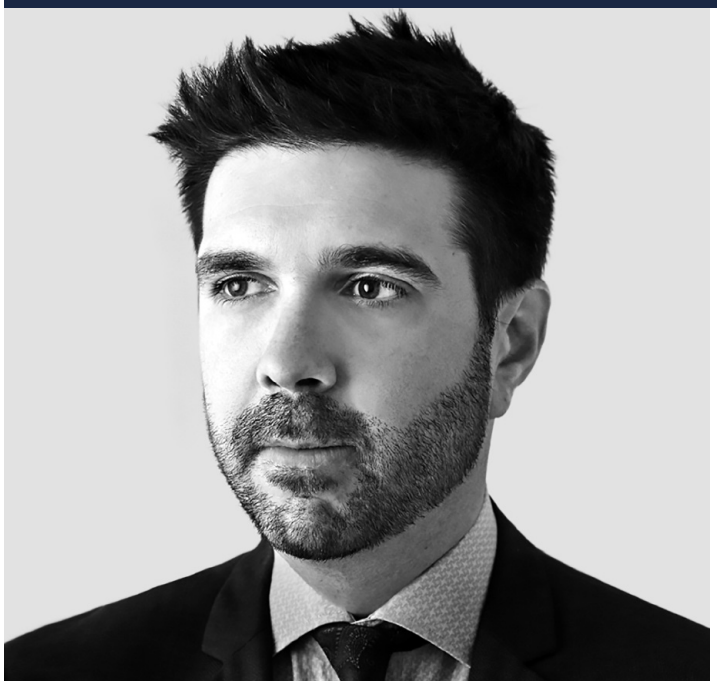
Professional Football Club Revenues, Direct Investment and COVID-19



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➔ ***TPO/TPI – FIFA RSTP – FIFA Regulations – Financial control – Financial Fair Play (FFP) – COVID-19***

It remains needless to say that COVID-19 has had a profound detrimental effect on the world's economy. The football industry has not been immune to the worldwide economic downturn. The suspension and cancellation of competitions and the necessity to play matches behind closed doors has negatively affected industry revenues.

Professional Football Clubs and COVID-19

Professional football clubs are particularly vulnerable to the economic effects of COVID-19. The main expense of a professional football club are player expenses in the form of salaries/wages and/or transfer fees. Although the introduction of club licensing and financial fair play regulations have instilled some financial responsibility at a club level, a club applying for a UEFA competition license can still spend up to its break-even point with an acceptable deviation of EUR 5 million per year.

The fact of the matter is that clubs will often budget up to this limit, running an acceptable loss. This is due to the unique nature of the football industry. Football clubs not only compete for revenues but compete on the field for championships. There is a direct correlation between monies spent on players and sporting success. Spending more money on players, despite certain imperfect market distortions, leads to a stronger team, which leads to better sporting results. UEFA has chosen to impose a limit on spending as a function of revenues and expenses as opposed to a North American style salary cap. It is also worthy to note that a professional football player's contract can last as long as five years.

All of these factors put enormous pressure on a professional football club's budget. The unforeseen decrease in television, advertising and matchday revenues caused by COVID-19 have put clubs the world over in a precarious situation.

Professional Football Clubs and Capital Injection

Historically, clubs have been able to raise funds by borrowing money against a particular type of income stream, such as leveraging revenues from future prize money or television rights. Typically, a club will sell a right to a future income stream at a discount in exchange for an immediate capital injection.

This environment, even pre-COVID-19, has incentivized football clubs to come up with new ways to finance their operations.

UEFA prize money and revenues from television rights are usually seen as a low risk where those types of revenues - based on their contractual terms - are predictable. By way of example, a Spanish club that has qualified for the UEFA Champions League group of 16 looking for financing can accurately predict the minimum amount of

UEFA prize money in December that it will receive by the end of the season. This is because amounts received from shared television revenues (the "*market pool*") are predictable based on competition regulations and a comparison to figures from previous years. Moreover, UEFA prize money for amounts earned for games already won but not yet paid are not just predictable, but certain, for the same reasons.

> ***This environment, even pre-COVID-19, has incentivized football clubs to come up with new ways to finance their operations***

This gives clubs the ability to raise revenues in the short term with low-risk receivables, on favourable terms as financial institutions are given certainty on their return on investment. The ability to access such funds has never been more necessary. It is more than likely clubs will need to access further capital before the end of the season. UEFA and other federation licensing regulations require that clubs satisfy all of their overdue payables by certain dates, mostly 31 March and 30 June. If the economic effects of COVID-19 continue to be felt at the end of the 2020-2021 season, clubs will certainly seek alternative forms of financing to ensure that they are able to compete in these competitions in 2021-2022.

FIFA Manual on Third-Party Ownership and Investment

Third-party ownership and investment serve professional football clubs in the same manner as these revenue-raising tools. The only difference is that the leveraged asset is the future value of a transfer of a player's contract. These are typically valued as higher-risk transactions as compared to future prize money and television revenues given the uncertainty of the value of a future player transfer. In this sense,

FIFA's Manual on Third-Party Ownership and Third-Party Investment could not have been released at a more appropriate time.

The basic view is that third-party ownership and investment is strictly prohibited by Articles 18bis and 18ter of the FIFA Regulations on the Statutes and Transfer of Players (RSTP). The reality is that the situation is much more nuanced. These revenue-raising tools are still allowed, within strict regulatory parameters. These parameters seek to protect certain sporting values, such as the ability of a club to make personnel decisions free of interference from a lending institution.

