The Relegation Clause from the Perspective of FIFA and CAS

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→ ***Relegation - FIFA - Court of Arbitration for Sport (CAS) - Player contract - Contractual Stability - Breach of contract - Just cause***

In this article, the authors will discuss the so-called relegation clause. All the relevant published jurisprudence of the FIFA Dispute Resolution Chamber and the Court of Arbitration for Sport will be analysed. After the case-law is discussed, an analysis will follow by the authors. More specifically, the principles that derive from the football jurisprudence and the legal pitfalls will be highlighted.

Introduction

Players and clubs sometimes insert a provision in employment contracts with regards to potential relegations (or promotions) of the club in the future; the so-called, *"relegation clause"*. For example, in the event the club will be relegated in the future from a higher to a lower division, the employment contract will be terminated, either automatically or by any legal action by one of the parties.

Especially among clubs regularly operating in the lower regions of the league, the relegation clause is an effective tool to protect themselves from very high salary burdens as a result of relegation. The inclusion of a relegation clause in a player contract, however, can also be to the benefit of the player. By including a relegation clause in the contract, the player can protect his sports career by not being contractually obliged to play in a lower league. In fact, by playing in a lower division, employment opportunities and the market value of 'relegated players' are likely to fall.

As we will see from the football jurisprudence to be discussed in this article, generally, there are two types of relegation clauses. On the one hand, there are relegation clauses whereby the contractual relationship of the parties automatically ends in case of a relegation to a lower league. This clause is of a casual nature, namely, not depending on the will of one of the parties. Both the club and the player can benefit from this type of clause. On the other hand, the jurisprudence shows that there are also relegation clauses in player contracts that do not automatically lead to the termination of the contractual relationship of the parties in case of a relegation. These clauses often provide for one of the parties to have a unilateral right to terminate the contractual relationship in case of a relegation.

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In this article, both types of relegation clauses will be under review. All the published jurisprudence of the FIFA Dispute Resolution Chamber (DRC) and the Court of Arbitration for Sport (CAS) in relation to said clause will be analysed. We will discuss whether the relegation clause is a valid clause, and if so, under what conditions. In order to also give this article a practical value, we will highlight the exact wording of the relegation clauses that are under scrutiny by the DRC and CAS. Finally, an analysis of the football jurisprudence will be made and the legal pitfalls as well as the most relevant principles from this jurisprudence will be brought to the attention of the reader.

Jurisprudence

FIFA Dispute Resolution Chamber

DRC 1 June 2005 no. 6526

In the first case to discuss, a player and a club signed an employment contract from which it followed that, apart from the salary, the player would receive a bonus per minute if he participates on the pitch to play a championship match. On 25 October 2004, however, the player contacted the FIFA DRC and stated that the club had refused to pay him the agreed bonuses. The club stated that the bonus clause of the employment contract was determined by the club's regulations, from which it followed that, in the event that the team fell into the zone endangered by drop out on the table, the club had the right to impose sanctions, such as the suspension or cancellation of the bonus. The club pointed out that in July, August, September, October and November 2003, the team was continuously in the relegation zone and therefore, the management of the club felt forced to cancel all the bonuses to the players during the period between July and November 2003.

The DRC discussed in particular Article 5 of the internal rules of the club, which stipulated:

> "***In case that the team falls into the relegation zone on the league table, the owner, the managing director or the head coach may withhold or withdraw the payment of bonuses.***"

The DRC concluded that the club's decision to withdraw the payment of the contractually agreed bonuses, based on Article 5, could not be supported by FIFA. The DRC deemed Article 5 to be ambiguous and arbitrary in its application, since it led to an unacceptable result based on subjective criteria. In the eyes of the DRC, the lack of objective criteria by the application of Article 5 led to an unjustified disadvantage of the player's financial rights. Therefore, the DRC concluded in this first decision that the player was entitled to receive the relevant bonuses from the club.

DRC 10 August 2007 no. 87677[3]

In this second case, a player and a club concluded an employment contract from which it followed that if the club was relegated at the end of the 2005-2006 season, the employment contract would be considered as terminated. Moreover, the player would be entitled to receive no more than the maximum amount of EUR 166,666 from the club for the effective duration of the employment contract.

