Sell-on clauses in light of FIFA and CAS jurisprudence

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→ **Sell-on clause – Player transfer – Transfer fee – FIFA Players' Status Committee (PSC) – Court of Arbitration for Sport (CAS) – CAS proceedings – FIFA proceedings - Contractual stability**

In this article, the authors will focus on the so-called sell-on clause. All the relevant published jurisprudence of the FIFA Players' Status Committee (PSC) and, on appeal, the Court of Arbitration for Sport (CAS) will be analysed in depth. An analysis will follow and the key principles that derive from the leading football jurisprudence and the legal pitfalls will be highlighted.

Introduction

Over the last decades international football has turned into a very lucrative business. Transfer fees of tens of millions of euros have become more and more common on a worldwide scale. Signing talented players, and subsequently transferring them for a higher amount to a third club, has become a very lucrative investment for clubs. As such, a frequently used way to keep a financial interest in a talented player, is to add a sell-on clause to the transfer contract.

We will see that 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 part of the transfer fee if the player is transferred to a third club for a higher fee, and was therefore worth the initial investment.

In this article, the authors will specifically focus on the sell-on clause. In this regard, the authors will discuss the benefits of the clause, but also the legal pitfalls related to this concept. Amongst others, the background and its purpose, the triggering criteria and the determination of the amount due by clubs in connection to sell-on clauses will be highlighted. In doing so, the authors analyzed all the relevant and leading jurisprudence of the FIFA Players' Status Committee (PSC)[3] and, on appeal, the Court of Arbitration for Sport (CAS).[4]

Purpose and mechanism of sell-on clauses

Background

Sell-on clauses are often included in transfer agreements. The FIFA Regulations on the Status and Transfer of Players (RSTP) do not provide for a definition or a further clarification of the sell-on clause. However, 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:*

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3 There is little jurisprudence of the FIFA Dispute Resolution Chamber (FIFA DRC) in relation to sell-on clauses. See, *inter alia*, DRC 30 January 2012, no. 01121201. Therefore, this contribution mainly focuses on the jurisprudence of the FIFA PSC and the CAS.

4 There is little literature on this subject. The authors refer to a contribution of CAS Arbitrator *Mark A. HOVELL*, *"A brief review of recent CAS jurisprudence in relation to football transfers"*, published in the CAS Bulletin. See also *A. DUVAL* and *A. RIGOZZI*, Yearbook of International Sports Arbitration 2015, chapter 4, *"The Sell-on Clause in Football: Recent Cases and Evolutions"*, 2016, TMC Asser Press/Springer, The Hague, 2016. See also *L. COLANTUONI* and *W. DEVLIES*, *"The sell-on clause in football: recent cases and evolutions"*, Yearbook of International Sports Arbitration 2015, TMC Asser Press/Springer, The Hague, 2016, p. 73-91.

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, payable to the old club in the event of a subsequent* "sale" *of the player from the new club to a third club.*"[5]

We see that sell-on clauses are often used in transfers in which a relatively small club (from a smaller league) sells a player to a relatively big club (from a bigger league). It often concerns a relatively unknown player that has the potential to become a big player as a result of which his market value (future transfer fees) will increase. Under these circumstances the selling club is often interested in accepting a relatively small transfer fee in exchange for a sell-on clause, as it provides the possibility for the selling club to benefit from a later increase in the market value of the player. This might also significantly benefit the new club, simply because it pays a relatively low transfer fee. In fact, the new club does not have to pay a high transfer fee at once with the risk that the talented player does not develop as was expected.[6]

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 part of the transfer fee if the player is transferred to a third club for a higher fee, and was therefore worth the initial investment.

> ***Sell-on clauses are beneficial for both the old and the new club***

Later on in this article, we will see that this type of sell-on clause was categorized by the CAS as the "*profit-sharing sell-on clause*".[7] From the jurisprudence of the CAS it follows that the CAS also recognized a second type of sell-on clause, whereby the old club is entitled to a percentage of the total transfer compensation.[8] For example, when a player is transferred for EUR 2,000,000, a "*profit-sharing sell-on clause*" would only oblige the new club to share the part of the subsequent transfer fee above EUR 2,000,000 with the old club. Under the same circumstances, a sell-on clause whereby the old club is entitled to a part of the total transfer fee would oblige the new club to share a part of the total transfer fee. Because of the contractual nature of a sell-on clause and the contractual autonomy that parties enjoy, which will also be discussed later on, being entitled to a percentage of the total transfer compensation is therefore also a possibility. This difference might seem irrelevant at first blush, but as the *rationale* behind the clause is of relevance, we will see that it will have some implications when calculating the sell-on fee, as will also be discussed later on in this article.

Legal classification

In order to analyze what legal qualification a sell-on clause should be given, it makes sense to first examine in what way a club and a player are contractually bound from a legal perspective.

When a player signs an employment contract for a number of years with say Club X, Club X gains an entitlement to use the federative rights of the player. When Club Y wants to acquire those federative rights by concluding an employment contract with the player, the new club should in principle wait until the employment contract with Club X has expired. If Club Y wants to acquire the federative rights at an earlier stage than that, they have to conclude a transfer agreement with Club X whereby Club X and the player mutually terminate the employment contract, in exchange for compensation. This compensation usually entails a sum of money.[9]

As mentioned before, sell-on clauses are often included in transfer agreements. Sometimes, when a young talented player is expected to become more valuable in the future (*i.e.* when it is expected that potential new clubs will be willing to pay a larger sum of money in the future to terminate the player's contract in order to conclude a new employment contract with him), clubs want to "*keep a stake in the economic rights*" of the player. The legal construction used to realize this is that Club X receives a contractual entitlement to a specified part of the compensation that Club Y will receive in the future. This "*sell-on clause*" is a part of the compensation Club X receives for the termination of the contract and as such, is stipulated in the transfer agreement. In this context, the authors find that this

5 CAS 2010/A/2098
6 CAS 2007/A/1219; see also CAS 2014/A/3461
7 CAS 2016/A/4379
8 CAS 2016/A/4379

9 However, as we will see later in this article, it is also possible that players are exchanged and that no transfer fee is paid.

sell-on entitlement should not be considered as "*keeping ownership over the economic rights*" in the sense of property law, but this entitlement should be considered as a new conditional contractual obligation.

