

28. FIFA's regulation of third-party influence and third-party ownership

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I. Introduction

In the 2015 version of the Fédération Internationale FIFA's Regulations on the Status and Transfer of Players (RSTP), Article 18bis, which had existed since 2008, was expanded in a meaningful way to include the possibility of sanctioning of the party acquiring influence over the club's decision-making process. This amendment was necessary because the wording from 2008 only allowed for the club to be sanctioned.

Article 18bis of the RSTP provides as follows:

1. No club shall enter into a contract which enables the counter club/counter clubs, and vice versa, or any third party to acquire the ability to influence in employment and transfer-related matters its independence, its policies or the performance of its teams.
2. The FIFA Disciplinary Committee may impose disciplinary measures on clubs that do not observe the obligations set out in this article.

Further to this and to avoid misunderstanding, the jurisprudence of FIFA and the Court of Arbitration for Sport (CAS) shows that any violation under Article 18bis of the RSTP occurs as soon as the contractual ability has been granted or acquired to exercise influence over a club's decision-making process on employment or transfer-related matters. In other words, it is not relevant (and a mistake to think) that any such influence must have been crystallised in practice. In fact, it is irrelevant if any influence was actually carried out or not (see, for instance, CAS 2021/A/8076). In contrast, if a contractual provision does not grant any influence, then no violation will, in principle, exist.

Additionally, FIFA found that entering into contracts that grant a third party a percentage of a player's economic rights jeopardises the transparency of (international) transfers and puts the transparency of football at risk. As a result, aiming to prevent the phenomenon of

speculative investment by persons or entities from inside or outside the football structure, FIFA decided to implement Article 18ter into the RSTP in 2015.

Initially, a third party was defined as 'a party other than the two clubs transferring a player from one to the other, or any previous club, with which the player has been registered'. On 26 June 2018, FIFA issued a media release announcing that the FIFA Disciplinary Committee had decided in multiple cases that players were not to be considered a 'third party' in the sense of Article 18ter of the RSTP. In these cases, the clubs had concluded contracts that entitled the relevant players to receive compensation in the case of their future transfer to another club. The FIFA Disciplinary Committee considered that the compensation had to be seen as part of the remuneration due under the players' employment contracts with their clubs. Since then, players are no longer considered any longer third parties with respect to their own future transfers and are entitled to receive a lump sum or a percentage of the transfer fee in relation to their future transfer.

Article 18ter of the RSTP provides as follows:

1. No club or player shall enter into an agreement with a third party whereby a third party is being entitled to participate, either in full or in part, in compensation payable in relation to the future transfer of a player from one club to another, or is being assigned any rights in relation to a future transfer or transfer compensation.
2. The interdiction as per paragraph 1 comes into force on 1 May 2015.
3. Agreements covered by paragraph 1 which predate 1 May 2015 may continue to be in place until their contractual expiration. However, their duration may not be extended.
4. The validity of any agreement covered by paragraph 1 signed between one January 2015 and 30 April 2015 may not have a contractual duration of more than one year beyond the effective date.
5. By the end of April 2015, all existing agreements covered by paragraph 1 need to be recorded within the Transfer Matching System (TMS). All clubs that have signed such agreements are required to upload them in their entirety, including possible annexes or amendments, in TMS, specifying the details of the third party concerned, the full name of the player as well as the duration of the agreement.

6. The FIFA Disciplinary Committee may impose disciplinary measures on clubs or players that do not observe the obligations set out in this article.

Not many decisions have come before FIFA's disciplinary bodies related to Article 18ter of the RSTP, whilst the number of cases before these bodies in relation to Article 18bis of the RSTP has been much more significant, especially as of 2015 (when the provision was amended, as set out above). In this entry, the most relevant decisions will be discussed, more specifically the cases before the CAS.

II. Compatibility with freedom of capital and freedom of contract

It is without a doubt that the above provisions seriously limit fundamental rights in light of the freedom of capital (and thus the freedom to conduct business) and the freedom of contract. In one of the leading cases before the CAS, i.e. CAS 2016/A/4490, the Belgian club RFC Seraing argued that Articles 18bis and 18ter of the RSTP were contrary to EU law and Swiss law. First, the CAS panel held that the Treaty on the Functioning of the European Union (TFEU) invoked by RFC Seraing is applicable to the regulatory activity of FIFA, and that Articles 18bis and 18ter of the RSTP constitute a restriction on the movement of capital relating to club funding. Subsequently, it focused on determining the legitimacy of the objective pursued as well as the necessity and adequacy of the measures in question to achieve this objective. In this regard, the panel noted that FIFA relied on several legitimate objectives pursued by 18bis and 18ter of the RSTP, namely, the preservation of the stability of players' contracts, the guarantee of the independence and autonomy of clubs and players in transfers, the safeguarding of integrity in football and fairness of competitions, preventing conflicts of interest, and maintaining transparency in player transfer transactions.