The exact formulation of Article 1 was the following:

> "***If club B goes to the 2nd division [...] at the end of 2005-2006 season, the player will not demand any rights or payments for the 2006-2007 season, at the same time if he has received more than 166,666 Euros at the end of 2005-2006 season, till 31.05.2006 date he will pay back overpaid money, and will not demand any right or payment and will be free to get his transfer certificate and cancel his agreement as single sided to be transferred to any club he wishes.***"

In March and April of 2006, the player sent several payment reminders in vain to the club for the signing-on fee, a monthly salary and eleven match bonuses. Consequently, on 30 April 2006, the player unilaterally terminated the employment contract due to the club's non-respect of its financial obligations. At the end of the 2005-2006 season, the club was relegated from the first to the second division, and in May 2006, the player filed a claim before FIFA for unjustified breach of contract.

The club responded to this claim with the argument that it had so far paid the player EUR 100,180. The club stated that considering the fact that the club was relegated at the end of the 2005-2006 season, and in view of the relevant contractual clause, the contract between the player and the club was terminated and the player would only be entitled to a maximum amount of EUR 166,000. Thus, only the amount of EUR 66,000 had to be paid to the player. The club filed a counterclaim since it was of the opinion that the player had left the club without permission. In October 2006, the player adjusted his position and stated

3 The decision is available here.

that in his understanding of the contract, in case of a relegation of the club at the end of the 2005-2006 season, he would have a unilateral option to terminate the contract. The player stated that he had planned to remain with the club regardless of a possible relegation.

The DRC referred to the general legal principle that the parties to an employment contract may agree that the anticipated termination of a short-term employment contract is subject to the fulfilment of a condition, as long as such condition is not of a potestative nature, *i.e.* not depending on the will of a party to the contract or a third party. The condition of the relegation of a club is dependent on other circumstances rather than the will of a party to the employment contract. In fact, it has to be presumed that the will of clubs and players is always to avoid relegation. The fulfilment of the condition of relegation is thus solely dependent on sporting circumstances. In other words, the condition of relegation is a casual condition, and not a potestative condition. The DRC concluded that parties to an employment contract are, as a general rule, entitled to stipulate that the termination of an employment contract is subject to a casual condition. The DRC stated that in view of the fulfilment of the agreed casual condition of relegation at the end of the 2005-2006 season, the contract in question was terminated by the end of that season. Besides that, the DRC stated that the clear wording of the relevant clause does not allow its interpretation as a unilateral option of the player to terminate or not to terminate, his employment contract at the end of the 2005-2006 season in case of a relegation.

The DRC concluded that as a consequence of the unjustified breach of contract by the player, he was obliged to pay the amount of EUR 17,167 to the club as a compensation. The player filed an appeal at the CAS against this decision. This appeal will be discussed below in CAS 2008/A/1447.

DRC 18 June 2009 no. 69311

In this third case, on 19 May 2008, a player contacted the DRC because the club had failed to pay the amounts for the months January to May 2008. The club claimed that according to Article 16 of the employment contract, it is stated that the agreement shall be *"automatically terminated"* without compensation, should the club be relegated from the 1st division. It alleged that it was relegated, and that the final match of the season was played on 22 March 2008. Therefore, the contract was terminated during that month and the club did not owe anything to the player for the subsequent months.

Before the DRC, the player requested the 5 remaining months of his contract (January until May 2008) as unpaid salaries. The DRC, however, concluded that the player was only entitled to receive EUR 7,000 for each of the months January and March of 2008 and that the *"relegation clause"* at hand was indeed valid. The DRC was of the opinion that under these circumstances the club still had to pay the player an additional month's salary, in order to serve as a *"notice period"*, and therefore the player was also entitled to receive an amount of EUR 7,000 for the month April 2008.

DRC 10 May 2012 no. 5121238[4]

In this next case, a player and a club signed an employment contract valid from the date of signature until 31 May 2011. Article 14 of the employment contract explicitly read as follows:

> "***The Club and the Player hereby agree that in case the Club plays for any reason during the validity of the Player's employment with club A, in the SECOND or Lower Division of the country C League, the Club has the right to terminate the Player's contract and the Player shall be free to be registered to any Club of his own choice. The Club and/or the Player, in that event, accepts that such termination is for just cause and shall not be entitled to any compensation.***"

In April 2011, the player formally notified the club of his intentions to terminate the contract if the club continued to neglect its contractual obligations. A few weeks later, the player lodged a claim against the club in front of the FIFA DRC stating there was no other option left for him but to unilaterally terminate the employment contract with the club with just cause.

