

Football:

# Inducement by clubs in light of art. 17(4) FIFA RSTP

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## Introduction

### “*Pacta Sunt Servanda*” and the “Protected Period”

Pursuant to art. 13 of the *FIFA Regulations on the Status and Transfer of Players* (“FIFA RSTP”), January 2021 edition, the contract between a professional and a club can only be terminated on expiry of the term of the contract or by mutual agreement.

The main purpose of this provision is that parties that enter into an agreement should respect and honour the contractual obligations during the term of the contract, also known as the principle of *Pacta Sunt Servanda*. FIFA, therefore, introduced the so-called “Protected Period”, which was meant to safeguard the maintenance of contractual stability.

The “Protected Period” is defined as a period of three entire seasons or three years, whichever comes first, following the entry into force of a contract, where such contract is concluded prior to the 28th birthday of the player, or two entire seasons or two years, whichever comes first, following the entry into force of a contract, where such contract has been concluded after the 28th birthday of the player.

FIFA was of the opinion that unilateral termination of a contract without a justified reason, especially during the Protected Period, had to be vehemently discouraged.<sup>3</sup> In other words, during the Protected Period, it had to be made much more difficult for one of the parties to unilaterally terminate the employment contract. As we will see in this article, the Protected Period is a very important aspect with respect to the imposition of sporting sanctions.

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<sup>3</sup> FIFA Commentary, explanation art. 13, p. 38.

### Termination with or without just cause

According to art. 14 of the FIFA RSTP, the principle of respect of contract is, however, not absolute. The situation could be that there was too much strain on the patience of one of the parties to respect the employment contract. FIFA, therefore, devised the possibility that, in the case of a valid reason by either of the parties, the so-called “just cause”, the employment contract may be unilaterally terminated by either party with no consequences of any kind. Put differently, there are no consequences in the event of just cause, which means that the party that unilaterally terminates the contract with just cause is not obliged to pay any compensation to the other party, nor can any sporting sanctions be imposed on such party.<sup>4</sup>

However, in the event that the contract has been terminated by one of the parties without just cause, without a valid reason, the party in breach is obliged to pay compensation. This is laid down in art. 17 para. 1 FIFA RSTP, which is the leading provision for the decision-making bodies of FIFA: the Dispute Resolution Chamber (“DRC”) and the Players’ Status Committee (“PSC”) in order to establish the amount of compensation due by a party that breached the contract without just cause. The party in breach without just cause is obliged to pay compensation irrespective of whether the breach is during or after the Protected Period.<sup>5</sup>

### Sporting sanctions

According to art. 17 para. 3 and 4 FIFA RSTP, so-called sporting sanctions can be imposed on players (para. 3) as well as on clubs (para. 4) in case a breach of contract, without just cause, takes place within the Protected Period. It is of crucial relevance to establish if the breach falls within the Protected Period, as a unilateral breach without just cause (or sporting just cause) after the

<sup>4</sup> Where there is just cause for the player, he is free to leave the club. Where there is just cause for a club, the latter is released from its contractual obligations with its player with immediate effect. This can be seen as a “*lex specialis*” of the general rule, which is stated in art. 16 FIFA RSTP, that a contract cannot be unilaterally terminated during the course of a season.

<sup>5</sup> FIFA Commentary, explanation art. 17 RSTP under 1 sub. 1, p. 47.

Protected Period will not lead to sporting sanctions.<sup>6</sup>

Pursuant to art. 17 para. 3 FIFA RSTP, sporting sanctions will be imposed on a player who is found to be in breach of his contract during the Protected Period. This sanction will, in general, be a restriction of four months on his eligibility to play in official matches. However, in case of *aggravating circumstances*, the restriction for the player will amount to six months.<sup>7</sup>

According to art. 17 para. 4 FIFA RSTP, in addition to the obligation of the new club to pay compensation, sporting sanctions may also be imposed on a club, if the latter is found to be in breach of contract or found to be inducing a breach during the Protected Period.

