

Principles deriving from “Exchange of Players” jurisprudence



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In this article, the authors will focus on the situation whereby clubs choose to exchange players without the imposition of any direct financial obligations, i.e. transfer fees. In this regard, all the published jurisprudence of the FIFA Dispute Resolution Chamber and the Court of Arbitration for Sport will be discussed. After the case-law is discussed, a further analysis will follow. More specifically, the principles that derive from the jurisprudence so far, the legal pitfalls and potential solutions will be highlighted.

Introduction

A very interesting phenomenon is the occurrence of the exchange of players, whereby clubs choose to swap players without the imposition of any direct financial obligations, i.e. transfer fees. Situations involving player exchanges have presented new legal questions and challenges before sports tribunals given the uncertainty of equating an economic value to a transfer where no explicit monetary value is attached. The FIFA Regulations on the Status and Transfer of Players (RSTP) are silent as to the question of how the exchange of players should be treated, namely if these exchanges necessitate the payment in relation to sell-on clauses or solidarity contributions. If such payments are prescribed, issues arise over how to equate a player to an economic figure in order to abstract any payments due. This ambiguous topic within football transfers thus requires further scrutiny as to how player exchanges are treated in jurisprudence so far, and how the exchange of players may affect subsequent transfer “trade-offs” in the near future.

This article examines and focuses on player exchanges with respect to the FIFA Dispute Resolution Chamber (DRC) and the Court of Arbitration for Sport (CAS) jurisprudence pertaining to the matter. There are currently no published FIFA Players’ Status Committee (PSC) decisions on the issue. In this article, the relevant decisions will be discussed in a chronological order so that the reader may have an overview of the existing jurisprudence of the DRC and the CAS so far. After these decisions are discussed, a further analysis will follow. More specifically, the principles that derive from the case-law and the legal pitfalls will be highlighted.

DRC jurisprudence

FIFA DRC, 12 January 2007, no. 17630²

In the first case to discuss, player Y had played at Club X (the claimant) for four seasons, from 7 May 1991 to 3 January 1995. Via a contract signed on 24 February 2005, player Y was transferred from Club A (the former club) to Club Z (the respondent). Club X requested the DRC to require the respondent to pay the amount

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² <https://resources.fifa.com>

owed as solidarity contribution to the claimant, given the transfer of player Y. The respondent submitted that player Y was exchanged with player B, while no transfer compensation was paid to Club A, and since there was no compensation paid to the former club, the claimant was not owed any solidarity contribution.

” A transfer contract equates to a bilateral agreement, whereby there is a mutually agreed upon exchange of obligations between the parties “

The Chamber acknowledged that a transfer contract equates to a bilateral agreement, whereby there is a mutually agreed upon exchange of obligations between the parties. Furthermore, the DRC underlined that the exchange of players implies an indirect financial agreement, because the relevant qualities of the players have financial value in the football employment market. Given these financial implications, the Chamber finally determined that the respondent was required to pay the claimant its due solidarity contribution, as required under the RSTP, 2001 edition. The assessed transfer value from which the 5% solidarity contribution was to be based was EUR 1,750,000. The DRC determined this to be the appropriate figure, because the respondent agreed to compensate the former club EUR 1,750,000 in the event that the player B’s medical examination results were not satisfactory enough to permit him to play football.

FIFA DRC, 9 January 2009, no. 19442a³

In this second case, player K was registered with Club A (the claimant) from 2 August 2000 to 3 August 2005. Player K was transferred from Club V to Club L (the respondent) on 3 January 2006, in exchange for the player J, who was transferred from the respondent to Club V, while registering on 5 January 2006. The claimant lodged a claim on 28 March 2006 against the respondent for the payment of the solidarity contribution corresponding to the transfer of player K from Club V to the respondent. The respondent contended that since there was merely an exchange of players with no financial compensation being paid to Club V, nothing was due.

