Sports Law & Taxation

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Conflict of FIFA transfer rules with European free movement of workers and competition law

The "Diarra" case and its labour law implications for The Netherlands

BY F.M. DE WEGER[1]

Introduction

On 4 October 2024, the European Court of Justice issued its judgment in the so-called "Diarra" case, ruling that a number of provisions of the international transfer regulations of world football association FIFA are contrary to European law, in particular, free movement of workers and competition law. In this article, the author will discuss the employment-related implications that this judgment might have for sport in The Netherlands, more specifically Dutch professional football.

On 4 October 2024, the Court of Justice of the European Union ("European Court of Justice") delivered an important judgment in a lawsuit filed by French football player (and former international) Lassana Diarra ("Diarra") against world football association FIFA and the Royal Belgian Football Association.[2] The case saw another important ruling on sport and European law by the European Court of Justice, following the three previous rulings in late 2023 by the same Court of Justice in the cases of the *International Skating Union*[3], *FC Antwerp*[4] and *European Super League*[5].

More specifically, the Diarra ruling determined that a number of provisions in FIFA's transfer regulations ("FIFA's transfer regulations") are contrary to European law, in particular free movement of workers and competition law. In essence, the European Court of Justice ruled that certain provisions in FIFA's transfer regulations discourage football players from transferring to another club and were such as to deprive new clubs, to a very large extent, of the right to register new players.[6]

The comparison with the Bosman case[7], in which the European Court of Justice had ruled in 1995 that footballers should be able to transfer to a new club without any hindrance after the expiry of their employment contracts by not being obliged to pay a transfer fee anymore, quickly came to mind. The Diarra-ruling of the European Court was quickly labelled by many as "the new Bosman".

Although the Diarra judgment also contains interesting considerations in the field of European competition law,

1 Frans de Weger is an attorney-at-law registered at the Bar in The Netherlands and founder of BMDW Advocaten in Haarlem. He is an arbitrator at the Court of Arbitration for Sport ("CAS") since 2015. In 2021, De Weger was appointed as chairperson of the FIFA Dispute Resolution Chamber ("DRC") and the Dutch association "Vereniging voor Sport en Recht". In addition, he is the author of two editions of the book *The Jurisprudence of the FIFA Dispute Resolution Chamber*, published by T.M.C. Asser International Press, in which De Weger provides an overview of the relevant case law of the FIFA DRC since 2001 onwards in international employment law-related football disputes.

2 CJEU, 21 December 2023, *BZ v. FIFA and URBSFA*, case C-650/22, ECLI:EU:C:2024:824.

3 CJEU, 4 October 2024, *International Skating Union v. European Commission*, case C-124/21, ECLI:EU:C:2023:1012.

4 CJEU, 21 December 2023, *UL v. Royal Antwerp Football Club v. URSBFA and UEFA*, Case C-680/21, ECLI:EU:C:2023:1010.

5 CJEU, 21 December 2023, *European Superleague Company SL v. FIFA and UEFA*, Case C-333/21, ECLI:EU:C:2023:1011.

6 As to competition law, the Court held that the rules at issue have as their object the restriction, and even prevention, of cross-border competition which could be pursued by all clubs established in the European Union, by unilaterally recruiting players under contract with another club or players about whom it is alleged that the employment contract was terminated without just cause. The Court observed that, subject to verification by the Cour d'appel de Mons, those rules did not appear to be indispensable or necessary.

7 CJEU, 15 December 1995, *URBSFA v. Jean-Marc Bosman*, Case C-415/93, ECLI:EU:C:1995:463.

in this article, the author will specifically focus on the potential employment law related consequences the judgment might have for Dutch sport, more specifically for Dutch professional football. It is true that, after Bosman, the Diarra ruling is another step forward for football players in terms of further respect for the free movement of football players as workers. However, the main question is whether it is to be expected, with the Diarra ruling in hand, that footballers in The Netherlands can unilaterally terminate their employment contracts with their Dutch employers more easily and more cheaply, as is suggested by some (experts and media) after the ruling. For the time being, the author thinks this is a bridge too far and he does not expect that "Diarra" will ultimately have the same impact as was the case with the Bosman ruling at the time.

