

Introduction**17 Years of Article 17 RSTP: An Overview**

By Lucas FERRER
Lawyer, Pinto-Ruiz & Del Valle
Barcelona - Spain

→ **Player contract - Player transfer - Contractual stability - Breach of contract - FIFA Regulations - Just cause - Court of Arbitration for Sport (CAS)**

After the recent amendments introduced by FIFA in the Regulations on the Status and Transfer of Players¹ (RSTP), it feels like an appropriate time to sit comfortably, look back and reflect upon the transfer system introduced by FIFA back in 2001. The entire transfer system that has been in place since then is a direct consequence of the *BOSMAN* ruling (1995) and the need to reconcile the principles of “contractual stability” and “freedom of movement”. This was certainly not an easy task and the negotiations between FIFA, the European Commission, FIFPro and UEFA stretched over a long period of time, culminating with FIFA’s issuance of the mentioned RSTP which finally entered into force in September 2001.

The new regulations constituted a massive change in many different fields and, amongst other things, imposed strict conditions on the international transfer of minors, provided a comprehensive training compensation system for players under the age of 23, and introduced the principle of contractual stability.

In this brief overview, we shall focus on the last of the principles listed above and, in particular, on the articles referring to the termination of contracts under FIFA rules. First, it is easy to see that FIFA’s intention in 2001 was to send a clear message aimed at reinforcing the contractual stability principle by establishing that, as a general rule, “contracts shall be respected and can only be terminated upon expiry of the term or by mutual agreement.”²

However, FIFA introduced an important exception to this general rule by explicitly granting the parties the possibility to terminate a contract at any time and without any consequences (neither payment of compensation nor any kind of sporting sanctions) if “just cause” were to exist.³ Finally, FIFA also introduced in 2001 the famous Article 17, which, in a very short time, became one of the RSTP’s cornerstones given that it set out the consequences that arise when a party breaches a contract without just cause.

As one can easily imagine, since those rules entered into force, the main focus of discussion with respect to the termination of contracts has been (i) to establish what is to be considered

¹ <https://resources.fifa.com>

² Art. 13 RSTP version 2001 - Respect of Contracts.

³ Art. 14 RSTP version 2001 - Terminating a contract with just cause.

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“just cause” and, of course, (ii) how to calculate the amount of compensation after a unilateral breach of contract when such breach is not justified. Regarding both issues, FIFA opted for an open approach and did not provide a clear and unequivocal answer in its regulations, leaving room for the deciding bodies to create their own jurisprudence on the matter.

With respect to the calculation of compensation, Article 17(1) RSTP⁴ established that, in case the parties had not agreed on determining the specific amount payable when a contract is unilaterally terminated without just cause, due consideration was to be given to criteria such as (i) remuneration and other benefits due to the player under the existing contract and/or the new contract, (ii) the time remaining on the existing contract, up to the maximum of five years, (iii) fees and expenses paid or incurred by the former club, and (iv) whether the contractual breach had occurred during the protected period.⁵

Since 2001, the aforementioned criteria have been applied differently by the FIFA adjudicating bodies and by the Court of Arbitration for Sport (CAS), causing certain ambiguity and inconsistency in the jurisprudence. The CAS adopted various approaches when it came to calculating the compensation, thus resulting in a certain degree of unpredictability concerning the final amount payable in such cases.

For instance, in CAS 2003/O/482 *Ariel ORTEGA v. Fenerbahçe and FIFA*, the compensation was mostly based on the expenses *Fenerbahçe* incurred for having the player in its team.⁶ In CAS 2005/A/902-903 *MEXÈS and AS Roma v. AJ Auxerre and AJ Auxerre v. MEXÈS and AS Roma*, the Panel took into consideration the transfer offer from the player's new club as well as the money paid by *AJ Auxerre* to extend his contract.⁷ Afterwards, in the well-known *WEBSTER* case⁸, CAS deemed it appropriate to only apply the criteria of the remaining salary under the contract⁹ (i.e. the residual value approach¹⁰). This decision had a big impact in the football community and triggered extensive discussions in the world of international sports law regarding the future of the football transfer system, as the *WEBSTER* case provided an easy way to anticipate the amount of compensation in the case of a unilateral termination and could give the impression that players were entitled to prematurely terminate their employment relationships by simply paying the clubs the residual value of their existing contracts.