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The FIFA TPO/TPI Manual is a welcome publication for practitioners plying their trade in the area. It specifically seeks to comprise "*a comprehensive list of contractual agreements that have been examined throughout the years by the FIFA judicial bodies, followed by a brief explanation of the analysis made and the reason why the competent bodies considered that a violation of either article 18TER or article 18TER was committed (or not) by the relevant party.*"[1]

Articles 18bis and 18ter of the FIFA RSTP

The key-point to take away is that FIFA has not only published a document that has identified the types of transactions prohibited under the RSTP but has also disclosed what types of transactions it considers to respect Articles 18bis and 18ter of the RSTP.

This is the main value-add of the FIFA TPO/TPI Manual, in that it specifically identifies which transactions do not transgress the rules. This type of transparency in the application of the regulations is precisely what is needed during this economic downturn, which may

1 FIFA Manual on TPO and TPI, 2020 edition, p. 7.

enable financially struggling clubs the ability to raise further revenue on a short-term basis.

This is a positive and welcome addition, specifically because of the ambiguous nature of Articles 18bis and 18ter. Article 18bis simply prohibits clubs from entering into a contract which enables another club or a third-party "*to acquire the ability to influence in employment and transfer-related matters.*"[2] Article 18ter is equally ambiguous when it merely speaks to the entitlement of a third party "*to participate […] in compensation payable in relation to the future transfer of a player from one club to another, or […] any rights in relation to a future transfer.*"[3]

Neither article nor any other portions of the FIFA RSTP define what is a "*third-party*" or what qualifies as "*influence*". The result is that jurists sitting on FIFA dispute resolution bodies and the Court of Arbitration for Sport (CAS) making decisions that affect the ability of clubs to raise financing, are left with little guidance in the interpretation and application of these provisions.

Before the legislation of Articles 18bis and 18ter of the FIFA RSTP, the only limits to commercial financing contracts with respect to the transfer of players was the drafter's imagination. The FIFA RSTP limited the scope of these transactions with little specificity. FIFA's TPO/TPI Manual improves transparency by giving practitioners new guidance.

TPO and TPI: Next Steps

Although the FIFA TPO/TPI Manual does present some clarity in the area, the constant criticism is that these are not actual regulations but a resource that explains the interpretation of the regulations. FIFA would have to amend the RSTP to codify the principles outlined in the FIFA TPO/TPI Manual. Without explicit amendments, panel members of the FIFA Dispute Resolution Chamber or the CAS can continue to make decisions on a case by case basis with little restrictions from the actual wording of Articles 18bis and 18ter of the RSTP.

This is due to the doctrine of hierarchy of norms. In CAS 2015/A/4153 Al-Gharafa SC v. Nicolas Fedor & FIFA, the CAS noted that within the context of whether a FIFA circular must be consistent with the FIFA RSTP, "*FIFA Circulars cannot be allowed to take precedence over the clear and specific wording of FIFA's regulations, including the RSTP, as the RSTP contains provisions of a higher ranking in the hierarchy of FIFA regulations than the contents of a circular.*"

Further amendments to Articles 18bis and 18ter of the FIFA RSTP would be welcomed.

The FIFA TPO/TPI Manual has no real source or authority in law, similar to the RSTP Commentary or a circular. It is merely FIFA's understanding of the application and interpretation of its own regulations. Although useful, it is not binding on arbitrators nor can practitioners unequivocally rely on its substance.

Ultimately, further amendments to Articles 18bis and 18ter of the FIFA RSTP would be welcomed. Such amendments could, in substance, mirror the interpretation and explanation of application explanations in the FIFA TPO/TPI Manual. This would provide the football legal community with further guidance as to what transactions are on-side and which transactions would raise the yellow flag deeming the transaction off-side.

> ***Further amendments to Articles 18bis and 18ter of the FIFA RSTP would be welcomed***

It is possible that some stakeholders, from a governance perspective, could argue that such detailed regulations concerning the ability of a club to raise revenue have no place in the RSTP. This author disagrees. When FIFA decided to issue TPO and TPI regulations it decided to wade into an overly complex area of financial transactions. To attempt to regulate such a complex area with a simplistic tool attempting to indiscriminately prohibit all transactions invites criticism that such a blunt tool should be refined for legal transparency.

The FIFA TPO/TPI Manual seeks to clarify the law in the area, but concrete amendments to the FIFA RSTP itself are a necessary step to provide further clarification.

2 FIFA RSTP, 2020 edition, Art. 18bis.
3 FIFA RSTP, 2020 edition, Art. 18ter.

Termination of an Employment Contract under Chinese Labor Law

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➔ ***Chinese Football Association (CFA) – Breach of contract – Just cause – Labour disputes – Labour law – National law – Fundamental Rights***

In China, it is mandatory that a labor contract dispute be submitted to specific labor arbitration tribunals. If the parties do not agree with the arbitral award, they can then bring an action before an ordinary civil court. This is the general rule for all the contractual labor disputes.

The most important law that the judicial authority refers to is the *Labor Contract Law of the People's Republic of China* (Labor Contract Law). When it comes to a contract concluded between a football player or coach and a Chinese football club however, it should be noted that it can be a little bit tricky.

According to Article 33 of *Sports Law of the People's Republic of China*, any dispute arising from competitive sports activities should be meditated or arbitrated by sports arbitration institutions. The establishment of such sports arbitration institutions and the scope of its jurisdiction should be regulated by the State Council of the People's Republic of China. However, so far, the State Council has not established or enacted any regulations in this regard.

