

Mr. sc. Andrijana Bilić
asistentica Pravnog fakulteta Sveučilišta u Splitu

CONTRACTUAL STABILITY *VERSUS* PLAYERS MOBILITY

UDK: 796:349.2

Pregledni znanstveni rad

Primljeno: 10.09.2011.

In this paper, the author considers the problem of harmonising the contractual stability of professional football players and their freedom of movement as workers. After analysis of the concepts of international mobility of professional football players and in particular their limitations in regard to players' transfer on the part of FIFA, the author points out the most commonly occurring problems which are related to defining player status, the option of one sided player contract extension and one sided contract termination, and in this sense provides solutions *de lege ferenda*.

Key words: *contractual stability, mobility of professional players, player status, one sided contract termination*

1. INTRODUCTION

Contemporary football is caught between two very powerful concepts: the freedom of movement of players on the one side and contractual stability on the other. International migration has been part of football from the beginning and is still part of modern football.¹ Although migration is not new phenomenon, an increase in the international mobility of professional footballers can be observed in the last years. The increasing international mobility of footballers has direct effects on the contractual situation with their employing club, thus it is very important to mention that the contractual and organisational dynamics of football have changed dramatically in the years since the European Court of Justice deliver ruling in its landmark case *Bosman*, which heralded an increasing juridification of professional football which has been, and is, generated by an increasing commodification of the sport. *Bosman* remains pivotal to the emergence of a football „industry“ in a number of European countries. Football has been transformed from a semi-commercialised activity to the ruthless business operation.

Today, the traditional stakeholders in football- clubs, players, sports administrators, supporters and the wider local communities from which they come – fight over destiny of the game with the new men in football ranging from football agents to rich benefactors.

These tensions within the game are most visibly demonstrated by the

¹ LANFRANCHI, P., TAYLOR, M., *Moving with the ball: the migration of professional footballers*, Oxford: Berg, 2001.

aspirations of the people, that is, professional footballers. Throughout the history of professional football, players have been subservient and very much treated like commodities. However, today's star players have become highly paid and sought after, and possess significant leverage in moving between clubs. Consequently, the balance of power between clubs and players has become tentative with conflicts emerging between contract stability and player mobility. This poses the major question as to the role the law should play in regulating relationship between player and the club; the changing dynamics in this specific relationship has been reflected at a general level over the last fifteen years by a contest as to who has the right to govern the game – the football authorities or external regulatory regimes supported by judicial rulings and decisions.

2. INTERNATIONAL MOBILITY OF FOOTBALL PLAYERS

International migration has been part of football from the beginning. After the standardization of the rules of the game in the second half of the 19. century, the British played a vital role in the diffusion of football throughout the world. At the turn of the century, clubs like FC Barcelona, AC Milan or FC Internazionale were founded on the initiative of migrant tradesmen forming a society of players from different nationalities such as British, German, Swiss, French, Italian etc.² Football players have, in fact, always been „on the move“.³ Even before the legalisation of professionalism in 1885., Scottish players were recruited by English clubs.⁴ Later in the 1920s and 1930s, at the time when Uruguay succeeded at the Olympics in Paris and Amsterdam and also won the first official World Cup ever played, the first remarkable intercontinental migration pattern between South America and Southern Europe emerged. Expatriate players had a chance to present themselves in international tournaments for the first time and thereby attracted the interests of European clubs.⁵

Movement of players should not be isolated from general migratory trends and patterns. Furthermore, we should identify three sets of determinants for migration: economic, cultural and institutional or structural. Economic pressure in the home country and high salaries abroad were, most often, the decisive „push and pull“ factors to initiate the movement of players. Yet the cultural and even institutional aspects may not be underestimated.⁶ The increase in the international movement

² MASON, T., *The origins and diffusion of football: rugby and association football in Britain, Management, law and humanities of sports*, 9.ed., Leicester: De Monfort University, 2008.

³ MAGUIRE, J., BALE, J., *Sports labour migration in the global arena*, London: Taylor & Francis, 1994.

⁴ The first two Scots to leave their country in order to play for an English club as „professionals“ were Frigus Suter and James Love, who signed with Darwen in Lancashire in 1879. (GILLER, N., *Football and all that: An irreverent history*, Hodder & Stoughton, London, 2004.

⁵ LANFRANCHI, P., TAYLOR, M., *Moving with the ball: the migration of professional footballers*, o.c.

⁶ The arrival of South American players in Italy at the beginning of the 1930s were seen as a natural and inevitable repatriation of Italian citizens who happened to be born in South America. Still today,

of players is often attributed to some degree of globalisation of the transfer market, but because of its historical and cultural roots that continue to underpin many of contemporary systems and networks of football player migration, instead of referring to a development towards a global market, a growing internationalisation seems to be a more adequate description of the phenomenon.

Intra-European mobility was further stimulated by the provisions for the free movement of labour within European Community just under Article 39 of the EC Treaty, keeping in mind that EC Treaty was adopted in 1957. In this context, the famous „Bosman case“ was of paramount importance for the right of free movement of football players. Before the case the football transfer system had been very rigid in the sense that transfer fee was due to be paid for a player even if the labour contract with the player's former club had already run out. Most significantly, the ruling facilitated the mobility of players on two levels. First, the players who were EU or EEA nationals could now freely move within the EU at the end of their contract as any transfer fees for out-of contract players were declared illegal. Second, the „3+2“ rule⁷ was abandoned for EU nationals thereby opening the door for the influx of more expatriate players into the squads of European clubs.⁸

Shortly after the ECJ ruling, a complementary case came about, as the Bosman decision was only applicable for EU citizens working in the European Union. When a Croatian player Goran Vlaović, ended his contract with Calcio Padova on the 30. of June 1996, the Spanish club Valencia CF signed the player. Calcio Padova, according to art.14 of the FIFA Regulations for the Status and transfer of players requested a payment of training compensation and was assigned an amount of 3.8 million Dollars. Valencia CF, following the ruling of Bosman, decided to file a claim against FIFA before the EU Commission as FIFA approved what seems to be evident and changed its Regulations. Accordingly, as of the 1. April 1999. it was admitted that any player, even a non-EU citizen, who had concluded his contract within the EU was free to move without having to pay any training compensation.⁹

Other reasons for increased mobility can be found in the geographical proximity

clubs might be induced to scout players with specific nationalities as to take advantage of a favourable immigration policy.

⁷ According to „Gentleman's Agreement“ between UEFA and the Commission regarding the nationality restriction rules. The restriction generally followed the „3+2“ model, meaning that the club could field only three foreign players and „assimilated“ players at the same time in a game in the competitions organised by the UEFA. In national leagues the number of foreign players could be higher. It may seem a bit surprising that this rule was given green light by the Commission when the compatibility of it under EU law was clearly disputable. (PARRISH, „Reconciling conflicting approaches to sport in the EU“, in CAIGER & GARDINER, Professional sport in the EU: Regulation and Re-regulation, The Hague, 2000:28)

⁸ FRICK, B., Globalisation and factor mobility: the impact of „Bosman ruling“ on player migration in professional soccer, *Journal of Sports Economics*, 10(1), p.88-106.

⁹ CRESPO PÉREZ, J.D.D., Transfers: Bosman to today, *International master in Management, law and humanities of sport*, 9. ed. University of Neuchâtel, 2009.

and improvements in communication and transportation.¹⁰ Besides, the expansion of television coverage of football has given players a platform to better present themselves in an international environment.