### Inducement by clubs

More specifically, according to the second sentence of art. 17 para. 4 FIFA RSTP, this provision also provides that “it will be presumed, unless established to the contrary, that any club signing a professional who has terminated his contract without just cause has induced that professional to commit a breach.” From art. 17 para. 4 FIFA RSTP, it follows that the club will be banned from registering any new players, either nationally or internationally, for 2 entire and consecutive registration periods. The club shall be able to register new players, either nationally or internationally, only from the next registration period following the complete serving of the relevant sporting sanction. In other words, once it is established by the decision-making bodies of FIFA or (on appeal) the Court of Arbitration for Sport (“CAS”) that the new club has induced a professional to commit a breach, the new club will be in the situation that severe sporting sanctions will be imposed upon the club.

In this article, the authors will focus on the concept of “inducement”. In particular, the authors will focus on the question under what circumstances will it be established by the FIFA decision-making bodies (PSC and DRC) and (on appeal) CAS, the authoritative committees at an international level in the world of professional football, that a new club has induced the professional to commit a breach. In this regard, all the relevant jurisprudence of FIFA and CAS, as from the existence of this Article 17 paragraph 4 FIFA RSTP until today, will be discussed in a chronological time order, thereby specifically focusing on and only referring to the relevant part of the

6 Recent cases in which CAS panels had to deal with the Protected Period: CAS 2019/A/6096 *FC Lugano SA v. FC Internazionale Milano S.p.A.*, award of 17 September 2019; CAS 2017/A/5359 *Persepolis Football Club v. Rizespor Futbol Yatirimlari*, award of 29 May 2018; CAS 2017/A/5339 *Club Sportiv “Gaz Metan” Medias v. Eric de Oliveira Pereira, FC Karpaty Lviv & Clube Atletico Metropolitan*, award of 24 April 2018.

7 CAS 2017/A/5056 *Ittihad FC v. James Troisi & FIFA* and CAS 2017/A/5069 *James Troisi v. Ittihad FC*, award of 23 November 2017 (operative part of 14 July 2017); CAS 2014/A/3797 *Khazar Lankaran Football Club v. FIFA*, award of 9 July 2015.

awards in relation to the concept of “inducement”.<sup>8</sup>

In the final conclusions, the authors will list all the criteria that can be derived from the jurisprudence and the lessons to learn for new clubs that must be taken into account in order to make a better assessment of the situation when sporting sanctions will be imposed due to an inducement.<sup>9</sup>

### Overview of FIFA and CAS jurisprudence

In 2005, the DRC established the inducement of AS Roma, lending emphasis to the fact that twenty-four hours after the contract between Mexès and Auxerre had been breached by the player without any valid reason, he already entered into a new contract with AS Roma.<sup>10</sup> On appeal at the CAS, AS Roma was considered to have induced Mexès, since it knew about the contractual situation with his former club and even met with the club to discuss the transfer.<sup>11</sup>

Two years later, in 2007, the CAS specifically noted that “inducement” as referred to in art. 17(4) RSTP must be considered as “an influence that causes and encourages a conduct”.<sup>12</sup> In this case, neither the DRC nor the CAS considered that the new club had induced the player to terminate the contract since:

- a at the time when the new club concluded an agreement with the player, the player alleged

8 Following the jurisprudence, the authors come to the conclusion that there is not much litigation at the PSC regarding inducement. From all the published cases on the FIFA-website, only the discussed matter from 2012 elaborates on inducement. In other cases where inducement is mentioned, it is not further discussed. PSC 25 November 2019, no. 11190043-E; PSC 25 September 2019, *Player Emiliano Sala*; PSC 5 June 2018, no. 06181557-E; PSC 15 June 2016, no. 06161028-E; PSC 16 March 2016, no. 0316367-E; PSC 20 November 2014, no. 11141318b; PSC 18 July 2020, no. 0712742.

