Chapter 4
Contractual Stability: Breach of Contract

Juan de Dios Crespo Pérez, Gianpaolo Monteneri, Wil van Megen and Peter A. Limbert

Contents

Juan de Dios Crespo Pérez—LL.M., Attorney-at-law, Ruiz Huerta and Crespo Sports Lawyers.
Gianpaolo Monteneri—Attorney-at-law, Monteneri sports law.
Wil van Megen—FIFPRO Legal Department.
Peter A. Limbert—Associate, Attorney-at-law, Squire, Sanders and Dempsey (UK) LLP.

J. de Dios Crespo Pérez (✉)
Valencia, Spain
e-mail: jddcrespo@ruizcrespo.com

G. Monteneri
Zürich, Switzerland
e-mail: gianpaolo@monteneri.com

W. van Megen
Hoofddorp, Netherlands
e-mail: wil@fifpro.org

P. A. Limbert
London, England
e-mail: peter.limbert@ssd.com

A. Wild (ed.), *CAS and Football: Landmark Cases*,
ASSER International Sports Law Series, DOI: 10.1007/978-90-6704-808-8_4,

4.1 CAS 2003/O/482 Ariel Ortega v. Fenerbahçe and Fédération Internationale de Football Association

Juan de Dios Crespo Pérez

The Ortega Award is a vivid demonstration of the consequences of a player's credulousness and ignorance. It marks the first case of a unilateral breach of contract by a player after the 2001 Fenerbahçe and Fédération Internationale de Football Association (FIFA)

Regulations for the Status and Transfer of Players (FIFA Regulations) were amended. Ortega had breached his contract during the protected period. Largely because of allegedly late salary payments and an ostensible failure to provide for adequate medical service, Ortega decided to quit Fenerbahçe Istanbul. Unaware of Article 32 of the Turkish Football Association Regulations and the 2002 FIFA Regulations, Ortega ultimately ended up paying US $11 million to Fenerbahçe Istanbul. The Court of Arbitration for Sport (CAS) also imposed a four-month suspension on Ortega from the date of the award. The author explains the background and its context.

4.1.1 Preamble

The "escape from Istanbul" could be the title of a movie but unfortunately it was only the behaviour that the football player Arnaldo Ariel Ortega did, in trying to end his contract with the Turkish club Fenerbahçe Spor Kulübü, that had just began some months before.

This case was the first one of a breach of contract by a footballer brought before the CAS after the FIFA Regulations for the Status and Transfer of Player was amended on 2001 (in force the 5th of July 2001), after a "gentlemen's agreement" between FIFA and the European Commission.

The Articles 21 and 22 (now revamped as the famous Article 17 of Webster and Matuzalem) were too new for been known and when Ortega decided to leave he had just a few words with somebody in his native Argentina and he was told that he could leave without any problem and would pay quite nothing as an indemnity. This was what he had in mind when he quit Fenerbahçe.

This advice changed Ortega's life and he had to suffer afterwards during a long time to put his career again into a normal way and made him a leading case of a new line of proceedings of football matters held before the CAS.

4.1.2 Facts

On the 23rd of May 2002, Fenerbahçe Spor Kulübü, hereinafter "Fenerbahçe" or "the Club", and Club Atlético River Plate, hereinafter "River Plate", agreed to sum of US $7,500,000 for the transfer of the football player Ariel Ortega, or "the Player".

On the 8th of June 2002, Mr. Ortega signed a global contract with the Club, containing provisions regarding image rights for US $2,000,000 per season, and on the 24th of June 2002, Mr. Ortega signed a contract to play football with Fenerbahçe for 4 years for a salary of US $1,000,000 per season.

During the winter break in the 2002–2003 season, Mr. Ortega returned to Argentina to receive treatment for an injury from his personal physiotherapist. However, the Club was not entirely comfortable about this departure and was concerned that the athlete may not return to Turkey to resume playing.

Afterwards, Mr. Ortega flew to Amsterdam, for a friendly match between Argentina and Holland on the 12th of February. After the match, Mr. Ortega returned to Argentina instead of making the short trip back to Turkey. He claimed he had the consent of the Club's President to be present at the birth of his third child, however, this assertion was denied by Fenerbahçe.

On the 18th of February 2003 the Club faxed a complaint to the representatives of Mr. Ortega. As a result of said complaint the Club and River Plate began negotiations discussing the possible transfer of Mr. Ortega back to Argentina.

These negotiations were broken down in early March, and on the 3rd of March 2003 the Club sent Mr. Ortega a fax requesting his immediate return. Having heard no response, the Club submitted a claim against the Player in front of FIFA on the 11th of April 2003.

On the 6th June 2003 the FIFA DRC ordered, *inter alia*, that Mr. Ariel Arnaldo Ortega pay Fenerbahçe US $11,000,000 as compensation for breach of his employment contract with the Club and decided that the Player had a sporting sanction of fourth month.

Following the decision against him Mr. Ortega asked to stay, suspend and set aside the order of the decision.[1]

On the 19th of September 2003 the CAS held a hearing and the parties made their various submissions.

4.1.3 Main Submissions and CAS Decision

The Parties agreed on the CAS as the place in which to hold their trial. This was permitted both by FIFA and the CAS.[2] Furthermore, the FIFA DRC decision stated that:

> This decision may be appealed before the CAS within 20 days of the receiving notification of this decision by contacting the court directly in writing and by following the directions issued by the CAS, copy of which we enclose hereto.

This was before FIFA approved its new Statutes that enter into force on the 1st of January 2004 and thus all the parties that would like to appeal a FIFA body decision had to accept the CAS jurisdiction. Some clubs[3] did not accept it and thus the case was not held before the Court of Arbitration but before the Ordinary Courts of Zurich (the place where FIFA had its address).

---

[1] On the 19th of August 2003 the CAS granted the stay of the execution of the decision.

[2] FIFA had accepted the jurisdiction of the CAS in Circular letter no. 827 from the 11th of November 2002. Article R72 of the CAS code provided that whenever the parties had agreed to refer a sports-related dispute to the CAS the CAS could hear the dispute.

[3] Sint-Truiden, from Belgium in 2003 for instance.

By the way, this was the only way to discuss FIFA decision at that time and various cases brought by clubs[4] were held before such Courts in the previous years.

But, in this case, Ortega thought that the CAS would be a better jurisdiction than the Swiss Courts and thus accepted to appeal it there.

Despite the contract operating in the jurisdiction of Turkey, and subsequently being subject to Turkish law, neither Party requested the dispute be heard according to Turkish law. Therefore the dispute was decided in accordance with FIFA Regulations and complimentarily Swiss law.[5]

4.1.3.1 Breach of Contract

Both Parties claimed that the contract had been breached by the other party at the hearing.

Mr. Ortega asserted that three terms of his contract had been breached by the Club:

- The payment of his salary,[6]
- The payment to Mr. Iacoppi,[7]
- The failure of the Club to provide adequate medical service.[8]

The Club asserted the contract had been breached by Mr. Ortega by:

> Failure to report to the Club and refusing to play according to the terms of his employment contract after the 12th of February 2003.[9]

With regard to payment of the salary of Mr. Ortega the CAS found that the Club had paid the Player for the months of September, October and November, and in March 2003 they made the payments for December and January.

The Club submitted, and the CAS accepted that the payment had not been made into the Player's bank account because they did not know where the Player was for a large part of December and January. Furthermore, the Player did not file a formal

---

[4] Rayo Vallecano de Madrid, Olimpia de Asunción, Sint-Truiden, Atlético Madrid or Alavés were some of them.

[5] Article R58 of the CAS code provides that the Panel shall decide the dispute according to the rules of law chosen by the parties or, in absence of such a choice, according to the law of the country in which the federation, association or sports body which has issued the challenged decision is domicile. In this case, according to Swiss law, as FIFA's domicile is in Zurich.

[6] Mr. Ortega's salary was US $1,000,000 per season for 4 years to be paid in 10 equal instalments which commenced from the 10th of September 2002.

[7] Mr. Iacoppi had an undefined role as a friend, mentor and advisor to Ariel Ortega and was entitled to a monthly payment of US $6,000 from the club.

[8] It was presumed by the CAS that the medical treatment and physical welfare of the player were obligations which had to be assumed by the Club.

[9] It was presumed by the CAS that the most basic of obligations of a professional football player is to play football for the club to which he is contract when they request him to do so.

against the Club for the payment of these outstanding salaries.[10] This failure to demand his salary weakened the Player's position in the case.

The CAS found that the failure of the Club to make the payment of the salary owed to the Player for December and January until March could not, in itself, constitute a breach of contract and entitle the Player to treat the contract as terminated.

The CAS found that although Mr. Iacoppi had only been paid the first instalment of US $6,000 this was not enough to discharge Mr. Ortega from the contractual obligations he owed to the Club.

With regard to the Club's alleged failure to provide adequate medical service the CAS found that these claims were grossly exaggerated. They noted that Player had suffered a strained groin in December and when the Club doctor's could not treat the Player effectively they allowed him to return to Argentina to seek the advice of his personal physiotherapist.[11]

The CAS panel also refused to acknowledge the Player's submission that he had gone back to Argentina, following the February 12th friendly match with Holland, with the consent of the Club President. The evidence provided by the Player failed to prove anything to support this claim, and the Club President gave first hand evidence that he had given no such permission to the Player.[12]

With regard to the behaviour, actions and submissions of the Player the Panel stated:

> We are bound to say that Mr. Ortega did not solicit, or certainly did not receive, proper advice as to the risk he ran in adopting his chosen course of action…. Mr. Ortega was determined for reasons which could not in law be held responsible, to move on from the Club as soon as possible—trying to negotiate an exit which would not involve him in potentially onerous liabilities.[13]

4.1.3.2 Suspension

The CAS panel considered whether or not the FIFA DRC had the competence and the power to give Mr. Ortega a playing sanction. They drew upon the FIFA regulations to evaluate whether or not said ban could be given to the Player for his

[10] It is strange that the Player did not file a complaint against the Club because Article 32 of the Turkish Football Association Regulations provides a specific mechanism for early termination of contract for a player who has not been paid his salary by his club. "The Player may issue a notice of termination within 15 days if the Player has not been paid by the Club as per the agreement…".

[11] Furthermore they found that the upset stomach the Player suffered in February 2003 was ultimately treated, albeit overseas, by the Club doctor's advice to give the Player certain pills.

[12] It was noted with the huge amount of foreigners on the books at Fenerbahçe it would be impossible to grant leave to every Player who had a wedding or a birth to attend.

[13] Para 29 of the Decision.

unilateral breach of contract. They looked at Articles 21, 22, 23 and 42 of the FIFA Regulations and Status for Transfer of Players, 2002 edition.[14]

The CAS panel decided to suspend the Player for four months from the date of the award pursuant to Article 23(a) of the FIFA Regulations for Status and Transfer of Players 2002, hereinafter "the Regulations".

Article 23(a) of said Regulations states:

> If the breach occurs at the end of the first or the second year of contract, the sanction shall be a restriction of four months on his eligibility to participate in any official football matches as from the beginning of the new season of the new club's national championship.

The CAS decided to construe the phrase "at the end of" as including the period up to the end of the first year. Therefore they decided FIFA were entitled to impose a suspension order against the Player.

The representatives of the Player attempted to contest this suspension order stating that the breach with "no just cause" had occurred in "exceptional circumstances[15]". They declared that Mr. Ortega's wife's pregnancy was an exceptional circumstance and was reasonable grounds for the breach of contract.

The Panel replied that Mr. Ortega's wife had delivered the baby without complications on the 13th of March and Mr. Ortega had ample time to return to the club following said delivery.

Furthermore, the representatives of Mr. Ortega alleged that due to FIFA's involvement in the case the Player was effectively suspended from as early as March 2003 and therefore had already served his suspension.

The Panel again disagreed saying that Ortega had only been officially suspended as of the 6th of June 2003 and could have played for whichever club he so chose after he had left Fenerbahçe earlier in the season.

4.1.3.3 Final Sum Awarded to Fenerbahçe

Ariel Ortega addressed the CAS and stated that if the award given by the DRC remained, it would mark the end of his playing career, as he would not be able to pay the amount for which he was deemed liable.

The CAS immediately admitted that the US $200,000 owed to Ortega by the Club would have to set off the final figure.

---

[14] Most of this information can now be found under Article 17 of the Regulations on Status and Transfer of Players 2009 edition.

[15] As per Article 23 of the Regulations. But those exceptional circumstances were accepted in the Mexès case and then were eliminated from the new Regulations in 2005, due to their lack of preciseness.

The CAS noted that Ortega had broken his contract within the protected period, in the first season nonetheless, and it would have a detrimental impact on the performance and the planning of the Turkish club.[16]

Furthermore, the CAS noted that Fenerbahçe had paid US $7,500,000 for the services of the Player, and were losing the Playing without having been able to use their "asset" to any effect. Additionally, Fenerbahçe had paid US $750,000 to the Argentinean Football Federation for the mandatory 15% participation fee. Fenerbahçe had also paid "Image Promotion Company" US $1,500,000 in order to obtain the image rights of the Player.

Finally the CAS noted that the Player would be receiving US $1,000,000 for playing salary, and US $2,000,000 for his image rights and had 3 years and 3 months remaining on his playing contract.

But CAS refuses the claim from the Turkish club about the "sporting loss" they have suffered. This loss has been accepted by CAS in the Matuzalem case, as a part of the "specificity of sport".

Taking into account all of these factors the CAS awarded Fenerbahçe with the final reimbursement amount of US $11,000,000.

4.1.4 Commentary

By and large this case was an easy one for the CAS to decide. The Player was clearly unsatisfied with life at his new club in Turkey. He wanted to return home to Argentina but did not have the legal tools to do so without having to compensate Fenerbahçe.

Although the Club did not pay him as contractually agreed for the months of December and January, the Player did not submit a formal complaint to the Club, the Turkish FA, FIFA or any number of governing/judicial bodies.

4.1.4.1 Article 23 Interpretation

However, one of the more interesting and controversial aspects of this CAS decision was the interpretation the CAS took to the old Article 23 of the Regulations.

These Regulations were obviously poorly drafted at the time, and when read word for word and interpreted literally they do not give FIFA the ability to impose a playing sanction on Ariel Ortega. Article 23(a) says the breach must occur at the

[16] The Player was intended to be an integral part of the team and having left immediately after the transfer window, for no compensation, he would affect how the team would perform on the field.

end of the first or second year; however, Mr. Ortega breached his contract in February, well before the end of the first year of the contract.

While it is obvious that the drafters of the FIFA Regulations intended to maintain contractual stability, and discourage a cavalier attitude towards contract; it cannot be said that the drafters had enshrined the maintenance of contractual stability in statute in this scenario and without the highly interpretative nature of the article by the CAS, Ortega would not have got a playing suspension.

4.1.4.2 Non-Payment Under Turkish FA Regulations

It is strange to consider that the outcome of this case may have completely changed had Ortega relied on Domestic regulations and complained about the non-payment of his salary to the Turkish FA. Mr. Ortega had the opportunity to make a formal claim for salaries that were owed to him by Fenerbahçe.

Mr. Ortega never availed of this opportunity most likely because of ignorance of the existence of a provision which would allow him to terminate his contract if he was not paid by his employer.

The CAS mentioned at para 21 of their decision that the Player could have relied on Turkish Football Association Regulations in order to terminate his contract. Articles 32 and 33[17] of the Turkish Football Association regulations define under which circumstances and by which means a player may inform his club of early termination of contract as a result of non-payment of salary.

Ortega had the opportunity to give notice of early termination of contract if he had not been paid within 15 days of the due date of salary. He would have had to issue a notice of termination of the contract to the Turkish Football Association and Fenerbahçe would have had 7 days to make payment of the said outstanding salaries.

Despite the fact that Ortega was in Argentina and not training with the Club, if he had issued the notice of termination, and Fenerbahçe failed to make the payment of the salaries before this trial his case might have been decided differently.

However, it is unlikely that he knew of the existence of these regulations[18] but this is not strange if he had received the same advice as for his early termination of contract.

As a result one of the first "unilateral breach of contract" cases was borne.[19]

[17] Article 32, as previously mentioned, sets out when the Player may issue a notice of termination. Article 33 sets out of the methodology of issuing said notice of termination.

[18] This could have been because of poor representation and legal advice, or because of the different language that the regulations were written in.

[19] The CAS discussed this missed opportunity at para 21 of the Decision.

4.1.5 Additional Commentary

It should also be noted that while the CAS noted in their award that Mr. Ortega had spoken about how an award of equivalent level to the one given against him by the FIFA DRC would end his career, they nonetheless confirmed the award of US $11,000,000.

While it had no legal relevance, it is stylistically strange that the CAS arbitrators would mention the pleas of Mr. Ortega perhaps garnering him some public sympathy but condemn him to pay the same amount.

Finally, while the decision of the case is sound, the final award is without calculations, which leaves the academic or interested reader searching for some sort of test with which to develop the jurisprudence for what were to become "Article 17 unilateral breach of contract cases". However this was the early days of said cases and the award, although lacking mathematical explanation, was legally sound.

And just for the public knowledge of how things have finished with Ortega, let us say that the very same night before the hearing was held, the parties agreed to an indemnity to be paid by several individuals and companies involved in the case for an amount of 4.5 million USD. This agreement was accepted by all of the parties but finally one of the paying individuals decided not to follow and then the settlement fall down. It was really a pity as the result of the case was not so evident in favour of Ortega. The funny thing is that Ortega reached finally an agreement with Fenerbahçe in August 2004 for the very same amount of US $4.5 million in order to play with the Argentinean club Newell's Old Boys and end his non-playing situation.

Thus, he lost eight months from the CAS decision plus what the time he had not played previously as not a club was wanting to contract him subject to pay the huge indemnity decided by FIFA, for finally settling for the same amount he could have paid much before.

