

MAINTENANCE OF CONTRACTUAL STABILITY IN PROFESSIONAL FOOTBALL GENERAL CONSIDERATIONS AND RECOMMENDATIONS

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1. Introduction

The maintenance of contractual stability between professionals and clubs in football has been one of the main principles of FIFA ever since the adoption of the new FIFA Regulations on the Status and Transfer of Players (RSTP) in July 2001.

This principle is dealt with in Chapter IV (Articles 13-18) of the current edition of the FIFA RSTP.

Throughout the years, some major cases in the area of the maintenance of contractual stability have been decided upon by the Court of Arbitration for

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Sport (CAS); the *Webster*¹ case, the *Matuzalem*² case and the *De Sanctis*³ case to name a few of them. These high profile cases have shown that a principle such as the maintenance of contractual stability must be reviewed and refined in order to improve the manner in which it is policed and governed.

We must recall that the principle intention of Chapter IV of the FIFA RSTP is the *stability* of contracts. This is called the "Respect of contract" in Article 13 of the FIFA RSTP. Article 17 is an exception to that stability and deals with the *consequences* of terminating an employment contract without just cause rather than providing the players with a *right* to terminate their employment contract.⁴

The question is, if contractual stability is sufficiently protected by the FIFA RSTP at the moment? The European Professional Football Leagues (EPFL) considers that Article 17 in isolation may be insufficient to provide clubs with adequate protection. It is our belief that a series of recommendations and proposals must be submitted to the relevant bodies in order to help the interested parties to draft their own stable contracts which only require intervention from the courts and dispute resolution bodies when absolutely necessary.

2. *Can we create a universally applicable system to improve contractual stability?*

It is evident from the results of the Contractual Stability Survey carried out by the EPFL that any recommendations for EPFL may not necessarily be universally applicable to all clubs/players, given the possible impact of national law, domestic football regulations and/or domestic collective bargaining agreements (the 'Domestic Rules'). However, we should not ignore the possibility to create a universally applicable system. Clubs and Players should therefore consider the recommendations set out below and take their own legal advice on their applicability and the possibility of their implication.

The comments below are also to be considered in light of the outcome of the negotiations between the EPFL, ECA, FIFPro and UEFA in respect of an Autonomous Agreement dealing with the European Professional Football Player Contract Minimum Requirements (with particular regard to the provisions in respect of the "*rights of Club and Player to extend and/or terminate the agreement earlier*"), within the framework of the European Social Dialogue, which shall provide an additional layer of regulation.

¹ CAS 2007/A/1298, 1299 & 1300 *Webster & Wigan Athletic FC v. Heart of Midlothian*.

² CAS 2008/A/1519 & 1520 *FC Shakhtar Donetsk v. Matuzalem Francelino da Silva & Real Zaragoza SAD & FIFA*.

³ CAS 2010/A/2145, 2146 & 2147 *Sevilla FC SAD & Morgan De Sanctis v. Udinese Calcio S.p.A.*

⁴ Compare paragraph 63 of the *Matuzalem* award, in which the CAS Panel stated that the termination of a contract without just cause "*remains a serious violation of the obligation to respect an existing contract. In other words, Article 17 FIFA Regulations does not give to a party, neither a club nor a player, a free pass to unilaterally breach an existing agreement*".

3. *What mechanisms could we introduce to improve the contractual stability?*

3.1 *The possible inclusion of a termination/ rescission/ indemnification/ buy-out clause*

It is notable that Article 17(1) of the FIFA RSTP expressly stipulates that “*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 sport and any other objective criteria*” (emphasis added). As such, it is open to the contracting parties of a playing contract to provide for the consequences of its breach in that playing contract.

If Leagues/Collective Bargaining Agreements/Players Union/FA have implemented a standard professional playing contract (the ‘Contract’), they may wish to give consideration to the *mandatory* inclusion of a clause in the Contract, subject to compliance with the Domestic Rules, which provides for the consequences of a player’s breach of contract under Article 17 of the FIFA RSTP.

Alternatively, some Leagues may consider advising their affiliated clubs of the *possibility* of including such a provision in their playing contracts, the details of which may be subject to negotiation on a case-by-case basis.

