14. Player transfers

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1. INTRODUCTION

This chapter revolves around one of the most high-profile aspects and the lifeblood of any football enterprise: player transfers. Player transfers often take place based on several sporting and financial factors. While the importance and influence of transfers from a sporting perspective is present, it remains hard to objectively determine the sporting merits of a player from a business perspective; this challenge is mostly thrusted to a club's technical staff and scouting department. On the other hand, the financial and legal aspects of transfers have hugely evolved throughout the years, and a set way of conducting transfers has emerged.

As a preliminary note, we want to address that the regulations applicable on transfers were historically only of influence on male football. Gradually, women's football professionalised and the influence of the regulations and need for alterations of the regulations grew. As a result, the rules applicable on male and female players are increasingly getting their own specific character and have their own customs.[1] While we acknowledge and applaud that women's football is professionalising in rapid succession, as also underlined by the specific amendment package of 2021 by FIFA which focused on women's football, the length of this contribution does not allow for an extensive discussion of both male and female transfers. Therefore, in this chapter, a brief overview of the important aspects of professional male players' transfers will be discussed. In this regard, it is good to note that, also given the length of this contribution, it will not be possible to exhaustively discuss all relevant background information regarding this topic. Therefore, for more extensive reads, we refer to relevant literature and documentation, as highlighted in the footnotes.

Before the important legal aspects of a transfer will be discussed, it is important to define what happens from a legal perspective when a professional player's transfer takes place.[2] In material terms, a 'transfer' effectuates that a professional player is 'released' from his old club and 'signed' by his new club. But what legal relationships need to be terminated and what relationships will rise into existence?

Unlike 'normal' employees, professional players are, in addition to their contractual employment relationship, also bound to their clubs via their registration with a member association (as shown in Figure 14.1 below). In contrast to employment relationship, which is

[1] For instance, training compensation (Art 20 FIFA RSTP) is currently not applicable to women's football, and female players may be registered outside registration periods to temporarily replace a female player that has taken maternity leave (Art 6 FIFA RSTP).

[2] It is good to underline that the FIFA Regulations on the Status and Transfer of Players ('RSTP') contain an independent definition of a '*professional player*', which entails that a player (i) must have a written contract; and (ii) must be paid more for his footballing activity than the expenses he effectively incurs, which follows from Art 2 FIFA RSTP; see also CAS 2016/A/4843, CAS 2015/A/4148 & 4149 & 4150, CAS 2009/A/1895; and CAS 2008/A/1739.

exclusively between the player and the club, the registration derives from a tripartite relationship between the member association, player and club, as a player is registered *with* a member association to play *for* a club. In case of a transfer, both links will have to be 'transferred' to the new club and association (see Figure 14.2 below).

Source: The authors.

Figure 14.1 *The 'double' binding between professional football players and football clubs*

This means that:

(i) the employment relationship with the old club has to be terminated;
(ii) an employment relationship with a new club has to be established;
(iii) the player has to be deregistered with his former association; and
(iv) the player has to be registered with his new association.

In this chapter, the relevant legal aspects of these transactions will be highlighted. In sections 2 and 3, we assess the competent bodies in case of disputes and the body of applicable regulation. In section 4, the procedure governing the international transfer of a player's registration will be discussed. In section 5, we will focus on the most notable contractual clauses in relation to a player's transfer. In section 6, the different types of compensation will be examined, and in section 7 the special rules governing the international transfers of minors will be highlighted. We conclude in section 8, with a prospect of future changes related to players' transfers.

At the moment of writing this contribution, there is an ongoing and exceptional situation in Ukraine that has caused a distressing humanitarian crisis, which led the Bureau of the FIFA Council to approve temporary amendments to the RSTP in order to provide legal certainty and clarity on a number of elements. By means of FIFA Circular no. 1787 of 9 March 2022, FIFA

gave a further explanation and provided amendments that were set out in the form of a temporary annex to the RSTP (Annexe 7) entitled 'Temporary rules addressing the exceptional situation deriving from the war in Ukraine'. Although these amendments have a temporary nature, due to the seriousness of the issue and the fact that transfers are affected by these changes, we will refer to the amendment throughout this chapter.

2. COMPETENT BODIES IN CASE OF DISPUTES

Before we discuss the substance of transfers, it is essential to note which bodies are competent in case of disputes in relation to transfers. Some basic knowledge about the dispute-resolution system in which transfer-related disputes are resolved is important to have in advance to be able to understand why the decisions of FIFA and CAS are essential in determining the legal boundaries for parties to conduct transfers. As all actors in transfers are private actors, their relationships are, in principle, governed by civil law, and disputes should be resolved in front of civil courts. However, in case of disputes between actors within football, the FIFA Regulations on the Status and Transfers of Players ('RSTP') provide for a so-called '*default competence*' of the FIFA Football Tribunal. The FIFA Football Tribunal can be subdivided into the FIFA Player's Status Chamber ('PSC'), the FIFA Dispute Resolution Chamber ('DRC') and the Agents Chamber (although the latter chamber is not active yet).

It should be noted that the FIFA PSC is always competent in disputes between two clubs belonging to different associations.[3] Furthermore, the FIFA DRC is always competent to decide upon disputes in which an International Transfer Certificate ('ITC') has been requested.[4] It follows from the wording of the FIFA RSTP that in disputes between parties belonging to the same association, FIFA is not competent, as the international dimension is missing.[5] In that scenario, the national civil courts are competent, unless the relevant member association has instated a national arbitral tribunal or dispute resolution chamber ('NDRC') whose competence has been included in its regulations.[6] However, as expressed in section 1, for an essential part, a player's transfer also concerns the employment relationship between a club and a player.[7] The FIFA DRC is also competent by default in international employment-related disputes.[8] However, while FIFA used to claim competence in all international employment-related dis-

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[3] See: FIFA RSTP Art 22.1(f).

[4] FIFA RSTP Art 22.1(a).

[5] See, *inter alia*, FIFA DRC 29 July 2021, Rherras; FIFA DRC 25 February 2021, Paulavets; FIFA DRC 4 June 2020, Engel; FIFA DRC 20 May 2020, Matar; FIFA DRC 23 April 2020, El Sahley; FIFA DRC 12 February 2020, Faure and FIFA DRC 3 October 2019, Van Bakel. The jurisprudence of the DRC shows that, the nationality taken into account shall be the one under which the player has been registered by the relevant member association upon registration of the contract at the heart of the dispute. In claims where a player has dual citizenship, one of which is the same as the nationality of the club, the case lacks international dimension.

[6] The decisive difference between arbitral tribunals and dispute resolution chambers is that the awards of dispute resolution chambers cannot be enforced via the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958).

[7] See also Chapter 13 in this book of Mr Michele Colucci and Mr Roy Vermeer, 'The Status and Role of Players in the Football Industry'.

[8] FIFA RSTP Art 22.1(b); An international transfer is defined in the FIFA RSTP as: 'the movement of the registration of a player from one association to another association'.

putes between clubs and players in its early cases,[9] its position has been slightly adjusted, as it was confronted with the fact that employment-related disputes are not arbitrable in every jurisdiction. Therefore, the '*default competence*' of FIFA is currently without prejudice to the right to seek redress in front of civil courts in employment-related disputes.[10] Similar to disputes between clubs, where there are disputes between clubs and players that lack an international dimension, the national civil courts are competent, unless the relevant member association has validly instated an NDRC whose competence has been included in its regulations. In contrast to club disputes, in international employment-related disputes, the parties can agree that an NDRC is competent to hear the dispute. In this case, certain prerequisites must be met.[11]

Whereby a final decision has been taken by the FIFA Football Tribunal in a dispute, an appeal can be lodged with CAS within 21 days of receipt of the decision in question.[12]

In this contribution we will, in principle, only address international transfers, and therefore refer to FIFA and CAS jurisprudence. However, case law before NDRCs indicates that FIFA and CAS jurisprudence, even if not directly applicable, influences national proceedings.

For the sake of completeness, the abovementioned system of 'mandatory' arbitration in front of FIFA bodies, the CAS and/or NDRC, has been criticised in legal literature and case law. However, and following the notorious *Mutu/Pechstein* case in front of the European Court of Human Rights, the current system has been declared compliant with the European Convention on Human Rights.[13] While tolerable, these organs will need to comply with the safeguards of Article 6 of the European Convention on Human Rights. Case law indicates that this is not always the case.[14]

3. APPLICABLE REGULATIONS

When a transfer takes place, it must also be determined which regulations and which national law is applicable to the transfer. In this regard, as different bodies can be competent as set out above, it is important to make a distinction between '*national*' and '*international*' transfers.

3.1 International Transfers

As derives from section 2, many international disputes arising out of international transfers are resolved in front of FIFA and (eventually in appeal before) the CAS, which are both seated in

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[9] FIFA DRC no. 25820, 4 February 2005; It should, however, be noted that the FIFA Statutes still prohibit recourse to ordinary courts of law unless specifically provided in the FIFA regulations in Art 59(2) FIFA Statutes, and obliges its associations to implement this in their regulations.

[10] FIFA DRC no. 28747-943544, 15 February 2008.

[11] Art 22.1b FIFA RSTP. Also see Circular 1010 and 'FIFA Commentary to the RSTP', Art 22. Note that in the case that the parties elected an NDRC or civil court, FIFA may still be competent if an ITC request has been submitted. The claim of the interested party should be in relation to said ITC request, in particular regarding the issue of the ITC. Where no consequence can arise for the new club of the player, there does not exist a relation between the employment-related dispute and the ITC, see FIFA DRC 25 February 2021, Paulavets.

[12] Art 58 FIFA Statutes.

[13] ECtHR, Mutu *and Pechstein v Switzerland* (no. 40575/10 and no. 67474/10).

[14] ECtHR, *Ali Riza and others v Turkey* (no. 30226/10).

Switzerland. In front of arbitration tribunals, the starting point for determining the applicable law in football-related disputes is firstly the *lex arbitri*, i.e., the applicable national law with respect to arbitration at the seat of the arbitration.[15] However, as the FIFA Football Tribunal is not a formal arbitral tribunal, it is not bound to the Swiss *lex arbitri*.[16] Therefore, the applicable law is to be determined in accordance with the FIFA regulations. In this regard, the Procedural Rules Governing the Football Tribunal provide as follows: 'In their application and adjudication of law, the chambers shall apply the FIFA Statutes and FIFA regulations, whilst taking into account all relevant arrangements, laws, and/or collective bargaining agreements that exist at national level, as well as the specificity of sport.'[17]

As a result, the FIFA regulations are leading for the FIFA DRC and FIFA PSC when resolving a dispute. In fact, it clearly follows from the well-established DRC jurisprudence that FIFA's Regulations prevail over any national law chosen by the parties.[18] In this regard, the DRC finds that the main objective of the FIFA Regulations is to create a standard set of rules which all actors within the football community are subject to and can rely upon. This objective would not be achievable if the DRC would have to apply the national law of a specific party on every dispute brought forth.[19]

It is, however, interesting to note that in case an appeal is lodged in front of CAS, Swiss law automatically becomes relevant, as the CAS Code[20] provides that:

> The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.

