deciding whether such Offer created binding effects on the parties, the following elements must be considered:

> **1** the written expressions of intent present in the letter; [and]

> **2** demonstrative actions taken by both parties after the letter of intent is signed.

Firstly, the DRC observed that, as per the wording, it seems clear that it was a letter intending the conclusion of a further employment contract and, therefore, the parties could rely on the assumption that the said document was not creating an employment relationship between them (emphasis added).

To our knowledge, this is the first time where the FIFA DRC has recognised the possibility for the parties to sign Letters of Intent which, according to the FIFA DRC, are "by definition" "not binding". It would be therefore interesting to see how this line of jurisprudence develops in the future.

In any event, one cannot wonder what the outcome would have been if the club was the party filing the relevant claim.

F DRC DECISION OF 6 MAY 2021

Lukas Grozurek v. Pafos FC

The Club sent an offer to the Player with the following content (the "Offer"):

TO: Lukas Grozurek

FROM: Pafos FC

SUBJECT: Proposal of contract to Mr. Grozurek

Dee Sir/Madam.

Hereby we would like to propose a permanent transfer with following conditions: SALARY:

> 15.000 EUR net monthly salary starting from 1.09.2020 until 31.05.2021

> Automatic extension of the contract until 31.05.2022 with same tarns with more than 2000 minutes played

BONUSES:

> 20.000 EUR bonus if Pafos FC win Cypriot top division

> 15,000 EUR bonus if Pafos FC win Cypriot cup

> 15,000 EUR bonus if Pafos FC Qualify for European competitions

> 25,000 EUR if Pafos FC reach UEFA Europa League group stage

> 50,000 EUR if Pafos FC reach UEFA Champions League group stain.

Thereafter, the Player returned a signed copy of the offer with the following note:

I, LUKAS GROZUREK, CONFIRM HEREBY THAT I AM WILLING TO ACCEPT THE PRESENT PROPOSAL ON THE EXPLICIT CONDITION THAT THE CONTRACT WILL BE FULLY TO MY SATISFACTION.

Subsequently, the Club sent a draft of an employment contract with a period of validity comprised between 1 September 2020 until 31 May 2021 and a monthly salary of EUR 16,500. The Club then ended the negotiations.

The Player filed a claim against the Club on the basis of the Offer, which was rejected by the FIFA DRC.

In particular, the DRC concluded that even if the Offer contained all the essentialia negottii, the fact that the Player mentioned that his acceptance of the Offer was "*on the explicit condition that the contract will be fully to my satisfaction*" and that the draft employment contract was sent "*using the 'track changes' functionality*" indicated that the parties "*were still under negotiations*".

G CAS 2010/A/2187

Roberto Calenda v. Sport Lisboa e Benfica Futebol, SAD

In this matter, the arbitral tribunal had to decide whether a unilateral declaration by Benfica (the "Declaration") constituted a binding agreement.

DECLARATION

The Sport Lisboa e Benfica-futebol, SAD, engages itself to pay to the player's agent of G., Mr Roberto Calenda the amount of EUR 700.000,00 (seven hundred thousand euros). The payment form will be discussed when the player will arrive in Lisbon, Tuesday 22.08.2005 in the afternoon.

Lisbon 21 August 2005

Signature illegible

Stamp of the club

The arbitral tribunal held that the Declaration could not be qualified and interpreted as a binding contract:

WHETHER THE DECLARATION QUALIFIES AS A CONTRACT IS QUESTIONABLE. IN THE COURSE OF NEGOTIATIONS PARTIES – IN PRACTICE – QUITE OFTEN EXCHANGE A NUMBER OF DOCUMENTS, LETTERS OR DECLARATIONS. NOT EVERY ONE OF THESE EXPRESSIONS OF A PARTY'S WILL, HOWEVER, CAN BE QUALIFIED AS A LEGALLY BINDING ACT OR A CONTRACT. INSTEAD, THERE ARE A NUMBER OF ACTS PRIOR TO THE CONCLUSION OF A CONTRACT WHICH ARE DIFFERENT IN NATURE AND CONSEQUENCES. THOSE ACTS MAY QUALIFY AS PRE-CONTRACTS, LETTERS OF INTENT, OFFERS TO ENTER INTO A CONTRACT, ETC.

Moreover, the wording of the Declaration supports the Panel's view. The Declaration expressly reserves the finalization of the contract to a later stage ("the payment form will be discussed when the player will arrive in Lisbon …"). This speaks in favour of construing the Declaration as an intention to conclude a contract at a later stage. This interpretation is further evidenced by the wording used in the heading of the document. The latter does not use the terms "contract", but uses the word "declaration" instead. In doing so the document supports the view that the terms and conditions in the document are not fixed in final terms, but are subject to final negotiations to be concluded in Lisbon. Finally, it should be noted that the Declaration does not look like a typical contract. It neither shows a signature of the Appellant nor is the document designed to be signed by the Appellant.

H DRC DECISION OF 10 MARCH 2022

Player A vs Club B

The main facts can be summarised as follows:

2 JUNE 2021

The Club sent a first offer to the Player

3 JUNE 2021

The Club sent a second offer to the Player

4 JUNE 2021

The Player allegedly sent the second offer signed to the Club

5-6 JUNE 2021

The Club and a third club concluded a Transfer Agreement for the Player

13 JULY 2021

The Club sent a Draft Employment Agreement to the Player for comments (with a DRAFT watermark)

15 JULY 2021

The Player returned the signed Draft Employment Agreement to the Club

18 JULY 2021

The Club informed the Player that it will not proceed with the transfer of the Player, "since, inter alia, (i) the Player did not undergo a medical exam and (ii) no contract of employment has been duly signed between [the Club] and the Player prior to the effective date of the [Transfer] Agreement." As a consequence thereof, the Club was of the opinion that the Transfer Agreement "shall be deemed null and void in its entirety as of its effective date of 1 July 2021."

The Player then filed a claim against the Club before the FIFA DRC, which was upheld. However, the following considerations are of interest.

> THE CHAMBER RECALLS, AND CANNOT IGNORE THE FACT, THAT THE PARTIES EXPRESSLY MENTIONED IN THE RESPECTIVE SECOND OFFER THAT IT IS NOT THE FINAL CONTRACT, E.G. "IT IS NOT THE FINAL CONTRACT AND DOES NOT REPRESENT THE DEFINITIVE AGREEMENT BETWEEN THE PARTIES" AND "AL AIN FC RESERVES HIS RIGHT TO WITHDRAW AND CANCEL AT ANY STAGE ANY OFFERS OR PROPOSALS INCLUDING THIS OFFER AT ITS SOLE CONVENIENCE AND DISCRETION". IN OTHER WORDS, THE PARTIES EXPLICITLY PUT IN THE CONTRACT THAT THE SECOND OFFER DID NOT PRESENT THE FINAL AGREEMENT. ALTHOUGH THIS DOES NOT RULE OUT PER DEFINITION THAT SUCH DOCUMENTS CAN STILL BE CONSIDERED AS FINAL CONTRACTS (AN ASSESSMENT THAT MUST BE DONE ON A CASE BY CASE BASIS), UNDER THE CIRCUMSTANCES THE CHAMBER FINDS THAT THE SECOND OFFER DID NOT REPRESENT THE FINAL CONTRACT."

The FIFA DRC however consider that the Draft Employment Contract was binding. It noted that it was unquestionable that such document contained all the essentialia negottii

which constituted an "offer capable of acceptance". That, in addition to the fact that the Player returned to the Club a signed copy of the Draft Employment Contract, lead the FIFA DRC to conclude that "the consent and intention of the parties to conclude an employment contract can be established (...) The fact that, when sending the draft, the Respondent asked the Claimant for his comments and that the document was marked as "DRAFT" does not change the conclusion of the Chamber in this case considering the various elements set out above, which, in the Chamber's view, sufficiently establish the mutual intention of the Parties to enter into a binding agreement."

LESSONS TO BE LEARNT

The cases referred to in this Section 4 show that, depending on the actual content of the pre-contractual document and the behaviour of the parties before, during and after the contractual negotiations, FIFA and CAS are ready to accept that the clear and true intention of the parties will override any objective considerations as regards whether such pre-contractual document contains all the essential elements to be considered a contract.

As such, whenever parties enter into contractual negotiations and sign documents related thereto, it is essential that the content of those documents fully and clearly reflect their scope and the parties' intentions. In particular, it is key that, whenever it is not the common intention of the parties to bind themselves by means of a pre-contractual document, the wording of the latter is clear and unambiguous in that respect.

5 CULPA IN CONTRAENDO

FINALLY, IT IS WORTH DEDICATING SOME LINES specifically to the principle of culpa in contraendo which may also trigger liabilities in the context of contractual negotiations. Such principle, which is widely recognised as a basis to claim tort damages, basically means that, once parties have started contractual negotiations, a legal relationship is created which imposes on the parties the duty to negotiate seriously and in a manner consistent with their true intentions.

Put differently, if a party has created in its counterparty a legitimate expectation that its true intention is to conclude a contract, any breach of such expectation may generate liability.[111] As put by the panel in CAS 2016/A/4489 Beijing Renhe FC v. Marcin Robak:

> The parties must negotiate in good faith and should not abandon the negotiations without a compelling reason for doing so. This duty to act in good faith already exists in fact at the time of contractual negotiations — i.e. independent of the existence of a written preliminary contract, letter of intent, or similar things and is known as culpa in contrahendo.

> Culpa in contrahendo (...) means the negligent/intentional breach of pre-contractual duties. A finding of culpa in contrahendo requires the existence of contractual negotiations, trust that merited protection, a breach of a duty, harm, a causal connection, and fault...