The most standard practice of sell-on clauses whereby Club X is the selling club of the player and Club Y is the buying club of the respective player can be drawn up as follows:

"*In case of a subsequent transfer of the player to a third club during the term of the employment contract with Club Y, Club X will be entitled to receive 15% of the transfer fee*"

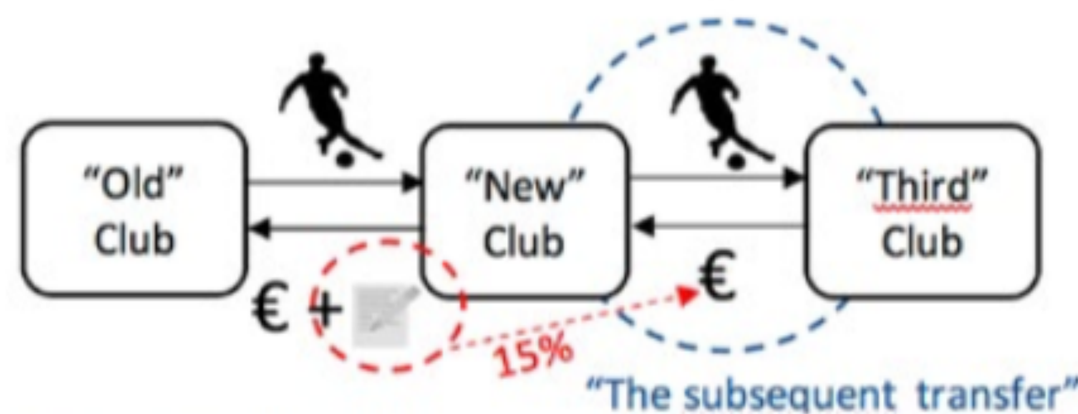

Figure 1: A schematic representation of a sell-on clause.

In view of the above, and from a more legal perspective, in this article, the authors will analyze sell-on clauses as being new conditional contractual obligations clubs legally commit to.

The contractual nature of sell-on clauses involves a number of implications. First, which can also be derived from the principles of contractual freedom and autonomy, parties are free to contract as they prefer. Subsequently, the interpretation of contractual provisions has to assess the intention the parties had when they concluded the contract. In other words, the primary goal of interpretation is to ascertain the true common intentions of the parties.[10] The standard way the CAS evaluates sell-on clauses, is to explore the "*real and common intent of the parties.*"[11] Where a factual consensus cannot be proven, declarations of the parties must be interpreted pursuant to the principle of good faith in the sense in which they could and have been understood, taking into account the wording and context and all circumstances.[12]

Parties must, however, also be aware that a CAS Panel does not need to look for the true intention of the parties at the moment of signing, when these are reflected in the clear wording of a contract, as also clearly follows from CAS jurisprudence, such as CAS 2016/A/4790.[13] In that case, the CAS Panel found that no such dwelling on inexact expressions had occurred. The provision at stake did not leave room for interpretation as the wording was clear and unambiguous. In this respect, the Panel also referred to the principle of "*in claris non fit interpretatio*", which provides that the language of a provision governs its interpretation where the language is clear and explicit and does not involve an ambiguity or absurdity. In other words, as was decided in that case, the CAS Panel did not need to look for the true intention of the parties at the moment of signing, as the true intention was reflected in the clear wording of the loan agreement (see CAS 2006/A/1152 and CAS 2011/A/2681).

In this context, in the event that a sell-on clause is not clear, 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 clauses (such as sell-on clauses) will be interpreted to the detriment of the party that drafted them, which also clearly follows from leading and consistent jurisprudence of the CAS (see, *inter alia*, CAS 2018/A/6023 and CAS 2017/A/5279).[14] Therefore, it is of legal relevance which party drafted the sell-on clause.

> **"*It is of legal relevance which party drafted the sell-on clause*"**

Parties that are entitled to sell-on clauses

As a general rule, as follows from Article 18ter of the RSTP, which provision was included in the RSTP in 2015, no club or player is entitled to enter into an agreement with a third party whereby a third party is being entitled to participate, either in full or in part, in compensation payable in relation to the future transfer of a player from one club to another, or is being assigned in relation to a future transfer or transfer compensation. Considering definition no. 14 of the FIFA RSTP, which definition is related to Article 18ter of the RSTP, 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. In view of the above provisions, it follows that clubs will therefore not be considered as third parties and as such are legally entitled to add sell-on clauses to their transfer contracts.

10 CAS/2013/A/3054; see also CAS 2005/A/871, CAS 2011/A/2449 and CAS 2013/A/3379. It comes down to the question of how to interpret these contractual clauses that are under review. In this regard, the Sole Arbitrator finds it necessary to refer to Article 18 (1) CO, which provides as follows: "*When interpreting the form and the contents of a contract, the mutually agreed real intention of the parties must be considered and not incorrect terms or expressions used by the parties by mistake or in order to conceal the true nature of the contract [...]*". There is consistent CAS jurisprudence on how to interpret contractual clauses, see, *inter alia*, CAS 2015/A/4057, CAS 2008/A/1544, CAS 2016/A/4519 and CAS 2016/A/4379.

11 CAS 2010/A/2098

12 CAS 2013/A/3054

13 CAS 2016/A/4790; this also clearly follows from CAS 2013/A/3137.

14 See also CAS 2004/A/642

As of 1 June 2019, the only other party that can be entitled to a sell-on fee is the player being transferred. In other words, in employment contracts between players and clubs a provision whereby the player is entitled to participate, either in full or in part, is permitted in relation to a future transfer or transfer compensation. As explained by FIFA in its Circular no. 1679, this change to the definition was introduced in order to reflect the jurisprudence of the FIFA Disciplinary Committee related to the reiterated practice of clubs, which entered into agreements with some of their players entitling them to receive specific compensation in the event of a future transfer to another club. It is FIFA's position, and rightly so, that such amounts promised to players should be seen as part of the remuneration due to the players under their employment relationships with their clubs and such agreements are not in violation of FIFA's rules on third-party ownership of players' economic rights.