The mobility of players has also been stipulated by international alliances of clubs and the setting up of transnational recruitment networks intermediaries such as agents. These alliances have been undertaken on the basis of different purposes. Alliances of European clubs are often forged as to give injured players an opportunity to regain experience for determined period in a lower league at another club. In other cases, immigration laws of one EU Member State might be more liberal because of historic bonds with a former colony for example. Through an alliance of collaboration a club from a different Member State might take players from these countries under contract taking advantage of them being nationalised or given a working permit in the former Member State.¹¹ A second type of alliance is based on the search for talent. This kind of alliance has precise effect on the migration flow between individual countries. Under such a type of partnership, priority rights on the transfer of talented players are given against a financial contribution. This explains why in some cases, migration flows between certain regions are more pronounced than for others. In the majority of cases, the developing clubs are from Africa or South America while contracting clubs are European. However, this kind of partnership has often been abused as to open the doors of player trafficking. As a response in 2001, FIFA has posed heavy restrictions on the transfer of minors under art.19 of the FIFA Regulations on the status and transfer of players.¹²

Sometimes, the mobility of the players has also been consequence of a particular coach who tends to source players he already worked with in the past and, frequently, stem from his home country or share his mother tongue.¹³

Today, in the five top European leagues (England, Spain, Italy, Germany and

¹⁰ GARDINER, S., WELCH, R., Show me the money: regulation of the migration of professional sportsmen in post-Bosman Europe, in: CAIGER, A., GARDINER S., (eds.) Professional sport in the European Union: Regulation and Reregulation, Cambridge University Press, 2001:107-126.

¹¹ Ibid.

¹² International transfer of players are only permitted if the player is over the age of 18 with three exceptions to this rule: the player's parents move to the country in which the new club is located for reasons not linked to the football; the transfer takes place within the territory of EU or EEA and the player is aged between 16 and 18; The player lives no further than 50 km from a national border and the club with which the player wishes to be registered in the neighbouring association is also within 50 km of that border. The maximum distance between the player's domicile and the club's headquarters shall be 100 km. In such cases, the player must continue to live at home and the two associations concerned must give their explicit consent.

¹³ For instance, at the time of his transfer from FC Porto to FC Chelsea trainer José Mourinho took with him three Portuguese players with whom he cooperated during his employment with FC Porto, Ferreira, Carvalho and Thiago. Another example is trainer Van Gaal, of Dutch nationality, who after his transfer from FC Ajax to FC Barcelona, not immediate, but during his engagement with later club, insisted on recruitment of the Barcelona team with the players from Dutch school of football, because he wanted Barcelona to play distinguishing Dutch football style.

France) four geographical zones represent 95% of all expatriate players.¹⁴

3. RESTRAINTS TO PLAYERS MOBILITY

The sport industry accounts for 2 % of the combined GNP of the 27 member states of the EU altogether.¹⁵ It therefore constitutes a significant part of the total economic activity within the EU. Football holds a considerable social and educational importance in Europe, being part of European tradition by engaging all kinds of people (spectators, supporters, sponsors, trainers to young-, semi-professional and professional players. Players transfers, sales of gadgets, souvenirs and tickets, matches, sponsorship deals, sales of broadcasting rights, player salaries and member fees are all examples of economic activities within the football sphere which all carry economic implications. Hence, it leaves no doubt that sport and economic overlap. FIFA and UEFA raises their voices concerning the „specificity of sports“ or the „special characteristics of sports“. According to their view sport should be considered as unique because of its special characteristics and therefore entitled to immunity from any legal control. Others find sports in no way different from any other economic activity and should therefore fall under EU law.

In its landmark cases, *Walrave and Koch*¹⁶, *Donr*¹⁷ and *Bosman*¹⁸, the Court has ruled that the sport is subject to EU law, more precisely the rules governing free movement and competition, as far as it constitutes an economic activity. The European football industry has, ever since the controversial Bosman case concerning transfer rules, been eager to separate sports from the application of the EU law arguing that the case-by-case approach taken by the Court so far leads to legal uncertainty.

Rules governing player mobility such as the player transfer system¹⁹ are generally

¹⁴ In France, the largest part of expatriate players is made of players from Senegal, Cameroon, Ivory Coast. Historic colonial ties between France and the African continent lie in the root of player migration. At the same time, the increasing share of Latin Americans is pronounced, like in Italy too, in particular Argentinians and Brazilians. In the English Premier League, astonishing 60% of expatriates are Western Europeans, majority French. Latin Americans, Africans, Eastern Europeans and others accounted for the remaining 40% in equal parts. The German Bundesliga is the most internationally diverse league of all the five, but the impact of Eastern European players is more pronounced than in other leagues.

¹⁵ BLACKSHAW, The specificity of sport and EU White Paper on sport: some comments, ISLJ, 3-4, pg.87

¹⁶ Case 36/74, B.N.O. *Walrave and L.J.N.. Koch vs Union Cycliste Internationale and others* (1974) ECR 1405

¹⁷ Case 13/74, *Gaetano Donr VS Mario Montero* (1976) ECR 1333

¹⁸ Case 415/93 *Union royale Belge des Sociétés de Football Association ASBL V Jean Marc Bosman, Royal club liégeois SA v Jean Marc Bosman and others and Union des Associations Européennes de Football (UEFA) V Jean Marc Bosman* (1995) ECR I-4921, para 106.

¹⁹ „The original intention of the transfer market was to keep the salaries of the better players on a decent level and to prevent all talent from ending up in just a few large clubs leading to a loss of excitement and unpredictability of the competition.“ BLANPAIN, R., INSTON, M., *The Bosman case – the end of the transfer system?*, Leuven, 1996:2

perceived to be a part of control mechanism of management over players,²⁰ hence providing the clubs with power and imposing restraints over the players' services and free movement. Player mobility constitute clash between the player's right of free movement and the special characteristic of sport. Moreover the interdependence between clubs separates it from all other industries. In the pre-Bosman era, as well some time after the judgement due to the sports governing bodies' unwillingness to adapt to the ruling, clubs were forced to pay compensation for the transfer of a player out-of-contract, that way restricting players' ability to choose another employer if the clubs could not agree upon a transfer fee. The Bosman aftermath eventually led to a revision of the FIFA Regulations on the Status and Transfer of Players in 2005. The Rules currently require a training compensation²¹ to be paid by the acquiring club for players up to 23 years of age related to the cost of training, in order to promote recruitment and training of the young players and to safeguard the competitive balance between the clubs, objectives which in Bosman were regarded as capable of being justified. The Bosman ruling also prohibited the condition to field the maximum of three foreign players and two assimilated players as the rule amounted to discrimination based on nationality. However, an important legal issue that was not resolved in Bosman is whether an out-of-contract player can move as of right to a new club in the same country. Another issue, not addressed in Bosman, is whether freedom of movement as guaranteed by art. 39 of EC Treaty permits players unilaterally to terminate existing contracts of employment to move to another club (Anelka Case).²² This situation generated legal debate whether preventing a player from terminating his employer contract in order to move to another club, as the transfer system does, is as much restraint on a player's freedom of movement as the rules declared invalid in Bosman. So, player should have the right to terminate his contract providing he is prepared to pay compensation to his club by reference to the normal contractual principles for calculated damages. In such circumstances club is then obliged to realise the

²⁰ CAIGER, A., O'LEARY, J., The end of affair: The Anelka Doctrine – The problem of contract stability in English professional football, in: CAIGER & GARDINER, 2000.197-217.