When looking at the '*applicable regulations*', i.e., the FIFA Regulations, the FIFA Statutes provide that in case of an appeal in front of CAS: 'The provisions of the CAS Code of Sports-related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law.'[21]

Currently, a dominant view within CAS jurisprudence is that this '*choice-of-law*' in the FIFA Statutes precedes over any choice of law made by the parties in their agreements.[22] Therefore, in case of an appeal against a FIFA decision, the CAS will apply the FIFA regulations and subsidiarily Swiss law. However, in cases where a specific issue is not governed in the FIFA regulations, and they therefore contain a *lacuna*, a small scope of application is then

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[15] See: Ulrich Haas, 'Applicable Law in Football-related Disputes – The Relationship Between the CAS Code, the FIFA Statutes and the Agreement of the Parties on the Application of National Law', CAS Bulletin 2015/2, pp. 8–18.

[16] Swiss Federal Tribunal 7 February 2017, A._____ v. B._____, 4A_492/2016.

[17] Art 3, Procedural Rules Governing the Football Tribunal, (October 2021 edn).

[18] See, e.g., FIFA DRC 20 January 2021, Schumskikh; FIFA DRC 4 June 2020, Demir; FIFA DRC 16 August 2019, Habib Daf and FIFA DRC 26 November 2016, no. 115771.

[19] See, *inter alia*, FIFA DRC 17 June 2016, no. 06161109-E and FIFA DRC 13 July 2017, no. 07170099.

[20] Art R58 CAS Code, (2020 edn).

[21] Art 56(2) FIFA Statutes (May 2021 edn).

[22] Haas (n 15), pp. 8–18.

left open for the law chosen by the parties in their agreements.[23] For example, where a case raises the question of whether a 'just cause' exists (as there is no definition in the FIFA RSTP), it is necessary to refer to Swiss law for a further interpretation.

The difference in the applicable law in front of CAS from that in front of FIFA[24] has sometimes resulted in inconsistency in the judgements of both bodies. However, there seems to be a tendency at FIFA to, while not bound by Swiss law, anticipate on the application of Swiss law in CAS appeals, with decisions given in line with Swiss law. Therefore, Swiss law ultimately also influences FIFA decisions. For the sake of legal consistency, this promotes consistency between the outcomes before FIFA in first instance, and before the CAS in appeal.

3.2 National Transfers

In principle, in cases of a transfer of a player between two clubs affiliated to the same association, the regulations of the relevant association are applicable. As the regulations of most member associations subsidiarily refer to the national law of the country which the member association governs, national transfers in most cases are governed by the regulations of the relevant association and the law of the country concerned.

However, as the transfer of a player consists of the alteration of multiple legal relationships, this is also partly dependent on the relationship concerned. For example, also in case of a national transfer, when the employment agreement of the player stipulates that the FIFA regulations are applicable and the FIFA DRC is competent, the FIFA regulations will primarily be applicable to an eventual dissolution or termination of the employment agreement in front of FIFA.

4. INTERNATIONAL PROCEDURE TO TRANSFER A PLAYER'S REGISTRATION

In this section, the procedural steps to be taken to transfer (the registration of) a player to a new club will be discussed. A transfer consists of two steps: a *deregistration* at the old club and a *registration* at the new club. As previously mentioned in section 1, the registration of a player is, in principle, independent from the contractual links a player has to a club. However, as will be seen throughout this entire chapter, both links have become intertwined on some specific points. As also derives from the title, this section will only be relevant in case of an international transfer, as only in that situation is the registration transferred by FIFA and only then are the FIFA regulations applicable. In case of a national transfer, recourse will exclusively have to be sought to the regulations of the relevant national member association (which falls outside the scope of this contribution).

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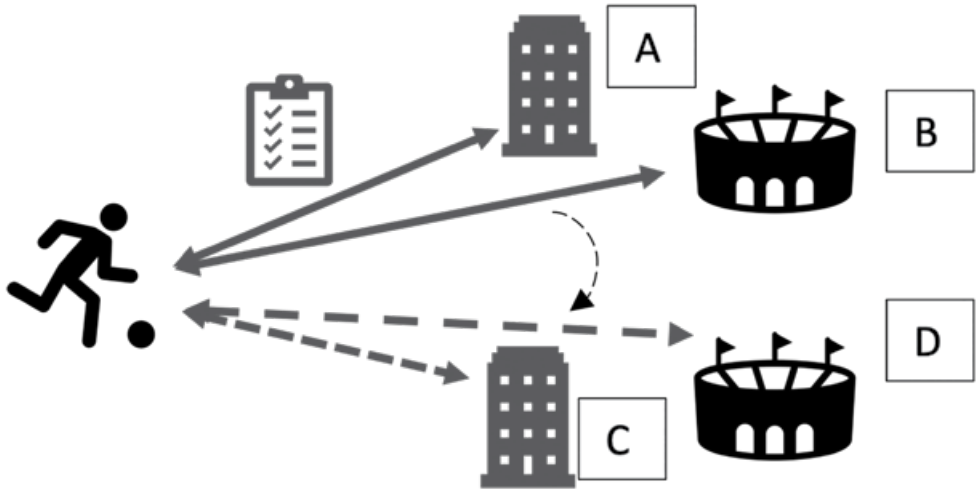
[23] Matters that are subject to the parties' autonomy include, for instance, whether and under what conditions a contract materialises, in accordance with which principles this is to be interpreted, whether and under what conditions the fulfilment of a contractual term can be feigned, whether a valid representation exists in connection with concluding the contract and under what conditions and in what amount interest can be awarded. See: Haas, ibid.

[24] CAS is obliged to subsidiarily apply Swiss law and in some cases the law chosen by the parties, while FIFA is only obliged to apply the FIFA regulations.

It is also noteworthy to mention that FIFA keeps track of all historical registrations of a player in the so-called *FIFA Player Passport*.[25] This is a document containing the relevant *essentialia* of the player, such as his name and birth date, and the clubs he has been registered with since the calendar year of his 12th birthday. The FIFA Player Passport is inextricably linked to the training compensation and solidarity contribution regimes, and when a transfer takes place, the association of the registering club is obliged to provide the registering club with the player's FIFA Player Passport in order to calculate and distribute the applicable training rewards.[26]



Source: The authors.

Figure 14.2 The transfer of a player's registration from member association A to play for club B to member association C to play for club D

4.1 Registration Periods

Players are only eligible to play organised football if they are registered with their club's member association.[27] To protect the integrity of competitions, players may only be registered with a club during one of the two annual registration periods fixed by the association of the new club.[28] This means that at the moment a deregistration is not governed by FIFA, and players can be deregistered at any time.[29] All associations are obliged to enter their registration

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[25] Art 7 FIFA RSTP.

[26] Training rewards will further be discussed in section 6.

[27] Art 5(1) FIFA RSTP.

[28] In principle, the first registration period shall begin on the first day of the defined season for a period of 12 weeks, and the second registration period shall occur in the middle of the season and may not exceed four weeks.

[29] Commentary to the FIFA RSTP (2021 edn), Art 6.2 c-i.

periods or 'transfer windows' at least 12 months in advance, and FIFA will communicate all relevant dates entered by its member associations via its Transfer Window Calendar, which is available at all times on the official FIFA website.[30] These registration periods are also binding for the relevant member association at a national level.[31]

As a general principle, which is reflected in Article 5 paragraph 4 of the RSTP, players may be registered with a maximum of three clubs during one season. During this period, the player is only eligible to play official matches for two clubs, subject to the temporary exceptions below. However, as an exception due to the Ukraine crisis, to provide the best possibility to continue playing, any player previously registered in the Ukrainian Association of Football (UAF) or Football Union of Russia (FUR) may be registered with a maximum of four clubs during one season and is eligible to play official matches for three different clubs.

4.2 Transfers of Unregistered Players and Players that have Terminated their Contracts

As an exception to the rule that players can only be registered during transfer periods, to protect unemployed players, a player whose contract has expired prior to the end of a registration period can be registered outside of a registration period.[32] This exception applies to professionals only, and their employment contract with their former club must have expired or been mutually terminated prior to the end of the transfer window of the engaging club.

A temporary exception due to the Ukraine crisis is that any player previously registered in the UAF or the FUR will also have the right to be registered outside a registration period, provided that the registration occurred before or on 7 April 2022.

Furthermore, in cases where a player has terminated his contact prematurely because of a serious breach of conduct by his club, or when a club has prematurely terminated a player's employment contract without just cause, a player can apply for a *provisional measure.* In cases where it is established on a *prima facie* basis that a player had just cause to terminate his contract, or that a club had not, FIFA may authorise the member association of his new club to register the player outside a registration period. However, as *provisional registrations* may violate the sporting integrity of competitions, member associations are not obliged to register players in cases where FIFA would authorise them to, and their regulations in this respect will prevail.[33]

4.3 Requesting an ITC via FIFA TMS

The ITC plays a substantial role in the transfer process and is governed via the FIFA Transfer Management System ('TMS'), an online system designed to monitor and administer international transfers. It is a key document for registering professional players with a new association following an international transfer.[34] Its issuance by the former member association is (in

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[30] Art 6(2) FIFA RSTP.

[31] Commentary on the FIFA RSTP (2021 ed), Art 6.1 b-iii.

[32] Art 6(1) FIFA RSTP.

[33] See: FIFA Commentary on the RSTP (2021 edn), Art 6.1 e.

[34] In addition, the request of an ITC is also a ground for FIFA to have competence over eventual disputes, Art 22(b) FIFA RSTP.

principle) a prerequisite for the registration with a new member association.[35] While the player is to be registered with an association, clubs may be sanctioned for fielding (amateur) players without starting the ITC process in TMS.[36]

Both the former and engaging club involved should enter the information required by the FIFA regulations in TMS to obtain an ITC. If the information entered by both clubs matches, the former member association will have to confirm the player's details, and the new member association can request the ITC. The delivery of an ITC may not be made conditional upon the payment of a fee.[37] However, as will be set out in paragraph 5.2.1 (a), the payment of a fee may under certain conditions be inserted into a transfer agreement as a condition precedent.