The club referred, among others, to Article 6 of the contract and submitted that according to the Club's Internal Regulations, *"all the players were obliged to pay 3 monthly salaries in case the Club is graded to the second division."* In this respect, the club was apparently *"graded"* in March 2011 and due to the fact that the player had apparently accepted the club's internal regulations, the club alleged that the player was therefore not entitled to claim the salaries for March, April and May 2011.

The DRC Judge recalled the wording of Article 6 and Article 14 of the employment contract. The DRC Judge established that these clauses were to the benefit of the club only and, thus, had a unilateral character. In addition, the club had failed to present

4 See also DRC 10 May 2012 no. 5121239.

documentation corroborating its allegations relating to the implications of Article 6, if at all valid. Therefore, such clauses could not be taken into consideration and the club's arguments were rejected as the relegation clause at hand was not valid.

DRC 7 February 2014 no. 0214233

In this fifth case, a player and a club signed an employment contract on 14 May 2009, valid from 1 July 2009 until 30 June 2012. Article 13 par. 3 of the said employment contract stated that:

> "***In case the first team drops to the first class during the first season thereof, the contract shall be deemed null with satisfaction of both parties without any financial liability on either party. In case the team remains in the professional league, this contract shall be deemed in force and valid.***"

Article 13 par. 14 of the same contract further stated that:

> "***Should the second party (the Player) terminate this contract while effective, he shall pay to the first party the full remaining contract value from the date of termination***."

On 17 February 2010, the club considered that the contract was terminated without just cause by the player. On 3 January 2011, the club filed a claim against the player before FIFA, requesting the payment of the remaining value of the contract from 17 February 2010, pursuant to Article 13 par. 14 of the contract. Because the club was relegated by the end of the 2009-2010 season, the player found that the contract was no longer valid and signed a new contract with another club.

The DRC deemed that the underlying issue in this dispute was to determine whether the employment contract had been unilaterally terminated with or without just cause by either of the parties.

The DRC deemed that Article 13 par. 3 of the contract consisted of an objective and reciprocal provision, which had been agreed upon and accepted by both parties. Thus, the DRC deemed that such clause is applicable in the present dispute and that the contract should be considered as automatically terminated at the end of the 2009-2010 season. Regarding the compensation, the DRC noted that the contract was breached by the player before the end of the 2009-2010 season. Thus, the DRC decided that the period between the breach of contract without just cause by the player and the automatic termination of the contract at the end of the 2009-2010 season was to be taken into account for the calculation of the amount of compensation to be paid by the player to the club.

DRC 5 November 2015 no. 11151618[5]

In this case, a player and a club signed a first employment contract on 1 June 2010, valid from that date until 31 May 2012. On 1 July 2011, the parties signed a second employment contract, which was valid from 1 June 2012 until 31 May 2015. Article 8 of this second contract read as follows:

> "***In case of gradation of the Football Club to an inferior Category, the Football Club will have the right to release the Football Player and the latter will have no right to damages.***"

On 8 February 2013, the player lodged a claim in front of FIFA against the club to be paid outstanding remuneration, compensation for breach of contract and an additional compensation. The player stated that in July 2012 the club informed him orally that his services were no longer required. The club referred to its contractual right of termination in accordance with Article 8 of the second contract to justify the alleged termination of the contract in July 2012 because it was allegedly relegated during the 2011-2012 season. The player claimed that Article 8 of the second contract was illegal.

The DRC considered the contract to have been terminated by the club on 31 July 2012. The issue was to determine whether this termination was with or without just cause. The DRC deemed it important to point out that the simple relegation of a club may not be considered, per se, to be a valid reason for the termination of an employment contract. Furthermore, the DRC held that Article 8 of the contract could not be applicable as it only granted the club the right to unilaterally terminate the employment contract without paying any compensation to the player in case the club is relegated. Therefore, the DRC decided that the club could not legitimately terminate the contract with the player on the basis of Article 8 of the contract, as such the provision established unbalanced rights for the parties and was therefore potestative and invalid. Therefore, the DRC decided that the employment relationship between player and club was terminated without just cause.

5 In the case DRC 15 December 2016, no. 12160812, a relegation clause also came across, but the DRC did not render an explicit decision on the validity of the relegation clause of the contract. For this reason, the case will not be discussed in this article. See also DRC 19 April 2018 no. 04181649.