4.2 CAS 2004/A/708 Philippe Mexès v. Fédération Internationale de Football Association (FIFA); CAS 2004/A/709 AS Roma v. FIFA; CAS 2004/A/713 AJ Auxerre v. AS Roma and Philippe Mexès; CAS 2005/A/902 and 903 P. Mexès and AS Roma v. AJ Auxerre and AJ Auxerre v. P. Mexès and AS Roma; CAS 2005/A/916 AS Roma v. FIFA

Juan de Dios Crespo Pérez

In the Mexès Award the CAS considered the legal coherence between the contract extension and the protected period under the 2001 FIFA Regulations for the Status and Transfer of Players (FIFA Regulations). Contrary to the 2005 Regulations, the 2001

Regulations did not explicitly state the renewal of the protected period by the renewal of the contract. Based on the ratio legis, the Panel concurred on the renewal of the protected period and thus on Mexès' breach of contract during the protected period. Other interesting issues which arose were sanctioning the player leniently as well as calculating the compensation. In his analysis the author sets these legal problems against the issues of the FC Pyunik cases and the Webster Award. The analysis also considers the AS Roma sporting sanctions: reduction of the transfer ban from two registration periods to one.

4.2.1 Preamble

Philippe Mexès had a very good relationship with the then Auxerre coach, the famous and renowned Guy Roux, who usually treated his players like his sons but when a father gives you his word you normally understand that he is going to comply with.

And this is what happened when Mexès thought that Roux had given him the possibility to be transferred to a club of his choice at the end of season 2003–2004. But a word is not a written contract and Roux denied the chance to his "son" to leave Auxerre so easily and he asked for a huge transfer fee.

This was sensed by Mexès like a treachery and then the Mexès saga began…which will involve not only the player and Auxerre but also AS Roma, his future club in a case that was to transform the FIFA Regulations of 2001 into the revamped 2005 which are quite the same as today. So the saga was not just another case but really a leading one.

4.2.2 Introduction

Before engaging in an analysis of the AJ Auxerre, hereinafter "Auxerre", Philip Mexes, hereinafter "Mexes" or "the Player" and AS Roma, hereinafter "Roma", cases it is best to clarify that there were three cases with the same facts but different party interests all heard together on the 11th of March 2005.

1. Philippe Mexès and AS Roma v. Fédération Internationale de Football Association (FIFA) and AJ Auxerre (and vice versa) for the sporting sanction of FIFA against the player. (TAS 2004/A/708/709/713).
2. AJ Auxerre c. AS Roma and Philippe Mexès (and vice versa) for the indemnity to be paid to Auxerre (TAS 2005/902 and 903).
3. AS Roma v. FIFA for the sporting sanction of FIFA against that club (TAS 2005/A/916).

Each of the three cases had to deal with Philippe Mexès prematurely terminating his employment contract with Auxerre in France, and subsequently signing a playing contract with Roma in Italy.

4.2.3 Facts

Philippe Mexès, born on the 30th of March 1982 in Toulouse, France, had been with the French club Auxerre from the age of 15. On the 13th of May 1998 Philippe Mexès signed a youth contract with Auxerre for 5 years. On the 20th of June 2000, Philippe Mexès replaced this youth contract by signing a professional football player's contract for a period of 5 years.

On the 15th of December 2002 Auxerre and Mexès agreed to extend the contract by one year, thus concluding at the end of the 2005–2006 season, the Player's salary was improved and the Club agreed to pay the Player a transfer bonus if he moved to another club. This was crucial to the dispute between the Parties, and will be discussed thoroughly later on in this commentary.

During the course of the employment contract, the Player asked the Club what transfer fee they would demand, if the contract was amicably terminated before its expiration date. The Club did not respond to the Player with a figure and just reminded him that he was under contract with the Club until the 30th of June 2006 and they would expect him to satisfy said contractual obligations.

On the 24th of May 2004 Roma informed Auxerre that they were interested in signing the player and they intended to make an offer for the Player's services. On the 4th of June 2004, Roma made an offer of €4,500,000 to Auxerre for the Player.

Auxerre told Roma that this offer was way below their valuation of the Player and therefore would not agree to the transfer for this amount of compensation. They added that the Player would remain under contract with the Club until the 30th of June 2006.

On the 11th of June 2004, Philippe Mexès made an appeal to FIFA requesting to be released from his contract on the basis of Article 42[20] of the Regulations on the Status and Transfer of Players, hereinafter "RSTP", 2001 edition. Less than 24 h later, Roma and Mexès signed a 4 year long contract from the 2004/2005 season to the 2007/2008 season.

Despite formal demands issued by the Club on the 21st of June 2004 and 1st of July 2004, the Player refused to attend training sessions with AJ Auxerre.

4.2.4 FIFA Dispute Resolution Chamber Decisions

On July 8th 2004 Auxerre filed a complaint to the FIFA DRC, requesting that their Panel hear a dispute regarding a breach of contract and inducement to breach contract by Mexès and Roma, respectively.

[20] Dispute Resolution Chamber will have to determine whether one of the parties has committed a unilateral breach of contract without just cause.

On the 31st of August 2004 the DRC rendered a decision regarding the validity of Mexès' contract with Roma, and any sporting sanctions which might apply to the player and the Club.

They determined that the Player would not be eligible to play for Roma for 6 weeks after the commencement of the Italian Championship on the 12th of September 2004. The DRC also determined that the alleged inducement for the Player to breach his contract would be ruled upon at separate disciplinary proceedings, and that any sanction given as a result of said inducement would be awarded after the other disciplinary proceeding. None of the parties were happy with the sporting sanction to the player and then appealed to the CAS (first Mexès case).

On the 13th of May 2005, the FIFA DRC decided that Mexès would have to pay Auxerre €8,000,000 for breach of contract. The FIFA DRC considered the objective criteria which were set out in Article 22.1 of the RSTP 2001 edition.

They took note of the higher salary Mexès would be receiving at Roma, and that Mexès had received 7 years of training, from the age of 15–22, at a Club with an excellent reputation for training players.[21] They stated that the remaining value of the Player's contract with Auxerre was €2,403,614. The DRC stated that they based their decision on the special circumstances of the case and objective criteria. Furthermore, Roma were found to be jointly and severally liable for the compensation payable to Auxerre because the DRC decided that they induced the Player to breach his contract.

Each of the Parties was unhappy with their decision. Auxerre believed the valuation of the Player to be closing to €18,000,000,[22] while the Club and Player were both unhappy with the amount of compensation they would have to pay and the length of the sporting sanctions they would receive.

On the 3rd of September 2004, Mr. Mexès and Roma each submitted an appeal against the decision of the FIFA DRC to the CAS in Lausanne, Switzerland, in accordance with Article 60.1 of the RSTP 2001 edition.(Second Mexès case).

Meanwhile, the case against AS Roma for inducing the breach of contract of the player continues and was finally decided by the DRC on the 23rd of June 2005, and sanctioned the Italian club with a prohibition of acquiring any new players during two transfer windows. This decision was appealed by AS Roma before the CAS. (Third Mexès case).

[21] One should assume that the DRC made mention of this in order to demonstrate that Mexès would not have the opportunity to play at such a high level and earn so much money, but for the fantastic training he received while playing at AJ Auxerre.

[22] Their valuation was supported by the assertion by Gazetta Dello Sport on the 31st of August 2004, where they publish the value of about 500 players, that Philippe Mexès worth €17,000,000.

4.2.5 Commentaries

4.2.5.1 CAS Decision First Mexes Case (Sporting Sanction to the Player):

Stay of Decision

Before the CAS held its final hearing on the dispute, they had to hold a preliminary hearing to decide whether or not to stay the decision of the FIFA DRC, effectively postponing any bans until after final judgment had been passed.

The Parties, following the lines of the CAS jurisprudence that the stay of the decision should be granted because:

There was a *chance of success on appeal*, that is to say, that the chance of having the decision overturned on appeal could not be discounted.[23,24]

On the *balance of interests* of the Parties. Which means that Auxerre and FIFA would not be suffering any significant damage.

The premature execution of the decision would be the Parties at the risk of suffering *irreparable harm*. In other words, if the Player and Club were set to receive suspensions from playing and registering players, but were later found to be innocent they would receive suspensions for offenses which they were not guilty of.

In light of the magnitude of the irreparable harm and the proximity in time of the final hearing, the CAS Panel elected to grant the petition for the stay of decision.

Final Award: Contract Extension and Protected Period

The CAS had to rule upon was whether or not Player had in fact breached his contract within the "Protected Period[25]". This was necessary in order to determine if sporting sanctions should apply to the parties, and what level of compensation would be awarded to the aggrieved party.

The CAS felt that due to the prolongation of the playing contract, and the extension of the playing contract, Philip Mexès and Auxerre had effectively reset the timer on the Protected Period and subsequently brought the timing of the breach of contract within the 3-year safe zone and consequently obliged the CAS to impose sporting sanctions on the Player and his new Club.

---

[23] Jurisprudence on this issue of "chance of success on appeal" was established in CAS 2003/O/482 Ariel *Ortega* **v** *Fenerbahçe* SK and FIFA.

[24] The representatives of the Player in their submissions stated in their Stay of Decision order that the "chances of success… are *prima facie* reasonable in the sense that they cannot be discounted."

[25] Defined in the Regulations.

However, some creativity was required by the CAS in this instance because the 2001 Regulations did not specifically state that the renewal of a contract would result in the renewal of the Protected Period. The Panel had to find the *ratio legis* for the rules which policed the legal relationship between the two parties.

The Panel thought that it was appropriate to consider the intention of FIFA for its own 2001 Regulations by examining the new version of the FIFA Regulations, and what they stated with regard to the extension of the term of a professional player contract and triggering a new stability period.[26] Therefore the DRC determined that the Player's signature of an extension agreement to their previous playing contract would restart the Protected Period even though this was not indicated in the 2001 Regulations and had to be changed in the 2005 ones.

Final Award: Suspension

The Regulations state that the player shall be banned from playing for 4 months, and the new club shall receive a ban from registering players for 2 transfer windows. However, these suspension times enshrined in the Regulations of FIFA were ignored by the CAS and other sanctions were imposed.

With regard to the Player's suspension Auxerre had no interest in the length of the playing ban imposed against Mexès as he was no longer part of the team. In the absence of any legitimate submissions stating why the sanction should be increased, and according to the principle of n*e ultra petita*, the CAS could not impose a playing ban of longer time than the one award which was given by the FIFA DRC, which was six weeks, according to the "exceptional circumstances of the case" that was stated in Article 23 of the 2001 FIFA Regulations.

Once again, those "exceptional circumstances" that had permitted the reduction of the usual sanction, had been taken off in the new Regulations of 2005.

Ignoring FIFA regulations

FC Pyunik Cases

Upon reading the CAS award of this dispute, one often wonders how Philip Mexès breaches his contract unilaterally within the Protected Period[27] and escapes with a 6-week playing ban, when the relevant Status clearly stated that Mexès should have received a 4-month playing ban.

However, this is not the first time that this happened. In the *FC Pyunik* cases,[28] which were also regarding unilateral termination of contract, the Player's Carl

[26] http://www.thefreelibrary.com/Publication+of+CAS+awards:+(per+March+2006).-a0169017238

[27] As a result of the CAS's interpretation that a renewal of contract shall be seen as a new contract, thus triggering the commencement of a new protected period.

[28] CAS 2007/A/1358 FC Pyunik Yerevan v. Carl Lombe, AFC Rapid Bucaresti and FIFA, CAS 2007/A/1358 FC Pyunik Yerevan v. Edel Apoula Edima Bete, AFC Rapid Bucaresti and FIFA.

Lombe and Edel Apoula Edima Bete both escaped sporting sanctions despite the FIFA Regulations indicating that their actions merited suspension.

Within their submissions and during the trial the Appellants, FC Pyunik Yerevan, stated that both of the respondents, the players and Rapid Bucharest,[29] should be condemned to sporting sanctions of six months[30] playing ban and two transfer registration period ban, respectively. They submitted effervescently, in capital text; at para 73.2 of the Carl Lombe decision[31] that:

> That both respondents have to be condemned to sporting sanctions of 6 months and of two transfer windows without inscriptions of players on the national and international level. AS FIFA FAILED TO SANCTION THEN ACCORDING TO THE FIFA REGULATIONS FOR THE STATUS AND TRANSFER OF PLAYERS.

FIFA had originally stated in their DRC decision, with regard to Article 17.3 and the stipulated sanction to apply to parties in breach of contract, that:

> [Article 17.3] assigns the competent deciding body the power, but by no means the obligation, to impose a sporting sanction on a player found to be in breach of contract during the protected period.

The CAS later confirmed FIFA's decision not to sanction the parties stating at para 118 of the Carl Lombe decision[32]:

> In view of the specific circumstances of the case, including the age of the Player at the time he signed the Employment Contract[33] and the controversy surrounding his registration from the Appellant, the DRC decided not to impose any sporting sanctions, which would have had a considerable impact on the Player and were considered to be excessive and inappropriate.

However, it does not appear that neither the FIFA DRC nor the CAS should have interpreted application of the clause as optional. The relevant provision, 17.3 of the Regulations, is clear in its wording when it states that "In addition to the obligation to pay compensation, sporting sanctions *shall* also be imposed."

The CAS admits in para 119 of the Carl Lombe decision that if the intention of the FIFA Regulations was to give the competent body the power to impose a sporting sanction, it would have employed the word "may" and not "shall".

There was nothing ambiguous about the wording of the article in either the Mexès or FC Pyunik cases. However, in each of the cases the DRCs decided to

---

[29] The club that the players joined after having breached their contract with Pyunik.

[30] Pyunik felt that a six, rather than four, month sanction should apply because they believed the breach of contract to have been made with aggravated circumstances.

[31] See n. 28 above.

[32] See n. 28 above.

[33] The Players, Lombe and Edima Bete were minors at the time of signing the playing contract with FC Pyunik.

make a decision in the interest of the "Spirit of the Regulation", which was then confirmed by the CAS.[34]

While one can understand the sympathetic nature of the Pyunik cases it is hard to understand why Mexès, a player who requested a transfer and then took matters into his own hands when he was not given one, was treated leniently when it came to the handing out of a sporting sanction.

It is the opinion of the writer that in certain situations the DRC or the CAS need to be lenient on the athlete because of unfortunate circumstances, mistreatment of one of the parties, the age of the player or any number of criteria.

However, it would be more legally sound and certain if FIFA were to redraft their Regulations to give the *power* to the DRC to impose a ban on the player and the club, rather than the obligation. Each time a player breaches his contract and the DRC or CAS does not feel that a ban is appropriate they are given the difficult task of straying away from unambiguous regulations, and essentially improperly interpreting the text in order to give a fair decision.

Mid-Season Breach

The FIFA regulations not addressing the scenario where a contract is extended rather than a whole new contract drafted with regard to the Protected Period. The CAS considered that the new Protected Period should take effect from when the contract extension comes into force. Ergo, they stressed that FIFA should clarify how the Protected Period should apply when a contractual extension comes into effect during the season.

However, it is my opinion that such clarification is now not necessary as the FIFA Regulations define the Protected Period[35] as "a period of three entire seasons or three/two years, whichever comes first, following the entry into force of a contract…" Therefore, FIFA has stipulated that if the breach of contract occurs mid-season but less than three years or seasons to the day after the signing of an extension of contract, then the Player will be deemed to have committed the breach within the protected period.

CAS Decision Second Mexès Case (Player and Roma Indemnity to Pay to Auxerre):

Final Award: Compensation

In its decision on the 13th of May 2005 the CAS felt one of the main issues to be considered is that the DRC had not properly communicated what their motivation

[34] In the case of Mexès this was because AJ Auxerre did not request the Player receive a longer playing ban. The maxim of *Ultra petita* was therefore applicable for the rights of the athlete.

[35] #7 in the Definitions Section of the FIFA Regulations on the Status and Transfer of Player 2009.

or method of calculation was in their decision obliging Roma to pay Auxerre €8,000,000 compensation.

Therefore, they believed it to be one of their primary mandates to calculate the amount of compensation due to be paid, if any, and state how they had reached this decision.

The CAS reviewed the facts concerning the potential transfer of the Player to another club from Auxerre.

The Panel first took into account the "investment" made by Auxerre on the player. Mexes had initially signed a five-year contract from 2000 to 2005, but then, on December 2002, he signed an extension until the end of the 2005–2006 season. This extension was made retroactive to 2002, so the extension was effectively a new four year contract from 2002 to 2006.

The Panel concluded that the difference between the old salary and the new salary that was effectively paid from the date when the extension was signed, in the summer of 2002, until the date in which the contract was terminated, in the summer of 2004. They also accounted for the bonus paid to Mexes for signing the extension, and the fee paid to the agent for the extension agreement. Therefore the effective costs incurred by Auxerre came to a total of €2,289,644.

The Panel then took into account the future earnings for the transfer of the player that Auxerre lost due to the breach. This is when they took into account Roma's offer of €4,500,000, as this was the only existing offer for the player.

This offer was the only official one and moreover was made by the future club of the player who signs a contract quite immediately after having ended his relationship with Auxerre. The offer in Mexès case is really an important issue and has been the example for the following breach of contract proceedings like the Webster one.

Comparison of Webster Offer

Later on in the case commentaries we shall analyse the Andrew Webster case[36] however, for the purposes of the Mexès case it is important to consider why the CAS interpreted the offers received from a third club.

The answers are two. One is timing. The fact that Hearts received the offer for Webster's services after the Player had broke his contract with the Club means that Hearts are not suffering any damage because the Player and the Club no longer have any contractual ties. The Club is not entitled to accept any offer; therefore it is money which they never could have earned.

However, in the Mexès case, these offers were received while the Player was still under contract with the Club and still was an asset of the Club. Therefore, the Panel was of the opinion that these offers were legitimate losses for the Club.

The pattern of these offers, and perhaps even the renewal of the contract with a clause providing for the Player to receive a certain proportion of any transfer offer

[36] CAS 2007/A/1298 and 1299 and 1300.

received, demonstrates that the Club had the intention, or at least, other clubs had the motivation to buy this player. In contrast, no offers were received for Webster in the time leading up to his breach; therefore it did not appear as if the Club would be able to earn any money from the Player, but for his breach of contract.

However, it is my belief that if the Panel thought Hearts were not entitled to any money because the offer was received after Webster had breached his contract and therefore the Club never could have accepted this offer. It would also appear that the refusal of an offer to purchase the Player by a third party should also not carry with it financial value because in this case Auxerre also could never have accepted this offer having previously turned it down.