As we all know, the Chinese Football Association (CFA) established an internal arbitration tribunal to hear cases in respect of: 1) decisions made by the CFA Disciplinary Committee; 2) disputes between the member associations, football clubs, footballers, coaches and intermediaries regarding the registration, transfer, qualification, employment contract and intermediary contract, amongst other disputes within its management scope; and 3) other disputes that the arbitration tribunal considers fall within its competence.

Legally speaking however, the CFA is merely a social entity responsible for supervising and managing the football industry and operating on behalf of the Government over specifically authorized issues. Not to mention, its impartiality has always been questioned. Therefore, its internal regulations and arbitration branch do not have the power to exclude the mandatory law, *i.e. Labor Contract Law of the People's Republic of China and Labor Dispute Mediation and Arbitration Law of the People's Republic of China*, which gives mandatory jurisdiction to all the labor dispute mediation and arbitration tribunals in China. If the parties do not agree with an arbitral award, either party can bring the case to the civil court within 15 days upon the receipt of the award.

In reality, we do see some civil courts define the employment-related dispute between a player and a club as a labor contract dispute and take the case. However, there are also cases where the court thinks that sports-related employment contracts (or labor contracts, depending on how the court defines it) are unique and should comply with their own rules, meaning that the parties should go to the CFA arbitration tribunal, especially if the parties have included arbitration clause of the CFA in their contract.

Depending on where the court is, the outcome can differ enormously. The problem of inconsistencies in the courts is beyond the author's power to resolve. So, this article's focus is not complicated legal theory or analysis but instead serves to give a general idea to foreign legal practitioners who might deal with cases involving Chinese labor law. Its aim is to help foreign legal practitioners understand how the Chinese labor arbitration tribunal and the court might deal with a

labor contract termination between a footballer and a club under Chinese Law.

The author acknowledges that most foreign players include FIFA and CAS as dispute resolution institutions in their contracts and go through procedures before those institutions. Nonetheless, the author has encountered a few cases where foreign footballers or coaches choose to apply Chinese Law and decide to resolve a dispute before the Chinese labor arbitration tribunal and civil courts.

Termination of a Labor Contract

An employee who wants to terminate a labor contract

In China, all labor-related laws, regulations and rules protect laborers' rights. Therefore, it is more difficult for an employer to terminate a contract than for an employee.

Basically, an employee can terminate a labor contract if:

1) The employer and the employee, through negotiation, mutually agree to terminate the contract (Article 36 of the *Labor Contract Law*);

2) The employee without reason, gives 30 days written notice in advance or three days written notice in advance if it is during the probation period (Article 37 of the *Labor Contract Law*) to the employer;

3) The employer committed one of the acts listed below, then the employee can terminate the contract without the need to give notice in advance:[1]

   i. The employer fails to provide protection or working condition as agreed in the labor contract;

   ii. The employer fails to pay the salary on time;

   iii. The employer fails to pay the social insurance for the employee;

   iv. The internal regulation of the employer violates the laws and regulations, which infringe the rights of employees;

   v. The labor contract is invalidated due to the occurrence of any of the situations falling under Section 1 of Article 26[2] of the *Labor Contract Law*; or,

   vi. The laws or administrative regulations stipulate other situations.

   If the employer forces the employee to work by violence, threat, or false imprisonment, or the employer gives directions violating the regulations, or forces the employee to work in a dangerous situation or any situation that might put the employee in danger, the employee can terminate the labor contract immediately without giving any notice in advance to the employer (Article 38 of the *Labor Contract Law*).

Clubs who want to terminate the labor contract

The law also lists out the situations where an employer can terminate the contract under certain circumstances.

1) When the employer and the employee through negotiation, mutually agree to terminate the contract (Article 36 of the *Labor Contract Law*);

2) The employer can terminate the contract if:

   i. The employee is proven to not fit the job description during the probation period;

   ii. The employee severely violates the internal regulations of the employer;

   iii. There is serious dereliction of duty or malpractice by the employee which causes material damage to the employer;

   iv. The employee during the contract term also establishes an employment relationship with other employers, which severely affects his capacity to fulfill his duty, or even after the employer brings it up, still refuses to correct it;

   v. The labor contract is invalidated due to the occurrence of any of the situations falling under Section 1 of Article 26 of the *Labor Contract Law*; or,

1 The *Labor Contract Law* does not explicitly state that the employee doesn't have to give a notice in advance if the employer falls under those situations. However, many courts in different situations have made it clear that under Article 38, the employee terminates the contract due to the unlawful behavior of the employer. Therefore the employee should not be required to give 30-days' notice which normally would be required when the employer does not engage in any unlawful behavior.

2 Section 1 of Article 26 refers to situations where: 1) the contract was concluded due to the threat, fraud or exploitation of the employee's unfavorable situation; 2) the employer exempts its mandatory obligation or excludes the rights of the employee; 3) any specific term or the whole contract violates the mandatory requirements set by the law or administrative regulations.

vi. The employee has been held criminally responsible (Article 39 of the *Labor Contract Law*).