Conversely, in May 2009, the CAS Panel in *MATUZALEM* case¹¹ decided to address the matter from a completely different angle and applied the “positive interest principle” (i.e. the injured party shall be left in the position that the same party would have occupied if the contract were performed properly¹²), thereby deviating from the residual value approach proposed in the *WEBSTER* case. This line of jurisprudence has also shown that other elements, aside from the objective criteria listed in Article 17(1) RSTP, can be of relevance in order to determine the compensation.¹³ The positive interest principle proposed by *MATUZALEM*'s Panel has been applied since then in multiple CAS cases¹⁴ and has become the predominant line of jurisprudence with respect to the calculation of compensation for a unilateral breach of contract. As an example, in CAS 2015/A/4094 *Lassana DIARRA v. FC Lokomotiv Moscow*, the Panel observed “no reason to depart from this line of jurisprudence [positive interest principle]” and confirmed the FIFA Dispute Resolution Chamber's (FIFA DRC) evaluation.¹⁵

4 Article 17 - Consequences of terminating a contract without just cause: 1. In all cases, the party in breach shall pay compensation. Subject to the provisions of article 20 and Annexe 4 in relation to training compensation, and unless otherwise provided for in the contract, compensation for the breach shall be calculated with due consideration for the law of the country concerned, the specificity of sport, and any other objective criteria. These criteria shall include, in particular, the remuneration and other benefits due to the player under the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years, the fees and expenses paid or incurred by the former club (amortised over the term of the contract) and whether the contractual breach falls within a protected period.

5 A period of three entire seasons or three years, whichever comes first, following the entry into force of a contract, where such contract 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, where such contract is concluded after the 28th birthday of the professional.

6 CAS 2003/O/482 *Ariel ORTEGA v. Fenerbahçe and FIFA*, par. 38.

7 CAS 2005/A/902-903 *MEXÈS and AS Roma v. AJ Auxerre and AJ Auxerre v. MEXÈS and AS Roma*, par. 78 et seq.

8 CAS 2007/A/1298, 1299 & 1300 *Webster & Wigan Athletic FC v. Heart of Midlothian*.

9 *Ibid*, par. 86 et seq.

10 “Substituting at Half-Time: Contractual Stability in the World of Football”, by *Kristian FUTTRUP KJÆR*.

11 CAS 2008/A/1519 - *FC Shakhtar Donetsk v. Mr. Matuzalem Francelino da Silva & Real Zaragoza SAD & FIFA*; CAS 2008/A/1520 - *Mr. Matuzalem FRANCELINO DA SILVA & Real Zaragoza SAD v. FC Shakhtar Donetsk & FIFA*.

12 “The Jurisprudence of the FIFA Dispute Resolution Chamber” - Second Edition, by *Frans DE WEGER*, p. 305.

13 For instance, criteria such as agent fees, the replacement costs, and the possible loss of a transfer fee, etc.

14 For instance: CAS 2010/A/2145-2147, *Sevilla FC SAD, Udinese Calcio S.p.A., Morgan DE SANCTIS*; CAS 2009/A/1881 *Essam ELHADARY v. FIFA & Al-Ahly Sporting Club*; CAS 2009/A/1856 *Fenerbahçe Spor Kulübü v. Stephen APPIAH* and CAS 2009/A/1856 *Stephen APPIAH v. Fenerbahçe Spor Kulübü* or CAS 2013/A/3411 *Al Gharafa S.C. & Mark BRESCIANO v. Al Nasr S.C. & FIFA*.

15 DRC decision dated 10 April 2015, par. 79. The DRC in order to calculate the compensation, considered: the remaining value of the employment contract breached by the player and the unmortised costs of acquiring the services of the player.