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DRC 28 January 2016, no. 01160851[6]

In this case, on 23 January 2015, a player (claimant) and a club (respondent) concluded an employment contract, valid from the date of signature until 31 May 2018. Article 3 of the contract reads:

> "***The Claimant is entitled to receive match bonuses in accordance with the sports club regulations (for U-21 Team competitions and Cup competitions, premium and special bonuses do not have any validity).***"

Article 3.9 of the contract further specified that:

> "***In case of getting out of the highest league of Country B, the Claimant wanted to stay in the second division. The contract will be reduced to 300.000 per season.***"

With regard to Article 3.9 of the contract, the DRC emphasised that the condition set for the player's salary to be reduced, i.e. the club's relegation to the second division, was totally independent from the will of any of the parties. Therefore, and considering its lack of potestative nature, the DRC held that the aforementioned stipulation had to be deemed valid as agreed by the parties. This DRC decision was also appealed in front of CAS, which will be discussed in this article.

DRC 31 August 2017 no. 08170867[7]

In this next case, a player and a club signed an employment contract on 30 June 2014, valid from 1 July 2014 until 30 June 2015. Article 6 par. 5 of the employment contract provided that:

> "***The Player is aware that in case of relegation or exclusion of the A-team from the competition, a major decrease of the Club's income will follow. The Parties to the Contract agree explicitly that the Club is allowed for these cases to reduce the monthly remuneration unilaterally by as much as 50%.***"

Article 10 par. 1 of the same employment contract stated that:

> "***The validity and effectiveness of the Contract terminates for the following reasons (...) h) written notice of termination with an immediate effect in case of relegation to a lower football league competition.***"

In May 2015, the player put the club in default of outstanding remuneration such as salaries and match bonuses. In June 2015, the player lodged a claim against the club before FIFA requesting to be paid an amount of outstanding remuneration and compensation for breach of contract. The club acknowledged it had been relegated on 13 May 2015 and argued that due to this relegation the remuneration of the player should be lower. The DRC determined that Article 10 par. 1 lit. h) of the contract upon which the player relied to prematurely put an end to the employment relationship with the club was valid, as it provided equal rights for both parties to terminate the contract if the club was relegated. Since it remained uncontested that the club was relegated in May 2015, the DRC deemed that the player had validly exercised his right to terminate the contract, and he had just cause to terminate the contract per date of 9 June 2015 due to the club's relegation.

DRC 17 May 2018 no. 05181876[8]

On 18 December 2015, a player and a club concluded an employment contract, valid from 1 January 2016 until 30 June 2018. Clause 29 of the employment contract provided that:

> "***In case of a drop to a lower class, the Parties undertake to renegotiate the terms of this contract. If the parties fail to agree on the new contract provisions the legal relationship between the Parties expires.***"

According to the player, the contract had expired on 18 July 2016 by virtue of Clause 29 of the contract. The player explained that after the 2015-2016 season, the club was relegated "*from the Professional Football League of Country D to Professional Football League of Country G*". The player argued that on 11 July 2016 he asked the club via email for a renegotiation of the contract under Clause 29. On this same day, the club's president replied via email that Clause 29 was invalid under the rules of the Football Association of Country D and therefore had no legal effect. In another email by the player, dated 13 July 2016, he once again asked the club to clarify its position in light of Clause 29. The club maintained its earlier point of view. On 18 July 2016, the player wrote to the club that, since the club had failed to present him a new contract proposal, he had "*no other choice but to treat the contract as expired in the light of Clause 29*". The DRC unanimously agreed that the primary issue at stake was determining whether Clause 29 of the employment contract was valid and binding.

6 The decision is available here.
7 The decision is available here.
8 The decision is available here.

After careful evaluation, the DRC felt that Clause 29, the relegation clause, left little ambiguity: once the club is relegated, the player and the club renegotiate the terms of the contract. The DRC further understood that, if no new agreement was reached, the contract would expire.

In this context, the DRC further interpreted the relegation clause as signifying that both parties need to be willing to continue the employment relationship. Thus, the willingness of, e.g. only the club would not be sufficient for the employment relationship to continue. Furthermore, the DRC determined that the relegation clause was both reciprocal and proportionate, *i.e.* it did not provide an advantage to one party over the other. The DRC proceeded to analyse whether the relegation clause had actually been invoked by one or both of the parties. The DRC established that the club was relegated to a lower division at the end of the 2015-2016 season. The DRC concluded that attempts were made between the parties to renegotiate the contract. It further noted that no new agreement was reached between the player and the club. The DRC concluded that the employment relationship between the player and the club ended on 18 July 2016 by virtue of Clause 29 of the employment contract. The relegation clause was considered as valid.

