

Substituting at Half-Time: Contractual Stability in the World of Football

Udskiftning i pausen: Kontraktuel stabilitet i fodboldens verden

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The thesis focuses on FIFA's efforts to maintain contractual stability between professionals and clubs in the world of international football. More specifically, the thesis will encompass a thorough description of the rules regarding the maintenance of contractual stability. Furthermore, the thesis analyses when one of the contractual parties is allowed to unilaterally terminate the employment contract and what the consequences are of termination without so-called just cause. With reference to the FIFA Regulations on the Status and Transfer of Players, Swiss law, and the latest jurisprudence of the CAS the thesis analyses whether the football world's own regulations contain a statutory basis for compensation in case of termination for just cause or whether the statutory basis is to be found in the subsidiarily applicable Swiss law.

The thesis concludes that the football world's own regulations contain provisions aiming for the maintenance of the principle of pacta sunt servanda. The regulation, however, provides scope for applying the principle of clausula rebus sic stantibus, when the contract can be terminated with just cause. The concept of just cause is not defined in the FIFA regulations, which is why the jurisprudence is of great importance. Causes for termination such as lengthy absenteeism, outstanding remuneration, assignment to the backup team and invocation of an error might justify the terminating party to unilaterally terminate the employment relationship. The thesis infers that the consequences of termination without just cause are that the party in breach must compensate the aggrieved party applying the principle of positive interest and the criteria set out in the FIFA regulations. In case of termination for just cause the thesis concludes that the statutory basis can be found in both the football world's own regulations and the subsidiarily applicable Swiss law. However, the most reliable basis for compensation in such cases must be found in the FIFA regulations because of the parties' possibility of choice of law.

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1. Introduction

Today, the world of international football is a billion-dollar business. In 2006 the Austrian EU-presidency published research showing that the industry of sport in 2004 created an added value of 407 billion euro, which is equivalent to 3,7 % of the EU's GDP, and employed about 15 million people, which is equivalent to 5,7 % of the EU-workforce.¹ During each transfer window, professional football players are transferred for billions of euros and sign contract worth millions. This commodification of the players and sport has a number of effects, including a substantial decrease in employee loyalty and patience from the employer. Instead, cup titles, television deals and worldwide sponsorship agreements are on the agenda. In an attempt to protect uniformity, equality and certainty in the world of international football, FIFA has passed the Regulations on the Status and Transfer of Players.² The purpose of the regulation is to maintain contractual stability and to ensure that the contractual parties respect the principle of *pacta sunt servanda*. Notwithstanding, RSTP Article 14 permits a party to unilaterally terminate the employment relationship on the grounds of just cause. If a contract is terminated without just cause RSTP Article 17(1) stipulates that the party in breach is obliged to compensate the other party to the contract. Whereas the RSTP Articles 14 and 17 are considered annually in a great number of cases before the FIFA Dispute Resolution Chamber and the Court of Arbitration for Sport, the purpose of this thesis is to analyse the grounds for termination in international football and to examine the legal issues regarding calculation of compensation in case of justified and unjustified termination of contract. This is a legal area of particular relevance and worth millions of euros, which is why it can be expected that this area will be the object of enhanced interest and importance in the years to come.

1.1 Thesis statement

The thesis at hand describes the rules and the latest jurisprudence regarding the maintenance of contractual stability in the world of international football. When is one of the contractual parties allowed to unilaterally terminate the employment relationship with just cause and what are the consequences of termination without just cause? Does the football world's own regulations contain a statutory basis for compensation in case of termination with just cause or is it to be found in the subsidiarily applicable Swiss law? With reference to the RSTP, Swiss law and the latest CAS jurisprudence, the thesis will analyse and answer these questions and emphasise the development regarding the maintenance of contractual stability.

1.2 Delimitation of the research object

The existing legal literature, which discusses the scope of the rules and jurisprudence regarding the maintenance of contractual stability, including termination of contract, is mainly focusing on the jurisprudence of the DRC of the period 2002-2006 and the CAS case law of 2003-2009. Therefore, this thesis will focus on the published and pertinent decisions since 2009. This thesis will only focus on decisions delivered by the CAS because its status as the highest court of appeal within the world of international football mean that its decisions possess a superior status at the apex of the sports-law system.

Given that termination on the expiry of the contract is uncontroversial, this ground for termination is not examined. Moreover, termination on the grounds of sporting just cause is not addressed because of the formal requirement of the thesis and as a published and well-reviewed thesis already has dealt with the subject. As there is a dearth of the legal literature regarding maintenance of contractual stability in the international football world, which mainly considers the jurisprudence of the period 2002-2009, this thesis will focus on the latest jurisprudence of the CAS, which is why other grounds for termination, which exist, are not addressed. The aim of the thesis is *inter alia* to emphasise the development of the maintenance of contractual stability and not to map all of the grounds for termination in the world of international football.

1.3 Methodology and literature

In this thesis a doctrinal analytical method will be applied, as the rules in force will be described, systematised and analysed. As the area of law is specific and there is a lack of existing literature on point, this thesis

¹ EVALD ET AL., p. 26

² RSTP

will primarily be based on a thorough scrutiny of relevant and recent CAS jurisprudence and a thoroughly examination of the relevant body of rules. The provisions regarding the maintenance of contractual stability set out in the RSTP and the FIFA Commentary will provide the legal framework for analysing the pertinent jurisprudence. After a thorough examination of the interaction between the relevant regulations and the jurisprudence, the thesis will be able to answer the central question posed by the thesis statement. Furthermore, the thesis will draw upon some elements of the legal literature, despite the relative lack of pertinent secondary resources.

1.4 Composition

Chapter 2 of this thesis will describe the relevant regulations and dispute resolution bodies, with a particular focus on their purpose. In chapter 3, the policy of the maintenance of contractual stability will be examined. The chapter includes a thorough description of the relevant rules, an examination of the different grounds for termination articulated in the recent CAS jurisprudence and an analysis of what grounds will not justify termination, according to the CAS. Chapter 4 will address the consequences of terminating a contract without just cause. The chapter will examine the application of RSTP Article 17(1). Chapter 5 will discuss whether a party who unilaterally terminates a contract with just cause has a right to compensation. The chapter considers whether such a right is grounded in the subsidiarily applicable Swiss law or in the football world's own regulations. Finally, chapter 6 is a sum up of the legal issues considered in the previous chapters.

1.5 List of abbreviations and terminology

Regulations:

CAS Statutes CAS Code of Sports-related Arbitration, Statutes of the Bodies Working for the Settlement of Sports-related Disputes.

CC Swiss Civil Code

CO Swiss Civil Code, Part Five: Swiss Code of Obligations

PILA Switzerland's Federal Code on Private International Law

RSTP FIFA Regulations on the Status and Transfer of Players

CAS decisions:

CAS 2014/A/3765 CAS 2014/A/3765 Club X. v. D & Fédération International de Football Association (FIFA), award of 5 June 2015

CAS 2014/A/3707 CAS 2014/A/3707 Emirates Football Club Company v. Hassan Tir, Raja Club and FIFA award of 19 June 2015

CAS 2014/A/3642 CAS 2014/A/3642 2015 Erik Salkic v. Football Union of Russia (FUR) & Professional Football Club Arsenal, award of 8 April 2015

CAS 2013/A/3237 CAS 2013/A/3237 Bratislav Ristic v. FK Olimpic Sarajevo, award of 14 March 2014

CAS 2013/A/3091-3093 CAS 2013/A/3091, 3092 & 3093 FC Nantes v. FIFA & Al Nasr SC award of 2 July 2013 (operative part of 3 June 2013)

CAS 2013/A/3089 CAS 2013/A/3089 FK Senica, A.S. v. Vladimir Vukajlovic & FIFA award

of 30 August 2013

CAS 2012/A/3033	CAS 2012/A/3033 A. v. FC OFI Crete, award of 29 November 2013
CAS 2012/A/2874	CAS 2012/A/2874 Grzegorz Rasiak v. AEL Limassol, award of 31 May 2013
CAS 2010/A/2202	CAS 2010/A/2202 AS Konyaspor Club Association v. J. award of 9 May 2011
CAS 2010/A/2145-2147	CAS 2010/A/2145 Sevilla FC SAD v. Udinese Calcio S.p.A. and CAS 2010/A/2146 Morgen de Sanctis v. Udinese Calcio S.p.A. and CAS 2010/A/2147 Udinese Calcio S.p.A. v. Morgan De Sanctis & Sevilla FC SAD, award of 28 February 2011
CAS 2010/O/2132	CAS 2010/O/2132 Shakhtar Donetsk v. Ilson Pereira Dias Junior, award of 28 September 2011
CAS 2010/A/2049	CAS 2010/A/2049 Al Nars Sports Club v. F.M., award of 12 August 2010
CAS 2009/A/1956	CAS 2009/A/1956 Club Tofta Ítróttarfélag, B68 v. R., award of 16 February 2010
CAS 2009/A/1909	CAS 2009/A/1909 RCD Mallorca SAD & A. v. FIFA & UMM Salal SC, award of 25 January 2010
CAS 2008/A/1589	CAS 2008/A/1589 MKE Ankaragücü Spor Kulübü v. J., award of 20 February 2009
CAS 2008/A/1519-1520	CAS 2008/A/1519-1520 FC Shakhtar Donetsk v. Mr Matuzalem Francelino da Silva and Real Zaragoza SAD and FIFA, award of 19 May 2009
TAS 2008/A/1491	TAS 2008/A/1491 Christian Letard c. FECOFOOT sentence du 16 octobre 2008
CAS 2007/A/1298-1300	CAS 2007/A/1298 Wigan Athletic FC v. Heart of Midlothian; CAS 2007/A/1299 Heart of Midlothian v. Webster and Wigan Athletic FC; CAS 2007/A/1300 Webster v. Heart of Midlothian, award of 30 January 2008
CAS 2006/A/1180	CAS 2006/A/1180 Galatasaray SK v. Frank Ribéry & Olympique de Marseille, award of 24 April 2007
CAS 2006/A/1100	CAS 2006/A/1100 E. v. Club Gaziantepspor, award of 15 November 2006
<u>Literature:</u>	
Bernasconi	CAS 2008/A/1519-1520 FC Shakhtar Donetsk v. Matuzalem Francelino da Silva and Real Zaragoza SAD and FIFA by Bernasconi, Michele, Afterword: The unilateral, unjustified breach of an employment contract by a professional football player – Some short remarks after Matuzalem, in Sports Governance, Football Disputes, Doping and CAS Arbitration by M. Bernasconi and A. Rigozzi, Editions Weblaw, Berne 2009
Crespo	CAS and Football: Landmark Cases, Pérez, Juan de Dios Crespo, CAS

2007/A/1298-1300 and CAS 2008/A/1519, in CAS and Football: Landmark Cases by Alexander Wild (editor), T.M.C. Asser Press and Springer-Verlag Berlin Heidelberg, The Hague 2012

- de Weger** The Jurisprudence of the FIFA Dispute Resolution Chamber by F. de Weger, T.M.C. Asser Press, The Hague 2008
- Evald et al.** Dansk & International Sportsret by J. Evald and L. Halgreen, Jurist- og Økonomforbundets Forlag 2014, København 2014
- Haas** Haas, Ulrich, Football Disputes between Players and Clubs before the CAS, in Sports Governance, Football Disputes, Doping and CAS Arbitration by M. Bernasconi and A. Rigozzi, Editions Weblaw, Berne 2009
- Limbert** CAS and Football: Landmark Cases, Limbert, Peter, CAS 2009/A/1880,1181 and CAS 2009/A/1856, 1857, in CAS and Football: Landmark Cases by Alexander Wild (editor), T.M.C. Asser Press and Springer-Verlag Berlin Heidelberg, The Hague 2012

Abbreviations:

- DBU** Dansk Boldspil-Union
- FIFA** Fédération Internationale de Football Association
- NADO** General Authority of Youth & Sports Welfare of The United Emirates
- SPFA** Scottish Professional Footballer's Association

Dispute resolution bodies:

- CAS** The Court of Arbitration for Sport
- DRC** FIFA Dispute Resolution Chamber
- PSC** FIFA Players' Status Committee

2. Relevant Regulations and Dispute Resolution Bodies

2.1 Regulations

In the following section introductory remarks will be made about the football world's own regulations, which apply in disputes regarding maintenance of contractual stability, including cases about termination of contract with or without just cause. The purpose is to present the structure of and outline the relevant set of rules.

2.1.1 FIFA and the FIFA Statutes

FIFA is the largest football organisation in the world. In 2016 six confederations and 211 football associations are affiliated to FIFA, making FIFA the most important football organisation worldwide.³ FIFA is headquartered in Zurich, Switzerland and the current president is Gianni Infantino.

The FIFA Statutes and the accompanying implementing regulations form the Constitution of football's international governing body, FIFA. The FIFA Statutes provide the basic laws for world football and regulate *i.a.* the transfer of players. The current version of the FIFA Statutes was adopted following their approval at the Extraordinary Congress in Zurich, on 26 February 2016 and came into effect on 27 April 2016. In connection with maintenance of contractual stability between professionals and clubs, Article 6 of the FIFA Statutes

³ <http://www.fifa.com/associations/index.html>

is relevant. Article 6 determines that the Council shall regulate the status of players and the provisions for their transfer.

2.1.2 Regulations on the Status and Transfer of Players

2.1.2.1 Scope

The most important set of rules regarding the protection of contractual stability in the international world of football is the RSTP. In accordance with Article 6 of the FIFA Statutes the FIFA Council issues the RSTP. The scope of RSTP is to lay down global and binding rules concerning the status of players, their eligibility to participate in organised football and their transfers between clubs belonging to different associations.⁴

As for protecting contractual stability RSTP Article 1(3b) states: “*Each association shall include in its regulations appropriate means to protect contractual stability [...].*” In other words, protecting contractual stability in international football is of crucial importance to FIFA as a means of protecting uniformity, equality and certainty in international football on a worldwide scale.⁵

2.1.2.2 History

The first RSTP were adopted in April 1991 and subsequently amended eleven times in the period between December 1993 and December 2015 by the FIFA Executive Committee.⁶

Since the European Court of Justice in December 1995 delivered their judgement in the famous Jean-Marc Bosman Case,⁷ the RSTP has to be in accordance with European community law insofar as professional football constitutes an economic activity subject to European community law. The result of the Bosman Case created a situation whereby clubs asked for extremely high transfer sums if a player wanted to leave the club before his contract expired. The new situation was untenable because the biggest clubs attracted all the good players, small clubs faced financial and sporting difficulties and enormous transfer sums were paid. Understandably, FIFA felt obliged to solve this newly created instability. As a result of much bargaining and dealing between FIFA and the European Commission, the new RSTP regulation was adopted by the FIFA Executive Committee on 5 July 2001 and came into force on 1 September 2001. The ground-breaking regulation consisted of provisions with respect to *i.a.* the transfer of players. The crucial pillars were a minimum contractual period of one year, the creation of two annual transfer registration periods and a protection system for the international transfer of minors.

On 1 July 2005 a reviewed edition of the RSTP entered into force. The reviewed edition was meant to have a more user-friendly structure and to improve the old rules.⁸⁻⁹ One of the fundamental principles on which the 2005 edition and the current version of RSTP is based is the principle that the associations must provide for appropriate means to protect contractual stability.¹⁰ The amendments between 2005 and 2015 have mainly consisted of rules regarding the protection of minors in international football, third-party influence on clubs and the jurisprudence of the PSC and the DRC.¹¹ The current edition of RSTP was approved by the FIFA Executive Committee on 24 and 25 September 2015 and came into force on 1 October 2015.¹²

⁴ RSTP Article 1(1)

⁵ DE WEGER, p. 1

⁶ <http://www.fifa.com/about-fifa/official-documents/law-regulations/index.html#doctransfersreg>

⁷ Case C-415/93

⁸ FIFA Circular letter no. 959

⁹ In DRC 22 July 2004, no. 74477, p. 3 the Chamber clarified that circular letters are an administrative instrument, which – as sources of law within the FIFA legal system – are hierarchically subordinated to the FIFA regulations.

¹⁰ RSTP edition 2005 and edition 2015 Article 1(3b)

¹¹ FIFA Circular letter no. 1206, 1190, 1130, 995 and 959

¹² References will be made to the current RSTP edition under the abbreviation “RSTP”

2.1.3 FIFA Commentary

In January 2007 FIFA published Circular letter no. 1075. The letter states that the purpose of the FIFA Commentary is to facilitate the access to and the understanding of the reviewed version of the RSTP. The annotated edition offers an overview of the RSTP by commenting on each single provision, by giving general information and clarifications, by providing a short explanation of the administration, and by referring to the jurisprudence of DRC, PSC and the CAS.