One can only assume that it is because Auxerre had already received offers for the Player and thus there was the indication that the Club would continue to receive offers in the future, that the CAS took the view that Auxerre might suffer potential loss because of the breach of contract of Mexès. Whereas, there was no indication that Hearts would suffer potential loss because Hearts had not received an offer for the Player until after he had terminated his contractual ties with the club.

The second answer is who made the offer. In this case, AS Roma was not only offering a transfer fee just a week before a contract is signed between the club and Mexès.

Forfeiting Transfer Fee

One point which is often ignored but interesting to note when reviewing this case is that Philip Mexès signed a contract extension which had a clause inserted to allow him to collect a certain percentage[37] of the transfer fee received by Auxerre for his playing services. However, because the Player unilaterally terminated his contract no transfer fee was received by Auxerre from Roma, so Philip Mexès would have forfeited any right to this percentage that he may have once had.

Valuation of the player

One of the most interesting parts of this case, and something which Auxerre were certainly unsatisfied with was the CAS's valuation of the Player, perhaps the Club's most prized asset. Auxerre in their submission to FIFA compared Mexès to several other professionals who had been acquired or transfer by Roma, and they compared Mexès to other professionals who had been acquired by different Club's in several positions.

Auxerre made note of several transaction involving AS ROMA, submitting the following information:

[37] The percentage of the transfer he was entitled to would increase the longer he spent with the Club.

- Walter Samuel, a 31 year old Uruguayan, had transferred from Roma to Real Madrid for 25 million euros, and played "exactly the same position as the player Mexès" who was only 22 years of age, and arguably just as talented.
- Emerson, a Brazilian defensive midfielder, had transferred from Roma to Juventus approximately 26 million euros[38]; and
- Ferrari, an Italian defensive minded player, had transferred from Parma to Roma for 16 million euros, and was not rated as highly as Mexès.

They also submitted the following information about comparable transfers:

- Ricardo Carvalho, a Portuguese centre-back, had transferred from Porto to Chelsea for 30 million euros, and this was after they had engaged in failed negotiations for Mexès.
- Gabriel Heinze, an Argentinean centre-back or full-back, had transferred from French team PSG to Manchester United for 11.5 million euros.
- Wayne Rooney, a young English forward, had transferred from Everton to Manchester United for 37.5 million euros.
- Finally Djibril Cisse, a young French forward, had transferred from Auxerre to Liverpool for about 20 million euros.

While not all of the information that Auxerre submitted with regard to other transfers was relevant to the dispute[39] it was clear that Auxerre had established that, in the current market, Mexès was a very valuable asset, and were Auxerre to transfer the Player he would command a fee comparable to the other footballers mentioned in their submission.

The Panel decided that Auxerre did not prove its commercial and sporting damages. It also determined that Auxerre had obstructed Mexes' possibilities to obtain a transfer by refusing to enter into any negotiations whatsoever.[40] At the same time, the Panel also determined that Roma's offer did not reflect the true value of the player, and that the offer's sole objective was to lead to the termination of Mexes contract with Auxerre.

In the end, the indemnity was fixed at €7,000,000, as a result of the sum of the costs incurred by Auxerre, €2,289,644, and Roma's offer, €4,500,000, plus the other criteria taken into account by the Panel, although no specification of why

[38] If the exchange of the Player Matteo Brighi was accounted for.

[39] Comparing a French centre-back of 22 years of age, to an English forward of 19 years of age is somewhat difficult. Furthermore, not every team is equally proficient in the transfer market. Some teams have a history of paying over market price for a Player in order to obtain the player they believe is necessary to win, and to prevent their direct competition from acquiring the talent. Real Madrid, Manchester United and Chelsea are three perfect examples of clubs who engage in this practice.

[40] It was submitted that Portsmouth FC in England had offered €7,000,000 for the Player's service, and this offer was also refused by Auxerre. Furthermore, it was brought to the attention of the CAS that both Manchester United and Chelsea FC had contract with Auxerre and engaged in a series of negotiations to by the Player. However, Auxerre were very reluctant to negotiate and made it difficult for the player to secure a transfer elsewhere.

they rounded the indemnity to exactly €7,000,000,[41] reducing the FIFA DRC amount by 1 million euros.

CAS Decision Third Mexès Case (Roma Sporting Sanction):

The CAS determined that Roma would receive a transfer ban of only 1 more registration period and thus reduced the ban from the previous two that the DRC had decided.

Roma had stated at the trial that because they had received notice from FIFA on the 30th of June 2005 and that during June some players have already signed a contract with the club.

Then Roma filed an appeal as well as a request for the stay of the execution. Such a stay was not granted by the President of the TAS Appeal proceedings initially on his decision dated 25th July 2005 but a second request was made to the Panel itself on the 2nd August 2005, with new facts such as a claim by the players that have signed with the club and that cannot be registered because of the ban.

The Panel decided that due to those new facts, the stay should be granted and gave it on the 8th of July 2005. Thus, Roma was not only entitled to register the previous players that have already signed a contract but also the possible news ones up to the end of that transfer window (i.e. 31st of August).

Once it was clear that Roma made the offer for a transfer and they signed quite immediately afterwards a contract with Mexès, the induction to the breach was evident and a sanction had to be taken by CAS.

The fight was on whether the sanction had to be reduce to one only as July 2005 had not been a free month due to the decision of not granting the stay to Rome. CAS accepted Roma's position that July and the eight days of August should be accepted as having been already punished, even though players have been contracted before that date (June) and after (rest of August).

Roma expressed the view, and the CAS agreed[42] that this should constitute having already served half of their transfer registration ban, and they should only be prevented from signing players for one more transfer window.

This was a splendid decision for Roma, as it had really only one ban being the only case where a reduction on two transfer windows was given.

[41] However, perhaps it is appropriate to draw attention to the Portsmouth bid which was turned down by Auxerre and recognise that the two figures are identical; €7,000,000.

[42] The CAS took the view that imposing a ban of two transfer window periods on Roma when they had not acted during the previous transfer window allegedly anticipating a ban was contrary to the "Spirit of the Regulations", therefore they did not take a literal interpretation of the Regulations.

4.3 CAS 2006/A/1100 Tareq Eltaib v. Club Gaziantepspor

Gianpaolo Monteneri

The Tareq Eltaib Award may be regarded as a guideline for determining 'just cause', as well as for calculating compensation. In this case, player Tareq Eltaib terminated his contract with Club Gaziantepspor for alleged late and non-payments of his remuneration. The Panel laid out what the player is expected to do for a valid termination of his contract where remuneration payment is delayed or is not forthcoming. The principle of good faith means the player must notify his club of his frustration with a clear warning. In the Panel's opinion the player's silence is to be seen as acceptance of the Club's conduct. Under these provisions, the CAS stated that Tareq Eltaib had breached his contract without just cause during the protected period. The author explains the guidelines in light of this case.

4.3.1 Preamble

(1) One of the most joyful moments for a football club and its fans is the signing of a new player for the club. The new player is meant to give to the club the vitality and strength it needs, so as to be competitive in the new season. The signature is usually widely broadcasted in the local media and based on the pictures offered to the public, the relationship between the player and the club is supposed to last forever. The reality, however, sometimes develops in a completely different way than the expectations of the parties and the agreements concluded between the clubs and the players are not performed in a proper way. Often the misunderstandings and failure to conform to the contractually agreed terms lead the parties to the breach or even the early termination of such agreements.

(2) In the same way, regrettably, it has become fashionable that clubs and players use minor infringements of their agreements as a ground for an exit of the employment relationship and subsequent claims for compensations of alleged damages. However, some termination of contract could have been avoided had the parties clearly comprehended their contractual capabilities prior to committing any of such actions. But since football is first of all passion and emotion, now and again rational thinking and balanced handling are neglected in a crisis situation between a player and club, with usually devastating effects for all parties involved.

(3) The public opinion, in particular the own fans, play an important role in the handling and decision-making process of a club but also of a player, creating pressure and expectation on them. But what appears to be reasonable from the point of view of an average person or fan cannot be often appreciated in the same manner in the light of applicable legal frame of State law or sports body regulations and reserves often surprises when the relevant decision is notified to the parties concerned.

(4) Fact is that employment-related disputes are increasing (both in number and in the value of the dispute), which is on one side explicable with the complete globalisation of football (more and more players are ready to leave their home countries and go to play abroad, even to the most unusual football destination) and on the other side with the increase of revenue generated by the leagues and clubs which is based primarily on television and commercial rights.
(5) The reasons for the disputes have always a simple common denominator: *remuneration*! For a player it is either a default in payment on the side of the club or a better financial offer coming from a third club. For a club it is the default in paying the salary of a player on time, which can be based either on a provisional cash flow problem or on the intention to part from the player since he has become uninteresting from a sporting perspective. The parties then use their tailor-made strategies so as to be released from their respective engagements.
(6) Whenever an employment-related dispute between a club and player occurs, the aggrieved party seeks recourse to the competent State or sports courts. In the event of a dispute which has an international dimension the parties have a tendency to start legal procedure before the FIFA Dispute Resolution Chamber ("DRC")[43] with the possibility to appeal the decision of this body to the Court of Arbitration to Sport ("the CAS"). The main reason for this choice is the fact of having an independent international body investigating and deciding on the matter with the possibility to have the decision taken respected and enforced through disciplinary measures in case of non-compliance.
(7) The first question to which these sports courts have to give an answer while analysing a dispute who is right and who had therefore *just cause*, i.e. a valid reason for the termination of an agreement?
(8) As far as the definition of the term "just cause" is concerned, the legislator (both at State and sports law level) has always preferred not to give a comprehensive definition but has left its assessment to the circumstances of the case, trusting in the correct evaluation of the judges. This had as an end result that the decisions about "just cause" depend solely on the appreciation of the concrete circumstances of a case by the judge(s) in question and may thus find slight divergences in understanding, interpretation and application depending on the person who is deciding and the legal background he is coming from.
(9) This article will provide the reader with the review and analysis of an award rendered by the CAS few years ago in respect of a dispute between the Libyan player, Tareq Eltaib ("the Player") and a Turkish Club Gaziantepspor ("the Club"), which has become a bench mark in establishing general guidelines for the evaluation of "just cause" as well as for determining the due conduct for the termination of an employment contract.

[43] For more details on the procedure before the FIFA Dispute Resolution Chamber please refer to the Regulations on the Status and Transfer of Players as well as on the Rules governing the procedures of the Players' Status Committee and the Dispute Resolution Chamber.

4.3.2 Facts of the Case

(10) The entire factual underlying of this case is rather hackneyed. The Player and the Club entered into an employment agreement for three seasons (from 2004/05 to 2006/07). However, in the middle of the second season, on 14 March 2006, the Player suddenly submits to the DRC a letter, claiming for his release from the employment relationship with the Club due to the repeated delays of payments under the agreement and non-payment of two monthly salaries, namely those of December 2005 and January 2006.

(11) In the same time the Club directed to the DRC its own claim relating to the unexcused absence of the Player. Thereof, the Club requested the DRC to order the Player to immediately return to the Club. The Club further maintained that it fulfiled its financial obligations towards the Player.

(12) The DRC, as the first instance deciding body, after due consideration of the positions submitted by both parties, issued an order to the Player to immediately resume duty with the Club ("the challenged Decision"). The decision taken by the DRC has for sure a big *Solomonic* component, as this body had clearly identified that the Player had left the Club without just cause and instead of straight away establishing that the Player breached and terminated the employment contract without just cause, with all the disciplinary and financial consequences of such decision, it offered to the Player the possibility to repair to his mistake and resume duty with the Club, particularly considering that the latter was more than happy to welcome him back, since he was a key player of the squad.

(13) The Player had however a different agenda and for sure no intention to go back (probably because he started to receive financially and sportive interesting offers) and instead appealed against the decision of the DRC requesting as provisional measure the stay of execution of the challenged Decision allowing him thus to enter into a contract with a new clubs pending the outcome of the appeal procedure.

4.3.2.1 Overview of the Submissions of the Player

(14) The Player requested the Panel to annul the challenged Decision asserting that he terminated the employment contract with just cause due to the repeated violations committed by the Club. In this respect, the Player also asked to recognise him as a free agent and to condemn the Club to the payment of compensation for the damage he had allegedly suffered.

(15) In addition, in order to explain the Player's reluctance to return to the Club and to resume with his obligations under the employment contract, the Player's submissions referred to an articles published in a Turkish newspaper, where the attempt to smear the Player's integrity was expressed by a high Club's representative.

4.3.2.2 Overview of the Submissions of the Club

(16) The Club in its turn rejected any assertion or assumption related to the just cause of the Player for termination of the employment contract and reasserted its interest in respecting what had been contractually stipulated with the Player. The Club alleged that it has always acted in perfect compliance with the provisions of the employment contract and never produced any valid reason for such illicit conduct of the Player.

(17) As regards to the consequences of the Player's behaviour, the Club requested the Panel to condemn the Player to the payment of compensation as well as to impose the sporting sanctions on him as consequence of the breach of the employment contract. Additionally, the Panel was called for holding the new club of the Player jointly and severally liable with the compensation for the payment of the compensation.

4.3.3 Questions Posed Before the CAS

(18) Prior to commencing with the legal analysis of the Panel's considerations of the case in question, it is essential to determine the main issues that are at stake and will need a closer scrutiny.

(19) The two central questions that have to be addressed are the following: figure: first, whether the Player and/or the Club committed a breach of the employment contract, and second, in the event any of the parties committed a contractual breach, to define the consequences thereof.

(20) The Panel was hence asked to establish the existence or non-existence of "just cause" in the sense of the FIFA Regulations on the Status and Transfer of Player ("the Regulations"), which would permit the Player either to be released from its contractual obligations or to be found liable for the breach of the contract and sanctioned accordingly.

4.3.4 Legal Analysis of the Case

(21) Within the entire discussion made by the Panel with respect to the grounds of termination of the employment contract, one can follow the general line of adherence to the *principle of contractual stability* established in Chap. IV of the Regulations. The Regulations want to ensure that, in the event a club and a player choose to enter into a contractual relationship, this contract will be honoured by both parties and that unilateral termination of contract is therefore only admissible whenever there is a valid reason for it, a just cause.

4.3.4.1 "Just Cause" for the Termination of an Employment Agreement

(22) Article 13 of the Regulations provides that in principle a contract between a professional player and a club can only be terminated solely on expiry of the term or on mutual agreement of the parties. Obviously, the said principle is called to caseharden globally the system of contractual relations and its stability in football.

(23) However, Articles 14 and 15 of the Regulations establish two exceptions from the general rule announced above. Thus, a contract can be terminated by either party without consequences of any kind (either payment of compensation or imposition of sporting sanctions) in the case of just cause.

(24) Beside the general just cause, the Regulations distinguish the so-called *sporting just cause*, described in more detail in Article 15 thereof, which is though not related to the "classical" just cause and will therefore not be considered at this stage in detail.

(25) However, if in respect of sporting just cause the FIFA legislator gives at least its general outline on its definition and general application, nothing is provided for the definition of a "just cause". Consequently, in each particular event the surrounding circumstances need to be considered separately and objectively, on case-by-case manner.

(26) A behaviour which is in violation of the terms of an employment contract can still not justify the termination of the contract for just cause. However, should the violation persist for longer time or should many violations be added all together over a certain period of time, or should the violation be a severe one, then it is most probable that the breach of the contract reaches a dimension that the party suffering the breach is entitled to unilaterally terminate the contract for just cause.

(27) In the case in question the Panel addressed the issues of the "just cause", however, being faced to the absence of clear guidance on the applicable law, as the contract did not provide for such a clause, the Panel, in application of the Code of Sport-related Arbitration established that in such circumstances one must fall back on Swiss law. Pursuant to this, an employment contract which has been concluded for a fixed term can only be terminated prior to the expiry of the term of the contract if there are valid reasons for the parties or if the parties reach a mutual agreement.

(28) In this respect, the CAS Panel cited Article 337 of the Swiss Code of Obligations which reads as follows:

> A valid reason is considered to be, in particular, any circumstances under which, if existing, the terminating party can in good faith not be expected to continue the employment relationship.

(29) According to Swiss case law, whether there is "just cause" for termination of a contract depends on the overall circumstances of the case; the existence of a valid reason has to be admitted when the essential conditions, of an objective or personal nature, under which the contract was concluded are no

longer present. In other words, as the Panel concluded, "it may be deemed as a case of application of the *clausula rebus sic stantibus*".

(30) Swiss law provides that only a breach which is of a certain severity justifies termination of a contract without prior warning. This is however an exception to the rule that finds application only in few selected cases where the stance of the defaulting party is extremely reproachable and the violation of massive gravity.

(31) In all other cases, the party that intends to terminate the employment relationship has to notify the other party about the violation of the contractual engagement and if this party does not rectify the violation within a short timeframe, the correct handling party is entitled to unilaterally terminate the contract.

(32) In principle, the breach is considered to be of a certain severity and justifies the premature termination of the employment contract when there are objective criteria which do not reasonably permit to expect the continuation of the employment relationship between the parties such as a serious breach of confidence.[44]

(33) The Panel took into account that in the case in question the Player was naming mainly two reasons for justification of his early termination of the employment contract. On the one hand, the Player referred to the alleged non-payment of contractually agreed amounts, and on the other hand, he affirmed that the publication of articles in the Turkish newspapers made it unreasonable to resume his employee's duties.

(34) First, the Panel noted that the newspaper publications mentioned by the Player were published only *after* the termination of employment contract indeed took place. In this respect the Panel noted:

> (…) the citations referred may not constitute a valid reason for the Appellant to terminate the Contract, as the newspaper articles were published only after the letter of termination and therefore at a time when the Appellant had left his place of residence and (…) thereby expressed that he no longer wished to resume his work with the Respondent.

(35) Consequently, the circumstances which occurred *after* the declaration of termination shall not be taken into account while determining whether there was or not a valid reason to terminate contract.

(36) Furthermore, the Panel considered the alleged delays in payments provided under the employment contract. Actually, none of the parties to the dispute argued that certain payments were in delay. The only thing disputed between the parties is how late the payments were effectively made.

(37) In the final analysis this question can be left unanswered. In the Panel's opinion, the fact that payments owed under the employment contract were made late does not constitute in general a valid reason for termination of the contract, particularly considering that the Player had accepted in the past the delayed payments of his salary without opposing or complaining to the Club

[44] Wyler 2002, p. 364. See also: Tercier 2003, p. 496.

about the delays. The Player should have clearly notified the Club about his frustration about the delays and the fact that he would not tolerate them any longer. But the Player has clearly failed to do so and has *de facto* accepted that the Club was making the payments with a certain delay.