3) In the following situations, an employer can either terminate the contract by giving 30 days written notice in advance or give an extra one-month salary to an employee:

i. The employee is sick or injured, not due to work, after his medical leave term expiration. However, the employee cannot resume his work nor other work adjusted by the employer;

ii. The employee cannot fulfill his duty, even after training or adjustment of working position; or,

iii. The substantial change of the objective condition while the labor contract was concluded, which makes the fulfillment of the labor contract impossible. After the employee's negotiation, both parties cannot reach an agreement over the amendment of the labor contract (Article 40 of the *Labor Contract Law*).

4) When an employer wants to lay off more than 20 people or less than 20 but over 10% of total employees, under the following situations, the employer needs to report to the labor union or to all employees 30 days in advance, and then listen and consider the suggestions of the labor union or employees. The layoff plan needs to be reported to the labor administrative department if:

i. The employer is under revitalization according to the *Enterprise Bankruptcy Law*;

ii. The employer encounters serious difficulties in production and business operation;

iii. The employer changes products, makes substantial technological renovations or adjusts the methods of its business operation, and it is still necessary to lay off the number of employees after changing the labor contract; or,

iv. The employer's objective economic situation, on which the labor contract is based, has changed materially, making it impossible to perform the labor contract.

The following employees shall be given retention priority when an employer needs to lay off employees:

a. Those who have concluded a fixed-term long time period labor contract;

b. Those who have concluded a labor contract without fixed term; and,

c. Those whose family has no other employee and has elderly or minors to support.

In the case where an employer intends to hire new employees within six months after it lays off the number of employees according to the first paragraph of this Article, it must notify the employees it laid off and shall, in equal conditions, give priority to those laid off employees (Article 41 of the *Labor Contract Law*).

However, when the employer wants to terminate the contract under Articles 40 and 41 of the *Labor Contract Law*, there are still restrictions. The contracts of the following employees cannot be terminated:

1) An employee who engages in operations exposing himself/herself to occupational hazards and has not undergone an occupational health check-up before he leaves his position, or who is suspected of having an occupational disease and is under-diagnosis or medical observation;

2) An employee who has been confirmed as having lost or partially lost his capacity to work due to an occupational disease or a work-related injury during his employment with the employer;

3) An employee who is sick or injured (not due to work-related reason) and is still within the medical leave term;

4) A female employee who is in her pregnancy, confinement[3], or nursing period;

5) An employee who has been working for the employer continuously for or over 15 years and is less than five years away from his legal retirement age; or,

6) Other situations as stipulated by law and administrative regulations.

3 *Postpartum* confinement is a traditional practice following childbirth in some Asian countries, which typically begins immediately after the birth, and the confinement lasts for a culturally variable length: typically for one month or 30 days, up to 40 days, two months or 100 days.

Compensation

Type of Compensation

Chinese labor law sets out two types of compensation in cases of premature contract termination. The first is called *economic compensation*, which is only paid by the employer to the employee when the contract is terminated by 1) the employee under Article 38 of the *Labor Contract Law* and 2) the employer under Articles 36, 40, and 41 of the *Labor Contract Law* and certain situations when the contract expires.[4]

The second is called *compensation*, when the employer terminates the contract, unless the law stipulates explicitly that the employer does not have an obligation to pay any compensation or it only needs to pay economic compensation, the employer needs to pay twice the amount of *economic compensation* to the employee.

As for liquidated damages, these can only be applied to an employee when the employee violates the obligations of the Service Agreement (Article 22 of the *Labor Contract Law*) or the Confidential and Non-Competition Agreement (Article 23 of the *Labor Contract Law*). Aside from these two situations, the law forbids an employer concluding any other kind of clause where the employee might be held accountable for liquidated damages. However, if the employee terminates the contract without reason and fails to give a 30-day notice, the employee will be held responsible for all the actual loss caused thereby. In reality, since the burden of proof is borne by the employer, there are not many cases where the employee has actually been determined to pay the actual loss.

Calculation of Compensation

According to Article 47 of the *Labor Contract Law*, an employee shall be given economic compensation based on the number of years worked for the employer and at the rate of one month's salary for each full year worked. Any period of more than six months but less than one year shall be counted as one year. The economic compensation payable to an employee for any period of fewer than six months shall be one-half of his monthly wages.

In the case where an employee's monthly wage is higher than three times the average monthly salaryset by the employer's municipality, the economic compensation to be paid shall be subject to this three times limit and shall be for no more than 12 years.

The term "*monthly wage*" mentioned here refers to the employee's average monthly wage for the past 12 months prior to the labor contract's termination or expiration.

The *compensation* shall be twice the amount of economic compensation calculated above.

The difference from FIFA Regulations

Pacta sunt servanda *is not the principle for labor disputes in China*

The legal doctrine of *Pacta sunt servanda* is enshrined in FIFA Regulations and Swiss Law. The application of such principle can be found in CAS jurisprudence, especially when deciding whether the termination of the employment contract between a club and footballer is with or without just cause and the compensation that needs to be determined by the panel.

Under FIFA Regulations, contracts cannot be terminated without just cause by either footballers or clubs. However, since China's labor law tends to protect laborers' rights, the legislators believe that the workers are usually in a weaker position, so the law should protect their rights. Therefore, if the Chinese labor law applies, the player who signs a contract with a Chinese football club would have the right to terminate the agreement without reason by simply giving written notice 30 days in advance. On the contrary, the football club can only terminate the contract when a particular situation listed by the law occurs.

The compensation calculation method

Usually, in the case where the player or the football club terminates the contract without just cause, they will claim compensation according to Article 17 of the FIFA Regulations on the Status and Transfer of Players (RSTP) and the interest stipulated in Swiss Law.