In legal disputes about contractual stability both the DRC and CAS are referring to the FIFA Commentary.¹³ However it is important to bear in mind that the situations in the FIFA Commentary, as well established by CAS jurisprudence, are just examples since the FIFA Commentary *per se* is not considered to be legally binding but merely a guiding source.¹⁴ Nevertheless it shall be noticed that on specific topics, the FIFA Commentary is making new rules, which are not in accordance with the RSTP.¹⁵⁻¹⁶

2.2 Dispute Resolution Bodies

In the following section the relevant dispute resolution bodies will be described. The purpose is to enable the reader to understand the dispute resolution system within the world of football.

2.2.1 FIFA Dispute Resolution Chamber

The DRC was established in 2001 as part of FIFA's wider effort to engender professionalism in the resolution of disputes. Specifically, the DRC was set up to take over certain disputes from the PSC and especially disputes regarding the international status and transfer of players. However, the DRC is not an arbitration court, which is why the decisions of the DRC can only be enforced through the statutes and regulations of FIFA. In accordance with FIFA Statutes Articles 11(4a) and 14(1a) and 14(1d), the affiliated associations must fully comply with all decisions of FIFA, including the DRC-decisions. Therefore, the affiliated associations, such as DBU, take all necessary steps to ensure that their own members, the national players and clubs, also fully comply with these decisions.¹⁷ This is the explanation behind FIFA's great influence through the DRC on international football and all its participants.

Today the DRC decides on basic issues by applying the RSTP, such as breach of contract with or without just cause or sporting just cause. Here, RSTP Article 22(b) is a central provision as it determines that FIFA is competent to hear employment-related disputes between a club and a player. However, the competence of the DRC is conditional on the dispute having an international dimension. If the association where both the player and the club are registered has established an arbitration tribunal composed of members chosen in equal number by players and clubs with an independent chairman, this can preclude the jurisdiction of the DRC. If the arbitration tribunal at national level does not fulfil these prerequisites, the DRC has jurisdiction.

However, with reference to FIFA Circular letter no. 827 FIFA agreed to recognise the jurisdiction of the CAS. This recognition is relevant as it enables the parties to appeal a DRC decision before the CAS and therefore makes CAS the highest court of appeal within the world of football. Furthermore, the FIFA Statutes Article 57 determines that FIFA recognises CAS to resolve disputes between *i.a.* FIFA, clubs, and players. Article 59(1) of the FIFA Statutes determines that the confederations, members and leagues shall agree to recognise CAS as an independent judicial authority and to ensure that their members, affiliated players and officials comply with the decisions passed by CAS. Moreover, it is implicit in the interaction between RSTP Articles 24 and 22 that claim for compensation can be brought before the DRC as the first-instance body and, by virtue of Article 57 of the FIFA Statutes, those decisions can be appealed before the CAS.

¹³ For example CAS 2012/A/2698 Para 109-110, p. 18

¹⁴ CAS 2012/A/2698 Para. 111, p. 18

¹⁵ FIFA Commentary, Article 17 Para 3, p. 47

¹⁶ DE WEGER, p. 109

¹⁷ FIFA Statutes Article 60

As to the fact that CAS is recognised as the highest court of appeal within the world of international football the following section will briefly describe the structure of the CAS and the relevant provisions, which apply in cases before the CAS.

2.2.2 Court of Arbitration for Sport

The mission of CAS is to sit Panels, which have the responsibility of resolving disputes arising in the context of sport by arbitration and/or mediation.¹⁸ The relevant division is the Appeals Arbitration Division, which is made of panels whose responsibility is to resolve disputes concerning the decisions of the bodies mentioned in CAS Statutes S12(3b).¹⁹

In addition, reflecting the appellate jurisdiction of the CAS the CAS Statutes S1 and R27 provides that the jurisdiction of the division requires an arbitration clause contained in a contract or regulations. The jurisdiction of the Appeals Arbitration Division may involve an appeal against a decision rendered of a federation, association or sports-related body where the statutes or regulations of such bodies – such as the DRC - or a specific agreement provide for an appeal to the CAS. Such provision is contained in FIFA Statutes Article 57. The reason why CAS is very cautious about determining its jurisdiction is the fact that if CAS is not competent, the Swiss Federal Tribunal is able to declare the decision null and void.²⁰

The FIFA Statutes Article 57(2) provides that the provisions of the CAS Statutes shall apply to the proceedings and CAS shall primarily apply the various regulations of FIFA and, additionally Swiss law. Moreover, the CAS Statutes R58 provides that the CAS Panel shall decide the dispute according the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in absence of such choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision or according to the rules of law that the Panel deems appropriate.

The provisions apply every time the parties have agreed to refer a sports-related dispute to the CAS. The starting point for determining the applicable law in the matter is PILA Article 187. According to Article 187(1) the parties are free to choose the law applicable and are not confined to choosing a national legal system. On the contrary, the parties can agree the application of a non-national law, which is why the rules and regulations of FIFA qualify as such.

According to PILA Article 187(1) and the CAS Statutes R58 a choice of law can be made not only expressly, but also tacitly. Usually, the CAS Panels finds that the parties have made a tacit choice of law based on a variety of considerations, including: whether one of the parties is basing his claim on Swiss law and the other party does not object hereto, whether the parties have knowingly submitted to the FIFA regulations either by directly referring the case to the DRC or by choosing the CAS Statutes and whether the parties are referring to the procedural rules of an institutional arbitration court. Even without an express choice of law the various panels often arrive at a subsidiary or supplementary application of Swiss law. Appeals against final decisions of FIFA's legal bodies shall be lodged with CAS within 21 days of notification of the decision in question and recourse may only be made to CAS after all other internal channels have been exhausted.²¹

3. Maintenance of Contractual Stability between Professionals and Clubs

In the following section the thesis will address the history of the RSTP and give a short representation of the relevant provisions.

¹⁸ CAS Statutes S12

¹⁹ CAS Statutes S201(a)(b)

²⁰ Judgement of May 3, 2010, 4A_456/2009 "Gert Thys Case" and Judgement of January 17, 2013, 4A_244/2012

²¹ FIFA Statutes Article 58(1)(2)

3.1 RSTP Chapter IV

3.1.1 History

As described in section 2.1.2.2 the famous Jean-Marc Bosman Case resulted in an agreement between FIFA and the European Commission on the main principles for the amendment of FIFA's rules regarding international transfers. The amended version of RSTP came into force 1 September 2001.

One of the main principles in both the RSTP edition 2001 and the current edition is contractual stability. The principle of contractual stability was underlined in the Circular letter no. 769, which summarised and explained the main points of the RSTP edition 2001.²² In the circular letter FIFA stated: "*Contractual stability is of paramount importance in football, from the perspective of clubs, players, and the public.*"²³ In continuation, the FIFA Commentary states that unilateral termination of a contract without just cause is to be vehemently discouraged.²⁴ The main purpose of FIFA's efforts to maintain contractual stability is that parties, which enter into an agreement, shall in principle respect and honour the contractual obligations during the term of the contract, known as the principle of *pacta sunt servanda*.²⁵

3.1.2 Sanctity of Contract

As the first article of the RSTP Chapter IV Article 13 lays down one of the main principles of the regulations of contractual stability. According to the Article, a contract between a professional and a club can only be terminated upon expiry of the term of the contract or by mutual agreement. The purpose of Article 13 is to ensure that parties, which enter into a contractual relationship in principle, respect the principle of *pacta sunt servanda* during the term of the contract.

As a consequence of the aim of ensuring the maintenance of contractual stability, FIFA introduced the so-called protected period. It is defined in the RSTP paragraph "*Definitions (7)*", which states that the protected period is a period of three entire seasons or three years, whichever comes first, following the entry into force of a contract, that is concluded prior to the 28th birthday of the professional, or two entire seasons or two years, whichever comes first, following the entry into force of a contract, that is concluded after the 28th birthday of the professional. Pursuant to Article 17(3), the protected period starts again when, while renewing the contract, the duration of the previous contract is extended. The difference between termination of contract inside or outside the protected period is described in section 3.1.5.

3.1.3 Termination with Just Cause

According to RSTP Article 14, the main principle of *pacta sunt servanda* is not an absolute one. Pursuant to the Article, a contract may be terminated by either party without consequences of any kind in the case of just cause. FIFA introduced the concept of so-called just cause termination to cover situations where it was too much of a strain of the patience of one of the parties to respect the contractual relationship for the entire contract term.²⁶ As a result, there are no consequences in the case of termination with just cause, and the terminating party is not obliged to pay compensation to the other party, nor can sporting sanctions be imposed on him.²⁷ Article 14 is a *lex specialis* to the general principle of RSTP Article 16 due to the fact that Article 14 represent the only situation in which either party is entitled to unilaterally terminate the contract at any time, i.e. also during the course of a season.²⁸ In other words, it may be deemed to be a case for applying the principle of *clausula rebus sic stantibus*.

According to the RSTP and the CAS case law Article 14 does not define the concept of just cause. As previously discussed, CAS panels often arrive at a subsidiary or supplementary application of Swiss law. Conse-

²² Circular Letter no. 769, p. 1

²³ Circular Letter no. 769, pp. 10-15

²⁴ FIFA Commentary, Article 13, p. 38.

²⁵ DE WEGER, p. 82

²⁶ DE WEGER, p. 83

²⁷ FIFA Commentary, Article 14 Para 5, p. 40

²⁸ FIFA Commentary, Article 16 Para 3, p. 44

quently, various CAS panels have examined the application of the CO and examined the concept of good cause. CO Article 337(2) provides that good cause is any circumstance, which renders the continuation of the employment relationship in good faith unconscionable for the party giving notice. Various CAS panels have confirmed the link between Article 14 and Article 337 and adopted the jurisprudence of the Swiss Federal Tribunal in defining the concept of just cause.²⁹ The link will be further examined in the analyses of the recent CAS case law.

3.1.4 Termination During the Season

RSTP Article 16 provides that a contract cannot be unilaterally terminated during the course of a season. The Article states that termination after the expiry of the protected period or because of sporting just cause is only allowed at the end of the season. The purpose is that the club must be able to rely on the services of all its players during the course of the season, unless the parties have agreed at mid-season to mutually terminate the contract. If the club were unable to rely on the services of its players, the club would suffer sporting instability that would severely harm the club itself and impact the other players. Furthermore, it would not be easy for the player to find a club wishing to employ him due to the fact that the squads are already formed. This *lex generalis* rule aims to protect and maintain the contractual stability, as the clubs must be in a position to rely on the services of all of their players. Otherwise this contractual instability could result in sporting instability and larger group of unemployed professional football players.

3.1.5 Consequences of Terminating a Contract without Just Cause

In the event that a contract has been terminated without just cause, the party in breach is obliged to pay compensation, whether the breach is inside or outside the protected period. The RSTP rules set out guidelines in order to determine the amount of compensation. These criteria and the validity of buyout-clauses will be further discussed in section 4.2. Additionally, Article 17(3) determines that sporting sanctions shall be imposed on any player found to be in breach of contract during the protected period. However, to incur sporting sanctions depends on whether the unilateral breach without just cause takes place inside or outside the protected period. If the breach takes place outside the protected period no sporting sanctions shall be imposed on the player. According to Article 17(4) sporting sanctions shall also be imposed on any club found to be in breach of contract or found to be inducing a breach of contract during the protected period. Due to the fact that the thesis is focusing on termination of contract and the calculation of compensation set out in Article 17(1) the imposition of sporting sanctions shall not be examined any further.

3.1.6 Special Provisions

RSTP Article 18 encompasses special provisions relating to the contract between the parties. Article 18 *i.a.* regulates the minimum and maximum length of a contract, the rules regarding negotiations between an employed player and a club and rules regarding the validity of contract, including medical examination and the grant of work permit. In addition, Article 18(5) regulates the event of a player who enters into more than one contract covering the same contractual period. In this case, Article 18(5) determines that the provisions set forth in RSTP Chapter IV about maintenance of contractual stability shall apply.

The FIFA Commentary states that if the player signs a second contract, the player effectively terminates the first one.³⁰ Due to a strict literal interpretation of Article 18(5) the FIFA Commentary suggests that in case of the player signing a second contract, the player effectively terminates the first one. Such strict literal interpretation is not in accordance with the current jurisprudence. In CAS 2009/A/1909 the Panel underlined that the signature by the player of two contracts for the same period constitutes in itself a breach of the RSTP and therefore entailed the application of RSTP Chapter IV. Furthermore, the Panel stated that the signature of two conflicting contracts *per se* constitutes an impermissible action. A player is not entitled to sign a second contract in order to “insure” himself against the possible breach of the first contract by the club. If the player

²⁹ CAS 2013/A/3091, 3092 & 3093 FC Nantes v. FIFA & Al Nasr SC award of 2 July 2013, Para 188-190, p. 32 and CAS 2006/A/1180 Galatasaray SK v. Frank Ribéry & Olympique de Marseille, award of 24 April 2007, Para 25, pp. 12-13

³⁰ FIFA Commentary, Article 18 Para 5, p. 56

does so, he is himself in any case in breach of one of the two contracts.³¹ In CAS 2009/A/1909 the Panel reached the decision that the player breached the second contract because the player refused to comply with the said contract and failed to join the second club according to the terms stipulated in the contract.³²

3.2 Grounds for Termination

Below, termination of contract on the grounds of mutual agreement will shortly be addressed as the ground for termination differs from the scope of the RSTP. Finally, termination of contract in the case of just cause and termination of contract without just cause will be examined closely in sections 3.2.2 – 3.2.4, as this is a contentious issue arising from Article 14 RSTP and well-established CAS jurisprudence.

3.2.1 Mutual Agreement

The scope of the RSTP Chapter IV is to protect contractual stability. Thus, it is interesting that the DRC in a decision of 10 June 2004 was of the opinion that RSTP Article 13 departs from the ground principle that contractual parties have entered a contractual obligation for a fixed period of time.³³ The reason why a mutual agreement on the early termination of a contract is considered effective by the DRC is that the agreement requires both parties to negotiate the terms on which the parties are willing to accept a rescission of an otherwise valid contract. Moreover, the DRC is accepting contracts, that provide for early termination if the DRC is satisfied that the parties have been able to negotiate these terms in a manner that is not the result of a unilateral command by only one of the parties.³⁴ If these prerequisites are met the RSTP Article 13 and the DRC state that a contract can be terminated by mutual agreement even though it differs from the scope of the RSTP. However, it must be noted that the mutual agreement of termination can both be declared expressly and tacitly.³⁵

Due to the fact that the scope of the RSTP Chapter IV is to uphold the principle of *pacta sunt servanda*, the thesis will now examine the possibility to terminate a contract with just cause contrary to the guiding principle.

3.2.2 Just Cause for the Club

Pursuant to RSTP Article 14 a just cause must be established if the club wants to unilaterally terminate the contract without any consequences. If the club unilaterally terminates the contract due to the fact that the player is absent from training this can be considered as a termination of contract with just cause. However, the absenteeism needs to reach a certain level.

3.2.2.1 Absence by the Player

In CAS 2014/A/3642 the parties were the Slovenian football player Erik Salkic (“the Player”) against the Football Union of Russia (“FUR”) and Professional Football Club Arsenal (“the Club”).

On 22 July 2013, the Player signed a contract with the Club valid until 30 June 2015. In the beginning of January 2014 the Player participated in a training camp held in Turkey. On 21 January 2014, the parties had a meeting to discuss the Player’s future. The day after, the General Director issued a decree on the Player on the temporary assignment to the backup team of the Club. The Player was temporarily assigned from 22 January 2014 to 5 March 2014. The Player immediately sent an email to the Club, which stated that the Player believed that the Club’s actions constituted a breach of contract and a violation of his rights, why he requested the Club to remedy the breach. The Club did not respond to the statement. On 27 January 2014, the Player emailed a second request.

During the period between the two emails, the Player trained with the backup team. On 30 January 2014, the Player lodged a claim before the Russian DRC. The day after the Club notified the Player about his absence.

³¹ CAS 2009/A/1909, Para 41, p. 21

³² CAS 2009/A/1909 Para 40, p. 21

³³ DE WEGER, pp. 83-84

³⁴ DE WEGER, p. 84

³⁵ CAS 2013/A/3089 Para 82, p.15

The Player did not respond. Two weeks later the Club sent a second letter to the Player requesting an explanation for his long absence from the team for the period 29 January until 12 February 2014. The Player did not respond. On 19 February, the Club sent the Player a notification, explaining that the contract was terminated due to the Player's long absence. On 25 June 2014 the Player appealed the Russian PSC decision to the CAS. During the proceedings the CAS Panel examined the Player's absenteeism and whether the absenteeism constituted a just cause for the club to terminate the contract.