> The breach of a duty in particular derives flow the principle of good faith. At the contractual negotiation stage it includes – regardless of whether a contract is later concluded - certain duties of care, considerateness, good faith, and of providing information, including the duty to negotiate seriously and in a fair manner. It essentially constitutes an independent basis of liability, somewhere between a contract and a tort. According to Swiss legal doctrine, it is a special form of liability for breaches of trust (see for example SFT 120 II 33l p.335, 336).

Consequently, parties must be aware that if they include in a pre-contractual document the promise to conclude an eventual contract, they may still be held liable if they breach that promise, even if the pre-contractual document does not contain all the essentialia negottii. It is also important to mention that such principle is intrinsically connected with "true pre-contracts" the scope of which, according to the generally held view, is simply a promise between the two parties to conclude a contract at a later date. [112] As such, parties to a "true pre-contract" may still be held liable in case they interrupt the negotiation process, even if all the essential elements of the eventual final contract have not been agreed.

6 GENERAL CONCLUSIONS

THE OBJECTIVE OF THIS NOTE WAS TO PROVIDE an overview of the FIFA's deciding bodies and CAS' approach as regards pre-contractual documentation, mainly on the basis of Article 18(4) RSTP, the common intention of the parties and the principle of culpa in contraendo.

The following are the key takeaways:

> To date, it is not clear whether the CAS and the FIFA DRC will accept that a "pre-contract" can make the conclusion of a future employment contract subject to the Player passing a medical examination. The jurisprudence is contradictory in that regard. It would seem that CAS will be more ready to accept such conclusion on the basis of a literal interpretation of Article 18(4) RSTP. As such, parties which insert such condition precedent into a pre-contractual documentation need to be aware that its enforceability is questionable.

> The FIFA DRC's view that a document which contains all the essentialia negottii, irrespective of other considerations, is binding on the parties is not easy to overcome. Nevertheless, the above analysed case-law shows that whenever it is clear that it was not the common intention of the parties to bind themselves via a pre-contractual document, then the FIFA DRC is ready to deviate from its general approach. As such, it is of paramount importance that all documents exchanged between the parties in the context of contractual negotiations are exhaustively clear in the sense that they do not constitute a binding contract and that they are fully aware of such fact. Put differently, the non-binding nature of the pre-contractual documentation shall clearly transpire from its wording and parties should act consistently in that sense. For instance, if parties howsoever start executing the terms of a pre-contractual documentation, it would be practically impossible to argue that it does not constitute a binding document irrespective of how clear the drafting was.

> Finally, parties should also bear in mind the principle of culpa in contraendo which may generate liabilities to a party which abruptly ends up contractual negotiations whenever its behaviour may have created legitimate expectations on its counterparty that a contract would be signed. That, even if none of the exchanged documents during the contractual negotiations contains the essentialia negottii to be considered a binding contract.

[111] See decision of the Swiss Federal Tribunal 4A_71/2019 of 8 October 2019

[112] See CAS 2008/A/1589 MKE Ankaragücü Spor Külübü v. J. For instance, Swiss law recognises such figure in Article 22(1) of the Swiss Code of Obligations which provides that: Parties may reach a binding agreement to enter into a contract at a later date.

JURISPRUDENCE

CAS 2020/A/7520

ALEKSANDR MANYAKOV V. MIKHAIL IGNATOV[113]

When the CAS jurisdiction is excluded by contract but granted by the applicable rules

DATE OF THE AWARD:

8 November 2021

ARBITRAL TRIBUNAL:

Mr Vladimir Novak, Attorney-at-law in Brussels, Belgium

MAIN TOPICS:

- Jurisdiction of the CAS
- Prevalence of an arbitration clause contained in a contract over one contained in the applicable regulations
- Limits to the application of the principle of benevolence

DECISIONS DEALING WITH SIMILAR ISSUES:

- CAS 2009/A/1910 Telecom Egypt Club v. Egyptian Football Association
- CAS 2012/A/3007 Mini FC Sinara v. Segey Leonidovich Skorovich
- Swiss Federal Tribunal decisión 4A_432/2017
- Swiss Federal Tribunal decision 4A_564/2020

KEY CONCLUSIONS:

- In a purely contractual matter, the Parties enjoy freedom to establish their rights and obligations as they deem fit (within the usual boundaries of the freedom of contract). This applies also to the dispute resolution mechanism. Accordingly, if the Parties agree that they do not wish to bring their dispute to the CAS, and such agreement does not violate public order ("ordre public"), their contractual will should prevail.

- A direct expression of the parties' will in a contract excluding CAS jurisdiction should not be superseded by an indirect CAS arbitration clause contained in the relevant regulations over which the Parties did not specifically agree.

- A provision in the Statutes of a national association does not constitute a mandatory provision of law, nor does it rise to the level of ordre public. Accordingly, if parties agreed to include a clause in a contract which violates the Statues of a national association, that may lead to disciplinary sanctions but it does not render the relevant clause invalid.

[113] Award published. This summary contains both quotations and paraphrasing of the original Award. Some parts have been amended for length and consistency purposes, however without altering the meaning of the original Award.

RELEVANT FACTUAL BACKGROUND

On 27 February 2020, the agent, Aleksandr Manyakov (the "Agent" or "Appellant") and the player Mikhail Ignatov (the "Player") signed a contract valid from 2 April 2020 to 1 April 2022 (the "Contract").

Clauses 7.1 and 7.2 of the Contract provided as follows:

Any and all disputes and disagreements that may arise between the Parties in respect of the matters not covered by the terms of this Agreement shall be settled through negotiations.

If the Parties fail to reach an agreement through negotiations, any and all disputes, disagreements, and claims arising out of or in connection with this Agreement, including those related to its conclusion, amendment, performance, violation, termination, cancellation, and/or validity, shall be referred to the jurisdictional bodies of the FUR (Dispute Resolution Chamber and FUR Players' Status Committee) to observe the mandatory pre-trial dispute resolution procedure in accordance with the procedures provided for in the FUR Rules on Dispute Resolution.

If the decision of the FUR jurisdictional bodies is not complied with or if the dispute is not subject to the jurisdiction of FUR jurisdictional bodies or in any other case when the disputes hereunder are not resolved in the above manner, the disputes shall be referred to the Mytishchi City Court of the Moscow region at the location of the "Agent".

On 12 May 2020, the Player proposed to terminate the Contract by a mutual agreement of the Parties. The Agent declined.

On 14 May 2020, the Player notified the Agent of a unilateral termination of the Contract, stipulating as follows:

Due to significant changes in the circumstances from which the parties proceeded when they concluded the [Contract], namely, provision of false information by the Agent and his representatives about other clubs taking interest in the potential employment of the Player, as well as the offers they make, there is no longer any necessity to continue the [Contract] dated April 2, 2020.

On 20 May 2020, the Agent requested that the Player pay 3,000,000 Russian roubles for the unjustified termination of the Contract,

On 4 June 2020, the Player initiated an action before the Dispute Resolution Chamber of the Football Union of Russia (the "FUR DRC") to hold the Contract invalid.

On 18 June 2020, the Agent submitted to the FUR DRC a counterclaim requesting payment for wrongful termination of the Contract.

On 24 July 2020, the FUR DRC adopted decision dismissing the Player's claims, and partially upholding the Agent's claim (the "FUR DRC Decision").

On 9 September 2020, the Player appealed the FUR DRC Decision to the FUR Players' Status Committee (the "FUR PSC").

On 9 October 2020, the FUR PSC annulled the FUR DRC decision. The Agent appealed such decision before the CAS.

LEGAL CONSIDERATIONS

The Parties are neither domiciled nor resident in Switzerland. Accordingly, reference shall be made to Chapter 12 of the

Swiss Private International Law Act ("PILA") in determining the extent to which the CAS has jurisdiction.

It is undisputed between the Parties that the FUR Regulations provide for CAS jurisdiction on appeal from the decision of the FUR PSC. However, there is a dispute as to the relevance and applicability of the dispute resolution mechanism contained in the FUR Regulations to the Contract at hand. This jurisdictional matter gives rise to three pertinent issues, which shall be addressed in the following section of the Award.

1 In a purely contractual matter, does a direct arbitration clause in a contract prevail over an indirect arbitration clause contained in the relevant regulations?

2 Does the contractual arbitration clause at issue exclude CAS jurisdiction by establishing jurisdiction of a specific local court?

3 Do the relevant regulations preclude the Parties from establishing a jurisdiction of a local court?

4 In a purely contractual matter, does a direct arbitration clause in a contract prevail over an indirect arbitration clause contained in the relevant regulations?

Arbitration is by its very nature consensual. It requires an arbitral tribunal to be satisfied that the parties appearing before it have mutually agreed to have their differences resolved by way of arbitration. Several CAS panels have insisted on the consensual nature of the arbitration agreement in order to bring the dispute before the CAS. Consequently, any appeal against a national federation's decision requires the parties' agreement to arbitrate.

In a purely contractual matter, the Parties enjoy freedom to establish their rights and obligations as they deem fit (within the usual boundaries of the freedom of contract). This applies also to the dispute resolution mechanism. Accordingly, if the Parties agree that they do not wish to bring their dispute to the CAS, and such agreement does not violate public order ("ordre public"), their contractual will should prevail. In other words, in a private contractual matter, a direct expression of the Parties' will in a contract excluding CAS jurisdiction should not be superseded by an indirect CAS arbitration clause contained in the relevant regulations over which the Parties did not specifically agree.

The Sole Arbitrator draws additional comfort in this regard from reputable academic commentary recognizing that "UEFA and FIFA rules can constitute, at best, a generic and indirect arbitration agreement, which cannot prevail over a specific and direct arbitration clause included in a contract that is straightforwardly binding for both parties." (Mavromati/Reeb, op. cit., p. 40).

The Sole Arbitrator also recalls case CAS 2012/A/3007, which considered the following contractual arbitration clause:

The Parties agree that any disputes arising out of this employment agreement … shall be settled by mediation procedures in the legal bodies of the RFU and the MF AR" and "If the Parties fail to settle the disputes by negotiations and/or in the legal bodies of the RFU and the MF AR, it shall be settled in accordance with the applicable laws of the Russian Federation.