²¹ FIFA Regulations 2010., art. 20

²² The possibility that contract-jumping might be permitted under EU law was identified as a result of the announcement by Nicolas Anelka in the summer of 1999 that he no longer wanted to honour his contract to play for Arsenal FC. Anelka wished to leave the UK and play for Lazio. At the time of his announcement Anelka had another four years contract to run. The problem for Anelka was that the Arsenal was not ready to release him from his contractual obligations, and Lazio was not prepared to pay sizeable transfer fee that Arsenal required. The transfer system operates on the basis of a rule that provides that the club that holds the registration for a player under contract is not required to release that registration until and if a transfer fee has been agreed. Therefore even if Anelka had walked out on Arsenal he would not have been able to play for any other club until his contract with Arsenal had expired. The position with respect to Anelka was ultimately resolved when Arsenal accepted a transfer bid submitted by Real Madrid.

players' registration²³ so that he can join and play for the club of his choice.²⁴ Some authors contended that the transfer system is a form of slavery²⁵ (modern form of slavery)²⁶, and that the players should be freed from shackles it provides to enable clubs to tie players to them for the entire period of their contracts. If clubs were no longer able to hold on to a player by refusing to release that players' registration, a footballer would be in the same position as employees in general.²⁷ In post-Bosman era a player was free to move to any club with whom he could agree personal terms.²⁸ So, the „contract shackles“ were loosened and the players started to utilised their new contract freedom to become more mobile and alter recruitment patterns across Europe.²⁹ The impact of Bosman did not occur for a couple of seasons after the ruling when pre-1995 contracts were up for negotiation. This was significant in England as a £ 670 million five year television deal was secured for FA Premier League rights in 1997. which provided clubs with a bigger pot of money then ever before. Clubs have now serious financial capital to play with and this had key consequences: club offered radically improved salaries not only out-of-contract *Bosman* type players, but also to currently contracted players in an effort to stave off Bosman; long-term contracts become the norm; transfer-fees radically rocketed on the transfer market as clubs tried to purchase player currently in contract; and significant number of overseas players, many of *Bosman-type* contracts, were recruited.³⁰

Initially free movement for out-of-contract players could only occur for EU players between clubs in different EU nations but further change occurred in 2000. with freedom of contract upon contract expiration movement extended to players moving between clubs in the same country.

²³ According to art.5 FIFA Regulations 2010. a player must be registered at an association to play for a club as either a professional or an amateur....only registered players are eligible to participate in organised football. By the act of registering, a player agrees to abide by the statues and regulations of FIFA, the confederations and the associations.

²⁴ CAIGER, A., O'LEARY, J., The end of affair: The Anelka Doctrine – The problem of contract stability in English professional football, o.c.

²⁵ MAGUIRE, J., Global sport: Identities, Societies, civilizations, Oxford: Polity Press, 1999: 102

²⁶ HORNE, J., TOMILSON, A., WHANNEL, G., Understanding sport: An introduction to the sociological and cultural analysis of sport, London: Spon, 1999: 249

²⁷ BLAINPAIN, R., INSTON, R., The Bosman case – The end of the transfer System?, Leuven, 1996. quoted by O'LEARY, CAIGER, o.c., pg. 321

²⁸ CASHMORE, E., Sports culture: An A-Z guide, London: Routledge, 2000:53

²⁹ MAGEE, J., Shifting balances of power in the new football economy, in: SUGDEN, A., TOMLISON, J. (eds.), Power games: Theory and method for the critical sociology of sport, London:Routledge, 2002:219

³⁰ GREENFIELD, S., OSBOURNE, S., Regulating football: Commodification, Consumption and the Law, London: Pluto Press, 2001:74; MAGEE, J., Shifting balances of power in the new football economy, O.C., 2002:220-221

4. CONTRACTUAL STABILITY IN PROFESSIONAL FOOTBALL

Organised football can only achieve uniformity, equality and certainty on a worldwide scale if a variety of fundamental principles and basic rules are applied to every party involved. FIFA was created in 1904. in order to achieve this goals.³¹ This international governing body of football aims to improve the game not only in relation to the rules on the field but also off the field. The national football association, as members of FIFA, should entirely comply with the FIFA Regulations on the Status and Transfer of Players (further: FIFA Regulations) and the verdict made by the Dispute Resolution Chamber (DRC)³² and the Court of Arbitration for Sports (CAS)³³. National associations should also take every possible precaution in order to ensure that their members, clubs and players also comply with these regulations.

The main aim of FIFA Regulations is to protect the rights of players and club and to safeguard the principle of maintenance of contractual stability between professional football players and clubs which is of fundamental importance in order to have an efficient transfer system and to maintain competitive balance.

The three most important issues in the application of FIFA Regulations and consequent disputies carried out in front of the DRC and CAS are:

- the definition of players' status,
- unilateral option clauses,
- unilateral breach of contract

³¹ DE WEGER, F., *The Jurisprudence of the FIFA Dispute Resolution Chamber*. The Hague: T.M.C. Asser Press, 2008.

³² According to art. 22 of FIFA Regulations on status and transfer of players 2010. Despute Resolution Chamber shall adjudicate in cases of:

- disputies between clubs and the players in relation to the maintenance of contractual stability where there has been ITC request and a claim from an interested party in relation to said ITC request, in particular regarding the issue of the ITC, sporting santions or compensation for breach of contract;
- employment-related disputes between a club and a player of an international dimension, unless an independent arbitration tribunal guaranteeing fair proceedings and respecting the principle of equal representation of players and the clubs has been established at national level within the framework of the association and/or a collective bargaing agreement;
- disputes relating to training compensation and solidarity mechanism between clubs belonging to different associations;
- disputes relating to the solidarity mechanism between clubs belonging to the same association provided that the transfer of a player at the basis of the dispute occurs between clubs belonging to different associations

According to art. 24 FIFA Regulations 2010. the DRC shall adjudicate in the presence of at least three members, unless in the following cases which may be settled by a DRC judge:

- all disputes up to a litigious value of CHF 100,000;
- disputies relating to the calculation of training compensation;
- disputies relating to the calculation of solidarity contributions

³³ Decisions reached by the DRC or DRC judge may be appealed before the Court od Arbitration for Sport (CAS), art.23 para.3 and 24 para.2

All of these issues are in close connection with contractual stability of professional football players.

4.1. Definition of player status³⁴

Under FIFA Regulations players are either considered as amateurs or professionals. It is clearly defined that „a professional is a player who has written contract with club and is paid more for his footballing activity than the expenses he effectively incurs. All other players are considered to be amateurs.³⁵ Thus, all of the differently designated contract such as agreements of „apprenticeship“, „training“ or „scholarship“ will be categorised as either amateur or professional. Since the introduction of new Regulation in 2001. (revised two times, in 2006. and 2010.), the so-called „federative rights“ were replaced by the concept of contractual stability. Under this concept, the link between a player and the club is principally based on a contract instead of the registration. Hence, a written contract of employment is the instrument which regulates the relations with professionals, but not with amateurs.

Consequently, the maintenance of contractual stability is dependent on the status of player. For instance, only under professional status the club in which player is is entitled to receive transfer fee. Also, if professional player breaches his contract and joins another club, the former can always claim for compensation, which is not possible in the case of amateur who maintains his status at the new club. The issue of training compensation also depends on player status. Only under the condition that the player signs his first professional contract are the training clubs of the player entitled to ask for training compensation.³⁶

First contract offers are highly polemical subject in professional football (many cases are making their way in front of DRC and eventually CAS). Clubs employ different strategies to engage the most talented young players. Some of them offer professional or pre-professional contracts by which they pay players a small salary and guarantee the contractual binding to the club. Others offer amateur agreement designated as „apprenticeship“ or „scholarship“ contract. The reason for such situation frequently originate either in the regulations of the national football association, which recognize their validity, or in the financial situation of the club, which make the offering of professional contracts to all of its youth players impossible.