Taking into account the above provisions, if follows that the 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 from one club to another in relation to a future transfer compensation.

Triggering events sell-on clause

Transferring portion of economic rights

As a starting point, it can be derived from the jurisprudence of the CAS that even if a sell-on fee does not specifically make reference to 100% of the economic rights, the sell-on clause will be triggered even if only a portion of economic rights is transferred.[15] From an award of the CAS of 11 May 2015, the Panel referred to clause 8 of the transfer agreement between the former club *AC Sparta Praha* and the new club *Genoa*, which determined that a sell-on fee needs to be paid "*in case of the future definitely transfer of the player's sports performances and economic rights from Genoa to another Club for a total amount higher than 3.250.000,00.*" The Panel found that this clause was triggered by a subsequent transfer from *Genoa* to *Inter* because: i) the rights to the player's sporting performances were definitively transferred from *Genoa* to *Inter*; ii) the player's economic rights were also definitively transferred from *Genoa* to *Inter* (albeit not 100% of them); and iii) the amount received by *Genoa* related to the transaction of the player's sporting performance and economic rights exceeded the amount of EUR 3,250,000.[16]

In this context, it must also be stressed that transfer fees that are received by the selling club on an instalment basis, result in payments of any sell-on fees to a previous club on a *pro rata* basis. Further to this, a party cannot claim for instalments that have not fallen due yet.[17] This also follows from the CAS jurisprudence, such as CAS 2013/A/3367 and CAS 2012/A/2875.[18]

> ***A party cannot claim for instalments that have not fallen due yet***

Non-payment by a third club

The jurisprudence clearly shows that the former and the new club are basically in it together with regard to the sell-on clause.[19] For example, in a decision of the PSC of 7 May 2014, a club was entitled to receive 25% of the difference between the transfer price and the amount of EUR 425,000.[20] When the player was subsequently sold to a third club for the amount of EUR 3,750,000, which had to be paid in three equal instalments, the new club sent the old club a payment plan in which it committed to pay it after one week of receipt from the third club. However, when the third club failed to pay the third installment, the new club objected to pay the old club the sell-on amount which was payable under the third instalment. In that case, the Single Judge decided that sell-on clauses are contractual agreements which are not definitive and subject to undetermined future events. Because of this uncertainty, the new club's obligation to pay a share of the transfer compensation could not be set as of the moment of the conclusion of the contract and was subject to the subsequent receipt of the relevant amount by the new club. In the context of the risk-sharing, the outcome seems fair.[21]

15 CAS 2014/A/3701

16 The CAS Panel seems to take note that this decision could establish an easy way for clubs to circumvent a sell-on clause by selling a small portion of the economic rights, paying the former club a sell-on fee based on this small portion, and subsequently buying back these economic rights. Therefore, the CAS Panel mentions that the situation would be different if there is any evidence of bad faith when a club sells a portion of the economic rights and subsequently reacquires the full 100% of the player's economic rights in order to prevent having to pay a sell-on fee based on 100% of the economic rights.

17 PSC 23 April 2013, no. 04132127. See also PSC 23 September 2015, no. 09151634 and PSC 30 June 2015, no. 06152122.

18 By the same token it makes sense that if a third club receives an amount in relation to a sell-on clause instalments and the sell-on clause provides for certain deductions, the deductions will also be deducted proportionately.

19 Please note that the party claiming compensation on the basis of a sell-on clause bears the burden of proof and must provide evidence in support of its assertion that a sell-on-clause was actually part of the agreement. See PSC 15 January 2014, no. 01141680.

20 PSC 7 May 2014, no. 0514799. See also PSC 23 April 2013, no. 04132127 and PSC 19 March 2013, no. 03132290.

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

In a case before the CAS from 2012, which is in line with the rationale of the above PSC decision, *Helsingborgs* was entitled to receive 15% of the net amount of a future transfer from *Parma*. The player was transferred from Parma to Internazionale for a transfer fee of EUR 10,000,000 and, on the same day, *Parma* entered into a co-ownership agreement in which 50% of the economic effects of the player were sold back to *Parma* for EUR 5,000,000. Six months later, *Internazionale* bought the remaining 50% of the economic effects for EUR 4,200,000. In this case, it was in dispute whether the sell-on fee should be based on a transfer fee of EUR 10,000,000 or EUR 9,200,000. The CAS Panel in that case underlined the common practice in the world of football whereby contracting parties deviate from initially agreed fictitious amounts. A sell-on fee has to be based on the amount which is actually received by a club for selling a player and not on an indicative amount. In this case the amount of EUR 10,000,000 was only an indicative amount for the transfer of 100% of the economic rights, and *Parma* and *Internazionale* agreed on the sale of the remaining 50% at a later date.[22] Therefore, the sell-on fee in the present case had to be based on EUR 9,200,000.[23]

Temporary Transfer vs. Definitive Transfer

The authors also take note of disputes that focus on the question of whether a sell-on clause is also triggered in the case of a temporary transfer, taking into account that the sell-on clause as included in the contract does not explicitly provide and consequently leaves room for this. In cases of an unclear clause, it is important to clearly define under what circumstances the sell-on clause will be triggered; only in the case of a permanent transfer or also in the case of a temporary one? To avoid misunderstanding in cases in which the sell-on clause explicitly excludes temporary transfers, it is important to clearly define when a transfer can be categorized as a definitive transfer, and when it must be considered a temporary transfer.