5. CONTRACTS

When a player is transferred, various interacting contractual relationships must be entered into, terminated or altered. As the contracts governing these relationships all have their own peculiarities and backgrounds, it is impossible to discuss all details of each individual contract. Nevertheless, in practice, there are several notable clauses which are of vital importance when transferring a professional player. In this section, some notable clauses in employment agreements and transfer agreements as emerging from case law are highlighted. Furthermore, the contracts concluded with players' agents will be discussed shortly.

5.1 Employment Agreements

5.1.1 Buy-out clauses and liquidated damages clauses

When a player is transferred, or to anticipate a future transfer, a very important clause in a player's employment contract is often a 'buy-out clause' or a 'liquidated damages clause'.[38] While in some jurisdictions buy-out clauses are mandatory in employment contracts with professional football players,[39] buy-out clauses are void in other jurisdictions.[40] Buy-out clauses are furthermore strongly related to the transfer compensation, the latter of which will be discussed in section 6.

It is important to note that buy-out clauses and liquidated damages clauses make use of the room given by FIFA in the RSTP to determine a compensation amount 'in case of a transfer' in the player's employment contract.[41] Though both clauses seem comparable, as they both provide for a sum of money to be paid 'in case a player makes a transfer', there is an important difference between a 'buy-out clause' and a 'liquidated damages clause'. Whereas a buy-out

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[35] In addition, a player is also eligible if: (i) the old association has not responded for seven days and the new association completed the registration; or (ii) if FIFA authorised the new association to provisionally register the player.

[36] See CAS 2016/A/4785, CAS 2014/A/3793; and CAS 2016/A/4805.

[37] Art 9 FIFA RSTP.

[38] In legal literature, similar clauses with only a punitive nature are also referred to as 'penalty clauses'. See Ariel N. Reck, 'Liquidated Damages, Penalty Clauses and Buy-outs in Football-related Employment Contracts under the FIFA Regulations', European Leagues Legal Newsletter.

[39] Spain, see the Spanish Royal Decree no. 1006/1985 (Royal Decree).

[40] France, see Patricia Moyersoen, 'Buy-out Clauses in French Sports Law', 9 *Football Legal* p. 113.

[41] Art 17(1) FIFA RSTP.

clause explicitly grants a player the right to unilaterally withdraw from his employment contract subject to the payment of a predefined amount,[42] a liquidated damages clause prescribes a predetermined amount of compensation to be paid by the player in case he breaches his contract. Therefore, in cases where a 'liquidated damages clause' is triggered, sporting sanctions will generally follow for the player and his new club based, in accordance with the FIFA RSTP.[43] However, in case of a 'buy-out clause', no sanctions will follow. Nevertheless, in cases where a player does not strictly follow the prerequisites stipulated in a buy-out clause, the contract may still be breached, and sporting sanctions may then also apply.[44]

Whereas FIFA held for a long time that liquidated damages clauses and buy-out clauses ought to be reciprocal to be valid,[45] CAS jurisprudence indicates that reciprocity is not a prerequisite for such clauses to be valid. Instead, and as put into words by the guiding and often referred to CAS-award of 17 March 2016 in this respect:

> [B]ased on FIFA and CAS case law, if a party to an employment contract were to terminate the employment contract without just cause, this would in principle require such party to compensate the other party for the damages incurred as a consequence of such breach. The non-amortised transfer fee paid for by a club to acquire the services of the player is usually included in such calculation as this is in principle indeed a damage incurred by such club, whereas the transfer fee paid for by the club would in principle not be taken into account in the calculation of the compensation if it were the club to terminate the employment contract without just cause, as the player does not incur any damages in this respect. This is not a consequence of the behaviour of the parties, but is simply a consequence of the different types of damages incurred by clubs and players in disputes regarding breach of contract. Specific circumstances put aside, the damage of a club in case of a unilateral and premature termination of an employment contract by a player is therefore generally higher than the damage of a player in case of a unilateral and premature termination by a club. This background analysis is deemed relevant by the Panel to show that the consequences of breach of contract are generally different for players and clubs and that, in the view of this Panel, this difference shall be taken into account in the assessment as to whether the individual solution reached by the parties is balanced and proportionate.[46]

While the reciprocity of compensation clauses is thus not a strict prerequisite, at least not in view of the CAS, it is undisputed that the amount of compensation stipulated in a compensation clause must be balanced and proportionate.[47] As the circumstances in each case differ, the proportionality of compensation clauses must be assessed on a case-by-case basis. Some authors indicate that the validity of compensation clauses should be analysed *ex ante* i.e., only considering the circumstances surrounding the conclusion of the contract.[48] However, the jurisprudence remains ambiguous on this point. It is also interesting to note that, while FIFA renders a disproportionate compensation clause non-applicable in most cases, the CAS will

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[42] See, e.g., FIFA DRC 16 July 2020, Pizarro and FIFA DRC 25 February 2020, Meleg.

[43] See for instance CAS 2013/A/3411 and CAS 2016/A/4550.

[44] See CAS 2015/A/4188.

[45] See, e.g., FIFA DRC 28 October 2021, Silva Barbosa; FIFA DRC 12 August 2021, Yevhen Hryhorovych; FIFA DRC 11 March 2021, Gomes De Sousa and FIFA DRC 31 October 2019, Torres Ruiz.

[46] CAS 2015/A/3999 and CAS 2015/A/4000.

Association (FIFA), award of 17 March 2016, par. 151.

[47] FIFA Commentary to the RSTP, Art 17, p. 142.

[48] Gauthier Bouchat, 'Liquidated Damages Clauses: A Critical Analysis of the Jurisprudence of the Dispute Resolution Chamber and the Court of Arbitration for Sport', *Football Legal*, 30 June 2018.

often adjust the compensation to an appropriate level, which is another significant difference between FIFA and CAS.

5.2 Transfer Agreements

5.2.1 Definitive transfer agreement

5.2.1(a) Conditions precedent

When completing a transfer, the engaging club often wishes to secure some safeguards regarding the (medical) status of the player and his eligibility to play for the club. In contrast to employment agreements with players, transfer agreements may be made subject to a successful medical examination or the player being able to obtain a working permit. It is, however, prohibited to set any conditions for an ITC to be issued. In this regard, the FIFA RSTP provide that '[t]he ITC shall be issued free of charge without any conditions or time limit. Any provisions to the contrary shall be null and void'.[49] In line with this provision, the FIFA Disciplinary Committee and CAS have held multiple times that requesting the payment of a sum of money to carry out the relevant procedures in TMS, which can be used by clubs releasing a player to exert pressure on an engaging club, is a violation of the FIFA RSTP.[50]

There are some nuances for this prohibition. In recent CAS awards, it has been decided a few times that while conditions should not be imposed on the issuance of an ITC, it is possible to stipulate in a transfer agreement that the payment of a certain amount is a condition precedent to the whole transfer.[51] When the condition precedent has to be interpreted as a condition without which the transfer would not have been concluded, it is therefore valid.[52] Releasing clubs can consequently acquire safeguards as to the payment of (the first instalment of) a transfer fee if the transfer agreement has been drafted properly.

5.2.1(b) Sell-on clauses[53]

Sell-on clauses are often included in transfer agreements and have been very popular clauses for many years. While the FIFA RSTP do not provide for a definition or a further clarification of the sell-on clause, the CAS describes the purpose of sell-on clauses as follows:

> The Sell-On Clause contains a well-known mechanism in the world of professional football: its purpose is to 'protect' a club (the 'old club') transferring a player to another club (the 'new club') against an unexpected increase, after the transfer, in the market value of the player's services; therefore, the old club receives an additional payment in the event the player is "sold" from the new club to a third club for an amount higher than that one paid by the new club to the old club. In transfer contracts, for that reason, a sell-on clause is combined with the provision defining the transfer fee: overall, the parties divide the consideration to be paid by the new club in two components, i.e. a fixed amount, payable upon the transfer of the player to the new club, and a variable, notional amount,

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[49] Art 9(1) FIFA RSTP.

[50] CAS 2014/A/3793; CAS 2016/A/4805.

[51] See CAS 2018/A/5953 and CAS 2019/A/6301.

[52] See CAS 2019/A/6229.

[53] Please note that this section is a shortened and updated version of 'Sell-on clauses in light of FIFA and CAS jurisprudence' – *Football Legal* (2020), of the same authors. Furthermore, sell-on clauses can also be included in players' employment contracts. In this case, the same principles apply.

payable to the old club in the event of a subsequent 'sale' of the player from the new club to a third club.[54]

We see that sell-on clauses are often used in the transfers of talented players that have the potential to be transferred again in the future for a higher amount. In this context, sell-on clauses are beneficial for both the old and the new club. The old club possibly benefits from the subsequent transfer, whereas the new club will initially have to pay a lower amount and will only be obliged to pay an additional transfer fee if the player is transferred to a third club for a higher fee and was therefore worth the initial investment.

As follows from Article 18ter of the FIFA RSTP, no club or player may enter into an agreement with a third party whereby a third party is 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.[55] In this regard, a third party is defined as a party other than the player being transferred, the two clubs transferring the player from one to the other, or any previous club with which the player has been registered. The FIFA RSTP do not leave room for any other third parties, such as intermediaries, investment companies or family members of the player, to participate, either in full or in part, in compensation payable in relation to the future rights of a player being transferred from one club to another.

The contractual nature of sell-on clauses has several implications. First, which can also be derived from the principles of contractual freedom and autonomy, parties are free to contract as they wish.[56] Furthermore, the interpretation of sell-on clauses requires an analysis of the 'real and common intent of the parties'. Where a factual consensus cannot be proven, declarations of the parties must be interpreted pursuant to the principle of good faith, taking into account the wording and context and all circumstances. In this context, it is important to take note of the principle '*in dubio contra stipulatorem*', which establishes that, in case of ambiguity or contradiction, the interpretation of unclear sell-on clauses will be interpreted to the detriment of the party that drafted them.[57]

Sell-on clauses are contractual agreements which are subject to undetermined future events. Because of this uncertainty, the new club's obligation to pay a share of the transfer compensation is subject to the subsequent receipt of the relevant amount by the new club, and the sell-on fee must be based on the amount which is actually received by a club for selling a player and not on an indicative amount.[58] Therefore, a party cannot claim instalments that are not due yet[59] and transfer fees that are partially received by the selling club result in payments of any

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[54] See CAS 2010/A/2098.

[55] See also Chapter 13 in this book of Mr Michele Colucci and Mr Roy Vermeer, 'The Status and Role of Players in the Football Industry'.

