

IN SPAIN

*By Juan de Dios CRESPO y
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Two decisions of Spanish courts concerning the issue can demonstrate the criterion followed in this country.

First among them, this is a decision rendered by the Salamanca Provincial Court in the case "*Sporty Investment S.A. v. Unión Deportiva Salamanca S.A.D.*" which says:

"(...) que en modo alguno un jugador está limitado a ceder la explotación de su valor deportivo a un determinado club o S.A.D. directamente, sino que puede hacerlo a todas las personas físicas o jurídicas que tengan capacidad para contratar, según se desprende de los artículos 1.271, 1.263 y concordantes del C.C. (LEG 1889\27); sin que se conozca la disposición especial en que se basa tal alegada limitación."

Meanwhile, the second case, a decision rendered by the Provincial Court of Castellón on 8 May 2013, stated in this regard that:

"(...) deberá igualmente partirse del hecho que los derechos económicos ... en sus aspectos esenciales propiamente ... constituyen como se dice en el recurso la dimensión económica o valor pecuniario de los derechos federativos, esto es, el precio a que puede ascender lograr la licencia o inscripción federativa de un jugador a nombre de un club de futbol para intervenir en las competiciones oficiales en las que participe formando parte de su plantilla, correspondiendo por tanto su percepción a quien ostente su titularidad, que puede corresponder o no al club que ostenta la inscripción federativa, sin perjuicio además del correspondiente contrato de prestación de servicios entre el club de futbol y el jugador."

In these few lines and on the basis of the preceding, we can conclude that Spanish law admits the existence of "*economic rights*" as independent and autonomous rights, recognizing that those may be subject to commercial exploitation. Although there is not a specific legal framework and given that FIFA does not establish an express prohibition regarding the intervention of the investment funds in football, we can conclude that in Spain this kind of business is fully legitimate and accepted while, on the other hand, leagues like the Premier League, French league or Polish league strictly forbid TPO in football •

WHAT ABOUT FIFA AND UEFA?

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As background information, we should remember the case emerged from the *TÉVEZ-MASCHERANO* affair in the *Premier League*. The said Argentinean players were transferred from the Brazilian club *Corinthians* to the English club *West Ham*. However, the mentioned players did not belong to *West Ham*, but to the company *Media Sports Investments (MSI)*, represented by the Iranian businessman *Kia JOORABCHIAN*. *JOORABCHIAN*, who had a partnership contract with the Brazilian club, decided to carry "his" two players from *Corinthians* to the English club *West Ham*, in order to improve their careers and, of course, his investment.

Apparently, the company *MSI* transferred both players at *West Ham* for a year, however, the contract included clauses such as that neither the club nor the player could object to one termination of unilateral contract by the company at any time or that the player could not object to play on any other team which the company chose.

Faced with such a situation and with a claim from another member of the League, the *Premier League* decided to punish the club due to a violation of the B13 (clubs must act in good faith) and of the U18 rules (no club shall sign a contract with third parties giving them the ability to materially influence the policies or the performance of its teams).

As a consequence of the above, FIFA took note and introduced an amendment in its regulations. Thus, from that date, January 2008, FIFA introduced a new article, 18bis, in its Regulations on the Status and Transfer of Players which states as follows:

"18bis. Third-party influence on clubs:

1. No club shall enter into a contract which enables any other party to that contract or any third party to acquire the ability to influence in employment and transfer-related matters its independence, its policies or the performance of its teams.

2. The FIFA Disciplinary Committee may impose disciplinary measures on clubs that do not observe the obligations set out in this article."

Nevertheless, we should emphasize that article 18bis bans "third party influence" and not "third-party ownership". For the same reason, the provision has no intention to prohibit the investment of third parties into clubs; consequently what we need to do is to ask ourselves what and who shall be considered as a "third party" and when a said "third party" exercises its "influence" in one or the other way.

From its side, UEFA does not accept in any case or under any circumstances that players can be owned by any third party (an agent, an entity, or financial institutions) that is not a club. Their position regarding this issue is clear and in no way admits that footballers are controlled by a third-party. From its own point of view, it is impossible to accept it and UEFA fights with all its strength against that. UEFA says that TPO is on track to destroy the financial situation of the clubs instead of improving them and thus that further prohibitions in the European continent are coming soon into force.

The President of UEFA, Mr. *PLATINI*, repeated *ad nauseum* that "this situation cannot continue, UEFA takes issue with all investment funds related to third-party ownership of players, where there are players that belong to an investment fund and are at different clubs, clubs that are competing against each other and this endangers the integrity of football, we have to protect our game."

