Chapter 5
Contractual Stability: Unilateral Options

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5.1 CAS 2005/A/973 Panathinaikos FC v. Sotirios Kyrgiakos

Jean-Samuel Leuba and Robert Fox

In the Kyrgiakos Award the CAS considered the validity of two unilateral options giving FC Panathinaikos the right to extend the player's contract unilaterally. The first option covered a period of two years; the second was for a one-year extension. Each extension would lead to the player receiving additional remuneration bonuses. In 2003 the club exercised the first option. However, things started go wrong when they tried to exercise the second one. Ultimately this dispute ended with the Panel's ruling for the validity of the unilateral extension options—much to the surprise of many lawyers, but mainly due to the contractual balance established between club and player. The authors comment on these matters as well as on the intriguing question of the applicable law and FIFA's competence in disputes between clubs and players.

5.1.1 Introduction

The arbitral award issued by the CAS on 10 October 2006 in the case *Panathinaikos FC versus Sotirios Kyrgiakos* (hereinafter: the "award") was noteworthy because it accepted the validity of a unilateral option enabling a club to renew a footballer's contract.

In this article, we will, of course, examine this particular question and the related reasoning of the CAS.

Nevertheless, this award also raises two other matters of interest: first, applicable law, and second, FIFA's competence to rule on the dispute between the club and the player. We will therefore examine these different issues in the order in which they are discussed in the award.

However, insofar as this publication contains the full text of the award, this article will not describe in full either the facts of the case or the reasoning adopted by the CAS.

Apart from a brief summary of the facts, only the elements relevant to the present article will be mentioned. Readers are therefore invited to read the full award first.

5.1.2 Summary of the Facts

In 2001, the Greek player, who was 22 years old at the time, signed a contract with an initial term of two years, which was due to expire at the end of June 2003. The contract contained two unilateral options granting the club the right to extend the contract, initially for a two-year period expiring at the end of June 2005, and then for a second period of one year, ending on 30 June 2006. The contract was duly registered with the relevant Greek authorities and placed under Greek law. With regard to remuneration, the parties had also jointly signed an agreement in 2001, entitling the player to additional bonuses. In June 2003, the club exercised its first two-year unilateral option, thereby extending the contract until June 2005. In January 2005, the player was loaned to Scottish club Rangers FC until the end of June 2005. The six-month loan agreement was signed in January 2005 by the Greek club, the Scottish club and the Greek player. Under this agreement, the Scottish club was granted an option to sign the player permanently at the end of the loan. The Scottish club did not exercise this option, although it had expressed interest in signing the player for a lower price. Instead, the Greek club exercised its unilateral option to renew the contract with the player for the 2005/06 season. The player, however, refused to return to the Greek club at the start of the 2005/06 season, claiming that the unilateral option was invalid. The file was therefore submitted to the FIFA Players' Status Committee, which ruled in the player's favour and considered the unilateral option to be invalid. The club appealed to the Court of Arbitration for Sport against FIFA's decision. In its award, the CAS found in the club's favour and recognised the full validity of the unilateral option.

5.1.3 Applicable Law

In the award, the panel clearly considered which law should apply (cf. award, p. 9, rec. 45–51).

The panel decided that the FIFA Regulations for the Status and transfer of players (in particular the 1997 edition) should apply in the first instance. This aspect was not discussed by the parties and did not prove to be relevant to the outcome of the dispute, since the FIFA regulations did not contain any provision authorising or prohibiting unilateral options to renew a contract. Therefore, the

panel clearly had to consider whether national law should apply as an alternative to the FIFA regulations.

Referring to Article R58 of the Code of Sports-related Arbitration (hereinafter: "the Code"), the panel deemed it inappropriate to apply substantive Swiss law to the contract (actually comprising two documents) signed by the parties, i.e. Panathinaikos FC and the Greek player Sotirios Kyrgiakos, on 27 July 2001. The arbitrators held that the contract had no connection whatsoever with Switzerland. It was a contract signed in Greece between a Greek citizen and a Greek football club concerning activities mostly taking place in Greece. Furthermore, the contract contained numerous references to Greek law, particularly Greek Sports Law 2725/99.

The panel therefore decided that the contract was exclusively connected with Greek law.

Also with reference to Article 58 of the Code, the panel considered that any other aspect of the dispute which was not covered by the FIFA regulations should be governed by Swiss law, which is the law of the country in which FIFA is domiciled.

The panel therefore held that the dispute should be decided in accordance with FIFA regulations and, on a subsidiary basis, according to Swiss law, with the important exception of any issues related to the contract and agreement signed by and between the parties on 27 July 2001.

The award does not contain any further discussion of applicable law. The solution adopted by the CAS certainly appears complicated. Indeed, in a procedure concerning a possible breach of contract, it is never easy to determine what is related to the contract and what is not. In fact, every important point is inevitably related more or less directly to the contract. It therefore remains to be decided what constitutes a "relationship".

Furthermore, the award does not contain any indication of why the panel did not apply Greek law to all aspects of the case as an alternative to the FIFA regulations. In other words, the decision that Swiss law should apply to questions unrelated to the contract was based on the fact that FIFA is domiciled in Switzerland. Of course, Article R58 of the Code sets out this criterion for deciding which law should apply. However, this criterion is an alternative to that of "the rules of law, the application of which the Panel deems appropriate". On the basis of this provision alone, the panel might well have decided that a dispute with all the characteristics of a Greek dispute should only be subject to Greek law, as an alternative to the FIFA regulations.[1]

Some are bound to argue that, under the FIFA Statutes (Article 62 para 2), the FIFA regulations should apply primarily and Swiss law in the alternative.

[1] This solution also seems to have been chosen by the CAS on other occasions, cf. Haas 2008, p. 222, where he cites CAS 2004/A/678 *Apollon Kalamaris FC v Oliveira Morais*, award of 20 May 2005, para 5.3 et seq.

How should this provision of the FIFA Statutes be interpreted and applied in relation to Article R58 of the Code? Should it be assumed that Article R58 takes precedence over Article 62 para 2 of the FIFA Statutes and that the CAS is therefore free to apply whatever law it deems appropriate? On the other hand, should it be considered that Article 62 para 2 of the FIFA Statutes constitutes an element of the arbitration agreement and therefore limits the discretion of the Court of Arbitration for Sport?

The arbitral award does not examine these questions and therefore does not offer any kind of response to them. The solution chosen by the panel appears extremely problematic and uncertain. The phrase "with the important exception of any issues related to the Contract" is extremely vague and does not explain with any clarity or certainty which law applies to which issue.

It should also be noted that, in the present dispute, in addition to the two contracts signed by the parties on 27 July 2001, a loan agreement was signed by the two parties and by the Glasgow Rangers club in January 2005. According to the grounds of the award, this loan agreement, although it bound the club and the player in certain aspects, was not subject to Greek law, unlike the contract signed in July 2001. In other words, it should therefore be subject to Swiss law. It is hard to see what relationship this agreement might have had with Swiss law.

As we have just seen, the arbitral award raises a number of questions concerning applicable law. It does not provide all the answers that might be expected. But it is particularly clear that, by juxtaposing the application of the national laws of different countries, the award creates significant uncertainties. Indeed, if the same parties were to go back in time to when they signed the first contract in 2001, they would need to consider which law the Court of Arbitration for Sport might apply if a dispute should arise six years later. If it is feasible that the laws of several different countries might apply concurrently, it would be impossible to draft a contract with all the precautions that would be necessary.

Perhaps it would be useful to remember what another CAS panel indicated in award CAS 2005/A/983 & 984 rec. 68, reiterated in award CAS 2006/A/1180 *Galatasaray SK v Frank Ribéry & Olympique de Marseille*, rec. 12: "In this regard, the Panel considers that sport is, by its very nature, a phenomenon that transcends borders. It is not only desirable, but indispensable that the rules governing international sport are standardised and broadly consistent throughout the world. In order to guarantee respect at global level, such regulations must not be applied differently from one country to another, particularly on account of interference between state law and sports regulations. The principle that FIFA rules should apply universally…. satisfies the need for rationality, certainty and legal forseeability".[2]

The above excerpt gives logical reasons why the FIFA regulations should apply in a standardised way. However, this does not resolve the problem when the FIFA rules are silent and do not help to settle a disputed issue. Is it therefore necessary,

[2] Translator's own translation; not the official CAS wording.

for the sake of standardisation, to decree or create a lex sportiva, to be applied universally? Such a solution creates other problems that are at least as serious as the application of national law, particularly with regard to the foreseeability and certainty of the law. Another solution would be to impose Swiss law systematically as the alternative law. Such a solution would have the virtue of ensuring that the law was foreseeable and clear. However, it would force all stakeholders in the sports world to submit all agreements systematically to the requirements of Swiss law. It is worth remembering that Swiss employment law contains numerous subtle rules that are either fully or relatively mandatory.

This means that just as many stumbling blocks may be faced if the parties fail to examine their agreement down to the smallest detail. However, all these questions extend beyond the scope of this article.

5.1.4 FIFA Competence

In the award, the panel considered that FIFA was competent to rule on the dispute between the Greek club Panathinaikos and the Greek player Sotirios Kyrgiakos.

FIFA's competence was examined in the light of FIFA's 1997 regulations. In this article, we will not therefore look in too much detail at these 1997 regulations, which are quite clearly being applied less and less, almost not at all, bearing in mind the length of time that has passed since they were adopted. We will therefore limit ourselves to a few brief remarks. First, it should be pointed out that FIFA's 1997 regulations are much less precise than the 2005 version with regard to FIFA's competence. In the case at hand, the panel referred to Article 19 of the 1997 regulations, ignoring the fact that this provision was part of chapter 5 (transfer of players from one national association to another). No aspect of the dispute between the Greek club and the Greek player involved a transfer from one association to another. Only the employment contract between a club and a player of the same nationality was at issue.