As to the reason behind the absenteeism, the Panel found that a distinction should be made between a club's right to assign a player to play matches with the backup team and a club's right to prevent a player from training with the first team. The Panel found that a measure to prevent a player from training with the first team is potentially a much harsher measure than solely assigning a player to play matches with the backup team. The Panel elucidated that the former seriously prejudices the player's future perspective with the first team, since the measure is of a more definite nature than the latter.³⁶ Moreover, the Panel underlined that the assignment of a player to train with the backup team must be reasonable and shall not be taken lightly, and can only be taken if the specific circumstances of the case so justify.³⁷ In the case at hand, the Player was assigned for the backup team for a period of 43 days. The Panel noted that the Player followed his instruction from the Club, but only for seven days. The Player then left the Club. The Panel emphasised that a temporary assignment for 43 days may constitute a breach of a player's rights perhaps if the assignment was made during the middle of the playing season, but perhaps not if the player was coming back from injury or during the winter break.

The Panel concluded that faced with the limited evidence, the Panel was satisfied that the assignment was temporary. Furthermore, the Panel concluded that whether the Club legitimately could assign the Player to train with the backup team could be left unanswered because the possible breach was not of such severity that it could justify a termination of contract by the Player after only seven days, during the winter break. The Panel underlined that such breach should have persisted over such a period of time that it could no longer be reasonably expected from the Player to continue the employment relationship.³⁸ As to whether a just cause existed when the club terminated the contract the Panel emphasised that the temporary assignment of the Player could potentially breach the Player's rights. However, due to the fact that the Player followed his instruction from the Club only for only seven days, the sequence of events did not give rise to sufficient grounds for the Player to unilaterally terminate the contract. More importantly, the Panel concluded that as a result of the Player left the Club on the 8th day and failed to return, after notifications from the Club requesting the Player to return, the Club was terminating the contract in accordance with RSTP Article 14.

In CAS 2014/A/3642 the Panel concluded that the Player's absence for a period of 22 days justified the Club's termination of the contract. This is in accordance with the jurisprudence of FIFA and CAS and on par with the FIFA Commentary, which speaks of a just cause for the club if the player displays an uncooperative attitude ever since his arrival at the club.³⁹

In an earlier decision,⁴⁰ the Sole Arbitrator ("the Panel")⁴¹ observed that on 6 January 2010, the Player, who had not succeeded in finding a new club, did not return to the Club's training session despite being requested to do so. The Player from that moment onwards was in breach of the contract. Despite that the Panel found that the Club did not pay the Player's remuneration from 15 December 2009 onwards, and the Club was already in breach of the contract at the time of the Player's absenteeism.⁴² In respect of the absenteeism, the Panel stated that the termination letter sent by the Club was sent during the 8th day of the Player's breach of

³⁶ CAS 2014/A/3642 Para 118, pp. 21-22

³⁷ CAS 2014/A/3642, Para 120, p. 22 and Para 125, p. 23.

³⁸ CAS 2014/A/3642 Para 131-134, pp. 24-25

³⁹ FIFA Commentary, Article 14, Para 4, p. 40

⁴⁰ CAS 2013/A/3089

⁴¹ CAS Statutes Article R50 and R54

⁴² CAS 2013/A/3089 Para 56-58, p. 12

the contract.⁴³ It is reasonable to interpret the Panel's decision as meaning that seven days of absence by the Player did not constitute a just cause for the Club to terminate the contract. However, the Panel concluded that the termination executed by the Club was to be considered without just cause because the Club was already in breach of its financial obligation at the time of termination.

From the recent case law it is clear that various panels are of the opinion that the absenteeism of a player can justify a club's termination of his contract. However, the absenteeism needs to reach a certain level. In the cases at hand the Panel concluded that absence of more than 20 days constituted a just cause for terminating the contract whereas seven days of absence did not constitute a just cause. The FIFA Commentary provides an example whereupon two weeks of unjustified absence can justify unilateral termination.⁴⁴ Consequently, it can be concluded that a player's absenteeism can justify a unilateral termination of contract if the absenteeism exceeds 20 days, maybe only two weeks.

3.2.3 Just Cause for the Player

Pursuant to RSTP Article 14 a just cause must also be established if a player wants to terminate his contract without consequence. If a player terminates his contract because of outstanding remuneration this can be considered as termination of contract with just cause. Moreover, deregistration of a player or invocation of an error can constitute a legitimate reason for termination. These and other causes for termination will be examined below.

3.2.3.1 Outstanding Remuneration

The recent CAS jurisprudence proves that the most frequent case of establishing a just cause for a player is in case of outstanding remuneration. However, the FIFA Commentary underlines that not every case of outstanding remuneration justify the termination of a contract.⁴⁵ The FIFA Commentary indicates that if the employer is late with the payment for only one month, this would be in violation of the terms of employment, but would not justify the party to terminate the contract with just cause. Under normal circumstances, only a few weeks' delay in paying a salary would not justify a termination of contract.⁴⁶ However, if there is significant delay or many violations occur over a certain period of time, FIFA is of the opinion that the breach has likely reached such a level that the party suffering the breach is entitled to terminate the contract.⁴⁷⁻⁴⁸

CAS has handed down two landmark decisions in which the CAS panels have established two prerequisites, which have to be fulfilled when determining if a player has terminated his contract with just cause. These decisions are beyond the scope of the thesis. However, some short remarks will be made because the decisions have created a precedent that future parties need to satisfy. In CAS 2006/A/1180 the Panel concluded that in case of termination of contract the only relevant criterion is the existence of a substantial breach of a main obligation such as the employer's obligation to pay the employee. This criterion is subject to two conditions. Firstly, the amount paid late by the employer may not be insubstantial or completely secondary. Secondly, the employee must have given a warning to draw the employer's attention to the fact that his conduct is not in accordance with the contract.⁴⁹ In CAS 2006/A/1100 the Panel also enumerated the prerequisites⁵⁰ and subsequently the prerequisites have been confirmed in various CAS decisions.⁵¹

The latest published decision on this topic is CAS 2014/A/3765. The parties were the Turkish Club X. ("the Club") against the Czech player D. ("the Player") and FIFA. The Player and the Club entered into a one-

⁴³ CAS 2013/A/3089 Para 60, p. 12

⁴⁴ FIFA Commentary, Article 14, Para 4, p. 40

⁴⁵ FIFA Commentary, Article 14, Para 2, p. 39

⁴⁶ FIFA Commentary, Article 14, Para 3, footnote 62, p. 39

⁴⁷ FIFA Commentary, Article 14, Para 2, p. 39

⁴⁸ FIFA Commentary, Article 14, Para 3, p. 39

⁴⁹ CAS 2006/A/1180 Para 26, p. 13

⁵⁰ CAS 2006/A/1100 Para 16 and 18, p. 10

⁵¹ CAS 2013/A/3091-93 Para 203-205, pp. 34-35

year-contract valid until 31 May 2014. According to the contract the Player was entitled to a monthly salary of EUR 20.000.

After having received only one month's salary until 23 May 2013, the Player sent a default letter to the Club requesting payment of EUR 80.000, being the outstanding salaries of four months. The request remained unanswered. On 6 June 2013, the Player terminated his contract by means of a termination letter and signed a one-year-contract with Karşıyaka SK. At the CAS hearing, the Club confirmed its responsibility for breaching the contract during the protected period and withdrew its request for relief regarding the obligation to pay the Player the outstanding salaries and compensation set out in RSTP Article 17(1).⁵² The decision does not directly consider if four months of outstanding remuneration justifies the termination of a contract with just cause. However, the fact that the Club accepts the appealed DRC decision indicates that the Club was aware of the fact that four months of outstanding remuneration normally justifies the termination of a contract with just cause, pursuant to RSTP Article 14 and the FIFA Commentary. In CAS 2010/A/2022 the Panel furthermore concluded that three months of outstanding salaries justified the Player to terminate his contract with just cause.⁵³

In CAS 2012/A/3033 the parties were the Serbian football player A. ("the Player") against the Greek club FC OFI Crete ("the Club"). On 18 July 2008, the sixteen year-old Player and the Club entered into an agreement valid until 30 June 2011. Pursuant to the contract, the Player was entitled to a monthly fee amounting EUR 1.000 NET. Moreover, the Player was entitled to a Christmas and Easter Bonus amounting half of the monthly fee. On 15 July 2009, the parties entered into a supplementary agreement to the contract of 1 July 2009. The supplementary agreement entitled the Player to a monthly fee amounting EUR 1.000 NET and a sign-on-fee amounting EUR 45.000 NET, which was to be paid in cash upon signing of the agreement.

In December 2009, the Player sent a letter to the Club. The Player notified the Club that there was outstanding remuneration of the sign-on-fee amounting EUR 45.000 and bonuses for 2008 amounting EUR 2.000. In its decision DRC Chamber considered that: "[...] the [Club] seriously violated the terms of the relevant [...] contract by clearly disrespecting its financial obligations in a substantial way [...] [why] the [Player] [...] was entitle[d] to terminate the contract unilaterally."⁵⁴

In its decision the Panel confirmed that the Player was entitled to a signing-on-fee of EUR 45.000⁵⁵ and the December 2009 salary and the 2009 Christmas bonus.⁵⁶ In light of the outstanding remuneration, the Panel established that the Player had just cause, when he – as a result of filing his claim with FIFA - implicitly terminated his contract with the Club.⁵⁷ The Panel concluded that monthly salaries, fixed bonuses and a sign-on-fee are considered as relevant factors when the Panel considers the concept of outstanding remuneration.

Additionally, CAS 2012/A/2698 is relevant to consider as to whether outstanding remuneration consisting of two months' salaries and a one-off payment justified the Player's termination of his contract.⁵⁸ The parties were the Turkish football club AS Denizlispor Kulübü Dernegi ("the Club") against the Brazilian football player Wesley Gonçalves ("the Player"). On the grounds of the case, the Panel reasoned that it was undisputed that the Club had not paid the Player's April and May 2009 salaries. Moreover, the Panel concluded that the Club had not paid the one-off payment and as highlighted under Article 14(3) of the FIFA Commentary⁵⁹, a Player who has gone for over three months without being paid may in general terms and in the absence of any proven facts that legally justify such delay, be entitled to terminate his contract on condition

⁵² CAS 2014/A/3765 Para 47, p. 10

⁵³ CAS 2012/A/2202 Para 14-15, p. 8

⁵⁴ CAS 2012/A/3033 Para 16, p. 6

⁵⁵ CAS 2012/A/3033 Para 59, p. 14

⁵⁶ CAS 2012/A/3033 Para 65, p. 15

⁵⁷ CAS 2012/A/3033 Para 71, p. 16

⁵⁸ CAS 2012/A/2698 Para 6-7, pp. 3-4

⁵⁹ FIFA Commentary, Article 14, Para 3, p. 39

that he has served his club with a notice of default. For the very reason that the Club did not pay the outstanding remuneration in time, the Player had just cause to terminate his contract because a persistent breach of the financial terms of a contract could severely endanger the position and existence of a player.⁶⁰

The fact that the Panel considers signing-on-fees as a financial obligation that needs to be considered, when establishing if a player has just cause to terminate the contract is also acknowledged in CAS 2013/A/3237. Here, the Sole Arbitrator underlined that the signing-on-fee was not in any way conditional upon the Player being employed for the whole contractual term. The payment had to be considered as an autonomous obligation payable without deduction.⁶¹

From the recent case law it is clear that various CAS panels are of the opinion that the non-payment or late payment of a player's remuneration can justify that a player unilaterally terminates his contract. However, the late payment may not be insubstantial and the employee must have given a warning to draw the employer's attention to the fact that his conduct is not in accordance with the contract. The recent jurisprudence also shows that the panels are considering signing-on-fees and fixed bonuses as relevant factors in determining the outstanding remuneration.

3.2.3.2 Invocation of an Error

In CAS 2009/A/1909⁶² the Panel considered whether an invocation of an error could be treated as a just cause for termination. Firstly, the Panel concluded that the dispute was to be determined on the basis of the RSTP, with Swiss law applying subsidiarily.⁶³ For that reason, the Player invoked CO Article 23-24, which regulates the rules regarding defect in consent. Subsequently, the Player alleged that he signed the second contract on the erroneous assumption that it could be terminated by simply paying the amount stipulated in its Article X, without any further disciplinary consequences.⁶⁴ FIFA alleged that there was no room for the subsidiary application of CO Article 23 because the RSTP conclusively determined the situations in which a player should consider him no longer bound by a contract. In this respect, the Panel referred to CO Article 23-26⁶⁵ and emphasised that the invocation of an error is indeed consistent with the RSTP as it could be treated as a just cause for termination. Furthermore, the Panel confirmed that a player could invoke domestic law in order to have a contract terminated if his consent is vitiated by error. In the Panel's opinion, it could not be held that the entire legal regime applicable to sports contracts had to be found exclusively in the RSTP. This is supported by a comprehensive CAS jurisprudence.⁶⁶

Furthermore, the Panel underlined that the RSTP consists of regulations adopted by FIFA: an association created under Swiss law and subject to the mandatory provisions of Swiss law. Therefore, the Panel doubted that the RSTP would be consistent with Swiss law if the RSTP was interpreted to exclude any remedy in the event the consent given by a player was vitiated by error, fraud or violence. The Panel underlined that according to Swiss law a contract is not binding because of an error only if the error is material and the invocation of the error is not contrary to the good faith of the other party.⁶⁷ Finally, the Panel concluded that the formation of the contract was not vitiated by an error relevant pursuant to the CO. Therefore the contract was binding on the Player, and therefore the Player was not able to terminate the contract with just cause.⁶⁸

It is of interest that the Panel concludes that the invocation of an error is indeed consistent with the RSTP as the invocation can be treated as a just cause for termination. Furthermore, it is interesting that the Panel con-

⁶⁰ CAS 2012/A/2698 Para 108-125, pp. 18-20

⁶¹ CAS 2013/A/3237 Para 58, p. 10

⁶² Referred to under section 3.1.6 RSTP, Article 18, pp. 11-12

⁶³ CAS 2009/A/1909 Para 15, p. 14

⁶⁴ CAS 2009/A/1909 Para 29, p. 18

⁶⁵ The wording is referred in Para 33, pp. 18-20 of the CAS 2009/A/1909

⁶⁶ CAS 2009/A/1909 Para 32, p. 18

⁶⁷ CAS 2009/A/1909 Para 34, p. 20

⁶⁸ CAS 2009/A/1909 Para 36-37, pp. 20-21

cluded that in any case a player could invoke domestic law in order to have a contract terminated, if his consent is vitiated by error. Thus, it can be concluded that an invocation of an error in principle can constitute a just cause for termination of contract.

3.2.3.3 Assignment to Backup Team and Deregistration

In CAS 2014/A/3642 the CAS Panel examined whether an assignment of a player to a club's backup team and the prevention from training with the first team could amount to a violation of the player's rights, whether the Club violated such rights and whether the Player was entitled to terminate his contract with just cause. The facts are summarised under section 3.2.2.1.

The Panel found that the temporary assignment of the Player to the backup team, at a time when there were no matches being played, potentially on the basis of the Head Coaches' view of the Player's footballing condition and with no loss in contractual benefits, such as pay, to train with other players in a team environment, could potentially have breached the Player's rights.⁶⁹ During the proceedings, the Club submitted that the dispute was of fundamental importance to football being allowing players to overrule the decision making of the coach would open the floodgates and allow all dissatisfied players to claim playing time and/or that training with the reserves would be a breach of contract that allow the players to move to another club as free agents. On the other hand, the Panel noted that many clubs seem to banish players to the reserves so as to "persuade" them to leave the club.⁷⁰

The Panel highlighted the player's contractual rights and that under both the CAS jurisprudence and the Swiss Tribunals and also the FUR Regulations and Russian labour law a player has in principle certain rights, be it personality rights, the right to train long-term in the correct environment or the right to expect to perform his trade, that of a professional football player.⁷¹ However in certain sporting circumstances, the club has the right to move players between the first team and other teams. Accordingly, the Panel established that these rights may conflict and when they do, the facts of each case and criteria such as the reason behind the demotion, wages, frequency, contractual terms and training facilities must be considered.⁷² In conclusion, the Panel underlined that the facts of the case did not give rise to sufficient grounds for the Player to terminate his contract because of the assignment. However, the Panel stressed that in principle an assignment to the backup team can violate a player's personality right to a level that justify the player to unilaterally terminate his contract.