9 FIFA’s policy in this regard has recently changed towards “repeated offenders”, i.e. clubs in situation of constant and repeated disrespect of contractual obligations. Nevertheless, decisions that were rendered some ten years ago can in principle not be taken into account in the assessment of whether a club can be denominated as a repeated offender. CAS 2016/A/4550 *Darwin Zamir Andrade Marmolejo v. Club Deportivo La Equidad Seguros S.A. & FIFA* and CAS 2016/A/4576 *Újpest 1885 FC v. FIFA*, award of 24 November 2016; CAS 2015/A/3999 *Al Ittihad Club v. Diego de Souza Andrade & CAS 2015/A/4000 Diego de Souza Andrade v. Al Ittihad Club & FIFA*, award of 17 March 2016. The fact that the club is a repeated offender is an aggravating circumstance which, in view of the fact that the underlying objective behind article 17 par. 4 RSTP is the need to maintain contractual stability between clubs and professional football players, justifies the imposition of sporting sanctions. See CAS 2014/A/3797 *Khazar Lankaran Football Club v. FIFA*, award of 9 July 2015. Certain aggravating factors are needed in order to tip the scale towards imposing sporting sanctions, for example the fact that a club was held liable for breaching four employment contracts with the player in a period of 24 months. CAS 2017/A/5056 *Ittihad FC v. James Troisi & FIFA & CAS 2017/A/5069 James Troisi v. Ittihad FC*, award of 23 November 2017 (operative part of 14 July 2017); CAS 2014/A/3797 *Khazar Lankaran Football Club v. FIFA*, award of 9 July 2015.

10 DRC 1 June 2005, no. 65503.

11 CAS 2005/A/916 *AS Roma v. FIFA*, award of 5 December 2005.

12 CAS 2007/A/1358 *FC Pyunik Yerevan v. L., AFC Rapid Bucaresti & FIFA*, award of 26 May 2008.

- to have a contract with a club in Cameroon;
- b the new club concluded a transfer agreement with this club in Cameroon; and
- c an International Transfer Certificate (“ITC”) was tendered and the new club was not obliged to doubt the validity of such ITC by the Football Association of Cameroon.

Due to these circumstances, so found the CAS in this particular matter, the new club could not be blamed as the club was completely clueless that the player was bound by a valid employment contract with Pyunik Yerevan from Armenia.

The above two cases show that a difference can be made between actual knowledge of the situation, like Roma had, and being completely clueless, as the respective club was in 2007.

In 2008, two other legal nuances were brought into play regarding the concept of inducement. The CAS overruled a DRC decision, declining an inducement, although the new club was informed there was still an existing contract between the old club and the player. The CAS came to this conclusion, because the new club made quite serious investigations via its lawyer about the contractual situation of the player. The CAS also considered that a sport management firm was involved which made the situation very complicated for the respective new club.<sup>13</sup> In other words, this case shows that any serious efforts can be taken into account.

Similarly, in another case in 2008, the CAS also took into account the efforts from the side of the new club to solve the situation after it had already signed a player that had terminated his former contract without just cause and became aware of the situation.<sup>14</sup> The CAS held that there was no evidence at the time of signing the contract by the new club with the player with respect to any inducement, as the new club was only informed about a potential breach by the player after it had signed a contract with him. The new club also tried to resolve the situation. Finally, the CAS considered that the new club was caught up in a dispute which it did not cause.

These nuances in 2008 point out, so the authors find, in order to escape from any inducement, that a club will have to do a thorough investigation and has to look pro-actively for solutions.

A year later, in 2009, the DRC concluded that, in order for inducement under art. 17 to exist, a breach of contract must

be established.<sup>15</sup> This has been the DRC approach ever since.<sup>16</sup>

In a case in 2010, inducement was adopted at a club from Kuwait, because:

- a the club played in the same league as the old club of the player and it was well aware of the contractual situation of the player with his old club; and
- b the old club approached the new club as soon as it heard rumours about a transfer of the player and informed that the player still had a contract with the old club.<sup>17</sup>

The combination of these set of elements led to the decision of the DRC that the new club induced the player to terminate his contract with the former club.

In 2012, the Single Judge of the FIFA PSC held that a direct link between the inducement and the termination of the employment contract by the player must be present.<sup>18</sup> In this case, the FIFA Single Judge could not find a link between the two, despite the “presumption rule”.