This remark throws up a general and global question. Is it really logical, or even desirable, that a dispute between a club and a player of the same nationality, concerning a contract applicable in the same country, should have to be submitted to FIFA which, as we have seen, applies its own regulations and, in the alternative, Swiss law?

In other words, in order to avoid any future risk in case of a dispute, any contract signed between a club and a player from the same country should conform not only with the FIFA regulations and the relevant national law, but also with Swiss law, which might be applied to the dispute under Article 62 para 2 of the FIFA Statutes.

To put it in another way, a club from a small country on the other side of the world which wanted to recruit a player from the same country should be advised to ensure that the contract complies with Swiss law. If FIFA (or the CAS) decides that a dispute has an international dimension (cf. Article 22 of the 2005 FIFA

regulations), Swiss law may be used to settle a dispute between a player and a club from the same country.

In other words, if FIFA is generally deemed competent as soon as a dispute has the slightest international dimension, the player and the club run the risk of seeing a future dispute resolved by FIFA, which will not apply the national law common to the club and the player.

In the award, the panel thought the dispute had an international dimension by virtue of the simple fact that it concerned whether the Greek player should resume his contractual obligations to the Greek club after a six-month loan in Scotland. However, the dispute did not concern any aspect of the loan agreement with the Scottish club.

Nobody disputed the validity of this loan agreement, nor that it had expired and had therefore ended.

Not even the question of the ITC could justify the international dimension, since this ITC had been the subject of a distinct, separate decision. The dispute therefore concerned only the contract signed between the Greek club and the Greek player in July 2001. This contract and all contractual relations between the two parties had only a national dimension, i.e. Greek.

Was it therefore necessary to decide that FIFA was competent to rule on a contract between Greek parties who were subject to Greek law, as the CAS decided? In other words, can FIFA's legal organs be expected to apply the national law of the player and club concerned?

FIFA's broad competence quite clearly has an objective and a consequence, i.e. a certain standardisation of applicable rules and judicial practices. However, it comes up against practical and legal obstacles when it is obvious that national law should apply to a dispute between a club and a player of the same nationality.

Therefore, in our opinion, while we can accept that the existence of an international dimension in the relations between the parties justifies, for the sake of legal certainty, a degree of standardisation, it is necessary, on the other hand, to show caution in a situation where the international element clearly has no direct, close link to the disputed issues.

5.1.5 Validity of the Unilateral Option Clause

Many sports law observers were surprised by the panel's decision concerning the clause granting the club a unilateral option. Unilateral options exist in practice, but they raise questions among lawyers. To the best of our knowledge, the CAS has been relatively hostile to such clauses,[3] although it has not ruled them out completely.

[3] Cf. Haas 2008, pp. 225–226 and the awards quoted, particularly CAS 2005/A/983 & 984 *Penarol v Bueno, Rodriguez & PSG,* rec. 119; 2006/A/1157 *C.A. Boca Juniors v Genoa*, rec. 8.1.

This decision to recognise the validity of the unilateral option is certainly based on an extremely pragmatic analysis of the contractual relations between the two parties.

First, the panel considered that, in known case law, no unilateral option had ever been declared absolutely void under all circumstances.

However, known CAS awards had found such clauses to be invalid in the cases examined, although not as a matter of principle and based only on examination of the specific details of the case (cf. CAS 2004/A/678, for example).

But, in particular, the panel considered that the details of the case between Panathinaikos FC and Sotirios Kyrgiakos were such that the unilateral option was fully valid.

The panel based this decision on a number of elements, which are summarised below:

If the clause were exercised, the contract would be valid for five years in total. Such duration conforms with the FIFA regulations (Article 18 of the Regulations for the Status and Transfer of Players) and corresponds with what the player might have expected when he signed the contract.

The original contract expressly provided for substantial increases in the player's salary and bonuses. For example, at the end of the initial three-year period, the club had a first option (two years) which, if it were exercised, would result in a significant pay rise. But, in particular, if the second option (one year) were exercised, i.e. for the fifth year of the contract, the player's remuneration would be doubled (salary and bonus). In the panel's opinion, such an increase in remuneration showed that there was a fair balance between the concessions made by each of the parties in the contract. The club could not impose or amend certain clauses when exercising the option. It was obliged to pay the increased remuneration, which represented the price paid for the option.

Incidentally, the award points out that, when the initial contract was signed, the player was playing for a third division club for an extremely low salary. In other words, in order to acquire the option, the club had to make significant promises in terms of salary.

It is extremely interesting to note that the panel did not think it could take into consideration the fact that the player was offered, instead of a fifth year at the Greek club, a contract with a Scottish club with a much higher salary. This was deemed irrelevant. The panel's views on this matter are interesting, because they confirm the imbalance that exists in the market between certain rich clubs. Now, although this imbalance clearly exists, it does not mean that contracts can be broken. The panel noted that the player's motivation for not honouring the fifth year after the club exercised its option was almost certainly entirely financial, since he was able to earn much more by breaking his contract.

Furthermore, the panel noted that the player had never complained when the club had exercised its first option to extend the contract for the third and fourth years. The player met his obligations. It was only during the fourth year, when he was loaned to the Scottish club and realised that it was in his financial interest to dispute the contract that the player actually disputed the unilateral option.

To conclude, the award refers to the cardinal principle, "pacta sunt servanda". Although everyone, of course, knows what this phrase means, the panel's reference to it appears instructive. Indeed, having pointed out that this principle is fundamental in contract law, it is right to consider that, whenever a contract is allowed to be broken for whatever reason, the principle of respect for and the stability of contracts is breached, as well as, to some extent, legal certainty. It should be remembered that a contract often represents the law between parties.

Finally, the panel not only noted that the contract signed in July 2001 appeared perfectly valid and therefore allowed the club to exercise the option for the 2005/06 season; it also pointed out that, in January 2005, when the loan agreement was signed with Rangers FC, the player had himself signed the agreement, which included a clause under which the Scottish club could, at the end of the loan agreement, sign him permanently for a transfer fee of €1,500,000. This constituted an implicit acceptance, several months before the deadline, of the fact that the club was entitled to extend the contract for a further year, as this was the only reason a transfer fee would be due. Therefore, a refusal to accept the validity of this clause implies not only that part of the contract signed in 2001 by the player and club was considered invalid, but also that part of the loan agreement signed by the player in January 2005, five months before the option to extend the contract was exercised, was also deemed invalid.

5.1.6 Conclusions

This arbitral award raises a number of questions relating to FIFA's competence and applicable law.

In substance, it has the virtue of referring to the fundamental principle "*pacta sunt servanda*". As well as this principle, the panel emphasised that the player's attitude was not "*bona fide*".

Certainly, such an attitude in this case did not warrant increased protection, especially as the contract, when viewed as a whole, represented a contractual balance between the parties, containing reciprocal concessions.

There was therefore clearly no imbalance or obvious disproportion.

The unilateral option was therefore deemed perfectly valid and correctly exercised by the club. It is no surprise that the CAS ordered the player to pay damages to the club.

5.2 CAS 2005/A/983 & 984 Club Atlético Peñarol v. Carlos Héber Bueno Suárez & Cristian Gabriel Rodríguez Barrotti & Paris-Saint-Germain

Juan de Dios Crespo Pérez

This case is about the two players Carlos Bueno and Cristian Rodríguez who refused to renew their contracts expiring at the end of 2004. The dispute arose through the contractual use of unilateral options granting the Uruguayan club CA Peñarol the right to extend the contracts, which did not include any reciprocal benefits for the players. The players' refusal to comply with the Uruguayan Football Player Statute led to their right to play football being 'frozen', with contractual obligations suspended. In terms of these regulations the players were not free to leave their club until the end of their extended contracts. In its award the CAS stated the invalidity of these clauses. This fact and the fact that FIFA Regulations and international principles of law prevailed over the national rules at hand, turned this award into a milestone, the so called 'South American Bosman'.

5.2.1 Preamble

By the end of June 2005 I received a call from an agent, Mr. Francisco "Paco" Casal, who is well known as one of the leading intermediaries in football. He had apparently read an article I had written for the sports Spanish newspaper "MARCA" in which I was explaining briefly and with some wit (or at least that was my intention) the new FIFA Regulations for the Status and Transfer of Players. He seemed to like my approach and decided that the case he had in hand against the Uruguayan club CA Peñarol could be interesting for me.

We met, and when he described the situation of the players Carlos Bueno and Cristian Rodríguez, I was astonished. The players were under contract until the end of 2004 but with an option in favour of the CA Peñarol for an extension. The players refused to sign the new contract and immediately were involved into the Regulations in force in Uruguay for those kinds of situations: they were ousted from the club, they were deprived of any training or the possibility to use the club's premises as well as not paid but retained as licensed players of the club in what is called "Rebeldía" or "Rebellion".

It seemed to me that this kind of behaviour was a bit out of time but it was what was happening in Uruguay for a long time thanks to the "Estatuto del Jugador Uruguayo" (Uruguayan Football Player Statute). And then, things changed a lot after the CAS decision and it was a mini-revolution in the Oriental Republic, as Uruguay is also known.

5.2.2 Facts

The facts of the case were, in general terms, the following:

The Uruguayan Football Player's Statute[4] establishes that contracts signed between a club and a player may be extended by the club until the second 31 December following the date of termination of the initial contract. If the contract is signed during the second half of the season, the contract may then be extended until the third 31 December following the date of termination. Considering that the Uruguayan football season runs from January 1 to December 31, this essentially means that a club may unilaterally extend a contract signed with a player for an additional two seasons, and even two and a half seasons in some cases.