In the following text we shall address some of the cases that describe previously mentioned situation.

³⁴ FIFA Regulations on Status and Transfer of players, 2010., art.1.para.1

³⁵ Para. 2

³⁶ Art.20 and Annexe 4 of FIFA Regulations 2010.

4.1.1. The case of Magnus Troest³⁷

This case highlights the implications of correctly defining the status of a player and whether he is amateur or professional according to the FIFA Regulations. The issue at hand was to determine whether a training compensation was due to be paid by the new club.³⁸

FIFA considered relationship between Troest and Aston Villa non-amateur because the player received remuneration in excess of the expenses incurred in his playing activity. So, the jurisprudence is clear in the sense that the relevant criterion to determine the status of player is not the signing of a contract but the amount paid by the club to the player. Any classification of a contract, such as „scholarship agreement“, made between club and the player is irrelevant.

4.1.2. The case of Cheick Tidiane Sarr³⁹

In this case CAS stated in the verdict that the „legal nature or the designation of the agreement between team and player is irrelevant.⁴⁰ Is was again referred to remuneration as the relevant criterion to define the status of player. Fee of 600 Euros constituted a salary and not mere compensation for the player, a fact which consequently turned the player into professional. So, all the costs related to the practice of football were already covered by the French club. CAS decided that the claim for training compensation was justified.

4.1.3. The case of Gerard Piqué⁴¹

In this case CAS Panel found that the player should be considered as an amateur not because of the designated „amateur contract“, but rather because the player „has never received any remuneration other than their reimbursement of actual

³⁷ Aston Villa FC v/B.93 Copenhagen (CAS 2006/A/1177)

³⁸ In 2003, the Danish player Magnus Troest and Aston Villa signed a „scholarship agreement“ intended to be valid for three years. The players former club, B.93 Copenhagen, subsequently demanded of Aston Villa to pay a training compensation. The English club replied that a training compensation would only be payable after signing a professional contract with the player (art.20 FIFA Regulations).

³⁹ FC Girondind de Bordeaux v/Lyngby Boldklub & Lundtofe Boldklub (CAS 2005/A/838). The player Cheick Tidiane Sarr has trained with Danish clubs Lundtofte and Lyngby before he turned sixteen. Then, the Sarr signed an „asspirant contract“ with FC Girondins de Bordeaux in France. The club contractually agreed to pay all of his expenses plus compensation fee of 600 Euros per month. Consequently, the Danish clubs claimed training compensation from Bordeaux which asserted that it did not owe training compensation because the player had never been offered a professional contract, a fundamental requirement according to art.20 of the FIFA Regulations 2010.

⁴⁰ CAS 2005/A/838, pg. 8, para.31

⁴¹ FC Barcelona SAD v/Manchester United FC (cas 2004/A/691). In 2002., the fifteen year-old Gerard Piqué and his parents signed a six year pre-professional contract with Spanish club FC Barcelona. The agreement stated that the player should „devote himself to the practice of sport and receive in return compensation only for...expenses“. In the following, Arsenal FC negotiated with the player and Barcelona in order to have the player join the English team. In the meanwhile Manchester United also wanted to put forward an offer but Barcelona replied that there were negotiations in place with Arsenal. Without having the consent of FC Barcelona, the player signed a non-professional „scholarship agreement“ with Manchester United that was to be replaced by a professional contract on the players' 18. birthday. Consequently, FC Barcelona filed a claim with FIFA and later appealed to CAS.

expenses incurred during the course of participation in any activity connected with association football⁴², which means that amateur contract is in question. So, the club can not claim inducement of breach of contract, because FIFA Regulations refer to professional contracts only.

For the contractual stability of professional footballers, not only issue of clearly defining the status of player arise, but also potential ramification arises in the context of first contractual offerings. Following cases reveals some of the problems involved.

4.1.4. The case of Leonardo do Bomfin⁴³

In this case final verdict states that any contract with minors with duration of more then three years is void⁴⁴, the player is free to sign and play for another club of his choice and need not to pay any compensation for his former club.

4.1.5. The case of Mohamed Lamine Sissoko⁴⁵

In this case CAS decided that the apprenticeship contract system is only valid at national level and that the FIFA Regulations are the rules to be applied regarding international transfers. According to these rules Sissoko did not breach his contract and had to be considered as a free agent for international transfers. As a consequence, he could register for a new club while the former club has no right to compensation in the case of breach of contract.

4.2. Unilateral options for the extension of players' contracts

Unilateral option clause are common practice for many clubs especially in South America, but also frequently used in Europe. In its basic form, players are offered short-term contracts which include a clause granting the club the unilateral option to extend the contract for a determined number of times and years. Usually, the increase in the player's salary in case of unilateral extension is also established in the same clause. For many clubs which are financially dependent on the development of young players, the inclusion of this type of clause in the players'

⁴² CAS 2004/A/691, par.76, pg.19

⁴³ PSV N.V. Eindhoven v/FIFA & Federação Portuguesa de Futebol (CAS 2005/a7835) & PSV N.V. v/Leonardo do Bomfin & FIFA (CAS 2005/A/942). At the age of 17, the Brazilian player Leonardo de Bomfim signed a four-and-a-half-year contract with the Dutch team PSV Endhoven. The following year, Bomfim signed a new contract with the Portugese club FC Porto. The player alleged that his contract with PSV was void because he was a minor at the moment of signing it, which consequently impedes a length of contract of more then three years.

⁴⁴ Art. 18 para. 2 FIFA Regulations 2010.

⁴⁵ AJ Auxerre v/Valencia FC & Mohamed Lamine Sissoko (CAS 2006/O/530). A French player Sissoko and AJ Auxerre signed so-called „apprenticeship contract“ for three years of duration, in which the club committed to provide player with a complete football formation. This kind of contact is special to the French regulation. On the expiration of a such contract, players are obliged to sign pre-professional contract („stagiare professionnel“) with the same club if it decides to offer it to the player. When AJ Auxerre offered Sissoko the contract of „stagiare professionnel“, the player declined and signed a professional contract with the Spanich club Valencia CF.

contracts has been common practice.

The main advantage lies in the possibility to contract a high number of players at comparatively low cost in the same season without being forced to engage in longer-lasting financial obligations. Regarding international acceptance of this clause, certain specificities are to be followed which might render such clauses valid. In the following the most important cases pertaining to this issue are presented.

4.2.1. The case of Carlos Bueno & Cristián Rodríguez⁴⁶

This case might be considered as significant for South America as the Bosman case for Europe. It challenged the system of contracts as established by the Uruguayan Football Association and practiced for many years. This case incorporated two legal difficulties. One of them was either the applicable law was the national law of Uruguay or Swiss law as referenced in the FIFA Regulations. The other problem was how to deal with the unilateral option of prolongation in a context of the right of free movement for the players. In effect, the contract of players have ended as they did not accept the unilateral option of their club.

With regards to applicable law, since both the players and the club were Uruguayans, reference was made to the FIFA Regulations and the general principles of labour law as well as international treaties signed by Uruguay on labour matters. At the end players were finally allowed to register for Paris-Saint Germain and Peñarol was denied any compensation. This was the first case to demonstrate the position of FIFA and CAS towards the principle of such clauses. Another important precedent left by this case is that the FIFA Regulations and applied Swiss law prevail over national law.