For example, in a CAS award of 9 July 2007, the issue at stake was whether a transfer had to be classified as a loan or as a definitive transfer. In that case, a player was loaned for a fee of EUR 200,000 during the last year of his employment contract with the club. After this loan period neither the borrowing nor the lending club offered the player a new contract. The selling club, which was entitled to sell-on participation, argued that the loan fee of EUR 200,000 was in fact a definitive transfer fee since the player had not returned to the lending club. The CAS decided that: "*The present situation is very common and in the present case does hardly differ from a typical, final transfer of a player, who is joining a club after his former employer accepted the early termination of their contractual obligations against a financial compensation*". Because of the classification of the transfer as a "*definitive transfer*" by the CAS Panel in that case, the former club was entitled to its sell-on share.[24]

"The question of whether a sell-on clause is also triggered in the case of a temporary transfer"

A similar situation occurred in a CAS award of 27 November 2012. When the player was transferred from *FC Flora* (Flora) to *Heracles Almelo* (Heracles), the agreement contained a sell-on clause which stipulated that: "*in case Heracles sells the player to a third club, FC Flora will receive 15% of the transfer fee above EUR 200.000.*"[25] Subsequently, the player was loaned to *AZ Alkmaar* (AZ) during the last six months of his employment contract for a loan fee of EUR 380,000. *FC Flora* then argued that the requirements in the sell-on clause had been met and that the club was entitled to its sell-on fee. The CAS Panel concluded that the drafting of the sell-on clause could have been better. Whilst "*selling*" and "*transfer fee*" point in the direction of a definitive transfer, the clause could have expressly excluded any true loan fee.

The main question was, similar as in the previous CAS case, whether the transfer to *AZ* had to be considered as a definitive or a loan transfer. Whilst assessing this, the Panel sought the real and common intent of the parties, as referred to earlier in this article. Following Swiss Law, the emphasis was not so much on what a party may have meant but on how a reasonable man would have understood his declaration.[26] The CAS Panel decided that there were more facts speaking in favour of this being a definitive transfer.[27] The Panel concluded that the word "*sells*" is different from "*loans*" in a literal

22 CAS 2012/A/2875. See also CAS 2014/A/3701, in which award the CAS Panel stressed that it adhered to the view expressed in CAS 2012/A/2875 insofar as it differed from the approach that was taken in CAS 2013/A/3317.

23 It comes down to the question of what is actually received, which follows from CAS 2014/A/3508 and CAS 2016/A/4669.

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

25 This is the fee *Heracles* paid for the player, making this sell-on clause a *"profit sharing sell-on clause"*.

26 ATF 129 III 118 consid. 2.5 p 122; 128 III 419 consid. 2.2 p. 422; for further explanation, see also CAS 2012/A/2733, par. 8.4.

27 The test of facts is done in 8.10-8.11, with the most important factors in favour of it being a definitive transfer such that there was no mechanism to call the player back, the high loan sum in comparison to the wages and the loan agreement mirroring the remaining part of the employment contract.

sense, but when looking at these circumstances the CAS Panel was satisfied that a reasonable man would see no difference here. Therefore, the sell-on clause was triggered, and *Flora* was entitled to its sell-on fee. However, when calculating the compensation, the CAS Panel did agree with *Heracles* that the salary the latter paid during the loan period had to be deducted from the "*loan*" fee.[28]

In a decision of the PSC of 7 May 2014, the old club was entitled to receive an incentive of 40% of the amount of any compensation related to any departure of the player before the expiration of his employment contract. In that case, the Single Judge held that the loan transfer of the player could not be considered as a "*departure*" triggering the payment of the conditional fee as stipulated, since the employment contract was not terminated but temporarily suspended.[29] Also in a PSC decision of 20 November 2014, a player was loaned for a loan fee of EUR 1,000,000 with a purchase option against the payment of EUR 500,000. The old and new club disagreed whether the sell-on entitlement they agreed on only covered definitive transfers or if it also covered loan agreements. They agreed that "*[the new club] undertakes that to ensure the 40% of the economic rights of the player held by [the old club] in case of transfer of the player to any other organization*" (*emphasis added*). In this regard, the Single judge acknowledged that the payment obligation by the new club would only be triggered in the event of the transfer of the player. The Single Judge was of the opinion that if the intention of the parties was to broaden the scope of the clause's applicability, they would have explicitly included in its wording the precise kind of transfer, *i.e.* loan agreements, that would have triggered the payment obligation as well. In view of the above, the Single Judge of the PSC decided that, when a sell-on clause is formulated as it is in the present case, it only covers the definitive transfer, *i.e.* only the transfer compensation of EUR 500,000.[30]

Trade of players[31]

A very interesting phenomenon is the occurrence of the exchange of players, whereby clubs choose to swap players without the imposition of any direct financial obligations, *i.e.* transfer fees. Situations involving player exchanges have presented new legal questions and challenges before sport tribunals given the uncertainty of equating an economic value to a transfer where no explicit monetary value is attached. The RSTP are silent as to the legal question of how the exchange of players should be treated, namely if these exchanges necessitate the payment in relation to sell-on clauses or a solidarity mechanism. If such payments are prescribed, issues arise as to the question of how to equate the exchange of a player to an economic value, in order to be able to determine any payments due.

The authors observe that many issues arise as to the exchange of players in relation to a solidarity mechanism, but player exchange can also generate speculation as to how 'sell-on clauses may come into play.[32] Currently, there are very few CAS cases which address this issue.[33]

> ***The authors are of the opinion that sell-on clauses can be triggered in the event an exchange of players takes place***

Where two clubs agree to a sell-on clause, if one of the clubs engages in a player exchange in the future devoid of a financial transaction, questions may arise in determining the transfer value so as to establish the percentage due in accordance with the sell-on agreement. It seems that if the initial clause did not explicitly prescribe terms in the case of a future exchange of players for either club who engages another club, the clubs may use a similar methodology as that applied in the DRC or CAS judgements when applying the solidarity mechanism.[34] This methodology would be the averaging of the two exchanged players' prior transfer values. Given the occurrence of player exchanges, it would be beneficial for clubs which agree to sell-on clauses to stipulate in their contracts how the financial value of a potential "*free*" exchange of players can be determined so as to ascertain the appropriate sell-on fee due. Nowadays, parties often try to take care of future situations whereby players might be exchanged. For example, clubs try to provide for this by stating that if the new club will receive some other form of consideration (including, but not limited to, player exchange, the playing of a friendly match and/or a percentage of future transfer) in return for the player's transfer, the parties shall agree in good faith to an appropriate equivalent transfer fee received by the new club. There is not much more that clubs