DRC 7 June 2018 no. 06180668[9]

In this final DRC case to be discussed, on 22 July 2015, a player and a club signed an employment contract valid from its date of signature until 30 June 2017. Article 14.1 of the contract contained a clause in which the "*Rules governing the Relations between a Sports Club and a Professional Player accepted by the Resolution of the Football Association of Country D dated 27 March 2015*" were considered to be an integral part of the contract. Article 8.5 of these Rules read as follows:

> "***The Club is entitled to a unilateral declaration without fault of the Player after transfer of the Club to a lower competition class due to sporting competition, provided that notice of termination of the Contract shall be made until 10 July, and the Club will not have towards the Player any arrears in the payment of contract remuneration and the Club shall pay to the Player a compensation in the amount of equivalent of one month individual remuneration.***"

On 7 July 2016, the club sent a letter to the player in which it unilaterally terminated the contract. The player sent a letter to the club in which he disagreed with the termination letter. On 5 April 2017, the player lodged a claim against the club before FIFA regarding compensation for breach of contract due to the club's unilateral termination of the contract without just cause. The player argued that the club did not have a just cause to unilaterally terminate the contract, as the contract did not refer to a "*unilateral termination of the contract due to the Club's relegation into a lower league*".

The members of the DRC considered it important to highlight that said clause was only included in the so-called Rules, but not in the contract. The DRC was of the opinion that Article 8.5 of the Rules amounted to a relegation clause but against such background, the members of the DRC however, unanimously agreed that a clause of such high importance had to be inserted in the employment contract itself. The DRC deemed that a mere referral to such clause is not sufficient. In a further examination, the DRC noted that the clause did not fulfil the requirement of reciprocity, as it provided for a unilateral termination right to the benefit of the club only. In particular, it appears that in case of relegation of the club due to sporting merits, only the club had the right to unilaterally terminate the contract and no such right was granted to the player. Therefore, the DRC decided that the club could not legitimately terminate the contractual relation with the player by making use of Article 8.5 of the Rules. As a consequence, the members of the DRC concluded unanimously that the club did not have just cause to unilaterally terminate the contract on 7 July 2016.

Court of Arbitration for Sport

CAS 2008/A/1447 E. v Diyarbakirspor[10]

The first CAS case to be discussed dealt with an appeal against the DRC decision of 10 August 2007 no. 87677 (see above), where the employment contract contained the following relegation clause:

> "***If Diyarbakirspor goes to the 2nd division from the Turkish Turkcell Super League at the end of 2005-2006 season, the player will not demand any rights or payments for the 2006-2007 season, at the same time if he has received more than EUR 166.666 Euros at the end of 2005-2006 season, till 31.5.2006 date he will pay back overpaid money, and will not demand any right or payment and will be free to get his transfer certificate and cancel his agreement as single sided to be transferred to***

9 The decision is available here.

10 The award is available here.

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any club he wishes. (Till Until 31.5.2006, date the player will receive net amount of 166.666 Euros, if he receives more than this amount, he will pay back overpaid money to the club.)"

The player, who appealed against the DRC decision, sent several payment reminders to the club, but these were not paid. Therefore, on 30 April 2006, the player unilaterally terminated the contract due to non-payment of contractual obligations by the club. At the end of the 2005-2006 season, the club was relegated from the first to the second division. On 17 May 2006, the player filed a claim against the club before the DRC claiming the total amount of EUR 415,955 as a consequence of the club's allegedly unjustified breach of contract. The DRC, however, rejected the claim of the player.

As we saw above, the DRC held that the termination date of the contract was under the non-potestative condition of relegation at the end of the 2005-2006 season, and therefore, since the relegation of the club had occurred at the end of the 2005-2006 season, the contract had ended on 30 June 2006. Considering this, the DRC ruled that the player was entitled to receive only the maximum amount of EUR 166,666 from the club for the effective duration of the contract. Therefore, the DRC decided that the player had to pay the club the total amount of EUR 17,167.

> ***Relegation clauses are mainly a way of protecting the player's careers, as their employment opportunities and market values would be reduced by playing in lower divisions during their short-term careers***

The Sole Arbitrator of the CAS considered that the outstanding payments were substantial. As the player had given the club two warnings, he had alerted the employer. Therefore, the Sole Arbitrator found that both conditions required for a non or late payment to be considered 'just cause' for termination of the contract were fulfilled by the player. As a result of this, the club was not entitled to claim any compensation from the player. Regarding the relegation clause of the contract, the Sole Arbitrator was of the opinion that the relegation clause was based on a condition that was not under the control of the parties. Furthermore, the Sole Arbitrator considered it important to mention that such clauses are mainly a way of protecting the player's careers, as their employment opportunities and market values would be reduced by playing in lower divisions during their short-term careers. Therefore, it was considered that the contract had expired on 30 June 2006 due to the relegation clause.