In CAS 2013/A/3091-3093 the parties were the French football club FC Nantes ("Nantes") and the Guinean football player Ismaël Bangoura ("the Player") against the Emirati football club Al Nasr Sports Club ("the Club") and FIFA. On 2 September 2010, the Player signed a four-year contract with the Club. On 26 September 2011 the Club paid half of the advance salaries to the Player, stipulated in the contract. One month later the Club deregistered the Player and hired a replacement. In Ultimo in 2011 the parties held meetings regarding the future plans of the Player. However, on 20 December 2011 the Player left the Club without authorisation and finally signed with Nantes on 31 January 2012.

During the proceedings, the Panel considered whether deregistration of the Player constituted a just cause for the Player to terminate his contract. With regard to deregistration as such, the Panel considered that it might infringe upon the Player's personality rights. Moreover, the Panel determined that according to CC, which was applying subsidiarily, any infringement of personality rights caused by another is presumed to be illegal and subject to penalties unless there is a justified reason that overturn the presumption.⁷³

⁶⁹ CAS 2014/A/3642 Para 138, p. 26

⁷⁰ CAS 2014/A/3642 Para 106, p. 18

⁷¹ CAS 2014/A/3642 Para 109-113, pp. 19-21

⁷² CAS 2014/A/3642 Para 112-113, pp. 20-21

⁷³ CAS 2013/A/3091-3093 Para 223, p. 37

Accentuating that personality rights apply to the world of sport, the Panel underlined that the rights include the development and fulfilment of personality through sporting activity, professional freedom and economic freedom. Moreover, the Panel stressed that when the sport is practised professionally, a suspension or any other limitation on access to the sport might impede the economic development and fulfilment of the athlete, the freedom of choosing his professional activity and the right to practice it without restriction. This freedom is particularly important in the area of sport since the period during which the athlete is able to build his professional career and earn his living through his sporting activity is short. Afterwards, the Panel stated that professional freedom therefore includes a legitimate interest in being actually employed by the employer as to the fact that an athlete who is not actively participating in competitions depreciates on the market and reduces his future career opportunities. The Panel substantiated their point of view by referring legal scholars and the jurisprudence of the Swiss Federal Tribunal.⁷⁴ In that light the Panel cited the appealed DRC-decision, which stated: *"Among a player's fundamental rights under [a contract], is [...] his right to access training and to be given the possibility to compete with his fellow team mates in the team's official matches" and "by "de-registering" a player [...] a club is effectively barring [...] the potential access of a player to competition and, as such, is violating one of his fundamental rights [...]" and therefore "the deregistration [...] could in principle constitute a breach of contract since it de facto prevents a player from being eligible to play for his club."*

In conclusion, the Panel decided that in light of the fact that, (a) the Player was actually practising with the Club's professional team during the deregistration period until his departure from Dubai, (b) he received his monthly salary during this period and (c) he did not complain about the situation before 23 January 2012, the Player acquiesced to his temporarily deregistration as from 24 October 2011. As such, while deregistration might in principle constitute a valid reason justifying termination; the Panel concluded that in the specific circumstances of the case it did not.

On the basis of these two decisions it can be concluded that CAS is of the opinion that a temporary assignment of a player to the backup team or deregistration of the player from the first team can in principle constitute a just cause for the player to unilaterally terminate the contract.

3.2.4 Unjustified Termination

In this section the latest case law will be analysed so as to establish when certain behaviour by one of the parties does not allow the other party to unilaterally terminate the contract and therefore will bear the consequences set out in RSTP Article 17.

3.2.4.1 Unjustified Termination by the Player

3.2.4.1.1 Unjustified Behaviour

The purpose of this section is to provide two examples of unjustified behaviour by the player, which clearly did not allow the player to unilaterally terminate his contract.

In CAS 2010/A/2145-2147 the parties were the Italian football player Morgan De Sanctis ("the Player") and the Spanish club Sevilla FC SAD ("Sevilla") against the Italian club Udinese Calcio S.p.A. ("the Club"). On 20 September 2005, the Player and the Club signed a fourth and final 5-year-contract with effect from 1 July 2005. On 8 June 2007, the Player wrote to the Club to terminate his contract. The notice of termination was with effect from the end of the 2006/2007 season and specially referred to RSTP Article 17. On 10 July 2007, the Player signed a 4-year-contract with Sevilla.

Firstly, the Panel found that all parties agreed that the Player had breached his contract because the Player terminated his contract without a valid reason for termination. Therefore, the Panel concluded that pursuant to RSTP Article 17(1) compensation was due to the Club.⁷⁵ It is obvious that the Player did not have just

⁷⁴ CAS 2013/A/3091-3093 Para 224-228, pp. 37-38

⁷⁵ CAS 2010/A/2145-2147 Para 12, p. 10

cause to terminate the contract since the only cause for termination was to make it possible for the Player to sign with Sevilla. This behaviour was in clear breach with both the RSTP and the principle of *pacta sunt servanda*.⁷⁶

CAS 2009/A/1909 provides another example. As mentioned earlier, the Panel concluded that a player is not entitled to sign a second contract in order to “insure” himself against the possible breach of the first contract by the club. Therefore the Panel reached the decision that the Player breached the second contract without just cause because contrary to RSTP Article 18(5) the Player refused to comply with the said contract and failed to join the second club according to the terms stipulated in the contract.⁷⁷

3.2.4.1.2 Non-appearance or Leaving of the Workplace

In CAS 2014/A/3707 the parties were Emirates Football Club Company (“the Club”) against the Moroccan football player Hassan Tir (“the Player”), the Moroccan club Raja Athletic Club (“Raja”) and FIFA.

On 14 May 2009, the Club and the Player signed a contract valid until June 2012. In December 2009, the Player was subject to an in-competition doping control and subsequently provisionally suspended. As from 1 January 2010, the Club suspended the payment of the Player’s contractual salary. On 16 February the NADO imposed a two-year ban on the Player starting 31 December 2009 and on the same day, the Player asked the Club to be authorised to leave the next day and travel to Morocco in order to consult with his lawyer. The Player promised to return within 21 days from the date of travel but he never returned. On 1 September 2010, the suspension was annulled and eight days after the Player entered into a contract with Raja.

On the question of whether the contract had been prematurely terminated the Panel firstly concluded that the dispute was to be determined on the basis of the FIFA regulations, with Swiss law applying subsidiarily⁷⁸ and hence invoked CO Article 334-337. Secondly, the Panel found that neither the Player nor the Club terminated the contract by way of regular, explicit and/or written termination contract or by way of a mutual agreement. Accordingly, the Panel held that according to Swiss law; fixed-term contracts terminate without requiring notice upon the expiry of the agreed period and are presumed to be without any trial period, as such a period shall be introduced and agreed upon by written agreement.⁷⁹ Moreover, the Panel emphasised that according to Swiss law; a fixed-term contract cannot come to an end before the expiration of the agreed period unless a valid reason exists, for example there is a good cause for termination. If a good cause can be established, the parties may at any time terminate with immediate effect. Pursuant to Article 337(2) a good cause exists when the terminating party in good faith cannot be expected to continue the employment relationship. In other words, a party can terminate the contract with good cause, when the event leading to the termination has significantly shattered the trust between the parties to such extent that a reasonable person could not be expected to continue to work with the other party who is responsible for the just cause.

The RSTP does not contain specific provisions about the consequences of an employee’s absenteeism, which is why the Panel invoked CO Article 337d. The Panel concluded that if an employee decides to stop carrying out his work, the employee must warn his employer without delay.⁸⁰ If an employee for an extended period of time fails to warn or to inform his employer of his intentions, the employer can, in good faith, assume that the employee is no longer interested in keeping his employment. Moreover, the Panel determined that there is an unjustified non-appearance at or leaving of the workplace when the employee is absent for a certain amount of time and the employer can reasonably assume that it is not the employee’s intention to return and that his decision is final. The Panel stated that this is particularly true if the employee is summoned to return to work or to justify his non-appearance and does not comply or if the employee does not return to work after vacation and leaves the employer without any news for several months.

⁷⁶ DE WEGER, p. 82

⁷⁷ CAS 2009/A/1909 Para 40-41, p. 21

⁷⁸ CAS 2014/A/3707 Para 75, p. 16

⁷⁹ CAS 2014/A/3707 Para 84, p. 17

⁸⁰ CO 321a(1).

In conclusion, the Panel concluded that the Player terminated the contract as to the fact that he did not return to the Club after his second visit to Morocco. Moreover, the Club was not in breach of any contractual obligations, in particular due to the fact that the Player did not inform the Club about its financial default. Finally, the Panel concluded that as a result of the Player's lengthy absenteeism he had terminated his contract without just cause.

3.2.4.1.3 Repeatedly Refusing to Sign a Contract

In CAS 2010/O/2132 the Panel found that a contractual clause providing for the extension of the employment relationship under certain circumstances previously stipulated in the contract is valid as long as both parties can compel the counterparty to conclude the agreed extension of the contract. Therefore, the Panel underlined that by repeatedly, refusing to sign the extension of the contract as provided by the valid extension clause, the Player breached its obligation under this clause.⁸¹ Moreover, the Panel concluded that the Player terminated the contract without just cause due to the fact that the Club was entitled to invoke the buy-out clause set out in clause 7.1 of the contract. However, it can be concluded that if a player repeatedly refuses to sign valid contract, contrary to a valid extension clause, this does not allow the player to terminate the contract with just cause.

3.2.4.1.4 Outstanding Salaries

In CAS 2013/A/3091-3093 the Panel addressed whether outstanding remuneration or deregistration of the Player constituted a just cause for the Player to unilaterally terminate his contract. The facts of the case are summarised under section 3.2.3.3.

Due to the failure of the Club to pay half of the advance payment the Panel concluded that based on well-established CAS case law, non-payment or late payment of a player's salary by the club may constitute just cause for terminating the contract.⁸² In conclusion, the Panel established that there was no repetition in the non-payment since the advance payment consisted of one single payment, albeit one which was not timeously made on time by the Club. The payment was delayed by 25 days. Furthermore, the Panel emphasised that the Player did not notify the Club of its financial default. Therefore, it can be concluded that if a player is to be entitled to terminate his contract due to outstanding salaries, the non-payment or late payment must be persistent or occur repeatedly and the player needs to notify the club of its default.

3.2.4.2 Unjustified Termination by the Club

The recent CAS jurisprudence also gives examples of when the club is not entitled to terminate a contract because the termination is without just cause.

3.2.4.2.1 Working Capacity due to Illness and Injury & Sporting Performance

In CAS 2009/A/1956, the parties were the Faroese club, Club Tofta Itróttarfelag, B68 ("the Club") against the Dutch football player, R ("the Player"). The Player played for the Club during the 2007 Faroese football season. On 26 January 2008, the Player signed a new contract with the Club, valid until 31 October 2008.

The Club alleged that it was entitled to terminate the contract due to Article 4 of the contract, which stipulated that the contract could be terminated within a month's notice if one of the parties failed to fulfil their contractual obligations. On that point, the Panel concluded that Article 4 had to be construed according to the relevant provisions of the RSTP because the RSTP is clear and does not give room for conflicting or diverging provisions agreed directly between the parties. Moreover, the Panel stated that the RSTP Chapter IV expresses the principle of maintenance of contractual stability and prohibits the unilateral termination of a contract during the season.

In its decision, the Panel underlined that the RSTP does not provide for a definition of just cause, which is why the CAS on this point has developed comprehensive case law. Furthermore, the legal literature suggests that if the player deliberately plays below his potential, this may constitute a just cause for the club to termi-

⁸¹ CAS 2010/O/2132 Para 17, p. 10

⁸² CAS 2013/A/3091-3093 Para 202-203, p. 34

nate the contract if the breach of duty is serious enough. Besides, the literature is clear that the player is obliged to do whatever necessary on his part to maintain his working capacity. If he breaches this obligation, this can be considered as a just cause for termination.⁸³ On the other hand, the legal literature considers that the fact that the player does not play at the level wanted by the club does not constitute a just cause for the club to unilaterally terminate the contract. The player only has to provide his working capacity. He does not owe any success. If the player cannot provide the club with his working capacity due to illness or injury, this does not constitute a just cause either.⁸⁴

Finally, the Panel concluded that the dispute was to be determined on the basis of the RSTP, with Swiss law applying subsidiarily.⁸⁵ Therefore, the Panel invoked CC Article 8, which established that the onus of proof lies on the party invoking a just cause and that the Club did not establish the existence of a just cause. Furthermore, the Panel stated that the evidence presented did not exclude the possibility that the cause of the bad performances was the existence of an old injury, which cannot be considered as a just cause.⁸⁶ In conclusion, the Panel established that the termination of the contract with immediate effect is to be applied as *ultimo ratio* and when the breaches of the contract by the Player are not serious, a termination with immediate effect shall only occur when the Player has been warned beforehand and made aware that a repetition of the act for which warnings have been issued might lead to the termination of the contract.

On the basis of CAS 2009/A/1956 it can be concluded that if the player cannot provide the club with his working capacity due to illness or injury, this does not constitute a breach of duty and there is no just cause for termination of the contract. The same goes for a case where the player does not play at the level wanted by the club. Finally, a justified termination of contract with immediate effect is to be declared only in circumstances where the player has committed a serious breach of the contract. If the breach is not serious, a termination with immediate effect shall only occur when the player has been warned beforehand and made aware that a repetition of the wrongful might lead to termination of contract.

3.2.4.2.2 Sporting Performance, Jus Cogens and Consent

In CAS 2010/A/2049 the parties were the Emirati football club, Al Nasr Sports Club (“the Club”) and the Iranian football player F. M. (“the Player”). The Player was employed pursuant to a contract valid until 30 June 2008. By letter dated 24 June 2007, the Club terminated the contract invoking three distinct grounds in order to justify the termination. The reasons were (i) unauthorised leave (ii) performance under an adequate level and (iii) involvement in a racist incident while on loan to Al Ahli F.C.

As to (i) the Sole Arbitrator (“the Panel”) concluded that the Club did not take action against the Player for ten months, until 24 June 2007 when it decided to terminate the contract for, *i.a.*, being late when coming back from international duty. The Panel determined that this passage of time created a rebuttable presumption to the effect that the Player might have legitimately believed that, *assuming arguendo*, he had been late returning to the Club after he had completed his international duty; he was exonerated from any liability. Therefore, the alleged breach of obligation did not justify the termination of contract.

As to (ii) the Panel established that although a Club may be legitimately disappointed with the performance of the Player, nothing in the contract justified termination based on sporting performance. Furthermore, the Panel concluded that in absence of strict contractual language, inadequate sporting performance could not constitute a legitimate breach of contract. This is in line with the CAS 2009/A/1956 and the legal literature.⁸⁷

As for the alleged racist behaviour by the Player, the Panel concluded that in general undeniably contracts cannot and should not be read in clinical isolation of the legal regime within they operate. A contract might legitimately be terminated for violation of the principle of *jus cogens*, which are not explicitly mentioned in a

⁸³ HAAS, p. 232

⁸⁴ HAAS, p. 232

⁸⁵ CAS 2009/A/1956 Para 10-11, pp. 10-11

⁸⁶ HAAS, p. 232

⁸⁷ HAAS p. 232

contractual arrangement. Such motives for termination of contract are of such importance that termination must occur promptly after the violation. The Club did not manage to persuade the Panel that there existed legitimate grounds for terminating the contract in accordance with the racist behaviour by the Player. Therefore, all the grounds invoked as justification for termination of contract were dismissed.⁸⁸

Based on the case at hand it can be concluded that CAS was of the opinion that in absence of strict contractual language, inadequate sporting performance did not justify the Club to unilaterally terminate the contract. As to the lengthy absenteeism the Panel established that the passage of time had created a rebuttable presumption of the Player's exoneration from any liability. Regarding the principle of *jus cogens*, the Panel determined that the principle in principle could justify the club to terminate the contract.

4. Consequences for Terminating a contract without Just Cause

In the event that a contract has been terminated by one of the parties without just cause, the party in breach is obliged to pay compensation pursuant to Article 17(1). Before analysing the recent jurisprudence about the application of the Article the thesis will discuss the application in an historic perspective and present the Article in detail.