In some States the inclusion of such a termination clause may be contradictory to national law.⁵ The “illegality” of such clauses within the state itself could be avoided by referring to the FIFA RSTP in said clause (“*in case of breach of contract according to the FIFA Regulations on the Status and Transfer of Players*”).

4. *How could said termination clause help to improve contractual stability?*

In case the Club and the Player have negotiated and contractually agreed upon such a termination clause, this includes the *right* for the player, approved by the club, to unilaterally and prematurely terminate the contract, provided that another club (or the player himself) pays the contractually stipulated amount of compensation.

The Leagues and their clubs may consider that the inclusion of such a ‘termination clause’ could reduce the litigation risk that the determination of compensation is left to the discretion of the FIFA Dispute Resolution Chamber (‘DRC’) and/or the Court of Arbitration for Sport (‘CAS’) and their interpretation of the FIFA Regulations and Domestic Rules.

Moreover, it could reduce the risk of litigation as such because a clause which contractually states the liability of the party in breach may discourage

⁵ In some countries - like the United Kingdom - the inclusion of such a termination clause may be contradictory to national law.

“anti-contractual” behaviour.

5. *Is there a difference between a termination clause and a buy-out or transfer clause?*

It is necessary to distinguish between a *buy-out* clause, which deals with compensation for the mutual termination of the playing contract agreed upon in advance between club and player, and a *termination* clause, which deals with the consequences of the unilateral termination of the playing contract by one party.

The difference between these clauses is illustrated in the *Matuzalem* case, in which the CAS Panel rejected Shakhtar Donetsk’s argument that the *transfer* clause contained in the Shakhtar Donetsk playing contract⁶ could be considered as a valid clause for assessing damages. The Panel placed particular reliance on the fact that the clause made no explicit reference to a possible unilateral premature termination in terms of Article 17 of the FIFA RSTP, but rather referred to a possible mutually agreed transfer, provided that a minimum transfer fee was paid, and, thus, the Panel rejected the relevance of this *buy-out* clause.

In accordance with Article 17.3 of the FIFA RSTP, in the event of the player terminating the Contract prematurely, clubs may wish to consider whether the Contract should provide for:

- a) a reasonable and structured *indemnity* clause with variable criteria to provide for a tiered indemnification depending on the moment of the unilateral termination; or
- b) a so called *liquidated damages* clause to provide for a genuine pre-estimate of loss; or
- c) a mechanism by which compensation may be payable, e.g. by reference to an independent expert for final determination of the compensation payable; and/or
- d) additional criteria to that set out in Article 17(1) of the FIFA Regulations for consideration by the FIFA DRC in determining the sum of compensation due to the club.

6. *How can the parties effectively determine an adequate level of compensation for early unilateral termination of a contract?*

Given the difficulty at calculating, with certainty, the financial consequences of a unilateral termination of Contract at the outset of the Contract, perhaps, a number of years later, Members may wish to consider the inclusion of criteria to help assess the damages due to a club in the event of the unilateral termination of the Contract by a player. In this case, such criteria may include:

- The total duration of the contract;

⁶ This clause stipulated that if Shakhtar Donetsk received a transfer offer of EUR 25,000,000 or more for the Player, then they would be obliged to accept such an offer.

- The number of years left under the contract at the moment of termination;
- The remuneration and other benefits that the player earns;
- Whether the termination occurs within the protected period;
- The fees and expenses paid or incurred by the club (amortized over the term of the contract);

In the alternative, we could have a situation where the "objective" value of the services of the Player, would be determined by an Arbitration Body of the FA or Professional League of the country concerned.

7. *What alternatives to the introduction of termination clauses into contracts do we have in case such clauses are illegal in a particular jurisdiction?*

7.1 *Renegotiation of the Contract or inclusion of unilateral options*

As was already mentioned above, a reference to the FIFA RSTP could help to avoid the illegality of a termination clause in a given jurisdiction.