[56] See for instance, CAS 2019/A/6187 and CAS 2019/A/6189, in which the parties, under certain circumstances, also agreed to a sell-on percentage in case of an offer by a new third club to pay a transfer fee. One could, however, question the disciplinary permissibility of such clauses in connection to the Third-Party Investment (TPI) regulations by FIFA.

[57] See, *inter alia*, CAS 2018/A/6023 and CAS 2017/A/5279. Which party drafted the contract will depend on the circumstances of each case.

[58] PSC 7 May 2014, no. 0514799, PSC 23 April 2013, no. 04132127 and PSC 19 March 2013, no. 03132290; CAS 2012/A/2875. See also CAS 2014/A/3701.

[59] This also follows from CAS jurisprudence, such as CAS 2013/A/3367 and CAS 2012/A/2875.

sell-on fees to a previous club on a pro rata basis. In the context of risk-sharing, this outcome seems fair.[60]

We also take note of disputes where the question arises of whether or not a sell-on clause can be triggered for a temporary transfer. In the case of a situation that hardly differs from a typical, final transfer of a player (for instance when a player is loaned for a fee during the last year of his employment contract), such a transfer can be qualified as a '*definitive transfer*'.[61] However, the applicability of a sell-on clause will always have to be determined on a case-by-case basis, as this is hugely dependent on the exact wording of the clause.[62]

In a general sense, trying to avoid paying out sell-on clauses based on overly formalistic arguments will not be easily tolerated by the CAS. For instance, when a club labels a transfer as a 'unilateral termination against indemnification',[63] when it uses a 'bridge transfer' to avoid a sell-on fee,[64] when it argues a contract has been terminated, thus breaking the 'chain of entitlement'[65] or when it argues that it did not receive compensation, but a new sell-on percentage,[66] the jurisprudence shows that a sell-on fee is still due.

In some cases, sell-on clauses stipulate an entitlement to a higher sell-on percentage if a player subsequently joins a rival of the former club. While these '*anti-rival*' clauses are aimed at reducing the risk of a future transfer to certain clubs, this does not automatically lead to a violating of the prohibition of Third-Party Influence as laid down in Article 18bis of the FIFA RSTP. Instead, it must be determined, based on a balance of probabilities, that a sell-on clause materially limits and influences other clubs in transfer-related matters.[67]

5.2.1(c) Bonus constructions

In some transfer agreements, part of the compensation the former club is entitled to is conditional upon certain sporting achievements. Examples include the individual performances of the player, such as the number of matches a player participates in or the number of goals or assists, and team performances, such as a certain result in a competition, or a qualification for or promotion to a certain competition. Discussions can arise over the interpretation of such conditional payments. While the entitlement to a specific amount is always dependent on the wording of a clause and must therefore be examined on a case-by-case basis, some general principles derive from CAS case law. From a procedural perspective, the club claiming to be entitled to a certain amount will bear the burden of proof to demonstrate that a conditional payment is due. Therefore, a claim for a bonus must always be substantiated by evidence that the condition precedent has been met, unless the creditor acknowledged that the bonus amount is due.

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60 CAS 2005/A/896 and CAS 2014/A/3508. See also CAS 2005/A/848.

61 CAS 2007/A/1219; CAS 2012/A/2733. See also PSC 10 November 2017, no. 11170343; CAS 2014/A/3508 and CAS 2018/A/5809.

62 PSC 7 May 2014, no. 0514303. See also CAS 2008/A/1793; PSC 20 November 2014, no. 1114580.

63 CAS 2019/A/6525; opposing this: CAS 2010/A/2098.

64 CAS 2014/A/3508. See also CAS 2004/A/701.

65 CAS 2020/A/7317.

66 CAS 2018/A/5912.

67 CAS 2020/A/7417.

From a material perspective, it is important to note that the interpretation of the relevant clauses is not covered in the FIFA RSTP, and thus not governed by Swiss law per se.[68] However, as many parties subject themselves to the FIFA regulations or Swiss law, many cases before CAS are resolved based on Swiss law. It derives from Article 18 paragraph 1 of the Swiss Code of Obligations that the meaning of a text, even a clear one, is not necessarily determining, and that the 'real and common intent of the of the parties', which may arise from a multitude of different circumstances, such as the drafting history of the agreement, its purpose or the overall content of the contract, will prevail over the purely literal interpretation.[69] In cases where a clause remains ambiguous, the principle of *in dubio contra stipulatorem,* which entails that the content of a contract should be interpreted against the party that drafted the contract in a specific situation, will subsidiarily come into play.[70]

5.2.2 Loan agreements

Under the FIFA RSTP, professional players may be loaned to other clubs by means of a loan agreement.[71] Loans must take place for a predetermined period and are mostly used to encourage the development and training of young players. As will be further elaborated upon in section 6, as the player will be registered with the hiring club, this will in principle be the club entitled to receive the relevant FIFA training awards. Also, as professionals are only entitled to be registered for three clubs during a season, it should be noted that a registration for a club on loan also counts as a registration.[72]

5.2.2(a) Participation bonuses and development fees

As parent clubs often want to encourage the development and training of young players by means of a loan, they will often want to ensure that the loaned player gets a certain amount of playing time. However, Article 18bis of the FIFA RSTP prohibits clubs from entering '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'.

In this regard, it should be noted that a penalty clause in the case of a player not participating in a sufficient number of matches has been considered a violation of Article 18bis of the FIFA RSTP on multiple occasions.[73] However, in other cases, jurisprudence indicates that a reduction of the loan fee when the player is not fielded in enough matches is not a violation of Article 18bis, as the possibility of having the performance fee reduced appears to be an incentive rather than a possible external influence.[74] Therefore, in cases where the parties to a loan

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[68] In CAS 2014/A/3588, e.g., a bonus clause was interpreted in accordance with French law. However, the same principles are applicable under French law.

[69] SFT 131 III 287; SFT 136 III 188; SFT 127 III 444.

[70] CAS 2017/A/5172.

[71] Art 10 FIFA RSTP.

[72] Art 5(4) FIFA RSTP. However, purely 'technical registrations' do not count for these limits. For example, when a player is definitively transferred to a club and instantly loaned to a third club, the registration with his parent club will be considered a 'technical registration'. See: Commentary to the FIFA RSTP (2021 edition), pp. 36–37.

[73] Manual on TPI and TPO in Football Agreements, pp. 75–82.

[74] See: Manual on TPI and TPO in Football Agreements, Decision of the FIFA Disciplinary Committee dated 23 July 2020, Arsenal FC v. Cork City FC, p. 40.

agreement want to include a development fee in their loan agreement, it is vital to carefully draft the wording of the agreement.

5.3 Contracts with Agents

When a player is transferred, an essential role is often played by agents. While it is difficult to stipulate what the exact services of agents are as this hugely varies between agents, it is in any case clear that they function as a middleman between clubs and players when negotiating the terms and conditions of a transfer agreement and/or employment agreement. As follows from Article 18 of the FIFA RSTP, if an intermediary is involved in the negotiation of a contract, he shall be named in that contract.[75]

The FIFA Regulations on Working with Intermediaries are currently applicable to all agents. However, at the moment of writing this chapter, the framework of rules applicable for agents is subject to major changes, the most important one being the new FIFA Agent Regulations. Unfortunately, as the content of the new FIFA Agent Regulations is still to be accepted and is therefore subject to change, we are not able to discuss these regulations, as such discussion would be inherently speculative.[76]

To be able to negotiate on behalf of clubs or players, agents often conclude a representation agreement with players. In these agreements, it is agreed between a player and his agent that the agent is (often exclusively) mandated to negotiate on behalf of the player.

Furthermore, in cases where a transfer has successfully been finalised, agents often conclude a commission agreement with the club in order to be paid for their services.[77] In these commission agreements, particularly if it concerns a talented player, it is sometimes stipulated that the agent will, in addition to a fixed fee for his services, receive a compensation payable in relation to the future transfer of a player. While its widespread use currently seems to be tolerated by FIFA, we are sceptical if this practice is in line with the prohibition on third-party ownership of players' economic rights.[78] On the other hand, however, it is disputed if prohibiting an agent to receive a future compensation in relation to a player's transfer is allowed under EU competition law.[79] This might explain why FIFA is currently reluctant to sanction this practice.

6. COMPENSATION

6.1 Transfer Compensation

In addition to compensations for training rewards (training compensation and solidarity contribution) – compensations which are closely linked to transfers and will be discussed in the

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[75] Art 18.1 FIFA RSTP.

[76] Some possible changes will, however, be discussed in section 8.

[77] See also Chapter 13 in this book of Mr Michele Colucci and Mr Roy Vermeer, 'The Status and Role of Players in the Football Industry'.

[78] Art 18ter FIFA RSTP.

[79] See for instance: Frankfurt am Main Higher Regional Court, judgment of 30.11.2021, Az. 11 U 172/19 (Kart).

next section – 'transfer compensation' is the most-common (and often also most lucrative) compensation to be received by clubs. In fact, if a player who is under contract – the so-called professional – transfers to another club, as a rule, the player is required to pay a compensation for the termination with mutual consent of his employment contract.

To better understand the dynamics of the transfer compensation, we must first consider the *Bosman* case, which had a huge impact on the international football world.[80] This case can even be considered as one of the most important sports cases to appear before the Belgian courts, and in relation to European sports law, it is possibly the most significant case.[81] Through its decision of 15 December 1995, the Court of Justice of the European Union ('the CJEU') stressed that sport, just like any other economic activity, is subject to the ordinary rules of European law.[82] This decision by the CJEU found FIFA's transfer system incompatible with EU law. More specifically, in this judgment it was decided that transfer compensation to be paid for a player who had ended his contractual relationship with his former club was not permitted and was in violation with the free movement of persons within the EU. Without entering into too many further details as regards the decision itself, the *Bosman* case led to the abolition of the actual transfer compensation between clubs at the end of the player's contract. In other words, transfer compensation could henceforth only be due in relation to premature contractual termination.

In the world of football, it is customary practice that the new employer of the player, i.e., the new club of the player, generally pays the required 'transfer compensation' in exchange for the redemption of the employment contract and its premature termination. The amount of this transfer compensation is, in principle, always left to the discretion of the former club and will be based on the principles of the market mechanism. In order to have more clarity as to the compensation amount in advance, parties can delineate the compensation in the employment contract itself, for example, by means of a '*buy-out clause'* or a '*liquidated damages clause*', as has been previously discussed.