CAS 2016/A/4549 Aris Limassol FC v. Carl Lomb[11]

The second CAS case concerned a case between the appellant *Aris Limassol FC*, a professional football club from Cyprus and member of the Cyprus Football Association (CFA). It was an appeal against the decision of the DRC of 5 November 2015 no. 11151618 (see above). The appellant played in the Cypriot First Division. *Carl Lombé*, the respondent, was a professional football player of Cameroonian and Armenian nationalities, last registered with the appellant. Per date of 1 June 2010, the parties concluded a first contract of employment, valid from the date of its signature until 30 May 2012, whereas the player had signed his very first contract with the club in 2008. According to this first employment contract, the player was entitled to a bonus if the club "*climbs to a superior division*". At the end of the 2010-2011 season, the club was promoted to the Cypriot First Division.

On 1 July 2011, the parties concluded a second contract of employment for the period of 1 June 2012 until 30 May 2015. The second employment contract stipulated in Article 8 that:

"***In case of graduation of the Football Club to an inferior Category, the Football Club will have the right to release the Football Player and the latter will have no right to damages.***"

Further, Article 20.3.1 of the Statutes of the CFA reads as follows:

"***In case a club is relegated from A to the B Division, the employment contracts of all foreign professional players shall be automatically terminated and shall be free the latest by 1st of June following the end of the Championship. A relevant term must necessarily be included in all employment contracts of foreign professional players of the A Division.***"

The club did not pay the remuneration for the months of March, April and May 2012 and did not pay the promotion-bonus at the end of 2010-2011 season. The club was relegated to the second division at the end of 2011-2012 season. As a consequence of such relegation, the parties argued with respect to a termination of the second contract in the summer of 2012. Because the club did not pay the outstanding remuneration, outstanding bonus and compensation payments to the player, the player decided to bring his case before FIFA. The DRC partially accepted the claim of the player.

11 The award is available here.

On appeal, the Sole Arbitrator was not convinced that, in the event that the CFA Transfer Regulations were applicable, Article 20.3.1 of the Statutes of the CFA would lead to the assumption of an automatic termination of the second contract. In the appeal proceedings in front of CAS, the club argued that foreign players did not have the statutory right to play in the second division, which was why all contracts of foreign players needed to be considered null and void in case of a relegation. However, the Sole Arbitrator noted that the player had actually played in the Cypriot Second Division when he signed the first contract with the club. In the eyes of CAS, the termination of the second contract based on said Article 20.1.3 of the CFA Transfer Regulations was, therefore, not valid.

With regard to Article 8 of the second contract, the parties argued whether there had to be an actual *"act of termination"* by the club or whether due to the alleged automatic termination such act was neither needed nor effected. The Sole Arbitrator considered that Article 8 was a so-called *"relegation clause"* which is a popular tool widely used with the aim to protect the club from wage burdens as a result of relegation, which would supersede the financial capability. Furthermore, the Sole Arbitrator noted that there are two different types of relegation clauses. Firstly, there are relegation clauses either stating that the contractual relationship of the parties automatically ends in the case of relegation of the club or giving both parties the right to terminate the employment contract in case of relegation. These kinds of relegation clauses do not only benefit clubs but also the players. Therefore, these clauses can be deemed as a valid way to protect mutual interests of both parties of the contract. Secondly, there are relegation clauses which do not automatically lead to the termination of the contractual relationship in case of relegation but only give one party the opportunity to terminate the employment contract without any regulation of compensation for the other party. In the view of the Sole Arbitrator, these kinds of relegation clauses bear the risk of containing an unbalanced right for the discretion of only one party without having any benefit of any kind for the other party.

Therefore, the Sole Arbitrator had to analyse the balance of benefit according to the specific circumstances of the present case. Article 8 of the second contract only allowed the club to terminate the employment contract in case of relegation. There was not any compensation granted to the player in the case of termination of the contractual relationship. This implied that the club retained full discretion as to whether the employment relationship with the player would continue or would come to an end following the relegation of the club, without protecting any established or substantiated benefit of the player. Therefore, the Sole Arbitrator finally considered that Article 8 of the second contract established unbalanced rights in the circumstances, and was, therefore, not valid.