Another option that clubs may consider is the renewal of contracts with players to trigger the commencement of a new protected period.⁷ The risk of the imposition of sporting sanctions on the player who terminates his contract unilaterally during the protected period may be a significant deterrent for a player who is contemplating the termination of his contract during the protected period. This sporting sanction is a strict liability sanction of a 4 month playing ban, rising to 6 months in the case of *aggravating circumstances*.

Furthermore, offers of new contracts made to the player by the club (particularly where remuneration is significantly increased) may be evidence that the club can adduce in support of a future damages claim. Evidently, there are commercial considerations to take into account and a player's increased wage demands may render such an approach untenable.

8. *Is it possible to include a unilateral renewal clause, which gives one party the right to maintain contractual relations with the other?*

An alternative approach, subject to the Domestic Laws, could be the inclusion of *unilateral options* to extend the term of the Contract, exercisable by the club or the player. It could be arguable that this would also have the effect of renewing the protected period and, thus, deter the player from terminating his contract unilaterally. Such unilateral options must however be carefully drafted to avoid the risk that the DRC and/or the CAS determine the options unenforceable (e.g., if

⁷ The period of three entire seasons or three years, whichever comes first, following the entry into force of the contract where the contract is concluded prior to the player's 28th birthday and two entire seasons or two years, whichever comes first, following the entry into force of the contract if the contract is concluded after the player's 28th birthday.

they may be considered so heavily weighted in favour of the club so as to be unfair to the player).

In this regard, clubs/players may wish to consider the Portmann Report, which was commissioned by FIFA in 2006 and which concluded that unilateral options do not violate Swiss or international public policy, provided that they "*take a form that does not excessively bind the employee*".

Each party would have to provide sufficient consideration to the other party in order to have the right to renew said contract. For example, the club would have to increase the player's wage by "X" % or match any offers made by all other parties; or the player would have to make "X" amount of first team appearances during the season in order to give him the right to renew his contract with the club. This possibility of having unilaterally renewal options already exists in some jurisdictions.⁸

8.1 General stability

8.1.1 In order to make these contractual changes workable, who must be approached?

1. The Player's Union: it is notable that any significant amendment to the Contract may entail the consent of the relevant domestic player's union and as such may be subject to negotiation and/or compromise.
2. Independent legal representatives of the parties: in the event that clubs elect to include a *termination clause* or a *unilateral option* in the Contract, it may be advisable to offer players the opportunity to take independent legal advice prior to entering into the Contract. In accordance with the recommendations of the *Portmann Report*, it may also be advisable to provide players with consideration in respect of the grant of a unilateral option. This may serve to increase the chances of enforceability of such clauses, if it can be proven that there has been a genuine "meeting of minds" and that consideration has passed between the parties.

Moreover, Clubs and Players should endeavour to make the levels of compensation for unilateral breach of contract reasonable, and should not impose punitive sums against those who breach their contract. This will allow these clauses to maintain their enforceability and negate the need for the intervention of the

⁸ Moreover, within FIFA Jurisprudence lies a five-tier test, based on the Portmann Report, which indicates when a unilateral option clause could be considered valid by FIFA. The five criteria are the following: the potential maximum duration of the labour relationship shall not be excessive; the option shall be exercised within an acceptable deadline before the expiry of the current contract; the salary derived from the option right has to be defined in the original contract; one party shall not be at the mercy of the other party with regard to the contents of the employment contract, for which a substantial increase of salary is the most important indication; and the option shall be clearly established and emphasized in the original contract so that the player is conscious of it at the moment of signing the contract.

courts to mitigate said termination clauses.

8.2 *Additional options to maintain contractual stability*

Consideration may also be given to the inclusion of a *choice of law clause* in favour of the law of the country in which the Member is domiciled, if the relevant domestic law supports the application of the above recommendations. There is, however, no guarantee that the domestic law will be applied to an "Article 17 dispute", given the comments of the CAS Panel in the *Webster* case, that due to the international nature of any such dispute, the governing law of the contract at the centre of the dispute may not be the governing law of the dispute itself.

Another option that clubs may consider is the inclusion of a *loyalty bonus system* in the Contract with the player. If the player is willing to stay a certain number of years with the club, he could receive a significant bonus payment. This may attract players to respect their contracts with the club instead of terminating them unilaterally.