Before addressing the legal consequences in more detail, in this article, the author will first discuss the Dutch laws and regulations and the deviations that apply in Dutch football compared to regular Dutch employment law. In particular, the author will set out in more detail how The Netherlands regulates the unilateral termination of employment contracts between football players and the Dutch clubs. Also having in mind that the European Court of Justice, in its judgement, underlines the relevance of national law. It should be noted here that FIFA has already reacted quickly and, in the meantime, made temporary adjustments to the transfer regulations, applicable with immediate effect, from which it also follows that national laws can now play a more dominant role.

Football-specific laws and regulations in The Netherlands

As a starting point, Dutch law stipulates that a temporary employment contract cannot be terminated unilaterally in the interim by either party, unless the parties have expressly agreed to this in writing in the employment contract. This explicitly follows from art. 7:667(3) of the Dutch Civil Code. If, despite the presence of such an interim termination clause, a party nevertheless terminates prematurely, the terminating party will owe the other party compensation. Dutch law has stipulated in art. 7:677(4) of the Dutch Civil Code that the compensation in that situation is then equal to the amount of the salary fixed in money over the period that the employment contract would have lasted if it had ended by operation of law. As a rule, this is often referred to as *"the residual value of the contract"*. The above thus applies to notices of termination, but also with regard to *requests for dissolution*, the law provides – more specifically in art. 7:671c (3) (c) of the Dutch Civil Code – that the subdistrict court may award the employer compensation equal to the same *"residual value of the contract"* if a temporary contract without an interim clause is dissolved at the employee's request.

In Dutch football, however, there are two peculiarities, in light of the above general framework.

First, employment-related football disputes are generally not submitted to the ordinary courts. In fact, football players and clubs have standard (mandatory) arbitration clauses in their contract stipulating that disputes, to the exclusion of the civil court, will be settled by the KNVB8 Arbitration Committee. In other words, it is not the Dutch civil court that is competent to deal with the matter, but the KNVB Arbitration Committee that has the final say – literally, as appeals are not possible.[9]

Secondly, player contracts in principle never have an interim termination clause included within the meaning of the law. It would be going too far to discuss the background to this (too) extensively in this article, but in essence, it boils down to the fact that the statutory chain rule regarding employment contracts between players and clubs has been eliminated by a Ministerial Regulation.[10] Therefore, no employment contracts for an indefinite period of time arise under that regulation.

The underlying reason for this, according to the Ministerial Regulation itself, is that without the possibility of entering into an unlimited number of fixed-term employment contracts (without the possibility of early termination), professional football organisations have insufficient certainty retaining their contract players. If, as a result of the chain-of-contract provision, an employment contract for an indefinite period were to be created, this contract could be terminated by the employee at any desired moment, subject to one month's notice. In short, if that were possible, it would have negative consequences for the continuity of (the implementation of) the technical policy of a professional football organisation – and thus on its business operations – and could under these circumstances lead to serious financial damage and, consequently, be detrimental to sporting continuity, according to the Ministerial Regulation.[11] In other words, the Ministerial Regulation has thus made it possible in Dutch professional football to conclude an unlimited number of temporary employment contracts (without the possibility of interim termination) with, amongst others, football players without subsequently creating an employment contract for an indefinite period of time.

Thus, in summary, in Dutch football we have to deal with:

- the Arbitration Committee of the KNVB (instead of the civil courts), and
- the situation that players and clubs generally conclude fixed-term employment contracts without an interim termination clause.

8 *Koninklijke Nederlandse Voetbal Bond* – Royal Netherlands Football Assciation.