28 CAS 2012/A/2733
29 PSC 7 May 2014, no. 0514303. See CAS 2008/A/1793, which award follows the same line of thought.
30 PSC 20 November 2014, no. 1114580.
31 See also *Frans M. de Weger* & *Allison Hatch*, 'Principles deriving from "Exchange of Players" jurisprudence', *Football Legal # 11* (June 2019), p. 31.
32 See, *inter alia*, DRC 26 May 2016, no. 0516200 and DRC 7 June 2018, no. 06181269.
33 CAS 2016/A/4821; see also another CAS case, *i.e.* CAS 2015/A/4197, but the award is not published. See also CAS 2014/O/3781-3782, in which award it was not established by the CAS Panel that the two transfers were separate and independent.
34 See, *inter alia*, DRC 26 May 2016, no. 0516200 and DRC 7 June 2018, no. 06181269; see also CAS 2016/A/4821.

can do to try to avoid future problems in relation to exchange of players. In any event, the authors are of the opinion that sell-on clauses can be triggered in the event an exchange of players takes place.

Early termination of employment contract

In addition to the situation where a new club concludes a transfer agreement and the old club terminates an employment contract, a player and club can also decide to mutually agree to terminate the employment contract, or one of the parties can end the contract unilaterally.

For example, in a CAS 2009/A/1759, a player was transferred from *FC Metz* to *Galatasaray*. *FC Metz* (Metz) would receive EUR 2,000,000 and additionally, in the event of the player being transferred from *Galatasaray* to a third club, an amount corresponding to 20% of the amount of the transfer compensation exceeding EUR 2,000,000. When the player did not receive his salary from the new club for 4 months, he unilaterally terminated his employment contract with just cause.[35] Afterwards the player signed by a new club as a free agent and was eventually transferred for EUR 25,000,000. *Metz* claimed that *Galatasaray* had prevented the fulfillment of the contract in bad faith.[36] In this case, the Panel had no hesitation in considering that *Galatasaray* had not respected the principle of good faith since it had failed to pay their employee, which is one of the core obligations of an employer. When the CAS Panel determined the amount that had to be paid, they made an estimation of the market value of the player at the moment the employment contract was terminated. When estimating the market value, the Panel noted that a player's "*market value*" is not necessarily equal to an eventual amount determined in a "*release clause*". After assessing multiple factors, it was to be deemed that the player would have been transferred for an amount of EUR 4,000,000 at the moment the contract was terminated, and consequently this amount was applied when calculating the sell-on fee.[37]

In a CAS 2010/A/2098, a player was transferred from *RC Lens* (Lens) to *Sevilla FC* (Sevilla). In case of a "*resale*" of the player by *Sevilla* to another club *Lens* would receive an additional fee, expressed as a percentage of the "*capital gain*" made by *Sevilla*.[38] The player and *Sevilla* included an indemnification clause in their contract following the *Real Decreto 1006/1985*. The player subsequently terminated his contract, having the indemnification clause paid by a third club. The Panel decided that, contrary to the claim of *Lens*, this termination was not to be considered as a "*resale*". The Panel found, in the context of a "*sale*" contract, that a transfer, being the object and purpose of the parties' consent, can actually be made in two ways: (i) by way of assignment of the employment contract; and (ii) by way of termination of the employment agreement with the old club and signature of a different employment agreement with the new club. It is important that in both scenarios, the old club expresses its agreement against the receipt of a payment.[39] On the other hand, a transfer of a player can also take place outside the scheme of a "*sale*" contract, if the employment agreement is terminated as a result of: (i) its expiration or (ii) its breach. In that event, the transfer is not a sale, because the old club did not express its consent to the termination.[40] Against this legal background, the CAS Panel decided that the termination by the player by paying the indemnification clause was not a sale since *Sevilla* did not consent to the early termination but was obliged to "*tolerate*" it. Therefore, the sell-on amount was not due in this case.[41]

> ***The termination by the player by paying the indemnification clause was not a sale***

In a more recent case before CAS between *Sevilla FC* (again) and *AS Nancy Lorraine*, which concerned an appeal against the decision of the PSC of 24 July 2019[42], the question whether the exercise of the buy-out clause had to be considered as a transfer triggering the sell-on clause and how the sell-on clause had to be interpreted, was also considered. The relevant sell-on clause was stipulated in the following way: "*In case a definitive transfer of the player is signed, and the player is transferred from [the Respondent] to another club, allowing [the Respondent] to realize a capital gain, 12% of this value will be transferred to [the Claimant].*" As in the abovementioned (and successful) CAS case against *Lens*, *Sevilla* was of the opinion that no transfer had taken place, because the player had only exercised his unilateral right to an early termination of the employment agreement. In this case, the CAS Panel deemed the intention of the parties to be the most important factor, but nevertheless came to a different conclusion.

35 That this termination was with "*just cause*" was also decided in CAS 2006/A/1180.

36 Pursuant to Article 156 CO. For an extensive description regarding Article 156 CO, see par. 14 of CAS/2009/A/1756. See also CAS 2014/A/3647-3648.

37 The entire calculation of the player's market value and its justification are mentioned in CAS/2009/A/1756, par. 28-32.

38 Recently, there was some debate about this "*indemnity clause*" construction again in connection to the so-called "*Vitolo case*" in which the player *Vitolo* was transferred from *Sevilla FC* to *UC Palmas*, and subsequently to *Atletico Madrid*. However, this case was decided by the Spanish arbitration court and will not be dealt with by the authors in this contribution.

39 Under Swiss Law, according to Article 184 CO, this expression of consent is a necessary element for a sale contract.

40 CAS 2010/A/2098, par. 27-28. This case concerned a termination without just cause as opposed to CAS/2009/A/1756 (which concerned a termination with just cause by the player).

41 The CAS Panel adds that, if sufficient evidence had been given of bad faith on the part of *Sevilla*, it could have reached a different decision; CAS 2010/A/2098, par. 42.