CAS 2016/A/4678 Balikesirspor FC v. Ermin Zec[12]

In this CAS case (an appeal against the DRC decision of 28 January 2016 no. 01160851, as discussed above), the appellant club, *Balikesirspor FC*, a Turkish professional football club in the 1. Lig, and the respondent player Mr *Ermin Zec*, signed an employment agreement valid from 23 January 2015 until 31 May 2018. This agreement contained several match bonuses, but also a reduction of the remuneration of the player in case the club was relegated to a lower league.

On 5 May 2015, the player sent a default letter to the club, claiming the payment of salary for February, March and April 2015 in the amount of EUR 150,000. When the club only paid 10 percent of this requested amount, the player sent another letter to the club in which he stated that if he did not receive the remaining amount before the date of 22 May 2015, he would unilaterally terminate the employment relationship with the club. The club only paid the amount of EUR 20,000 in a reaction to this letter. On 2 June 2015, the player unilaterally terminated the contract, and on 22 June 2015, the player lodged a claim for breach of contract against the club before the FIFA DRC and requested the amount of EUR 140,000. On 9 June 2015, the club was relegated to the Turkish second division.

As previously discussed in this article, the FIFA DRC finally found that the player actually had just cause to terminate the contract unilaterally on 2 June 2015, since the club, without any valid reason, failed to pay the player an amount of EUR 140,000. The club should have been held liable for the early termination of the contract. The DRC decided that the player was entitled to receive from the club an amount of money as compensation for the breach of contract in addition to any outstanding payments on the basis of the contract. The DRC made a calculation of the total remuneration to the player under the terms of the contract. Finding that the parties had validly agreed that in case of the club's relegation, the annual remuneration to the player should be reduced by EUR 300,000, the DRC concluded that an annual remuneration of EUR 300,000 would serve as the basis for the determination of the amount of compensation for breach of contract. Finally, the DRC decided that the club had to pay the amount of EUR 210,000 to the player serving as compensation for the breach of contract.

12 The award is available here.

The Relegation Clause from the Perspective of FIFA and CAS

On 27 June 2016, the club filed its statement of appeal before CAS. The club requested, among other things, that CAS rule that the club had no debt to the player. The parties fully disagreed on whether the termination of the contract by the player was with or without just cause and, accordingly, what the financial consequences of this termination were for either party.

The CAS Panel (Panel) had to resolve two issues: 1. If the player had just cause to terminate the contract; and 2. If there were financial consequences due to this early termination. Since the club had not adequately discharged the burden of proof to establish that the club had fulfilled its payment obligations to the player, the Panel concluded that the player had just cause to terminate the contract.

With regards to the financial compensation for the breach of contract, the Panel reviewed the relegation clause under the player's contract. The Panel noted that due to Swiss Law it is possible for an employer and an employee to agree that certain circumstances beyond the control of both parties should result in a forward-looking change of the agreed remuneration. Due to Article 3.9 of the contract, the Panel considered that the agreed reduction would be applicable only if the player wanted to continue his contractual relationship with the club after the relegation. The Panel noted that the specific provision was agreed prior to the conclusion of the contract at a time when there was no imminent risk of relegation. Therefore, the clause was deemed valid in the eyes of the Panel.

Principles and legal pitfalls

Examining and focusing on the DRC jurisprudence first, we can derive a few principles.

In all the cases in which the DRC deemed the relegation clause to be valid, these clauses were of a non-potestative nature, meaning that the relegation clause at hand was not dependent on the will of one of the parties under the contract. According to the jurisprudence of the DRC, relegation is a casual condition, and therefore, the contract is automatically terminated in case of relegation. However, in case of a potestative condition (i.e. which is dependent on the will of one of the parties), it would be upon decision of the parties whether or not the contract terminates in case of relegation. In the event the clause has a potestative character, it will not be considered as valid by the DRC.

Another element for a valid relegation clause that we can derive from the DRC case law is a reciprocity requirement. The relegation clause must not provide an advantage to one party over the other. In other words, both parties must benefit from the clause, following the DRC case law.

A third condition is that the relegation clause has to be in the employment contract itself. For example, from a legal point of view, it does not suffice if the relegation clause is included in the internal regulations of the football association. It has to be included in the employment contract itself, as concluded between the club and the player, as is considered by the DRC in its jurisprudence.