As FIFA convinced the panel that alternative measures to the ban on clubs and players from entering into third-party ownership (TPO) financing schemes do not appear reasonably capable of achieving the objectives pursued, and in the absence of a decision of a court or European institution concluding that Articles 18bis and 18ter of the RSTP

violate EU law, the CAS panel decided that the restrictions imposed by Articles 18bis and 18ter of the RSTP were justified and permitted under EU law (cf. CAS 2017/A/5463), further confirmed by the Swiss Federal Tribunal (SFT) (SFT 144 III 120). The legal debate about the permissibility of the articles 18bis and 18ter under EU law, and FIFA's autonomy to impose these (restrictive) rules and enforce them via its own bodies and the CAS is still ongoing (see, CJEU C-600/23 (*Royal Football Club Seraing v FIFA & URBSFA*)).

In another case before CAS, i.e. CAS 2020/A/7417, the compatibility of Article 18bis of the RSTP with the freedom of contract under Swiss law and the interpretation of the concept of 'influence' were discussed. In this case, the English club Arsenal Football Club had signed multiple transfer agreements in which it agreed that it would be entitled to a sell-on percentage in case the relevant player made a subsequent transfer. However, it made a distinction between the situation in which a player was transferred to a football club in the UK, in which case the percentage was slightly higher, and clubs outside the UK. As the higher percentage might have financial implications for the new clubs, the FIFA Disciplinary Committee and Appeals Committee decided that such 'anti-rivalry clauses' constituted an infringement of Article 18bis of the RSTP.

The CAS panel, however, disagreed and held that, whilst it is possible for FIFA to set limits on the contractual freedom of entities that are subject to the FIFA rules and regulations by prohibiting the conclusion of agreements that may jeopardise the integrity and/or the independence of clubs, such restrictions must be balanced with the principle of contractual freedom under Swiss law. In light of the foregoing, the CAS panel stressed that an unsubstantial possible influence should not be considered a violation of Article 18bis of the RSTP. Instead, the influence at stake has to concern an interest worthy of protection to safeguard the integrity of the competition as a whole.

Therefore, based on this CAS award, it can be concluded that the potential influence must be material, and a financial provision in a freely negotiated transfer contract, which restricts the financial freedom of the new club to some extent, does not automatically constitute a violation of Article 18bis of the RSTP as long as the influence remains below a certain threshold. In this case, as the

additional percentage was very modest, the CAS panel was not convinced that the influence reached the required threshold (see also CAS 2020/A/7008). As a result, whether a specific situation entails a ‘material influence’ in order to establish the existence of an infringement of Article 18bis of the RSTP needs to be assessed on a case-by-case basis.

III. Examples of violations

Several types of violations can be recognised. Some examples concern clauses restricting the new club with respect to the future transfer of a player; clauses linked to selection in matches; clauses obliging the club to communicate certain information; and clauses with the obligation for a club to transfer/release a player under certain conditions. With regard to some clauses, it is clear that they are permitted under the RSTP. For example, in decisions of FIFA’s judicial bodies, it is consistently held that a right of first refusal, a buy-back option, a performance-related bonus, and a conditional purchase obligation are no violations of Article 18bis of the RSTP. On the other hand, the permissibility of some types of clauses is dependent on the specific circumstances of the case. In some cases, the obligation of a club to share sensitive medical information, or prohibiting a club from transferring a player until a transfer fee is fully paid, seemingly minor infractions, may be deemed violations of Article 18bis of the RSTP by FIFA. This will, in essence, be dependent on the amount of influence exerted in each specific situation.