In the past, FIFA's decision-making bodies and (in appeal) the CAS have been confronted at the international level with many transfer-related disputes in which players or clubs terminated contracts without just cause. In fact, many interesting transfer-related cases involve players who terminated their employment contracts without having a just cause and, subsequently, made a transfer to their new club after the termination. In this regard, it must be noted that the FIFA RSTP provide that if a contract between a player and a club is terminated without just cause, the party in breach shall pay compensation as is explicitly laid down in Article 17 of the FIFA RSTP, which is the cornerstone provision of the FIFA RSTP. In these cases, the FIFA DRC and the CAS have established the exact amount of compensation due to the former club. We wish to note that the 'just cause' as follows from Article 14 of the FIFA RSTP differs from the 'sporting just cause' as laid down in Article 15 of the FIFA RSTP. From the latter

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[80] Case C-415/93 *Union Royale Belge des Sociétés de football association ASBL v. Jean-Marc Bosman Royal Club Liègois SA v. Jean-Marc Bosman. SA d'Economic Mixte Sportive de l'Union Sportive du Littoral de Dunkerque, Union Royale Belge des Sociétés de Football Association ASBL, Union des Associations Européennes de Football Union des Association Européennes de Football v. Jean-Marc Bosman* [1995] ECR I-4837.

[81] Wise A. and Meyer B.V. *International Sports Law and Business*, Vol. 2. (Kluwer Law International, The Hague, 1997), pp. 1104–1105.

[82] Blanpain R. '10 Years of Bosman: The Fight for Player Freedom Continues,' (2006) 1(2) *The International Sports Law Journal* 116.

provision, it follows that an established professional who has, in the course of the season, appeared in fewer than 10 per cent of the official matches in which his club has been involved, may terminate his contract prematurely on the ground of this so-called 'sporting just cause'. As opposed to a valid just cause under Article 14, compensation may be payable in accordance with Article 15.

Before discussing the relevant jurisprudence, it is important to note that if a professional is required to pay compensation, the professional and his new club shall be jointly and severally liable for its payment (Art 17 para 2 RSTP). In other words, if the player transfers to a new club, but it is established by the FIFA DRC (or CAS) that the player terminated the contract without just cause, the new club will then also be held liable for such payment.[83]

The 'jointly and severally liability-rule', as introduced above, can be seen as a heavy burden for new clubs and characterises the peculiarities of the international football world. This concept is legally sound and its validity has been confirmed by the CAS, thereby referring to a decision of the Swiss Federal Tribunal ('SFT').[84] The jurisprudence does, however, show that under very exceptional circumstances, the new club can escape from this strict liability.

For example, when the party which chooses to end the contractual relationship is the former club, there seems to be a limit on the application of joint liability of the new club, as apparent from the famous *Mutu* case.[85] Also noteworthy is the *Diarra* case, which was dealt with by the FIFA DRC and later on confirmed by the CAS. With the *Diarra* ruling, the new club escaped from its liability under Article 17 paragraph 2.[86] In this context, the FIFA DRC recalled that, following the termination of the contract, the player did not find a new club and remained unemployed at the time of the passing of the FIFA DRC decision. Thus, in principle, Article 17 paragraph 2 of the FIFA RSTP could not be applied in that case. Another relevant decision in which an exception was made to the joint and several liability of Article 17 paragraph 2 of the FIFA RSTP is the *Smouha* case, in which the CAS found that there still must be justification for the provision's application. In fact, if a player's new club can prove that it did not benefit or profit from the player's breach of contract, then it should be possible, so found the CAS, that the new club can escape from the liability rule under Article 17 paragraph 2.[87]

The termination of contracts by players after the Protected Period has led to many interesting cases, in particular the famous *Webster and Matuzalem* case. Before we discuss these cases, it is important to address and share a few words about the Protected Period.

A club and a player that enter into an agreement should, in principle, 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 Protected Period, which was meant to safeguard contractual stability. The Protected Period was the period of three entire seasons or three years, whichever comes first, following the entry into force if such contract was concluded

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[83] Please note that the player will still be considered as the primary debtor for the payment of the compensation because of the breach of contract, which is also reflected in CAS jurisprudence (CAS 2019/A/6233).

[84] See CAS 2019/A/6096 and SFT decision of 20 December 2016, no. 4A_32/2016, from which latter decision it follows that it concerns 'a passive joint liability between the author of the contractual violation and the one who has profited from said violations'.

[85] See CAS 2013/A/3365 and 3366. It must be noted that this award was based on Art 14 para 3 of the 2001 edition, which is the current Art 17.

[86] See FIFA DRC 10 April 2015, no. 04151519 and CAS 2015/A/4094.

[87] See CAS 2017/A/4977.

prior to the 28th birthday of the professional, or it was a period of two entire seasons or two years, whichever comes first, following the entry into force of the contract if such contract was concluded after the 28th birthday of the professional. FIFA upheld that unilateral termination of a contract without a justified reason, especially during the Protected Period, must be vehemently discouraged. In other words, during the Protected Period, it was made very difficult for one of the parties to unilaterally terminate the employment contract. The Protected Period plays a key role with regards to the amount of financial compensation in the case of a unilateral termination, but also with regards to the sporting sanctions to be imposed. It must further be noted that, if the parties agree to extend the contract, the Protected Period will start again. Parties consequently pursue longer contractual stability.

Analysing the jurisprudence on this subject, we see that CAS panels had a different view on the calculation of the compensation to be paid by the player to his former club following the unjustified early termination of the contractual relationship after the end of the Protected Period. In Webster, on the one hand, it was decided that the compensation payable by the player to his former club for the early termination of the contract without just cause had to be based on the residual value of the contract that was prematurely terminated. With hindsight, this was a stand-alone decision, as in *Matuzalem*, on the other hand, the principle of 'positive interest' was followed. This is now also the leading principle in the current approach of the CAS in similar matters.[88] According to this principle, the injured party should be compensated for damage incurred because of the breach of the contract. In other words, the injured party must be put in the position it would have been in had the breach of contract not occurred. This means that, on top of the residual value (as was the outcome in *Webster*), additional financial elements must also be considered (which follows with *Matuzalem*), such as fees (for transfers and agents) and expenses that were paid by the former club.

We find it fair not to follow the *Webster* approach, as this would otherwise mean that players (and potential new clubs) can simply calculate in advance what would be the compensation amount, thereby also drifting away from the specific circumstances of a case which should, in principle, be reflected in the amount of compensation. It is also this uncertainty that will make parties more reluctant to unilaterally terminate a contract, and hence, it effectively addresses moral hazard issues. This is in line with FIFA's aim to better serve and protect the principle of *pacta sunt servanda* and to avoid unilateral terminations, albeit that a termination outside the Protected Period is still a termination whereby the party already benefits from the avoidance of sanctions (which will only be imposed in case it concerns a termination within the Protected Period). Moreover, the *Webster* approach does not seem to align with Article 17 RSTP itself as said provision also provides for other criteria than the residual value.

6.2 Training Compensation

Another payment that might be due in relation to a transfer is 'training compensation'. Hereinafter we will discuss some of its key aspects, without being exhaustive.[89]

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[88] See, *inter alia*, CAS 2009/A/1880 & 1881, CAS 2014/A/3626, CAS 2015/A/3955 & 3956, CAS 2018/A/5607 and CAS 2020/A/7029.

[89] In Frans de Weger, *The Jurisprudence of the FIFA Dispute Resolution Chamber* (2nd edn, T.M.C. Asser Press, 2016), the concept of training compensation is extensively discussed in Chap 11. See, e.g., in relation to the loan of professional (p. 365) and waiver of right (p. 410).

As outlined above, the *Bosman* case led to the abolition of the transfer compensation between clubs at the end of the player's contract.[90] However, after *Bosman* the question still remained unanswered as to whether FIFA's system of training compensation could be considered as 'EU law-proof', since training compensation is a payment that is also due after expiry of a player's contract. In other words, the discussion remained whether FIFA's training compensation system was compatible with the principle of free movement of workers. In the *Bernard* case of 2010[91] and the subsequent *Wilhelmshaven* saga,[92] more light was shed on the concept of training compensation and its legal acceptance under EU law.[93]

6.2.1 *Bernard*

In the *Bernard* case (1997), the player Olivier Bernard signed a so-called '*joueur espoir*' contract with the French club Olympique Lyonnais for three seasons, and the contract started on 1 July 1997. Before the contract was due to expire, Olympique offered the player an official professional contract for one year from 1 July 2000. However, the player refused to sign the proposed contract and later signed a professional contract with the English club Newcastle United FC. Consequently, Olympique Lyonnais sued Bernard before the Employment Tribunal in Lyon and requested damages jointly against the player and Newcastle United FC. The amount claimed was €53,357.16. This amount corresponded to the remuneration which Bernard would have received over one year if he had signed the contract offered by Olympique.[94]

The Employment Tribunal in Lyon decided that the player had unilaterally terminated his contract and ordered him and Newcastle United FC to jointly pay Olympique an amount of damages of €22,867.35. On appeal, the Cour d'Appel in Lyon had a different view and decided that the obligation on a player at the end of his training to sign a professional contract with a club that had provided the training, and that also prohibited the player from signing such a contract with a club in another Member State of the EU/EEA, was in violation of the current Article 45 of the Treaty on the Functioning of the European Union ('TFEU') (ex Art 39 EC Treaty).

Olympique was not happy with the decision and appealed against it before the Cour de Cassation. The Cour de Cassation considered that, although Article 23 of the French Charter did not formally prevent a young player from entering into a professional contract with a club

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[90] Case C-415/93 *Union Royale Belge des Sociétés de football association ASBL v. Jean-Marc Bosman Royal Club Liègois SA v. Jean-Marc Bosman. SA d'Economic Mixte Sportive de l'Union Sportive du Littoral de Dunkerque, Union Royale Belge des Sociétés de Football Association ASBL, Union des Associations Européennes de Football Union des Association Européennes de Football v. Jean-Marc Bosman* [1995] ECR I-4837.

[91] Case C-325/08 *Olympique Lyonnais SASP v. Olivier Bernard and Newcastle United FC* [2010] ECR I-02177.

[92] The saga started with the decisions of the FIFA DRC 5 December 2008, nos. 128921a and 128921b, followed up in appeal by the CAS (CAS 2009/A/1810 and 1811), and then the German decisions of the Oberlandesgericht (OLG) Bremen, 30 December 2014, 2U 67/14, which was successfully appealed before the Highest Regional Court (ruling of 30 December 2014), ending with the decision of the Bundesgerichtshof of 20 September 2016 (BGH), the highest German Civil Court; ECLI:DE:BGH:2016:200916UIIZR25.15.0 (nr. 163/2016).