In any event and with regard to the “presumption rule”, it must be taken into account that it explicitly follows from the jurisprudence that a new club cannot reverse the presumption, if this club does not respond to a claim by the former club in a procedure before the DRC.<sup>19</sup>

In the famous Bangoura-case<sup>20</sup>, the CAS panel underlined that criteria such as:

- 1 the financial situation of the new club at the time the offer was made;
- 2 the offer made to the player;
- 3 the financial value of this offer; and
- 4 the sporting level of the new club;

can be considered as factors that can be taken into account when establishing whether or not the new club has induced, influenced or encouraged the player to terminate the contract with his former club.<sup>21</sup>

<sup>15</sup> DRC 18 June 2009, no. 69681; DRC 5 December 2008, no. 128331.

<sup>16</sup> For example: DRC 16 July 2020, Yufeng; DRC 21 September 2017, no. 09171641; DRC 21 September 2017, no. 09171641.

<sup>17</sup> CAS 2010/A/2196.

<sup>18</sup> PSC 18 July 2012, no. 0712742.

<sup>19</sup> DRC 27 February 2013, no. 0213412.

<sup>20</sup> CAS 2013/A/3091 *FC Nantes v. FIFA & Al Nasr Sports Club*, CAS 2013/A/3092 *Ismaël Bangoura v. Al Nasr Sports Club & FIFA*, CAS 2013/A/3093 *Al Nasr Sports Club v. Ismaël Bangoura & FC Nantes*, award of 2 July 2013.

<sup>21</sup> CAS 2013/A/3091 *FC Nantes v. FIFA & Al Nasr Sports Club*, CAS 2013/A/3092 *Ismaël Bangoura v. Al Nasr Sports Club & FIFA*, CAS 2013/A/3093 *Al Nasr Sports Club v. Ismaël Bangoura & FC Nantes*, award of 2 July 2013, 128.

<sup>13</sup> CAS 2008/A/1568/ *M. & Football Club Wil 1900 v. FIFA & Club PFC Naftex AC Bourgas*, award of 24 December 2008.

<sup>14</sup> CAS 2008/A/1453 *Elkin Soto Jaramillo & FSV Mainz 05 v. CD Once Caldas & FIFA* and CAS 2008/A/1469 *CD Once Caldas v. FSV Mainz 05 & Elkin Soto Jaramillo*, award of 10 July 2008.

In addition, the respective CAS panel also established in this case that the new club's own – active – role is of crucial importance in light of the inducement. At the same time, it was stressed that a club cannot be responsible for inducement, so long as it acts in good faith.<sup>22</sup>

The FIFA DRC, at the hearing in 2014, described a dispute between Evian Thonon Gaillard FC (“Evian”) and Udinese Calcio S.p.A. (“Udinese”) as one of the “*clearest breaches of contract and inducement at the DRC in years*”.<sup>23</sup>

The DRC decided in that case that it should be concluded that if Evian by stance of not contacting the old club directly deliberately chose to disregard actual facts in order to claim in bad faith that it was not aware of the Udinese-contract. This behaviour cannot be protected. If it had complied with the RSTP and undertaken some commonsense due diligence, Evian would have duly clarified the player's contractual status and not induced the player to breach the contract. On appeal, the CAS panel had more sympathy for Evian, because there was no active poaching of the player and also, because the key evidence to convince the panel that there was no passive inducement either, would be the evidence of the player's new agent (at some time in June 2011, the player changed agent), who would be unlikely to come before the CAS and incriminate themselves.<sup>24</sup> As such, Evian faced serious difficulty finding the evidence to rebut the presumption rule, whilst the potential sanction would be seen as “strong” for poor due diligence, as opposed to active poaching.<sup>25</sup>

In 2015 and 2016, in line with previous decisions, the CAS decided that the new club's actions and knowledge at the moment of the signing are relevant.<sup>26</sup> This interpretation meets with the case law so far as in all the cases, so the authors note, where the new club was considered to have induced the player, it was evident that the new club knew or should have known about the contractual situation of the player at the moment of signing the employment contract.

In 2016, although the club Újpest 1885 argued that it could not be considered as having induced the player's breach of contract, this argument, in itself, does not rebut the aforementioned presumption. Indeed, art. 17 para. 4 FIFA RSTP states that “any club” signing a

<sup>22</sup> DRC 30 August 2013, no. 08133453.