(38) In any event, it is to consider that many clubs are not always in the position to pay the players' salary on the due date and light delays are usually accepted and acceptable as long as they do not represent a financial hardship for the player concerned.

4.3.4.2 Necessity to Give Warning

(39) Having considered the arguments exposed by the Player, in particular the fact that the Player left the Club for the continuous breach of the employment relationship and delays in fulfilling its financial commitments, the Panel made a fundamental conclusion related to the early termination of a contract:

> A prerequisite for terminating because of late payment is that the player should have given a warning. This follows from the principle of good faith; for the breach of duty is—objectively—from the outset not so grave that it would have been unreasonable to expect the Appellant to continue the employment.

(40) Thus, before the Player has terminated the employment contract, it should have been not only advisable but compulsory to let the Club know, firstly, that he is complaining that the Club's conduct is not in accordance with the contract and, secondly, that he is not prepared to accept such breaches of contract in future. But the Player did not send any warning to the Club.

(41) Moreover, the Panel established that:

> If the Appellant did not at the time consider the belated payments to be a "significant" breach, then this fact cannot on its own later constitute a valid reason for termination of a Contract. Instead, the player's silence must be considered to be acceptance of the Club's conduct, which would make it appear to be in bad faith to justify termination of the contract by reference to the belated payments.

(42) The party who terminates the contract and who blames the other party must act without delay; if he does not act immediately he is deemed to have renounced to the right of termination.

(43) The Player claimed that the Club was not only unpunctual in payments, but also that the Club did not pay the salaries for the last two months of employment. Nevertheless, even with respect to this argument of the Player, the Panel noted that it is important to understand whether the salary has already been in arrears for a considerable amount of time or whether the arrears amount to a considerable amount. What is also of relevance is whether the debtor simply refuses to make payment and if there are circumstances that could easily be resolved through a warning notice.

(44) The Panel thus concluded that at the time of termination, the Player had no reason to assume that a warning notice would not change the Club's conduct, particularly considering that the Player was a key player of the Club and that the disappearance and thus breach of the Player occurred in an extremely delicate phase of the championship while the Club was competing for not being relegated to the second division.

(45) Consequently, it would in good faith have been reasonable to expect the Player first to warn the Club prior to terminating the contract. However, a warning addressed to the Club may have given to the latter the chance to possibly rectify an alleged illicit situation and the Player did maybe not want to go through the risk to have to remain with the Club in case of full compliance with the terms of the contract on the side of the Club.

(46) In essence, the Panel therefore decided that the Club had not committed a breach of contract and consequently the Player had no just cause for the termination of the employment contract.

(47) The award does not give any elucidation with respect to the procedure, the form, the contents, etc. regarding the warning of the early termination. In this respect, it is advisable to observe the mandatory formal requirement existing under the national labour law under which the employment contract is concluded, which is in the majority of the cases the law of the country where the Club is domiciled, unless the party have agreed in the contract to put the same under the application of another law.

(48) The party who declares the contract terminated must have previously fixed an additional period of time of *reasonable length* for performance by the other party. In such a case, the party who declares the contract terminated must normally send two communications to the other party, the first one putting the counterparty officially under default and the second one terminating the contractual relationship if the defaulting party has still not complied with it.

(49) The termination of a contract is made by unilateral declaration of the party faithful to the contract to the other party; it does in general not require a specific form, unless it is compulsorily imposed by law, but it has to be notified within reasonable time. It is generally made in writing but theoretically it could be even made orally.[45]

[45] Although there is in general no form requirement for notice giving, one main problem is that oral/telephonic notices are difficult to prove. The burden of evidence of notice giving is clearly on the party giving notice, and if this cannot be proven, the judge will not allow this party to rely on the notice, and this will result in the loss of a remedy. For notices of major importance like the termination of an employment contract written form is therefore indispensable. Moreover, so as to have sufficient evidence in case of dispute it is advised to send notices via registered mail, courier, plaintiff or any other form that guarantees to prove safe receipt by the counterparty. Where national law imposes a qualified notification of notices, these shall be complied with for the notice to be valid.

(50) While there may not be any specific requirements as to form or content, the aggrieved party's declaration must at least make it clear that the other party no longer can count on the former's performance in respect of the contract concerned.

(51) That is to say, the notice must express with sufficient clarity that the party will not be bound by the contract any longer and considers the contract terminated. A high standard of clarity of the notice is necessary, i.e. the unequivocal terms that the party wanting to terminate the contract believes that the contract is terminated that is to say, it must be evident to a reasonable person that the notice in question must clearly express the aggrieved party's wish to terminate the contract as a remedy in consequence of a particular breach.

4.3.4.3 Employment Freedom of the Player

(52) One further issue referred to by the Panel in the case in question was the Player's argument about his employment freedom. The Player refused to return to the Club following the challenged Decision asserting that he could choose to sign for a new club. The Panel in this respect concluded that:

> A player cannot be compelled to remain in the employment of a particular employer. If a player terminates his employment contract without valid reason, then the latter is not withstanding the possibility of sporting sanctions—obliged to compensate for damages, if any, but is not obliged to remain with the employer or to render his services against his will.

(53) According to the CAS jurisprudence in principle a person should not be compelled to remain in an employment relationship of a particular employer, if he does not wish so. An employee who breaches an employment contract by wrongful and premature withdrawal from it may be liable in damages or even imposed sanction according to the Regulations, but is not subject to an injunction to remain with his employer. This position is under Swiss law (Article 337d of the Swiss Code of Obligations) and under CAS jurisprudence.[46] Should the Player be compelled to remain as an employee of the Club he would "suffer irreparable harm, be it because he would have to renounce to other job opportunities or simply because he would be forced to work for an employer against his own will".[47]

(54) The general position of the CAS regarding employment freedom of a player as an employee is in compliance with the relevant international standards.

---

[46] Preliminary Decision of 17 August 2004 in the matter CAS 2004/A/678 Apollon Kalamarias F.C. v/FIFA and Oliveira Morais; Preliminary Decision of 30 August 2004, in the matter FC Barcelona v/Manchester United F.C.

[47] CAS 2006/A/1100, Order rendered by the President of the Appeals Arbitration Division of the Court of Arbitration for Sport, dated 6 July 2006.

The freedom of employment is recognised by the numerous conventions of the International Labor Organization as well as by the international human rights acts.

(55) The fact of not being compelled to remain with the Club despite the existence of a valid employment contract may not be understood from a practical point of view, considering the remuneration the player is receiving or the acquisition costs incurred by the Club so as to guarantee the services of the player from his former club.

(56) Moreover, this is a situation that has been used (but also abused) many times by players, that simply refuse to resume duty with the club and disappear, putting the club before an accomplished fact. There is in most of the situations already the complicity of a new club interested in hiring the services of the player.

(57) The club risking to lose the player is put before a dilemma: on the one side, insist on the performance of the contract and establish its termination by fault of the player, who did not come back, or on the other side accept the requests of the player and allow his transfer to rather favourable conditions for the new club and the player.

(58) It is extremely difficult for a club to hold a player who intents to leave, irrespective of the existing employment contract. Accepting the transfer of the player avoids to the club having to enter into a legal battle that may lasts for years and that may give only partial satisfaction to the aggrieved club and keeping a player in the squad that is not motivated causes sportive damage, both on the pitch as well as in lockers as such player may have a negative impact on the other. The right balance for the welfare of the club (under due consideration of the situation of the player) has to be found in each case.

4.3.4.4 Calculation of the Compensation Due to the Club

(59) Since the DRC while passing the challenged Decision did not make any thorough investigation of the facts and did not make any conclusions on the amount of compensation due, but instead decided on the Player having to return to the Club, the Panel preferred to refer the case back to the DRC so that this body could calculate the compensation due to the Club.

(60) The Panel however gave some guidelines on the method of calculating the compensation, so as to assist the DRC in this respect.

(61) Thus, the Panel, pointed out that the amount of compensation must particularly be guided by the effective loss suffered by the Club. The particular importance is attached in this case to the "law of the country concerned", and in the present case this is Swiss law. Article 337d para 1 of the Swiss Code of Obligations grants an employer the right to receive compensations for the damage due to the termination of the contract by the employee if the latter, without valid reason, does not appear at the working place, or if he leaves it

without notice. The amount of compensation equals to one quarter of the wage of one month.

(62) The Club is however entitled to claim compensation for additional damages that goes beyond that in Article 337d para 1 of the Swiss Code of Obligations. If the existence or the exact amount of damages cannot be established, the judge shall assess them in his discretion, having regard to the ordinary course of events and measures taken by the damaged party in equity and on the basis of the ordinary course of the events.

(63) Since the moment the present award was rendered, many subsequent awards have dealt with the calculation of the damage following a termination of an employment contract and the case law at CAS level is continuously developing, completing in this way the general guidelines given in this case.

4.4 CAS 2007/A/1298 Wigan Athletic FC v. Heart of Midlothian; CAS 2007/A/1299 Heart of Midlothian v. Webster and Wigan Athletic FC; CAS 2007/A/1300 Webster v. Heart of Midlothian

Juan de Dios Crespo Pérez

The Webster Award deals with the breach of contract by a player outside the protected period. During this term Webster was offered a contract extension. Because he refused, in effect Webster was banned from the first eleven (by sitting on the bench) despite his high potential and all his efforts. So in May 2006 Webster decided to terminate his contract due to end on 30 June 2007. Webster could leave for a compensation of £150,000 plus interest. The Webster Award has often been styled the new 'Bosman'. Because of the lenient compensation, clubs were afraid of future compensation barely reaching a quarter of the possible transfer sums. These fears arose through the CAS' remaining value approach in calculating compensation. However, the Matuzalem decision demonstrated that these fears did not materialise. The author sheds light on the circumstances of this decision, as well as on the Panel's considerations and differences in CAS' compensation calculation.

4.4.1 Preamble

As the lawyer of Andrew Webster, I have probably talked and wrote about the "Webster case" more than a hundred times and it is somehow difficult to summarise such a *long and winding road* in some minutes or pages. The case was known as a new revolution in football when I had never had that idea. Article 17 of the FIFA Regulations for the Status and Transfer of Players is so uneasy to interpret for anyone in football, even the most experienced lawyer, that I must say that Webster is just *another brick on the wall* of the construction of the relationship between clubs and footballers.

We shall see other bricks and some layer between them coming in the future and this case was just the beginning of the story but at least it was known as the first one where a player correctly and regulatory used his right to end his contract after the FIFA "protected period".

4.4.2 Facts

Remember just a few of the facts of the case. On 30 March 2007 18 year old Andy Webster signed for Heart of Midlothian LC (Hearts) from Arbroath club, two Scottish clubs, for a transfer fee of 75,000 GBP.

Webster signed a contract due to run from the 31st of March, 2001 to the 30th of June, 2005. On July 1st, 2003 Andy Webster signed a contractual extension with Hearts until the 30th of June, 2007.

Andy Webster's progression as a player was steady and strong. He had become one of the most important players at Hearts as a leader in their defence, and a Scottish international. Hearts were keen to tie down Mr. Webster to a longer contract with improved terms in order to secure the long-term future of one of their prize players.

However, Andy Webster rejected this contractual offer until 2009, in fact he rejected several subsequent offers, giving the impression that Andy Webster was ready to move on to a bigger club, despite his success with his long-term Scottish club.

During this period of contractual negotiations Mr. Webster was seemingly frozen out of the first team and forced to watch many of his team's matches from the sidelines. Hearts went even through the Scottish Cup to its final and Andy was not in the starting team when he had been of its best components. For a Scot not to be in his final was surely a big disappointment and the beginning of the end of the relationship.

The relations between him and the club continued to simmer until eventually they reached their boiling point. One of the club's major shareholders made negative and critical remarks regarding Andy Webster to the media.

Mr. Webster decided he had enough of what he perceived to be unfair treatment and approached the Scottish Professional Footballer's Association (SPFA) seeking counsel and recourse against his club for the statements of their most important shareholder.

They advised Mr. Webster that the best action would be to lodge a claim in writing requesting to terminate his contract with just cause according to Article 18 of his employment contract. However, with the prospect of missing the entire 2006–2007 season because of a ongoing court procedure Mr. Webster opted to take an alternate rough and unilaterally terminate his contract without just cause making his case falling under the scope of Article 17 of the FIFA Regulations for the Status and Transfer of Players.

After having notified Hearts of his intention to breach his contract, and leaving the club without their official consent Andy Webster signed a three year contract with English club Wigan Athletic FC (Wigan). When the English FA asked the Scottish FA association for the International Transfer Certificate (ITC) of the Player the Scottish FA told the English FA that they would not issue the ITC because the Player was still under contract with Hearts.

On the 31st of August, having approached FIFA with their grievance regarding the issuance of the Player's ITC, Wigan was granted the provisional registration by the Single Judge of the Player's Status Committee.

4.4.3 Claim

Hearts submitted claim against both Andy Webster and Wigan to the FIFA Dispute Resolution Chamber (DRC). They claimed for GBP 5,027,311 compensation and a two-month long playing ban from all official competitions against the Player; and a payment of compensation from Wigan and a one registration period long ban from registering any new players against the Club.

The DRC had to consider what criteria should be considered when evaluating a unilateral termination case. The criteria for cases of this nature were found in Article 17.1 of the Regulations on Status and Transfer of Players 2005 (RSTP in force then) which states:

> In all cases, the party in breach shall pay compensation, Subject to the provisions of Article 20 and annex 4 in relation to Training Compensation, and unless otherwise provided for in the contract, compensation for breach shall be calculated with due consideration for the law of the 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 of contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years, the fees and expenses paid or incurred by the Former Club (amortised over the term of the contract) and whether the contractual breach falls within a Protected Period.

Later in the commentary section of this article will be critique regarding the above article and its deficiency's however for now we will discuss how the DRC in the Webster dispute interpreted this article in light of particular facts of this case.

Following the decision of the European Court of Justice in the *Bosman*[48] case, it has been established that a Player is free to sign an employment contract with another club of his choice anywhere within the EU, and cannot be denied his Article 39 right to work freely.

Therefore there is no question that Andy Webster was entitled to breach his contract and move from Hearts to Wigan. He could have left without reason, it just so happens in this case he was unhappy with the behaviour and the comments of

[48] *Union Royale Belge des Sociétés de Football Association ASBL and others v. Jean-Marc Bosman; Case C-415/93, ECR I-4921.*

the members of the club hierarchy and wanted to continue the development of himself as a Player at another, perhaps bigger, club.

However, FIFA have established a set of various rules and regulations to deter playing from doing this, including playing suspensions based on when the contract was breached, and the aforementioned Article 17 principles of compensation in the interest of the "Maintenance of Contractual Stability.[49]"

The previously referred to "Protected Period" is a provision which is designed to discourage "contract jumping".[50] The protected period enshrined in para 7 of the Definitions of the Regulations states that the protected period is defined as:

> A period of three entire Seasons or three years, whichever comes first, following the entry into force of a contract, is such contract concluded prior to the 28th birthday of the Professional, or a period of two entire Seasons or years, whichever comes first, following the entry into force of a contract, if such contract was concluded after the 28th birthday of the Professional.

Andy Webster had signed a new contract with Hearts on the 1st of July 2003, and was 24 years old when he breached his contract in July 2006. Three full seasons, and years had elapsed by the time Mr. Webster had breached his contract, however it was unclear if he had properly complied with all the time regulations involving notification of intention to breach one's contract.

Anyway, FIFA is not always so clear about the sanctions for breaching a contract within the "protected period" and sometimes the clear obligation that is established in its Regulations[51] for a sporting sanctions to whom has breached his contract during that period is not followed by the DRC and even CAS has join the same understanding,[52] which is something really strange and contrary to both the exact wording of the article and the aim of the change agreed between FIFA and the EU Commission: the protection of the integrity of sport.

Furthermore, it was unclear which criteria the FIFA DRC would consider because of the absence of a "buy-out" clause,[53] it was only clear that their decision would be made "in light of the applicable national law.[54]" Due to a lack of jurisprudence, different interpretations of the reading of the Regulations, or legal savvy, the parties also had completely differing views on an acceptable

---

[49] Chapter IV of the FIFA Regulations on the Status and Transfer of Players, 2005 edition.

[50] Soek 2009.

[51] Article 17.3 "*In addition to the obligation to pay compensation, SPORTING SANCTIONS SHALL ALSO BE IMPOSED on any player found to be in breach of contract during the protected period.*"

[52] CAS 2007/1358 and 1359 FCPyunik Yerevan vs Carl Lombe, Apoula Bete, Rapid Bucuresti and FIFA.

[53] Penalty clauses are adjudged to be illegal according to Scottish Law. However Article 17.3 of the FIFA regulations allows for the insertion of contractually agreed unilateral termination compensation clauses. By the way CAS has already ruled in a case in which the unilateral termination amount was considered to be an abusive figure (CAS 2006/A/1082 and 1104 Real Valladolid vs. Barreto).

[54] Article 17.1 of the Regulations.

amount of compensation. Webster and Hearts believing the compensation payment amount should be €200,000 and €5,027,311, respectively.

4.4.4 FIFA DRC Decision

On the 4th of April 2007, the FIFA DRC determined that Webster had unilaterally breached his contract, an assertion which was not contested, outside the "Protected Period." The DRC decided that the residual value of the contract was GBP 199,976. The DRC also noted that Andy Webster was due to earn GBP 10,000 per week with Wigan.

Then the FIFA DRC started to discuss criteria related to the "specificity of sport", which might impact on the final amount due to be awarded to Hearts. They mentioned that Hearts should have paid transfer compensation to Arbroath club, which was a consideration which should not have factored in their claim against Webster for breach of contract legally,[55] but showed the club in a bad light in the realm of sport. The DRC also stated that Webster had served 5 years at Hearts, during which time the club had played a significant part in the Player's development and growth in profile as a footballer.

They stated that limiting the amount of compensation due to Hearts to the residual value of the contract would "undermine the principle of the 'maintenance of contractual stability'", and it would inadequately compensate the injured party.