In loan agreements, for example, the lending club often wants to trigger the club hiring a player to regularly field him in order for him to develop. In such a case, according to FIFA’s decisions, a ‘performance fee’ payable by a club, which was gradually lowered until zero if the player made more appearances, was found to be permissible under Article 18bis of the RSTP, as it merely incentivised the hiring club. By contrast, clauses by means of which clubs have to pay an additional ‘penalty amount’ in case a player is not fielded for a particular number of matches have been considered to be a violation of Article 18bis of the RSTP as they force a club to field a player by economic consequence (see CAS 2021/A/8306). By the same token, CAS jurisprudence shows that sell-on clauses securing a minimum amount at which a club is

obliged to transfer a player or pay a fee based on the offer submitted to the club will not be accepted (see CAS 2015/A/4490).

These examples merely emphasise that there is a thin line, or in other words a sliding scale, between incentivising a party to conduct certain behaviour, which is in line with Article 18bis of the RSTP, and forcing them to conduct behaviour, which is not permitted.

IV. Contractual consequences of violations

Articles 18bis and 18ter of the RSTP are separate provisions, and a breach of one of these provisions does not establish *per se* that the other provision is also violated.

Further to this, the CAS jurisprudence on the impact on the validity of contracts of a potential violation of Article 18bis of the RSTP suggests that, whilst a violation of Article 18bis of the RSTP may be grounds for a disciplinary sanction, it will not render the relevant contractual provision null and void. In this regard, the CAS panel in CAS 2018/A/6027 explained that

Article 18bis is not concerned with the issue of the validity and/or the binding nature of the contractual provisions enabling a party to an agreement to exercise undue influence to its counter party-football club. This is a matter to be settled under the applicable law ... It is perfectly possible that said contractually agreed provisions are enforceable under a set of applicable (civil law) rules and at the same time fall foul of Article 18bis of the FIFA Regulations (which at any case does not and cannot determine whether they are illegal, invalid or unenforceable).

(see also CAS 2019/A/6187&6189; CAS 2021/A/8306)

V. Future developments

Some new technologies or fixed customs in the football industry raise questions as to their permissibility under Articles 18bis and 18ter of the RSTP. Three important subjects will be highlighted hereinafter.

First, new technologies are being implemented in the football industry to attract capital and increase the fanbase. Without delving too deeply into the technological side of this particular topic, a fan token is a digital item by means of which a third party (for instance, a fan of a football club) acquires a set of benefits from the club. So far, these benefits are

very much similar to loyalty programmes and authorise the holders of fan tokens to 'vote' and decide on several issues such as the colour of the away kit for the next season or the design of the entrance tunnel of the field.

However, if the benefits derived from these tokens are more directly related to team management or operations, they might be contrary to Articles 18bis and/or 18ter of the RSTP. Furthermore, we have seen some clubs and entities preparing the offer of cryptographic tokens which will be used for 'investment in player's rights, acquiring them, selling, and getting profit'. It can be disputed and questioned if the offering of such tokens is in line with Article 18ter of the RSTP.

Second, in addition to a player being entitled to an amount dependent on his future transfer, football agents also often wish to be paid and want to benefit in case a player makes a subsequent (future) transfer. Therefore, when a player signs an employment contract with a club, it is common within the football industry that a club undertakes in advance, non-exclusively, to engage the services of his agent in case of a future transfer of the player. In most cases, a lump sum payment schedule is agreed upon in advance, which often entails a lump sum gradually increasing dependent on the transfer compensation the club will receive. In case the club eventually decides to engage another agent, it is agreed in advance that the club will pay the agent compensatory damages equal to the amount that would have been due in accordance with the payment schedule. Since the payment schedules often come down to payment obligations similar to receiving a percentage of a player's transfer fee, it may also be disputed whether this practice is in line with Article 18ter of the RSTP (see also Articles 16(3)e and 16(3)g of the FIFA Football Agent Regulations). However, so far, no cases are known to the authors in which FIFA sanctioned a party as a result of such lump sum agreement.

Third, another practice that is prevalent in the football industry consists of third parties who provide funding for the entire squad of a club and gain a claim on the profits of the transfer income of the entire squad. Whilst Article 18ter of the RSTP is drafted in the singular ('a player') and this practice concerns a group of players, the question could still be raised if this course of action is in line with Article 18ter of the RSTP. However, also in these matters, there are no cases known to the authors in which FIFA convicted a party as a result of this practice. It will be interesting to see whether such clauses will be accepted in the future, all the more so because the FIFA judicial bodies will not only take into consideration the clauses in a singular case but also in a more systematic approach.

Bibliography

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