[93] For an extensive analysis of these cases, reference is made de Weger (n 89), see Chap 11 'Training Compensation' (as from p. 335).

[94] See also Weatherill S. *European Sports Law – Collected Papers* (T.M.C. Asser Press, The Hague, 2014), p. 485.

in another Member State, its effect was to hinder or discourage young players from signing such a contract in the event that the provision in question could give rise to an award of damages against them. The Cour de Cassation noted that the dispute raised a matter of interpretation of said Article 39 since it raised the question of whether such a restriction could be justified by the objective of encouraging the recruitment and training of young professional footballers in accordance with the *Bosman* case. Therefore, the Cour de Cassation decided to ask the CJEU for a preliminary ruling and asked the Cour de Cassation whether the principle of the freedom of movement for workers, as laid down in Article 45 TFEU (ex Art 39 EC Treaty), precludes a provision of national law pursuant to which a '*joueur espoir*', who at the end of his training period signs a professional player's contract with a club of another Member State of the EU, may be ordered to pay damages, and if so, whether the need to encourage the recruitment and training of young professional players constituted a legitimate objective or an overriding reason in the general interest of justifying such a restriction.

The CJEU considered that rules such as those in this specific matter, according to which a '*joueur espoir*', at the end of his training period, was obliged to sign a professional contract with the club that had trained him, are likely to discourage such player from exercising his right of free movement, especially in the event that the player is liable to pay damages if he signs a professional contract with a club in another Member State at the end of his training period. According to the CJEU, those rules can be considered as a restriction on the freedom of movement for workers (players).

However, according to the CJEU, a measure which constitutes an obstacle to freedom of movement for workers can be accepted if it pursues a legitimate aim compatible with the EC Treaty (now TFEU) and is justified by overriding reasons in the public interest.[95] The CJEU underlined that whether a system which restricts the freedom of movement of such players is suitable to ensure that the aforementioned objective is attained and does not go beyond what is necessary to attain it, the specific characteristics of sport in general, and football in particular, and of their social and educational function, must be taken into account.[96] According to the CJEU, a scheme providing for the payment of compensation for training where a young player, at the end of his training, signs a professional contract with a club other than the one which trained him can, in principle, be justified by the objective of encouraging the recruitment and training of young players. However, following the decision it is of the utmost importance that such a scheme must actually be capable of attaining that objective and be proportionate to it, taking due account of the costs borne by the clubs in training both future professional players and those who will never play professionally.[97] In the matter at hand, the payment to the club which provided the training did not contain compensation for training, but was related to damages, for which the player concerned would be liable for breach of his contractual obligations and the amount of which was unrelated to the real training costs incurred by the club.[98] In other words, according to the CJEU, the damages were not calculated in relation to the training costs incurred by the club that provided such training, but in relation to the total loss suffered

[95] See, para 38 of the *Bernard* Judgment. Application of that measure would still have to be such as to ensure achievement of the objective in question and not go beyond what is necessary for that purpose.

[96] See, ibid., para 40.

[97] See, ibid., para 45.

[98] See, ibid., para 46.

by the club. Furthermore, the amount of that loss was established on the basis of criteria which were not determined in advance.[99]

Under those circumstances, the CJEU was of the opinion in this case that the possibility of obtaining such damages went beyond what was necessary to encourage recruitment and training of young players and to fund those activities. The CJEU finally decided and emphasised that a scheme such as this, under which a '*joueur espoir*' who signs a professional contract with a club in another Member State, at the end of the training period of the player, is liable to pay damages calculated in a way which is not related to the actual costs of training the player concerned, was not necessary to achieve the aforementioned objective.

6.2.2 *Wilhelmshaven*

After the *Bernard* case of 2010, the football world assumed, rightly or wrongly, that FIFA's training compensation system could be considered as 'EU law-proof' and thus compatible with the principle of free movement of workers. However, it did not end with *Bernard*, as it was in the *Wilhelmshaven* case that the compatibility of FIFA's training compensation system was evaluated again.

In the *Wilhelmshaven* case, the player Sergio Sagarzazu, who had the Italian and Argentinian nationality, was registered as an amateur player with the Argentinian clubs Excursionistas and River Plate for a certain period of time. After his stay with these clubs, the player transferred to the German professional football club SV Wilhelmshaven, where he signed a professional contract from 8 February 2007 until 30 June 2007. The contract was then prolonged for an additional season. Both Argentinian football clubs claimed that they were entitled to receive training compensation, which was rejected by Wilhelmshaven. Therefore, both Argentinian clubs submitted a claim before the DRC. In its decisions of 5 December 2008, the DRC ordered the club Wilhelmshaven to pay the Argentinian clubs training compensation.[100] According to the Chamber, Excursionistas was entitled to €100,000 and River Plate was entitled to an amount of €57,500. Wilhelmshaven did not agree and on 23 March 2009 Wilhelmshaven filed two statements of appeal with the CAS. In its award of 5 October 2009, the Sole Arbitrator of the CAS confirmed the DRC decisions of 5 December 2008 and rejected the objections which were raised by Wilhelmshaven.[101]

As a result of the fact that Wilhelmshaven still refused to pay, on 13 September 2011 the FIFA Disciplinary Committee sanctioned Wilhelmshaven with additional fines. The FIFA Disciplinary Committee stated that if the club Wilhelmshaven had not paid within 30 days, a deduction of six points would be imposed. However, Wilhelmshaven still did not comply with the ruling of the FIFA Disciplinary Committee. Therefore, another six points deduction was requested again by FIFA to be imposed by the German Football Association, the DFB, but again in vain. In the meantime, Wilhelmshaven had been relegated to a lower league. Instead of the DFB, the Norddeutscher Fussball Verband imposed the deduction sanction on Wilhelmshaven.

In May 2013, Wilhelmshaven decided to challenge the deduction sanction before the German courts. Aside from this, Wilhelmshaven also appealed a new decision of the FIFA Disciplinary Committee to the CAS in which a relegation sanction was ordered, the decision

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[99] See, ibid., para 47.
[100] FIFA DRC 5 December 2008, nos. 128921a and 128921b.
[101] CAS 2009/A/1810 and 1811.

being confirmed on 24 October 2013.[102] The Norddeutscher Fussball Verband confirmed this decision and implemented the relegation sanction.

Although Wilhelmshaven did not appeal the CAS decisions before the Swiss Federal Tribunal, the court cases before the German courts were still pending. Before the Landgericht Bremen, Wilhelmshaven was challenging the six-point deduction and the forced relegation. However, the court rejected the claims of Wilhelmshaven. This decision was also appealed before the Highest Regional Court, who finally decided that the said CAS award was contradictory to EU law.

The main legal issue for Wilhelmshaven was that the CAS did not accept EU law.[103] According to Wilhelmshaven, the RSTP were contradictory to the EU's free movement of workers. More specifically, in the said CAS case the Sole Arbitrator questioned whether the DRC decisions of 5 December 2008 were in breach of EU law. With regard to Wilhelmshaven's argument on freedom of movement, the arbitrator was of the opinion that this argument was only available to the individual player and not to the club, thereby making reference to consistent CAS jurisprudence in this respect.[104] The second issue related to the fact that the player concerned also had the Italian nationality as a result of which Wilhelmshaven was of the opinion that the Argentinian clubs were obliged to offer the player a contract in accordance with Article 6 paragraph 3 of Annex 4 of the RSTP, as will be discussed later in this chapter. Since they failed to do so, they were not entitled to claim training compensation. The Sole Arbitrator decided that Article 6 of Annex 4 of the RSTP on the intra EU/EEA transfer of players was narrowly circumscribed within a limited geographic area, i.e., the EU/EEA territory. Prior to examining whether a contract had been offered to the player, the case had to fall within the scope of the above provision; in other words, the transfer had to take place from one national association to another within the EU/EEA.[105] The fact that the criterion of nationality is irrelevant has been confirmed by the CAS several times.[106] According to the Sole Arbitrator of the CAS, there was therefore no reason to depart from the unambiguous wording of Article 6 paragraph 3 of Annex 4, which is not applicable in the case of a player moving from a country outside the EU/EEA to a country within the EU/EEA, and which is consistent with the CAS jurisprudence.[107]

With reference to well-established case law, the Highest Regional Court did not agree with the above reasoning of the CAS. The Court was not convinced between the intra-EU and the

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[102] This CAS award of 24 October 2013 has not been published.

[103] Richard Parrish and Samuli Miettinen, *The Sporting Exception in European Union Law* ASSER International Sports Law Series (T.M.C. Asser Press The Hague, 2008), p. 171.

[104] CAS 2004/A/794 and CAS 2006/A/1027.

[105] For the same reason, the benefit of the provision will automatically also be refused to a Turkish club.

[106] CAS 2006/A/1125.

[107] CAS 2007/A/1338. See also CAS 2010/A/2075. In this case reference was also made to the Wilhelmshaven case. The Panel also emphasised that Art 6 para 3 of the RSTP depends on the location of the transferring clubs and not on the nationality of the players. This means that the difference made by the RSTP between a transfer within UE/EEA and outside this territory is therefore not based on the nationality of the player. Marítimo applied for the applicability of Art 45 TFEU (ex Art 39 EC Treaty) on the freedom of movement for workers within the EU. However, the Panel was clear and referred to the *Wilhelmshaven* case and stated that the arguments related to the freedom of movement of workers are only available to individual players and not to the club as an employer. Finally, the CAS rejected the request of Marítimo.

extra-EU transfers, as referred to in Article 6 paragraph 3. According to the Highest Regional Court the free movement principle should also apply to persons with EU nationality moving from a non-EU country to an EU country. In other words, the Highest Regional Court did not agree with the Sole Arbitrator's opinion that the free movement argument was only available to the individual player and not to the club. Article 6 of Annex 4 must also be applicable to persons with an EU nationality. As far as it concerns a person with an EU nationality from a non-EU country to an EU country, FIFA's system of training compensation was contradictory to EU law.[108] However, it is interesting to note in the football world that, from the award of the Highest Regional Court, it can be concluded that the system of FIFA's training compensation is compatible with EU law as long as it concerns the so-called 'intra EU-transfers'. At the highest German civil court, the German Bundesgerichtshof (BGH), the Wilhelmshaven saga finally came to an end.[109] The BGH ruled in favour of Wilhelmshaven and decided that the club was not bound by the decisions of FIFA and CAS due to failures in the German football regulations. Unfortunately, the question whether FIFA's training compensation system was compatible with EU law remained unanswered by the BGH.