In line with the first decision of the DRC of 12 January 2007, the Chamber noted that a transfer contract represents a bilateral agreement, thus implying a mutual exchange of obligations between the parties, namely, the exchange of players. This exchange constitutes

an indirect financial agreement, because the players’ sporting qualities have an attached economic value in the football employment market. Article 1 of Annex 5 of the RSTP, 2005 edition, relating to solidarity contributions, is not to carry a strict interpretation to the detriment of the underlying principle of the article itself, nor does such interpretation reflect the *ratio legis* of the legislator. Thus, the Chamber further delineated in this case that the solidarity mechanism cannot be circumvented in the exchange of players, and so the respondent was deemed obliged to pay the required solidary contribution to the claimant. Furthermore, the Chamber determined that the value of the transfer should be deduced by averaging the transfer compensation paid for the player K to Club V (EUR 6,465,000) and the transfer compensation paid for the transfer of player J to the respondent (EUR 3,150,000); as such, the solidarity contribution to be paid should be calculated on the basis of the gauged transfer compensation of EUR 4,800,000.

FIFA DRC, 9 January 2009, no. 19442b⁴

In this third case, player K was registered with the Club G (the claimant) from 1 July 1995 to 2 August 2000. On 3 January 2006, the player was transferred from Club V to Club L (the respondent), registering there on 5 January 2006. Rather than transfer compensation, the agreement called for the exchange of player K from Club V for player J, who was registered with Club L. Club G lodged a claim against the respondent in front of the DRC on 28 March 2006 for the payment of solidarity contribution stemming from the transfer of player K from Club V to the respondent. The respondent retorted however that no solidarity compensation was due, because no compensation - from which the solidarity value would be taken - was paid to Club V.

” The exchange of players constitutes an indirect financial agreement, as the sporting qualities of the players carry an economic value in the football employment market “

The DRC determined, in line with the jurisprudence so far, that any transfer contract represents a bilateral agreement, which furthermore implies a mutual exchange of obligations between parties involved. The exchange of players in the case at hand constitutes an indirect financial agreement, as the sporting qualities of the players carry an economic value in the football employment market. As such, the Chamber concluded that a solidary payment was due to the claimant.

³ <https://resources.fifa.com>

⁴ <https://resources.fifa.com>

Furthermore, in determining the transfer value of the exchange of players, the DRC found that the assessed transfer compensation should be the average value of the transfer compensation paid for player K to Club V (EUR 6,465,000) and player J to the respondent (EUR 3,150,000), which equals EUR 4,800,000; the 5% solidarity compensation stems from this transfer value.

FIFA DRC, 17 August 2012, no. 812019⁵

In the third case at hand, player J was registered with the Club S (the claimant) from 3 March 1994 until 30 January 2004. He was further registered with Club R (the respondent) on 1 September 2006. The claimant lodged a claim against the respondent for the payment of a solidarity contribution connected to the transfer of player J from Club A to the respondent, which was made on a loan basis for the 2006-2007 season, in return for the transfer of player B from the respondent to Club A. The respondent rejected this claim by relying on Article 1 of Annex 5 of the RSTP, noting that solidarity compensation derived from transfer compensation. The respondent argued that since there was no compensation, the transfer of player R carried no economic value and so no such solidarity payment was due by the respondent to the claimant. Meanwhile, the respondent rejected that there was an exchange between players J and B, insisting that it had loaned player B to Club A without the payment of a loan fee, because there was no availability on its team at the time for a non-European player. The respondent further noted that Club A wanted player J to play for another club for sporting reasons. Club A further supported the respondent's position and claimed that the two transfers were included in the same transfer agreement for practical reasons only, thus not denoting a player exchange.

The Chamber noted, in line with the aforementioned jurisprudence, that, as a general principle, any transfer agreement - including a loan agreement - represents a bilateral agreement, and consequently, a mutual exchange of obligations between the parties. Given the signing of the loan agreement, which the Chamber stated is subject to the same provisions on solidarity mechanisms as are transfer agreements based on Article 10 of the RSTP, 2005 edition, the parties agreed upon a mutual exchange of obligations. This agreement furthermore indirectly implied a financial agreement, as the relevant qualities of the player carry an economic value in the football employment market. The Chamber stressed that the provisions regarding solidarity mechanisms apply to all transfer agreements, whether

permanent or temporary, and thus the claimant was entitled to a solidarity contribution on the basis of the respective loan agreement.