9 Subject to the possibility of lodging extraordinary legal remedies, *i.e.* revocation or annulment, before the Arnhem-Leeuwarden Court of Appeal (see art. 1064-1068 of the Dutch Code of Civil Procedure).

10 See *Government Gazette 2015, 17972* | *Overheid.nl* > *Official announcements.*

11 The Ministerial Regulation states that this not only harms professional football organisations, when it comes to players retention and thus sporting continuity, but it also affects the current system of fees payable in the event of changes, thus jeopardises the survival of the sector.

Then the interesting follow-up question is what the consequences will be in terms of the amount of compensation if a player unilaterally breaks his employment contract (without an interim termination clause) under Dutch law.

The legislator has deviated on that point as well. Whereas, as a rule, the "(ordinary employee" has to pay the residual value in case of termination (and dissolution), as explained above, this is again different for football players. This is because art. 7:677(6) of the Dutch Civil Code contains an exception. This exception provides that the court (the KNVB Arbitration Committee) can award a higher compensation in case a professional football player (who is registered as such at the professional football department of the KNVB) has terminated irregularly, in short, if the player has terminated the player contract without an interim termination clause. Similarly, art. 7:671c (4) of the Dutch Civil Code provides the same when it concerns a request for dissolution of the contract.

The expected labour law implications in The Netherlands after the Diarra ruling

The question now is to what extent "Diarra" will actually have an impact on the legal situation in The Netherlands. Having in mind the above legal framework, that really remains to be seen. As set out before, for the time being the author does not think that the Dutch situation will be directly affected.

In any event, there is no doubt that in The Netherlands the above-mentioned specific football legislation applies which does not change with the Diarra ruling. Indeed, as noted in the introduction, even more importance should be given to the applicable national law following the Diarra ruling, which also follows from the new temporary rules as implemented by FIFA in the transfer regulations. Therefore, it makes sense to anticipate what might be expected from the Arbitration Committee of the KNVB, as the body dealing with the employment-related cases between players and Dutch clubs in accordance with Dutch law, as set out above, when facing disputes whereby an employment contract between a player and a Dutch professional club is unilaterally terminated without just cause.

To start with, no disputes in relation to unilateral termination has come before the Arbitration Committee of the KNVB after Diarra. Looking at the "pre-Diarra disputes", the author is also not aware of any case law of the KNVB Arbitration Committee on the basis of which compensation was determined in the past after unilateral termination of a player's contract in a dispute between a player and a Dutch professional football club in order to have some direction as to how the court will deal with such cases after Diarra. The author does, however, see a very clear and consistent line in the KNVB arbitration case law as to dissolution requests filed by players in the "pre-Diarra era".

From these dissolution cases, it can be derived that the bar for proceeding to dissolution of contracts is high and that the KNVB Arbitration Committee attaches much importance to the so-called *"pacta sunt servanda"* principle. Such dissolution requests are, so the KNVB case law shows, not easily granted, to say the least, let alone if such requests were made by players during the football season.[12]

Having in mind this reluctant approach as to dissolution requests, it is not ruled out that "pacta sunt servanda" will also be highly valued by the KNVB Arbitration Committee in relation to unilateral terminations without just cause. As a side step and although outside football, in a Dutch ice hockey case, which came before the Dutch arbitration court of the ice hockey federation recently (but before Diarra) and in which case the ice hockey player unilaterally terminated his contract without just cause, the court did not even accept the termination by the ice hockey player as the termination was considered as undesirable and not in line with good manners in ice hockey. The arbitration court emphasised that the sporting consequences could not be taken lightly, and unilateral termination could only be accepted under exceptional circumstances. For this reason, the Dutch arbitration court ruled that, in light of the specific circumstances of the case, the termination could not take effect.[13] It is worth mentioning that the termination of the ice hockey player even took place after the season.