The Appellant in CAS 2012/A/3007 argued that CAS had jurisdiction as per the FUR Regulations, which provided that all decisions of the FUR Committee could be appealed to the CAS. The sole arbitrator in that case determined that the clause at issue failed to exclude the jurisdiction of state courts and declined jurisdiction on that basis.

The Appellant argued that case CAS 2012/A/3007 was not relevant for present purposes as it considered an employment-related dispute and, until recently, the Russian Labour Code provided that only state courts could hear employment-related cases. This contention cannot be accepted. The Sole Arbitrator in CAS 2012/A/3007 did not decline CAS jurisdiction because it was mandated by Russian law but simply because there was no sufficiently clear intent of the parties to exclude their disputes from resolution before state courts and to have, instead, the CAS resolve such disputes.

In light of the foregoing, the Sole Arbitrator finds that, in a private contractual matter such as the one at hand, if the Contract's arbitration clause were to exclude CAS jurisdiction by establishing the jurisdiction of local courts instead, that 'direct' arbitration clause would prevail over an 'indirect' CAS arbitration clause contained in the FUR Regulations.

DOES THE CONTRACTUAL ARBITRATION CLAUSE AT ISSUE EXCLUDE CAS JURISDICTION BY STABLISHING JURISDICTION OF A SPECIFIC LOCAL COURT?

With reference to clauses 7.1 and 7.2 of the Contract, the Sole Arbitrator held as follows.

Clause 7 .2 of the Contract does not directly establish CAS jurisdiction, as it does not include any reference to the CAS. The Appellant claims that Clause 7.2 of the Contract establishes CAS jurisdiction indirectly, as it refers to the FUR dispute resolution mechanism which then refers to the CAS. This position cannot be accepted. Clause 7.2 does not contain any reference to specific provisions of the FUR Regulations which would enable to conclude that the Parties truly intended to opt for a full FUR-prescribed dispute resolution system. The reference to the FUR jurisdictional bodies is not sufficient in this regard because it is evident from the wording of Clause 7.2 that the Parties established the competence of two specifically designated FUR bodies to resolve matters in a 'pre-trial' format rather than following the entire FUR dispute resolution process, including the CAS. Nor is this conclusion called into question by the wording in Clause 7 .2 referring to "procedures provided for in the FUR Rules on Dispute Resolution", which, based on objective interpretation, merely sets out procedural rules to be applied before the named 'pre-trial' FUR jurisdictional bodies.

If the Parties intended to strictly follow the FUR dispute resolution system, they would likely have included in Clause 7.2 a reference to pertinent provisions of the FUR Regulations or simply name the CAS as the ultimate adjudicator. The fact that they did not do so, combined with the extent and specificity of Clause 7 .2, provides a strong indication that the Parties went to great length to set out their 'own' dispute resolution mechanism, comprising three components: (i) FUR DRC; the FUR Committee; and (iii) the Mytishchi City Court.

This leaves open the pertinent question whether the Parties' dispute resolution mechanism effectively excluded CAS jurisdiction.

The Sole Arbitrator recalls from above that Clause 7.2 provides for a dispute referral to the Mytishchi City Court if (i) "the decision of the FUR jurisdictional bodies is not complied with"; (ii) "the dispute is not subject to the jurisdiction of FUR jurisdictional bodies"; or (iii) "in any other case when the disputes hereunder are not resolved in the above manner".

The Sole Arbitrator notes that points (i) and (ii) appear to

deal with respective issues of enforceability and lack of jurisdiction of the FUR DRC or the FUR PSC, and therefore not the merits of any dispute between the Parties.

It follows that point (iii) establishes the competence of the Mytishchi City Court "in any other case when the disputes hereunder [i.e., any and all disputes, disagreements, and claims arising out of or in connection with this Agreement, including those related to its conclusion, amendment, performance, violation, termination, cancellation, and/or validity] are not resolved in the above manner".

The Sole Arbitrator notes that the meaning of "not resolved" in the context of Clause 7.2 of the Contract is not unambiguously clear. However, the following considerations bear mention in this regard.

First, consistent with the well-established principle of contra proferentem, any ambiguity ought to be interpreted against the drafting party, i.e., the Appellant who wishes to establish CAS jurisdiction. This applies especially in circumstances where the Mytishchi City Court was selected "at the location of the Agent", i.e., the Appellant.

Second, the wording "in any other case ·when the disputes hereunder are not resolved in the above manner" is objectively very broad.

Third, if a dispute remains and could still be appealed, it is not "resolved". It follows that Clause 7.2 explicitly designated two FUR jurisdictional bodies as competent at a "pre-trial" stage, which in tum provides a strong indication that the Mytishchi City Court was competent to act in the subsequent "trial" stage. Accordingly, if the dispute was not "resolved" at the "pre-trial" stage because the dispute remained, the Parties could seek "resolution" at the "trial" stage before the Mytishchi City Court.

Fourth, similar wording led previous CAS panel to conclude that the local courts were competent to rule on appeal on the merits. For instance, in CAS 2012/A/3007. The Sole Arbitrator is thus convinced that Clause 7.2 of the Contract established the jurisdiction of the Mytishchi City Court to the exclusion of the CAS.

DO THE RELEVANT REGULATIONS PRECLUDE THE PARTIES FROM ESTABLISHING A JURISDICTION OF A LOCAL COURT?

The recognized autonomy of parties to enter into an arbitration agreement is directly correlated to, and stems from, the principle of freedom to contract. The right of parties to resolve their disputes with one another in a manner of their own choosing is a basic aspect of individual autonomy and liberty. Consequently, the parties' freedom to resolve disputes in a manner of their choice can only be limited in exceptional circumstances. Those circumstances typically include cases where an arbitration agreement violates public policy, for example, criminal law infringements or other serious violations of ordre public, or mandatory provisions of law from which parties normally cannot contract out.

The Appellant claims that Article 46 of the FUR Statutes limits the Parties ability to agree to refer their contractual disputes to national courts. However, even if that were the case, Article 46 of the FUR Statutes does not constitute a mandatory provision of law, nor does it rise to the level of ordre public. Accordingly, any potential violation of the FUR Statutes and related regulations might potentially lead to disciplinary sanctions, but otherwise does not render Clause 7 .2 of the Contract invalid. Therefore, Article 46 of the FUR Statutes does not call into question the lack of CAS jurisdiction under Clause 7.2 of the Contract.

In light of the foregoing, the Sole Arbitrator finds that the CAS lacks jurisdiction to entertain the present Appeal.

CAS 2020/A/7230

PLAYER B V. CLUB Z[114]

Clubs' right to move players between the first and other teams: under which circumstances?

DATE OF THE AWARD:

17 January 2022

ARBITRAL TRIBUNAL:

Mr Francesco Macrí, Attorney-at-law in Piacenza, Italy

MAIN TOPICS:

> Requirements for a party to terminate a contract with just cause

> Player's exclusion from training

> Right of a club to move players between the first team and other teams

DECISIONS DEALING WITH SIMILAR ISSUES:

> CAS 2007/A/1369 O. v. FC Krylia Sovetov Samara

> CAS 2013/A/3091,3092,3093 FC Nantes, Ismaël Bangoura, Nasr Sports Club & FIFA

> CAS 2014/A/3642 Erik Salkic v. Football Union of Russia & PFC Arsenal

> CAS 2014/A/3684 & 3693 Leandro da Silva v. SL Benfica

> CAS 2015/A/4286 Sebino Plaku v Wroclawski Klub Sportowy Slask Wroclaw

KEY CONCLUSIONS:

> The issuance of an offer to mutually terminate a contract does not constitute an abusive conduct on the part of a club, nor does it constitute a presumption on the willingness of such club to terminate a contract without just cause. Especially when the player does not complain about such offer.

> Whenever a player is excluded from a club's first team, there has to be a balance between the player's personality rights and a coach's right to decide not to field a player and exclude him from the first team. In a case where the measure to exclude a player from the first team is only temporary and he continues to train with fellow teammates, even if from the second team, there is no abusive conduct from the club. As such, in those circumstances, a player does not have just cause to terminate the contract.

[114] This summary has been anonymised as the relevant award is yet to be published. This summary contains both quotations and paraphrasing of the original Award. Some parts have been amended for length and consistency purposes, however without altering the meaning of the original Award

RELEVANT FACTUAL BACKGROUND

On 31 July 2019, Player B (the "Player") and Club Z (the "Club") signed an employment contract (the "Contract") valid until 31 May 2022, according to which the Player "shall be deemed a member of [the Club] and represent [the Club's] main team as a footballer".

Article 8(1) of the Contract provided as follows:

This contract may be terminated on the grounds specified in regulatory documents of FIFA, UEFA…

After the winter season break, on 3 January 2020, the Player returned to Country Z to join the team's winter training camp.

On 4 January 2020, the Club's Manager called the Player for a meeting and provided him with a draft mutual termination agreement (the "Termination Agreement").

On 5 January 2020, the Player informed the Club's Manager that he was looking for a new team.

On 7 January 2020, the Club's Manager asked the Player if there was any news about his negotiations with another club to which the Player replied:

Not good yet, still waiting, now I also have to leave for studies, need to pass the exams, I have a flight today

Also on 7 January 2020, the parties exchanged the following communications:

1 the Club sent an email to the Player with the subject "Training "With second team", whereby it informed the Player about the date and the venue of the upcoming training of the second team.

2 The Player replied via email: "… after all threats against me from you and suspension to join training, I do not intend to sign any agreement on early termination of the contract to my consent. I inform you that I am forced to leave Country Z because of fear for my life. I also inform you that I intend to inform FIFA about this case".

Thereafter, some further exchange of correspondence occurred between the parties.