42 PSC 24 July 2019, no. 07192352

The CAS found that a "*transfer*" must be seen as a "*movement*" in the registration/employment relation. The Panel noted, and rightly so, that the wording of the sell-on clause was wide enough to cover every kind of transfer, both in a contractual and non-contractual framework, for which *Sevilla* was to receive a payment, independent of the exact legal construction behind the transfer. The different outcome in relation to the "*Keita-case*" can be explained by the fact that in this case the triggering element was the general, and broad term "*transfer*", whereas in the "*Keita case*" the triggering element was a "*resale*". *Sevilla*'s appeal was rejected.[43]

In a decision of the PSC of 18 March 2013[44], which appeal led to the CAS award of 8 May 2014[45], the dispute revolved around a player who was transferred from *Boca Juniors* (Boca) to *Corinthians*, by a transfer agreement containing a sell-on clause. Later on, the player signed an employment contract with *West Ham United* after a termination of contract with mutual consent between the player and *Corinthians*. *Boca* claimed that by terminating the employment contract by mutual consent, *Corinthians* had, similar as in the case in CAS/2009/A/1756, prevented the fulfillment of the contract in bad faith. Both the FIFA and CAS Panel did, however, not agree, because there was no evidence of payment to *Corinthians*, and there was no situation whereby *Corinthians* had tried to circumvent its contractual relations towards *Boca*. Even though the normal situation would be to transfer the player for a significant amount of money, the termination of the employment contract was a business decision. In the light of all this, the CAS found that the sell-on clause was not applicable.

In a decision of the PSC of 18 March 2013[46] a former club was entitled to a sell-on percentage of 15% "*at the moment the player or a third party pays the early termination clause in order to be transferred to another team or his transferred by Club B (*"the new club"*) to another team. ACS (*"the old club"*) shall receive the minimum amount of EUR 125.000, - in any of the mentioned events of early termination or transfer.*" Because neither of them benefited from the employment relationship, the new club and the player mutually agreed upon the early termination of the employment contract free of charge. Subsequently, the player signed an employment contract with another club. In this case, the PSC held that the old club would only be entitled to receive compensation from the new club in the event that the player would be transferred to a third club and the respondent would receive a transfer compensation in exchange for such transfer, either from the player or a third party. In this context, the transfer agreement did, however, not refer to the situation where the new club and the player would voluntarily agree upon the early termination of the employment contract with mutual consent and the player would, subsequently, join a third club as a free agent. Therefore, the PSC finally decided that the old club was not entitled to receive the minimum amount.

Other avoiding mechanisms

We have also observed mechanisms whereby clubs try to avoid paying sell-on fees. In a CAS award of 23 March 2015[47], *FC Lokomotiv* (Lokomotiv) was obliged to pay a former club, *FC Nika*, 15% of the amount received for a subsequent transfer. *Lokomotiv* then transferred the player free of charge to *FC SKA Rostov* (Rostov). Four months after the transfer, the player terminated his contract with *Rostov*, and entered into an employment contract with his former employer, *Lokomotiv*. After several years, *Lokomotiv* sold the player to *Spartak* for a transfer fee of EUR 8,000,000. *FC Nika* argued that it was still entitled to the sell-on fee since the transfer to *Rostov* was not a permanent transfer but had in fact to be considered as a loan agreement.

The CAS agreed with this position. In the opinion of the CAS Panel, the transfer was a simulated act, the main indicators being the fact that at the time the transfer from *Lokomotiv* to *Rostov* took place, *Rostov* had already reached the limit of 5 loaned players, and therefore could not loan the player and the fact that the player, after agreeing to a sell-on clause, was transferred free of charge. By formalizing the transfer as a definitive transfer, *Lokomotiv* aimed to circumvent both the rule limiting the number of loaned players and the sell-on clause. The CAS Panel deemed the "*definitive transfer*" to be a simulated act, and therefore considered it to be a loan. Taking this in consideration, the sell-on clause had not yet been triggered when the player was transferred to *Spartak*, and hence *FC Nika* was entitled to 15% of the transfer fee.[48]

43 CAS 2019/A/6525

44 PSC 18 March 2013, no. 03133212 and PSC 26 March 2012, no. 0312234.

45 CAS 2012/A/3012. In light of Article 156 of the CO, the CAS Panel agreed that the clause at stake in the agreement was a conditional clause. However, the CAS Panel considered that the occurrence of the condition foreseen in such clause was not prevented by the respondent's early termination of the agreement because such termination was, at least from the evidence filed by the parties in this case, just the exercise of the parties' right (the respondent and the player) to freely terminate a labour contract early by mutual consent.

46 PSC 18 March 2013, no. 03133212

47 CAS 2014/A/3508; see also CAS 2004/A/701.

48 Because *Lokomotiv* had not yet received the total transfer fee of EUR 8,000,000,-, the CAS Panel considered that the sell-on fee should be based on the amount actually received, and not on the indicative amount of EUR 8,000,000, -, which was also confirmed in CAS 2012/A/2875; see also CAS 2011/A/2449.

Determination of the amount deriving from the sell-on clause

Which amount should be used when calculating a sell-on fee?

An important aspect regarding a sell-on clause is the assessment of the amount which is used in order to calculate the amount due. Since a sell-on clause aims to split the economic risk, and therefore also the economic profit, clubs often agree to receive a percentage of the "*net transfer fee*". As stated before, a sell-on fee should in principle be based on the amount which is actually received by a club. In this regard, it is interesting which amounts can be deducted from the total transfer fee in the case of a sell-on fee based on a "*net transfer fee*". The definition of this "*net transfer fee*", is often disputed between the clubs. Furthermore, it is also important to define which costs can be deducted in case a sell-on fee is based on "*any transfer fee*".

> ***The definition of this "net transfer fee" is often disputed between the clubs***

In a CAS award of 16 January 2006[49], the new club *Fulham* and the former club *Metz* agreed that, if a player was transferred from *Fulham* for a fee, *Metz* would receive a "*one-off*" payment, being 15% of any net transfer fee above the transfer fee paid to *Metz*. The words "*net transfer fee*" were not explicitly defined in the agreement. When the player was subsequently sold, *Fulham* wanted to deduct all the costs and expenses associated with the employment of the player, namely the agent fees, the player's wages, bonuses, insurance and the fixed amount paid to *Metz* pursuant the transfer agreement. The CAS Panel in charge decided that *Fulham* was only entitled to deduct the agents' costs, as these were the only costs in direct connection with the transfer of the player to the third club.