This possibility to unilaterally extend the contract does not implicate a reciprocal benefit to the player. The club had the sole obligation to adjust the salary of the player to the increase in the national Consumer Price Index, but had no obligation to provide better conditions whatsoever to the player. Furthermore, if the player refused to accept the contract extension, the club is entitled to list him as "rebellious" and to suspend its contractual obligations such as payment of the player's salary. The player would only be free to leave the club when the "rebellion" period ended, namely, when the contract (with the extensions allowed by the Statute) expired.

In this context, Carlos Bueno and Cristian Rodríguez, two Uruguayan professional football players, refused to agree to terms for a new contract with their club, Club Atlético Peñarol of Montevideo, Uruguay. The players were seeking a pay raise and other benefits to be included in their contracts.

The club, however, knowing that the Statute granted it the right to unilaterally extend the players' contract for a further two seasons by merely adjusting the players' salary in accordance with the Consumer Price Index, refused to negotiate and, when the players refused to sign a new contract, listed them as "rebellious" before the Uruguayan Football Federation and was thus exempted from fulfilling its contractual obligations (such as paying the players' salary). The players, in principle, were unable to sign with a different club.

Notwithstanding the above, and after being unable to play for approximately four months, the players proceeded to sign a contract with the French club Paris Saint-Germain for the season 2005/06, disregarding the Uruguayan Player's Statute which, in principle, established that they were still contractually bound to Peñarol even if listed "on rebellion".

As expected, Peñarol filed a claim against the players and Paris Saint-Germain before the FIFA Dispute Resolution Chamber, arguing that the players, induced by the French club, had breached their contract with Peñarol without just cause.

The DRC[5] rejected Peñarol's claim on the basis of the invalidity of an unilateral option clause in favour of a club, and the Uruguayan club proceeded to appeal before the Court of Arbitration for Sport.

[4] Now modified thanks to the *Bueno-Rodriguez* case.

[5] Decision of 24 October 2005.

5.2.3 Commentary

The decision taken by the Court of Arbitration for Sport (CAS) in the case of two Uruguayan footballers, Carlos Bueno and Cristian Rodríguez, who decided to disregard the extension clause that bound them to their employer, Uruguayan football club Club Atlético Peñarol, is of particular relevance in the world of football, due to the role that unilateral extension options in favour of clubs have maintained in the past few years.

It also established an important precedent as regards the law applicable to an international football case, as the CAS decided that the FIFA Regulations and international principles of law should prevail over national law considerations, when deciding over the validity of the unilateral extension option tying two Uruguayan players to a Uruguayan club.

Such has been the notoriety and impact of this case, that it has even been labeled the '*South American Bosman*'.

An extension option in professional football is the right of the player and/or the club to extend an employment contract for a certain period which is stipulated by the parties in the contract that binds them. The option can be reciprocal or unilateral. In the first case, both parties may agree on the extension, while in the second case, only one of the parties has the possibility to exercise the extension option without the need for the other party's consent.

In practice, unilateral extension options are normally established in favour of the clubs. The clubs establish this option in the contract to try to prevent the situation whereby their players leave freely at the end of their employment contract. Most clubs try to keep their players as long as possible, particularly when they expect their value in the transfer market to rise.

This practice has increased in certain regions of the world (particularly Latin America and China) as a consequence of the *Bosman* ruling and the end of the old transfer system which enabled the clubs to obtain a transfer fee when the player moved to a new club, even if the player was out of contract.

As a result of this practice, several players who have been affected by it have proceeded to legally challenge unilateral extension options included in their playing contracts, from which they obtain no benefits. The clubs have defended the inclusion of the said clauses on the basis that national laws, as a general rule, do not object or prohibit them.

However, in the purely sporting context, the decision taken by the Court of Arbitration for Sport (CAS) in the *Bueno-Rodriguez* case has produced sporting jurisprudence that should constitute the basis for future decisions regarding similar cases.

Despite the popularity and frequent use in international football of the unilateral extension clause, particularly after the Bosman ruling and the resulting changes to the FIFA Regulations, the latest editions of the Regulations on the Status and Transfer of Players (RSTP) have not included any provisions governing the validity of the aforementioned option. This has led the clubs into the belief that

they are able to freely include this clause into players' contracts and therefore establish a mechanism to retain them when it suits the club's interest.

This type of clause has become particularly common in several countries in Latin America and other jurisdictions such as China. In Latin America, clubs have justified their inclusion by sustaining that this mechanism is their only defense against richer European clubs who take their players at a very young age, as they do not have the financial position to sign long-term contracts with players whose future development is yet uncertain.

However, several clubs in Europe have also included such a clause in the contracts signed with their players, constituting proof that the issue at stake is of global concern and not specific to a particular area of the world.

The appointed Panel of the CAS determined that the fundamental question of the dispute was precisely to determine whether the players Bueno and Rodriguez were still bound contractually to Peñarol when they signed employment contracts with Paris Saint-Germain. However, as an essential prerequisite to answer this question was to determine which law was applicable to the case at hand. Peñarol insisted on the fact that Uruguayan law should be applied as all parties involved in the employment contract were Uruguayan nationals.

However, the CAS determined that, since football is a global phenomenon, it is essential that the rules that govern the sport at the international level are uniform and coherent worldwide[6]:

> The Panel considers that sport is naturally a transnational phenomenon. It is not only desirable but indispensable that regulations referred to the sport at an international level have a uniform and coherent worldwide character. In order to ensure a respect at a worldwide level, such a regulation should not be applicable in a different way from one country to another, due to interferences established by a State Law or a Sporting regulation. The principle of the universality of the application of the FIFA regulations—or of any other international federation—is a need for the legal rationality, security and predictability. All the members of the football family are therefore under the same regulations, which are published. The uniformity that comes from it tends to assure the equality of treatment between all the addressees of such regulations, independently of the countries from which they are

The outcome of two cases with the same facts in two different jurisdictions should produce the same result. This is a kind of *lex sportiva,* a legal cousin of the *lex mercatoria* that is known in international commerce.

And it has to be said that as an international element came into the case, the Paris-Saint-Germain, rules of internal value, like the Uruguayan Football Players Statute, are not valid anymore in an international conflict.

Of course, there are a lot of detractors of *lex sportiva* but it is evident that if there is no common regulation that could be predictably understood by the entire football (or any other sport) family, the legal conflicts would be much more than at present.

[6] Point 68 of the award.

The Panel then asseverated the following:

> As it has been stated, the aim of the FIFA Regulations is to create uniform regulations that can be valid for all the cases of international transfers and in which all the actors of the football family are subject to. This aim would not be reached if all the applicable rules of one or other country had to be applied. It would be inconceivable that such national rules would affect parties that are not subject to the law of a country.[7]

Thus, it is crystal clear that the FIFA Regulations are applicable to the more than 200 of its members, with no obligation for any of them to be subject to the legal reality of another State.

Furthermore, the Panel reminded us the following:

> Then, unless you want to undermine the fundamental aim of the FIFA international Regulations, the agreements and other legal dispositions of national levels can only be applicable if they are in conformity, or at least complementary to the FIFA Regulations, but in no case if they are contrary to those. This necessity of uniform legality is, moreover, one of the most evident "specificities of sport" that article 25.6 of the FIFA Regulations refers to.[8]

It cannot be said more clearly and in lesser number of words. The "internationalist" scope of FIFA is therefore admitted, which is also strange when you talk about the body that controls the world of football, but I am not referring to the Marxist sense of the word…

Finally, we have to take into consideration that this is really the only way to deal with football when it comes to an international aspect as if the national legislation had to enter in conflict in order to know which one has to be applied, we can forget about a quick answer to any dispute.

Thus, let us keep the *"internationality of football"* that praises the Panel in the *Bueno-Rodríguez* case.

The CAS also determined, on the basis of Swiss International Private Law, that it had the possibility to apply a law that was not particular to a specific State, but of universal application such as sporting rules or federation rules, as long as the said rules were not in opposition to public policy.

The Panel then applied Article R58 of the Code of Sports Related Arbitration and Article 59.2 of the FIFA Statutes to conclude that the FIFA Regulations (and subsidiarily Swiss law) were applicable to the case. This conclusion was also supported by the fact that all parties involved are members of national federations that are, in turn, members of FIFA and thus subject to its rules and regulations.

Furthermore, considering that the dispute involves an international transfer and cannot be deemed a "local" dispute, Uruguayan law is not applicable, as there is a clear interest that the dispute be solved in accordance to unified rules and regulations of an international nature.

The Panel stated that sport is "a phenomenon that naturally expanded towards the borders" and that "it is not only preferable but also indispensable that the

[7] Point 101 of the award.

[8] Point 102 of the award.

regulations which control the sport at an international level have a regular and largely coherent character in the whole world."

In that sense, we must remember that the Switzerland Federal Code on Private International Law (LDIP)[9] had to be taken into consideration and the Panel said that:

> … Consequently, the applicable regulations in first instance, FIFA Regulations in this case, cannot be superior to an imperative rule of Swiss Law if the result could be a contradiction in the essential values, duly recognized as per the Swiss legal concepts, that is to say, the Public Policy.[10]

Therefore, it clarifies the need of the FIFA Regulations to adapt itself to the Swiss public policy as the CAS and LDIP compel to do so, but also due to the fact that the FIFA Statutes are under Swiss Law too, as the world football regulator is an association of Swiss Law.

The Panel continues stating that:

> At first glance, the FIFA Regulations do not contain rules that might contradict the essential and well known values of the Swiss legal concepts. However, if a rule of article 25.6 of the FIFA Regulations is contrary to the public policy, it should not be taken into consideration. It would be also the case if an imperative rule of national law would be contrary to the Swiss concept of Law, if hypothetically such a national rule could be assumed as per article 19 of LDIP.

So, the Panel gives us a lot of weapons in order to make it clear that there are no ways to avoid Swiss Law, either by FIFA as it is a Swiss association of civil law, or by any national law of any other country.