The Chamber next considered how to determine the financial value of the exchange of players. The Chamber noted that in the exchange for the loan of player J from Club A to the respondent, the respondent had “paid” Club A with player B, and as such, the Chamber had to calculate the appropriate market value of player B, as he was the “*compensation paid*” for the loan of player J from Club A to the respondent. Given that player B had been transferred from the claimant to the respondent for EUR 24,500,000, this amount would be the starting point for determining the amount for which the solidarity payment was to be calculated. The transfer compensation was lowered by the Chamber, given that the transfer was on a loan and not a permanent basis.

FIFA DRC, 26 May 2016, no. 0516200-e⁶

In this case, player P was registered with *Pepsi Football Academy* (the claimant or PFA) from 10 January 1998 to 30 June 1999. On 28 January 2014, the player was registered with *Stoke City Football Club* (the respondent or *Stoke*). The claimant lodged a claim in front of FIFA against *Stoke* on 25 December 2015 for the payment of the solidarity contribution for the transfer of player P from *Cardiff* to *Stoke*. Moreover, PFA argued that based on the information at its disposal, there was a player exchange between *Cardiff* and *Stoke*, with player P going to the respondent in return for *Stoke* transferring player K to *Cardiff*. As such, and because there was no transfer compensation paid, PFA noted that this does not mean the transfer is devoid of economic value. *Stoke* did not agree and said that the exchange was an exchange of registration, while neither player had an attached value. Meanwhile, *Stoke* argued that it was simply a domestic transfer with no monetary exchange, so no solidarity compensation was required.

The Chamber acknowledged that a transfer contract represents a bilateral agreement, thus implying a mutual exchange of obligations between the parties. As the parties agreed upon a “*transfer of registration*” for the two players, the DRC found this to demarcate an exchange of players, which further indicates an indirect financial agreement, as the sporting qualities of the players have an economic value in the football employment market. As such, solidarity contribution

⁵ <https://resources.fifa.com>

⁶ <https://resources.fifa.com>

As this case was further discussed in the appeal proceedings before CAS, all relevant names are provided.

was due to PFA for the exchange of players P and K. In calculating the value of the exchange of players, the Chamber noted that *Cardiff* paid to *West Bromwich Albion FC* for the transfer of player P the compensation of GBP 2,450,000 (approx. EUR 2,900,000), while the transfer compensation paid by *Stoke* to *Sunderland AFC* for the player K was GBP 6,790,000 (approx. EUR 7,900,000). The Chamber calculated the value of the exchange of players based upon the average of these two sums, equating to GBP 4,620,000 (approx. EUR 5,400,000), which was used as the base figure in determining the solidarity contribution due.

FIFA DRC, 7 June 2018, no. 06181269-e⁷

In the last DRC case to be discussed, player E was registered at Club A (the claimant) from 31 August 2006 until 30 June 2007. This player was engaged by Club C (the respondent) while out of contract free of payment from Club F. He registered with Club C on 30 July 2015. On 20 July 2015, Club F concluded a financial agreement with player E, which was conditional on the transfer of Player G from the respondent to Club F. Aside from the proposed salary and financial benefits, the agreement noted that “[Club F] and [the respondent], with the consent of [player E], reached an agreement for the definitive transfer of the player’s federative rights.” This agreement furthermore stipulated the transfer of player G from the respondent to Club F against the payment of a fixed transfer compensation totaling EUR 10,000,000, along with a conditional transfer fee of up to EUR 3,000,000. Club A requested the DRC to require the respondent to pay the amount owed as a solidarity contribution for the transfer of player E from Club F to the respondent. The claimant argued that this was in line with the relevant DRC jurisprudence on the application of solidarity mechanism provisions to the exchange of players. The respondent, however, rejected this claim which was submitted to FIFA by stating that it acquired player E out of contract free of payment (thus, a free agent), and he was not a part of a player exchange.

In its decision, the Chamber acknowledged that, based on the documentation entered into the Transfer Matching System (TMS) for the transfer of player E from Club F to the respondent, player E was contacted as a free agent. Meanwhile, in the financial agreement between Club F and player E, the player agreed upon an early termination with his former club, Club F. Meanwhile, the transfer agreement between Club F and the respondent regarding player G (from the former to the later club) did not refer to player E in any manner.