4.2.2. The case of Sortirios Kyrgiakos⁴⁷

This case bears very interesting implications in regards to the validity of unilateral options. In the appeal procedure at CAS, the Panel declared that the player was responsible of unilateral breach of contract. The arbitrators relied on the principle of „*pacta sunt servanda*“. The term and conditions offered by the club on the close of the contract were considered as fair and reasonable by the Panel. Unilateral

⁴⁶ Club Atlético Peñarol v/ Carlos Bueno & Cristián Rodríguez & Paris Saint-Germain (CAS 2005/a/983 & 984). The players Bueno and Rodriguez had an employment agreement with the Uruguayan club Atlético Peñarol for one year, but the club had a right to unilaterally extend the contract for a number of years. In order to do so, the salary of players had to be increased according to the officially reported annual increase of the cost of living in Uruguay. At the end of the season, the players signed with the French club Paris Saint-Germain not accepting the clubs' unilateral right of prolongation. At first FIFA did not deliver the ITC (International Transfer Certificate), which meant that initially Bueno and Rodriguez were not allowed to play for the French club.

⁴⁷ Panathinaikos Football Club v/Sortirios Kyrgiakos (CAS 2005/A/973) Kyrgiakos and Panathinaikos FC signed a two year employment contract in 2001. The contract granted the club the right of a unilateral two-year extension, plus one additional year thereafter. While Kyrgiakos was playing under loan agreement for Glasgow Rangers FC in Scotland, Panathinaikos exercised the option to prolong the contract. The player refused to play again for the Greek club and personally considered the contract void as the legality of unilateral option contracts was not recognized internationally.

option clause did not create a relationship of unequal bargaining power between the parties. The very significant increase in the salary of Kyrgiakos combined with various bonus payments in the case of prolongation were paramount reasons in the decision of CAS.

4.2.3. The case of Diego Barreto⁴⁸

This is rather complex case which incorporates three important issues of contemporary legal landscape: unilateral breach of contract, mitigation of the compensation fee and unilateral option clause. Contrary to the general jurisprudence there are certain elements such as equal bargaining power of the parties, a significant increase in the salary of the player or the concession of the right of unilateral expansion in a separate agreement which might render unilateral option clauses acceptable by CAS.

4.2.4. The case of Javier Alejandro Almirón⁴⁹

In this case DRC condemned the player and the new club to pay solidarily 68000 Dollars for the unilaterally breach of contract, because DRC recognised the validity of both registered contract in AFA and additional private contract which conceded the club the right to unilaterally prolong the contract. The critical element was that the player perfectly knew and understood the right that he had given to the club.

4.3. Unilateral contract termination

Contractual stability is of paramount importance in football, from the perspective of clubs, players, and the public.⁵⁰ After the Bosman ruling and the recognition of the principle of freedom of movement for football players, FIFA

⁴⁸ Real Valladolid CF SAD V/Diego Daniel Barreto Cácares & Club Cerro Porteño (CAS 2006/A/1082 & 1104). The Paraguayan goalkeeper Diego Barreto and Real Valladolid CF had an employment contract which included a fixed buy-out clause of 6 million Euros. The reasons for litigation was that Barreto used the argument of unilateral extension of his prior contract with the Paraguayan club Cerro Porteño to breach his valid labour contract with Real Valladolid FC which he had recently signed. The CAS ruled in the final appeal that the unilateral option of extending the player's contract is not deemed valid under the prevailing conditions. Hence, the player was found guilty of unilateral breach of contract with Real Valladolid FC. Further, the Panel considered that the amount of 6 million Euros was not proportional to the real value of the player to the Spanish club and mitigated the amount according to art. 44 of the Swiss Code of Obligations. CAS set the new compensation fee to be paid by the player Barreto to 1.5 million Euros

⁴⁹ Club Atlético Lanús v/Javier Alejandro Almirón & Polideportivo Ejido SAD (FIFA 07/00789). The Argentinean player Javier Alejandro Almirón signed contract with Argentinean club Atlético Lanús in 2006. The contractual agreement was for one year but granted the club the right to unilaterally extend the contract for two more years under the condition that the club would increase the salary of the player by 15 % each year. Additionally to the employment contract, parties also signed a private agreement which obliged the club to pay the player 18,000 Dollars as in return for having the unilateral extension right. After one year, the player signed a new contract with the Spanish club Polideportivo Ejido, not respecting the right he had conceded to Lanús. As a consequence, the Argentinean club filed a claim with FIFA

⁵⁰ FIFA Circular letter 769, 2001, pg.10

was compelled to modify the regulations of its transfer system.⁵¹ The impetus for what turned out to be significant changes to transfer rules was a decision by the European Commission that it would challenge the transfer system before the ECJ on the basis of EU competition law unless the footballing regulating bodies, in particular FIFA, voluntarily formulated and implemented new rules which the Commission could regard as consistent with EU law. The Balog case⁵² was also part of the background to the European Commission's intervention. This case was dropped after the Advocate General gave his Opinion but before the ECJ could give its ruling. The ECJ had been asked to rule on whether applying transfer rules to out of contract players offended Article 81 of the EC Treaty and, if so, whether the protection of EU law extended to nationals of countries with third party status. Despite speculation that this litigation in itself could have led to the demise of the transfer system, it is clear that, even if the ECJ had ruled in Balog's favour on both of these issues, such a ruling would have fallen well short of declaring the transfer system to be inherently contrary to EU law. Hence the pressure brought to bear by the Commission on FIFA to engage in voluntary reform. Consequently, new transfer rules were adopted by FIFA with the Commission's approval in July 2001. These have been replaced with revised rules that were adopted in October 2003 and which came into force on July 1 2005. and its revised edition which came into force in October 2010.

A major issue which dominated initial negotiations of these Regulations was concern about the stability of employment contracts. Club and league officials were worried that players would simply break their contracts and take up employment or „revolve“ to other clubs.⁵³

The Regulations contains various provisions to ensure the maintenance of contractual stability between players and the club. They seek to inherit a proper balance between the two principles of contractual stability and freedom of movement.

In the event that a club and a player decide to enter into contractual agreement, FIFA seeks to ensure that this contract will be honoured by both parties. It tries to discourage players or clubs from unilateral termination.⁵⁴ „A contract between a Professional and the club may only be terminated on expiry of the term of the

⁵¹ The first FIFA Regulations for the Transfer and status of Football Players that recognise the „freedom of movement“ and other recommendations made by the European Commission were released in September 2001.

⁵² Midfielder Balog reached the end of his contract with Charleroi in 1997 and was set for a free transfer to French club Nancy. But Charleroi demanded a fee, arguing that as Balog was not an EU citizen he did not come under the Bosman ruling. The deal fell through and Balog was left tied to Charleroi but without a contract and he trained on his own. In the summer of 1998 a local Belgian court ruled Balog was free to move without a fee and he signed for second division Mons. The court also asked the European Court to make a final ruling on the matter.

⁵³ DWORKIN, J.B., Owners versus players: Baseball and collective bargaining, Auburn House Publishing, Boston, 1981:41-53.