<sup>23</sup> DRC 30 July 2014, no. 0714414.

<sup>24</sup> CAS 2014/A/3739 & 3749 *Jonathan Mensah & Evian Thonon Gaillard FC v. FIFA & Udinese Calcio S.p.A.*, award of 16 July 2015 (operative part of 30 April 2015).

<sup>25</sup> CAS 2014/A/3739 & 3749 *Jonathan Mensah & Evian Thonon Gaillard FC v. FIFA & Udinese Calcio S.p.A.*, award of 16 July 2015 (operative part of 30 April 2015).

<sup>26</sup> CAS 2016/A/4550 *Darwin Zamir Andrade Marmolejo v. Club Deportivo La Equidad Seguros S.A. & FIFA* and CAS 2016/A/4576 *Újpest 1885 FC v. FIFA*, award of 24 November 2016; CAS 2015/A/3953 & 3954 *Stade Brestois 29 & John Jairo Culma v. Hapoel Kiryat Shmona FC & FIFA*, award of 30 November 2015.

professional that has terminated his contract without just cause is presumed to have induced that professional to commit a breach, and not only the club that requests an ITC or signs an employment contract with that professional immediately after the breach.<sup>27</sup>

In 2020, the DRC considered in a case that taking into account:

- a the admission by the new club that it was interested in the player's services; and
- b the lack of diligence by the new club in connection with signing the player,

it had no other option than to conclude that the new club had not been able to reverse the presumption contained in art. 17(4) of the RSTP.<sup>28</sup>

In the same year, the DRC ruled that, if a new club follows the strict steps provided for in a buy-out clause and the wording of such clause specifically contemplates the possibility that his club would receive an offer for the transfer of the player, such an action could not constitute an inducement to get the player to breach his contract with the former club.<sup>29</sup>

### Conclusions: relevant criteria and lessons to learn

In this article, the authors have focused on the concept of inducement in light of art. 17 para. 4 FIFA RSTP and, in particular, laid special focus on the question under what circumstances will it be established by the decision-making bodies of FIFA (PSC and DRC) and (on appeal) CAS that a new club has induced the professional to commit a breach of contract. Having analysed the jurisprudence, several lessons can be learned and conclusions drawn.

As a starting point, sporting sanctions can only be imposed when the breach of contract took place within the Protected Period. Only then, inducement can be established. That seems like simply stating the obvious, but, in practice, clubs still seem to overlook this basis principle.

Similarly, and as a further handhold to take into account, as a *conditio sine qua non*, a breach of contract must be established. In fact, without a breach, no inducement can be established.

By the same token, and for the sake of clarity, the authors note that a new club cannot reverse the presumption rule under art. 17 if the accused club does not respond to a claim by the former club. Under such scenario, the club forfeits its right and sanctions will then be imposed.

<sup>27</sup> CAS 2016/A/4550 *Darwin Zamir Andrade Marmolejo v. Club Deportivo La Equidad Seguros S.A. & FIFA* and CAS 2016/A/4576 *Újpest 1885 FC v. FIFA*, award of 24 November 2016.

<sup>28</sup> DRC 18 June 2020, Cinari.

<sup>29</sup> DRC 16 July 2020, Pizarro; DRC 25 February 2020, Meleg.

With regard to buy-out clauses and any risk for inducement, the jurisprudence clearly shows that, if a new club follows the strict steps provided for under a buy-out clause and the wording of such clause specifically contemplated the possibility that his club would receive an offer for the transfer of the player, such an action could not constitute an inducement. However, the authors note the risks, in light of these clauses, as it is not clear under all circumstances whether the clause can actually be considered as a buy-out clause (this is sometimes a very thin line).

In view of the relevant FIFA and CAS jurisprudence, the bottom line is that, if the new club cannot establish that it acted in good faith, the club will place itself in the proverbial catbird seat, taking into account the “presumption rule”. At the end of the day, this is decisive in light of inducement. To escape from an inducement conviction, good faith must be demonstrated.

The jurisprudence points out that the more direct the link between the clubs is, for example, if the new and old club play in the same league, the sooner inducement will be established.