In light of the above, the Chamber finally concluded that there was no mutual exchange of obligations between Club F and the respondent as regards player E, while the lack of acknowledgement of player E in the transfer agreement of Player G indicated that the two players’ respective transfers were separate affairs. Thus, the claimant’s allegation was rejected, and no solidarity contribution was due.

CAS jurisprudence

CAS 2016/A/4821 Stoke City Football Club v. Pepsi Football Academy⁸

This is the only published CAS decision regarding the exchange of players in football.⁹ This case dealt with an appeal of the DRC decision from 26 May 2016 (whose factual background was discussed above), whereby *Stoke City Football Club* had to pay the club *Pepsi Football Academy* (PFA) a solidarity contribution of GBP 33,910.80 (approx. EUR 40,000) plus 5% interest *per annum* as from 25 December 2015 until the date of effective payment following the RSTP, 2012 edition.

Stoke claimed that no solidarity payment to PFA was required given that there was no financial transaction during the players’ exchange between *Cardiff* and *Stoke*. Furthermore, *Stoke* argued that PFA was not entitled to solidarity contribution, because a club cannot deduct a 5% contribution fee where there is nothing to deduct the 5% from, and where no compensation is paid, a club cannot calculate the valuation of players with certainty, thus inhibiting them from valuing a monetary figure from which to deduce the 5%. Further, *Stoke* argued that player P had no value in that the transaction between the clubs was an “exchange of liabilities”.¹⁰

PFA argued, however, that the lack of a monetary exchange in this case does not presuppose that the transaction was devoid of any value. The RSTP do not specify the form of compensation, and Article 237 of the Swiss Code of Obligations (SCO) governing sales contracts also applies to exchanges, as the two clubs are sellers of the registration rights of their respective players. Meanwhile, PFA dismissed *Stoke’s* argument that player K had no value, while the subjective value given to player K by the team’s management is unrelated to the player’s transfer value.¹¹

⁸ www.football-legal.com

⁹ There is another CAS case, *i.e.* CAS 2015/A/4197, but the award is not published.

¹⁰ See par. 27.

¹¹ See par. 29.

⁷ <https://resources.fifa.com>

The CAS Panel broke the core of its decision into three central areas of concern for the case at hand: (i) the application of the solidary mechanism where there is no monetary compensation at stake; (ii) the value of the players when exchanged; and (iii) a valuation methodology.

Application of solidarity mechanism

The CAS Panel supported the respondent’s argument that the RSTP did not specify the nature of compensation, while Swiss Law indicates that an exchange of goods is essentially two sale contracts, demarcated by the two clubs as sellers of the registration rights of their respective players. This argument is furthermore supported by the consistent jurisprudence of the DRC.¹²

Value of players when exchanged

The appellant further contended that there could be no calculation of a solidarity contribution because the players had no value at the time of exchange as they were not playing at their respective clubs, thus insinuating a liability to their employers given that the players were still required to receive salaries in line with their contractual terms.¹³ However, the Court found fault in this characterization based on three grounds. First, a player’s evaluation as worthless on one team does not predicate that the player will be worthless on another team, as there are numerous variables in influencing a player’s performance such as team dynamics and positions within the squad which vary per club. Second, even if a team intends for there to be no value within a transaction, this does not mean that such a transaction is devoid of intrinsic value, and it would be difficult to imagine the *raison d’être* for the transaction itself if there was no value. And third, the Court reasons that the existence of a transaction presupposes the clubs saw an inherent value, as even in the case of exchanging liabilities, the exchange may hold value for the clubs in question *via* minimizing potential future costs stemming from their respective players who produced little value.¹⁴ The Court next considered whether the players had an equal value. CAS determined that whereby two players’ registration rights are exchanged, in the absence of any additional monetary exchange, the transfer price must necessarily be the same for both players.¹⁵

Valuation methodology

The Court lastly considers a method of valuation in determining the solidary contribution. The appellant argued in the CAS proceedings that the FIFA DRC’s approach in establishing a monetary value by means of “mixing” the players’ value is “*inappropriate*” and only the value attributed to player K should be considered. This value, the appellant maintains, can be measured *via* either the player’s book value after amortization of his transfer fee over four years, or it can be determined on the basis of the remaining contract value of the player.¹⁶ PFA contended that there can be no drawn connection between a player’s salary and the amount of the transfer fee, while *Stoke’s* suggested methodologies do not consider a player’s professional qualities.¹⁷