The calculation methods of the FIFA RSTP include "*the residual value approach*" and "*the positive interest.*" The residual value approach is calculating the remaining value of the contract. The positive interest on the other hand is decided on a case-by-case basis, and it is roughly the replacement cost.

Whether it is the player or the football club, neither can expect to get too much if the *Chinese Labor Contract*

4 It happens when the employer generally cannot operate anymore, such as the employer is in bankruptcy, liquidation or closed due to administrative order, etc.

Law applies. The *economic compensation* and *compensation* are linked to the time the employee has been working in one company. However, due to footballers' short career life in general and the frequent movement of footballers between clubs, the compensation will not be too high. If the player terminates the contract, it is even possible that the club will not get anything.

> ***Since China's labor law tends to protect laborers' rights, the legislators believe that the workers are usually in a weaker position, so the law should protect their rights***

Under Chinese labor law, the parties can also include a penalty clause in their contract, which is in line with Articles 160 to 163 of the Swiss Code of Obligations.

According to the *Chinese Labor Contractual Law*, an employer can impose a penalty obligation on an employee only under two situations. The first is when they sign a service agreement where the employer provides training for the employee, and the amount of such penalty cannot exceed the actual amount the employer spent. The second is where the employee signed a Confidential and Non-Competition Agreement. The Confidential and Non-Competition Agreement would have required the employee not to work in a company that competes with the previous employer even after the labor contract's termination or expiration. However, the employer needs to pay the employee a certain amount of compensation each month under such agreement; in the absence of such compensation, the employee has the right not to comply with such agreement.

Besides the above two situations, any penalty clause imposed on an employee is invalid.

The enforcement of the relevant award and decision

While FIFA decisions have an enforcement system, which is typically more effective than a domestic court, sometimes a party needs to find a way to actually enforce a FIFA decision or a CAS award.

So far, the author has only seen the recognition and enforcement of a CAS award through the New York Convention in China.[5]

Since FIFA however is not recognized as an international arbitration tribunal under the New York Convention, it would be impossible to recognize and enforce FIFA decisions through a Chinese court.

Labor disputes under Chinese Law need to be submitted to a specific labor arbitration tribunal; if the parties do not agree with the award, then either party can bring the case before a regular civil court within 15 days after the receipt of the award. After an award issued by the labor arbitration tribunal enters into force, a party can require civil court to enforce it.

5 The author was lucky enough to have the chance to be involved in one enforcement case. It was a dispute arising from a legal service agreement between *Dalian Professional Football Club* (Dalian Pro FC) and a Spanish law firm, where *Dalian Pro FC* refused to pay the legal fee. The case was submitted to CAS, and the Panel issued the award in favor of the lawyer. The CAS award was recognized and enforced in China.

The Curious Cases of *Chennai City FC*

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→ ***COVID- 19 – Force majeure – Player contract – Breach of contract – Just cause – Salaries – Overdue payables – Compensation – Mitigation – FIFA Dispute Resolution Chamber (DRC) – FIFA Regulations – Swiss Law***

FIFA DRC, 20 July 2020, nos 20-00728, 20-00729 & 20-00730

On 20 July 2020, the FIFA Dispute Resolution Chamber (DRC) rendered three inter-connected decisions against the Indian club Chennai City FC *(Club) in favor of several Spanish footballers -* Sandro Rodríguez Felipe, Adolfo Miranda Araujo *and* Roberto Eslava Suárez *(Players) - whereby it ordered the Club to pay the Players' outstanding salaries and compensation for unilaterally terminating their employment contracts without just cause.*

Introduction

What makes these cases so interesting is that each of the Players' employment contracts contained a very detailed *force majeure* clause, providing that:

> *"17. Subject to the other provisions of this Agreement, the failure by a party to fulfil any of its obligations under this Agreement shall not be considered to be a breach of or a default under this Agreement in so far as the inability arises from an event of Force majeure, provided that the party affected by that event has taken reasonable precautions, has duly communicated the occurrence of the event to the other party, and has taken due care and attempted to mitigate the consequences of such event, all with the objective of carrying out the terms of this Agreement without delay. For the purpose of this Agreement,* "FORCE MAJEURE" *means an event or circumstance which is beyond the reasonable control of a party and which makes a party's performance of its obligations impossible and includes but is not limited to wars, acts of terrorism, civil unrest, hostilities, public disorder, epidemics, fires, Acts of God, Court Orders or Governmental restrictions and actions and decisions of regulatory and sports authorities."*

Unlike a lot of other *force majeure* clauses included in international sporting contracts, these clauses actually foresaw both "*epidemics*" and "*government restrictions*" as specified events beyond the reasonable control of a party, thus justifying their avoidance of liability in the circumstances.

At this point, it may be surprising that the FIFA DRC found against the Club, despite the presence of such detailed clauses in the Players' employment contracts, but, as will be demonstrated below, the FIFA DRC was correct in reaching its conclusion due to the conduct of the Club in light of the *force majeure* clauses, as well as the COVID-19 Football Regulatory Issues[1] and FAQs[2] published by FIFA in April and June 2020.

In their respective claims lodged before the FIFA DRC, the Players sought to recover their outstanding salaries, as well as compensation for the premature termination of their employment contracts without just cause. The Players alleged that, on 29 March 2020, the Club, without prior notice, decided to unilaterally terminate their contracts, pursuant to the *force majeure* clause, in view of the COVID-19 global pandemic. All three Players responded to the Club on 31 March 2020, thereby rejecting the *force majeure* that it had invoked and offered a 10-day deadline to "*find an amicable solution*" regarding the issue of termination as well as their outstanding salaries.