It means that whoever wants to be a member of the football family, of FIFA family, cannot, in any way, withdraw from the *vis atractiva* of Swiss Law. The issue is not worthless, as the FIFA Rules and Statutes are the rules that must be accepted by anyone who is a member or wants to continue as a part of the family.

And as the Statutes are approved by the FIFA Congress, in which all the associations are members[11] and where the decisions are taken by majority,[12] it cannot be said afterwards that the legal duties of FIFA Regulations are unknown. The legal system of FIFA is accepted by all its direct (associations) members or indirect (leagues, clubs, players, agents, etc.…).

As for the Uruguayan law, the Panel clarified as follows:

> As per article 19.2 of the LDIP, this solution would be even clearer if the application of the imperative Uruguayan law would come to a result that would be incompatible with the Swiss conception of the Law. Without anticipating the further considerations that shall be said in detail afterwards, the Panel observes that the litigious rules of the Uruguayan law, which is said to be mandatory, i.e. the unilateral option of renewal of the players' contracts and the so-called system of "rebellion", raise serious doubts as to their compatibility to

[9] Loi fédérale Suisse sur le droit international privé, dated 18 December 1987.

[10] Point 94 of the award.

[11] Article 25.2 m and 26 of FIFA Statutes.

[12] Article 27.4 of the FIFA Statutes.

> the minimum standards of protection of employees in Swiss Law. It is to say that even though Uruguayan Law was to be directly applicable if its contents complied with the needs of legitimate interest stated in article 19.1 of LDIP, the Panel would have to refuse the applicability of rules that are potentially contrary to the Public Policy as defined hereinabove.
>
> We have to point out, finally, that the simple fact that, as the appellant says, the whole system of Uruguayan rules that regulates the professional sport have been declared under Public Policy is not enough to raise them to the level of Public Policy in the sense of LDIP. Independently of what angle we might see the notion of Public Policy, its material content cannot be formed by anything else but rules and principles that have a particularly high material value. Therefore, it is not enough to proclaim that the rules are of Public Policy because they are related to certain relationships to give them such a quality.
>
> In conclusion, even using article 19 of LDIP, the Panel considers that the Players' Status of Uruguay cannot be taken into consideration in the present case.[13]

Definitively, we must say that, even in the case that some national rules could be applied, thanks to Article 19 of LDIP, which permits that a Public Policy regulation of another State is applicable in Switzerland, if there is an evident connection with the facts, such rule should in any case be under the "Swiss conception of Law".

Then, this drives us to the point of saying that the entire Swiss legal system, depending on the case in question, had to encounter its home in any CAS award and in the present *litis*, Swiss Law has no possibility to admit the Uruguayan Players' Status which is contrary to the employees' rights in the *Confederatio Helvetica.*

Anyhow, a final remark must be made in this particular issue, as national law (Greek one) was used in the case between the Player Kyrgiakos and its former club Panathinaikos FC, both Greeks, as it was established that there was no *international element* in it.[14]

The CAS' stance regarding applicable law in this case constitutes a fundamental precedent, as the Panel determined that uniformity and legal certainty are essential for football to function globally as an organized sport, and only a universally applicable set of rules established by the sport's governing authority may achieve this objective. Thus, in a football-related case of international transcendence, FIFA's rules and regulations should be applicable over national law, as long as the aforementioned regulations are not contrary to public policy and fundamental principles of law.

When analyzing the dispute within the scope of the FIFA Statutes, the RSTP and Swiss law, the Panel determined that the players Carlos Bueno and Cristian Rodríguez were not contractually bound to Club Atlético Peñarol when they signed employment contracts with Paris Saint-Germain.

Thus, the players did not infringe Article 17 of the RSTP, which refers specifically to the consequences of a unilateral breach of an employment contract between players and clubs.

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[13] Point 109, 110 and 111 of the award.

[14] CAS 2005/A/973 *Panathinaikos FC v Sotirios Kyrgiakos*.

The CAS sustained its decision on the argument that a contract, or Statute governing the same, that allows a club to unilaterally extend the duration of a player′s contract with only a minimum adjustment to the player's salary, is clearly incompatible with the FIFA Regulations in regard to contracts, as these should always have a fixed duration and clearly stipulate the player's salary and other benefits.

The Uruguayan system allows a club, in practice, to establish a long-term contract with the player which, through the unilateral extension option, it may rescind at the end of only one year. The club can therefore refuse to extend the contract if a specific player does not progress as expected, but may retain players who have increased in quality and value, without having the obligation to increase the player's salary.

This leads to a system which is clearly disproportionate in favour of the clubs, and is contrary to the general principles of labour law, as the system gives the clubs undue control over the players without adequately rewarding the players in exchange. It is really a gambling on players but with all the cards in the hands of the club.

What a club should do, if it wants to control as much players as possible or at least the players it considers *previously* as potential transferable footballers, is to sign a long-term contract with them (three years for instance) and bet on them, but not just contract them for one year, in a sort of *period of proof* and only if they appeared to be good, to sign another year or if they are very good more than one only… This seems really unfair for the employees and this is what the CAS has understood.

Peñarol presented, on the very last day and before the hearing, the now well-known "Portmann report",[15] made by Prof. Portmann on the request of FIFA (and surely forced by the South American associations…) regarding the "unilateral option to renew a contract". That report makes clear that, according to Swiss Law, those kinds of options are valid, provided that they have certain points clearly stated in the contract.

Of course, it did not help the case itself, as those points were not, in any way, in the Uruguayan contracts, but would be a preparation for the future contractual labour agreements in Uruguay and some other South American countries that had a similar type of regulations.

But at the time of the case, the system imposed by the Uruguayan Statute of Players disregards the reforms contained by the FIFA Regulations of 2001 and 2005 that derogated the old transfer system, in which a club had the possibility to retain a player and block his move to a different club even if the player's employment contract with the club had expired.

By allowing a club to unilaterally extend a player's contract with no due consideration for the player, the Statute effectively allows Uruguayan clubs to maintain the old transfer system by retaining out-of-contract players, and declaring those that refuse to enter into a new contract as "rebellious".

[15] Dated 10 February 2006.

Furthermore, the Uruguayan *status quo* benefits the clubs when a player is signing a new contract, which is normally the point at which the player is in a weaker position and cannot truly negotiate fair terms. The player then has no possibility to escape the system and obtain more favourable employment conditions, or even the freedom to conclude a contract with a different employer.

The disproportion in the relation between club and player is contrary to contractual law, and a Statute that supports this system should be deemed illegal and unacceptable.

Despite the fact that the FIFA rules and regulations do not specifically touch the subject of unilateral extension of contracts, the aforementioned system is clearly contrary to the spirit of the said rules and regulations, and also to Swiss law as we have previously seen. The Panel took care to mention that such a system is not only contrary to a specific article or rule contained in a code, but is also contrary to the fundamental values of the Swiss legal order as a whole, as the employee is left completely at the mercy of his employer.

The provisions that enable a club to declare the player as "rebellious", contained by the Uruguayan Statute of Players, are also contrary to the Swiss Code of Obligations, as they enable an employer to suspend the payment of the salary to a player while simultaneously blocking his possibility to practice his profession. In general, a system that allows the employer to withhold an employee's revenue for several years is clearly contrary to the fundamental principles of law.

The Panel even considered that the "state of rebellion" in which a player supposedly incurs by refusing to sign a new contract with the club, voids the contractual relationship between the parties since the employer stops paying the salary at that time, and thus, if declared "rebellious", the player and the club are no longer linked by an employment contract.The said contract should be considered rescinded the moment the employer refuses to pay the player his salary while also preventing him from exercising his profession.

In conclusion, the CAS determined that a clause granting a club the unilateral right to extend a football player's contract without any due consideration for the player, such as a substantial increase in salary or other types of benefits, is contrary not only to the FIFA Regulations on the Status and Transfer of Players, but also to the Swiss Code of Obligations and the generally accepted principles of law.

The CAS thus proceeded to uphold the DRC's decision and determined that the players Carlos Bueno and Cristian Rodríguez did not have a valid contractual relationship with Club Atlético Peñarol when they proceeded to sign an employment agreement with Paris Saint-Germain.

This, of course, gave the start for a change in some countries, like Uruguay and also Argentina and Paraguay. In Argentina, for instance, the new official contract drafted by the association (AFA) had tried to introduce the Portmann's indications but failed to do it completely, so we will see what will happen in the future and we might have a potential Bueno-Rodriguez there also …

5.3 CAS 2006/A/1082-1104 Valladolid v Barreto, Cerro Porteño

Gerardo Luis Acosta Perez

This award revolves around the player Diego Barreto who signed a contract with Spanish club Real Valladolid CF SAD for the period after expiry of his contract with Cerro Porteño (Paraguay). However, Barreto had only considered his own position. The contract with Cerro Porteño covered a unilateral extension clause in the club's favour. For a number of reasons the player intended not to fulfil his contract with Real Valladolid CF SAD. He thus cited the unilateral extension clause of his prior club to breach the new contract. The CAS decided that such a unilateral extension of the player's contract would not be valid, and Barreto had to pay €1,500,000. In calculating compensation the Panel mitigated the amount of a buy-out clause of €6,000,000 established in the contract with Real Valladolid CF SAD. The author delves into the background to this ruling.

5.3.1 Introduction

The aim of this document is not to analyze the arbitration award with which the Court of Arbitration for Sport ended the dispute between the club Real Valladolid CF SAD and the player Diego Barreto and the club Cerro Porteño (Paraguay). Our discussion will focus on the background of the dispute, especially on the role played by another unknown stakeholder in this legal transaction.

In order to do so, we will begin with a description of Diego Barreto's legal situation in the club Cerro Porteño during the season of 2004 (I), and will then describe the circumstances surrounding the signing of the contract with the club Real Valladolid CF SAD (II) and we will conclude with a description of the breach of this contract (III). Finally in conclusion, we will briefly outline the outcome of the case in FIFA and the CAS.