On 22 January 2020, the Club sent a last warning to the Player in the following terms:

Dear [Player], (…) This is a last warning. Unfortunately, I did not receive any answer on my previous correspondence. The Club requests you to come back till 22 January 2020 at the latest, otherwise the contract will be terminated with just cause. Please contact the Club immediately to schedule your trip to Country Z.

Nevertheless, the Player did not reply to the letter and did not re-join the Club.

On 9 January 2020, the Player lodged a claim against the Club before the FIFA Dispute Resolution Chamber ("DRC") seeking compensation for breach of contract. The FIFA DRC rejected such claim.

Thereafter, the Player filed an appeal before the Court of Arbitration for Sport ("CAS").

LEGAL CONSIDERATIONS

The Sole Arbitrator observed that the core of this matter centred around the question of whether the Player had just cause to terminate the Contract.

In this regard, the Sole Arbitrator first focused his attention on the short period from 3 January 2020, the date of the Player's arrival to Country Z, to 7 January 2020, when the Player left Country Z thereby terminating the Contract.

Briefly, the Player complained that the Club no longer wanted to avail of his performance after his return. The Player was surprised that the Club's Manager told him abruptly that "he should terminate the Contract" and provided him with a termination agreement which was allegedly to be signed in a hurry. The Player argued that he was pressured into signing the termination agreement by being excluded from training with the first team.

With that in mind, and with reference to Articles 337(1), 337b(1) and 337(d)(1) of the Swiss Code of Obligations ("SCO"),

the Sole Arbitrator pointed out that, under Swiss Law, any of the parties to an employment relationship can terminate the contract "at any time" provided there is good cause to do so. In the absence thereof, such termination could entitle the aggrieved party to receive compensation. The Sole Arbitrator also referred to the question of contractual stability and underlined that its maintenance in professional football is confirmed by Articles 13 and 14 RSTP.

In that regard, the Sole Arbitrator noted that the FIFA Commentary on the RSTP establishes the following:

The definition of just cause and whether just cause exists shall be established in accordance with the merits of each particular case. In fact, behaviour that is in violation of the terms of an employment contract still cannot justify the termination of a contract for just cause. However, should the violation persist for a long time or should many violations be cumulated over a certain period of time, then it is most probable that the breach of contract has reached such a level that the party suffering the breach is entitled to terminate the contract unilaterally.

The Sole Arbitrator fully adhered to such legal framework, which is constantly applied by CAS jurisprudence. As such, he proceeded to examine whether the Club's conduct was of such a nature that the Player could no longer be reasonably expected to continue the employment relationship.

IS THE OFFER TO TERMINATE THE CONTRACT A VIOLATION OF CONTRACTUAL STABILITY?

Whereas the Player submitted that he received the Termination Agreement for the first time on 4 January 2020, the Club's Manager reported that the Player announced his desire to leave the Club as of December 2019. For these reasons, the Club's Manager prepared the draft of the Termination Agreement. According to the Club's Manager, no one from the Club ever forced the Player to sign it, who only asked for two days to verify the feasibility of some ongoing negotiations for his transfer.

In that regard, the Sole Arbitrator noted that the draft Termination Agreement had no legal effect since the parties did not sign it. Consequently, the Sole Arbitrator deemed it was not necessary to examine the content of the draft since, in any case, this unsigned document did not contain any statement of responsibility against either party that may have any relevance in the proceedings. Doing such an exam would mean entering the field of suppositions, which are not proofs and not even presumptions.

That said, it was necessary to ascertain whether the offer to mutually terminate the Contract constitute, in and of itself, a misconduct on the part of the Club.

In that regard, the Sole Arbitrator recalled the content of the exchanged email and WhatApp messages during early January 2020 confirmed that the Player was indeed looking for a new club.

Although it appears that both parties were eager to terminate the contract, it cannot be stated that the Club pressured the Player to sign the Thermination Agreement. What is more, he never complained about the draft provided by the Club. As such, it was concluded that the Club had not committed any breach of Contract by offering to mutually terminate it.

THE PLAYER'S ALLEGED EXCLUSION FROM TRAINING

The Player further stated that he was hired to be part of the main team but that, after his return to Country Z, the Club informed him that he should train with the second team.

The Club pointed out that the Player was only the third goalkeeper of the team and that, after proper training and field experience, he could eventually reach the level of performance required to play in his first team.

In this regard, the Player referred to the Contract which provided that he was hired to "represent the Club's main team as a footballer" and that he should "participate in the training and competitions" of the main league.

The Sole Arbitrator noted that such provision does not clarify whether the Player had the right to be part of the first or second team as the Club divided the players into several groups. In addition, the Sole Arbitrator underlined that, from the Club's emails to the Player, he was repeatedly invited to join the team and train with the other teammates and that the measure of sending him to the second team was only a temporary one.

The Sole Arbitrator also highlighted that the Player did not offer any valuable proof that the training with the second team during a few days in January 2020 was less effective than the training with the first team.

With that in mind, the Sole Arbitrator adhered to the CAS jurisprudence which provides that there must be a balance between a player's personality rights and a coach's right to decide not to field a player and exclude him from the A-team.

Furthermore, the Sole Arbitrator agreed with the following considerations of the Panel in CAS 2014/A/3642 regarding the severity of the measure to disallow a player from training with the A-team:

The Panel recognises that one Club's set up may differ from another's but believes that a squad of players tend to train together as the first team squad, only some of which will actually play in the first team on match days. In view of this, the Panel finds that a measure to prevent a player from training with the first team squad is potentially a much harsher measure than solely assigning a player to play matches with the second team while being allowed to train with the first team squad. The former seriously prejudices the player's future perspectives with the first team, since such measure is of a more definite nature than the latter. There may be individual reasons, such as recovery from injury, which may dictate that a player trains away from the first team squad, which would need reviewing in each particular case.

This being said, the Sole Arbitrator stressed that the Club never prevented the Player from training; instead, it instructed the Player to train with the second team until he decided whether to terminate the employment agreement or not.

The Sole Arbitrator thus concluded that given the fact that the training with the second team was effective and, above all, a temporary measure, the Player's claim in this regard was groundless.

For the sake of completeness, the Sole Arbitrator noted that the Player did not send any warning notice to the Club asking to be reinstated to the first team. On 3 January 2020, he complained with the Club's goalkeeper coach that he "was excluded from the group". Nevertheless, he did not send any other request or prior warning to the Club.

As a consequence, any abusive conduct of the Club cannot be ascertained and, as such, does not constitute a valid ground for the Player to terminate the Contract.

As such, the appeal was rejected.

CAS 2020/A/7054

CLUB S V. PLAYER R & CLUB L & FIFA[115]

A game changer for the joint and several liability rule?

DATE OF THE AWARD:

21 February 2022

ARBITRAL TRIBUNAL:

Mr Ulrich Haas, Professor in Zurich, Switzerland

Mr Olivier Carrard, Attorney-at-Law in Geneva, Switzerland

Mr Eirik Monsen, Attorney-at-Law in Oslo Norway

MAIN TOPICS:

> FIFA's jurisdiction under Article 22(a) RSTP and the principle of lis pendens

> Standing to be sued of a player's new club in light of Article 17(2) RSTP

> Lack of legal interest of a party to request the imposition of sporting sanctions

DECISIONS DEALING WITH SIMILAR ISSUES:

> CAS 2009/A/1996 Ali Riza vs Trabzonspor & TFF

> CAS 2015/A/3953 & 3954 Stade Brestois 29 & John Jairo Culma vs Hapoel Kiryat & FIFA

> CAS 2016/A/4408 Raja CA de Casablanca v. Baniyas FSC & Ismail Benlamalem

> CAS 2017/A/4977 Smouha SC vs Ismaily SC & Aziz Abdul & Asante Kotoko & FIFA

> CAS 2018/A/5693 & 5694 Riga FC, FC Partizan and FIFA

> CAS 2019/A/6621Club O v. Player X & Club M

KEY CONCLUSIONS:

> The nature of an appeal, namely whether it is "vertical" or "horizontal", remains the same before all instances as the functions performed by the relevant adjudicatory body do not vary according to the reasons for assessing (or not) such claim. Even if FIFA has nothing directly at stake, disputes adjudicated by FIFA bodies, such as the FIFA DRC, can still be characterized as horizontal if they involve direct or indirect members of FIFA. The fact that the FIFA DRC declined its jurisdiction based on lis pendens and did not decide on the underlying issues does not change the nature of the relevant appeal lodged before the CAS.

> Article 22(a) of the Regulations on the Status and Transfer of Players ("RSTP") does not require any "inducement" and, in addition, does not require that a claimant demonstrates the intent of the player to move abroad at the time of the termination of the contract. Rules on jurisdiction must be interpreted in an objective manner in order for the claimant to know in advance before which forum it must file a claim. What the Player intended when he terminated

KEY CONCLUSIONS (CONTINUED):

the Contract can only be established after lengthy evidentiary proceedings. To link the competence of the FIFA DRC to the outcome of such evidentiary proceedings would not only make access to justice very burdensome, but it would be also contrary to procedural efficiency.

- According to the jurisprudence of the Swiss Federal Tribunal ("SFT"), in cases of joint liability, there are as many matters in dispute as there are couples of claimant/defendant. Such interpretation may open up the possibility of forum shopping for the creditor against different joint debtors. However, this is the consequence of the FIFA regulations providing for joint and several liability of the player and the new club in case of termination of an employment agreement without just cause.

- It is within the autonomy of FIFA to regulate the type of liability it wishes to impose on the new club. Nothing in the wording of Article 17(2) RSTP indicates that, before condemning the new club to pay compensation, an analogous determination must have been made by the FIFA DRC against the player. In addition, nothing in the wording of Article 17(2) RSTP indicates that the liability of the new club stands and falls with a binding (separate) decision by FIFA holding the player liable according to Article 17(1) RSTP. Such requirement would be contrary to the guiding principles of joint and several liability according to which the liability of the joint debtors is on an equal footing.