While the DRC generally has a clear guiding line when it comes to relegation clauses, there are some exceptions. One of these is the case of 5 November 2015, no. 11151618. In this case the DRC considered that the relegation of a club *"per se"* is not a valid reason to terminate an employment contract. In our opinion, the DRC seems to refer to a scenario in which there is no relegation clause in the contract, but one of the parties nevertheless wanted to terminate the employment contract due to the relegation of the club. It is reasonable to argue that the relegation of a club is only a valid reason for termination of the contract, as long as a relegation clause is inserted in the contract itself.

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In the DRC cases, most of the relegation clauses were of the type that one or both of the parties were allowed to terminate the employment contract in case of relegation. A particular case in this category was the case of the DRC dated 18 June 2009, no. 69311. The employment contract in this case contained a relegation clause which stated that the contract would be automatically terminated in case of relegation. The club was relegated on 22 March, but in the eyes of the DRC the club still had to pay the player his salary over the month of April, because this month was considered to serve as a notice period. This is the only case, as far as we know, in which the DRC applied a notice period in the case of a relegation. Since this was the only case in which the DRC established that the parties had to consider a notice period, this case seems to be isolated

in FIFA jurisprudence. In other words, this FIFA DRC case seems to be an exception to the rule that a notice period is not required where a relegation clause deems a contract to be invalid in case of relegation.

Another remarkable relegation clause was the one mentioned in the DRC case of 7 June 2018 no. 06180668. This relegation clause stated that *"the Club is entitled to a unilateral declaration without fault of the Player after transfer of the Club to a lower competition class due to sporting competition (...)"*. The formula *"due to sporting competition"* was, however, not the subject of this dispute, but it raises the question of what falls under *"sporting competition"*. It is clear that this contains the match results of a club, but what if a club is relegated due to a reduction of points as a penalty by the national football association? Would this relegation clause still apply in this situation? As the DRC has not rendered a decision on what falls under *"sporting competition"* yet, we do not recommend that clubs and players insert this type of relegation clause in employment contracts.

> ***The relegation clause must not provide an advantage to one party over the other***

Not only the FIFA DRC, but also CAS, is of the explicit opinion that relegation clauses can be entitled as valid clauses. In the CAS award 2008/A/1447, it was decided that the clause in which it was stated that the contract would terminate in case of relegation of the first team from the first to the second division, was valid. As with the DRC, CAS also adheres to the principle that the clause has to be of a non-potestative nature. In the case of 2016/A/4549, the relegation clause was only to the benefit of the club and lacked reciprocity. Therefore, it was considered to be invalid.

In the CAS appeal of the DRC case of 28 January 2016 no. 01160851, the potestative nature of Article 3.9 was not one of the merits. However, the Panel did consider another interesting consideration, namely the fact that the specific provision was agreed at a time when there was no imminent risk of relegation, thereby contributing to the validity of the clause. An interesting question is what should be considered as an "*imminent risk of relegation*". This raises the question whether a club that has been at the bottom part of the league table for several seasons but manages to stay in the highest league every year, has an imminent risk of relegation and can, therefore, not conclude relegation clauses in employment contracts with players. This seems to be quite illogical. In fact, by its very nature, clubs close to the relegation zones are those that prefer to insert relegation clauses in their contracts.

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In summary, and after having analysed the jurisprudence of the DRC and CAS, when concluding a relegation clause, it is important to pay attention to the following criteria in order to create a valid relegation clause in an employment contract:

1. The relegation clause has to be adopted in the signed employment contract itself;

2. The relegation clause has to be reciprocal;

3. When the employment contract states that it loses its validity due to relegation, no further action of the parties has to be required. In other words, the clause needs to end automatically without any further action from the parties;

4. The relegation clause has to be unambiguous and objective and cannot be arbitrary in its application, since this would lead to an unacceptable result based on non-objective criteria; and,

5. The relegation clause has to be of a casual nature and cannot have a potestative character, i.e. it is not allowed to depend on the will of a party to the contract or any third party.

If a relegation clause meets the above-mentioned criteria, in our view there is not much doubt that the FIFA DRC and CAS will deem this clause to be valid. However, in case of illnesses or injuries of the players, the DRC or CAS might have a different view. It is possible that in such a scenario, a resolutive condition, *i.e.* the relegation clause, cannot be invoked by one of the parties. It is interesting to wait for the occurrence of such a dispute in front of the FIFA DRC or CAS.