The DRC decided that the final amount that Webster had to pay Hearts was GBP 625,000. This amount was based on the residual value of the playing contract with Hearts in Webster's 1st year with Wigan, and multiplying this amount by a co-efficient of 1.5.[56] Finally, as per the Regulations,[57] Wigan was found to be jointly and severally liable for the compensation amount for assumed induced breach of contract. None of the 3 parties were satisfied with the decision and they all appealed the decision to the CAS.[58]

4.4.5 CAS Decision

One of the most obvious and important point of contention was made by Wigan during the CAS hearing. They stated that the DRC had contravened Article

[55] It is the responsibility of Arbroath club to claim against Hearts if they have not been paid the training compensation which they are entitled. Although Hearts have an obligation to pay this amount, it has nothing to do with how much they should be compensated from Webster as a result of breach of contract.

[56] The method of calculation for the figure of 1.5 as a co-efficient remains questionable at best, and there is no indication, statutory, jurisprudential or otherwise, whether this figure came from.

[57] Article 17.2 of the 2005 Regulations.

[58] As per Article 63 of the FIFA Statutes.

13.4f)[59] of the Rules Governing the Procedures of the Players' Status Committee and the DRC by failing to give adequate explanation for the reasons of the decision they made against Webster and Wigan. The CAS agreed with Wigan stating that the FIFA DRC had failed to give a proper account of the manner in which they calculated the sum of GBP 625,000 awarded against Webster and Wigan.

> [I]n the final analysis it is impossible to understand from reading the decision what weight was giving to what criteria determining the quantum (GBP 625,000).

The CAS Panel dismissed the decision of the DRC and decided to make their judgement on the matter, based on R57 of the CAS code.[60] They stated that because of the absence of a clause in the contract which would specify the amount of compensation that would be paid in the event of a breach of contract; it was the duty of the case to determine the level of compensation, on the basis of article 17 of the Regulations.[61]

The Panel decided that they would not consider compensating Hearts for the training of the Player because this was not one of the criteria discussed in Article 17. Perhaps it was their view that the consideration one reviews in exchange for successfully training a Player is the sporting benefit gained by having a talented player in one's squad rather than having a Player who is incapable of contributing to the overall team performance. In other words, you train a player in order to help your team play well on the field, not to sell him later on.[62]

In order to determine the appropriate level of compensation according to Article 17 of the Regulations, the CAS needed to take into account three criteria.

1. The national law of the country concerned.
2. The specificity of sport.
3. Any other objective criteria.

The CAS did not accept Hearts request to have the amount of compensation calculated according to the rules and principles of Scottish law regarding damage for breach of contract (*restitutio in integrum)*. They said that Article 17 only required that the adjudicating body make their award for damages with *due consideration* for the law of the country concerned. In other words, it is not necessary to calculate the amount in accordance with the national law, but rather to contemplate whether the award will infringe the principles of the national law concerned.

---

[59] Article 13.4f)—Written decisions shall contain… f) the reasons for the findings.

[60] Article R57—The Panel shall have full power to review the facts and the law. It may issue a new decision which replaces the decision challenged… .

[61] One would assume that *some* compensation was to be paid because of the first sentence of Article 17 of the Regulations. "In all cases, the party in breach shall pay compensation."

[62] However, these days with the increased role business has to play in Sport and the current global financial climate. Some clubs make their living just by training and selling quality footballers.

The CAS then considered how they should evaluate "specificity of sport" when determining compensation. They took the view that the specificity of sport was about balancing the need for contractual stability with the need to ensure the free movement of players.[63]

The Panel took the view that the "protected period" was a measure which existed in order to preserve contractual stability. They believed it existed in order to give players and clubs bans and suspensions if they unilaterally terminated the contract within a certain number of years since the commencement of the contract.

Furthermore, they stated that even if the protected period has expired the level of compensation for the unilateral breach of contract should not act as punishment nor enrichment for said breach. The Panel said the following about compensation:

> [It] should be calculated on the basis of criteria that tend to ensure clubs and players are put on an equal footing in terms of the compensation they can claim or required to pay.[64]

One of the most important things to be drawn from this decision was when the Panel stated that:

> It is in the interest of the football world that the criteria applicable in a given type of situation… be as predictable as possible.[65]

In order for contracting parties to know what the potential damages are when they are about to enter into an employment contract with another it is important that the CAS, or whomever the adjudicating body in the future is, sets out a sound precedent which can be referenced and followed by contracting parties and judges alike.

For this reason the CAS refused to consider Heart's GBP 4,000,000 valuation of Webster. They stated to consider this as part of the damages would both enrich the club and punish the Player which was not the goal of Article 17, nor the objective of the CAS. It had not been mentioned in the contract between the two parties as an amount to be considered in the event of breach of contract, and the CAS stated that even if it had there would be no moral or judicial justification for the existence of such a clause; the merits of said clause would have to be examined.[66]

The CAS also refused to considered the GBP 75,000 request from Hearts for the amount that they paid to Arbroath club and sated that this matter should have been resolved during the contract with Webster and was not a matter for discussion.[67]

---

[63] Para 132 of the Decision.

[64] Para 138 of the Decision.

[65] Also para 138 of the Decision.

[66] Para 139 of the Decision.

[67] Para 140 of the Decision—When you review their request to cover the purchase cost of almost GBP 100,000 for the Player together with their request for GBP 4 million; the Club appears to be claiming GBP 3.9 million for the training of the Player, a Player with which they have played a huge amount of games and also benefited from said training. Furthermore, they said that attaching the transfer cost to a Player after he had unilaterally breached his contract would be the realm of Sport back to the "pre-Bosman days where freedom of movement was unduly hindered by transfer fees."

The CAS also said that the remuneration and consideration to be received by the Player under the terms of his new contract was no subject to review because it was not focusing on the content of the employment contract which had been breached, and could be seen as punitive in nature.

4.4.5.1 Compensation Awarded to Hearts

The CAS stated that they believed the most suitable criterion to consider in accordance with article would be the remaining salary due to the Player. They said that just as a Player is entitled to receive the remainder of his salary if his contract is unilaterally terminated by his employer, the club should be entitled to claim a similar amount of money against the Player. In this that amount was GBP 150,000.[68] The Panel stated that the criteria of Article 17.1 of the Regulations were not necessarily cumulative and they couldnot find any other reason to award with more damages than the value of the outstanding salaries of the Player.[69]

The Panel also said that the GBP 150,000 should carry with it the rate of 5% annual interest rate from the date of the breach. They stated that because neither of the parties contested this rate of interest imposed by the FIFA DRC that they saw no reason to change it.

4.4.5.2 Several and Joint Liability of Wigan

In accordance with Article 17.2 of the Regulations, the CAS determined that Wigan shall be jointly and severally liable for the payment of the compensation paid to Hearts. Wigan contended that they should not be held liable because they had no part to play in Webster's decision to unilaterally terminate his contract and leave Hearts.

While Wigan protested their innocence and in this instance there was no reason for the Panel to doubt otherwise, however, the wording of Article 17.2 was not conditional on fault and Wigan did not present any real evidence to demonstrate that Article 17.2 should be interpreted in any other than the literal sense.

4.4.6 Commentary

4.4.6.1 Expanding on the Specificity of Sport or Equity

The decision made by the CAS in the Webster case is by all means a legally sound decision. The CAS has taken into account all three criteria which should be

[68] Para 153 of the Decision.

[69] Para 154 of the Decision.

reviewed when awarding compensation because of an Article 17 breach of contract.

1. The award is made with due consideration for national law.
2. The award takes into account the specificity of sport.
3. The award considers objective criteria; in this case the future salaries owed to the Player.

However, there is a stark contrast between this case and other Article 17 breach of contract by the Player cases: the amount of money awarded to the Club at the end of the proceeding.

In recent years we have seen Mexes[70] (previously to Webster) condemned to pay €7,000,000, Matuzalem[71] condemned to pay €12,000,000 and Mutu[72] (both *post-Webster* awards) condemned to pay €17,000,000,[73] whereas in the Webster case we saw Andy Webster[74] given a GBP 150,000 sanction. These cases are not only distinctly different because of the vast discrepancies in the levels of compensation awarded. This could be explained simply by examining the difference in quality, and subsequently pay, and acquisition costs of the Players. The main difference between the three cases and Webster is the approach of the CAS to the award with regard to the "specificity of sport".

While the CAS does not specifically state that one of the criteria that was considered when they awarded damages against Andy Webster in favour of Hearts was the Club's treatment of the Player. It is clear that the Arbitration Panel were hesitant to grant a big award in favour of a club who had so badly mistreated one of their most promising players. Thus, it seems that the "just cause" that Andy Webster initially used to end his contract and then replaced by Article 17, was into the arbitrator's mind.

As I said, Andy Webster had played a large part in Hearts' run in the Scottish Cup competition and he was denied a place on the playing field in the final, which they won on penalties, because of the contractual dispute he was having with the club. He was bad mouthed in front of the press by his employers, and he was mistreated within the club. They asked him to sign a new contract, and when he said no because he believed his playing career was destined for bigger and better things and also because of the treatment he has received during the previous month, Hearts representatives tried to, in a way, force him into renewing his deal.

Without saying so, the CAS took the human element of sport into consideration and evaluated the behaviour of each of the parties when making their final award. Webster, a Scottish international, had probably, with no disrespect intended,

[70] TAS 2005/A/902.

[71] CAS 2008/A/1519.

[72] CAS 2008/A/1644.

[73] The three figures are proximate and not intended to be read as the actual amounts awarded by the CAS, but as round numbers to emphasis the difference in amounts awarded to the parties.

[74] CAS 2008/A/1644.

grown too big for a club of Hearts' stature. Rather than handing in a transfer request and demanding a move, Webster was passive in his behaviour and just chose *not to resign* with Hearts. He was treated badly as a result, and when one party has acted maliciously towards another they do not deserve to be rewarded for said bad behaviour. This can be called criteria within the realm of specificity of sport, but not overtly mentioned at trial, or simply equity, but it certainly had a part to play in the decision-making of the CAS.

4.4.6.2 The FIFA Regulations; Article 17

> In all cases, the party in breach shall pay compensation, Subject to the provisions of Article 20 and annex 4 in relation to Training Compensation, and unless otherwise provided for in the contract, compensation for breach shall be calculated with due consideration for the law of the 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 of contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years, the fees and expenses paid or incurred by the Former Club (amortised over the term of the contract) and whether the contractual breach falls within a Protected Period.

Article 17 is really well intentioned. It is designed to protect something which is surely essential to the preservation of world football; "The Maintenance of Contractual Stability." The common idea of the EU Commission and FIFA to "maintain the contractual stability" is something to follow in order to avoid the possible lack of fair play within a competition. Competitors need to know that few changes are going to be done without an agreement between the parties involved and that a club could prepare its team and the consequent championship in which it participates without sudden shocks of players leaving just before the beginning of the season.

But, in case that such shock happen, the players and the inducting clubs shall have a sporting sanction if the breach is done during the so-called "protected period" and always an indemnity to pay within or outside that period.

And, it was also drafted in order to give clubs and players an idea of how much compensation they may have to pay to each other in the event of unilateral termination of a contract without an indemnification clause. But that idea is not clear in any case and it will be different from case to case.

While some of the criteria which are discussed carry with them merit such as the due consideration for national law, and the specificity of sport. The article is sometimes poorly worded and often misinterpreted.

First and foremost, there is a line which states:

> [C]ompensation for breach shall be calculated with due consideration for the law of the country concerned, the specificity of sport, and any other objective criteria.

This sentence is poorly written, and although it may seem nit-picky it does not make grammatical or logical sense. The "problem" word is *other* when referring

to "other objective criteria." The reason why this word cannot be there is because the word other implies that both the national law of the country concerned and the specificity of sport are already objective criteria. We can see from case law and the fantastic amount of academic commentary about the "specificity of sport" that it is not a well defined category and cannot be seen as objective criterion.

Secondly, and most importantly with regard to the Webster decision, the line which reads "the remuneration and other benefits due to the player under the existing of contract", is continuously misinterpreted by the courts, and only recently have they changed their mind with regard to the interpretation of the intentions of the drafters.[75]

This sentence was surely included in Article 17 in order to provide indication to what amount of money should be given to *the player* if his club unilaterally breached the contract. In other words, if the club cancels the contract without just cause, they must pay the player the remainder of the wages he was due to receive during the contract.

However, in this decision both FIFA and the CAS believed that this amount of money should be considered as a means to determine the compensation owed to a club when the player unilaterally terminated the contract. This is wrong. The club is effectively getting "double compensation" in this scenario. When the player breaches his contract and leaves the club, the employer no longer has to pay their employee. Therefore the club is already being "awarded" this compensation. The remaining value of the contract no longer must be paid to the player; the club can keep this money.

The CAS say that they do not wish to consider the amount of money spent training the Player because there is no provision made for such a consideration in Article 17. This is also incorrect. Article 17 says that "other objective criteria" should be considered this idea leaves a lot of room for judicial interpretation. It also says that an example of said objective criteria could be "the fees and expenses paid or incurred by the former club." It is clear that this could be and perhaps should be interpreted as the money spent on training the player during his time at the club.

While it is true that different clubs spend different amounts on training players, it could also be said that the clubs with higher quality training facilities who spend more money on the development of their players, give their players a higher probability of success in the world of professional football, and perhaps even develop better players. Therefore, when the clubs choose to sell these players they should be except to recoup higher figures for the sale of their assets.

Webster, by breaching his contract, could have denied Hearts such an opportunity, which means that the money which they had spent developing his talents and skills was lost. Although they were able to benefit from said training because

[75] They choose not to consider the outstanding salaries of the player as damage caused to the club in the Mutu decision because they recognise that these are salaries which Chelsea will not have to pay the player anyway.

of the performances of Mr. Webster on the football pitch while a member of the club. But the main issue is that a football player is also an employee and when someone decides to end prematurely his contract, he would not be asked to pay any "compensation" for leaving his job. Football and sport in general have that "specificity" that has created Article 17, which is that a competition is something more than just a business or a mere employer−employee contractual scheme.

So, in one side there is the freedom for employees/footballers and in another one there are the "sporting aspects" of a contractual relationship, which is not related only to the relationship between those two parties, but have to share it with other competitors (clubs) and a competition (League).

And, there is still a business aspect of football which should have some room to be recognised, which is the transfer value and the sale of a talent like Webster, a talent which had been brooded by the club for several years, would have generated a lot of revenue, and perhaps this is why the Webster award was so misunderstood as the way to end contracts without having to pay anything else but the remaining of the contract. Of course this appears to be a mistake as soon another sputnik was to be seen in the sky: Matuzalem. But this is another story…

Finally, this case was compared to Bosman. It was said that it might have a similar "liberating effect" on the rights of players, and their freedom to move between clubs whenever they wanted to. It was frequently stated that players would have the ability to buy-out their contracts, without playing suspension, if they waited until the protected period of their contract had expired and they paid the remaining salaries owed to the club.

This information was incorrect, for two reasons. First because, in countries where indemnification clauses are legal, and contracts where said clauses are inserted the opportunity to have an Article 17 case heard is virtually nonexistent; and second because, the decision in the Webster case was very facts specific and had a lot to do with the behaviour of the parties.

It will be seen later in the Matuzalem[76] case why said jurisprudence did not last and the "Webster buy-out" theory did not manifest itself in the world of sports law.

4.5 CAS 2008/A/1519 FC Shakhtar Donetsk (Ukraine) v. Mr. Matuzalem Francelino da Silva and Real Zaragoza SAD and FIFA

Juan de Dios Crespo Pérez

The Matuzalem Award is about breach of contract outside the protected period without just cause. The Panel ordered Matuzalem to pay FC Shakhtar Donetsk compensation of

[76] CAS 2008/A/1519—FC Shakhtar Donetsk (Ukraine) v/Mr. Matuzalem Francelino da Silva (Brazil) and Real Zaragoza SAD (Spain) and FIFA.

€11,858,934 plus interest. In calculating the compensation the Panel considered the non-amortised transfer sum and the sports-related damages. However, it did not accept the contractual buy-out clause as the basis for calculating compensation. Contrary to the Webster ruling, with the Matuzalem Award the CAS approached the positive interest in calculating compensation. Against this background the author notes that My first thought was that Article 17 of the FIFA Regulations for the Status and Transfer of Players is like the 1001 Nights of the legendary Arabian tales: 'all different and marvellous'.

4.5.1 Preamble

After the revolutionary road that the Webster's case seemed to have opened in 2008, only a year after appeared a new award that hit the news and became the latest of the legal sports law gossip.

In that particular moment, as the lawyer of the winning side, the Ukrainian club Shakhtar Donetsk, I received a lot of felicitations and calls regarding the final decision of one of the (again) leading cases from the CAS.

One of them, from a journalist, focused his questions not on the legal points or on the issues where that award could drive the football world but merely on how I feel to have won against myself.

I was really happy, as any lawyer is when winning such a relevant dispute but that precise thought has not crossed my mind. However, I commenced to wonder about that remark and I immediately reminded that my first thought was that Article 17 of the FIFA Regulations for the Status and Transfer of Players is like the 1001 Nights of the legendary Arabic tales, "all different and marvelous". So, the contractual stability and the possibility to terminate a professional contract by a footballer *ante tempus* was not to be decided on a single angle but on a case-by-case basis and each proceedings will end with a different award, depending on several factors and multiple criteria.

4.5.2 Facts

On the 27th of November 2007, The FIFA Dispute Resolution Chamber awarded FC Shakhtar Donetsk, the sum of 6,800,000 € to be paid by Matuzalem Francelino da Silva, hereinafter "Matuzalem" or "the Player", and for the first time explained how and why the final sum of a compensation has been reached. As it is well known, FIFA deciding bodies were not specially prepared to give their thoughts about how an amount for indemnity is reached when a contract has been breached.

Matuzalem arrived at Shakhtar Donetsk from Brescia Calcio Spa, hereinafter "Brescia", in the summer of 2004 for a fee of €8,000,000. In two seasons the player had developed into the team's most talented player and was appointed as the captain.

On the July 2 2007, Matuzalem terminated his playing contract with his Ukrainian club, Shakhtar Donetsk. He had served three years of a five-year playing contract worth approximately €1,200,000 each year. When Matuzalem terminated his contract, his club was two weeks from the commencement of their UEFA Champion's League qualification rounds. Matuzalem signed a playing contract with Real Zaragoza for three seasons with an annual remuneration of approximately €1,000,000 not including bonuses on 19 July.