5.3.2 Employment Relationship with the Club Cerro Porteño

Diego Barreto, born on July 16, 1981 registered with the Cerro Porteño at age 15, and completed all of his training as a footballer within this club. His outstanding performance in Cerro Porteño, led him to be chosen for the national team at a very early age, taking part in the under 17 and under 20 national teams. With both these teams, he received awards in competitions organised by the South American Football Confederation as well as in the World Championships.

When he was 19 years old, Diego Barreto and Cerro Porteño signed a Sporting Employment Contract under law 88/91 which "Establishes the Status of Professional Footballers" in Paraguay. The duration of the contract was four years from January 1, 2000 until December 31, 2004. In the contract, before the signatures,

a special clause was included which enabled Cerro Porteño to extend the contract for two more years.

Under this contract, Diego Barreto played with the national team of Paraguay in the South American under 23 "Pre Olympics", the "A" team of the Copa América and the Olympic Games in Athens, all in the year 2004, winning the silver medal in the two Olympic competitions.

5.3.3 The Contract with Real Valladolid CF SAD

In July 2004, more specifically on July 17, 2004, a day after his 24th birthday, while Diego Barreto was in Peru with the "A" national team of Paraguay due to his participation in the Copa América, the player's father was contacted in Paraguay by a lawyer, Mr Pascual Barrios, who offered him an employment contract with Real Valladolid CF SAD, to begin on January 1, 2005, when the contract with Cerro Porteño would have expired, without taking into consideration the possibility that the extension agreed on by the parties in that contract would occur.

The player's father was offered a sum of money (€300,000) for allegedly acting as his son's representative, as stated in the FIFA Player's Agent Regulations. The father obtained the consent of his son and a contract was created between Real Valladolid CF SAD and Diego Barreto.

In the contract, Pascual Barrios, is not named as the representative of Real Valladolid CF SAD, but as a lawyer acting on behalf of Diego Barreto. The contract was signed by the President of the Spanish club and by Pascual Barrios, on behalf of the player. Then, in order to avoid potential problems, Pascual Barrios faxed the document to Diego Barreto, who was in Peru, to seek his approval of it. The player signed the contract, confirming everything that Pascual Barrios had done on his behalf.

The contract stipulated that Diego Barreto was required to pay the fees of his agents and lawyers, which explicitly included Pascual Barrios. Until that point there were no problems.

However, when the date came around for the first payment of a sum of money to be made, which was to be paid in advance, Pascual Barrios, who acted as a representative of the Spanish club to the player and his father, but who, in the contract had a different role, provided his personal bank account details for the payment, and then only gave Diego Barreto and his father the sum of €50,000 (in the contract the amount was €100,000).

From the point when Pascual Barrios refused to hand over the full sum of the money to the player, Barreto also began to breach the contract, which culminated in the arbitration award of the CAS.

5.3.4 Breaches of Contract by Diego Barreto

Continuing to trust Pascual Barrios, Diego Barreto believed that he could claim that Real Valladolid had breached the contract which would have rendered that agreement null and void and he therefore considered himself free to sign a contract with any club of his choice. Real Valladolid, however, rejected this argument because it had paid the money owed according to the instructions of the player's "representative", Pascual Barrios.

At this point, in October 2004, Cerro Porteño requested that Diego Barreto sign a contract extension, in accordance with the clause in the contract that expired on December 31, 2004. Diego Barreto refused and a labour dispute was initiated in Paraguay.

Diego Barreto announced, through the media, that nothing had been signed with Real Valladolid, perhaps believing that the agreement between the two sides had been legally voided following Pascual Barrios' breach of contract, and initiated a series of training tests with UD Almería (Spain).

Diego Barreto's situation was therefore quite complex, involving three clubs. The first, Cerro Porteño, requested his compliance with the extension clause in the contract via the labour courts of Paraguay. The second, Real Valladolid CF SAD, having paid the player's "representative", required him to train at the club. The third, UD Almería, was where he was training and they wanted him to sign a contract with them.

Under these circumstances, Diego Barreto decided to end his disputes as follows:

(a) He accepted the extension of the employment contract requested by Cerro Porteño in the Paraguayan courts and signed a new two-year contract with them.
(b) He then informed Real Valladolid CF SAD and UD Almería SAD of this fact, so that they could contact Cerro Porteño, in accordance with the provisions of the FIFA Regulations on the Status and Transfer of Players.

Only UD Almería contacted Cerro Porteño and they eventually agreed to the transfer of Diego Barreto on the condition that they receive compensation of approximately €400,000.

The transfer occurred in July 2005, at which time Barreto was about to be declared eligible by the Royal Spanish Football Federation. At this time Real Valladolid CF SAD requested the fulfilment of the contract signed on July 17, 2004.

Through a legal procedure brought before the Royal Spanish Football Federation, Real Valladolid ensured that Diego Barreto would not be permitted to play for UD Almería until November 11, 2005. Before this, on June 7, 2005, Real Valladolid filed its dispute with the Dispute Resolution Chamber in order to obtain compensation for breach of contract. In other words, on the one hand Real Valladolid was opposing Diego Barreto being permitted to play at UD Almería, as

the club had a valid contract with the player which preceded the UD Almería contract, and on the other hand, at the same time, they were pursuing legal means to obtain compensation from the player for breach of contract.

The legal process continued with FIFA deciding on January 12, 2006 that Diego Barreto would have to pay compensation of EUR 462,500, which was then increased to EUR 1.625 million by the CAS. In this regard we must remember that Real Valladolid CF SAD requested payment of €6,000,000 and Diego Barreto felt that he was only responsible for €150,000.

5.3.5 The Arbitration Award

Before presenting our findings on this particular case, it is worth analyzing the main arguments used by the Arbitration Panel, in ordering Diego Barreto to pay compensation of €1,625,000.

Diego Barreto's case was highly complex, given that the Panel had to resolve the following issues as mentioned in Section 59:

5.3.5.1 Validity of the Contract Signed on July 17, 2004

In this regard it ruled the following, using, at this point, Swiss law (Section 62): "Article 4 of the Regulations on the Status and Transfer of Players (2001 version) states that all professional players must have a written contract. In Swiss law, the validity of contracts is not dependent on a particular form of compliance but rather it comes under a special legal provision. The provision is based on the principle of autonomy and, consequently, on the principle of consent, which Swiss obligation law believes to constitute freedom of compliance with the rules. In this type of case, the individual employment contract signed between the parties is not subject to a particular form of compliance, in view of Article 319, Section 1 of the Swiss Company Law. Therefore, the criticism made by the player concerning the lack of a sufficient number of original copies of the contract of July 17, 2004 is deemed unfounded and cannot lead to any revocation or invalidity of the agreement."

5.3.5.2 Ruling on the Contract of July 17, 2004

In Section 66 the Panel ruled that: "The fact that entry into service has been agreed on for the future is not sufficient to conclude that there is a pre-contract. It is indeed clear from Article 320–322 of Swiss Company Law that the decisive factor in assuming the existence of an employment contract is an agreement on the performance of work in exchange for remuneration. So it is not therefore legally inconceivable that legal contracts are signed which are not to be fulfilled

immediately. These agreements are contracts and not preliminary contracts or promises of a contract."

5.3.5.3 Supposed Unilateral Breach of Contract and Reasons for it

The panel mentioned (Section 69): "It has not been disputed that the player did not turn up at Real Valladolid to perform his duties. As a result of this fact, the player has violated his contractual obligations resulting from the agreement of July 17, 2004" and (Sections 71 and 72) "we must ask whether the player had reasons for not carrying out his duties which could justify the breach of contract. With regard to this, the player cited the existence of the renewal clause in his contract of December 27, 2000 with Cerro Porteño. It is not straightforward to distinguish, in this argument made by the player, if this fact is cited as a way to justify the unilateral breach of contract or as a circumstantial occurrence that should lead to a reduction in any possible compensation. Whatever the case may be, the panel considers that the contract renewal clause invoked by Cerro Porteño at the end of 2004 does not, on its own, constitute a valid reason in accordance with Article 21 and the following clauses of the aforesaid FIFA Regulations."

5.3.5.4 Principle and Amount of Compensation for Unilateral Breach of Contract

Regarding the validity of the clause, the panel said (Section 79): "So the indemnity clause in the contract of July 17, 2004 is considered as valid with regard to its beginning. We add, in the interest of clarity, that an employment contract providing compensation for a unilateral breach of contract by the worker cannot be considered as being in violation of the law. Swiss law, in accordance with the place of arbitration, does not object to this clause being invoked", adding that (Section 85) "under Swiss law, the judge should exercise caution when reducing the sentence, in order to protect the freedom of will of the parties. In doing so, the judge must take into account, in particular, the creditor's interest in the implementation of the obligation, the seriousness of the breach of the obligation and the debt owed and the economic capabilities of the parties" to conclude that (Section 89) "the panel also considers, in parallel, that the amount of the compensation clause for a unilateral breach of contract must be set in accordance with the interest of the club in the execution of this contract. That interest may correspond to the value of the player on the market, if that value can be demonstrated, as in the *Mexès* case. By default, the panel considers that this value should at least correspond to the remuneration the club was prepared to give the player under the repudiated contract, meaning the investment that the Club agreed to in order to secure the services of the player."

5.3.5.5 Obligation to Reimburse Payments made by Real Valladolid

On this issue the panel said that (paras 97 and 98): "Apart from compensation for unilateral breach of contract, the decision under review has awarded Real Valladolid the sum of €125,000 in reimbursement for the payments made by the Club in fulfilling the aforementioned contract of 17 July, 2004. On several occasions, especially before the Dispute Resolution Chamber and in the context of this procedure, the player has accepted this claim, both in terms of its principle as well as the specific amount. Therefore, in his statement of appeal, the player stated that he confirms the decision of the Dispute Resolution Chamber as "the repayment of €125,000 to Real Valladolid" and "we must emphasise that this issue is not being contested and that the decision reached can be confirmed at this point".