The Club, in its reply to the Players, rejected their offer to find an amicable solution, as it simply confirmed their termination and advised the Players that their outstanding salaries would

1 FIFA, COVID-19 Football Regulatory Issues, 7 April 2020.
2 FIFA, COVID-19 Football Regulatory Issues FAQs, 11 June 2020.

be paid by no later than the end of April 2020.

The Players further alleged that the Club invoked the *force majeure* clause in order to terminate the contracts of all its foreign players, against the principle of equal treatment, in order to take advantage of the situation by restructuring its squad. Ultimately, the Players held that actions of the Club were contrary to the FIFA COVID-19 Regulatory Issues and FAQs.

In its reply to the claim, the Club denied that FIFA was competent to deal with the matter, alleging that the contract between itself and the Players conferred jurisdiction on the Players Status Committee of the All Indian Football Federation (AIFF). Regarding the merits of the dispute, the Club acknowledged that it was indebted to the Players for their outstanding salaries but rejected the claims regarding the unilateral termination of their employment contracts, on the basis that the Indian League was suspended on 15 March 2020, and that it was experiencing financial difficulties due to service problems with local banks, leaving it with no other option but to terminate the contracts based on the *force majeure* clauses contained therein.

Considerations of the DRC

The DRC judged itself competent to deal with the matter by virtue of Article 22 lit. b) of the FIFA Regulations on the Status and Transfer of Players (RSTP), due to the Club's failure to provide any evidence proving that the Players Status Committee of the AIFF was compliant with the criteria established in FIFA Circular no. 1010 of 20 December 2005.[3]

3 FIFA Circular no. 1010, 20 December 2005

The main issue which needed to be resolved by the DRC, in this case, was whether or not the Players' employment contracts had been terminated with or without just cause, as well as the resulting consequences of the same. In consideration thereof, the DRC proceeded to highlight that, following the outbreak of the pandemic, FIFA had issued a set of guidelines (COVID-19 Football Regulatory Issues) which aimed to provide advice and recommendations for the purpose of helping member associations and stakeholders mitigate the negative consequences of the pandemic, as well as ensure that any response was harmonized in the common interest. This was subsequently followed by the COVID-19 FAQs, which provided further clarification on relevant questions in connection with the regulatory consequences of the virus.

Thereafter, the DRC noted that the unilateral termination of the Players' contracts was based on the Club's assumption that the outbreak of the COVID-19 pandemic was to be considered a situation of *force majeure*, thereby leaving it with no other option but to terminate the contracts. However, in analyzing the concept of a *force majeure* situation, the DRC noted, based on the documents issued by FIFA, that "*it is for a party invoking force majeure to establish the existence of said event under the applicable law/ rules as well as the consequences that derive in connection thereto.*" Applying this reasoning to the case at hand, the DRC noted that the Club had failed to submit any form of documentary evidence which supported the existence of a *force majeure* situation.

This was even more relevant in light of the wording of the *force majeure* clause relied upon by the Club, as it stipulated that the party in default must take *reasonable precautions* and *duly communicate the occurrence of the event*, as well as attempt to mitigate the consequences thereof. Again, the DRC acknowledged that no evidence had been presented, which proved that the Club had taken such precautions or attempted to mitigate the damages for the Players. In this context, the conduct of the Club was highly relevant, as it had unilaterally decided to terminate the Players' contracts immediately, without exploring less drastic measures and without any prior notice having been given to the Players. In this regard, the Chamber highlighted that (i) the AIFF season was only suspended and not canceled and (ii) that, in any event, the Players' contracts were due to run for an additional season before the fixed term was due to expire, and thus there was nothing to suggest that the Players' contracts had become permanently impossible to perform.

> ***Only a breach or misconduct of a certain severity justifies the termination of a contract, which can only ever be the* ultima ratio**

Returning to the COVID-19 documents issued by FIFA, the DRC wished to emphasize, as per the explicit wording of FAQ no. 16, as well as pages 6 and 7 of the FIFA COVID-19 Football Regulatory Issues, that "*except where a termination of a contract occurred following a unilateral variation made as a result of COVID-19, said guidelines do not apply to assess unilateral terminations of existing employment agreements.*"[4] Therefore, these documents were held not to be applicable in the

4 FIFA DRC, 20 July 2020, nos 20-00728, 20-00729 & 20-00730

present case, as none of the Players agreed to a variation before the termination was affected. Accordingly, this dispute had to be settled in line with the FIFA Regulations and jurisprudence.

In this respect, it was recalled that only a breach or misconduct of a certain severity justifies the termination of a contract, which can only ever be the ultima ratio. Thus, if more lenient measures can be taken in order to ensure the fulfillment of the parties' contractual obligations, then such measures must be taken. With regard to the facts of this case, it was accepted that the Club unilaterally terminated the Players' contracts on 29 March 2020 without any prior notice or attempt to find an amicable solution, as per the offer made by the Players on 31 March 2020. In light of the above, the DRC concluded that the Club had no right to unilaterally terminate its employment relationship with the Players, and thus the termination effected by it on 29 March 2020 was without just cause.