[115] This summary has been anonymised as the relevant award is yet to be published. This summary contains both quotations and paraphrasing of the original Award. Some parts have been amended for length and consistency purposes, however without altering the meaning of the original Award.

RELEVANT FACTUAL BACKGROUND

On 14 September 2017, Club S (the "Former Club") and Player R (the "Player") entered into an employment contract (the "Contract"), valid from 1 July 2017 to 30 June 2022.

In the event of a dispute in relation to the terms of the Contract, Clause 10 provided for the exclusive competence of a national arbitral institution (the "NAI")

On 14 June 2018, the Player terminated the Contract by way of letter, invoking just cause. In particular, he alleged that the Former Club had breached its legal and contractual obligations.

On 2 August 2018, the Player concluded a new employment contract with Club L (the "New Club").

Subsequently, the New Club entered a transfer instruction in the Transfer Matching System ("TMS") and on 31 August 2018, requested the International Transfer Certificate ("ITC") from the Former Club's national association. On 4 September 2019, the New Club's national association confirmed receipt of the ITC.

On 17 August 2018, the Player lodged a claim against the Former Club before the NAI, in accordance with Clause 10 of the Contract.

In his claim, the Player sought a declaration that the Contract had been terminated with just cause and requested from the Former Club compensation. The Former Club filed its answer on 14 September 2018, rejecting the Player's claim on its merits and filing a counterclaim.

On 31 October 2018, the Former Club raised an objection to the exclusive jurisdiction of the NAI, while applying for the proceedings to be stayed on the grounds that the FIFA Dispute Resolution Chamber (the "FIFA DRC") was the appropriate body to determine the dispute. Such request was dismissed by the NAI.

On 5 November 2018, the Former Club lodged a claim against the Player and the New Club before the FIFA DRC. In its claim, the Former Club requested the FIFA DRC to find that the Contract had been terminated by the Player without just cause, and to hold jointly and severally liable the New Club for the payment of compensation

On 23 January 2019, the Player submitted his response to the Former Club's claim before the FIFA DRC, alleging that FIFA was not competent to deal with this dispute but that the NAI was. In the alternative, the Player argued that the Contract had been terminated with just cause and for this, he filed a counterclaim demanding compensation.

On 18 March 2019, the NAI issued its decision by which it held that the Player had terminated the Contract without just cause and awarded compensation to the Former Club (the "NAI Decision").

On 20 February 2020, the FIFA DRC rendered its decision and concluded that the Former Club's claim was inadmissible due to lis pendens (the "FIFA Decision"). On 6 May 2020, the Former Club filed a Statement of Appeal against the Player and the New Club with the Court of Arbitration for Sport ("CAS").

LEGAL CONSIDERATIONS: THE EFFECTS OF THE NAI DECISION

In the case at hand, the NAI was called upon to issue an award by way of "voluntary arbitration". An award issued by the NAI in voluntary arbitration may be challenged through an application for setting aside and/or through an appeal to the competent ordinary courts. The award issued in voluntary arbitration will only have res judicata effects after it is notified to the parties and once there is no more possibility for appeal or for setting aside.

It follows from the above that as long as a setting aside procedure is pending, the NAI Decision does not have res judicata effects. It is questionable whether the setting aside procedure is still pending. As such, this Panel proceeds under the assumption that the setting aside procedure is pending before the national jurisdictions and that, therefore, the NAI Decision has not become final and binding yet.

The competence of this Panel is also not impacted by the principle of lis pendens. First, Article 186 (1bis) of the Swiss Private International Law Act ("PILA") provides that a panel may - in principle - "decide on its jurisdiction without regard to any action having the same subject matter that is already pending between the same parties before a state court or another arbitral tribunal".

Thus, there is no automatic stay or inadmissibility in case of lis pendens. Secondly, the matters in dispute before the NAI and before this Panel are different, as it will be evidenced below.

In fact, the Former Club clarified at the hearing that it pursued three different claims before this Panel, that is:

1. **A claim directed against the Player and FIFA to impose sporting sanctions;**
2. **A claim against the New Club for the payment of a certain amount of money; and**
3. **A claim against the New Club and FIFA to impose sporting sanctions on the New Club.**

It is obvious that all the above claims before CAS are different from the matter in dispute before the NAI. While only claim (i) is directed against the Player, the Panel nevertheless highlights that such claim relates to disciplinary sanctions and is not contractual in nature. Hence, claim (i) is different from the matters in dispute before the NAI and no lis pendens can arise. This is even more true considering that the NAI is not competent to decide on disciplinary sanctions against the Player based on the RSTP. Moreover, the procedure pending before the NAI cannot affect claims (ii) and (iii) as neither the New Club, nor FIFA were involved in it.

THE CLAIMS FILED BY THE FORMER CLUB TO IMPOSE SPORTING SANCTIONS

With respect to the imposition of sporting sanctions, this Panel refers to the constant CAS jurisprudence according to which an indirect member of FIFA has no standing to request that sporting sanctions be imposed on other indirect members, such as clubs or players. The Panel is of the view that it is solely within FIFA's prerogative to decide on the imposition of sporting sanctions. Moreover, the RSTP do not recognize the possibility for a club to bring a claim against FIFA to this effect. Likewise, the Former Club's claims do not derive from association law.

THE CLAIM FOR COMPENSATION AND UNJUST ENRICHMENT AGAINST THE NEW CLUB

As a preliminary issue and before determining whether the New Club shall pay a compensation to the Former Club, the Panel must first assess whether the New Club has standing to be sued. The Panel notes that the FIFA regulations do not indicate which party has standing to be sued and ultimately against whom the appeal must be directed.

While the New Club accepts that FIFA is also a Respondent to the claim before CAS, it asserts that it is a Respondent only because the Former Club is challenging a decision on admissibility of the FIFA DRC. It contends that FIFA decided it was not competent because of lis pendens but did not decide any underlying issues. According to the New Club, FIFA is plainly not a party and moreover, the Former Club makes no claims or requests for relief against FIFA (with the exception of the claims about the sporting sanctions).

The New Club alleges that it is not possible to overturn the FIFA Decision without a proper request for relief against FIFA whereas the question as to whether FIFA has jurisdiction is a vertical issue.

This Panel finds that the nature of a dispute, whether vertical or horizontal, depends on what is claimed by the parties (i.e., on the matter in dispute), not on the reasons for which an adjudicatory body may dismiss or accept a claim. For this Panel, the nature of the claim or the appeal, whether "vertical" or "horizontal", remains the same before all instances as the functions performed by the relevant adjudicatory body do not vary according to the reasons for assessing (or not) such claim. Even if FIFA has nothing directly at stake, disputes adjudicated by FIFA bodies, such as the FIFA DRC, can still be characterized as horizontal if they involve direct or indirect members of FIFA.

Here, the claim at stake pertains to compensation and unjust enrichment. The fact that the FIFA DRC declined its jurisdiction based on lis pendens and did not decide on the underlying issues does not change the nature of the relevant claim lodged by the Former Club against the New Club before the CAS.

In view of the above, the Panel concludes that the New Club has standing to be sued and that it can examine the appeal filed by the Former Club even if FIFA has no direct involvement in the substantive elements of the claim regarding the compensation and unjust enrichment.

The FIFA DRC dismissed the claims filed by the Former Club because of lis pendens. Such principle mainly serves the purpose to prevent identical matters to go ahead in parallel proceedings, since this bears the danger of conflicting decisions with res judicata effects.

The rules on lis pendens contained in Swiss law, which the Panel shall refer to in this case, establish two essential requirements: (1) there must be two parallel proceedings that share the same cause of action and (2) those proceedings must involve the same parties.

FIFA argued in its Answer that "the [New Club] would only have a secondary or an 'accessory' role in the proceedings before the DRC, since these proceedings if admissible would

in any case have centered on an analysis of the Player's behaviour. The Player is the principal obligor whereas the [New Club] might have been a subsidiary obligor."

The Panel observes that the applicable RSTP do not specifically describe a claim based on Article 17(2) against the new club as being purely accessory or ancillary. In point of fact, Article 17(2) RSTP does not provide a graduated relationship between the liability of a player and the liability of a new club. Instead, this provision speaks about joint and several liability, which must be interpreted in light of the subsidiarily applicable Swiss law. In particular, Article 144 of the Swiss Code of Obligations ("SCO") describes the substantive effects of joint and several liability as follows:

1 A creditor may at his discretion request partial pe1formance of the obligation from each joint and several debtor or elsefi1ll pe1formancefi'om any one of them.

2 All the debtors remain under the obligation until the entire claim has been redeemed

It follows from the above that the liability of joint and several debtors is on an equal footing whereas one liability is not subsequent or accessory vis-a-vis the other. Consequently, the interpretation of the FIFA DRC according to which the New Club's liability was merely accessory has neither basis in the wording of the applicable regulations, nor in the subsidiary applicable Swiss law.

The Panel now turns to the procedural consequences arising out of the foregoing. In light of the jurisprudence of the SFT, the Panel understands that, in cases of joint liability, there are as many matters in dispute as there are "couples demandeur/defendeur".

In the case at hand, the Panel observes that the claim against the Player and the one against the New Club are, from a procedural point of view, two different matters in dispute. In this respect, the Panel further notes that the Former Club initiated a proceeding in a jurisdiction (i.e., the FIFA DRC) where a different relief would be obtained. The Panel is aware that the above interpretation may open up the possibility of forum shopping for the creditor against different joint debtors. However, this is the consequence of the FIFA regulations providing for joint and several liability of the player and the new club in case of termination of an employment agreement without just cause.

Given that the claim against the Player is procedurally distinguished from the claim against the New Club and taking into account that the New Club's liability is not accessory vis-a-vis the liability of the Player, the proceedings pending before the NAI cannot prevent the Former Club from initiating a separate action against the New Club with the FIFA DRC.