4.1 History

Below some remarks will be made about two CAS landmark cases regarding the application of RSTP Article 17. The cases are still today widely discussed in the legal literature.⁸⁹ In the landmark cases the CAS panels altered the state of law in that the *residual value approach* was substituted with the *principle of positive interest*. The residual value approach was outlined in the Webster Case and the application of the principle of positive and alteration of the state of law is described in the Matuzalem Case, which is why both cases are included.

4.1.1 The Webster Case

In CAS 2007/A/1298-1300, the CAS Panel had to consider how to calculate compensation in case of the player terminating the contract without just cause. The Panel was of the opinion that due to the fact that the player was entitled to receive the remainder of his salary if the club unilaterally terminated the contract, the club should be entitled to claim a similar amount of money against the player.⁹⁰ The approach was called the residual value approach. However, this approach involved certain shortcomings, which will be addressed after some short remarks about the case.

On 30 March 2001 the Scottish football player Andrew Webster ("the Player") signed a contract with the Scottish club Heart of Midlothian LC ("the Club"). In April 2005 the Club wanted to further extend the contract. Due to the Player's steady and strong progression and the fact that the Player now was a Scottish national, the Player rejected several contractual offers by the Club. As a result the Player was seemingly frozen out of the first team and forced to watch many of his team's matches from the bench. After conferring with the SPFA the Player terminated his contract relying on RSTP Article 17.

One of the main questions was how to calculate the compensation stipulated by Article 17(1). The Panel underlined that compensation in general should be calculated on the basis of criteria that tend to ensure clubs and players are put on an equal footing in terms of the compensation they can claim or are required to pay. Moreover, they emphasised that the objective criteria applicable in a given type of situation must be as predictable as possible because this is in the interest of the international football world.⁹¹ After considering the criteria outlined in Article 17(1), the Panel concluded that the most suitable criterion would be the remaining salary due to the Player. The Panel was of the opinion that as the Player was entitled to receive the remainder

⁸⁸ CAS 2010/A/2049 Para 11-14, pp. 5-6

⁸⁹ CRESPO, pp. 68-92

⁹⁰ CAS 2007/A/1298-1300 Para 86, pp. 27-28

⁹¹ CAS 2007/A/1298-1300 Para 73, p. 25

of his salary if the Club terminated the contract, the Club should be entitled to claim a similar amount of money against the Player.⁹²

In conclusion, the Panel considered that the criteria set out in Article 17 were not designed to be cumulative *per se*, which is why the Panel did not see reasons to award any other amount as an additional head of damage. Consequently, the Panel decided to apply the residual value approach, and thus the level of compensation owed to the Club by the Player was the residual value of the contract.⁹³

4.1.2 The Development of the Residual Value Approach

Although the Panel in the Webster Case took all three criteria listed in Article 17(1) into account and reached a legally sound decision, the following CAS case law has showed a quite distinct difference between the residual value approach and the approach chosen in the later jurisprudence. In CAS 2008/A/1519-1520 the Panel altered the state of law as the residual value approach was substituted with the principle of positive interest.

One of the reasons why CAS changed its approach is due to the wording of Article 17(1). More precisely, the wording “*the remuneration and other benefits due to the player under the existing contract.*” The courts have regularly misinterpreted this sentence.⁹⁴ Undoubtedly, the sentence was included in Article 17(1) in order to indicate the level of compensation that should be awarded to the player in case of the club unilaterally terminated the contract. The aim of the line surely was to provide that in case of the club terminating the contract against the RSTP, the club should pay the player the remainder of the remuneration he was due to receive during the contract. Likewise, both FIFA and CAS also applied the residual value approach in cases where the player terminated the contract without just cause. However, the application of the residual value approach in such cases is wrong because it leads to the club being awarded double compensation. When the player terminates the contract and subsequently leaves the club, the club no longer has to pay remuneration to the player. Therefore, the club is already being awarded this “compensation”. In other words, the remaining value of the contract no longer must be paid to the player, and thus the club already has saved that amount of money.

4.1.3 The Matuzalem Case

In CAS 2008/A/1519-1520 the Panel altered the state of law as to the fact that the residual value approach was substituted with the principle of positive interest. Therefore, this thesis will make some short remarks about the Matuzalem Case and about the reason behind the alteration.

The parties of the case were the Ukrainian football club FC Shakhtar Donetsk (“the Club”) against the Brazilian football player Matuzalem Francelino da Silva (“the Player”), the Spanish football club Zaragoza SAD (“Zaragoza”) and FIFA. In the summer of 2004 the Player signed a contract valid until 30 June 2009. On 2 July 2007, only two weeks before the qualification to the UEFA Champions League, the Player informed the Club, that he terminated the contract pursuant to RSTP Article 17. On 19 July 2007, the Player signed a contract with Zaragoza and one year later, the Player signed a three-year-contract with the Italian football club, Lazio S.p.A. (“Lazio”).

Regarding the calculation of compensation, the Panel applied the principle of positive interest.⁹⁵ However, firstly the Panel emphasised that the Player breached the contract without just cause, and thus the Club was entitled to receive compensation, pursuant to RSTP Article 17(1). Secondly, the Panel considered that the Clause 3.3 of the contract was a kind of *de minimis cap* to trigger an obligation of the Club to negotiate and conclude a transfer agreement with the interested club.⁹⁶ The clause was not to be considered as a buyout

⁹² CAS 2007/A/1298-1300 Para 86, pp. 27-28

⁹³ CAS 2007/A/1298-1300 Para 87-89, p. 28

⁹⁴ CRESPO, p. 78

⁹⁵ CAS 2008/A/1519-1520 Para 86-90 pp. 24-26

⁹⁶ CAS 2008/A/1519-1520 Para 65-75, pp. 20-22

clause within the meaning of RSTP Article 17 “*unless otherwise provided for in the contract.*” Therefore the calculation was to be made in consideration of the criteria set out in Article 17(1).⁹⁷

After applying the principle of positive interest, which aims to determine the amount, which basically shall put the injured party in the position that the same party would have occupied if the contract were performed properly, the Panel concluded that the Player would have to pay a compensation amounting EUR 11.858,934 to the Club.⁹⁸ The Panel concluded that the principle of positive interest shall apply not only in the event of an unjustified termination or a breach by a player, but also when the party in breach is the club. Accordingly, the judging authority should not satisfy itself in assessing the damage suffered by the player by only calculation the net difference between the remuneration due under the existing contract and any a remuneration received by the player from a third party. Rather, the judging authority will have to apply the same degree of diligent and transparent reviews of all the objective criteria, including the specificity of sport, as foreseen in RSTP Article 17(1).⁹⁹

Finally, the Panel concluded that: “[...]the calculation [...] shall be diligent and there is no power for the judging authority to set the amount due in a fully arbitrary way. By asking the judging authorities, [to] duly consider a whole series of elements, including such a wide concept like “sport specificity”, and [...] “any other objective criteria”, the authors [...] achieved a balanced system according to which the judging body has on one side the duty to duly consider all the circumstances of the case and all the objective criteria available, and on the other side a considerable scope of discretion so that any party should be well advised to respect an existing contract as the financial consequences of a breach or a termination without just cause would be, in their size and amount, rather unpredictable. At the end, however, the calculation made by the judging authority shall be [...] just [,] fair, [...] transparent and comprehensible.”¹⁰⁰

On the basis of the two landmark cases it can be concluded that CAS altered the state of law by submitting the residual value approach for the principle of positive interest. Moreover, the Panel of CAS 2008/A/1519-1520 highlighted that Article 17 is part of the RSTP Chapter IV that deals with and tries to foster the maintenance of contractual stability between professionals and clubs. The purpose of Article 17(1) is solely to reinforce contractual stability and to strengthen the principle of *pacta sunt servanda* in the world of international football, *i.a.* by acting as a deterrent against unilateral contractual breaches and terminations. The deterrent effect shall be achieved through the impending risk of having to pay a compensation calculated with due consideration of all the relevant criteria listed in Article 17(1). Furthermore, the judging authorities shall aim to determine an amount which puts the affected party in the position that they would have been in if the contract had been performed properly and avoid double compensation for the aggrieved party as per the residual value approach. Finally, the Panel concluded that the Article gives the judging authority a clear mandate to establish the damage suffered by a party on a case by case basis, with due consideration of all elements of the case, including the criteria mentioned in Article 17(1), which are non-exclusive.

4.2 RSTP Article 17 In Details

4.2.1 Introductory Remarks

In the event that one party terminates the contract without just cause the consequences set out in RSTP Article 17 apply. This is true irrespective of whether the contract was unilaterally terminated inside or outside the protected period. Unilateral termination of a contract without just cause is always inadmissible. In the case of termination of contract inside the protected period both financial and sporting sanctions shall be imposed on the party in breach. Due to the object of the thesis, the following analysis focuses only on the legal consequences set out in RSTP Article 17(1), which is why the sporting sanctions set out in Article 17(3)-(4) will not be discussed any further.

⁹⁷ CAS 2008/A/1519-1520 Para 76, p. 22

⁹⁸ CAS 2008/A/1519-1520 Para 187, p. 43

⁹⁹ CAS 2008/A/1519-1520 Para 88, p. 25

¹⁰⁰ CAS 2008/A/1519-1520 Para 89, p. 25

4.2.2 Prerequisites

Pursuant to the wording of Article 17(1) the party in breach is obliged to pay compensation. However, it is of interest to clarify whether only the party who terminated the contract without just cause can be the debtor, or whether the debtor can also be the party who gave the other party just cause to terminate the contract. The legal literature and CAS agree that pursuant to the intent of RSTP Chapter IV both the party terminating unlawfully as well as the party providing just cause for termination are obliged to compensate pursuant to Article 17(1).¹⁰¹ However, accentuating the importance of maintaining contractual stability, the entitlement to compensation for contractual breach is exclusively in favour of the party that has suffered the breach, which is why the right to compensation cannot be assigned to a third party.¹⁰²

The heading of Article 17 “*Consequences of terminating a contract without just cause*” indicates that termination of contract without just cause is a necessary prerequisite. However, it cannot be inferred that one party is always forced to terminate the contract in order to be able to claim compensation. Instead, the aggrieved party can be entitled to claim compensation for the loss incurred as a consequence of the breach of contract without terminating the contract. This legal basis does not follow from Article 17, but rather from the additionally applicable Swiss law.¹⁰³

4.2.3 Effects on the Contract

If the contract is terminated pursuant to RSTP Article 14, the contract is terminated with effect *ex nunc*. However, if the contract is terminated within the meaning of Article 14, it is of interest to clarify what effect the termination has on the employment relationship. Firstly, the wording of RSTP Article 17 does not expressly clarify the fate of the contract in the event of unilateral termination of the contract. However, the fate can be inferred indirectly from the wording of Article 17(1) as to the fact that the amount of compensation depends on, *i.a.* the remaining term of the contract. This emphasises that the obligation to pay compensation is intended to replace the club’s obligations, primary the obligation to occupy the player and to render the sporting performance.

As mentioned before, Swiss law often applies subsidiarily in cases before the CAS¹⁰⁴ and according to CO Article 337c (1) the employee has a right to compensation against the employer if the employer dismisses the employee with immediate effect and without good cause. Pursuant to Article 337c (1) the compensation is calculated in light of what the employee would have earned had the employment relationship been terminated in accordance with the notice period or by expiry of the fixed term. Here too, the compensation replaces the primary obligation of the employer. Consequently, Article 17(1) is in line with the often-applicable Swiss law. In case of the player unilaterally terminating the contract, both the legal literature and the CAS case law reject any obligation on the player to continue to have to render his services.¹⁰⁵ In other words, the player is solely obliged to pay the club compensation in accordance with the criteria set out in Article 17(1).

4.2.4 Buyout-clauses

Pursuant to Article 17(1) and (2), the contract can stipulate the amount that the player shall pay to the club as compensation in order to unilaterally terminate the contract. The clause is called a “*buyout-clause*.”¹⁰⁶ The FIFA Commentary explains that the reasoning behind accepting buyout-clauses, which on its face do not enhance contractual stability, is that the parties mutually agree on the amount of the buyout-clause at the very beginning and fix this in the contract. In the respect of buyout-clauses, it is important to know that on one hand, the sports legislation of certain countries such as Spain¹⁰⁷ made it compulsory for buyout-clause to be included in the contracts. On the other hand, there are countries that cannot include the buyout-clause in

¹⁰¹ HAAS, pp. 234-235

¹⁰² RSTP Article 17(2) and FIFA Commentary, explanation article 17, Para 5, p. 48

¹⁰³ HAAS, p. 235, footnote 105

¹⁰⁴ CAS Statutes R58 and FIFA Statutes Article 66(2)

¹⁰⁵ HAAS, p. 236

¹⁰⁶ FIFA Commentary, Article 17 Para 3, p. 47

¹⁰⁷ Real Decreto 1006

their contracts, as it is not compatible with mandatory labour law.¹⁰⁸ However, according to FIFA and the FIFA Commentary a buyout-clause stipulated in the contract is considered valid.

The acceptance of buyout-clauses is an expression of that the deciding bodies must take the parties autonomous agreement into careful consideration. However, it is important to note that legal scholars are not of the same opinion when it comes to the extent of the contractual autonomy.¹⁰⁹ Even if one were to agree with the opinion that Article 17 grants the parties contractual autonomy to the widest extend, this is not without limits. The contractual autonomy is limited by the universal principle of *ordre public*. The *ordre public* proviso is supposed to prevent a decision conflicting with basic legal or moral principles, which applies supranationally and therefore limits the contractual autonomy in employment-related disputes.¹¹⁰

In CAS 2013/A/3091-3093, the Panel found it in accordance with Article 17(1) and 17(2) to stipulate the amount of compensation the party in breach was obliged to pay the aggrieved party. Moreover, the Panel concluded that such clauses are subject to certain criteria. Namely, such clause shall not leave any room for interpretation and must clearly reflect the true intention of the parties and therefore shall not be drafted in vague and ambiguous terms. If the clause does not meet the criteria, the clause cannot be considered as a buyout clause in terms of the RSTP.¹¹¹ The freedom of the parties recognised in the domestic legal systems, to stipulate the amount of compensation to be paid in case of termination of contract without just cause is widely commented and accepted in CAS jurisprudence.¹¹²

As a modification to the normal nature of buyout-clauses CAS 2010/O/2132 is of interest. Even though the legal dispute was about the calculation of compensation the Panel was of the opinion that a buyout clause can even be of importance when a Panel is to calculate the compensation due. The parties had agreed on the consequences of one of the parties breaching the contract during the 3rd season of the contract. However, the Panel concluded that the parties had agreed on something else, which in the Panel's view had indirect influence in the calculation of the compensation pursuant to Article 17(1). According to the Panel, Clause 7.1 of the contract validly stipulated the consequences if the Player did not agree to extend the contract for one extra year. Consequently, the Player had to pay the Club an amount equal to his salary in the 5th season. On this basis, the Panel concluded that by doing so the parties, in mutual agreement, somehow quantified the loss of utility or the damage that the Club would suffer in case the Player decided not to extend the contract. Therefore, the Panel found it reasonable that the same criterion applied in case of the Player unilaterally terminating his contract without cause.¹¹³

On the basis of the two decisions and the FIFA Commentary it can be concluded that RSTP Article 17 stipulates that when the deciding bodies are calculating the amount of the compensation they must take the parties' autonomous agreement into careful consideration. Moreover, it can be concluded that such buyout clauses must not leave any room for interpretation and must clearly reflect the true intention of the parties and therefore shall not be drafted in vague and ambiguous terms. Finally, the CAS case law underlines that other clauses in the contract can have indirect influence on the calculation of the compensation if the clause somehow quantify the loss of utility or the damage that the party in breach would suffer in case of the player unilaterally terminates his contract without just cause.

4.2.5 The Objective of the Calculation

If the contract does not encompass a buyout-clause, Article 17 underlines that the compensation is to be calculated in accordance with the various criteria set out in Article 17(1). However, the objective of the calculation is not mentioned in the Article. According to the recent CAS case law, the aggrieved party must – as a

¹⁰⁸ DE WEGER, p. 108

¹⁰⁹ HAAS, pp. 237-238

¹¹⁰ HAAS, p. 223 and p. 238

¹¹¹ CAS 2013/A/3091-3093 Para 259-261, p. 43

¹¹² E.g. CAS 2009/A/1909 Para 47, p. 22

¹¹³ CAS 2010/O/2132 Para 50-51, p. 16

general rule – be placed in the position he would be in had the breach of the contract not occurred. The objective is lead by the principle of positive interest.¹¹⁴ Moreover, it is important to emphasise that Article 17(1) does not aim to punish the party in breach. The punitive character is regulated in RSTP Article 17(3), which is why there is no scope for the compensation to have any punitive character. Furthermore, procedural aspects also support this view. The reason why is that a claim for punitive damage actually conceals a disciplinary measure by FIFA. Therefore, the appeal should be against FIFA, rather than the other party.