On 10 November 2006[50], the CAS Panel ruled an award on the definition of "*the net amount*", although in another context since the case was not related to a sell-on clause (but nonetheless has relevance in this respect). The question was whether it was possible to deduct a solidarity contribution and training compensation from the total transfer compensation when calculating the "*net amount*". The CAS Panel ruled, in that case, that the proper interpretation of "*net amount*" is "*without any deduction*", in the sense that the net amount must exactly correspond to the amount which is received in the creditor's bank account. Therefore, the deduction could not be limited to tax and bank costs, but covered all possible deductions, including those deriving from the solidarity mechanism. This interpretation of "*net amount*" as the amount which is received in the creditor's bank account in the context of sell-on clauses was also confirmed in another award of the CAS which was issued on 17 December 2012.[51]

> ***There is some debate on whether agent costs can be deducted***

There is some debate on whether agent costs can be deducted.[52] For example, in an award of 20 October 2016, *Sunderland* was entitled to 20% of "*any transfer fee received*" by *Al-Ain FC* in case of a subsequent transfer. The player was subsequently transferred to a third club for EUR 9,000,000. Under these circumstances, the CAS Panel ruled as follows: "*The Sell-on Clause speaks of 'any transfer fee received', not of a net transfer fee, i.e. a sum received after deduction of the costs in direct connection with the transfer of the player including the agent's costs or intermediary remuneration. Entering into the intermediary agreement was a business decision of the Appellant which cannot be held to the detriment of the Respondent.*" In other words, the CAS Panel decided in this case that where the clear wording of a sell-on clause speaks of "*any transfer fee received*", and not of a "*net transfer fee*", *i.e.* a sum received after deduction of the costs in direct connection with the transfer of the player, including the agent costs or any intermediary remuneration, no deduction should be made from the transfer fee received by the club selling the player to a third club regarding the payment of the sell-on fee to the "*old club*" of the player transferred. Consequently, the CAS Panel also underlined that since *Al-Ain FC* and the third club had agreed that *Al-Ain* would pay any solidarity to training clubs, the solidarity payments could not be deducted from the total transfer compensation. [53]

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49 CAS 2005/A/896

50 CAS 2006/A/1018

51 CAS 2012/A/2806

52 In an unpublished decision of the PSC of 7 April 2010, the old and the new club had agreed that: *"L'Olympique de Marseille (the old club) and Standard de Liège (the new club) agree to split the eventual compensation for a transfer of [the player] to a third club in half."* When the player was subsequently transferred from *Standard de Liège* to a third club for an amount of EUR 1,000,000, *Standard de Liège* was of the opinion that it was allowed to deduct the transfer bonus paid to the player, and the agent costs. The PSC agreed with this position. Since the sell-on clause was not clear on whether the 'net amount' or 'gross amount' had to be paid, the Single Judge was of the opinion that it was only fair to consider that the clause was limited to half of the amount actually received by *Standard de Liège* as a transfer compensation. The Single Judge decided that the deduction made for the commission paid to the agent and the transfer bonus paid to the player was allowed.

53 CAS 2016/A/4379; See also PSC 11 May 2012, no. 0512060; see also CAS 2013/A/3054 and CAS 2005/A/896.

It must be taken into account that in the context of permitted deductions, as indicated before, the principle of "*in dubio contra stipulatorem*" is also relevant, following which it must be established which party drafted the clause, which also follows from CAS jurisprudence.[54]

Are variable amounts part of the "total transfer compensation"?

In a CAS award of 15 December 2017[55], *Genoa* and *Dinamo Zagrebia* (Dinamo) could not agree on the interpretation of the words "*total transfer compensation*". Dinamo was entitled to a sell-on bonus of EUR 1,000,000 "*in case of subsequent definitive transfer of the Player to a third club for a total transfer compensation higher than EUR 4.000.000*" *(emphasis added)*.[56]

In this case, the player was subsequently transferred to a third club, for the fixed amount of EUR 3,500,000 and a conditional fee of EUR 1,000,000 in case the player participated in 20 matches. At the moment the player had played in 20 matches, and the condition was therefore fulfilled, *Dinamo* argued that the club was still entitled to the sell-on bonus. *Genoa* submitted that by "*total transfer compensation*" the parties meant only the fixed compensation amounts of a subsequent transfer and not the variable amounts stipulated therein. Finally, the CAS Panel ruled in this case that: by "*total transfer compensation*" the parties, which are established football clubs that are commercially experienced and familiar with transfer agreements and the terms used therein, intended to regard both the fixed transfer fee and the variable amounts stipulated for the subsequent transfer of the player.[57]

The responsibility to share information

In a CAS award of 13 September 2013[58], *Palermo* transferred a player to *River Plate*, and was entitled to 50% of the economic rights over a future transfer following the transfer contract. Further to this, *River Plate* had to inform *Palermo* about the terms and conditions of the offer made by any future third club. *River Plate* needed *Palermo*'s authorization for a transfer of the player to a third club, and *Palermo* had the right to offer a different transfer agreement with another third club which would effectuate that *River Plate* would receive a higher sum of money.

The player was subsequently transferred to *Porto* for a transfer price of EUR 3,400,000 under the condition that *Porto* would bear all expenses related to the transfer transaction.[59] The total sum of the tax expenses amounted to EUR 833,000. It was in dispute whether the sell-on fee should be calculated over the transfer price, or over the transfer price plus the tax expenses. In the first place, the CAS Panel decided that in cases where two clubs share the economic rights over a player, the club who maintains the registration of the player has a heavy degree of responsibility to inform the previous club with regard to the terms and conditions of the transfer in view of the financial profit-sharing rights of the previous club. In the second place, the CAS Panel also analyzed in this case the agreement and negotiations that were conducted between the parties and finally came to the conclusion that *Palermo* had, based on the specific circumstances, accepted the transfer price of EUR 3,400,000 as the economic rights.[60]

When interpreting sell-on clauses, the "real and common intent of the parties" is used to determine the legal consequences of said clauses

Conclusions

As mentioned in the introduction, a "*sell-on clause*" is an optional clause in a transfer contract which obliges a new club to share an eventual future transfer fee in case of a subsequent transfer with the old club. The contractual obligations deriving from sell-on clauses are often disputed between parties due to their poor contractual drafting which has led to many disputes in front of FIFA and the CAS. When interpreting sell-on clauses, the "*real and common intent of the parties*", beyond the literal meaning of the words used in a sell-on clause, is used to determine the legal consequences of said clauses. In this regard, it is important to keep the principle of "*in dubio contra stipulatorem*" in mind, which establishes that the interpretation of an unclear clause will be interpreted to the detriment of the party that drafted the clause.