5.3.5.6 Sanctioning the Player

In Section 101, the panel says: *"*In this case, the panel finds no reason to stray from the clear language of the FIFA Regulations or to reverse the decision reached by the Dispute Resolution Chamber. In particular, the fact that the player has not been permitted to play in Spain for more than two months because of the administrative management of Real Valladolid opposing his registration in another Spanish club, means that the circumstances could not be considered as exceptional in the sense of Article 23 of the FIFA Regulations. There is not, therefore, any reason why the sanction imposed in the meeting with the player should be reduced, as he requested."

5.3.5.7 Sanction Against Cerro Porteño

The Panel finally rejects any sanction against Cerro Porteño saying (Section 105*): "*For the reasons given previously given, Real Valladolid does not have, in this case, any reason to challenge the ruling made by the Dispute Resolution Chamber in this regard. The decision made will be confirmed accordingly at this point.*"*

5.3.6 Conclusion

Now that the arbitration award is known, certain pieces of information should be added to the analysis, which were not considered by the arbitration panel. These include the following.

(a) The ambiguous position, in this case, of Pascual Barrios and a company, who presented the offer from Real Valladolid to the player and his father, and later appeared in the contract as the player's representatives. In the legal procedure, numerous pieces of evidence were provided detailing the links between the president of the Spanish club and the lawyer Barrios and the company.
(b) The position of Real Valladolid CF SAD which, for four months, opposed the player's registration at UD Almería, so that he could not play, using the argument that he already had a valid contract and that he should be registering with Valladolid but, at the same time, initiating a legal procedure with FIFA's DRC to claim compensation for breach of contract. Either the player had a valid contract, or the player breached the contract. But not both at once.
(c) The decision made by CAS to disqualify the time during which the player was not permitted to play for UD Almería as a result of the opposition of Real Valladolid CF SAD, from counting towards the 6-month suspension.

However, it is clear that Diego Barreto signed two contracts with two different Spanish clubs and that also extended his contract with Cerro Porteño. And all this was done, not with the intent of defrauding Real Valladolid, but as a result of circumstances in which he was deceived by people who presented themselves as emissaries of Real Valladolid, but who, in the contracts, took on the role of the representatives of the player.

It has also not been mentioned at all that the *Diego Barreto* case effectively paved the way for the resolutions later reached by the CAS in the *Webster* and *Matuzalem* cases. Section 89 of the transcript shows the outcome of these two cases. The compensation for unilateral breach of contract by the player can be calculated either by the "value of the player on the market, if that value can be demonstrated, as in the *Mexès* case" (the solution in the *Matuzalem* case) or "the remuneration the club was prepared to give the player under the repudiated contract, meaning the investment that the Club agreed to in order to secure the services of the player" (the solution in the *Webster* case).

5.4 CAS 2006/A/1157 Club Atlético Boca Juniors v. Genoa Cricket and Football Club S.p.A.[1]

Frans M. de Weger

The Boca Juniors Award was about the move of a minor player, Fernando Martín Forestieri, from Club Atlético Boca Juniors to Genoa Cricket to Football Club S.p.A, ignoring a unilateral extension option exercised by Atlético Boca Juniors. Fernando Martín Forestieri moved to Italy as a consequence of his parents immigrating there. The CAS decided that in view of the minor player's prevailing interest in staying with his family, he did not have to go back to Argentina. Even though the Panel did not have to decide on the validity of the unilateral extension options, it took a critical view of the validity and enforceability of unilateral extension options, even from the perspective of the opinion of Prof Wolfgang Portmann, which encompasses the criteria for the validity of unilateral extension options

(see: Unilateral option clauses in footballer's contracts of employment: an assessment from the perspective of international sports arbitration, International Sports Law Review (2007) no. 1, pp. 6–16). The author evaluates this award and the CAS' approach to the validity of unilateral extension options favouring clubs.

5.4.1 Facts

This case concerns a dispute between the Argentinian football club Club Atlético Boca Juniors (hereinafter referred to as: "Boca") and the Italian football club Genoa Cricket and Football Club S.p.A. (hereinafter referred to as: "Genua").

On 18 September 2005, the player Fernando Martín Forestieri (hereinafter referred to as: "Fernando"), born in Argentina and with dual Italian and Argentinean nationality, at the age of 15 entered into a contract with Boca. The contract was stated to end on 30 June 2006, when Fernando would have been 16 years old. In the contract his club Boca was given the right to unilaterally extend the contract twice for one year.

In December 2005 the player Fernando and his family moved to Italy, where he entered into a contract for a term of three years with Genua. Therefore, on 6 July 2006 the Italian Football association requested the Argentinean Football Association to issue the International Transfer Certificate (hereinafter referred to as: "ITC").

On 14 July 2006 the Argentinean Football Association responded to the request, stating that Fernando was still under contract to Boca. Boca asserted that on 31 May 2006 it had exercised the right to extend Fernando's contract for one year by sending the player a telegram to an address in Buenos Aires. Finally, the dispute was referred to FIFA and the FIFA Players' Status Committee (hereinafter referred to as: "Single Judge") had to decide whether or not a provisional registration should be issued.

The Single Judge referred to the jurisprudence of the FIFA Dispute Resolution Chamber (hereinafter referred to as: "DRC") and the Court of Arbitration for Sport (hereinafter referred to as: "CAS") which had concluded that unilateral options were, in general, void as being in unlawful restraint of trade. Boca relied upon a legal opinion from Dr. Wolfgang Portmann (hereinafter referred to as: "the Opinion").[16]

In the Opinion, Dr. Portman expressed the view that such provisions can be valid from the point of view of Swiss private international law. However, it was important that there had to be certain safeguards in relation to their exercise. The Single Judge noted that the extension option concerned did not meet these prerequisites. As result thereof, the Single Judge had doubts whether the option was enforceable and so whether a contractual relationship existed between the player Fernando and Boca.

[16] Dr. Wolfgang Portmann is a professor of private and employment law at Zurich University.

The Single Judge finally decided on 22 August 2006 that the Italian Football Federation could provisionally register the player Fernando as a Genua player.[17] Boca did not agree and appealed before CAS against the decision of the Single Judge. Boca's argument in appeal essentially was that the player Fernando should be required to play for their club. According to Boca the player should not be permitted to play for another club during the period of the disputed extension of his contract.

5.4.2 Decision

To go straight to the point: CAS agreed with the decision of the Single Judge. However, the CAS panel did not entirely concur with the Single Judge's reasoning.

According to CAS, the Single Judge appeared to place considerable weight on the Opinion, and implied that, if the Single Judge had not had such doubts about whether the unilateral extension option had been exercised in compliance with the conditions set forth in the Opinion, he would have refused the provisional registration. The CAS panel stated that it was not prepared to give the Opinion such weight. Even more, CAS emphasized in this case that it had great difficulty in following Dr. Portmann's reasoning, and in accepting the validity and enforceability of the extension option.

Fortunately, according to CAS, the CAS panel did not have to decide the issue of the option in the present case, because the panel would put its decision on a wider basis.

According to CAS, Boca's submission founders on a long and consistent line of CAS jurisprudence, as well as the jurisprudence of many systems of law, that will not require a person to perform a contract for personal services against his or her will.[18] CAS emphasized that the player Fernando was still a minor and it emphasized that it would be inconceivable that any tribunal anywhere in the world would require the player Fernando either to be separated from his family, and have to move back to Argentina against his will, or require Fernando's family once more to uproot itself from Italy to move back to Argentina. Finally, the appeal by the club Boca against the decision of the Single Judge on 22 August 2006 was dismissed by the CAS panel.

[17] The provisional registration can be seen as a first step in a case where there is an issue between clubs or associations as to whether an ITC should be issued. See Annex 3 Article 3 of the Regulations on the Status and Transfer of Players 2009.

[18] CAS refers to CAS 2006/A/1100 *Tareq Eltaib v Club Gaziantespor*.

5.4.3 Commentary

5.4.3.1 Intro

CAS explicitly emphasized in this award that nothing that it had stated had to be taken as an indication that CAS had formed any view as to whether the unilateral extension option in the player's contract was valid and enforceable. However, this case can still be seen as an interesting one with respect to the issue of unilateral extension options. More specifically, despite the fact that the aforementioned statements regarding the validity of the option concerned can be entitled as an Obiter Dictum, CAS did lift a corner of the veil regarding its point of view on the Opinion of Dr. Portmann. Therefore, I would like to lift out several relevant aspects with regard to this clause, more particularly related to the consequences for the future. In order to place this decision of CAS in the right perspective and to understand the commentary of this case well, first a short background, the relevant jurisprudence till so far and the criteria of Portmann regarding the unilateral extension option will be discussed.

5.4.3.2 Background

The extension option is the right of a player and/or club to extend their employment contract for a certain period which the parties have stipulated in their current employment contract. There are many kinds of extension options. There is the reciprocal extension option in favour of both the player and the club whereby both parties are entitled to prolong the contract for a certain predetermined period and there is the extension option in favour of only one of the parties. In the daily practice of international professional football, extension options mostly only favour the club.

After the Bosman case in 1995[19] in which the European Court of Justice decided that a club was not allowed to pay compensation for the transfer of a player who had ended his contractual relationship with his former club and that this was in violation of the free movement of persons within the European Union, there was a substantial increase in the use of the extension option in favour of clubs. By including options in their favour clubs attempt to prevent the situation whereby their professional football players serve out their employment contracts and are thereafter able to leave for free.