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In line with this reasoning, the positive interest principle has also been accepted by several CAS Panels in the recent years, confirming the “*consensus in the CAS jurisprudence as to the application of the ‘positive interest’ principle approach followed in the case of CAS 2008/A/1519 & 1520 [MATUZALEM case], and applied in CAS 2009/A/1880 & 1881 [EL HADARY case]*”.¹⁶

Despite the apparent consolidation of the CAS jurisprudence with regards to the interpretation of Article 17 RSTP, some stakeholders (mainly the players and FIFPro) and part of the qualified doctrine expressed criticism regarding the positive interest approach followed by the CAS, considering that it grants too wide discretion to the judging authorities and that it has led to excessive compensation amounts, thus prioritizing contractual stability to the detriment of the player’s free movement rights.¹⁷

On 18 September 2015, FIFPro filed a complaint against FIFA with the European Commission’s Directorate -General for Competition, challenging the global transfer market system governed by FIFA’s regulations claiming that it was anti-competitive, unjustified and illegal.¹⁸ FIFPro was of the opinion that the transfer system, and in particular the RSTP, was failing to attain the objectives agreed to by the European Commission in 2001 (*i.e.* contractual stability, financial solidarity - redistribution

of revenue -, competitive balance, integrity and stability of competitions, as well as the training of young players).

One of the main complaints addressed by FIFPro was that around 4,000 players every year shall lodge a claim before the FIFA DRC in order to recover the amount owed by clubs and due to the volume of cases, they have to wait months for a final decision which entitles them to finally be paid.

The players’ union also stated that clubs asking inflated transfer fees represent an extreme barrier for clubs to compete fairly for playing talent as the cost of fielding a competitive team is in constant increase. Following *NEYMAR*’s transfer to *Paris Saint-Germain*, FIFPro issued a statement calling on “*the European Commission to investigate the flow of money via transfer fees within the EU territory to understand their impact on competitive balance in the region*” and requesting a “*reform of the current transfer system rules is a priority for FIFPro in order to protect the rights of players as workers and safeguard the best interests of the game*”.¹⁹

According to FIFPro, *NEYMAR*’s transfer may generate a bubble in the football market which will lead to a situation whereby only the richest clubs will be able to bid for the elite footballing talent. These clubs which are buying and selling players at this scale are thereby effectively pricing other clubs out of the market for the best players.²⁰ On the other side of the coin, the European Club Association (ECA)

published in 2014 a “*Study on the Transfer System in Europe*”²¹, which offered an overview of all international transfers involving European clubs occurred during a 2-year period (seasons 2011-12 and 2012-13). The ECA, with the publication of the study, came to the following conclusions:

- “*The football industry is not different to the rest of the economy;*
- “*Clubs’ revenue growth is absorbed by employee costs;*
- “*Money redistribution from top to bottom is a fact;*
- “*The current transfer system counters competitive imbalance;*
- “*Out-of-contract transfers represent the majority of total international transfers;*
- “*The majority of total international loans involve Under-23 players.*”

The conclusion of the study also pointed out that there were several indicators emerging from the study which show that the current transfer system allows for the free movement of players and the redistribution of money from top to bottom.

The tense situation and the lack of dialogue that has traditionally characterized FIFA and FIFPro’s relation has improved in the recent times as, on 6 November 2017, FIFPro withdrew its complaint against FIFA’s global transfer rules before the European Commission after the both institutions had concluded a landmark six-year cooperation agreement.

¹⁶ CAS 2015/A/4046 & 4047 *Damián Lizio & Bolívar Club v. Al-Arabi SC*, par. 112; CAS 2015/A/4346 *Gaziantepspor Kulübü Derneği v. Darvydas SERNAS*, par. 93.

¹⁷ Paul A. CZARNOTA, *FIFA Transfer Rules and Unilateral Termination Without “Just Cause”*, 2 Berkeley J. Ent. & Sports L. (2013) <http://scholarship.law.berkeley.edu>

¹⁸ FIFPro Legal Action Against FIFA Transfer System: www.fifpro.org

¹⁹ *NEYMAR Deal is Tip of the Iceberg* www.fifpro.org

²⁰ FIFPro challenge the football transfer system, by Nick DE MARCO & Dr Alex MILLS.

²¹ *Study on The Transfer System in Europe* www.ecaeurope.com

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This new era where FIFA and FIFPro have decided to work together with other stakeholders has led to the most significant change in the transfer system regulated in the RSTP since 2001 by the introduction of the amendments to RSTP that entered into force on 1 June 2018.

How these changes are going to affect the football world and the legal implications that may come with them are questions that will be solved in the near future and that certainly will for sure trigger interesting debates; however, what can be certainly assured at this moment is that FIFPro has managed to introduce many of its long-lasting demands into the RSTP and that by the codification of CAS' jurisprudence (mainly article 14 bis and compensation due to a player) in the regulations, FIFA has decided to limit the discretion of the deciding bodies in favor of the legal certainty.