Accordingly, the Panel finds that there is no duplication of proceedings in the present case. Indeed, the claim against the New Club with the FIFA DRC cannot be deemed as another parallel and concurrent proceeding taking place as it is substantially not the same as the one before the NAI.

As a result, the Panel rules that the FIFA DRC was wrong to dismiss the Former Club's claim under Article 17(2) RSTP.

Having established that the principle of lis pendens does not apply to the claim filed by the Former Club against the New Club under Article 17(2) RSTP, the Panel must next resolve whether the FIFA DRC has jurisdiction to deal with this dispute.

The Respondents contend that the dispute is exclusively of a national dimension. In particular, the Respondents argue that Article 22(a) RSTP does not apply to this dispute as it does not relate to or arise from a request for the Player's ITC. On the other hand, the Former Club claims that the FIFA DRC is competent to adjudicate its claim against the New Club in view of the international dimension of the dispute given by the issuance of the ITC.

In this context, the Panel must analyse the way Article 22(a) RSTP should be interpreted and applied. The Panel starts its analysis by reviewing such article's wording and identifies four elements which must be examined to determine whether the FIFA DRC should have accepted competence to adjudicate the dispute, that is:

1 a dispute between clubs and players;

2 a dispute in relation to the maintenance of contractual stability (Articles 13-19 RSTP);

3 an ITC request; and

4 a claim in relation to the ITC request by the interested party.

The Panel believes these elements had to be observed at the time the FIFA DRC made its decision. At this point in time there was - in the Panel's view - a dispute in relation to Article 17(2) RSTP involving the Player, the Former Club and additionally the New Club.

Furthermore, there had been an ITC request for the Player filed by the New Club on 29 August 2018. Hence, the Panel is of the opinion that elements (1), (2) and (3) identified in Article 22(a) RSTP were present at the time the FIFA DRC made its decision. For the Panel, it is not unreasonable to imply that there is necessarily an international dimension where there is an ITC request.

In continuation, the Panel turns its attention to element (4) and the underlying question as to whether such claim was present at the time the FIFA DRC made its decision.

In this regard, the Panel remarks that the Respondents argue that the Former Club's claim does not present any international dimension that might justify the intervention of the FIFA DRC, notably by relying on the comments made by Mr. Omar Ongaro, former Football Regulatory Director and Head of Player's Status according to which the contractual dispute must "have its grounds directly in the ITC request" for Article 22(a) RSTP to apply. The Respondents further argue that Article 22(a) RSTP can only apply if there is an immediate and direct causal link between the termination of the employment contract with the old club and the subsequent ITC request further to the signature of a new employment contract. In particular, they contend that the Former Club's claim is not causally and temporally linked to the ITC request.

According to the aforesaid decisions, if there is a certain period of time between the termination of the employment contract with the old club and the ITC request with the new foreign club, then the matter is not "international" within the meaning of Article 22 RSTP and, therefore, the FIFA DRC is not competent. For the Panel, Article 22(a) RSTP therefore serves the purpose of distinguishing the matters for which the national bodies are competent and the ones for which the FIFA DRC is competent.

However, when a termination of a contract is followed by an international transfer and a subsequent dispute as to whether the new foreign club must compensate the old one according to Article 17(2) RSTP, then the prerequisites of Article 22(a) RSTP are - in the Panel's view - fulfilled and FIFA is competent. While there may be an exception where the matters are segmented, because a lot of time passes between the termination of the old contract and the international move to a new club. This, however, is not the case here.

Indeed, the (foreign) New Club entered into an employment agreement approximately six weeks after the dispute between the Player and the Former Club arose whereas the Player terminated his Employment Contract with the Former Club approximately ten weeks before the request for the ITC. Even if a certain time passed between the

termination of the Contract and the ITC request, the Panel finds that the matters were not segmented, but rather sequential from one another. Under these circumstances, the ten-week time lapse is irrelevant for the Panel.

Article 22(a) RSTP does not require any "inducement" and - in addition does not require that a claimant demonstrates intent of the player to move abroad at the time of the termination of the contract. Rules on jurisdiction must be interpreted in an objective manner in order for the claimant to know in advance before which forum it must file a claim. What the Player intended when he terminated the Contract can only be established after lengthy evidentiary proceedings. To link the competence of the FIFA DRC to the outcome of such evidentiary proceedings would not only make access to justice very burdensome, but it would be also contrary to procedural efficiency.

The New Club also submitted that Article 22(a) RSTP cannot apply due to the fact that the Former Club did not object to the issuance of the ITC. The issuance of an ITC is a matter related to national federations and only indirectly to clubs. Thus, whether a club "opposed" to the issuance of an ITC is not decisive in the context of Article 22(a) RSTP.

Since the Panel finds that the FIFA DRC was (and still is) competent to decide upon the Former Club's claim based on Article 17(2) RSTP, nothing prevents this Panel from deciding the merits of this case (or to refer the matter back to the FIFA DRC).

WHAT ARE THE CONSEQUENCES OF THE ABOVE?

The Panel notes that Article 17(2) RSTP requires for the new club to be liable when the player is required to pay compensation. This condition is a preliminary question with respect to the new club's liability. However, the Parties dispute whether and to what extent the Panel is restricted in assessing and determining this preliminary question.

The Panel finds that when assessing this preliminary question, i.e. if the professional is required to pay compensation, it is not bound by the findings and conclusions of the NAI since such decision was issued between different parties. It is equally clear that this Panel is not prevented from assessing such preliminary question by the exclusive jurisdiction contained in Clause 10 of the Contract.

The New Club is of the view that the Panel is prevented from determining this preliminary question, since Article 17(2) RSTP requires that the FIFA DRC makes such determination first in a binding manner vis-a-vis the Player. According to the New Club, the joint liability of the new club only kicks in once the FIFA DRC has determined and decided that the player is required to pay compensation. The Panel notes that it is within the autonomy of FIFA to regulate the type of liability it wishes to impose on the new club. However, as already explained, when looking at the wording of Article 17(2) RSTP, the Panel finds that such requirement is not

enshrined therein. In fact, nothing in the wording of this provision indicates that, before condemning the new club to pay compensation, an analogous determination must have been made by the FIFA DRC against the player. In addition, nothing in the wording of such article indicates that the liability of the new club stands and falls with a binding (separate) decision by FIFA holding the player liable according to Article 17(1) RSTP. Such requirement would be contrary to the guiding principles of joint and several liability according to which the liability of the joint debtors is on an equal footing (as explained above). Furthermore, such interpretation would be in conflict with the decision CAS 2019/A/6621, where the panel upheld the liability of the club according to Article 17(2) of the RSTP in the absence of a respective holding of FIFA vis-a-vis the player (because the FIFA Decision had been squashed).

Finally, such understanding would also be in conflict with the jurisprudence of the SFT according to which -procedurally- the "joint defendants remain independent from each other" (les consorts simples restent independants les uns des autres."). Thus, the Panel finds that it is in no way restricted when assessing and determining the preliminary question as to whether the Player would have been liable for compensation.

On the basis of the foregoing, the Panel determined that the Player had terminated the Contract without just cause and that the New Club is jointly and severally liable of any compensation to be paid. However, the question of the quantum was sent back to the FIFA DRC for its determination.

CAS 2020/A/7443

PLAYER M V. CLUB Z

CAS 2020/A/7446

CLUB Z V. PLAYER M & CLUB A & CLUB B[116]

Calculation of compensation due to a club: webster, matuzalem or neither?

DATE OF THE AWARD:

29 March 2022

ARBITRAL TRIBUNAL:

Mr Martin Schimke, Attorney-at-Law in Dusseldorf, Germany

Mr Ulrich Haas, Professor of Law in Zurich, Switzerland

Mr Michele Bernasconi, Attorney-at-Law, Zurich, Switzerland

MAIN TOPICS:

- Right of a party to appeal to the CAS even if it did not request the grounds of the FIFA DRC decision.
- Admissibility of new evidence presented before the CAS.
- Calculation of compensation due to a club on the basis of Article 17 RSTP.
- Bridge transfer

DECISIONS DEALING WITH SIMILAR ISSUES:

- CAS 2008/A/1519 & 1520 FC Shakhtar Donetsk v. Matuzalem Francelino da Silva & Real Zaragoza SAD & FIFA
- CAS 2017/A/4935 FC Shakhtar Donetsk v. Olexandr V. Zinchenko, FC UFA & FIFA
- CAS 2017/A/5366 Club Adanaspor v. Mbilla Etame Serges Flavier
- CAS 2018/A/5607 & 5608 RSC Anderlecht v. Matías E. Suárez & CA Belgrano
- CAS 2019/A/6463 Saman Ghoddos v. SD Huesca & Östersunds FC & Amiens Sporting Club & FIFA
- CAS 2020/A/7029 Association Sportive Guidars FC v. CSKA Moscow & Lassana N'Diaye

[116] This summary has been anonymised as the relevant award is yet to be published. This summary contains both quotations and paraphrasing of the original Award. Some parts have been amended for length and consistency purposes, however without altering the meaning of the original Award.

KEY CONCLUSIONS:

- On the basis of the applicable rules, not only a party that requests the grounds of a FIFA decision shall be entitled to file an appeal. This means that FIFA is expected to send the grounds of a decision, once requested, to all the parties of the FIFA proceedings and that all the parties are entitled to file an appeal against such decision, provided they have an appropriate legal interest worthy of protection to do so.

- The maximum length of a contract referred to in Article 18(2) FIFA RSTP does not apply to extensions but is rather aimed at preventing employment contracts being concluded for a term longer than 5 years. Whether a new employment contract is concluded or the contractual parties subsequently agree on an extension has no material impact on the validity of the contract concluded; both are to be considered as a new agreement, with another maximum valid term of 5 years.