4.2.6 RSTP Article 17(1) Criteria

Pursuant to Article 17(1) the compensation shall be calculated with due consideration for the law of the country concerned, the specificity of sport, and any other objective criteria. Short remarks will be made about the law of the country concerned, any other objective criteria and the weighting of the criteria. Regarding the specificity of sport and the damage suffered by either the player or the club, these criteria will be analysed in connection with analysing the recent CAS jurisprudence.

As to the law of the country concerned it is of interest to note that the legal literature suggests that a clarification of the wording “*with due consideration for the law of the country concerned*” needs to be made.¹¹⁵ Neither the wording nor the FIFA Commentary provides any clarification. On the one hand the criteria can be interpreted as referring to the law chosen by the parties as mentioned under section 2.2.2. On the other hand the criteria can be interpreted as referring to the law of the legal system with which the dispute has the closest connection. At the time of writing there is no common understanding of the wording.

As to any other objective criteria it should be noted that Article 17(1) includes a non-exhaustive list of criteria, which are to be considered when calculating the amount of compensation. Furthermore, it is of importance to understand that the criteria set out in Article 17(1) are intended for a multitude of varying cases with the consequence that not all of the criteria will apply equally in every case, or equally when calculating the compensation by the player or the club. However, the applied criteria must not disadvantage one party compared with the other party. Finally, co-responsibility by the aggrieved party will, of course, always be considered as an unmentioned further objective criterion.

With regard to the weighting of the various criteria it is important to notice that both the DRC and CAS have great latitude of discretion when applying Article 17(1). Pursuant to the wording of Article 17(1) the deciding body only has to take the various criteria *into consideration* when calculating the compensation. Furthermore, the FIFA Commentary only mentions that the RSTP provide for some criteria that *can* be taken into account when establishing the compensation due.¹¹⁶

4.3 CAS Jurisprudence

Above, RSTP Article 17(1) has been thoroughly examined. The thesis will now look towards the CAS jurisprudence with respect to compensation paid by the party in breach and the application of the principle of positive interest. Section 4.3.1 will analyse the jurisprudence regarding compensation paid by the player whereupon section 4.3.2 considers compensation paid by the club.

4.3.1 Compensation paid by the Player

As mentioned earlier, CAS altered the state of law in CAS 2008/A/1519-1520. In this context CAS 2009/A/1180-181,¹¹⁷ known as the El-Hadary Case, is considered as another landmark case. Here, the Panel followed the principle of positive interest set out in the Matuzalem Case. Since then, the principle of positive interest has been addressed in numerous awards delivered by various CAS panels. Below, the thesis will analyse how the panels have been addressing the principle in the latest decisions rendered by the CAS. The

¹¹⁴ BERNASCONI, p. 249

¹¹⁵ HAAS, p. 240

¹¹⁶ FIFA Commentary, Article 17(1), p. 46.

¹¹⁷ LIMBERT, pp. 99-105

thesis will analyse decisions regarding unjustified termination of contract by the player and by the club starting with the application of the principle in case of the player terminates the contact without just cause.

4.3.1.1 Principle of Positive Interest

In analysing the application of RSTP Article 17(1) and the principle of positive interest CAS 2010/A/2145-2147 has been chosen as point of the departure because of its thorough and illustrative consideration of the said article and principle. The facts of the case are referred under section 3.2.4.1.1.

In the case, the Panel concluded that the compensation for the Player's breach of the contract was to be determined in accordance with Article 17(1). The Panel concluded that the Panel's role was to consider each of the criteria within the Article and any other objective criteria in the light of the specific facts of the case. Furthermore, the Panel saw its role as determining how much weight, if any at all, to apply to each criterion in determining the amount of compensation. The Panel concluded that the role of a panel is to apply all of the Article 17(1) criteria and any other objective criteria to the specific facts and determine which are relevant and which are not and to ensure the calculation made is just, fair, transparent and comprehensible with a view to putting the injured party in the position it would have been in had no breach occurred.¹¹⁸ In other words, applying the principle of positive interest.

On the question of how to apply the objective criteria of Article 17(1) the Panel underlined that the list of criteria is not intended to be exhaustive and if the principle of positive interest is to be applied, then other objective criteria can and should be considered. However, there must be a logical nexus between the breach and loss claimed.¹¹⁹

As to criteria referred in Article 17(1) the Panel considered *i.a.* the remuneration and other benefits and underlined that this criterion has proved the most contentious to date. Firstly, it shall be noted that the Panel referred to the approach applied in the Matuzalem Case. Here, the Panel calculated the value of the services of the player by looking at the amount the injured party would have to pay to replace the player. The Panel of the Matuzalem Case was of the opinion that there were two components – the wages of the replacement player and the cost to acquire him. Therefore, the Panel held that the amount the new club was willing to pay the player in breach gave the best indication of what a theoretical replacement player would be paid. Subsequently, the Panel looked for evidence as to what the aggrieved party would have to pay to acquire a replacement player. In doing so, the Panel took the evidence from the contract the new club entered into with a third club and deducted the remuneration under the old contract.¹²⁰

In the case at hand, the Panel concluded that in absence of any concrete evidence with respect to the value of the Player, the Panel could not apply exactly the same calculation as in the Matuzalem Case. Furthermore, the Panel emphasised that by using the value of the replacement costs only rather than the estimated value of the Player, the Panel did not seek to depart from the Matuzalem approach but wished to emphasise that there is not just one calculation method as well as that each case must be assessed in the light of the elements and evidence available to each CAS panel.¹²¹

As to the criteria within protected period the Panel concluded that this criteria is dealt with in the specificity of sport criterion. This is in line with the previous CAS case law. As to the criterion law of country concerned the Panel confirmed the previous CAS jurisprudence in underlining that the criterion might be relevant in favour of the player or in favour of the club, or be utterly irrelevant.¹²²

With regard to other objective criteria to be considered, the Panel addressed the replacement costs the Club had incurred as a direct result of the Player's breach. In previous jurisprudence the criterion has been consid-

¹¹⁸ CAS 2010/A/2145-2147 Para 16-19, pp. 12-13

¹¹⁹ CAS 2010/A/2145-2147 Para 23, p. 14

¹²⁰ CAS 2010/A/2145-2147 Para 36, p. 18

¹²¹ CAS 2010/A/2145-2147 Para 36-44, pp.18-21

¹²² CAS 2010/A/2145-2147 Para 50-52, pp. 22-23

ered in order to establish the positive interest. In the Panel's opinion the replacement cost criterion is deemed as a logical place to start to see what loss the injured party has actually suffered as a result of the breach, before comparing this with the theoretical calculations a judging authority is directed to make under Article 17(1). Moreover, the Panel referred the El-Hadary Case where the Panel stated that Article 17(1) is an attempt by FIFA to give some directions on how to calculate the damage suffered. Finally, the Panel underlined that a panel has the benefit of hindsight or the benefit of seeing how the breach of contract actually affected the injured party. As part of the replacement cost, the Panel concluded that the aggrieved party has an obligation to mitigate the damage suffered. Due to the fact that Swiss law often applies subsidiarily, the well-recognised requirement to mitigate the effects and loss related to damages is confirmed in the CO Article 44(1). According to the Panel it would vary from case to case how the aggrieved party must mitigate the damages.¹²³

Finally, the Panel considered the criterion specificity of sport. The Panel confirmed the previous CAS jurisprudence to the effect that the criterion is neither an additional head of compensation nor a criterion allowing to decide in equity, but a correcting factor, which allows the Panel to take into consideration other objective elements that are not envisaged under the other criteria of Article 17(1). As mentioned under section 4.3.2.3 neither the RSTP nor the FIFA Commentary offer any express guidance as how judging bodies should calculate the compensation under the criterion specificity of sport. However, as a footnote the FIFA Commentary mentions the possibility of awarding additional compensation.¹²⁴ On these ground the Panel followed the specificity of sport jurisprudence detailed in the Matuzalem Case and corrected the compensation with an additional compensation being six months remuneration under the new contract.¹²⁵

CAS 2010/A/2145-2147 confirmed the principle of positive interest and the application of RSTP Article 17(1). Furthermore, the recent jurisprudence demonstrates that various panels are of the opinion that the principle of positive interest also applies when calculating the compensation in accordance with Article 17(1) in the case of a player terminating his contract without just cause. The principle is applied in various CAS decisions such as CAS 2014/A/3707, CAS 2012/A/3033 and CAS 2010/O/2132.

In CAS 2013/A/3091-3093 the Panel considered another interesting aspect of the application of the principle of positive interest. In its decision, the Panel agreed with the DRC as to the fact that offers made by third parties might be relevant for the evaluation of the damage suffered by the club, as they provide important information. Therefore, the Panel concluded that the compensation amounted EUR 4.500.000, which corresponded to the offer made by the Club to Nantes on 26 January 2012 regarding the potential transfer of the Player. However, it must also be noticed that the CAS Panel only considered the market value of the Player and did not consider the other criteria set out in Article 17(1). In addition, CAS 2010/O/2132 established that a buyout clause could be interpreted as the parties, in mutual agreement, quantifying the loss of utility or the damage that the Club would suffer in case the Player decided not to extend the contract. Therefore, the Panel found it reasonable that the same criterion applied in the case of the Player unilaterally terminating his contract without cause and that a validly stipulated buyout clause can be applicable in determining the compensation due pursuant to Article 17(1).¹²⁶

In light of the recent jurisprudence it can be concluded that the CAS has confirmed the alteration set out in the Matuzalem Case. The recent jurisprudence almost unanimously confirms that the CAS panels are applying the principle of positive interest when calculating the compensation in the case of the player's breach of contract without just cause. However, both CAS 2013/A/3091-3093 and CAS 2010/O/2132 illustrate that the panels will consider other information such as offers made by third parties and validly stipulated buyout clauses when calculating the compensation due. Nevertheless, future CAS panels will likely continue to apply the principle of positive interest in cases where Article 17(1) applies.

¹²³ CAS 2010/A/2145-2147 Para 24-26, pp. 14-15

¹²⁴ FIFA Commentary, Article 17(1), p. 47, footnote 75 in fine.

¹²⁵ CAS 2010/A/2145-2147 Para 59, pp. 24-25

¹²⁶ CAS 2010/O/2132 Para 50-51, p. 16

4.3.1.2 No More Value on the Services of a Player

A modification to the principle is the calculation of compensation owed to the club by the player when the club no longer values the services of the player. The landmark CAS case on this subject is CAS 2009/A/1856-1857¹²⁷, known as the Appiah Case. The Panel applied the positive interest approach and found the player should not have to pay any compensation to the club. This was because that due to an injury he was unable to play football in the entire period since before the unilateral termination of the contract until the expiry of the contract. Therefore, the player was of no value to the club, or any other club, during the remaining period of the contract, and he could not be held liable for either the club's failure to receive a transfer fee or the club having to buy a replacement player. Consequently, the Panel concluded that the amount the Club saved by not having to pay the player salary outweighed any loss the club suffered through unamortised costs and disciplinary fines.

In CAS 2014/A/3642, the Panel concluded that the Player did terminate his contract without just cause. However, as to the calculation of the compensation, the Panel underlined that the Club placed no value on the Player's services and that questioned the existence of damages for the Club. Furthermore, the Panel stated that the Club apparently considered it favourable to save the payments of salary in exchange for losing the Player's services. Therefore, the Panel considered that the Club could not argue that there was any damage to be compensated. Finally, the Panel concluded that if the Club places no value on the Player, the Club cannot be awarded any value or compensation for the Player, regardless of whether the Player breached the contract or not.¹²⁸ The position is confirmed in the more recent CAS 2014/A/3707 where the Panel concluded that the Player, who was suspended for doping, should not compensate the Club for the lost services of the Player because he was not able to play at the moment he breached the contract and for the rest of the remaining period of the contract. Therefore, the Player was not able to deliver his contractual services to the Club, which is why the Club did not suffer any damages that could be compensated.¹²⁹ In light of the addressed jurisprudence it can be concluded that no compensation is due if the player is of no value to the club or if the club places no value on the player's services.

4.3.1.3 Inducing the Player

RSTP Article 17(2) and 17(4) stipulates that if a player is obliged to pay compensation, his new club shall be jointly and severally liable for its payment and that sporting sanctions shall be imposed on any new club found to be in breach of contract or found to be inducing a breach of contract during the protected period. In CAS 2013/A/3091-3093, the Panel concluded that Nantes bore the burden of proof to rebut the presumption contained in Article 17(4). Furthermore, the Panel concluded that according to Article 17(4) and CAS jurisprudence an inducement is an influence that causes and encourages conduct. Indirectly, the Panel underlined that criteria such as (i) the financial situation of the new club at the time the offer was made, (ii) the offer made to the player, (iii) the financial value of this offer, and (iv) the sporting level of the new club, can be considered as factors to be considered when establishing if the new club has induced, influenced or encouraged the player to terminate the contract with his former club. In addition the Panel established that the new club's own – active – role also is of crucial importance. Finally, the Panel found that Nantes had certain influence in the case at hand and that Nantes, for quite a time, was well aware of the Player's contractual situation with the Club. On this basis, Nantes was not able to rebut the presumption and therefore induced the Player to unilaterally terminate the contract against the RSTP.¹³⁰

¹²⁷ LIMBERT, pp. 99-105

¹²⁸ CAS 2014/A/3642 Para 142, p. 26

¹²⁹ CAS 2014/A/3707 Para 140, p. 29

¹³⁰ CAS 2013/A/3091-3093 Para 270-281, pp. 44-46

4.3.2 Compensation paid by the Club

4.3.2.1 Application of RSTP Article 17

In the case of the club unilaterally terminating the contract without just cause the question arises as how the damage suffered by the player is to be calculated in accordance with Article 17(1). In these situations, the lost term of the contract is considered as the starting point.

Given that Swiss law often is additionally applicable, the CAS panels often calculate the compensation in accordance with the CO Article 337c(1)-(2). The Article determines that the employee is entitled to damages if the employer dismisses him with immediate effect and without good cause. The damages should add up to the amount the player would have earned had the contract ended after the required notice period or on expiry of its agreed duration. Pursuant to Article 337c(2)¹³¹ the amount the player has saved or earned elsewhere because of the employment or could have earned elsewhere had he made reasonable efforts is deducted from the player's claim for damages, so as to ensure that the player is not overcompensated. According to the subsidiarily applicable Swiss law, the club therefore has to compensate the player in accordance with the principle of positive interest.

As described below, the recent CAS case law has confirmed the principle of positive interest in cases of compensation paid by the club. In analysing the application of RSTP Article 17(1) and the principle of positive interest, CAS 2012/A/3033 has been considered because of its thorough and illustrative consideration of the said article and principle. The facts of the case are explained at section 3.2.3.1 above.

Firstly, the Panel stressed that the vast majority of the CAS jurisprudence applied the principle of positive interest when calculating the amount of compensation. Consequently, the Panel found that the legal framework confirmed by the CAS and the principle of positive interest also applied in the case at hand.¹³² As to the criteria referred in Article 17(1) the Panel considered *i.a.* the remuneration and other benefits. Due to this criterion, the Panel, when considering the principle of positive interest, looked at the total amount of salary and bonuses the Player would have received if the Club had not breached the contract. Moreover, the Panel found that this is the amount that shall be used as the basis for calculating the total amount of compensation due. Subsequently, the Panel found that, in principle, the remuneration the Player earns with his new club during the remaining contractual term of the contract should be deducted from the amount the Player would have earned with the Club should the Club have properly performed the contract. As part of the criterion the Panel also considered rental fees of the apartment and meals allowance as other benefits due to the Player under the existing contract.¹³³ Further, the Panel discussed the criterion specificity of sports including the damage to the Player's professional career, damage caused in relation to insurance and pension schemes and damages incurred by the Player because of supporting his family.¹³⁴

In CAS 2012/A/2698, the Panel confirmed that the criteria of Article 17(1) are wide and that the deciding body has the discretion in assessing and determining the amount of compensation based on the specified criteria as well as any other objective criteria. Further, the Panel confirmed the principle of positive interest when calculating the compensation due.¹³⁵ As early as in 2009-2010, a CAS Panel has confirmed the principle of positive interest and the link between the principle and the often-applicable Swiss legislation, *i.a.* CO Article 337c.¹³⁶

The recent CAS case law demonstrates that various CAS panels are of the opinion that the club has to compensate the player for the entire positive interest. Moreover, the panels conclude what the player has saved or

¹³¹ HAAS, pp. 242-243

¹³² CAS 2012/A/3033 Para 73-76, pp. 16-17

¹³³ CAS 2012/A/3033 Para 83-86, pp. 18-19

¹³⁴ CAS 2012/A/3033 Para 118-116, pp. 24-27

¹³⁵ CAS 2012/A/2698 Para 136-138, p. 22

¹³⁶ CAS 2009/A/1956 Para 27, p. 14

earned elsewhere because of the employment or could have earned elsewhere had he made reasonable efforts shall be deducted from the player's claim for damages. In conclusion, the panels are of the opinion that the principle of positive interest applies when a panel is calculating the compensation in the case of the club breaching the contract without just cause and that the player has an obligation to mitigate damages. This obligation is described below.