At the international level there is uncertainty regarding the validity of the unilateral extension option. The DRC as well as CAS, as the authoritative committees at the international level for professional football, have provided the

[19] Case C-415/93, *Union royale belge des sociétés de football association ASBL v. Jean-Marc Bosman, Royal Club liègois SA v. Jean-Marc Bosman. SA d'Economic Mixte Sportive de l'Union Sportive du Littoral de Dunkerque, Union Royale Belge des Sociétés de Football Association ASBL, Union des Associations Européennes de Football Union des Association Européennes de Football v. Jean-Marc Bosman*, judgement of 15 December 1995, [1991] ECR I-4837.

international football world with several decisions related to the subject of the extension option.[20] What conclusions can be drawn from analyzing DRC and CAS jurisprudence till date?

5.4.3.3 Jurisprudence Till Date

After analyzing DRC and CAS jurisprudence, it can be concluded that neither of the committees till date have found a uniform answer to the question related to the validity of unilateral extension options. The DRC seems to have a general way of analyzing the validity, maintaining that the clauses in general have a disputable validity. The DRC refers to its own jurisprudence constantly and has tried to formulate a starting point when assessing the clause's validity.[21] CAS does no such thing, dealing with each case individually and making the relevant circumstances decisive in each case. CAS is not bound to earlier jurisprudence due to the absence of the so-called 'Stare Decisis'-principle and as a result thereof, each case will be dealt with individually, making future jurisprudence quite uncertain.[22]

Nonetheless, one general conclusion can be drawn: unilateral extension options are—by their very principle—in general incompatible with FIFA regulations and the principle of global labor law. Indeed, both DRC and CAS have only once ruled in favour of a valid option.[23] In that respect it cannot be left unmentioned that both cases had the extraordinary circumstance of the player accepting an earlier extension that was based on the same option clause. Both players in these cases

[20] All published decisions of the DRC can be found on the FIFA web site: www.fifa.com. All published decisions of the CAS can be found on the CAS web site: www.tas-cas.org. Contrary to the dispute resolution committee DRC it must be noted that CAS is officially a court of arbitration. Without wishing to put too much emphasis on the possible differences it is important to remain aware that DRC decisions can only be enforced through regulatory measures. This means that only FIFA members, amongst other clubs and players, can be sanctioned. If a club or player fails to comply with a DRC decision, a disciplinary sanction can be imposed. CAS arbitration awards on the other hand can be much more difficult to enforce. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 applicable to the recognition and enforcement of arbitral awards made in the territory of a state other than the state where the recognition and enforcement of such awards are sought only applies to the Parties to this Convention. This means that non-Party countries lack the legal means to enforce arbitral awards. FIFA however is competent to respond directly to a party that infringes the rules by forcing the national association to impose a sanction. Parties therefore prefer the DRC as a sports deciding body given the possibilities that FIFA has to enforce decisions through its own FIFA channels. See also FIFA Commentary, explanation Art. 22, p. 65.

[21] DRC 22 July 2004, no. 74508, DRC 13 May 2005, no. 55161, DRC 24 October 2005, no. 105874, DRC 21 February 2006, no. 261245, DRC 23 March 2006, no. 36858, DRC 30 November 2007, no. 117707, DRC 7 May 2008, no. 58860, DRC 9 January 2009, no. 19174 and DRC 15 May 2009, no. 59081.

[22] It must also be noted that under CAS rules the parties have a formal say in the composition of the CAS committee.

[23] DRC 21 February 2006, no. 261245 and CAS 2005/A/973 *Pananthinaikos Football Club v Sotirios Kyrgiakos*, 10 October 2006.

only started protesting when their clubs had already extended their players' contracts for the second time!

Despite the above-mentioned, both DRC and CAS have not gone so far as to declare unilateral extension options invalid *under any circumstance*. The DRC refers to its jurisprudence in similar cases, but rules every case on the basis of specific relevant circumstances. CAS does not sustain a clear line of reasoning by referring to its own jurisprudence, but bases its decisions solely on the circumstances of the case at hand.[24] For example, in a case before CAS of 10 October 2006 all relevant circumstances pointed towards the validity of the clause.[25] Apart from the fact that this is the first and only CAS-decision in which CAS declared a unilateral extension option valid, it is also an important decision since the CAS panel clearly emphasized that the relevant circumstances of each and every case can and will be decisive.[26] CAS emphasized in this case the value of FIFA's principle of contractual stability by using the *pacta sunt servanda* principle as a starting point and decisive factor.[27]

In another important CAS decision of 12 July 2006,[28] which can be considered as the landmark CAS-case of unilateral options, CAS refers to the Opinion of Dr. Portmann.[29] In his article, Portmann gives an explicit review of the case at hand. Portmann gives us five criteria on the basis of which a specific option right should be judged in order to answer the question whether the extension right is to be considered as an excessive commitment. In its decision of 12 January 2007, the DRC used Portmann's criteria as leading for valid options. Since then, the criteria are being used in football practice all over the world and are being highly valued.[30]

[24] An earlier decision that in a way covered the unilateral extension option is TAS 2003/O/530 *A.J. Auxerre Football c Valencia CF, SAD & M. Mohamed Lamine Sissoko*, 27 August 2004. In this case the club tried to convert a 'trainee' contract into a professional contract using an extension.

[25] CAS 2005/A/973 *Pananthinaikos Football Club v Sotirios Kyrgiakos*, 10 October 2006.

[26] An earlier CAS-case that dealt with a unilateral extension option was TAS 2006/A/1082–1104 *Real Valladolid CF SAD v Diego Barretto Cáceres & Club Cerre Porteno*, 19 January 2007. In this case the unilateral extension option was considered invalid, because of its incompatibility with FIFA regulations. In this case, CAS referred to its decision in the aforementioned CAS-decision of 12 July 2006, 2005/A/983 & 984, *Club Atlético Peñarol v Carlos Heber Bueno Suárez, Christian Gabriel Rodríguez Barrotti & Paris Saint-Germain*. One last CAS-case that handled some sort of unilateral option clause was the CAS-decision of 2006/O/1055 *Del Bosque, Grande, Miñano Espín & Jiménez v Besiktas*, 9 February 2007. In this case, however, the unilateral option clause referred to the right to terminate the relevant employment contract.

[27] See also dr. mr. S.F.H. Jellinghaus' annotation in 'Jurisprudentie in Nederland', Arbeidsrecht 194, May 2007, no. 5.

[28] TAS 2005/A/983&984 *Club Atlético Peñarol v. Carlos Heber Bueno Suárez, Christian Gabriel Rodríguez Barrotti & Paris Saint-Germain*.

[29] Prof. Wolfgang Portmann, *'Unilateral option clauses in footballers' contracts of employment: an assessment from the perspective of international sports arbitration'*, 7 Sweet & Maxwell International Sports Law Review (2007) no. 1, p. 6–16.

[30] Unfortunately this decision is not published on the web site of FIFA.

However, it is noteworthy in respect of the validity of unilateral extension options that after the mentioned cases before the DRC of 12 January 2007 and CAS of 12 July 2006, neither DRC nor CAS in later cases referred directly to the criteria of the Opinion. As mentioned previously, till date DRC and CAS have only once ruled in favour of a valid option. Moreover, in later cases the DRC is extremely reluctant in establishing options valid.[31] Also CAS, for example in a more recent case of 7 June 2010, is reluctant and states that the validity and enforceability of an option is not accepted.[32] So, a relevant question in that respect is, will the criteria of Portmann as laid down in the Opinion in fact be sufficient enough to establish a valid extension option?

5.4.3.4 The Criteria of Portmann

In the case between Boca and Genua the CAS panel explicitly, as pointed out earlier in the Introduction, lifted a corner of the veil regarding the Opinion of Dr. Portmann. CAS referred to the fact that it was not prepared to give the Opinion such weight as the Single Judge did. CAS even had great difficulty in following Dr. Portmann's reasoning, and in accepting the validity and enforceability of the extension option.

In the mentioned case before the DRC of 12 January 2007, for the first time the committee time gave us complete clarity and conditions under which the unilateral option can be valid. In this case the DRC first of all made note of the mentioned CAS case of 12 July 2006, the player referred to.[33] As mentioned, this CAS case could be seen as leading with regard to the option. The DRC finally decided that the system of the unilateral extension option in general is not compatible with the Regulations of FIFA. However, the DRC also referred to the Opinion of Dr. Portmann and his five criteria in order to establish whether an extension option can be valid.

Also CAS referred to Portmann's criteria in the mentioned CAS case of 12 July 2006 and applied them to the present case in one sentence under point 110 of its decision. However, it is important to note that Portmann's criteria are being mentioned and discussed in the part of the CAS-decision that assessed the question of applicable law. As from point 113 of its decision, CAS assessed the validity of a unilateral extension option. When CAS started assessing whether the option was valid, Portmann's criteria were never mentioned. Instead, the CAS came to the conclusion that the option was invalid for other reasons since it did not match with the FIFA rules.

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[31] See for example, DRC 30 November 2007, no. 117707, DRC 7 May 2008, no. 58860, DRC 9 January 2009, no. 19174 and DRC 15 May 2009, no. 59081.

[32] CAS 2009/A/1856 *Fenerbahçe Spor Kulübü v Stephen Appiah*, CAS 2009/A/1857 *Stephen Appiah v Fenerbahçe Spor Kulübü*, 7 June 2010.

[33] TAS 2005/A/983&984 *Club Atlético Peñarol v Carlos Heber Bueno Suárez, Christian Gabriel Rodríguez Barrotti & Paris Saint-Germain*, 12 July 2006.

It could be concluded after having studied both cases the DRC overestimated the value of Portmann's criteria in its case of 12 January 2007.

Nonetheless, and as said earlier, the criteria of Portmann are being considered as the general guideline by the professional football world in order to establish whether a unilateral extension option in favour of the club can be considered as valid.