- There is no predetermined methodology to assess the value of the services of a player because the reality of the transfer market is complex and in constant movement depending on many circumstances, including offer and demand. One recognized method of assessing the value of the services of a player is to look at the transfer fee paid or offered "in non-suspicious times". However, when looking at such transfer fee one must take into account that such transfer fee is the result of very complex considerations of the parties involved.

- While the method applied by the FIFA Dispute Resolution Chamber (DRC) may be an alternative to calculate the damages incurred, the Panel finds that, if applied "mechanically" and without due consideration of all the objective circumstances of the given case, it is not optimal. In addition, it makes somehow the calculation of the potential compensation due in case of breach quantifiable in advance, which is in principle against the deterrent effect and the core rationale of Article 17 FIFA RSTP.

- The amount of compensation initially due to a party can be mitigated on the basis of Article 44(1) and 337b(2) of the Swiss Code of Obligations (SCO) in case such party's behaviour contributed to the unilateral contractual breach of its counterparty.

- CAS jurisprudence has already dealt with the concept of "bridge transfer" in detail and emphasised that the sanctioning association or the one invoking the existence of such a transfer has the burden of proof to show that the club or other party has gained an economic benefit from participating in the bridge transfer, i.e. that the transfer was taking place (at least also) out of interests other than sporting interests.

RELEVANT FACTUAL BACKGROUND

On 26 July 2015, Club Z and Player M (the "Player") entered into an employment contract (the "First Contract"), valid for a period of four seasons.

According to the Player, on 14 or 16 July 2016, allegedly by being blackmailed by Club Z, he signed a blank employment contract, i.e. an employment contract that did not specify the salary to be paid and the length of the engagement. Club Z denies such allegation.

From 16 July 2016 until 28 June 2017, the Player was loaned to another club.

On 24 July 2017, following an inquiry by the Player, the National Association of Club Z (the "ZNA") provided the Player with a certificate confirming that he "is recorded in the branch files during the season: Season: 2015/2016; Stage: First team (premium); Club: Z"

According to Club Z, on 28 August 2017, it and the Player concluded a new employment contract (the "Second Contract"), valid for a period of five seasons, until the end of the 2021/2022 season. The Player denies having signed a contract on or around this date and maintains that Club Z unilaterally added the terms to the blank contract that he allegedly signed on 14 July 2016.

On 18 or 25 November 2018, the ZNA registered the Second Contract, i.e. more than 14 months after such contract allegedly entered into force.

On 9 January 2019, the Player sent a notice to Club Z arguing that it had "pressured" him to sign an "empty contract".

On an unknown date, Club Z allegedly reproached the Player for not attending training sessions as from 17 June 2019 and instructed him to report for a training camp as from 25 June 2019.

On 20 June 2019, the Player sent a second notice to Club Z with similar content as the email dated 9 January 2019, this time with the ZNA in copy.

On 20 July 2019, the Player, apparently considering that the Second Contract was invalid and that the First Contract had expired, concluded an employment contract with Club A, valid for a period of two seasons, until 31 June 2021.

On 30 July 2019, Club Z sent a correspondence to the Player asking for clarifications about the fact that he had concluded an employment Contract with Club A.

On 1 August 2019, the National Association of Club A (the "ANA") requested the ZNA to issue the Player's International Transfer Certificate (the "ITC"), to which the ZNA objected following consultation with Club Z. Thereafter, the Single Judge of the FIFA Players' Status Committee granted the provisional registration of the Player with Club A.

On 27 November 2019, the Player sent a notice to Club A, invoking a unilateral termination option contained in the contract between the Player and Club A. The Player and Club A then concluded a mutual termination agreement, by means of which they settled their financial dues.

On 1 January 2020, Club B and the Player concluded an employment contract, valid for a period of four and a half seasons.

On 6 January 2020, Club Z filed a claim before the FIFA DRC against the Player, Club A and Club B.

On 13 August 2020, the FIFA DRC rendered a decision by which it held that the Player had terminated the Contract without just cause and ordered the Player to pay to Club Z compensation for breach of contract, with Club A being held jointly and severally liable (the "DRC Decision").

Apparently, only the Player requested the grounds of the DRC Decision. However, both the Player and Club Z appealed such decision to the Court of Arbitration for Sport (CAS).

LEGAL CONSIDERATIONS: AS REGARDS THE ADMISSIBILITY OF CLUB Z'S APPEAL

The Player objects to the admissibility of Club Z's appeal on the ground that Club Z had allegedly not asked for the grounds of the DRC Decision prior to filing an appeal with CAS, as a consequence of which the Appealed Decision became final and binding towards Club Z.

Club Z maintains that it did send a request for the grounds of the DRC Decision to FIFA on 15 August 2020. In any case, even assuming that Club Z would not have asked for the grounds, Club Z submits that its appeal is still admissible, because CAS jurisprudence establishes that the admissibility of an appeal does not depend on receipt of the request by FIFA or on which party asked for the grounds

Furthermore, the "NOTE RELATED TO THE APPEAL PROCEDURE" in the DRC Decision provides that "this decision may be appealed against before the Court of Arbitration for Sport", which does not limit such possibility to the party that asked for the grounds. Accordingly, Club Z submits that its appeal must be deemed admissible.

With reference to Article 15 of the FIFA Procedural Rules, in the Panel's view, it is sufficient if one of the parties asks for the grounds of the relevant decision, in order for all parties to the dispute be able to appeal such decision.

This view is also supported by the note at the end of the DRC Decision from which it transpires that the Appealed Decision should only become final and binding if none of the parties has asked for its grounds.

It follows that the Panel is satisfied that, in any event, on the basis of the applicable rules, not only a party that requests the grounds of a decision of a FIFA body shall be entitled to file an appeal. This means that FIFA is expected to send the grounds of a decision, once requested, to all the parties of the FIFA proceedings and that all the parties are entitled to file an appeal against such decision, provided they have an appropriate legal interest worthy of protection to do so.

Accordingly, the Panel finds that the appeals filed by Club Z and the Player are admissible.

AS REGARDS THE VALIDITY OF THE SECOND CONTRACT

Whereas Club Z maintains that the Second Contract was concluded on 28 August 2017, the Player argues that he did not conclude any contract on or around such date, but that Club Z unilaterally added terms to a blank contract that the Player had signed already on 14 July 2016.

Given that the contract at the heart of the present dispute is the Second Contract, the Panel will first proceed to assess whether such contract was indeed concluded. Because Club Z relies on the Second Contract to claim compensation for breach of contract from the Player, it is Club Z that carries the burden to prove the existence thereof. In this respect, the Panel notes that Club Z provided a copy of the Second Contract, containing the Player's signature. Club Z further provided a letter issued by the Deputy Executive Manager of the ZNA, confirming to Club Z that the Second Contract had been registered with the ZNA, however only at a later date. The Panel finds that there is uncertainty with respect to the actual date of registration of the Second Contract with the ZNA.

Regardless of the above, it is not in dispute that the Second Contract was ultimately registered with the ZNA and that it contains the Player's authentic signature, as a consequence of

which the Panel finds that the Second Contract is presumed to be valid

In any event, the mere fact that the Second Contract may not have been registered with the ZNA within the time limit required to do so does not make the Second Contract invalid. As also retained by the FIFA DRC in the DRC Decision, the formality of registering an employment contract with a national football association does not impact on the validity of an employment contract.

Turning to the Player's argument that the Second Contract is invalid because it violates Article18(2) RSTP, thus argument shall also be dismissed. The Panel finds that the maximum length of a contract referred to in Article 18(2) RSTP does not apply to extensions but is rather aimed at preventing employment contracts being concluded for a term longer than 5 years.

Whether a new employment contract is concluded or the contractual parties subsequently agree on an extension has no material impact on the validity of the contract concluded; both are to be considered as a new agreement, with another maximum valid term of 5 years. Nothing prevents football players and clubs from extending their employment relationship much longer than 5 years, as long as each individual contract, or each extension, does not exceed the maximum 5-year term.

IF THE SECOND CONTRACT WAS VALIDLY CONCLUDED, WHO TERMINATED IT AND WHEN?

The Panel notes that there is no termination letter on file from either Club Z or the Player. This can be explained by the fact that the Player maintains that no Second Contract was concluded and that he was therefore free to conclude an employment contract with Club A on 20 July 2019, while Club Z had no reason to terminate the Second Contract because it wanted to continue the employment relationship with the Player.

While a breach of contract does not necessarily equate to a termination, in the present situation the Panel finds that it was the Player who implicitly terminated the Second Contract by signing an employment contract with Club A during the validity of the Second Contract. Indeed, Article 18(5) FIFA RSTP provides as follows: "If a professional enters into more than one contract covering the same period, the provisions set forth in Chapter IV shall apply."

Since a football player can only be registered for one club at a time (Article 5(2) RSTP), the Panel finds that the Player's conclusion of an employment contract with Club A de facto terminated his employment relationship with Club Z.

Consequently, the Second Contract was implicitly terminated by the Player without just cause by signing an employment contract with Club A on 20 July 2019.

WHAT ARE THE CONSEQUENCES THEREOF?

Having determined that the Player did not have just cause to terminate the Second Contract, it is up to the Panel to determine the consequences thereof.

Article 17(1) RSTP provides for the consequences of terminating a contract without just cause. This provision is therefore the starting point to determine the compensation payable.

The Parties did not deviate from the application of Article 17(1) FIFA RSTP by means of a liquidated damages clause in the Second Contract. The compensation for breach of contract to be paid to Club Z by the Player is therefore to be determined in accordance with the parameters listed in Article 17(1) RSTP.

The Panel takes due note of previous CAS jurisprudence

establishing that the purpose of Article 17(1) FIFA RSTP is basically nothing else than to reinforce contractual stability, i.e. to strengthen the principle of pacta sunt servanda in the world of international football, by acting as a deterrent against unilateral contractual breaches and terminations, be it breaches committed by a club or by a player.