Furthermore, it follows from the jurisprudence that the new club, before signing a contract with a player, must always conduct quite serious investigations, for example, through its lawyer, to avoid any inducement. It makes sense that, if the new club has doubts as to the contractual status of the player, in light of its investigation duty, the potential new club addresses the club where the player is still under contract (or not). This also makes sense from the perspective of art. 18 para. 3 FIFA RSTP. In fact, from this provision, it follows that a club intending to conclude a contract with a professional must inform the player’s current club in writing before entering into negotiations with the player. So, it can be concluded that, if a club adheres to this provision, any risks of inducement will be minimized.

Once the new club is in the situation that it finds out after it has contracted a player that breached his contract without just cause, the new club can still escape from any sporting sanctions. As such, it must actively try to resolve the situation. In such situations, the CAS can consider that the new club was caught up in a dispute which it did not cause. The jurisprudence clearly demonstrates that the effort to solve the issue is a very important aspect, which must be taken into account by new clubs and can be of help in order to avoid sanctions.

Taking a deeper look at the jurisprudence of FIFA and CAS, we observe many criteria that can be taken into account when establishing if the new club has induced, influenced or encouraged the player to terminate the contract with his former club. For example, the financial situation of the new club at the time the offer was made can be of relevance, but also the offer made to the player, and its financial value, can be taken into account. At the same time, panels also seem to find of relevance the sporting level of the new club and the exact decision of the player to leave the club before meeting representatives of the new club.

As a final remark, the authors bring to mind and wish to recall that the above elements are not set in stone and must be seen as guidelines and pointers of direction in order to assess any inducement. It will always be the overall package of elements that should dominantly point in the direction of inducement. As such, the decision whether or not an inducement can be established, will so always depend on the specific circumstances of each and every case.



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## Contents

---

2021/01 Football: The impact of COVID-19 on the football industry – A player-centric perspective

2021/02 The potential liability of sporting associations for COVID-19 induced harms to players – Part one

2021/03 The commercial exploitation of youth athletes in South Africa – Part one

2021/04 Football: Inducement by clubs in light of art. 17(4) FIFA RSTP

2021/05 Fighting racism in English football: still a long way to go!

2021/06 Saving Trinidad and Tobago domestic football. An intellectual property based proposal – Part two

2021/07 Some South African perspectives on WADA's Whereabouts rule and its impact on athletes' rights to privacy – Part two

2021/08 Pro-athletes: Guidelines for choosing a financial advisor

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# 12·1

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# Table of Contents

Vol. 12 No. 1 March 2021

Editorial 4

## Articles

2021/01 **Football: The impact of COVID-19 on the  
football industry. A player-centric perspective**  
*by Dr. Lucien W. Valloni* 8

2021/02 **The potential liability of sporting associations  
for COVID-19 induced harms to players – Part one**  
*by Dr. Jason Haynes* 11

2021/03 **The commercial exploitation of youth athletes in South Africa – Part one**  
*by Zawadi Dlamini and Steve Cornelius* 15

2021/04 **Football: Inducement by clubs in light of art. 17(4) FIFA RSTP**  
*by F.M. de Weger and C.F.W. de Jong* 20

2021/05 **Fighting racism in English football: still a long way to go!**  
*by Jonathan Copping* 25

2021/06 **Saving Trinidad and Tobago domestic football.  
An intellectual property based proposal – Part two**  
*by Dr. Justin Koo* 29

2021/07 **Some South African perspectives on WADA's Whereabouts  
rule and its impact on athletes' rights to privacy – Part two**  
*by David Robert Du Toit and Steve Cornelius* 33

2021/08 **Pro-athletes: Guidelines for choosing a financial advisor**  
*by Lazaros Ioannou* 39

2021/09 **Sportspersons, entertainers and taxing the digital economy**  
*by Michelle Klootwijk and Dick Molenaar* 41

2021/10 **Tax avoidance – Has the pendulum of public sympathy swung?**  
*by Tim Gillett* 45

2021/11 **Fiscal residence and criminal tax implications  
for professional football players**  
*by Pietro Mastellone* 49