4.3.2.2 Mitigation by the Player

In CAS 2012/A/2874137 the parties were the Polish football player Grzegorz Rasiak ("the Player") against the Cypriot football club AEL Limassol ("the Club"). On 20 August 2010, the parties signed a contract valid until 31 May 2012. On 20 April 2011, the Club terminated the contract with immediate effect and without just cause. On 27 September 2011, the Player entered into a contract with the Polish club Jagiellonia Białystok ("the Polish club"). Due to the pending dispute between the Player and the Club, FIFA refused the registration of the Player with the Polish club. On 25 November 2011, upon receiving the approval of FIFA for the registration, the Player and the Polish club entered into a new contract valid until 30 June 2013.

As to whether the Player had an obligation to mitigate the damages suffered by the Player, the Panel underlined that, in principle, the remuneration the Player earned with the Polish club during the remaining contractual term of the contract with the Club should be deducted from the amount the Player would have earned with the Club should the Club have properly performed the contract. Furthermore, the Panel concluded that whether the Player should have done more to mitigate his damages and whether this should be a reason to reduce the amount of compensation to be awarded to the Player is a subjective element and should be dealt with under the criterion of specificity of sport.

Accordingly, the Panel concluded that a party suffering from a breach of contract has a general obligation to mitigate his damages. However, that principle goes two ways. On the one hand, the mitigated amount shall be deducted from the amount used as the basis to calculate the compensation due. In other words, insofar as a player is able to mitigate his damages, he has not suffered any damages. Consequently, the party in breach shall not compensate the mitigated amount as this would lead to unjust enrichment of the aggrieved party. On the other hand the Panel emphasised that the fact that the party suffering from the breach was able to mitigate his damages is a fact that should be considered to the benefit of the party suffering from the breach in light of the criterion specificity of sport. In conclusion, the CAS jurisprudence has confirmed the obligation to mitigate damages suffered, *i.a.*, in CAS 2012/A/2698¹³⁸ and CAS 2010/A/2202.¹³⁹

In CAS 2009/A/1956, the Panel concluded that the compensation due to the Player should not be deducted in accordance with the Player's obligation to mitigate the damages suffered when the Player did not play for another club until the end of his fixed term contract with the Club. There was no evidence that the Player was in a position to play for another club and refused to do so, thereby breaching his duty to mitigate the damage suffered. Here, the Panel again confirmed the obligation to mitigate the damages suffered.

4.3.2.3 Specificity of Sport

One of the criteria set out in Article 17(1) is the specificity of sport. As mentioned earlier, this criterion is to be interpreted by the CAS on the footing that the FIFA Commentary is silent about how to apply the criterion. However, the FIFA Commentary mentions the possibility of awarding additional compensation, which may not surpass the amount of six monthly salaries. This can be interpreted as a limitation of the Panel's discretion when applying the criterion.

According to the CAS jurisprudence, the criterion shall be used to ensure that the solution reached is just and fair, not only under a strict civil or common law point of view, but also taking into due consideration the specific nature and needs of the football world and making an appropriate evaluation of the interests at stake,

¹³⁷ CAS 2012/A/2874 Para 91-107, pp. 20-23

¹³⁸ CAS 2012/A/2698 Para 142-146, pp. 22-23

¹³⁹ CAS 2010/A/2202 Para 21-26, pp. 9-10

which is consistent with the landscape of international football. Moreover, the jurisprudence underlines that the specific circumstances of a case may lead a panel to increase the amount of compensation, by reference to the concept of fair and just indemnity provided by the CO Article 337c(3) and 337d(1) without applying the strict quantitative limits set out in the said articles. This point of view is confirmed *i.a.* in CAS 2012/A/2874.¹⁴⁰ Moreover, the Panel of the Matuzalem Case underlined that CO Article 42(2) underpinned the purpose of the criterion as the wording makes clear: “[w]here the exact value of the loss or damage cannot be quantified, the court shall estimate the value at its discretion in light of the normal course of events and the steps taken by the injured party.”

In CAS 2012/A/3033, the Panel underlined that pursuant to the specificity of sport the Panel has the discretion to adjust the objective damages incurred by the Player. Thus, the Panel indicated that the criterion applies when the Panel is of the opinion that the compensation should be adjusted and finally confirmed that the Panel would assess whether it felt the objective amount of damages was just and fair or whether the amount should be reduced or increased in light of the specificity of sport. In the case at hand, the Panel concluded that the Player was entitled to aggravated damages because of the damage to his professional career, to the pension scheme and social security schemes and damages incurred by the Player in supporting his family. The compensation was therefore increased by an amount equal to one year’s salary due to the criterion specificity of sport.

In CAS 2014/A/3707, the Panel opined that sport has its own specific character and nature and plays its own important role in the society. Therefore, the Panel found that the judging bodies have to take into due consideration the specific nature and needs of sport when assessing the circumstances of the dispute at stake, so to arrive to a solution which takes into reasonable account not only the interests of players and clubs, but, more broadly, those of the whole football community. In other words, when the deciding body applies the criterion, the judging body shall keep duly in mind that the dispute is taking place in the somewhat unique world of sport. The judging body therefore should aim at reaching a solution that is legally correct, and also appropriate upon an analysis of the specific nature of the sporting interests at stake, the sporting circumstances and the sporting issues inherent to the case.¹⁴¹ This position is confirmed in CAS 2013/A/3089 where the Sole Arbitrator (“the Panel”) considered that when assessing the amount of compensation the Panel should duly keep in mind the specific nature of sport and the specific sporting circumstances of the case at stake.

4.3.2.4 Conclusion

According to the application of RSTP Article 17(1) it can be concluded that the recent jurisprudence emphasises that the club has to compensate the player for the entire positive interest to put the aggrieved party into the position in which he would have been had the contract been duly performed. However, the recent jurisprudence also concludes that the aggrieved party has a general obligation to mitigate his damages so that the aggrieved party is not overcompensated. Notwithstanding the panels have emphasised that the fact that the party suffering from the breach is able to mitigate his damages is a fact that should be considered to the benefit of the party suffering from the breach in light of the criterion specificity of sport. According to the jurisprudence, the criterion specificity of sport shall be used to ensure that the solution reached is just and fair and is taking into due consideration the specific nature and needs of the football world and making an appropriate evaluation of the interests at stake, which is consistent with the landscape of international football.

5. Termination with Just Cause – Right to Compensation?

In sections 3-4 this thesis has analysed the grounds for termination and the consequences for terminating a contract without just cause. Nevertheless, it is also of both theoretical and practical importance to analyse the situation in which one of the parties terminates the employment relationship with just cause. In that context one of the interesting legal questions concerns the right to compensation. Does the party who terminated the contract with just cause have a right to compensation and does the RSTP or the additionally applicable Swiss

¹⁴⁰ CAS 2012/A/2874 Para 183, pp. 35-36

¹⁴¹ CAS 2014/A/3707 Para 151, p. 30

law provide a statutory basis for compensation in such a situation? These are the questions the thesis will analyse below.

5.1 Terminating a Contract with Just Cause

The relevant article of the RSTP is Article 14. As described in section 3.1.3 the Article determines the consequences of termination of contract with just cause. However, the wording of the Article does not address all the consequences of a unilateral termination of the contract with just cause. Article 14 leaves it open to interpretation what the consequences are for the other party of the contract. In the following sections this thesis will analyse two different paths regarding the question of the possible right to compensation and the statutory basis for such compensation in case of termination of contract with just cause.

5.1.1 The Swiss Path

Pursuant to the CAS Statutes and the FIFA Statutes and confirmed by a consistent body of CAS case law, Swiss law often applies subsidiarily in cases before the CAS. As described earlier, the CAS Statutes R58 determines that the arbitration court shall decide the dispute according to the applicable federation regulations and the rules of law chosen by the parties. If the parties have not made any such choice of law, R58 provides that the applicable law is the law of the country in which the sports federation whose decision forms the subject of the proceedings is domiciled. Therefore, in the employment disputes analysed Swiss law will often be applicable. The reasoning behind this is described in section 2.2.2.

Furthermore, the FIFA Statutes Article 57 provides that FIFA recognises CAS to resolve disputes *i.a.* between clubs and players and the provisions of the CAS Statutes shall apply to the proceedings. Moreover, Article 57(2) stipulates that CAS primarily shall apply the various regulations of FIFA, and, additionally, Swiss law.

It is therefore of interest to examine relevant Swiss law and establish whether the Swiss legislation contains provisions about compensation in case of unilateral termination of an employee.

5.1.2 Application of the Swiss Code of Obligation

The relevant legal framework is the CO. More precisely Article 337b. Article 337b determines that where a party's breach give rise to a right to terminate for good cause, the party in breach is fully liable for damages with due regard to all claims arising under the contract. Moreover, Article 337b(2) stipulates that the Court determines the financial consequences of termination with immediate effect at its discretion, taking due account of all the circumstances. In other words, Article 337b regulates the consequences for the other party and establishes that the aggrieved party is entitled to compensation. However, the FIFA regulations, including the RSTP, do not contain an article equivalent to Article 337b.

Furthermore, RSTP Article 17(1) may be relevant as it stipulates the consequences of termination of contract without just cause. However, the CAS jurisprudence rejects the relevance of Article 17. In CAS 2010/A/2202, the Panel concluded that because the contract was terminated with just cause, Article 17 was of no assistance, as it dealt only with termination without just cause.¹⁴² Subsequently, the Panel addressed the applicability of Article 337b because the RSTP was – and still is – silent about the consequences of terminating a contract with just cause. Here, the Panel concluded that due to the contract and in light of the Swiss legislation, the starting point for any compensation in case of termination with just cause is the balance of monies due under the contract.¹⁴³

The application of Article 337b has been examined in two 2008 CAS-decisions. A detailed discussion of the facts of these cases is beyond the scope of this thesis. However, this thesis will make some short remarks about the decisions so as to illustrate the application of Article 337b. In CAS 2008/A/1589 the Panel concluded that based on Article 337b and TAS 2008/A/1491 the party that terminates a contract for just cause

¹⁴² CAS 2010/A/2202 Para 16, page 8

¹⁴³ CAS 2010/A/2202 Para 18-19, p. 9

must be compensated. Moreover, the Panel considered that the party in breach must compensate the other party for the whole damage caused, considering all claims based on the contract. Finally, the Panel stressed that based on Article 337[b] which in the Panel's opinion applies as well in case of termination for just cause, the employer in breach of a contract signed for a definite period of time must pay the employee his salary until the end of the period fixed in the contract.¹⁴⁴ Likewise, the Panel in TAS 2008/A/1491 concluded that the Article 337b was applicable in determining the compensation due to a termination of contract with just cause.¹⁴⁵

5.1.3 Calculation of Compensation

By reference to CAS 2010/A/2202¹⁴⁶, CAS 2008/A/1589¹⁴⁷ and TAS 2008/A/1491 the question of how to calculate compensation has its prima facie answer in Article 337b. According to the provision and the CAS decisions the starting point for the calculation of the compensation due is the balance of monies due under the contract that remains. In other words, to put the injured party in the position it would have been in if no breach had occurred.

However, the prima facie calculation not an absolute one due to the fact that both the Swiss legislation and the CAS case law have considered the question whether the aggrieved party has an obligation to mitigate. According to a strict literal interpretation of Article 337b, the Article does not contain a right to set-off. However, TAS 2008/A/1491 has established that Article 337c (1)-(2) applies by analogy.¹⁴⁸ Pursuant to Article 337c (1) the employee who has been dismissed with immediate effect without good cause is entitled to damages in the amount he would have earned had the contract ended after the required notice period or on expiry of the contractual terms. Article 337c (2) determines that such damages are reduced by any amount that the employee saved as a result of the termination of the employment relationship or that he earned by performing other work or would have earned had he not intentionally foregone such work. However, the Article 337c applies only where the employer dismisses the employee without just cause and not to the situation where the employee terminates the contract with just cause. Therefore, the CAS panels have considered whether Article 337c is applying by analogy. In CAS 2010/A/2202 the Panel referred to TAS 2008/A/1491 in which the Panel cited a Swiss Supreme Court judgment.¹⁴⁹ In the judgment the Court confirmed that Article 337c (1)-(2) applies by analogy to Article 337b. Moreover, the Swiss Supreme Court concluded that the application of Article 337c (1)-(2) does not necessarily supersede the contractual intent of the parties because Article 337c (2) does not belong to the category of Articles from which it is not possible to derogate, cf. CO Articles 361-362. According to the CAS and the Swiss Supreme Court, the contractual parties can expressly provide that the employee will not have to add to his claims any income received between the date of the breach of the contract and its expiry.

In continuation of the facts in CAS 2010/A/2202 the Panel stated that some academics question whether it is possible for a liquidated damages clause to derogate in advance the legal provisions of the CO related to the compensation of damages. Moreover, the Panel referred to TAS 2008/A/1491 and concluded that CO Article 163 is applicable in determining if a contractual buyout clause shall be reduced since the clause is excessively high.¹⁵⁰

5.1.4 Conclusion

As to the CAS jurisprudence it can be concluded that various panels have confirmed the applicability of the CO Articles 337b-337c both in determining whether the party who breaches the contract with just cause was entitled to compensation and if so how the compensation should be calculated. However, the parties are allowed to decide that the dispute shall be decided under another legal framework than the Swiss legislation.

¹⁴⁴ CAS 2008/A/1589 Para 40-42, pp. 26-27

¹⁴⁵ TAS 2008/A/1491 Para 41, pp. 14-16

¹⁴⁶ CAS 2010/A/2202 Para 18-19, p. 9

¹⁴⁷ CAS 2008/A/1589 Para 41, pp. 26-27

¹⁴⁸ TAS 2008/A/1491 Para 41, pp. 14-16

¹⁴⁹ ATF 133 III 657

¹⁵⁰ CAS 2010/A/2202 Para 28-31, pp. 10-11

Therefore the Swiss path can be said to contain a right to compensation but cannot be considered as a reliable statutory basis for compensation in the situation where the contract is terminated with just cause.

5.2 The FIFA Path

Not only the Swiss law is of interest in analysing the possible right to compensation and the possible statutory basis for compensation. It is also of interest to consider whether the football worlds own regulations, *i.a.* the RSTP, provides a reliable statutory basis for compensation in case of termination of contract with just cause.

5.2.1 The FIFA Regulations

RSTP Article 14 determines that a contract may be terminated by either party without consequences of any kind where there is just cause. However, as described above, the wording of Article 14 does not address all the consequences because the Article does not regulate that the party with just cause is entitled to any compensation as a result of breaching the contract. Moreover, RSTP Article 17 only stipulates the consequences of terminating a contract without just cause. However, the FIFA Commentary, in introductory remarks, gives an overview and outlines the different possibilities in relation to the termination of contract. The FIFA Commentary says in the case of the player terminating a contract with just cause, compensation may be payable to the player. Furthermore, the FIFA Commentary states that in the case of the club terminating a contract with just cause, compensation may be payable to the club.¹⁵¹

In the FIFA Commentary to Article 14 (5) and (6), FIFA substantiates the introductory remarks as to the fact that Article 14(5) provides that in the event of just cause being established by the competent body, the party terminating the contract with a valid reason is not liable to pay compensation or to suffer the imposition of sporting sanction. More importantly, Article 14 (6) provides that the other party to the contract, who is responsible for and at the origin of the termination of the contract, is liable to pay compensation for damages suffered as a consequence of the early termination of the contract and sporting sanctions may be imposed. In addition, two footnotes to Article 14 (6) stipulate that just cause for the termination of a contract by one party is usually the consequence of a violation of the contract by the other party and with regard to the consequences of terminating a contract without just cause, reference is made to RSTP Article 17.¹⁵² With reference to the FIFA Commentary introductory remarks and the remarks made about Article 14 (5) and (6) it seems like the FIFA Executive Committee, through the FIFA Commentary, sought to provide a statutory basis for compensation in case of termination of contract with just cause. Accordingly, it is of interest to examine whether the CAS panels have addressed the question and whether they have confirmed this possible statutory basis.