On July 17 2008, the Player was transferred to SS Lazio Spa, "Lazio", after the clubs and the Player agreed to a loan agreement. Included in the loan agreement was an option to purchase the Player's registration rights for €13,000,000 or €14,000,000 plus VAT.[77]

Matuzalem signed a three-year playing contract with Lazio, the final two years of which would become active should Lazio choose to exercise their purchase option. The annual salary for the first season of this contract was €895,000 and €3,220,900 for the second and third seasons.

Matuzalem decided to terminate his contract with Shakhtar prematurely and unilaterally using the possibility given by Article 17 of the FIFA Regulations. The Club informed him that he could only extinguish his contract and join a new club if he paid the €25,000,000 buy-out clause stipulated in Article 3.3 of the Player's contract.

It is likely that the Player had received advice that he would be able to terminate his contract prematurely and he would only have to pay his former Club the amount that was owed to him as future contractual salaries.

He also would not receive any sporting sanctions as the "Protected Period[78]" of his contract had expired. This would have been strict compliance to the jurisprudence set by the CAS in the *Webster*[79] decision.

4.5.3 Main Submissions and CAS Decision[80]

4.5.3.1 Parties' Submissions

Both parties appealed the FIFA DRC decision issued on the 12th of November 2007 to the CAS. The CAS decided that they were competent to hear the dispute in

[77] 14 million euros if Lazio qualified for the Champions League.

[78] A period of time, determined by FIFA, at which, depending on the age of the Player when he signs the contract, the Player may unilaterally breach his contract without receiving a playing suspension.

[79] CAS 2007/A/1298 Wigan Athletic FC v/Heart of Midlothian; CAS 2007/A/1299 Heart of Midlothian v/Webster and Wigan Athletic FC; CAS 2007/A/1300 Webster v/Heart of Midlothian.

[80] CAS 2008/A/1519-1520 Shakhtar Donetsk v/Matuzalem and Real Zaragoza.

accordance with CAS[81] and FIFA Statutes,[82] the order of the procedure of the two parties[83] and the decision given by the FIFA DRC.

Shakhtar Donetsk made several requests to the Panel. They requested that:

- The FIFA DRC decision be annulled and that the CAS issue a decision stating that the €25,000,000 clause was an indemnification clause, and not a transfer clause,[84] and that they award the Club €25,000,000.
- The CAS award compensation to the Club as per all the objective criteria contained within Article 17 of the CAS Regulations.[85]
- The CAS force Matuzalem to pay 5% annual interest on the amount awarded from the date the Player broke his contract, the 2nd of July 2007.

Matuzalem and Real Zaragoza filed a joint answer and appeal to the Panel with some of the following requests for relief[86]:

- To reject the appeal lodged by the Club.
- To set aside the challenged DRC decision.
- To establish that the amount of compensation due by the Player is €2,363,760 or €3,200,000.

Both parties also requested that the legal expenses and costs of the arbitration procedure were paid by the other party.

4.5.3.2 The Main Issues and the Decision

The Panel noted that the main issues to be considered when deciding this dispute were the following:

A) Was Shakhtar Donetsk entitled to any compensation?
B) If so, how much?
C) Are there any reasons to adjust the award given by the FIFA DRC?
D) Is Real Zaragoza jointly and severally liable for the payment of said compensation?

---

[81] Article R47 and R57 of the CAS code.

[82] Article 60ff. of the FIFA Statutes.

[83] Para 47 of the Decision.

[84] If this clause was met it would give any club the right to negotiate a playing contract with Matuzalem.

[85] Point 28 of the Decision the Club requested (in Euro):

- 4,788,431 for non-amortised expenses
- 2,400,000 for the remuneration of the player
- 5,000,000 for the *lucrum cessans* – They mentioned the USD 7,000,000 offer made for Matuzalem by U.S. Cittâ di Palermo Spa and stated the minimum amount that should be considered for *lucrum cessans* is the value of an offer made by another club
- No less than 5,000,000 for sports-related damage.

[86] Para 30 of the Decision.

Point (A)

The Panel duly noted that neither the Player nor his representatives ever argued the existence of just cause or sporting just cause for the breach of the contract. Therefore Matuzalem was essentially admitting that he had rescinded the contract unilaterally and without just cause.

According to the first sentence of Article 17.1 of the Regulations on the Status and Transfer of Players, hereinafter "the Regulations" or "the FIFA Regulations", "in all cases, the party in breach shall pay compensation."

Therefore it was pretty clear that given the unilateral and premature nature of the termination of contract and because of the absence of any just cause or sporting just cause.[87]

Point (B)

Clause 3.3 of the employment contract between the parties which stated that:

> During the validity of the Contract, the Club undertakes—in case the club receives a transfer offer in amount of €25,000,000 or [more] the club undertakes to arrange the transfer within the agreed period.

The CAS came to the conclusion that this clause could not be interpreted as an indemnification clause and therefore they would have to calculate damages in light of Article 17. They noted that the calculation should be made with "due consideration[88]" for:

- The law of the country concerned
- The specificity of sport
- Any other objective criteria including:
  - The remuneration and other benefits due to the player under the existing and/or new contract.
  - The amortised fees and expenses paid or incurred by the Former Club.
  - Whether the breach occurred within the protected period.[89]

The Panel considered the aforementioned elements in mixed order in the following manner:

[87] Which allow parties to breach their employment contracts according to Articles 14 and 15 of the Regulations, respectively.

[88] As per Article 17 of the Regulations.

[89] Para 76 of the Decision.

The Remuneration Element

The Panel deemed that very important non-exclusive criteria mentioned in Article 17 para 1 of the FIFA Regulations is the remuneration and other benefits due to a player under the existing and the new contract. However, they also felt that the *difference* between the value of the new contract and the value of the old contract should be considered as it may give an appropriate indication of the "actual market value," which may give a better indication of the "actual loss" suffered by Shakhtar for their player unilaterally breaching their employment contract.

The Panel observed that the yearly remuneration of Matuzalem at Shakhtar at the moment of unilateral termination was approximately €1,200,000.

The Panel stated, after a series of calculations,[90] that the Player would be paid €1,000,000 plus bonuses for the 2007/2008 season and €2,445,600 plus bonuses in the 2008/2009 season.

The Panel took the view that because third parties (Zaragoza and Lazio) and the Player himself valued the services of the Player at this level that it would be appropriate to consider this as part of the calculation of the loss suffered by Shakhtar Donetsk.

The Value of the Services

The Panel was keen to acknowledge that the services provided by a player are traded and sought after and therefore worth legal protection when determining the economic value of a unilateral breach of contract.[91]

The Panel then examined how much both SS Lazio and Real Zaragoza valued the services of the Player per year by examining their loan agreement and the average yearly salaries they would pay the player.[92] SS Lazio had declared that they were willing to pay an average €14,000,000[93] to transfer the player, plus €7,112,267 in salaries to the player over three years time[94]; they valued the player at €7,336,800 per season. Real Zaragoza were willing to sell the player for an average of €14,000,000 plus pay the player €6,546,667 in salaries to the player over three years time[95]; they valued the player at €5,640,000 per season.

The Panel was not willing to consider the penalty clause of €22,500,000, should the player not return to Real Zaragoza following the loan, as an indication of the value of the services of the Player. They believed that from the evidence submitted

[90] Found at paras 96–100 of the Decision.

[91] Para 103 of the Decision.

[92] Para 107.

[93] The option clause in the loan agreement was between €13,000,000 and 15,000,000.

[94] €2,445,600—Average yearly salary while on loan at SS Lazio.

[95] 2007/2008—€1,000,000; 2009/2010, 2010/2011—€2,320,000.

by Player and the Club that the amount of €22,500,000 was designed to act as a deterrent rather than a valuation.

Lost Earnings: Missed Transfer Fees

The Panel recognised that the loss of earnings or *lucrum cessans* could be included when calculating the damages for an unjustified termination of an employment contract.[96]

The major point of discussion regarding the loss of earnings is the club's lost opportunity to sell the player and receive compensation because they have terminated their contract early.

> [C]laim of his former club for the opportunity to receive a transfer fee that has gone lost because of the premature termination of the employment contract.[97]

The Panel stated that offers made by third parties for the player could help determine the value of the damage suffered by the club for two reasons.

i. Offers could help determine the value of the services of the player.
ii. The loss of the transfer fee may be a compensable damage head.[98]

The Panel said that the €7,000,000 offer for Matuzalem's services from Palermo should not be immediately disregarded because Shakhtar Donetsk turned said offer down. Although no direct damage was suffered by Shakhtar Donetsk, the offer could still be considered as a watermark in order to find the best valuation of the Player's services. The Panel did state that in the dispute, Shakhtar Donetsk was not entitled to claim the €7,000,000 offer from Palermo as a compensable loss of profits.[99]

The Fees and Expenses Paid or Incurred by the Former Club

According to Article 17 para 1 the fees and expenses that were required to obtain the player *should* be amortised[100] and taken into account when awarding compensation.

The Panel calculated the non-amortised value of the transfer fee to be 2/5 of €8,000,000 or €3,200,000 which was the fee Shakhtar Donetsk paid Brescia to

---

[96] CAS 2005/A/902 and 903, *Mexes and AS ROMA v/AJ Auxerre*, N 136; diss. CAS, *Webster Decision*, N 141 et seq.

[97] Para 117 of the CAS Decision; Cf. Haas 2009 at fn 156 et seq.

[98] A loss or hardship for which loses can be obtained—Depending on whether the club can prove that the timing of the termination infringed with their ability to accept an offer.

[99] Para 121.

[100] CAS 2006/A/1141, *Moises Moura Pinheiro v/FIFA and PFC Krilja Sovetov*, N 87; Ongaro 2009.

negotiate an employment contract with the Player. However, the Panel would not consider any solidarity contributions paid by Shakhtar as expenses[101] nor did they consider that the payment of agent's fees were linked to the transfer of the player, and they would not consider this in the amount to be determined for expenses incurred by the former club.[102]

Law of the Country Concerned

The Panel acknowledged that the amount of compensation awarded could vary depending on the laws of the country concerned, which is the law governing the employment contract between the player and the club; generally the laws of the country in which the club is domiciled.[103] However, the Panel concluded that in light of the submissions made by the parties to the dispute there were no particular arguments made in light of Ukrainian or Swiss law which could be taken into consideration by the panel in order to alter the amount of compensation due.

Additional Objective Criteria

It is important to note for future cases that the Panel stated that if the club could prove that as a result of the player's premature breach of contract that they were unable to fulfil their contractual obligations with a third party, such as a sponsorship agreement, then it would be possible to factor this into their determination of compensation.[104]

The Specificity of Sport

Finally the Panel considered the specificity of sport. The Panel recognised that sport plays an important role in society, as have sports organizations,[105] the courts,[106] the White Paper on Sport,[107] and even the European Commission.[108] They went on to justify the existence of the concept, and the concept serves the

---

[101] Para 128.

[102] The Panel also viewed agent's fees as potentially part of the costs incurred by the club to acquire the player, however in this case Shakhtar were not able to prove that such payments were linked to the transfer of the Player.

[103] FIFA Commentary on the FIFA Regulations, fn. 74.

[104] Para 151 of the Decision.

[105] http://www.fifa.com/aboutfifa/federation/releases/newsid=960669.html

[106] CAS, *Webster Decision*, N 131 et seq.

[107] COM [2007] 391 final.

[108] Treaty of Lisbon, 2007/C 306/01, para 124, revised Article 149.

Panel quoted the Panel from the *FC Pyunik*[109] decision to best explain what purpose the ideal serves.

> The criterion of specificity of sport shall be used by a panel to verify that the solution reached is just and fair not only under a strict civil (or common) law point of view, but also taking into due consideration the specific nature and needs of the football word (and of parties being stakeholders in such world) and reaching therefore a decision which can be recognised as being an appropriate evaluation of the interests at stake, and does so fit in the landscape of international football.[110]

In other words, the Panel will assess the amount of compensation that should be awarded according under Article 17, with adherence to the objective criteria listed in said article. Afterwards the Panel shall review the amount of compensation in light of the world of sport, and evaluate the decision's ability to protect the interest of sport. The Panel must make an award that is legally correctly and respects the specific nature of sport.[111]

4.5.3.3 Final Calculation

More criteria were considered by the Panel when discussing what should be the final amount of compensation awarded in light of the guidelines of Article 17,[112] the Specificity of Sport, and Articles 42.2 and 99.3 of the Swiss Code of Obligations[113]; however they did not sufficiently affect the outcome of the calculation to merit discussion in this article.

The Panel stated that the value of lost services of the Player would amount to €11,258,934, and the Player would have to pay an additional 6 months' salary because of the poor timing of his breach of contract.[114] Furthermore, in accordance with the request for relief from Shakhtar Donetsk and Swiss law,[115] the Panel awarded 5% annual interest on the sum of €11,858,934 payable from the 5th of July 2007.

---

[109] CAS 2007/A/1358, *FC Pyunik Yerevan v/Carl Lombe, AFC Rapid Bucaresti and FIFA.*

[110] CAS *FC Pyunik Yerevan* decision, N 104-10.

[111] Para 155 of the Decision.

[112] FIFA RSTP *et seq.*

[113] The Panel deemed that this was the applicable law to the present dispute: When a judge cannot establish the exact amount of ompensation then the judge may assess the amount of damages in a discretionary manner.

[114] The Player, who was the Club's most influential player and team captain, terminated his contract with the Club just a few weeks before the start of the qualification rounds of the UEFA Champions League.

[115] Article 104 para 1 of the Swiss Code of Obligations. NB. Swiss law was additionally applicable to the dispute because of FIFA's existence in Switzerland.

4.5.3.4 Joint and Several Liability

Article 17.2 of the Regulations says that the new club who contracts a player who has unilaterally terminated his contract shall be presumed jointly and severally liable.

The Panel confirmed the position of the DRC and the FIFA Regulations and held Real Zaragoza jointly and severally liable.

4.5.3.5 Costs

Both Parties had claimed costs against each other in the dispute, and the Panel took the view that because both parties had filed an appeal against the award of the DRC the costs should be shared by the parties. They stated that the costs would be paid 2/10 by Shakhtar Donetsk, 4/10 by Matuzalem and 4/10 by Real Zaragoza.

Finally, the arbitration costs of Shakhtar Donetsk would be equally split by Matuzalem and Real Zaragoza. They would have to pay CHF 7,000 each.

4.5.4 Commentary

This case was quite different from that of *Webster*, as the transfer amount was not amortised when the player terminated his contract, with two remaining years still existing and no renewal of contract was involved. So a sum was granted to the club for such pending amortization of the transfer fee.

Another amount was given on the basis of the "remuneration and other benefits due to the player under the previous and the new contract", which is a quite different position of the CAS award on Webster.

Finally, another amount was decided to compensate the "sports-related damage… in the light of the stability of sport" which is, also, a totally diverse application of Article 17 than that of the Panel in Webster's case.

All the parties appealed to the CAS and the novelty in the procedure at the CAS has been the presence of FIFA, which has requested to be a party, even though it was initially not admitted by Matuzalem and Zaragoza. This is a clear sign that FIFA wanted, at last, not to be taken out of the legal decisions of the CAS, contrary to its previous insistence not to be a party in the appeal.

4.5.4.1 The €25,000,000 "Buy Out" or Transfer Clause

The CAS clearly thinks that the way the clause was drafted indicates that it was a kind of a transfer clause or an offer to the player to ask a third club to pay the agreed amount as a transfer. This is acceptable, as the buy-out clause or indemnity clause should be drafted, in my opinion, clearly mentioning Article 17 and that the

sum specified is "the one due as compensation in the event of a unilateral breach, respectively termination of the contract by either of the parties".[116]

4.5.4.2 The Decision

The factual circumstances of the case were completely different to those in *Webster;* therefore the CAS did not apply the "test" developed in *Webster.* Instead they used several criteria, mainly the loan agreement between Real Zaragoza and Lazio with which to determine the value of the player.[117] They reviewed the figure reached in light of the hotly debated "Specificity of Sport[118]" and gave an award in favour of Shakhtar Donetsk for the amount of €11,858,934.[119]

The amount is widely explained in the award itself but let us face that the new evidences requested by Shakhtar before the hearing and given at that time, had made a total change in respect of the claim by Shakhtar itself and that was the way the Panel decided to follow.

The importance of the loan agreement, the new contract (after the previous one signed) between Zaragoza and Matuzalem and the labour contract between Matuzalem and Lazio (the loan was for one year but the contract for three…) was an indispensable tool for the Panel to decide the final indemnification. What is important to mention is that such documents have to be requested by Shakhtar in order to know their contents and they were initially denied by Matuzalem and Zaragoza but finally disclosed in the very same hearing, which was a sort of luck to the Ukrainian club, as it served finally for its purposes as it was widely used by the Panel in order to settle the final indemnity amount. Of course, the whole request made in the statement of claim by Shakhtar has to be reviewed with those new documents but it was worth to do it.

The CAS reached the most equitable decision they could, and gave some of the proverbial power back to the clubs at a time when top Player's can behave as mercenaries and hold billion dollar businesses for ransom.[120]

However, they have not been given the tools with which to issue a confident decision which sets a precedent and gives clubs and players an indication of what

---

[116] Point 74 of the Decision.

[117] They took the value of the lost services as being approximately €14,224,534 and €13,093,334 minus the salaries which they would not have to pay to the Player.

[118] €600,000 or the equivalent of approximately 6 months' salary was awarded solely in light of the specificity of sport.

[119] Plus an interest rate of 5% from the 5th of July—shortly after the player had breached his contract. This was in accordance with Swiss Law, Article 339.1 of the Swiss Code of Obligations; and Jurisprudence, Decision of the Swiss Federal Tribunal of 4 May 2005, in *re X c/Y*, case no. 4C.67/2005, consid. 6; Decision of the Tribunal Cantonal du Canton du Vaud of 20 February 1980.

[120] http://news.bbc.co.uk/sport2/hi/sports_talk/1105037.stm, http://soccerlens.com/andy-webster-and-g14/5528/

value a unilateral breach of contract may carry in the future. But, as I said in the preamble, this is something difficult to venture as each case has so different issues that it would be quite impossible to pretend to know what kind of indemnity should be paid.