⁵⁴ „A contract between professional and the club may only be terminated upon expiry of the term of the contract or by mutual agreement“, art.13 FIFA Regulations 2010.

contract or by mutual consent.⁵⁵

Despite this, the Regulations countenance contracts being terminated for just cause or for sporting just cause.⁵⁶ The former is where either a club or a player does not fulfill obligations contained in the contract. The meaning of „sporting just cause“ is not defined and there is clearly scope for different interpretations at the level of national courts. However, for the purposes of international transfers only, FIFA rules stipulates that sporting just cause includes failure to involve an ‘established Professional’ in more than 10% of a club’s official matches.⁵⁷ If this situation persists, this, in itself, could provide the basis for future litigation between a player and his club. In any case a contract cannot be unilaterally terminated during the course of a season.⁵⁸ As was the case with the original 2001 rules, a contract arising from an international transfer may only last for five years.⁵⁹ Transfer fees can still be required for a player who is out of contract prior to his 23rd birthday. However, after that age a player only remains tied to his contract through the registration system for the relevant ‘protected period’. This is now defined as a period of three entire years or seasons, whichever comes first, in the case of all contracts concluded prior to the 28th birthday of the player, and two years (or seasons) in the case of contracts concluded after the player’s 28th birthday.⁶⁰

Once the protected period has expired, a player is able to terminate his contract in order to join a new club provided compensation is paid to his current club. This compensation should be at least equal to the remaining value of the player’s contract plus any transfer fee that the club paid for the player (the value of this fee decreases over the period of time that that the contract has lasted). It should be noted that even when the protected period has expired, or the player wishes to terminate for sporting just cause, he may not terminate his contract during a season. Indeed, a player only has 15 days after the last official match of the season⁶¹ to notify his club that he has decided to terminate his contract with it.⁶²

If there is unilateral breach without just cause during the protected period his

⁵⁵ FIFA Regulations on Status and Transfer of players, 2010., art.13

⁵⁶ Art.14 and 15

⁵⁷ Art.15

⁵⁸ Art.16

⁵⁹ Art.17 para 1

⁶⁰ FIFA Regulations on transfer and status of players 2010., definitions, clause 7.

⁶¹ There is inconsistency between the definition of the Season and an Official Match. Season is defined as „the period starting with the first Official Match of the relevant national league championship and ending with the last Official Match of the relevant national league championship“ (clause 9, Definitions, Regulations for the Status and Transfer of players). Official Match is defined as „ matches played in the framework of Organised Football, such as national league championships, national cups and international championships for clubs, but not including friendly and trial matches.“ (clause 5). The fact is that an Official Match played in a national cup competition or an international championship could occur after the completion of a national league championship.

⁶² Art.17 para. 3

club will again be entitled to claim compensation⁶³. Entitlements to compensation cannot be assigned to a third party⁶⁴, but sports sanctions will also be applied against the player. A player is prevented from participating in any official football match for an effective period of 4 months as from the beginning of the next season. This period can be extended to a maximum period of 6 months in cases of aggravating circumstances, such as failure to give notice or recurrent breach.⁶⁵ If a club has induced a player to act in breach of contract the ban may continue until the expiry of the second transfer window following the date the breach of contract was committed. However, any such ban cannot last for longer than 12 months. Where appropriate, sports sanction may also be imposed against the player's agent⁶⁶ and the club⁶⁷ inducing the breach. Sanctions against the latter may include fines, deduction of points and exclusion from competitions.

However, the complexities involved in implementing this right are demonstrated by the findings of FIFA's Dispute Resolution Chamber (DRC) in the 'Webster case.'

4.3.1. The case of Andy Webster

Andy Webster terminated his contract with Hearts at the end of the 2005/06 season and then agreed to move to Wigan. Hearts successfully argued that Article 17 did not apply, even though the protected period of Webster's contract had expired, as he had failed to give the requisite 15 days' notice. In fact, Webster gave notice within 15 days of the Scottish Cup Final, which he argued by custom and practice constituted the last match of the Scottish season. The DRC disagreed but, on the basis that this constituted a minor breach of the rules, only banned him from the first two matches of the following season. With respect to compensation, the DRC rejected Hearts' claim of £5 million and awarded the club and Webster jointly £625,000. This figure was arrived at by reference to the residual value of Webster's contract with Hearts and his salary in the first year of his contract with Wigan, which was then multiplied with a 1.5 coefficient. Webster and Wigan

⁶³ „... compensation for breach shall be calculated for due consideration for the law of country concerned, the specificity of sport, and any other objective criteria. These criteria shall include, in particular, the remuneration and other benefits due to the player under the existing contract and/or new contract, the time remaining on the existing contract up to the maximum of five years, the fees and expenses paid or incurred by the Former Club and whether the contractual breach falls within the protected period.“ Art. 17 para.1 FIFA Regulations 2010.

⁶⁴ Art.17, para.2

⁶⁵ Ibid.

⁶⁶ „ Any person subject to the FIFA Statues and FIFA Regulations (club officials, player's agents, players etc) who acts ina a manner designed to induce a breach of contract between professional and a club in order to facilitate the transfer of the player shall be sanctioned.“ Art.17 para. 5

⁶⁷ „In the addition to the obligation to pay compensation, sporting sanctions shall be imposed on any club to be found in the breach of contract or found to be inducing a breach of contract during the Protected Period. It shall be presumed, unless established to the contrary, that any club signing a Professional who has terminated his contract without just cause has induced the Professional to commit the breach. The club shall be bound from registering any new players, either nationally or internationally, for two Registration Periods .“ Art. 17 para.4

Atletic appeal to the Court of Arbitration for Sport on the grounds that he had given the requisite notice, and that the 1.5 coefficient was incorrect as the contract with Wigan should not have been taken into account. Webster's reason for terminating his contract was a decision by Hearts not to select him for the first team after he failed to agree an extension to his contract. Therefore, there is perhaps the basis for also arguing that he had terminated. The CAS concurred with the submission of the parties that the DRC had failed in its obligation to provide "reasons for its findings" in awarding a compensation payment of £625,000.⁶⁸ The CAS turned its mind to the issue of which legal system should form the basis of its decision making. Hearts, it should be remembered, had submitted it should be Scots law and the principle of *restitutio in integrum*. Webster and Wigan Athletic had maintained it should be Swiss law and/or that of the European Community. The CAS rejected Hearts' submission. It said: "*Hearts is relying on general rules and principles of Scottish law on damages for breach of contract, i.e. on provisions of Scottish law that are neither specific to the termination of employment contracts nor to sport or football, while article 17 of the FIFA Status Regulations was adopted precisely with the goal of finding in particular special solutions for the determination of compensation payable by football players and clubs who unilaterally terminate their contracts without cause. In other words, it is important to bear in mind that it is because employment contracts for football players are so atypical, i.e. require that the particularities of the football labour market and the organization of sport be accounted for, that article 17 was adopted. At the same time, footballers' contracts remain akin to employment contracts⁶⁹ (and are generally characterised as such under national laws), than to some form of commercial contract to which general rules on damage are applicable.*"⁷⁰

It saw no reason to turn its back on the "specific solutions and criteria laid down in article 17", as the FIFA Statutes:

*"...underline the primary application of the Regulations chosen by the parties, [and] that article 17(1) itself refers to the specificity of sport and it is in the interest of football that solutions compensation be based on uniform criteria rather than on provisions of national law that may vary considerably from country to country."*⁷¹

Finally, it said:

"In light of the history of article 17, the Panel finds that the specificity of sport is a reference to the goal of finding particular solutions to the football world which enable those applying the provision to strike a reasonable balance between the needs of contractual stability, on the one hand, and the free movement

⁶⁸ Para. 93 to 102, CAS, The Webster Decision, 30. January 2008.