According to the DRC in its decision of 12 January 2007, the following criteria are decisive in order to establish whether an option in favour of the club can be valid:

1. The potential maximal duration of the labour relationship shall not be excessive;
2. The option shall be exercised within an acceptable deadline before the expiry of the current contract;
3. The salary reward deriving from the option right has to be defined in the original contract;
4. One party shall not be at the mercy of the other party with regard to the contents of the employment contract; and
5. The option shall be clearly established and emphasized in the original contract so that the player is conscious of it at the moment of signing the contract.

With regard to the first condition, the DRC pointed out that the maximum duration can be five years as stated in the Regulations of FIFA.[34] The duration in this case was not excessive, because the total period (initial contract including the option years) did not exceed the five-year term. With regard to the second condition, the fact that the option must be invoked within an acceptable deadline before the end of the current contract, the DRC decided that five days before the opening of the transfer period was too short. The player was left in uncertainty till the last moment. This was a huge disadvantage for the player as a result of which the short term was not accepted by the DRC. In continuation, the DRC puts the third condition to the test and established that the salary reward deriving from the option right was defined in the original contract. The fourth condition contained that one party shall not be at the mercy of the other party with regard to the contents of the employment contract. The DRC in this respect made a match with the question whether a salary increase existed after the club invoked the option. The DRC referred in this respect to the CAS-case the club referred to.[35] In that matter in case the option was invoked the salary reward in the first year would be 25% and in the second year 100%. In the present case before the DRC the increase was 9% for the first year and 8.33% for the second year. The DRC concluded that the position with respect to the negotiations was not equal and that there was no apparent gain for the player as a result of the extension. For that reason the player

[34] See Article 18 para 2 of the FIFA Regulations on the Status and Transfer of Players, edition 2009.

[35] CAS 2005/A/973 *Pananthinaikos FC v Sotirius Kyrgiakos*.

was at the mercy of the club with regard to the content of the employment contract. With regard to the last condition the DRC was of the opinion that the clause concerned was established in the original contract. However, the DRC noted in that respect that the option was mentioned in the middle of both contracts without laying emphasis on it in a different manner. As a result thereof the unilateral extension option was not inserted in the contract in a correct manner. The player was not made fully aware of it. One of the safeguards as stated in the Opinion was to clearly highlight the option clause in favour of the employer.[36] At the end, the DRC decided in this case on the basis of the five elements that the unilateral option in this case could not be considered as valid.

It must be noted that the DRC in this matter also pointed out that the player in the relevant CAS-case the club referred to, explicitly accepted the first extension and solely disputed the second extension. According to the DRC, this was an important matter for the CAS to decide as it did. Finally, it is important to note that the DRC emphasized that the unilateral option, even if an option fitted in with all the five elements, can still be invalid. This can be derived from the words'If at all' as considered in point 9 of the DRC-decision. In other words, the DRC pointed out that even if the option can be seen as a valid clause, the five elements are at least of crucial importance.

5.4.3.5 Future of the Unilateral Extension Option

Although CAS explicitly emphasized in the case between Boca and Genua, as said above, that nothing that it had stated had to be taken as an indication as to whether the extension option in the contract was valid, one can now understand better—in relation to the jurisprudence of DRC and CAS—that this case is interesting with respect to the validity of unilateral extension options. The CAS seems to call in question the Opinion of Portmann and its criteria. What can be expected from future DRC and CAS decisions after this award? What will be the impact of this decision?

After having read the decision of CAS between Boca and Genua it can be concluded that the criteria of Dr. Portmann might not be interpreted as absolutely leading by CAS and DRC in future cases. In this case the CAS panel seems to give us a warning that in future cases CAS might be more than skeptical with regard to the validity of unilateral extension options. The message of this case: please be

[36] In the report '*Contractual Stability in Professional Football, Recommendations for clubs in a context of international mobility*', by Diego F.R. Compaire (Italy/Argentina), Gerardo Planás R.A. (Paraguay) and Stefan-Eric Wildemann (Germany), July 2009, reference is made to the case *Club Atletico Lanus/Javier Alejandro Almiron & Polideportivo Ejido SAD (FIFA 07/00789)*. However, this case is also not published. As far as I know and based on the report the unilateral extension option in the latter case was not valid because the decisive argument was that the player was absolutely aware of the unilateral extension option. According to the DRC the player therefore explicitly accepted this clause.

aware, meeting with the five criteria may not be sufficient. The particular circumstances of each case will now be even more decisive. One can say that after having analyzed the other relevant DRC and CAS jurisprudence, it still deems important to meet at least the five criteria mentioned in the DRC-decision of 12 January 2007 and the CAS-decision in the *Bueno & Rodriguez* case.[37] However, please be aware that the DRC does not refer to the criteria anymore in later cases and CAS—briefly put—seems to slightly distance itself from the value awarded to the criteria in the past.

Nonetheless, a general declaration of invalidity is not to be expected. The use of unilateral extensions is common in professional football all over the world, and openly declaring such clauses invalid under any circumstances would have serious consequences. In none of the decisions the DRC or CAS declare the unilateral extension option invalid *under any circumstance*. In that respect one should take into account that each case shall be decided on the relevant circumstances of that specific case. In my opinion, DRC and CAS will be more inclined to declare an extension option valid, if all five mentioned criteria are met. However, to be sure and to increase the chances, I would advise to add a sixth and seventh criterion to the list.

First, although this cannot be derived from the decisions of CAS and DRC, it would be advisable that the extension period is proportional to the main contract. For example, a main contract for the period of one year, with an extension option for four years does fall within the five-year maximum that is mentioned in FIFA Regulations. These clauses, however, can be considered as a disguised probation period solely in favour of the club and can therefore in my opinion not be considered as legally valid.

Second, it would be advisable to limit the number of extension options to one.[38] For example: a player's contract is signed for a period of one year. The contract contains a unilateral extension option that gives the club the right to extend the contract twice, one for year each, such as was the case in the matter between Boca and Genua. Again, the total period of five years (main contract of three years and two extensions of one year) falls within the FIFA Regulations and matches the five criteria mentioned by the DRC and CAS, but it still bears a substantial risk that this kind of option by the DRC or CAS will eventually be considered as an unreasonable commitment of the football player, being the weaker party in the employer–employee relationship.

It should be noted that from the analyzed jurisprudence one main criterion is deemed most important by DRC and CAS: the player should receive a significant increase in salary due to the extension. Furthermore, a club should explicitly mention the extension option in a contract by making the player sign the clause concerned, in addition to the player's contract. In order to avoid any

[37] CAS-decision of 12 July 2006, 2005/A/983 & 984, *Club Atlético Peñarol v Carlos Heber Bueno Suárez, Christian Gabriel Rodríguez Barrotti & Paris Saint-Germain*.

[38] See DRC 22 July 2004, no. 74508.

misunderstanding, I would say: put the unilateral extension option in bold characters above the player's signature.[39]

In conclusion, it can be said that even if all of Portmann's criteria (plus the additional ones) are met, this still does not automatically mean that the extension option will be valid. A declaration of validity appears dependent on another requirement, which cannot easily be put into words, but comes down to the fact that the relevant circumstances of a specific case shall always be decisive: has the player accepted an earlier extension? How did the player behave after the club's extension? Did the player play in any official matches and did the player keep training with his team after the extension? Did the club only extend the contract because it can then claim higher damages due to a player's breach? Did the player explicitly agree with the effects of the option (in writing, verbally or can it be drawn from his stance)? In short: apart from the aforementioned criteria, all relevant circumstances of a specific case should point towards validity of the unilateral extension, in order to establish a valid clause.

Following the decisions of CAS and DRC, one can come to the conclusion that the validity of a unilateral extension option increases in case the player accepted an earlier option in his contract or in case acceptance followed due to his stance, for example by continuing to take part in training sessions and official matches after the extension.[40] On the other hand, the DRC will be more inclined to come to an invalid option in case the contract is not provided with conditions that will bring the player a substantial advantage. Also, the fact that the extension option is extended by the club solely in order to claim higher compensation, will not speak in favour of the club.[41]

Finally, it is noteworthy to mention that recent developments in South America show us a decrease in the usage of unilateral extension options. For example, in South America where the unilateral extension option was extremely popular (and in some countries still is) the disputable validity of the clause has caused it to fall into disuse in certain countries. A recently published report even shows that in Chile the unilateral extension option is now completely banned and in Uruguay it only still exists because the players' union disagreed with its abolishment.[42] Furthermore, in Argentina the unilateral option can only be used

[39] The unilateral extension option could also be laid down in a document apart from the employment contract in which the player explicitly agrees to this clause. See DRC 23 March 2006, no. 36858.

[40] DRC 21 February 2006, no. 261245 and CAS 2005/A/973 *Pananthinaikos Football Club v Sotirios Kyrgiakos*, 10 October 2006.

[41] DRC 9 January 2009, no. 19174 and CAS 2009/A/1856 *Fenerbahçe Spor Kulübü v Stephen Appiah*, CAS 2009/A/1857 *Stephen Appiah v Fenerbahçe Spor Kulübü*, 7 June 2010.

[42] The unilateral extension option provides for employment. If the possibility of unilateral extension did not exist, fewer players would be provided with contracts. .

in contracts with players up to 21 years old and for a maximum of three years.[43] We will wait and see what happens here. In my opinion, there will still be enough options for players and clubs to come to a valid option.

Reference

Haas U (2008) Football disputes between players and clubs before the CAS, in sport governance, Football disputes, doping and CAS arbitration, 2nd CAS & SAV/FSA Conference, Lausanne 2008

[43] See the report '*Contractual Stability in Professional Football, Recommendations for clubs in a context of international mobility*', by Diego F.R. Compaire (Italy/Argentina), Gerardo Planás R.A. (Paraguay) and Stefan-Eric Wildemann (Germany), July 2009.