The Panel finds that the legal framework set out in Article 17(1) RSTP and the principle of positive interest are applicable to the present case and adheres thereto. Against this background, the Panel will proceed to quantify Club Z's objective damages, before applying its discretion in adjusting this total amount of objective damages to an appropriate amount, if deemed necessary, in particular in considering the Player's argument that the alleged contributory negligence of Club Z should result in the consequence that no compensation for breach of contract is to be awarded, or alternatively, that the amount of compensation is to be reduced with 75%.

While under contract with Club Z, the services of the Player represented a certain value to Club Z.

The Panel finds that there are different ways of assessing the value of the services of a player at the time of a breach. Article 17 FIFA RSTP itself makes clear that compensation for a breach shall be calculated with due consideration of any appropriate objective criteria, unless the parties have agreed in advance on the amount of such compensation. This is also in line with Swiss law, and with Article 43 SCO in particular. There is therefore no predetermined methodology to assess the value of the services of a player, because the reality is complex and in constant movement depending on many circumstances, including offer and demand.

One recognized method of assessing the value of the services of a player is to look at the transfer fee paid or offered "in non-suspicious times". However, one must take into account that such transfer fee is the result of very complex considerations of the parties involved. A club may ask for a higher transfer fee when transferring a player to a competitor than to another club. A receiving club may be willing to pay more for a player in order to lure the latter into a weaker league or if the "selling club" is willing to provide certain guarantees. In addition, an objective market value presupposes a perfectly functioning market and that – in addition - the market participants behave rationally. This, however, is not necessarily the case when looking at the transfer market. Thus, a transfer fee agreed upon is an indication for the value of the services of a player only to a limited extent and, therefore, must be assessed with great care. The latter is even more true if there has been only an offer for a transfer. In such case the transfer has not materialized. The reasons why a transfer may have failed are countless and proposal and counter proposals may be, under certain circumstances, only an indication of the objective market value of the services of a player. Offers, therefore, must be assessed even with greater caution.

There are of course also other (imperfect) methods to objectively assess the value of the services of a player at the moment of a breach.

Indeed, the FIFA DRC in the DRC Decision resorted to quantify Club Z's damages based on the average between the remaining value of the Second Contract and the value of the Player's employment contract with Club A, fictionally extended to match the remaining term of the Second Contract, plus the costs incurred by Club Z to retain a replacement of the Player.

While the method applied by the FIFA DRC may be an alternative to calculate the damages incurred, the Panel finds that, if applied "mechanically" and without due consideration of all the objective circumstances of the given case, it is not optimal.

In addition, it makes somehow the calculation of the potential

compensation due in case of breach quantifiable in advance, which is in principle against the deterrent effect and the core rationale of Article 17 FIFA RSTP.

In order to assess and quantify the amount of compensation due the Panel will therefore commence its analysis by assessing the evidence presented by Club Z in quantifying its damages by trying to determine the value of the Player's services at the moment of termination in an objective way.

TRANSFER OFFERS RECEIVED

The Panel notes that Club Z presented evidence of transfer offers received from third parties for the services of the Player dated 2 and 14 May 2019.

While the Panel has no particular reason to doubt about the authenticity of the offer, it finds that the origin of the offer is somewhat uncertain, in particular because it is not clear which clubs would allegedly be willing to pay such transfer fee. The Panel therefore finds that this offer does not constitute sufficient evidence in and of itself to establish that the services of the Player apparently had a value of EUR 6,000,000 on 2 May 2019. The counteroffer of EUR 9,000,000 sent by Club Z on 8 May 2019 is in any event of no relevance, as this counteroffer was apparently never accepted.

ANNUAL LOAN FEE PAID FOR THE SERVICES OF THE PLAYER

Resorting to the other evidence on file, the Panel finds that the loan fee paid by to Club Z is another reasonable indicator of the value of the services of the Player. Club Z was paid USD 1,200,000 and USD 2,300,000 respectively for the Player's services over the 2016/17 and 2017 /18 seasons.

The Panel notes that if the loan fee paid to Club Z is multiplied by the seasons remaining under the Second Contract, one arrives at an amount of USD 6,900,000 (3 x USD 2,300,000).

While this is to a certain extent evidence of the value subscribed to the services of the Player in a given season, the above calculation resulting in an amount of USD 6,900,000 is to some extent speculative and somewhat abstract, not least because the value of the services of a player normally decreases when the remaining term of the employment contract becomes shorter, i.e. Club Z would probably not have been able to receive a loan fee of USD 2,300,000 for the Player in the final year of the Second Contract. Furthermore, one must also take into account that permanent transfers and temporary transfers are very different legal concepts which may achieve very different fees on the market.

The Panel therefore finds, although acknowledging that this reasoning necessarily involves a certain degree of speculation, that a transfer fee somewhere around USD 6,000,000 offered to Club Z in May 2019 may not have been a completely unreasonable indication of the value of the services of the Player at the relevant point in time.

Considering this, the Panel finds that there is no reason to resort to the suboptimal method of quantifying Club Z's damages in an arithmetical way, simply based on the salary earned by the Player with all the involved clubs that was applied by the FIFA DRC in the DRC Decision.

Consequently, the Panel finds that the value of the services of the Player at the moment the Player breached the Second Contract was approximately around USD 5,000,000 to USD 7,000,000 and that, on a preliminary basis, this range is close to the objective damages incurred by Club Z by the Player's breach. However, in light of the reasoning that follows, the

Panel does not consider it necessary to come to a definite and precise conclusion as to the objective damages incurred by Club Z.

IS THE AMOUNT OF COMPENSATION PAYABLE TO BE MITIGATED DUE TO CONTRIBUTORY NEGLIGENCE?

The Panel finds that Article 44(1) SCO is applicable to the matter at hand as circumstances attributable to Club Z without any doubt exacerbated the position of the Player and that the amount of compensation payable by the Player to Club Z should be reduced as a consequence thereof.

Having quantified Club Z's damages and the amount of compensation for breach of contract that the Player should, in principle, pay to Club Z, the Panel will now analyse the extent of Club Z' s contributory negligence and determine which consequence this may have on the amount of compensation to be paid.

First, on 9 January and 20 June 2019, the Player sent written notices to Club Z concerning the validity of the Second Contract. Club Z failed to respond to these notices, which the Panel found reproachable.

Second, Club Z itself declared on 14 July 2016 on its official website that the First Contract with the Player had been extended for one season, i.e. on the same date that the Player's loan to was confirmed. However, it turns out that no second employment contract was concluded between Club Z and the Player on or around such date. Club Z's declaration however contributed to the uncertain contractual situation of the Player

Third, while Club Z allegedly reproached the Player by means of an undated letter for not attending training sessions as from 17 June 2019 and instructed him to report for a training camp as from 25 June 2019, Club Z provided no evidence that the Player had been instructed to report for training sessions as from 17 June 2019. The Panel considers this to be yet another example of Club Z's failure to adequately inform the Player of his obligations under the Second Contract.

Finally, as argued by the Player, the Panel notes that CAS jurisprudence has recognised that, in line with Article 337b(2) SCO, situations in which a unilateral breach of a contract cannot be deemed to have been caused exclusively by the conduct of one party, the Panel has to decide in its due discretion the financial consequences of such breach, taking into account all circumstances.

The Panel has carefully considered the circumstances listed above, both on the basis of Article 44(1) and Article 337b(2) SCO as well as its discretion to take into account subjective elements on the basis of Article 17(1) FIFA RSTP, and considers it just and fair that the compensation for breach of contract in the amount shall be fixed to USD 2,000,000.

At the same time, the Panel finds that Club A is to be held jointly and severally liable together with the Player to pay such compensation to Club Z.

IS CLUB B TO BE HELD JOINTLY AND SEVERALLY LIABLE TOGETHER WITH THE PLAYER AND CLUB A?

The Panel notes that Article 17(2) RSTP indicates that "the professional and his new club shall be jointly and severally liable". The term "new club" is defined in the RSTP as follows: "the club that the player is joining". Neither refers to the possibility of a player having multiple new clubs.

The new club of the Player after he left Club Z was Club A.

Club B is therefore, in principle, not the Player's new club in the sense of Article 17(2) RSTP.

However, the Panel finds that in case Club Z were able to prove that Club A, Club B and the Player had set up a scheme before the Player joined Club A, whereby it had been the intention that the Player would ultimately be registered with Club B, (which practice is generally referred to as a "bridge transfer"), this would be a practice justifying that Club B would have to be held jointly and severally liable as well.

CAS jurisprudence has also already dealt with the concept of "bridge transfer" in detail and emphasised that the sanctioning association or the one invoking the existence of such a transfer has the burden of proof to show that the club or other party has gained an economic benefit from participating in the bridge transfer, i.e. that the transfer was taking place (at least also) out of other interests than sporting interests.

While the Panel cannot exclude the possibility that a bridge transfer indeed took place, because there are certain factual elements allowing for some suspicions to this effect, such as for example the fact that the employment contract between the Player and Club A contained a provision allowing the Player to unilaterally terminate the employment contract with a 5-days' notice, which is quite unusual in the football industry, the Panel ultimately finds that Club Z provided insufficient evidence to conclude that a bridge transfer took place.

The Panel also notes that, while not directly applicable to the matter at hand, Article 5bis(2) RSTP was not triggered as the Player remained registered with Club A from 20 July 2019 until at least 27 November 2020, i.e. the date the Player unilaterally terminated his employment contract with Club A, before finally signing an employment contract with Club B on 1 January 2020. The Player's registration with Club A therefore lasted at least 18 weeks, which is a slightly longer period than the benchmark of 16 weeks allowing for a presumption that a bridge transfer took place.

Consequently, and in view of the above-mentioned principles of proof, the Panel finds that Club B is not to be held jointly and severally liable together with the Player and Club A to pay compensation.

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