⁶⁹ About the difference between contract of service and employment contract in football: SIEKMANN, R., Labour law, the Provision of Services, Transfer Rights and Social Dialogue in Professional Football in Europe, <http://go.warwick.ac.uk/eslj/issues/volume-4/number1/siekmann>

⁷⁰ Para. 128

⁷¹ Para 129

of players, on the other hand, ie. to find solutions that foster the good of football by reconciling in a fair manner the various and sometimes contradictory interests of clubs and players.”⁷²

The problem still remained, however, of how to interpret Article 17 in determining an “appropriate” level of compensation for Hearts. As a first step, the CAS noted that Article 17 “*applies to the unilateral termination of contracts both by players and clubs... [and] must be interpreted and applied in a manner which avoids favouring clubs over players or vice versa*”.⁷³ It pointed out that the particular needs of clubs for contract stability are protected by the Protected Period of Article 17, in tandem with the three year time frame contained in Clause 7 of the Definitions; and the requirement of Article 16 that contracts cannot be unilaterally terminated during the course of a season. It added that, subject to contractual obligations:

“...compensation should not be punitive or lead to enrichment and should be calculated on the basis of the criteria that tend to ensure clubs and players are put on equal footing ... [and] that the criteria applicable in a given type of situation and therefore the method of calculation of the compensation be as predictable as possible”.⁷⁴

Having examined the general thrust of Hearts’ submission, it proceeded to examine the various elements of its claim for compensation. It rejected the main claim of £4 million, the rationale of which was based on the lost profit and replacement value of Webster, because such compensation had not been incorporated into his contract and to impose such a payment would “*cause the club to be enriched and would be punitive vis à vis the Player*”.⁷⁵ It said that “*there is no economic, moral or legal justification for a club to be able to claim the market value of a player as lost profit.*”⁷⁶ Nor was there any reason, “*to believe that a player’s value on the market owes more to training by the club than to a player’s own efforts, discipline and natural talent...In any case, it is clear that a club cannot simply assume that it is the only source of success of a player and thus claim his entire value, particularly without bringing any proof (which would be very difficult) of its paramount role in the player’s success in leading to his market value.*”⁷⁷

Finally, in dismissing Hearts’ submission on this matter, it said:

“...from an economic and moral point of view, it would be difficult to assume a club could be deemed the source of appreciation in market value of a player while never be deemed responsible for the depreciation of value. Consequently, if the

⁷² Para.136

⁷³ Para.136

⁷⁴ Para.138

⁷⁵ Para.139

⁷⁶ Para.141

⁷⁷ Para.142

*approach relied on by Hearts were followed, players would be entitled to claim for example that they are owed compensation for their alleged decrease in market value caused by such matters as being kept on the bench for too long or having an incompetent trainer, etc. Obviously, such a system would be unworkable and would not serve the good of football.*⁷⁸

The CAS observed that under Article 20 and Annex 4 of the Regulations, compensation for training players was not based on a player's market value "*but on demonstrable investment made and costs incurred by the club*"⁷⁹. Moreover, given that Webster was over 23 when his termination occurred, there was no scope in Article 17.1 for "*market value*" compensation.⁸⁰ To accede to Hearts' submission:

*"...because of the potentially high amounts of compensation involved, giving clubs a regulatory right to the market value of players and allowing lost profits to be claimed in such manner would in effect bring the system partially back to the pre-Bosman days when players' freedom of movement was unduly hindered by transfer fees and their careers and well-being could be seriously effected by them becoming pawns in the hands of their clubs and a vector through which clubs could reap considerable benefits without sharing the profits or taking corresponding risks. In view of the text and history of article 17 (1)...allowing any form of compensation that could have such an effect would clearly be anachronistic and legally unsound."*⁸¹

Hearts' claim, linking compensation to the "profits" Webster obtained from his new contract, was rejected "*because rather than focusing on the content of the employment contract which had been breached, it is linked to the Player's future financial situation and is punitive*".⁸² The CAS also rejected Hearts' claims concerning alleged sporting and commercial losses because of its failure to establish either the cause of Webster's termination or the existence of the damage; and its costs before the DRC, as the DRC's regulations preclude the payment of such costs and Hearts' lack of success in the current proceedings.⁸³

The CAS concluded that the residual value of the contract between Webster and Hearts provided the appropriate criteria for the compensation payable to the club;⁸⁴ an amount of £150,000. This, together with an interest payment of five per cent from when the contract was terminated was awarded to Hearts.⁸⁵

The CAS did not consider whether or not Webster's notification to Hearts of

⁷⁸ Para 143

⁷⁹ Para.144

⁸⁰ Para.145

⁸¹ Para.146

⁸² Para.150

⁸³ Para.155

⁸⁴ Para.160

⁸⁵ Para.156

the breaking of his contract occurred in the 15 day notification period, whether or not an Official Match (the Cup Final) played after the completion of the national competition did, or did not, constitute part of a Season.⁸⁶ That time was long past.

Consistent with the decision of the DRC, the CAS ruled that Webster and Wigan Athletic were jointly and severally liable for the compensation payable to Hearts. Finally, it ruled that the costs of the hearing were to be equally shared by the parties, with each party responsible for its own costs.

CAS confirmed that players could utilise provisions contained in FIFA's Regulations for the Status and Transfer of Players which enabled them to unilaterally breach their contract without just cause. The CAS observed that Hearts was seeking a return to the pre-Bosman era when players were "pawns in the hands of their clubs".⁸⁷ *Bosman* forced FIFA and UEFA to develop a new system of employment rules which "*reconcil[ed] in a fair manner the various and sometimes contradictory interests of clubs and players*".⁸⁸ The CAS's decision is also of importance for its undermining, if not dismissal, of the traditional claim made by clubs that they, through the training they provide, are responsible for improvements in the skill and "*market value*" of players. Such improvement, the CAS found, could be due to "*the player's own efforts, discipline and natural talent*".⁸⁹ The decision of the CAS in this case, in particular, its statement that the resolution of disputes should be "based on uniform criteria rather than on provisions of national law that may vary considerably from country to country" is consistent with this stance and provides another example of the increasing spread of soccer's recently created system of international jurisprudence.

4.4. Solutions de lege ferenda

4.4.1. Definition of player status

The only pertinent element to determinate the player's status is the remuneration received by the player. The amateur status is defined by the fact that a player „has never recieved any remuneration other then reimbursment of his actual expenses incurred during the course of his participation in any activity connected with association footbal"⁹⁰. Any remuneration, bonus or signing-on fee that the player receives in excess of what is needed to cover his footballing expenses will constitute a salary.⁹¹ Finally, that remuneration could be even lower then the minimum salary of the country, under condition that amounts paid are higer then

⁸⁶ Article 17.3 states that, "In all cases...sporting sanctions shall take effect from the start of the following season of the New Club".

⁸⁷ Para.146

⁸⁸ Para.132

⁸⁹ Para.142

⁹⁰ CAS 2004/A/691, *Barcelona v/Manchester United*, para.76

⁹¹ CAS 2005/a/838, *Girondins de Bordeaux*

the stipulated limit of incurred expenses in playing football, in which case football player will be considered professional.⁹² So, it is to conclude that the legal nature or designation of the agreement between the player and the club is irrelevant to determine the player's status. Another element to be aware of is the maximum length of contract. Any contract between clubs and minor longer than three years is void. Thus, the player will be free to move while the club cannot claim for any type of compensation.

Considering the principle that on the expiration of a contract the football player can move freely clubs are well advised to set a clear strategy in respect to the status of their players and the subsequent offering of pre-employment contracts as required by national legislation. For the economic interests of the club it is utterly important as it guarantees stability in the sporting and financial planning.