Having discussed these important cases in relation to training compensation and the EU influences on training compensation, we will now consider FIFA's training compensation system.[110]

6.2.3 FIFA's training compensation system

After *Bosman*, which imposed severe restrictions on clubs to demand financial compensation from players based on the termination of their registration, there were still some legal openings to protect clubs that were involved with the training and education of players in the past. Therefore, FIFA introduced a training compensation system for clubs that were involved in the training of players. The RSTP 2001 edition were the first rules that contained provisions that regulated the compensation for the training and education of young players. According to FIFA Circular no. 769, the system of training and education was designed to encourage more and better training of young players and to create solidarity among clubs by awarding compensation to clubs which had invested in the careers of its former players. However, in some jurisdictions the entitlement to training compensation remains a subject of discussion.

In accordance with Article 20 of the RSTP, 2022 edition, training compensation shall be paid to a player's training clubs when a player is registered for the first time as a professional and each time a professional is transferred until the end of the calendar year of his 23rd birthday. The obligation to pay training compensation exists when the transfer takes place during or at the end of the player's contract. Annex 4 of the RSTP, 2022 edition, provides for explicit details regarding the system of training compensation. According to this Annex, a player's training takes place between the ages of 12 and 23, and training compensation should be

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[108] See also CAS 2012/A/2862. This case contains an exception to Art 19 RSTP. From this case it can be derived that the exception contained in Art 19 para 2 under b RSTP also applies to players having the nationality of a member country of the EU/EEA on the understanding that the club still needs to fulfil the criteria as follows from Art 19 para 2 under b RSTP.

[109] See the decision of the BGH of 20 September 2016 (BGH), the highest German Civil Court; ECLI:DE:BGH:2016:200916UIIZR25.15.0 (nr. 163/2016).

[110] Another important case and legal crusade, such as the *Wilhelmshaven* saga, was the *Pechstein* case, which was finally dealt with by the German Bundesgerichtshof. See also Oberlandesgericht (OLG) Munich, 15 January 2015, Az. U 1110/14 Kart.

payable for training incurred up to the age of 21, unless it is evident that a player has already terminated his training period before the age of 21. In that respect, it is important to distinguish the years relating to the obligation to pay training compensation and the years relating to the *calculation* of the amount. In other words, an amount for training compensation will be payable until the end of the calendar year in which the player reaches the age of 23, but the *calculation* of the amount payable will be based on the years between 12 and the age when it is established that the player completed his training. No training compensation will be due if a player signs his first professional contract or changes clubs on an international level *after* the end of the season of his 23rd birthday.

Article 2 paragraph 2 of Annex 4 of the RSTP, 2022 edition, provides for several specific situations when training compensation will not be applicable. Firstly, training compensation is not due if the former club terminates the player's contract without just cause (without prejudice, however, to the entitlements of the previous clubs), as the former club should not be rewarded for its behaviour. Secondly, training compensation is not due if the player is transferred to a so-called category 4 club, referring to clubs in the fourth tier of lower.[111] Training compensation is also not due in the event that a professional reacquires amateur status on being transferred. In this respect it is important to be aware of Article 3 paragraph 2 of the RSTP, 2022 edition, which states that if an amateur player reregisters as a professional within 30 months of being reinstated as an amateur, then training compensation will be due after all.[112] Fourthly, training compensation is also not due if the club claiming the training compensation does not exist anymore due to, in particular, bankruptcy, liquidation, dissolution or loss of affiliation.[113] In fact, training compensation relating to transfers of players may only be claimed by clubs, which are properly affiliated to the member association of the country to which they belong.[114] Finally, which is another exception, we also note that if two clubs conclude a transfer agreement against a transfer compensation, training compensation is considered as being included in the transfer compensation. The claiming club will then not be entitled to training compensation as well as transfer compensation. However, it should be noted that if the parties wish to stipulate otherwise so that training compensation is due in addition to the agreed transfer compensation, they can do so, but they need to explicitly mention it in the transfer agreement.[115]

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[111] It is unclear whether a 'first registration' with a Category 4 club triggers the entitlement to training compensation.

[112] According to Art 3 para. 2 RSTP (2022 edn), a new club will pay training compensation in accordance with Art 20 of the RSTP, 2014 edition. See, e.g., FIFA DRC 24 October 2011, no. 1011707, and 13 December 2013, no. 12131102.

[113] Art 3 para 3 Annexe 4 FIFA RSTP (2022 edn).

[114] FIFA DRC 2 November 2007, no. 117526.

[115] FIFA DRC 21 August 2020, Maturano Dos Santos; FIFA DRC 26 September 2019, no. 09191934; DRC 21 February 2006, no. 26595. See also FIFA DRC 9 November 2004, no. 114363 and no. 114312, FIFA DRC 13 June 2008, no. 3830, FIFA DRC 31 July 2008, no. 78026, FIFA DRC 9 January 2009, no. 19512, FIFA DRC 21 February 2006, no. 26595, FIFA DRC 9 November 2004, no. 114312 and no. 114363. See FIFA DRC 12 March 2009, no. 39328. See also CAS 2004/A/785. In the latter case, the CAS decided that when negotiating the transfer agreement, there was a clear understanding between the parties that all financial aspects of the transfer were validly and fully agreed upon. If the appellant had wanted to reserve its right to claim a compensation, it would have had to address such issue with the respondent. Instead, the appellant agreed to a 'free transfer', reserving only the right to an additional fee of 25 per cent to be paid in case of another transfer to a third club. Against this background, the panel's

The calculation of the compensation due in respect of training and education costs is a bit more complex. All of FIFA's member associations are instructed to divide their affiliated clubs into a maximum of four categories depending on the financial investment they make in training players.[116] The four categories range from the top professional level, which are the Category 1 clubs corresponding to all clubs in the top division of a member association's national league, to Category 4 clubs, which are all clubs in the fourth tier or lower, most often amateur clubs. The exact qualification is crucial for the calculation of training compensation.

To calculate the amount of training compensation, FIFA set indicative amounts of training costs per category for each confederation. Table 14.1 below presents the applicable amounts.

Table 14.1 Training compensation categories for each confederation and the amount of compensation applicable

Confederation	Category 1	Category 2	Category 3	Category 4
AFC	–	$ 40,000	$ 10,000	$ 2,000
CAF	–	$ 30,000	$ 10,000	$ 2,000
CONCACAF	–	$ 40,000	$ 10,000	$ 2,000
CONMEBOL	$ 50,000	$ 30,000	$ 10,000	$ 2,000
OFC	–	$ 30,000	$ 10,000	$ 2,000
UEFA	€ 90,000	€ 60,000	€ 30,000	€ 10,000

Having the above in mind, training compensation is calculated by taking the training costs the new club would have incurred according to its category and multiplying this figure by the number of years of training it would have provided. This multiplier generally corresponds to the period between the calendar year of the player's 12th and his 21st birthdays.

As an example, player A has played from his 16th until his 19th year during three seasons with a Category 2 club. Then, being 22 years of age, player A signs a professional contract with a foreign Category 1 club (having the same calendar year as the Category 2 club). This means that the Category 2 club is entitled to receive an amount of training compensation. The amount will be based on the training costs made by the Category 1 club, which falls under Category 1 of CONMEBOL and corresponds to a fixed amount of training costs of $50,000, the amount which has to be multiplied by the number of seasons player A played with the Category 2 club (three seasons, as set out above). The Category 2 club would then be entitled to receive training compensation corresponding to the total amount of $150,000.

Finally, special attention should be given to the fact that within the EU/EEA, in order to avoid any incompatibility with EU law, there is an extra requirement on whether or not training compensation is due (along with a different calculation method). This extra requirement was related to a situation whereby, if the former club did not offer the player a contract under

interpretation of the transfer agreement concluded by the parties in November 2002 was that the appellant was content to transfer the player G. to the respondent on the stated terms: through such transfer the appellant was indeed released from its obligation to pay a considerable sum of money, i.e., the second sign-on fee and the salary due to the player up to the end of his contract, as well as the applicable social charges. By agreeing to a free transfer without making any reservation for an additional compensation for training, the appellant effectively, at least towards the respondent, waived any right to claim an additional payment.

[116] See FIFA Circular no. 1249, 6 December 2010 and FIFA DRC 2 July 2020, Bakhtiyarov (a) and FIFA DRC 16 April 2021, Mason.

certain strict conditions, no amount for training compensation is payable by the new club, unless the former club can justify that it is entitled to such compensation (the so-called 'bona fide interest', Article 6 paragraph 3 of Annex 4 of the RSTP). Put differently, if the club did not offer a contract to its player or, alternatively, is not able to justify its right for payment in this respect, the club will forfeit its right to receive training compensation. These provisions are created to reflect specific circumstances pertaining to aspects of EU law, more specifically the principle of freedom of movement for workers.

As a final note, we refer to the temporary amendments, which explicitly state that no training compensation will be due on registering any player whose previous registration was in the UAF or FUR and whose contract has been suspended.

6.3 Solidarity Contribution

In addition to the payment of training compensation, a solidarity contribution can also be due in the context of transfers. Hereinafter we highlight some key aspects.[117]

Although the solidarity mechanism has similarities with the system of training compensation, the solidarity mechanism has a different aim, that being solidarity within the football community, whereas training compensation aims to compensate clubs for the investment they have made in training young players.

Following Article 21 of the RSTP, 2022 edition, the solidarity mechanism entails that each time a professional is transferred before the end of his contract, a so-called solidarity contribution is due by the new club to all the clubs for which the player played between the ages of 12 and 23. As for training compensation, the solidarity mechanism stipulates that the former club that provided the education and training of the player is entitled to receive an amount of solidarity contribution in the event of a future transfer of its former player in the course of his ongoing employment contract. However, there are some significant differences with training compensation, too.[118]

For instance, training compensation is applicable regardless of whether a player transfers during his contract or after the end of his contract (i.e., if he is transfer-free). A solidarity payment is, however, only due if the player transfers *during* the course of his contract.[119] In other words, a solidarity contribution is not due after the end of a player's contract and is always linked to and derives from a transfer compensation. A general rule of thumb is that if transfer compensation is paid, a solidarity contribution is automatically due, too. Another important difference between both systems is that training compensation is only due when the transfer or signing of the contract of the player takes place before the age of 23.[120] The applicability of the solidarity mechanism, however, does not depend on the age of the player.[121]

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[117] See also de Weger (n 89), in which the concept of solidarity mechanism is extensively discussed, see p. 447. See also Chemor M.F. (2013) 'Solidarity Contribution in Pathological Contract Terminations,' (2013) 3/4(13) *International Sports Law Journal* 225–235.