By the same token and in light of the highly valued *"pacta sunt servanda"* principle, the author does not rule out either that the KNVB Arbitration Committee will be more critical as to unilateral terminations during the season, similar as with its approach in the cases related to dissolution requests[14], also having in mind that it follows from the Diarra ruling that a prohibition of unilateral termination of employment contracts in the course of a season or even a given year, which probation explicitly follows from FIFA's transfer regulations, seems to be legitimate and acceptable in light of stability of the composition of the pool of players used by clubs in the course of a given season.[15]

Be that as it may, it really remains to be seen whether the unilateral termination by players in The Netherlands will actually be accepted more easily, as is suggested by some, after the Diarra ruling. Once the termination is accepted and it comes down to the amount of compensation to be paid by the player to the club for the termination without just cause, it is just as important to know the approach of the KNVB Arbitration Committee as to their determination of potential compensation.

In this respect, the author first wishes to draw attention to the fact that the temporary amendments to FIFA's transfer regulations – more specifically, the new art. 17(1) – leave

12 See, *inter alia*, KNVB Arbitration Court, 2 February 2006, no. 1100, and 31 January 2011, no. 1302.

13 Arbitration Court of the Dutch Ice Hockey Federation, 6 September 2024, IHBNL 2024.2.

14 See, *inter alia*, KNVB Arbitration Court, 2 February 2006, no. 1100, and 31 January 2011, no. 1302.

15 See para. 144 of the Diarra ruling.

ample room to determine the amount of compensation and, in this regard, no specific parameters are further given other than the more general *"positive interest principle"* (the so-called positive contractual interest). The KNVB Arbitration Committee does therefore not seem to be further constrained in that respect either, keeping in mind that the FIFA regulations will also have so-called consequential effects at national level in the football-related cases, as previously decided, several times, in KNVB case law.

In line with FIFA's *"positive interest principle"*, as implemented in the FIFA regulations, the author does not even rule out that actual damages incurred by a club will be taken into account by the KNVB Arbitration Committee. In this respect, the author notes that reference was made to the actual damages that were potentially incurred by an amateur club in a case before the KNVB Arbitration Committee in 2024. Although it was established that no damages were incurred by the respective amateur club, so found the committee, the interesting question is what if it could be established that damages were incurred by a club as a consequence of a unilateral termination without just cause.[16]

As to the amount of compensation, the author is fully aware that the Diarra judgment refers to the residual value of the contract as potential compensation that would have to be paid after unilateral breach of contract, with the European Court specifically referring to the Law of 24 February 1978 on the employment contract of remunerated sportsmen and sportswomen, which prescribes *"residual value"* in case of wrongful breach of contract. In this regard, the author is also aware that the Dutch legislator did not prescribe the manner in which higher compensation on top of residual value should be calculated thus leaving it to the KNVB Arbitration Committee to determine the compensation after a unilateral termination without just cause, which is now seen as problematic by some after Diarra.

Notwithstanding the above, the fact that the European Court of Justice considered that the amount of compensation for a termination without just cause cannot be highly unpredictable, does not in itself and per definition mean that the compensation should thus be highly predictable as from now. In fact, and apart from the fact that one should also keep in mind that it also was the combination of the former provisions of FIFA's transfer regulations that made the European Court state that that set of rules would result in significant legal risks, unpredictable and potentially very high financial and major sporting risks, the Diarra ruling did not rule out that the compensation could vary based on the specific circumstances of the case. Put differently, *"residual value"* does not seem to be set in stone by the European Court of Justice. The author, also for this reason, expects that the KNVB Arbitration Committee will still base its legal assessment of the validity of any future unilateral terminations of a player contract and its financial consequences on the specific circumstances of each and every case. Therefore, in the eyes of the author, it is not to be expected that, in all unilateral termination cases, *"residual value"* is the maximum amount for the KNVB Arbitration Committee, bringing in mind again that it has the legal tools to award more based on Dutch law. It seems like a realistic scenario that the specific circumstances of each and every case, whereby a contract is unilaterally terminated without just cause, might give rise for the KNVB Arbitration Committee to award more than *"residual value"*.