The CAS Panel addressed this issue by first claiming that the methodology for calculating solidary mechanisms due should be simple enough that it can be applied in transfers without leading to unnecessary disputes, while it allows for a final transfer amount to be determined so as to serve as the basis for the calculation of solidarity contribution.¹⁸ The Panel then noted that the methodology employed by the DRC was relatively simple, but since the DRC decision, additional factors, such as the players taking on active roles within their new teams and scoring goals, came into play; this information could lead to the determination of a more precise transfer value.¹⁹ Furthermore, at the time of the player exchange, the parties’ submissions provided information regarding K’s transfer fees in his original move from *Sunderland* to *Stoke*. Since the DRC proceedings, the value of K’s transfer to *AFC Bournemouth* from *Cardiff* became known. The Court acknowledged that it would be inappropriate to consider these figures in determining the transfer value, as this would introduce information *ex post* the original exchange of players. However, the Panel noted that this loan value gives an indicator so as to show that the market value of the player remained relatively constant before and after the exchange, despite factors such as age. Thus, the CAS Panel finally supported the valuation methodology used by the DRC.²⁰ The Court further proposed that codifying the DRC’s applied valuation methodology for cases involving player exchanges could help establish a greater degree of predictability in ascertaining the transfer values, and subsequently, calculations for solidary contribution.

The CAS Panel ultimately upheld the DRC decision and thus dismissed *Stoke’s* appeal.

¹² See par. 42.

¹³ See par. 46 and 47.

¹⁴ See par. 48.

¹⁵ See par. 56.

¹⁶ See par. 27c.

¹⁷ See par. 29b.

¹⁸ See par. 59.

¹⁹ See par. 61 and 62.

²⁰ Par. 63, 64 and 65.

Principles and conclusions deriving from the jurisprudence

The exchange of players presents itself as an equally interesting, but also complex issue. It has been shown from DRC and CAS jurisprudence, as indicated above, that even in the absence of a financial transaction, the exchange of players still holds value and gives rise to the need for an attached financial valuation of the transfer. This is necessary so as to uphold the principle of solidarity contribution prescribed under Annex 5 of the RSTP. In line with all FIFA and CAS jurisprudence on the issue of player exchange thus far, the authors recognize the importance of taking a teleological approach in reading the relevant provisions of the RSTP corresponding to solidarity contributions. The solidarity mechanisms were introduced so as to “foster the training of young players by awarding a contribution that will be distributed to all clubs that have trained the player throughout his entire sporting activity.”²¹ A strict reading and a strictly textual approach would bereft the meaning of this mechanism if clubs were able to dodge payments simply because they engaged in the exchange of players without paying transfer compensations.

” Even in the absence of a financial transaction, the exchange of players still holds value and gives rise to the need for an attached financial valuation of the transfer “

Analyzing the jurisprudence of the DRC, it is striking that the DRC has created well-established jurisprudence in relation to the exchange of players. The exchange of players implies an indirect financial agreement, because the relevant qualities of the players have financial value in the football employment market. The authors can fully adhere to this legal approach of the DRC.

However, after analyzing the decisions, for the DRC to establish that an exchange of players took place, it seems that it is decisive that the exchange of player is laid down in one transfer agreement. In other words, in the event that the exchange of players does not derive from one transfer agreement, the players’ respective transfers will be established as separate affairs, which also follows from DRC 7 June 2018 (no. 06181269-e) and indirectly from the other case-law.

The authors do have some doubts with this approach, let alone that this approach paves the way for the parties to circumvent any payments in case of an exchange of players by simply drafting separate

transfer agreements. In the eyes of the authors, it cannot be excluded that a player exchange still had taken place despite separate transfer agreements being drawn up. For example, if an exchange of several players took place on the same day and were announced as one single transfer on the website of the clubs involved (and media articles also point in the direction of an exchange of players, although this does not seem to be sufficient in the eyes of the DRC; see DRC 7 June 2018, no. 06181269-2), it would be too easy, in the eyes of the authors, to automatically deny an exchange of players by simply referring to the fact that separate transfer agreements were concluded. The authors are aware that FIFA proceedings are essentially written proceedings and so do not provide for an extensive scrutiny with regard to the facts of the case and further evidence, but at this point FIFA’s approach seems to be a bit too simplistic to us.