Regarding the Players' outstanding salaries from December 2019 until March 2020, the DRC was unanimous in its opinion that the submissions offered by the Club, *i.e.* service restrictions at the local banks, could not justify the non-fulfillment of its obligations, especially considering that a number of installments were due before the pandemic broke out. Accordingly, it was concluded that the Club was not entitled to use the COVID-19 outbreak as an opportunity/excuse to escape from its debts, which had validly fallen due before the outbreak.

Regarding compensation, the DRC ordered the Club to pay the Players their outstanding salaries, which were due at the time of termination, together with the residual value of their employment contract as damages in terms of Article 17(1) of the FIFA RSTP and interest at the rate of 5% *per annum*. All further requests for compensation were rejected.

Analysis

Firstly, it is necessary to note that the COVID-19 Football Regulatory Issues published by FIFA was only intended to provide general (non-binding) interpretative guidelines to the RSTP. FIFA is thus encouraging clubs and their players/coaches to work together to find appropriate collective agreements on a club or league basis […] for any period where the competition is suspended due to the COVID-19 outbreak. Accordingly, unilateral decisions to vary terms and conditions of contracts will only be recognized by the DRC or Players' Status Committee (PSC), where they are made in good faith, are reasonable[5] and proportionate.

Furthermore, unilateral decisions, consistent with national laws or accepted by collective bargaining structures, will only be recognized where: (i) clubs and employees cannot reach an agreement, and (ii) national law does not address the situation or collective agreements with a players' union are not an option or not applicable. Thus, it is not impossible for FIFA to recognize the validity of unilateral terminations based on *force majeure*, however, there is only a very narrow corridor which parties must pass through for the same to be permissible.

The above paragraphs serve to highlight that FIFA has made the express decision not to dictate how parties should proceed to arrange their employment affairs in view of the COVID-19 pandemic. Rather, FIFA can be seen as encouraging parties to try and find some common ground regarding suitable employment conditions while their relevant league competition is suspended and, only thereafter, will FIFA recognize unilateral decisions.

> ***Clubs must ensure that they do not owe players any overdue payables when seeking to invoke a unilateral termination based on* force majeure**

It should thus be unsurprising that the DRC refused to recognize a unilateral termination invoked by the Club, despite the presence of detailed *force majeure* clauses, as the players' offer to enter good negotiations in order to find a solution was refused. It would have been contradictory for FIFA, on the one hand, to encourage parties' cooperation in finding mutually agreeable solutions and, on the other, confirm a termination that has been imposed by one party without attempting to negotiate a solution with the other party.

It is therefore suggested that, even if clubs have included *force majeure* clauses in their employment contracts with their coaches and players, it does not automatically entitle them to terminate these agreements unilaterally on the basis of the same. On the contrary, clubs seeking to rely on *force majeure* clauses referring to COVID-19 must: (i) specifically

5 When assessing whether a decision is reasonable, the DRC or the PSC may consider, without limitation:
(i) Whether the club had attempted to reach a mutual agreement with its employee(s);
(ii) The economic situation of the club;
(iii) The proportionality of any contract amendment;
(iv) The net income of the employee after contract amendment;
(v) Whether the decision is applied to the entire squad or only specific employee(s).

define the types of events which, in their opinion, would lead to a situation of *force majeure* and (ii) be able to prove, before FIFA, the existence of the said events which have created the *force majeure*, as well as the consequences deriving therefrom.

Furthermore, clubs must ensure that they do not owe players any overdue payables when seeking to invoke a unilateral termination based on *force majeure*, as they risk giving the impression that they have not attempted to negotiate a solution and are simply trying to abuse the power that they have. As mentioned above, the situation surrounding the COVID pandemic does not relieve a club from its contractual obligations, especially where those obligations have validly fallen due prior to the outbreak of the virus. Hypothetically, if FIFA were to accept the "*financial difficulty due to COVID-19*" argument, it would inevitably open the door to clubs seeking an excuse not to pay their players or forcing the players to terminate their contracts.

However, even where the presence of a *force majeure* clause has been established, and the existence of a situation of *force majeure* can be proved before FIFA, a club must nonetheless conduct itself in a manner which is consistent with its agreements. For example, if a contract specifies a notice period, then that notice period must adhered to. Similarly, with regard to clauses which place an obligation on the parties to negotiate an agreeable solution, any failure to do so will likely preclude a club from relying upon such clause when seeking just cause to terminate.

One final note regarding *force majeure* under Swiss Law: if there is no *force majeure* clause provided for in an employment contract, the legal consequences - in terms of Swiss Law - will be dependent on whether the impossibility of performance exists only for a limited period of time. In this scenario, the default provisions of Articles 107 to 109 of the Swiss Code of Obligations become applicable. These provisions accordingly provide that, where a party is in default, the other party may set an appropriate time limit for the performance to take place. Failing which, the other party may withdraw from the contract. Where a party withdraws, any payment or other performance already made must be returned; however, no compensation is required where a party is not at fault. This will usually be the case where a party was unable to fulfill the contract due to COVID-19.

However, if performance of the terms of the contract become permanently impossible, Article 119 of the Swiss Code of Obligations provides that the parties will be released from their respective obligations, which have not yet been fulfilled, and they must accordingly return what they have already received from the other. These are, however, not mandatory rules, as parties are free to negotiate and provide their own rules, which will accordingly prevail over the legal provisions of the Swiss Code of Obligations.

Changes in Spanish Legislation related to the Sports Sphere and the Activity of Betting Companies

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→ ***Betting – Sponsorship – Spanish Professional Football League (LaLiga) – National law***

According to the latest notifications sent by the Ministry of Consumer Affairs through the publication of a new Royal Decree in the Official State Bulletin (BOE) of Spain, any commercial activity and connection of betting companies with sports organizations will be prohibited, including football clubs.