For example, the author does not rule out that the KNVB Arbitration Committee will still find relevant in its assessment of the financial consequences whether the employment contract was unilaterally terminated within or outside the Protected Period (which principle remained unaffected by the Diarra ruling and is justified by the pass-through of the international regulations at national level). By the same token, it cannot be ruled out either that the KNVB Arbitration Committee will find the point in time relevant for the amount of compensation (think of a player terminating his contract without just cause on the final day of a transfer period). Although it is not to be expected that the KNVB Arbitration Committee will follow the same route as the Dutch arbitration court of the ice hockey federation did in its case, in which said court did not even accept the unilateral termination by the ice hockey player, the point in time of the termination might still have its effect on the compensation.

In conclusion, it also remains to be seen whether the unilateral termination by players in The Netherlands will actually also become more cheaper, as is suggested by some, after the Diarra ruling.

Final remarks

Although the Diarra ruling does represent another step forward in terms of further respect for the European free movement of football players as workers, the author does not expect that, for the time being, the ruling will directly change the (legal) situation in The Netherlands. Having in mind that the KNVB Arbitration Committee will be the designated body to decide on such cases in The Netherlands based on Dutch law, the author does not think that players can unilaterally terminate their employment contracts with their Dutch employers more easily and more cheaply per se.

Even if, after Diarra, *"residual value"* amounts might be more likely to be adhered to, it should not be left unmentioned either that even amounts of compensation in terms of *"residual value"* can still be substantial from an objective point of view. In fact, if a football player earns a high salary, such player will generally also have to pay a high amount in terms of his *"residual value"* if the employment contract is unilaterally terminated without just cause. In this regard, one should also not forget that the Diarra ruling stipulated that new clubs could no longer automatically be held jointly and severally liable with the player for the payment of compensations resulting from the player's unilateral severance, which has also since been amended and now follows from the new temporary regulations to adhere to the European law standards

16 See KNVB Arbitration Court, 19 July 2024, no. 1608.

following the Diarra ruling. Therefore, especially now, in combination with the disappearance of this "co-debtor-rule", *"residual value"* amounts will (even) weight (more) heavily on players. This might even create an extra hurdle for players to make the decision to unilaterally terminate their player contracts, especially for those who will not easily find a new club and whose incomes will come to a standstill or even drop backwards with their new clubs.[17]

As a take-away in light of *"residual value"* amounts, and to keep an eye close on Dutch (labour) law and the consequences the Diarra ruling might have in The Netherlands: in the extremely hypothetical situation that the Diarra case would have been dealt by the KNVB Arbitration Committee for the determination of compensation for the unlawful breach of contract to be paid by Diarra, still an amount of € 16,588,600 (or even a higher amount based on Dutch law) could have been ordered in accordance with Dutch labour law. After all, that was the residual value of Diarra's employment contract at the time his contract was unilaterally terminated. That may sound like a lot – and of course it obviously does (!) – but such an amount to be paid to his former club by Lassana Diarra would then still have been entirely in line with the legal framework under Dutch employment law.

To conclude, the author wishes to note that there is still every legal scope for players and clubs to include specific provisions in employment contracts whereby concrete agreements are made on the financial consequences in case of a unilateral termination in future. Consider, for example, the inclusion of the termination compensation in the player contract. Dutch employment law, by no means, prohibits such provisions, as also clearly decided in the KNVB arbitration case law. Incidentally, that possibility is also kept fully open from the perspective of the new FIFA regulations. It is to be expected that these kinds of provisions will only reappear even more in Dutch player contracts, so that both the players and clubs can keep control, to a certain extent, over the future compensation.

17 Let alone many other aspects which should also not be ignored, such as the fiscal implications when having no co-debtor, the imposition of sporting sanctions that can still be applied (under circumstances), and non-legal reasons by leaving the club without creating a dispute.