5.2.2 CAS Jurisprudence

In CAS 2012/A/3033, the Panel concluded that the Player implicitly terminated his contract with the Club for just cause.¹⁵³ The Panel referred to RSTP Article 14 and underlined that this provision did not specifically determine that the Player was entitled to any compensation for breach of contract by the Club. However, the Panel was satisfied that the Player, in principle, was entitled to compensation. In that respect, the Panel made reference to the FIFA Commentary and referred to Article 14 (5) and (6) of the FIFA Commentary. Finally, the Panel concluded that although it was the Player who terminated the contract by filing a claim against the Club with FIFA, the Club was at the origin of the termination of the contract, which was why the Club was liable to pay compensation for damages suffered by the Player as a consequence of the early termination.¹⁵⁴

In CAS 2012/A/2698, the CAS Panel considered whether the Club or the Player had just cause to terminate the contract. According to the statement of the case the Club allegedly terminated the contract on 6 August

¹⁵¹ FIFA Commentary, Introduction to articles 13-17, no. 2 and 5, p. 37

¹⁵² FIFA Commentary, Article 14 (5) - (6), p. 40 and footnotes 63-64

¹⁵³ CAS 2012/A/3033 Para 66, p. 15

¹⁵⁴ CAS 2012/A/3033 Para 70-72, pp. 15-16

2009 whereas on 7 August 2009 the Player informed the Club that he had terminated the contract. The Panel concluded that the Club terminated the contract without just cause whereas the Player had just cause to terminate.¹⁵⁵ The Panel found that having found that the Club unilaterally terminated the contract without just cause; the Club was obliged to compensate the Player.¹⁵⁶

However, it is of interest that the Panel underlines that: “[...] it is clear that the Contract was terminated on 7 August 2009. The value remaining thereunder must therefore be calculated with effect from 8 August 2009 [...]”.¹⁵⁷ By referring to 7 August 2009 as the date of termination it can be interpreted that the Panel was of the opinion that the Player was the party who actually terminated the contract, and therefore was the contract terminated with just cause. Furthermore, it is of interest that the Panel referred to RSTP Article 17(1) in its calculation of compensation because it regulates the consequences of termination without just cause. If the Panel is of the opinion that the Player terminated the contract, the decision is another example of a Panel, which awarded compensation to the party who terminated the contract with just cause contrary to a strict literal interpretation of the RSTP Articles 14 and 17.

5.2.3 Calculation of Compensation

Having established that both the FIFA Commentary and the CAS jurisprudence are consistent that compensation is due in case of termination of contract with just cause it is of interest to examine how the panels are calculating the compensation in such cases.

In CAS 2012/A/3033 the Panel referred to and applied Article 17(1) and CAS jurisprudence. Moreover, the Panel underlined that the principle of *pacta sunt servanda* and the principle of positive interest applied whereupon the Panel scrutinised the criteria set out in Article 17(1).¹⁵⁸ In CAS 2012/A/2698 the Panel also applied Article 17(1) and emphasised that the criteria set out in Article 17(1) are wide and the deciding body has the discretion in assessing and determining the amount of compensation. Here too, the Panel applied the principle of positive interest.¹⁵⁹

5.2.4 Conclusion

According to the FIFA Commentary and the CAS case law, the FIFA Commentary encompasses important remarks about the possibility for compensation in the case of termination of contract with just cause. In doing so, the FIFA Commentary applies the principle of origin of termination. Moreover, various CAS panels have applied the FIFA Commentary and the principle of origin of the termination in cases of termination of contract with just cause. As to the calculation of compensation in such cases the CAS panels apply the principle of positive interest, and therefore calculate compensation pursuant to RSTP Article 17(1). In conclusion, Article 14 (5) and (6) of the FIFA Commentary and RSTP Articles 14 and 17 offer a solution inside the applicable sporting regulations and provide a possible reliable statutory basis for compensation in the case of one of the parties unilaterally terminating the contract with just cause.

6. Conclusion

The main objectives of this thesis were to describe the rules regarding the maintenance of contractual stability in the world of international football, to examine the concept of unilateral termination of contract with just cause and the consequences of termination without just cause and finally to examine whether the football world's own regulations contain a statutory basis for compensation in the case of termination for just cause or whether it is to be found in the subsidiarily applicable Swiss law.

The RSTP-regulation Chapter IV regulates the maintenance of contractual stability. One of the central tenets of the regulation of contractual stability is that the contractual parties must respect and honour the principle

¹⁵⁵ CAS 2012/A/2698 Para 121 and 129, pp. 120-121

¹⁵⁶ CAS 2012/A/2698 Para 131, p. 21

¹⁵⁷ CAS 2012/A/2698 Para 139, p. 22

¹⁵⁸ CAS 2012/A/3033 Para 73-146 pp. 16-82

¹⁵⁹ CAS 2012/A/2698 Para 135-138, p. 22

of *pacta sunt servanda*. However, the principle is not an absolute one. Pursuant to RSTP Article 14, a contract may be terminated by either party without consequences of any kind in the case of just cause. In other words, it may be a case for applying the principle of *clausula rebus sic stantibus*. In the event that a contract has been terminated by one of the parties without just cause, the party in breach is obliged to pay compensation. The RSTP Article 17(1) sets out guidelines in order to determine the amount of compensation.

According to the RSTP and the CAS jurisprudence Article 14 does not define the concept of just cause, which is why the jurisprudence of the football world's highest court of appeal – the CAS – has been of interest. Based on the analyses of the jurisprudence it must be concluded that absenteeism by the player can justify a club's termination of his contract if the absenteeism reached a certain level. In addition, the principle of *jus cogens* can also justify the club to terminate the contractual relationship. Furthermore, non-payment or late payment of a player's remuneration can justify a player's unilateral termination of contract if the late payment is not insubstantial and the employee has given the employer a warning of his default. According to the jurisprudence causes for termination such as invocation of an error, assignment to the backup team and deregistration from the first team can in principle justify the player to terminate his contract for just cause.

Furthermore, the jurisprudence has established that certain types of behaviour do not justify a unilateral termination of contract. According to the recent case law a player cannot terminate his contract for just cause if the only cause for termination is to make it possible for the player to sign with a new club. A player is also not justified in terminating the contract if he repeatedly refuses to sign a valid contract, contrary to a valid extension clause. Additionally, the random non-appearance or leaving of the workplace or a single case of late-payment does not allow the player to terminate the contract. Conversely, if the player cannot provide the club with his working capacity due to illness or injury, this does not constitute a breach of duty and there is no just cause for the club to terminate the contract. The same goes for a case where the player does not play at the level wanted by the club and inadequate sporting performance is not contractually stipulated as a ground for termination.

With regard to the outcome of the analysis of the consequences of termination of contract without just cause it can be concluded that the CAS has altered the state of law by substituting the residual value approach with the principle of positive interest. Therefore, various panels are applying the principle of positive interest with a view to putting the injured party in the position it would have been in had no breach occurred. These criteria are set out in RSTP Article 17(1) but cannot be considered exhaustive. However, the jurisprudence does establish that various panels are accepting mutually accepted buyout-clauses as long as such clauses do not leave any room for interpretation and clearly reflect the true intention of the parties. The outcome of the analyses of the recent jurisprudence establishes that the principle of positive interest is applied in cases of calculating the amount of compensation due to the club. As a relevant modification to the general rule, it should be noted that CAS considers that no compensation is due if the player is of no value to the club or if the club places no value on the player's services. Furthermore, various panels have applied the principle of positive interest calculating the amount of compensation due to the player. Here, the lost term of the contract is considered as the starting point. However, it has established that the player has an obligation to mitigate his losses. Further, the jurisprudence underlines that the undefined criterion "specificity of sport" shall be used to ensure that the solution reached is just and fair, taking into due consideration the specific nature and needs of the football world.

With regard to whether the football world's own regulations contain a statutory basis for compensation in case of termination for just cause or whether it is to be found in the subsidiarily applicable Swiss law, the outcome of the examination is that various CAS panels have confirmed the applicability of the Swiss CO Articles 337b-337c both in determining whether the party who breaches the contract with just cause is entitled to compensation and, if so, how the compensation shall be calculated. However, given that the parties are allowed to agree that the dispute shall be decided under another legal framework than the Swiss legislation, Swiss law can be said to contain a right to compensation but cannot be considered as a reliable statutory basis for compensation where the contract is terminated with just cause. With regard to whether the football world's own regulations contain a statutory basis for compensation it can be concluded that the FIFA Com-

mentary encompasses important remarks about the possibility for compensation in the case of termination of contract with just cause. In doing so, the FIFA Commentary applies the principle of origin of termination. This principle has been confirmed by the CAS jurisprudence. As to the calculation of compensation in such cases the panels apply the principle of positive interest, and therefore calculate compensation pursuant to RSTP Article 17(1). Therefore, it can be concluded that the RSTP offers a solution inside the applicable sporting regulations and provides a possible reliable statutory basis for compensation in the case of one of the parties unilaterally terminating the contract with just cause.

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8. Annexes

8.1 Annex 1

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Swiss Civil Code

of 10 December 1907 (Status as of 1 July 2014)

Please note: this translation does not yet include the amendments of 1.1.2016

Please note: this translation does not yet include the amendments of 1.1.2017

The Federal Assembly of the Swiss Confederation,

based on Article 64 of the Federal Constitution^{1,2}

and having considered the Dispatch of the Federal Council dated 28 May 1904³,

decrees:

II. Against
infringements
1. Principle

Art. 28³⁰

¹ Any person whose personality rights are unlawfully infringed may petition the court for protection against all those causing the infringement.

² An infringement is unlawful unless it is justified by the consent of the person whose rights are infringed or by an overriding private or public interest or by law.

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Swiss Civil Code

2. Actions
a. In general³²

Art. 28a³¹

¹ The applicant may ask the court:

1. to prohibit a threatened infringement;
2. to order that an existing infringement cease;
3. to make a declaration that an infringement is unlawful if it continues to have an offensive effect.

² In particular the applicant may request that the rectification or the judgment be notified to third parties or published.

³ Claims for damages and satisfaction or for the handing over of profits are reserved, in accordance with in accordance with the provisions governing agency without authority.

English is not an official language of the Swiss Confederation. This translation is provided for information purposes only and has no legal force.

**Federal Act
on the Amendment
of the Swiss Civil Code
(Part Five: The Code of Obligations)**

of 30 March 1911 (Status as of 1 July 2015)

Please note: this translation does not yet include the amendments of 1.1.2016

Please note: this translation does not yet include the amendments of 1.1.2017

Art. 23

F. Defect in
consent
I. Error
1. Effect

A party labouring under a fundamental error when entering into a contract is not bound by that contract.

Art. 24

2. Cases of
mistake

¹ An error is fundamental in the following cases in particular:

1. where the party acting in error intended to conclude a contract different from that to which he consented;
2. where the party acting in error has concluded a contract relating to a subject matter other than the subject matter he intended or, where the contract relates to a specific person, to a person other than the one he intended;
3. where the party acting in error has promised to make a significantly greater performance or has accepted a promise of a significantly lesser consideration than he actually intended;
4. where the error relates to specific facts which the party acting in error considered in good faith to be a necessary basis for the contract.

² However, where the error relates solely to the reason for concluding the contract, it is not fundamental.

³ Calculation errors do not render a contract any less binding, but must be corrected.

Art. 25

3. Invoking error contrary to good faith

¹ A person may not invoke error in a manner contrary to good faith.

² In particular, the party acting in error remains bound by the contract he intended to conclude, provided the other party accepts that contract.

Art. 26

4. Error by negligence

¹ A party acting in error and invoking that error to repudiate a contract is liable for any loss or damage arising from the nullity of the agreement where the error is attributable to his own negligence, unless the other party knew or should have known of the error.

Federal Act on the Amendment of the Swiss Civil Code

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² In the interests of equity, the court may award further damages to the injured party.

Art. 42

II. Determining the loss or damage

¹ A person claiming damages must prove that loss or damage occurred.

² Where the exact value of the loss or damage cannot be quantified, the court shall estimate the value at its discretion in the light of the normal course of events and the steps taken by the injured party.

³ The costs of treating animals kept as pets rather than for investment or commercial purposes may be claimed within appropriate limits as a loss even if they exceed the value of the animal.¹⁶

Art. 163

II. Amount, nullity and reduction of the penalty

¹ The parties are free to determine the amount of the contractual penalty.

² The penalty may not be claimed where its purpose is to reinforce an unlawful or immoral undertaking or, unless otherwise agreed, where performance has been prevented by circumstances beyond the debtor's control.

³ At its discretion, the court may reduce penalties that it considers excessive.

Art. 321a

II. Duty of care
and loyalty

¹ The employee must carry out the work assigned to him with due care and loyally safeguard the employer's legitimate interests.

² He must use the employer's machinery, work tools, technical equipment, installations and vehicles in the appropriate manner and treat them and all materials placed at his disposal for the performance of his work with due care.

Art. 334¹⁴⁰

G. End of the
employment
relationship
I. Fixed-term
employment
relationship

¹ A fixed-term employment relationship ends without notice.

² A fixed-term employment relationship tacitly extended beyond the agreed duration is deemed to be an open-ended employment relationship.

³ After ten years, any employment relationship contracted for a longer duration may be terminated by either party by giving six months' notice expiring at the end of a month.

Art. 337

IV. Termination
with immediate
effect
1. Requirements
a. For good
cause

¹ Both employer and employee may terminate the employment relationship with immediate effect at any time for good cause; the party doing so must give his reasons in writing at the other party's request.¹⁶⁵

² In particular, good cause is any circumstance which renders the continuation of the employment relationship in good faith unconscionable for the party giving notice.

³ The court determines at its discretion whether there is good cause. However, under no circumstances may the court hold that good cause is constituted by an employee being prevented from working through no fault of his own.

Art. 337a

b. Salary at risk

In the event of the employer's insolvency, the employee may terminate the employment relationship with immediate effect unless he is furnished with security for his claims under such relationship within an appropriate period.

Art. 337b

2. Consequences
a. Termination
for good cause

¹ Where the good cause for terminating the employment relationship with immediate effect consists in breach of contract by one party, he is fully liable in damages with due regard to all claims arising under the employment relationship.

² In other eventualities the court determines the financial consequences of termination with immediate effect at its discretion, taking due account of all the circumstances.

Art. 337c¹⁶⁶

b. Termination
without just
cause

¹ Where the employer dismisses the employee with immediate effect without good cause, the employee is entitled to damages in the amount he would have earned had the employment relationship ended after the required notice period or on expiry of its agreed duration.

² Such damages are reduced by any amounts that the employee saved as a result of the termination of the employment relationship or that he earned by performing other work or would have earned had he not intentionally foregone such work.

³ The court may order the employer to pay the employee an amount of compensation determined at the court's discretion taking due account of all circumstances; however, compensation may not exceed the equivalent of six months' salary for the employee.

Art. 337d

c. Failure to take
up post and
departure
without just
cause

¹ Where the employee fails to take up his post or leaves it without notice without good cause, the employer is entitled to compensation equal to one-quarter of the employee's monthly salary; in addition he is entitled to damages for any further losses.

² Where the employer has suffered no losses or lower losses than the value of the compensation stipulated in the previous paragraph, the court may reduce the compensation at its discretion.

³ Where the claim for damages is not extinguished by set-off, it must be asserted by means of legal action or debt enforcement proceedings within 30 days of the failure to take up the post or departure from it, failing which it becomes time-barred.¹⁶⁷

⁴ ...¹⁶⁸

Switzerland's Federal Code on Private International Law (CPIL)¹

of December 18, 1987²

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¹ Private translation of the official Text by UMBRICHT Attorneys, Switzerland,
© by Dr. Robert P. Umbricht, LL.M., 1989 – 2011; suggested citation: *Swiss CPIL, Umbricht Attorneys, Zurich (Switzerland) 2011*.

² as amended until 1st January 2011.

All footnotes are omitted. They are available at: www.admin.ch/ch/d/sr/2/291.de.pdf.

Art. 187

VIII. Decision on the merits

1. Applicable law

¹ The arbitral tribunal shall rule according to the law chosen by the parties or, in the absence of such choice, according to the law with which the action is most closely connected.

² The parties may authorize the arbitral tribunal to rule according to equity.