This is creating tension between these entities and the sports sphere. The Minister of Consumer Affairs notified the CEOs and Presidents of 25 football clubs that all sponsorship agreements with betting companies should be terminated at the end of the current sports season. This is the main requirement of the Royal Decree regulating the activity in the sector of betting and betting-related games, which will most probably be in force on 30 August 2021. This new legislation will undoubtedly have negative consequences for betting companies.

According to the Royal Decree's draft, current sponsorship contracts should be extended within the transition period which, however, cannot exceed the current sports season.

As of now, 13 of 20 football clubs performing in the Spanish *La Liga* are sponsored by betting companies: *Sevilla FC*, *Valencia CF*, *Real Betis*, *Granada CF*, *Levante UD*, *Deportivo Alavés* and *Cádiz CF* are putting the logos of betting companies to their kits while *Athletic Bilbao*, *Getafe CF*, *RC Celta*, *Real Madrid CF*, *Elche CF* and *CA Osasuna* include betting companies to their roster of sponsors and promotional materials.

> ***The clubs of* LaLiga *would lose up to EUR 90 million per year***

Most football clubs requested that a moratorium of three years be imposed on such limitations. The main objective of such a measure is to terminate the current and valid sponsorship agreement in the normal course. However, the Ministry of Consumer Affairs is skeptical about such a measure and the requirement to terminate the sponsorship contracts at the end of the current season is still on the table.

LaLiga President, Mr *Javier TEBAS*, in one of his interviews, indicated that the clubs of *LaLiga* would lose up to EUR 90 million per year due to the new restrictions and the total prohibition to link betting activity to football entities. According to him, it would be more reasonable to strictly regulate the relationship between betting companies and sports clubs and not prohibit it outright. Mr *TEBAS* also mentioned that he would make all possible efforts for the transition period of three years to be implemented.

The text of the Royal Decree also includes the limitation of advertising by betting companies and games on television with only a slot available from 1 am to 5 am for such advertising. The Royal Decree extends the prohibition of bookmaker advertising to sports kits and "*loyalty*" discounts for the fans of a team at the moment of registration

Spanish Sports Council allows *LaLiga* Games on Fridays and Mondays

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→ ***Spanish Football Federation (RFEF) – Spanish Professional Football League (LaLiga) – Broadcasting rights – Calendar – National courts – National law – National Regulations***

CSD Resolution, 16 October 2020

The President of the Spanish Sports Council, Irene Lozano *(picture), has decided to allow Friday and Monday* LaLiga *fixtures. This has been one of the hottest points in the tense relationship between the Royal Spanish Football Federation (RFEF) and* LaLiga.

LaLiga wants matches to be played on Fridays and Mondays to have ten different kick-off times per weekend. However, this goes against RFEF's decision of keeping all matches on the weekend between Saturday and Sunday. The Federation's belief is that weekend scheduling would help supporters attend matches, and so the RFEF banned matches on Fridays and Mondays.

This long-standing dispute has had several milestones.

On 26 July 2019, the RFEF Competition Judge, not as a competition and disciplinary body but by a delegation of the RFEF President, issued a resolution prohibiting the dispute of matches on Fridays and Mondays. The resolution was appealed by *LaLiga* before the Spanish Sports Council (CSD) and a commercial court.

On 9 August 2019, the Commercial Court number 2 of Madrid decided as a provisional measure that until it decides on the merits, there would be games on Fridays but not on Mondays. This order was appealed by *LaLiga* before the Provincial Court, which revoked it on 1 June 2020.

On 27 May 2020, the Commercial Court issued a judgment rejecting *LaLiga*'s claim.

On 1 June 2020, the Provincial Court of Madrid issued an order that upheld *LaLiga*'s appeal against the judicial order of 9 August 2019, revoking it and granting the precautionary measures allowing games on Fridays and Mondays.

On 14 July 2020, *LaLiga* filed an appeal before the Provincial Court of Madrid against the judgment of the Commercial Court number 2 of 27 May 2020 and requested before the Commercial Court the maintenance of the precautionary measures agreed by the Provincial Court.

On 16 October 2020, when the judge was yet to rule on the precautionary measures, the CSD surprised everyone by anticipating the judge's order and resolving the conflict of competence in favor of *LaLiga*. Therefore, there will now be games on Fridays and Mondays.

The decision of the Provincial Court on the merits of the matter is still pending, although it has already advanced its criteria in the order of 1 June 2020, favorable to *LaLiga*.

The CSD, an autonomous body within the Ministry of Culture and Sports with the power to regulate and mediate in conflicts between federations and leagues, has concluded that employers (*LaLiga*) have the power to schedule matches, according to the Sports Law, the agreement coordination signed by the RFEF and *LaLiga* and its statutes. The affected parties can present a contentious-administrative appeal against the resolution within a period of two months, and RFEF showed its will to file such an appeal.

The ruling of the CSD, signed by its President, *Irene Lozano*, authorizes *LaLiga* to hold first and second division matches on Fridays and up to 20 games per season on Mondays with, *"in principle, only one game per day."* The CSD also requests that Monday matches must be used mainly to reschedule and recover postponed or suspended matches "*for health reasons related to the COVID-19 pandemic or other eventualities*" and to maintain the principle of equivalence between clubs, that is to say, it is not always the same team that plays on Mondays.