The future of TPO is then at risk at UEFA's level and the future regulations in its prohibition have already been discussed even before having been drafted or approved •



>> 27 March 2014 - Astana

Speech of UEFA President *Michel PLATINI* at the XXXVIII Ordinary UEFA Congress

"Today players are certainly not the property of their clubs, but something worse is happening instead. Increasingly, players are owned by opaque companies based in tax havens and controlled by some unknown agent or investment fund."

"Quite simply, some players are no longer in control of their own sporting careers and are transferred each year to generate revenue for anonymous individuals who just want to get their hands on some of the money in football."

"If FIFA fails to act, we will address this issue in our own competitions in Europe. The UEFA Executive Committee has already adopted a position on this issue in principle, and we will see this through."

"I do not want to be complicit in these practices, and at the moment I have the nasty feeling that I am."

"There comes a time when you have to stop hiding behind committees, sub-committees, studies by expert groups and academic reports."

"The amount of money that vanishes into thin air in a single transfer exceeds the entire annual budget for your global solidarity program, GOAL. Do you realize what that means? Do you consider that normal? I, for one, do not."



>> 12 May 2014 - Zurich

An upcoming regulation?

On 12 May 2014, FIFA sent to the members of FIFA a circular no. 1420 in order to provide them with the executive summaries of two studies about TPO.

Indeed, FIFA mandated two studies in January 2013 (study conducted by the *International Centre for Sports Studies -CIES*) and August 2013 (study conducted by the *Centre de Droit et d'Economie du Sport -CDES*) with the overall objective of gathering data and information available on this practice as well as on the different aspects connected with TPO (cf. FIFA Circulars nos. 1335 and 1373).

FIFA's aim is that adequate and proportionate solutions may be suggested within an inclusive and informed process involving all the relevant stakeholders at the level of the competent FIFA bodies. A general update on TPO will be provided at the 64th FIFA Congress held in Sao Paulo on 10 and 11 June 2014.

BEFORE THE COURT OF ARBITRATION FOR SPORT (CAS)

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CAS has had the opportunity to pronounce itself on the issue. Thus, CAS has recognized the distinction between the federative rights and economic rights of the football player and the possibility to dispose freely of the latter.

Precisely, in the following awards, the CAS has alluded to the topic. In this sense it has established:

CAS 2004/A/635 RCD Espanyol de Barcelona v. Club Atlético Vélez Sarsfield

CAS 2004/A/662 RCD Mallorca v. Club Atlético Lanús

"A Club holding an employment contract with a player may assign, with the player's consent, the contract rights to another clubs in exchange for given sum of money or other consideration, and those contract rights are the so-called 'economic rights' to the performances of a player; this commercial transaction is legally possible only with regard to players who are under contract, since players who are free from contractual engagements –the so called free agents– may be hired by any club freely, with no economic rights involved (...)

In accordance with the above distinction, while a player's registration may not be shared simultaneously among different clubs - a player can only play for one club at a time -, the economic rights, being ordinary contract rights, may be partially assigned and thus apportioned among different right holders."

The lawfulness of contracts trading portions of economic rights is implicitly confirmed in both the 1997 and the 2001 FIFA Regulations.

CAS 2008/A/1482 Genoa C.F.C. v. C.D. Maldonado

"The Panel does not need to decide whether the July, 9, 2003 Contract, was valid. Indeed, the existence itself of such contract is irrelevant as with regard to the validity of a transfer agreement. For international registration purposes, it is only the club, as employer, that is able to transfer a player under an employment contract to another club. The fact whether further "internal" arrangements may exist between investors, the player and even the club itself, does not matter, as it does not have any legal impact on the validity of the Transfer Agreement."

CAS 2011/O/2136

"Even if the Economic Rights Contract is a contract caught by art. 18bis RSTP, para. 2, such article makes clear that the consequences for clubs will be disciplinary in nature: 'The FIFA Disciplinary Committee may impose disciplinary measures on clubs that do not observe the obligations set out in this article'. (...) Regardless the external validity of a contract from the perspective of the relevant sporting organizations, a contract may still be of contractual effect between the parties.

Regardless of any violation of art. 18bis as a result of the Economic Rights Contract, such contract and any contract based thereon are not prevented from being valid and enforceable between the parties thereto. Under Swiss Law, a contract will only be null and void if it is either impossible to perform, illicit or contrary to good customs."

Therefore, it becomes obvious that CAS allows the possibility of third party ownership, but it is also evident that not all and every case will be acceptable.

For instance in another case, this time confidential, CAS has determined the nullity of a TPO contract between an investor and a player in which the player had to follow certain legal duties that were jeopardizing his labor rights.

Thus, CAS will protect and accept the TPO when it is not going against the basic principles of labor law and employment contracts; but if it does not influence, the commercial side of it is not, right now, illegal and thus will get the approval of CAS •