The exchange of players gives rise to several questions about the potential extent or imposed limitations on this practice. For the time being, all known cases involving player exchanges between clubs devoid of a monetary exchange were limited to the transaction of a transfer of players’ rights and obligations. However, hypothetical situations emerge whereby a club may transfer one or more players to a second club in exchange not for player(s) from that second club, but for other rights and duties. For example, how would a situation be treated whereby a player is given to a club, and in return the “buying” club must play a certain number of friendly matches against the “selling” club in the forthcoming seasons? Also, a club may have a player who is no longer playing in matches and is thus seen as a liability and further choose to “freely” give this player to another club, if in return, the receiving club agrees to take over all remaining wage obligations of the player. In line with CAS jurisprudence, as discussed previously, this would not be a viable option for clubs wishing to circumvent the solidarity contribution fee, as the value of the exchange would instead reflect the minimizing of potential future costs for the club.²²

Further, it must be noted that in all the published cases (only) two players were exchanged. But what if a case concerned an exchange of three or more players? In that case it will be much more difficult to establish the value of the players. It is quite logical, as CAS determined previously in the only published CAS award so far, that whereby two players’ registration rights are exchanged, in the absence of any additional monetary exchange, the transfer price must necessarily be the same for both players. However, in case of an exchange of three players, not only must it be proven that an

²¹ DRC case from 9 January 2009, case number 19442b, “Considerations of the DRC”, par. 8.

²² CAS 2016/A/4821 par. 48.

exchange took place, but also that the player for which an amount is claimed (a solidarity contribution or any payment based on a previously concluded sell-on clause) actually had a financial value within the context of the so-called “*triple transfer deal*”.

What must also be taken into account when analyzing the jurisprudence so far is that all decisions were related to claims for solidarity mechanism. In this context, the well-established jurisprudence was created. However, player exchanges can also generate speculation as to how “*sell-on clauses*” may come into play, as there are currently no published cases which address this issue. Where two clubs agree to a sell-on clause, if one of the respective clubs engages in a player exchange in the future devoid of a financial transaction, questions may arise in determining the transfer value so as to abstract the percentage due in accordance with the sell-on agreement. It seems that if the initial clause did not explicitly prescribe terms in the case of a future exchange of players for either club who engages another club, the clubs may use a similar methodology as that applied in the DRC or CAS judgements when applying the solidarity mechanism. This methodology would be averaging the two exchanged players’ prior transfer values. Given the occurrence of player exchanges, it would be beneficial for clubs which agree to sell-on clauses to stipulate in their contracts how the financial value of a potential “*free*” exchange of players can be determined so as to ascertain the appropriate sell-on percentage due. Nowadays, parties often try to take care of future situations whereby players might be exchanged. For example, by stating that if the new club will receive some other form of consideration (including, but not limited to, player exchange, the playing of a friendly match and/or a percentage of future transfer) in return for the player’s transfer, the parties shall agree in good faith to an appropriate equivalent transfer fee received by the new club. There is not much more that clubs can do to try to avoid future problems in relation to the exchange of their players.

**” It would be beneficial for
FIFA to codify a valuation
methodology in its regulations “**

Taking into account the legal limitations parties face with regard to exchange of player issues, it would be beneficial for FIFA to codify a valuation methodology in its regulations. The above CAS Panel proposed that codifying the DRC’s applied valuation methodology for cases involving player exchanges could help establish a greater degree of predictability in ascertaining the transfer value, and subsequently, calculation for solidary contribution. The authors support, and warmly

welcome, the CAS Panel’s remark in CAS 2016/A/4821, that a codified methodology to establish transfer values would provide more predictability in cases involving player exchange, thus providing a mechanism for clubs to determine the solidarity payment required where no financial transaction exists (although the authors are aware this is not an easy task). However, as long as no regulations specifically provide for this issue, we think it is not a bold prediction to assume that the next case is just around the corner for the DRC and CAS.