4.4.2. Unilateral option clauses for the extension of players' contract

The main advantage of unilateral options which allow for the extension of players' contracts is the reduced financial risk in comparison to long-term contracts. Their validity is commonly recognized internationally and depends on the presence of a number of very specific elements. CAS stated that unilateral options curtail the freedom of movement or choice of professional player and are inconsistent with the general principle of labour law⁹³, which does not mean that such options are invalid but only refers to the need to question the validity of such options on a case by case basis, looking at the balance of the contract⁹⁴. Clubs which make frequent use of unilateral options find themselves in a very uncertain situation regarding the validity thereof and the contractual stability with their players. In an age of increased international mobility, players bound to the club under such a clause could leave without any compensation. Unilateral options could still be valid if they are not in violation of public policy and respect the law of the countries concerned. Further, they have to preserve an equal bargaining power between the employer and the employee. On crucial aspect is that an option clause does not downgrade the terms and conditions during the contract extension compared with the original ones, but to increase the salary by an appropriate amount.⁹⁵ This clause is not recognized internationally as it destabilizes the equal power between the employer and his employee. In order to stress contractual stability and planning security of clubs, it shall be advised against any possible reliance on this contractual clause. When signing players from youth academy, it is recommended rather to use small remunerated contracts which can later be adjusted to pay tribute to the merits of a player. This way, players are at least protected under a professional status, which is of paramount importance for the

⁹² CAS 2006/A/1177, Aston Villa, point 7.4.11

⁹³ CAS 2005/a/973, Kyrgiacos, para.19.4, pg.5

⁹⁴ Para.32, pg.8

⁹⁵ PORTMAN, W., Unilateral option clauses in footballers' contracts of employment. An assessment from the perspective of international sport arbitration, Maxwell's International Sport Law Review, 7(1), p.6-16.

claim of receiving a transfer or compensation fee.

4.4.3. *Unilateral contract termination*

Unless otherwise provided for in the contract, compensation for the breach shall be calculated with due consideration for the law of the country concerned, the specificity of sport⁹⁶, and any other objective criteria. In the event of termination of contract without just cause, compensation may be stipulated in the contract.⁹⁷ This way clubs will be in the safer position if they include a clause in their player's contract which makes reference to the unilateral breach of contract. It is important to emphasise that an inadequate compensation postulated by the club, even if it is anchored within the contract, might be mitigated by the judge.⁹⁸ The risk of mitigation arises when the fixed amount stipulated in the contract is not proportional to the salary of the player or to the original transfer value, in case the player had been transferred. In most cases non-proportionality occurs if a potential future market value is estimated at the time of the conclusion of the contract, which frequently happens with young players, or is set to discourage other clubs from acquiring that player and receive some media attention.

On the condition that the club is able to demonstrate that the criteria used were reasonable and compensation fee represents a good approximation of the residual value of the player for the club, the Arbitration Panel will most likely also accept the postulated amount. The compensation amount should be a function of a fixed sum set at the beginning of the contract adjusted over time for a variety of criteria taking into account the objective performance of the player and the club. Such a variable indemnity clause should be drawn up avoiding any potential misinterpretation of the valuation parameters used. All the concepts should be clearly defined. One of the criteria that shall be used in the calculation of a compensation fee is whether the contractual breach falls under protected period.⁹⁹ But, there are also cases of breach of contract within the protected period in the recent jurisprudence in which the panel did not consider any additional compensation besides the applicable sporting sanctions for the player.¹⁰⁰ As a consequence of these different verdicts, the best strategy is to set up an indemnity clause which distinguishes between unilateral breach during and after the protected period. It is also strongly advisable how to calculate a compensation for either of the situations. It is clear that indemnity clause which uses a variable model for the calculation of an eventual compensation thus reduces the risk of mitigation. In counting the variable indemnity clause we should distinguish two situations: a)

⁹⁶ Art. 165 of Treaty on functioning of European Union (TFEU) under title XII in combination with art. 6 TFEU provides the EU with a soft competence on sport:“The Union shall contribute to the promotion of European sporting issues, while taking account of specific nature of sport, its structures based on voluntary activity and its social and educational function.”

⁹⁷ FIFA Regulations 2010, art.17 para. 1

⁹⁸ CAS 2006/A/1082-1104 Valladolid c/Barreto Cácares & Cerro Porteño

⁹⁹ CAS 2007/A/1298, 1299 & 1300, Award, para. 149, pg.39

¹⁰⁰ CAS 2008/A/1453 & 1469 Soto Jaramillo, Award, para.24-41

home grown players and free agents that joined the club and b) players transferred from other clubs by a transfer fee. In the first case it should take into account money that the club will most likely spend during the length of players' contract, including salaries, engagement fees and estimated bonuses. For the second case it should include initial transfer fee, the remuneration and all other economic benefits for setting up „objective criteria“ in the calculation of compensations.¹⁰¹ Further the base amount could be increased or decreased dependent on the performance of the player and the club. Some other criteria could also be applied: age and experience; appearance rates; goal-scoring records; international recognition; club achievements; protected period; image of the player or other off-the-pitch criteria etc. It is also important to emphasise that the transfer fees are determined by the market.

5. CONCLUSION

Contemporary football is caught between two very powerful concepts: the freedom of movement of players on the one side and the contractual stability on the other. FIFA attempts to provide a universal guideline on how to deal with contractual stability and international mobility. One major challenge is diversity of national regulations in sports which has internationalized rapidly. In DRC and CAS sentences in cases of unilateral breach of contract the keyword „specificity of sport“ has been abundantly used to justify some decisions made. It is certainly not easy to defend the actual transfer system in light of certain interferences with public and private law. But, the strategy of many clubs is based on transfer activity, which actually implies the movement of the players. Most importantly, this should be regulated in a uniform manner as not to damage certain clubs more than others. As the football industry is on its way to become increasingly professionalized, especially at the top end, smaller clubs should also have some means by which they can at least claim a financial compensation for their sporting losses.

Regarding the tensions concerning the right to govern football it seems that some accord has been reached between the football authorities (FIFA, UEFA) and external regulators (European Commission, ECJ), though this does not mean that the existing consensus as represented by FIFA transfer rules will definitely be able to withstand legal challenge. So, it is contended that the best way to resolve these tensions is by moving to a system of reflexive law using the method of EU social law as a paradigm. The advantage is that it requires the involvement of the relevant social partners whose collective bargaining may produce European collective agreement which, if the social partners so request, may then be given legal force through an EC directive.¹⁰² The role of law is reduced to acting as a mechanism for ensuring that agreed minimum standards are complied with.

¹⁰¹ FIFA Regulations, art.17 para.1

¹⁰² Under art. 138 of EU Treaty, the European Commission must engage in dialogue with social partners as to the content of any proposed directive. Moreover, art.139 permits the relevant social partners to conclude their own collective agreements.,

Such a directive could take the FIFA transfer rules as a starting point, but not in its entirety. One possible basis for reform would be to abolish the registration system and permit clubs to use contractual mechanisms such as post-employment restraints or garden-leave clauses. The alternative would be to leave registration system intact whilst providing for appropriate rights to contract-jump on the basis of FIFA rules. One possible variation to the current FIFA rules would be, on the expiry of the contract's protected period or where the contract is terminated for sporting just cause, to permit contract jumping during the season, but only to the club which is not in competition with player's current club.

To conclude, unless players are given an absolute right to terminate their contracts unilaterally, such is the situation in any standard employment relation, any legal mechanism to secure some degree of contract stability will result in some form of transfer system, albeit an informal one, if players under contract are to be able to move to other clubs.

STABILNOST UGOVORA VS. MOBILNOST IGRAČA

U radu se razmatra problem usklađivanja ugovorne stabilnosti profesionalnih nogometaša i njihove slobode kretanja kao radnika. Nakon prikaza i analize koncepta međunarodne mobilnosti profesionalnih nogometaša, a posebice njegovog ograničenja u vidu sustava transfera uspostavljenog od strane FIFA-e, ukazuje se na najčešće probleme koji se javljaju, a vezani su uz definiranje statusa igrača, opciju jednostranog produljenja ugovora te jednostrani raskid ugovora i u tom smislu daje rješenja *de lege ferenda*.

Ključne riječi: *ugovorna stabilnost, mobilnost profesionalnih igrača, status igrača, jednostrani raskid ugovora*