4.5.4.3 The "Right to Terminate a Contract" by Article 17

The CAS state in their decision that,

> The authors of Article 17 of the FIFA Regulations[121] achieved a balanced system according to which the judging body has on one side the duty to duly consider all the circumstances of the case and all the objective criteria available, and on the other side a considerable scope of discretion,

The statement made by the CAS is absolutely correct. The drafters of Article 17 did indeed create an article which gives the decision-making bodies ample room with which to make a discretionary decision based on equity and fairness. However, the purpose of Article 17 is the "Maintenance of Contractual Stability.[122]"

The CAS goes on to state that:

> [A]ny party should be well advised to respect an existing contract as the financial consequences of a breach or a termination without just cause would be, in their size and amount, rather unpredictable.[123]

Unfortunately, the previous statement is contrary to the very ethos of stability itself. We have seen how different the awards in a unilateral breach case can be in the *Matuzalem* and *Webster* decisions.[124]

In the situation of unilateral breach we will have players and clubs who take a chance to breach the employment contract unilaterally because they will believe that their result will be better than had they observed their contract.

And to clearly sustain that Article 17 is not a weapon to use in any case, CAS stated that:

> However, a termination of a contract without just cause, even if this occurs outside of the Protected Period and following the appropriate notice period remains a serious violation of the obligation to respect and 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…[125]

---

[121] FIFA Regulations on Status and Transfer of Players 2008 edition.

[122] Suggested by the title of Chap. IV of the FIFA Regulation on Status and Transfer of Players 2008 edition.

[123] CAS 2008/A/1519—FC Shakhtar Donetsk (Ukraine) v/Mr. Matuzalem Francelino da Silva (Brazil) and Real Zaragoza SAD (Spain) and FIFA; CAS 2008/A/1520—Mr. Matuzalem Francelino da Silva (Brazil) and Real Zaragoza SAD (Spain) v/FC Shakhtar Donetsk (Ukraine) and FIFA.

[124] Comparing and contrasting final awards of approximately €11,858,934 and £150,000.

[125] CAS award on Matuzalem, point 63.

4.5.4.4 Future of Article 17

The future is simple. Either the CAS sets out a test which has certain definable objective criteria which will govern each Article 17 dispute, or FIFA redraft Article 17 and make it more definitive, in order to increase contractual stability. Or clubs should agree with players on buy-out or indemnity clauses.

FIFA have stated that "Contractual stability is of paramount importance in football, from the perspective of clubs, players, and the public.[126]" The existence of Article 17 goes some of the way to address this issue; however, it is not drafted in a sufficiently comprehensive manner in order to ensure real solidity of contract between clubs and players.

The article mentions the calculation of compensation for breach of contract in light of the "specificity of sport," a concept which they fail to define in their regulations.[127] Furthermore they say that "any other objective criteria" should be defined without defining objective. This infringes the ethos of the word itself. It orders for something to be objective it must be defined, and not left for someone to give their *subjective* opinion of the constitution of objective. Perhaps an exhaustive list not entirely necessary but a list including more provisions than:

1. The remuneration and other benefits due to the player under the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years,
2. The fees and expenses paid or incurred by the former club (amortised over the term of the contract),
3. Whether the contractual breach falls within the protected period,[128]
4. The sporting loss and the specificity of sport.

The latest has been, for the very first time, included in a CAS award regarding a breach of contract and even though, the six months salaries that the Panel has thought would be enough for the sporting loss (within the specificity of sport) this should be discussed and surely would be in the future.

We have to face that players, when reaching a certain point of their career and due to personal or external matters as pressure of the club to renew, non-agreement on the new salaries, family issues, sporting needs of the player or whatever other reason, will utilise Article 17 and this should not be considered as an illegal treatment to the clubs but merely as an abrupt termination of the contract established in the Regulations that might permit clubs to obtain an indemnity for such termination.

The way resolve the issue of how much compensation shall be awarded in case of a unilateral termination of contract is simple: Contract.

---

[126] FIFA Circular Letter 769.

[127] It is arguable that nobody has managed to give an adequate definition of the specificity of sport—Not the EU courts, not the Lisbon Treaty, and not FIFA.

[128] Article 17.1 RSTP.

Where possible[129] the parties should seek to impose reasonable, variable, structured and tiered indemnification clauses where the contract specifically states how much the parties will have to pay each other in case of a unilateral breach. The value can vary based on the remaining years of the contract, the performance of the player,[130] the performance of the team or any other criteria the parties deem appropriate.

For example, a player signs a 5 year long employment contract. If in the first year of the contract either party breach, they will have to pay the other party 50 million. In the second year they will have to pay 40 million, and so on and so forth. Of course, this is only one of the criterion to be used with that kind of "changing clause" but we should think about it as the only way to avoid decision that could not be the one that we expect.

This is the future; a clause which encourages "*the maintenance of contractual stability*" and, if not, which permits to objectively know the detailed and contractually agreed criteria to apply when the contract is breached.

4.6 CAS 2005/A/876, 2006/A/1192, 2008/A/1644 Adrian Mutu v. Chelsea

Wil van Megen

In 2003 Mutu was transferred from AC Parma to FC Chelsea at a price of €22,500,000. But the extended 'Mutu saga' began in 2004 when Mutu had taken cocaine on several occasions. Mutu was thus terminated by FC Chelsea. Then several panels of judges (namely FAPLAC; FIFA DRC; CAS; Swiss Federal Court) were occupied with this dispute over several years. Ultimately the CAS ordered Mutu to pay compensation of €17,173,990 plus interest. The amount was based mainly on the non-amortised FC Chelsea transfer sum. The author believes this was not the right conclusion. Will van Megen draws a comparison with the Oliver Bernard ruling of the ECJ. In his view a transfer sum cannot be used as benchmark for calculating compensation. At its most extreme, Mutu became the victim of Chelsea's wealth, even if he did breach the rules.

4.6.1 Introduction

In the dispute between Adrian Mutu and Chelsea we now have landed at case nr. 7, the decision after an appeal against the last decision of the Court of Arbitration for Sport (CAS) of the Swiss Bundesgericht. The dispute is about the dismissal of Mutu by Chelsea for a positive doping test in 2006 and the consequences this termination has had for the player.

---

[129] In jurisdictions where indemnification clauses are permitted.

[130] It should be noted that performance-related unilateral breach clauses may not be the most desirable criterion as they encourage player's who seek to prematurely terminate their contract to perform poorly, thus encouraging either a sale or a lower level of contractual compensation.

In the latest decision CAS confirmed the FIFA DRC ruling that Mutu has to pay 17 million euros compensation to Chelsea.[131] The largest part of this amount consists of the non-amortised transfer sum that Chelsea paid to Mutu's former club Parma. Because of the approaching deadline for payment Mutu's current perspective is a career threatening ban as he almost certainly will not be able to pay this amount. The fact that the player had a recent new doping ban is not helpful either but irrelevant for this case.

4.6.2 Some of the Backgrounds

After a promising start with the club Chelsea became more and more dissatisfied with Mutu's performance. Chelsea admitted that they deliberately targeted the player because they suspected him of using drugs and subsequently dismissed him. According to Professional Footballers' Association boss Gordon Taylor, Chelsea target-tested the player with a view to getting rid of him. "The attitude may be zero tolerance but it's not a policy we would approve of." "Chelsea have a duty of care. We would expect an interest in the moral and social welfare of its employees." Additionally, the Premier League has always had a great tradition of rehabilitating addicted players.[132]

Taylor considers it astonishing that Chelsea is not prepared to discuss the situation with Mutu and set an example, encourage rehabilitation and get him back on track.

4.6.3 The Legal Aspects

It is time for an analysis to see how the case could end up like this. The result of a short overview is an astonishing range of mistakes and misconceptions by all deciding bodies.

4.6.4 Overview of the Separate Cases

We can see that in all cases a number of elementary things went wrong. Read and shiver.

---

[131] CAS 2008/A/1644, 31 July 2009.

[132] BBC Sport: Blues suspected Mutu of drug use, http://news.bbc.co.uk/sport2/hi/football/teams/c/chelsea/3964801.stm

4.6.5 The First Case

1. The first case was brought before the arbitration body of the English premier league, the Football Association Premier League Appeal Committee (FAPLAC). This panel concluded that the dismissal of Mutu was justified. However, the FAPLAC did not take a decision about the compensation to be paid by Mutu but referred this part of the matter to the FIFA Dispute Resolution Chamber (DRC). In fact this must be considered a strange decision. In order to judge whether a dismissal is justified it is absolutely necessary that the judging panel is aware of all relevant facts and circumstances of the case. The compensation to be paid is most certainly a relevant item in this process. By referring the case to another body for compensation this part of the circumstances could not be considered by the FAPLAC.
2. The second thing that comes to mind is the fact that the FAPLAC did not consider the specificities of sport in this case. There are hardly any examples of top players being dismissed by their club even after serious misconduct. There are several examples in the English Premier League. The Boyer—Dyer scuffle of 2 April 2005 is a notorious example. Before the eyes of millions of spectators two team mates fought with each other during a match. Craig Bellamy has been involved in several misconduct charges and Joey Barton was even imprisoned without being dismissed.
   The normal thing to do for a Premier League club in such a situation is to sanction the player with a fine and/or a period of non-payment of salary. The latter sanction is made possible by the collective bargaining agreement between the clubs and players' organization PFA. Eventually a transfer of the player to another club can take place. In this case the club chose for an immediate dismissal which was only possible because of the overwhelming wealth of the club. Chelsea simply could afford to take another direction and dismissed the player without being able to overlook the consequences. Most probably they did not care. In fact they took the risk of getting nothing but were prepared and able to accept that risk. In recent major transfers they did not see any problem with amortising large amounts for failed transactions like those of Shevchenko and Crespo. It is not a strange conclusion that Mutu is primarily a victim of the prosperity of Chelsea as no other club in the world would have acted in this way. Any other club that wanted to get rid of a player like Mutu would have transferred him to another club in order to control damages. In fact this is an obligation for a damaged party. This practice in English football is a very relevant specificity of sport which the FAPLAC did not take into account in their judgment.
3. The third point that pops up is the referral by the FAPLAC to the FIFA DRC for the establishing of the compensation. It has to be noted that the FIFA DRC is only competent in cases that have an international dimension. Such a dimension exists e.g. when a player has a different nationality as the country in which the club is based. In this case Chelsea is based in England whereas

Mutu has the Romanian nationality. This means that if Mutu would have been an Englishman the case could not possibly be referred to FIFA. In that case it would have been up to the FAPLAC to decide on the compensation themselves. Off course that would only have been possible according to the contract and relevant national regulations. This means that the case could only be referred to FIFA because of the nationality of Mutu. This distinction purely on the basis of nationality must be considered discrimination as described in national and international legislation.[133] As it concerns the nationality of the person concerned this is direct discrimination and as such it cannot be justified. At no stage this was recognised. The fact that Mutu agreed with the referral of the case cannot be considered decisive.

4. The fourth point is the problem that occurs when we look at Article 17 of the FIFA Regulations on the Status and Transfer of Players (RSTP). This article constitutes a liability for the player *and his new club* in the case where a player breached the contract with his former club without just cause.[134] Because of the fact that the case was brought before the English FAPLAC this made the involvement of Mutu's new Italian club in the procedure impossible as the FAPLAC has no jurisdiction over Italian clubs. It is the question if FIFA could have involved the Italian club after the referral to the FIFA DRC. As it did not happen this matter remains unsolved.
5. The FAPLAC decision was appealed by Mutu with CAS.[135] Also here it was not possible for the panel to judge the case in full because the financial consequences were not clear and still had to be decided. The specificities of sport as described above were not taken into account at all. The FAPLAC decision was confirmed by CAS after which the case went to the FIFA DRC.
6. The DRC declared the Chelsea claim inadmissible because of the fact that the parties initially chose to present their case at national level.[136] It is DRC case law that if the parties choose for another body to have their dispute decided the case will not be admissible before FIFA.
7. The FIFA DRC decision was appealed by Chelsea and CAS ruled that according to the applicable regulations FIFA should deal with the case.[137] CAS did not pay any attention to the fact that because of this way of litigation the new Italian club of Mutu, which according to FIFA regulations was jointly and severally liable for compensation, was excluded from the process. Maybe this was not argued by one of the parties and also not by FIFA.
   Confronted with this CAS decision the FIFA DRC was obliged to pass a new judgment only on the amount of compensation to be paid by Mutu. Thereto the

[133] The European Convention on Human Rights; Race Relations Act 1976.

[134] Article 17 para 2 If a professional is required to pay compensation, the professional and his new club shall be jointly and severally liable for its payment.

[135] CAS 2005/A/876,15 December 2005.

[136] FIFA DRC 106176, 26 October 2006.

[137] CAS 2006/A/1192,21 May 2007.

Chamber attempted to follow the guidelines of Article 17 of the Regulations on the Status and transfer of Players:
Article 17 Consequences of Terminating a Contract Without Just Cause
The following provisions apply if a contract is terminated without just cause:

1. In all cases, the party in breach shall pay compensation. Subject to the provisions of Article 20 and annex 4 in relation to Training Compensation, and unless otherwise provided for in the contract, compensation for breach shall be calculated with due consideration for the law of the 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 the new contract, the time remaining on the existing contract up to a maximum of five years, the fees and expenses paid or incurred by the former club (amortised over the term of the contract) and whether the contractual breach falls within a Protected Period.
2. Entitlement to compensation cannot be assigned to a third party. If a Professional is required to pay compensation, the professional and his new club shall be jointly and severally liable for its payment. The amount may be stipulated in the contract or agreed between the parties.
   The outcome of this case was that Mutu had to pay €17,000,000 to Chelsea.[138] The major part of this amount consists of the non-amortised transfer sum paid by Chelsea to Parma. When we look at the text of Article 17 then we can conclude that the transfer sum paid indeed is one of the components covered by this paragraph. However, this is only under the precondition as laid down under the strict precondition of para 2 of Article 17: "the professional and his new club shall be jointly and severally liable for its payment". The reason for this is that the payment of a transfer sum is a matter for clubs and not for players. The relevant amount is negotiated between clubs and lies totally outside of the scope of the player. In fact you can say that the better a player performs the higher the transfer sum will be.
   As we saw before, Mutu's new club was not involved in this dispute and therefore could not be held responsible for the payment of the amount of compensation. Because of this the whole amount of compensation was allocated to the player. In other words: because of the way the parties started their dispute Mutu had to bear consequences that normally would not be his problem. This aspect was wrongly ignored by the FIFA DRC. It is very peculiar that at no stage of the whole process one of the parties nor FIFA attempted to involve the new club.

8. The fact that the liability for compensation can be accounted to another party than the one that is directly involved is extremely relevant. We can see that in

[138] FIFA DRC 7 May 2008.

another football case in which liability for compensation also applies to the new club of the player: the Olivier Bernard case.[139] This case is about a young French player who transferred from the French club Olympique Lyonnais to Newcastle United FC in England after the termination of his training contract. According to the French regulations Bernard was obliged to sign a contract with the French club that trained him. The sanction for non-compliance with this rule is a three-year ban on national level. As this ban does not apply in England the club brought the case before a civil court in France in order to get a judgment on compensation. In appeal the French court presented the case to the European Court of Justice. Previously the Advocate General of the Court gave her opinion on the case.[140] In her considerations she made a very remarkable distinction between the situation that the successive employer can be held responsible for the compensation and the one in which the employee himself is the one to pay.

According to the Advocate General a system where the new employer is obliged to compensate the former employer that trained and educated the employee needs another standard for compensation than in the case the employee himself is liable. The standard for the first situation is that the new employer saved himself the costs for having a full training system that eventually delivered the outstanding employee. In fact here this is the talented professional player. In such a case it is considered reasonable that the new club pays a relevant part of the total of efforts from the former club in order to obtain the current result. The FIFA regulations on training and education follow this way of reasoning as laid down in Annex VI of the FIFA Regulations on the Status and Transfer of Players on training compensation and solidarity mechanism.[141] In case the individual employee has to pay the training costs another standard applies. In such a case only the actual individual costs for the training of the worker have to be taken into considerations as this employee cannot be held responsible for being a part of a broader system established by his employer according to the Advocate General; although less extensively the ECJ follows this way of reasoning in the ruling itself.

This Court decision implies that the fact that a new employer is liable for the payment of compensation is relevant for the outcome of a dispute regarding this compensation. A different standard applies if the individual worker is personally liable for the compensation. In that case only the actual costs for this individual must be taken into account.

As there in fact is a system regarding the compensation for breach of contract

---

[139] ECJ,16 March 2010, Olympique Lyonnais v Olivier Bernard and Newcastle United FC, C-325/08.

[140] Opinion of the AG Sharpston in the Bernard case.

[141] http://www.fifa.com/aboutfifa/federation/administration/playersagents/regulationstatustransfertsplayers.html

by players similar to the system of compensation for training and education the distinction made by the Advocate General should also apply to transfer payments. In both situations it is the new club that pays for the compensation. When a transfer sum was paid by the former club it is reasonable that the new club pays compensation for that. As the player is not involved in the negotiations about the sum to be paid for him it is not reasonable that he has to bear all of the consequences. Looking at the Mutu case where the new club was not involved in the several disputes the implications of the Bernard case should have a drastic effect on the outcome of the case. The FIFA DRC should have disregarded the pro rata part of the transfer sum and not consider it a part of the compensation amount. According to Article 17 para 2 of the FIFA RSTP it would have been up to Chelsea to approach the new club in order to obtain compensation for the investments that were lost. Such outcome would have been much more appropriate than the current one in which we see that Mutu is threatened with a career ending ban as he—of course—will never be able to pay the compensation amount by himself. The outcome of the DRC decision is very dissatisfactory as the club that got him for free, Juventus, then transferred him for €8,000,000 to Fiorentina. As this is not a successive club it is not liable for the compensation claimed by Chelsea.