54 CAS 2011/A/2508; see also CAS 2018/A/6023 and CAS 2017/A/5279.
55 CAS 2017/A/5213
56 See also PSC 28 February 2017, no. 02171787
57 Please note that this award is also in compliance with CAS 2012/A/2875 in which the CAS Panel, considers that *"in the opinion of the Panel, it is common practice in the world of football that the contracting parties deviate from initially agreed fictitious amounts. The Panel considers that a sell-on fee is to be based on the amount actually to be received by a club for selling a player to a subsequent club and not on an indicative amount. (emphasis added)"*.
58 CAS 2013/A/3054
59 These include 24,5% taxes to the Argentine Football Association and the Argentinian Players' Union, any other contribution, right, tax, rate or tariff in accrued in Portugal, and the costs of agents.
60 It is remarkable that the CAS Panel is focusing on the interpretation of the parties in this specific case based on their correspondence, and it is not, like in most other cases, trying to find a general interpretation of the words used in the transfer contract.

The authors note that whereas FIFA has a more formal, textual approach, and remains close to the literal meaning of the words used when interpreting a sell-on clause, the CAS has a more material approach, and tries to interpret sell-on clauses in the sense in which they could and have been understood when taking into account the context and all relevant circumstances.

The material approach of the CAS has proven to be very effective in order prevent the circumvention of the application of sell-on clauses on multiple occasions. For example, in CAS 2014/A/3701, a player was transferred for an amount of EUR 16,000,000 and, at the same time, 50% of his economic rights were sold back to the selling club for EUR 8,000,000. In that case, FIFA decided that the sell-on fee should be calculated based on a transfer fee of EUR 16,000,000, as that was the amount in the subsequent transfer agreement. On appeal, the CAS Panel disagreed and decided that the sell-on fee should be calculated based on a transfer fee of EUR 8,000,000 as that was the amount actually received.[61] While the outcome of the CAS award does not appear to be unjust, it also seems to interfere with the principle of legal certainty as the wording of the respective sell-on clause and subsequent contract were clear.

It should also be mentioned that, in several cases, a club did have (partial) success in avoiding the application of a sell-on clause because of the, in the authors' opinion, overly formal approach taken by the CAS. The best example is the so-called "*Keita case*" in which *Sevilla* did not have to pay a sell-on percentage, because the CAS Panel decided that the payment of an indemnification clause was not deemed to be a "*resale*" since *Sevilla* did not express its consent. The outcome of this case may have contributed to the subsequent disputes between *Sevilla* and former clubs about sell-on clauses in the so-called "*Vitolo case*" and "*Lenglet case*". The (very much welcomed) outcome in the *Lenglet* case was that the sell-on clause, which explicitly mentioned "*transfer*", was triggered by payment of the indemnification fee. The importance of drafting the sell-on clause becomes very clear in this case as the different outcome in the *Lenglet* case was mainly due to a slightly different wording of the respective sell-on clause.

In the authors' opinion, a well-drafted sell-on clause is the most important factor to effectuate the legal obligations parties have agreed on. After an extensive analysis of the applicable jurisprudence, the takeaway principles from this article when drafting a sell-on clause are:

61 The CAS Panel reconstructs the transfer as one transfer amounting to EUR 8,000,000 in which 50% of the economic rights were retained. In the opinion of the CAS Panel, and as mentioned earlier in the article, the fact that only 50% of the economic rights were transferred does not prevent the sell-on clause from being triggered.

- **The Parties should explicitly stipulate which events (for example a definitive transfer and/or a loan transfer and/or a trade of players) trigger the entitlement to a sell-on fee**. If this is not explicitly stipulated in the contract, the claiming party bears the risk that the sell-on clause will in principle only be due in case of a definitive transfer.

- **The parties should specify with utmost precision which costs will be deducted from a subsequent transfer fee**. In case of a "*net transfer fee*", it must be taken into account that the costs in direct connection to the transfer (such as agents' fees) can be deducted, as the relevant amount is the "*amount actually received*". It is to be expected that in case of "*any transfer fee*" none of these costs can be deducted from the amount stipulated in the subsequent transfer agreement. In all cases, if a variable bonus amount is included in a subsequent transfer agreement, the variable amounts must be considered when determining the sell-on fee in case the criteria are fulfilled.

- **There is a heavy duty of information on the new club**. As the clubs agree to share the financial consequences in case of a subsequent transfer, a former club should at least be provided with the relevant information regarding a subsequent transfer that is necessary to determine the eventual sell-on fee, such as a copy of the transfer (or loan) contract or termination letters and agreements. This also makes sense from the background perspective of the sell-on clause: the parties are basically in it together.

- **The parties should anticipate in advance which amounts the former club will be entitled to in case of a mutual termination of the employment agreement, unilateral termination or in case the club receives another form of compensation (such as friendly matches, a player exchange, the take-over of wage payments or a new sell-on percentage, etc.)**. For example: an appropriate "*equivalent transfer fee*" the parties shall agree upon in good faith and/or a specified liquidated damages amount.

The authors are fully aware that the wording of a sell-on clause is heavily dependent on the bargaining power of the parties concerned, and it will therefore not always be possible to contract as desired. Nevertheless, in addition to discussing the CAS and FIFA jurisprudence on sell-on clauses, this article does hopefully aim to give a better indication of the legal pitfalls, possibilities and what ought to be taken into account when drafting on a sell-on clause.