[118] For example, and as referred to earlier, for the provisions regarding solidarity contribution, it is irrelevant whether a particular player already ended his training period, because it is a different concept from training compensation. See FIFA DRC 17 March 2015, no. 03151545.

[119] See, e.g., FIFA DRC 22 June 2007, no. 67986.

[120] FIFA Circular no. 769 dated 24 August 2001.

[121] From a more linguistic point of view, the 'solidarity contribution' is the contribution itself to be paid by the new club. The overarching system is called 'solidarity mechanism'.

This is also confirmed by several decisions of the FIFA DRC.[122] Similarly to training compensation, more details regarding solidarity mechanism are laid down in a specific Annex (no. 5) of the RSTP (2022 edition).[123] In accordance herewith, training compensation is due only once, whereas a solidarity contribution is due each and every time a player makes a transfer and a transfer compensation is paid. A final difference is that training compensation is calculated based on fixed training costs, as set out above, as solidarity contributions are calculated as a percentage of the transfer compensation.

Previously the solidarity mechanism and the system of training compensation were only applicable in the case of an *international* transfer. However, as laid down in Article 1 paragraph. 2 under b FIFA RSTP, as of 1 July 2020, a solidarity contribution is also due if a professional is transferred (either on a definitive or loan basis) between clubs affiliated to the same association, provided that the training club is affiliated to a different association.[124] Put differently, even in the case of national transfers, it is now possible to claim solidarity contribution for clubs affiliated to different associations.

Article 1 of Annex 5 FIFA RSTP provides that if a professional moves during the course of his contract, 5 per cent of any compensation paid within the scope of this transfer, not including training compensation paid to his former club, shall be deducted from the total amount of this compensation and distributed by the new club as a solidarity contribution to the club(s) involved in his training and education over the years. The solidarity contribution reflects the number of years (pro rata if less than one year) he was registered with the relevant club(s) between the calendar years of his 12th and 23rd birthdays, as set out below:

- Calendar year of 12th birthday: 5 per cent of 5 per cent of any compensation
- Calendar year of 13th birthday: 5 per cent of 5 per cent of any compensation
- Calendar year of 14th birthday: 5 per cent of 5 per cent of any compensation
- Calendar year of 15th birthday: 5 per cent of 5 per cent of any compensation
- Calendar year of 16th birthday: 10 per cent of 5 per cent of any compensation
- Calendar year of 17th birthday: 10 per cent of 5 per cent of any compensation
- Calendar year of 18th birthday: 10 per cent of 5 per cent of any compensation
- Calendar year of 19th birthday: 10 per cent of 5 per cent of any compensation
- Calendar year of 20th birthday: 10 per cent of 5 per cent of any compensation
- Calendar year of 21st birthday: 10 per cent of 5 per cent of any compensation
- Calendar year of 22nd birthday:10 per cent of 5 per cent of any compensation
- Calendar year of 23rd birthday: 10 per cent of 5 per cent of any compensation

Many interesting questions can arise in relation to the solidarity mechanism. For example, is such a payment due in the case of a buy-out clause (and/or liquidated damage clause)? It follows from the DRC jurisprudence that a solidarity contribution is due whenever a player moves between two clubs after triggering the buy-out clause.[125] The same holds true in the event of the exchange of players when no transfer compensation is paid. The DRC jurispru-

[122] FIFA DRC 1 April 2011, no. 4112858. See also FIFA DRC 10 July 2013, nos. 07132717a, 07132717b and 07132717c.

[123] For the rationale of the solidarity mechanism, the authors refer to CAS 2012/A/2944.

[124] See also FIFA DRC 22 December 2020, Petkovic.

[125] See, *inter alia*, FIFA DRC 11 March 2021, Ruiz Peña; FIFA DRC 24 April 2015, no. 04151496. See also CAS 2011/A/2356.

dence shows that the exchange of players indirectly implies a financial agreement, because in practice, the relevant qualities of the players have a financial value in the football employment market. In other words, in the event of a player exchange, a solidarity contribution can be due, too.[126]

7. MINORS

For the sake of completeness, we note that the RSTP have a special focus on protecting minors who move internationally. More specifically, Article 19 of the RSTP permits international transfers of players only if they are over the age of 18.[127] The *rationale* and primary objective of such provision is to protect the welfare of young players against exploitation and mistreatment, as also clearly follows from the FIFA Commentary. At the same time, the same provision also provides for a few exceptions as to give the minor players the opportunity to make the most of the sporting possibilities available to them. For a more detailed analysis of these exceptions, the authors refer to Chapter 13 in this book of Mr Michele Colucci and Mr Roy Vermeer, 'The Status and Role of Players in the Football Industry'.

Analysing the jurisprudence of FIFA in relation to minors and its exceptions, it must be noted that the case law is extremely strict and does not leave much room for diversion. On the one hand, this is justified, as a strict approach is the only way to prevent measures designed to protect minors being compromised. However, on the other hand, FIFA's approach seems to be a bit too strict now and then, and we note a bit more flexibility before the CAS. Although it follows from the FIFA Commentary that the CAS follows the same strict approach as FIFA,[128] we observe that CAS panels seem to provide for more opportunities to accept minor's transfers.[129] Such differences can be explained, and make sense, so we find, from the perspective that CAS proceedings provide for more possibilities for parties involved to submit further evidence, for example in terms of hearing witnesses and the fact that oral hearings will generally be held. CAS proceedings simply provide for more legal tools.

As mentioned before, FIFA felt the need to only accept international transfers of minors under very strict conditions and that such transfers had to be implemented and enforced uniformly and without exception all over the world. At the same time, FIFA was forced to make concessions to the EU in order to comply with European law, in particular the principle of freedom of movement. For this reason, FIFA created the exceptions. The question remains whether the exceptions under Article 19 are still not in conflict with provisions under EU law, especially Article 45 TFEU, which deals with the freedom of movement of workers. However, we find that no such breach exists, as legitimate grounds seem to exist in order to protect

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[126] See, *inter alia*, FIFA DRC 26 May 2016, no. 0516200; FIFA DRC 17 August 2012, no. 812019; FIFA DRC 28 September 2007, no. 97276, FIFA DRC 29 September 2010, no. 10101596, FIFA DRC 12 January 2007, no. 17630, FIFA DRC 17 August 2012, no. 812019 and FIFA DRC 26 May 2016, no. 0516200.

[127] See also Chapter 13 in this book of Mr Michele Colucci and Mr Roy Vermeer, 'The Status and Role of Players in the Football Industry'.

[128] See, *inter alia*, CAS 2014/A/3611 and CAS 2017/A/ 5244.

[129] See, *inter alia*, CAS 2015/A/4178 and CAS 2020/A/7503.

and to safeguard the position of minor players, which is also explicitly recognised under the jurisprudence of the CAS.[130]

In relation to the Ukraine crisis, as follows from the temporary Annex 7 of the RSTP, to best protect minors fleeing the conflict in Ukraine, any minor residing in the territory of Ukraine who wishes to be registered with a new club shall be automatically deemed to fulfil the requirements of the exception provided in Article 19 paragraph 2 d) of the RSTP, as set out above.

8. CONCLUSION AND FUTURE DEVELOPMENTS

Having now analysed the various legal components of player transfers, we can conclude that it touches upon many interesting aspects and is legally defined by EU law, national law, football regulations of national federations and FIFA. In this context, the jurisprudence of FIFA, CAS, national and European Courts has significantly influenced transfer-related matters and will keep doing so in the future. The competent bodies for disputes, which are highlighted in this chapter, will continue to crystallise the legal landscape of transfers. For this reason, as we have seen, it is of utmost importance to designate with accurate precision the legal body dealing with future, transfer-related issues. In fact, FIFA strictly follows its own regulations, as FIFA regulations are leading for the FIFA DRC and FIFA PSC when resolving a dispute. When the transfer-related dispute will be dealt by the CAS, then Swiss law (and/or the applicable national law) automatically also becomes relevant.

Many interesting cases have been discussed in this chapter, more specifically with regard to the amount of compensation due in the case of transfer-related disputes. As already noted in the introduction, not only the legal aspects, but also the financial aspects of transfers have greatly evolved throughout the years and continue to do so. Legal practitioners working in the field of football must closely monitor further developments. As such, this chapter concludes with a number of forthcoming developments which we believe will have a significant influence on player transfers.

A worrying trend for the football community is related to the effective payments associated with the aforementioned training rewards (solidarity mechanism and training compensation). It was indicated that the gap between the solidarity contribution and training compensation rewards due to training clubs and the actual training rewards paid by engaging clubs to training clubs was growing every season. Therefore, FIFA will adopt a FIFA Clearing House system in the course of 2022, which will effectively ensure the payment of the solidarity contribution and training compensation amounts to training clubs around the world.[131] The Clearing House will be a separate entity under the full control of FIFA and will be in charge of processing payments related to training rewards. FIFA will calculate the training reward payments and will communicate these to the FIFA Clearing House for their execution. The FIFA Clearing House will act as a central counterpart in these payments and will be charged with performing all required checks. Specifically, it will make sure that the money paid by the new club is correctly distributed to the training clubs based on a global electronic player passport system, and in compliance with national and international financial regulations, including applicable

[130] See CAS 2008/A/1485.

[131] It is to be expected that the FIFA Clearing House will be located in Paris, France.

anti-money laundering laws and checks for sanctioned countries. This system will further help in closing this financial gap.

Another important development relates to the position of intermediaries. In fact, in 2022, reforms to regulate agents will be implemented. The aim is to improve transparency, protect player welfare, enhance contractual stability and to raise professional and ethical standards. The current draft of the new FIFA Agent regulations includes: (a) the establishment of a cap on commissions; (b) a limitation on multiple representation; (c) the reintroduction of a mandatory licensing system for agents; and (d) the establishment of the FIFA Agents Chamber to address disputes between agents, players and clubs. FIFA deems that these restrictions imposed on agents are in line with European law, as they are reasonable, rational, proportionate and necessary to protect the interests of players and the wider interests of football.[132] These changes will undoubtedly be a breeding ground for further legal discussions.

Final noteworthy future developments include: (i) a restriction on the number of international loans; (ii) the growing influence of bargaining agreements; and (iii) a possible re-evaluation of the 'Sporting Just Cause', as stipulated in Article 15 of the FIFA RSTP. Obviously, the developments in the Ukraine crisis might force FIFA to make further regulatory changes.

There is no doubt that the ball will keep rolling, likewise in the field of transfer law.

[132] See Chapter 15 in this book authored by Mr S. Weatherill.