9. The appeal against the FIFA DRC decision was dismissed by CAS, disregarding all arguments brought forward inclusive of discrimination and the fact that Mutu is held liable for a claim that should at least partly be paid by Juventus.
10. Mutu's argument that in order to mitigate damages Chelsea had to take other measures than direct dismissal was explicitly rejected by the CAS panel. According to the CAS the obligation to control damages only exists after the occurrence and not before. What is disregarded here is the fact that Chelsea did not involve Mutu's new club. It is obvious that an Italian Series A club provides much more redress than an individual player. The fact that Chelsea chose not to involve the new club had certainly to be taken into account in the calculation of the damages.
11. This case offered an exquisite occasion for an application of the specificities of sport even in the case it might not be argued by the player. The fact that Chelsea did not do what any other club would have done just because of their financially dominant position should also have been reflected in the decision. Looking at the recent CAS case law in football matters it appears that CAS panels tend to be reluctant in applying specificities of sport.[142] If these specificities are applied they seem to work against the player.
12. In last instance the case is brought before the Swiss Bundesgericht in order to see whether the CAS ruling is against Swiss law or public order. This starting point only gives a very small margin to have a CAS award revised. The

[142] CAS 2008/A/1519, *FC Shaktar Donetsk v Matuzalem and Real Zaragossa*, www.tas-cas.org/dw2files/document/3229/5048/0/Award%201519-1520%20_internet_.pdf(September 2010) and CAS 1-6-2010, 2009/A/1856,1857, FC Sion/El Hadary/FIFA/Al- Ahly, www.tas-cas.org/d2wfiles/document/4267/5048/0/ Award%201880-1881.pdf.

decision of the Bundesgericht implied that the arguments brought in were not enough to reach the standard that is necessary in order to annul the CAS decision.[143] For Mutu this finalises a dramatic march through the institutions without getting anywhere.

4.6.6 Conclusions

The conclusion that can be drawn from the previous seven cases in this dispute is that despite the outcome of the Bosman ruling[144] a professional football player is still not regarded upon as a normal worker under an employment agreement with his club. The FIFA Regulations have anchored the specificities of sport concerning compensation matters, especially looking at Article 17 and Annex VI of the FIFA RSTP. It is obvious that Mutu did things he should not have done and that the relationship with Chelsea likely could not be continued. However, this is no reason to discard the relevant regulations and laws. On many occasions the panels should have chosen a different direction than they have done. Bottom line is that it cannot be the aim nor the result of the system that because of what he did a player's career is seriously endangered. Mutu is held liable for a claim that for the biggest part should not be accounted to him and under normal circumstances would not have to be paid by him. Chelsea abused their wealth by choosing direct dismissal instead of the usual way in which such cases are handled; a transfer in order to control damages. This fact was not recognised from the very start of the dispute and none of the panels that dealt with the case were able to put the case in the right perspective: that is that a professional football player is an employee like any other one. A mistake made should not confront a worker with the horrifying perspective of termination of his career, even if his name is Adrian Mutu.

4.7 CAS 2009/A/1880, 1881 FC Sion/Essam El-Hadary v. FIFA and Al-Ahly Sporting Club CAS 2009/A/1856, 1857 Fenerbahçe v. Appiah/Appiah v Fenerbahçe

Peter Limbert

In recent years the CAS has rendered several awards on calculating compensation for the unilateral breach of contract of a player's employment contract under Article 17 of FIFA Regulations for the Status and Transfer of Players. In analysing these awards it is apparent that the CAS exercises a great deal of transparency in calculating compensation. This is good news for those involved or who might become involved in future cases. The author

[143] Bundesgericht 10 June 2010 http://jumpcgi.bger.ch/cgi-bin/JumpCGI?id=10.06.2010_4A_458/2009

[144] ECJ, 15 December 1995, *Bosman*, C-415/93, ECR I-4921.

considers this development with particular reference to the FC Sion/Essam El-Hadary v FIFA and Al-Ahly Sporting Club (CAS 2009 A/1880/81) and Fenerbahçe v Appiah/ Appiah v Fenerbahçe (CAS 2009/A/1856/1857) Awards.

4.7.1 Introduction

The last 3 years has seen a significant development in the CAS' approach to the calculation of compensation for the unilateral termination of a player's employment contract under the FIFA Regulations for the Status and Transfer of Players (the "FIFA Regulations"). The recent decisions in *FC Sion/Essam El-Hadary v FIFA and Al-Ahly Sporting Club* (CAS 2009 A/1880/81) and *Fenerbahçe v Appiah/Appiah v Fenerbahçe* (CAS 2009/A/1856/1857 mark the latest point in a line of authorities which have seen the CAS shift from the pro-player "residual value" approach exemplified by the decision in *Heart of Midlothian v Webster and Ors* (CAS 2008/A/1298/99/300), to the "positive interest" approach first set out in *Shakhtar Donetsk v Matuzalem and Ors* (CAS 2008/A/1519-20).

As set out below, the CAS decisions in *FC Sion* and *Appiah* develop and expand upon the positive interest approach and provide guidance on how future CAS Panels may assess damages under Article 17. While it remains to be seen whether such Panels will follow these authorities, it is arguable that to the extent they are consistent with each other and *Matuzalem* and demonstrate a reliable, transparent approach to the calculation of compensation, they represent a positive step for football.

4.7.2 The 3 Year Shift

FC Sion and *Appiah* should not be viewed in isolation. Rather, they should be considered against the background of relatively recent jurisprudence in which the CAS can be seen to have shifted its approach from the decision in *Webster,* to its current approach, the roots of which can be found in the decision in *Matuzalem*.

Following *Webster*, participants in football were particularly concerned to see whether future Panels would follow the formulaic, pro-player approach favoured by the CAS, or whether a new approach would be found. In *Webster* the fundamental issue centred on the measure of compensation due when a player unilaterally terminates his contract without just cause outside the Protected Period. Hearts (Webster's former club) argued that at its most basic, compensation under Article 17 should provide an effective remedy for the losses a party suffers as a result of the other's unilateral termination. It claimed (inter alia) that in Webster's case, compensation under Article 17 should comprise a sum equivalent to the value it had lost and that could be reflected in either the replacement cost of a player of similar age, ability and experience or the loss of the opportunity of securing a transfer fee for the player.

The CAS however, disagreed. It stated that for breaches of contract outside the Protected Period, compensation should be limited to a sum equivalent to the remaining value of a player's contract. This method—which became known as the "residual value" approach—created a misconception among some players, agents and clubs that a player could "buy himself out of his contract" after the expiry of the Protected Period by unilaterally terminating it and moving to another club.

The CAS decision in *Webster* left many questions unanswered. For example, it was not clear how the approach would be applied in cases where the termination occurred within the Protected Period. Similarly, it provided little (if any) clarification as to how the approach could be reconciled with the various criteria set out in Article 17 for the assessment of compensation. Lastly, and perhaps most importantly, it left unclear how a party (particularly a club) could be adequately compensated for a player's breach of contract if it could only recover what was left on his salary and bonuses and the point of termination. While it was one way of measuring the value a player represented to a club, it bore no proper relationship to a club's loss as a player's registration has a very significant value to a club which often far exceeds the value of his wages. Moreover, to common lawyers at least, the measure of compensation itself—i.e. the recovery of unpaid residual salary—seemed misconceived given that the remaining value of a player's contract would ordinarily represent a *saving* to a club, not a recoverable head of loss.

Some of these questions were addressed the following year in the CAS' decision in *Matuzalem*—another case involving a player's unilateral termination of contract outside the Protected Period. In *Matuzalem*, the CAS decided not to follow *Webster*, instead favouring an approach to the interpretation of Article 17 and the calculation of compensation which was reflected in both Swiss and common law legal systems. This principle—which became known as the "positive interest" approach—aims to put the injured party back into the position he would have been in had the contract been performed properly.

In *Matuzalem* therefore, the CAS found that contrary to the misconception created by *Webster*, Article 17 is not intended to provide a basis by which a party may terminate his contract with impunity. Rather, it is intended to protect and reinforce the principle of the maintenance of contractual stability in football. To that end, the Panel decided that the calculation of compensation under Article 17 should not be bound by a particular formula, but should be determined on a case-by-case basis, assessing the entire ambit of an injured party's loss—not just the remaining value on a player's contract.

4.7.2.1 FC Sion and Appiah: Applying and Developing Matuzalem

While the CAS decisions in *FC Sion* and *Appiah* turned on their own facts and had vastly differing results, they can each be viewed as applying *Matuzalem's* positive interest principle. Moreover, they should also be seen as developing the doctrine given that they deal with certain issues that remained outstanding following *Matuzalem*, including the relevance of the Protected Period to the calculation of

compensation, the availability of replacement cost as a head of damage and the enforceability of unilateral options.

As set out below, in *FC Sion* and *Appiah* the CAS refused to follow the DRC's approach to the calculation of compensation and instead continued with a consistent line of jurisprudence since *Matuzalem*, applying a broad analysis to the calculation of an injured party's loss.

Appiah

The main significance of the CAS' decision in *Appiah* is that firstly it involved the application of the positive interest principle in a case involving unilateral termination inside the Protected Period. Secondly however, it also demonstrated that the application of that principle is flexible enough to lead to a result whereby the player is found to be not liable to pay over an amount of money in compensation.

The basic facts of the case are as follows: Appiah joined Fenerbahçe from Juventus for €8 million in July 2005. He entered into a four-year contract with the club until 2009 which included a unilateral option in favour of the club to extend the contract to five years. His salary and benefits under the contract ranged from approximately 2 million euros (in 2005/6) to approximately 2.4 million euros (in 2008/9).

In May 2007, Fenerbahçe organised for Appiah to have an operation on his left knee at a hospital in Istanbul. However, in December 2007 the player was diagnosed with deep vein thrombosis, which the Player alleged was as a consequence of him not receiving anticoagulants (blood thinning drugs) following the operation.

Appiah later alleged that Fenerbahçe had failed to provide him with adequate medical care by failing to treat him properly or diagnose him quickly enough. He claimed this amounted to a breach of contract without just cause which entitled him to treat the contract as terminated as from the end of the 2007/8 season. Appiah went to Italy for treatment by his own doctors and did not return to the club after January 2008. As a result of his medical condition he did not play professional football for another club until after the expiry of his contract in 2009.

The club denied any medical malpractice and demanded Appiah's return to the club. When he failed to do so, the club exercised a unilateral option to extend the contract until 2010, bought a replacement player and issued proceedings against Appiah before the DRC, claiming compensation of approximately 12 million euros and the imposition of sporting sanctions.

At first instance, the DRC decided Appiah should have returned to Fenerbahçe and that his failure to do so constituted his unilateral termination of the contract without just cause. It therefore ordered him to pay compensation to Fenerbahçe in accordance with Article 17 of the FIFA Regulations, which it calculated at approximately 2.2 million euros, based on the unamortised costs the club incurred in signing Appiah from Juventus.

Both Appiah and Fenerbahçe appealed to the CAS. The club maintained its claim for over €12m, arguing that compensation should comprise approximately

4.8 million euros in residual value (which it claimed should include the period of the unilateral option until 2010), 4.17 million euros in unamortised costs and 3 million euros for Appiah's breach in light of the "specificity of sport".

Contrastingly, Appiah firstly argued that if any compensation was due, it was due from the club to him as a consequence of his medical mistreatment. Secondly however, he argued that even if compensation was due from him to the club, such compensation should be reduced to €0 because the club's saving, by not paying him for the remainder of the contract, outweighed its loss through his termination.

The CAS agreed with Appiah. It found that whilst his failure to return amounted to a unilateral termination within the Protected Period, the application of the positive interest approach meant that he should not have to pay any compensation to the club. Appiah had been unable to play football between December 2007 and at least July 2009 (i.e. the entire period since before the termination until the expiry of the contract). There was no dispute between the parties that Appiah's injury was not his fault, therefore was no basis on which he should be liable for any loss caused to Fenerbahçe as a result of it. The injury effectively rendered Appiah of no value to Fenerbahçe (or any other club) during the remainder of his contract, and as such he could not be liable for either: (i) the club's failure to receive a transfer fee (which would have been impossible to achieve as Appiah was injured); or (ii) the club having to buy a replacement player (because the club would always have had to replace Appiah regardless of whether the contract was terminated).

Consequently, the amount Fenerbahçe saved by not having to pay Appiah the remainder of his contract—approximately 2.6 million euros—outweighed any loss it suffered through unamortised costs and disciplinary fines—approximately €2.5 million.

In calculating the unamortised costs under the contract until 2009, the CAS also agreed with Appiah's argument in relation to the unilateral option. It confirmed the commonly held view that as a matter of CAS, FIFA and Swiss law jurisprudence, unilateral options are unlawful and unenforceable.

FC Sion

The significance of the CAS' decision in *FC Sion*—which involved circumstances similar to *Webster* and *Matuzalem*—is firstly that it is another case involving a breach within the Protected Period. More importantly however, it can also be seen to develop the positive interest approach by explicitly accepting replacement cost as a valid head of damage in the calculation of compensation under Article 17.

The basic facts of the case are as follows: On 1 January 2007 the player, Essam El-Hadary, entered into an employment contract with an Egyptian club, Al-Ahly Sporting Club ("AA"). Under the contract, which was due to expire at the end of the 2009/10 season, he was paid approximately US $292,000 per year. On 25 February 2008, after meeting with AA a few weeks earlier regarding a possible transfer to FC Sion, El-Hadary wrote to AA terminating his contract. He argued

that AA had previously agreed to let him join a European club and had agreed he could leave.

AA disputed this. It therefore issued proceedings against El-Hadary and FC Sion (the player's new club) claiming compensation and the imposition of sporting sanctions against the player and FC Sion.

At first instance the DRC agreed with AA, holding that El-Hadary had unilaterally terminated his contract without just cause within the Protected Period and that FC Sion had induced his breach. As a result, it ordered the player to pay compensation of €900,000 (jointly and severally with FC Sion), calculated in accordance with Article 17. The compensation took into consideration the residual value of the player's contract with AA and his contract with FC Sion over the same period (calculated at €300,000), plus the "sports-related damages" AA had suffered as a result of his breach (calculated at €600,000).

On appeal, whilst the CAS upheld the DRC's decision as to liability, it did not agree with its calculation of compensation under Article 17. Instead, the CAS followed the positive interest principle set out in *Matuzalem*, assessing (inter alia) the compensation due to AA by considering what it would cost AA to replace El-Hadary with one of similar value. The CAS took into account evidence adduced at the hearing that FC Sion would have been willing to pay US $600,000 for the player before he terminated the contract. It also considered that FC Sion was willing to pay the player US $488,500 until the end of the period in which he would have been registered with AA but for his termination. On this basis the CAS found that to be put in a position as if the contract had been performed properly—i.e. to return AA to the position equivalent to that as if El-Hadary had not terminated the contract—AA would have to spend US $1,088,500 (i.e. a transfer fee of US $600,000 and wages of US $488,500) to acquire a player of similar quality to El-Hadary.

Just as in *Appiah*, the CAS' decision in *FC Sion* represents an important step in the jurisprudence in this area. The CAS' approach in accepting that "replacement cost" is a valid head of damage brings the interpretation of Article 17 back to the argument Hearts made (but which was rejected) in *Webster*.

4.7.2.2 Life After FC Sion and Appiah

The decisions by the CAS in *FC Sion* and *Appiah* will be viewed as positive by most participants in football. Firstly, they make clear that the overriding intention of Article 17 is to protect the principle of contractual stability in football and to act as a mechanism by which an injured party may be adequately "compensated" for its loss.

Second, the decisions should allay any fears clubs had after *Webster* that their interests were not adequately protected by the CAS. Following *FC Sion* and *Appiah* it is clear that clubs' interests should be adequately protected by a line of authorities that aims to assess compensation in by taking into account the full spectrum of their loss.

Third, the decisions (and in particular, *Appiah*) also represent positive steps for players. *Appiah* confirms that CAS Panels are willing to take into account all of the circumstances in assessing compensation, even where there has been a breach within the protected period. In times of spiralling wages and fees, players should be encouraged that CAS Panels will not simply address compensation based on a formulaic approach considering the residual value of their contracts.

Fourth, it is hoped that these authorities lay to rest any lingering doubts as to whether compensation awards should be necessarily lower in cases of breach outside the Protected Period. This distinction—which was artificial in any event since in many cases the Protected Period bears little if any correlation to a party's loss in cases of unilateral termination—was responsible for the misconception that a player could "buy himself out of his contract".

Fifth, while the jurisprudence will continue to evolve, *FC Sion* and *Appiah* can finally be seen to provide clarity and consistency to an area which has been the subject of much debate over the last 3 years. By applying and developing *Matuzalem*, the CAS has created a line of authorities which participants in football can rely upon to deliver fair and reasoned decisions in cases of unilateral breach by a player or a club.

A note of caution however: whilst *FC Sion* and *Appiah* go some way to clarifying further points in relation to the calculation of compensation under Article 17, some fundamental issues remain. One of the most important of these relates to the extent to which the positive interest approach may be followed in circumstances where the parties have chosen a specific governing law. In *Webster*, *Matuzalem*, *FC Sion* and *Appiah*, the CAS decided to apply Swiss law in the absence of any explicit choice by the parties. The absence of a choice of law made it appropriate that the principle informing the calculation of compensation under Article 17 was governed by Swiss law. However, whether the positive interest principle is intended to be of general application—i.e. in circumstances where the parties have chosen a law other than Swiss law to govern the dispute—remains largely untested. It is possible that since the DRC and the CAS are organisations domiciled in Switzerland, this is the intention—i.e. because the interpretation of Article 17 will necessarily be governed Swiss law, however it is hoped that this issue will be clarified in due course.

References

Haas U (2009) Football disputes between players and clubs before the CAS. In: Bernasconi M, Rigozzi A (eds) Sport governance, football disputes, doping and CAS arbitration: CAS and FSA/SAV conference, Lausanne 2008. Editions Weblaw, Berne

Ongaro O (2009) The FIFA players' status committee and the FIFA DRC. In: Bernasconi M, Rigozzi A (eds) Sport governance, football disputes, doping and CAS Arbitration: CAS and FSA/SAV conference, Lausanne 2008. Editions Weblaw, Berne

Soek JW (2009) The prize for freedom of movement: the Webster case. In: Gardiner S et al (eds) EU, sport, law and policy. T.M.C. Asser Instituut, The Hague

Tercier Pierre (2003) Les contrats spéciaux. Zurich, Bale, Geneve

Wyler Rémy (2002) Droit du Travail. Berne