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# The Jurisprudence of the FIFA Dispute Resolution Chamber

*2nd Edition*

Frans de Weger

Springer

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Frans de Weger

# The Jurisprudence of the FIFA Dispute Resolution Chamber

Second Edition

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# Advance Reviews

Frans de Weger's work on the jurisprudence of the DRC is a "must-have" for anybody dealing with sports law and, in particular, dealing with football issues under the *FIFA Regulations on the Status and Transfer of Players*. It is a comprehensive and well-organized book that I highly recommend.

*Massimo Coccia, Professor of International Law and Attorney-at-Law in Rome (Italy), CAS Arbitrator, Author of many publications on sports law issues*

Where to go when trying to understand the *FIFA Regulations on the Status and Transfer of Players*? Now Frans de Weger has the answer with his new version of the much-awaited and needed "Jurisprudence of the FIFA DRC". His first one of 2008 was and is still the only book in English which has reviewed the long and winding case law of FIFA DRC. This is not an easy task and the 2016 edition has not only improved on its predecessor but also opened a wider range of enlightenment for the football law practitioner. This is the book that we all called for and quoting Woody Allen, I would say that with it you will be aware of "Everything you wanted to know about FIFA DRC and you were afraid to ask". We must thank Frans for sparing us time with this clairvoyant and helpful book.

*Juan de Dios Crespo Pérez*
*Sports lawyer*

By a systematic and analytical study of the most important decisions rendered by the FIFA Dispute Resolution Chamber, Frans de Weger has traced the context, purpose and evolution on how one should read and understand the *FIFA Regulations on the Status and Transfer of Players*. The Author has managed to explain in a pure and understandable way the issues specific to the industry of football and how these should be taken into account by clubs and players in their legal relationship and within organised football. The second edition of this book, which is systematic and practical at the same time, will surely be of great interest to both specialists active in the world of "football law" and aspiring individuals.

*Wouter Lambrecht, Attorney-at-law, Head of Legal at the European Club Association, FIFA Dispute Resolution Chamber Member and Mediator at the Court of Arbitration for Sport*

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# Contents

**Part I Introduction**

**1 Background Dispute Resolution Chamber** . . . . . 3
1.1 Introduction . . . . . 4
1.2 Regulations on the Status and Transfer of Players . . . . . 6
1.2.1 Introduction . . . . . 6
1.2.2 History . . . . . 6
1.2.3 *Bosman* Case . . . . . 7
1.2.4 Post-*Bosman* Period . . . . . 8
1.2.5 2001 Edition . . . . . 10
1.2.6 2005 Edition . . . . . 11
1.2.7 FIFA Comparison 2001 and 2005 . . . . . 13
1.2.8 FIFA Commentary . . . . . 14
1.2.9 2008 Edition . . . . . 16
1.2.10 2009 Edition . . . . . 17
1.2.11 2010 Edition . . . . . 18
1.2.12 2012 Edition . . . . . 19
1.2.13 2014 Edition . . . . . 20
1.2.14 2015 Edition . . . . . 21
1.2.15 2016 Edition . . . . . 24
References . . . . . 24

**2 Procedural Aspects** . . . . . 25
2.1 Introduction . . . . . 26
2.2 Procedural Rules. . . . . 28
2.3 Composition . . . . . 30
2.4 Jurisdiction . . . . . 31
2.4.1 Civil Court . . . . . 31
2.4.2 The PSC . . . . . 35
2.4.3 The DRC . . . . . 39
2.4.3.1 General . . . . . 39
2.4.3.2 "*Sub a Procedure*": ITC Request . . . . . 41



aruiz@isdemasters.com

2.4.3.3 "*Sub b Procedure*": Employment-Related Disputes . . . . . 42
2.4.3.3.1 General . . . . . 42
2.4.3.3.2 International Dimension . . . . . 46
2.4.3.3.3 Independent Arbitration Tribunal . . . . . 50
2.4.3.4 Training Compensation and Solidarity Mechanism . . . . . 55
2.4.3.5 Solidarity Mechanism Between Clubs Belonging to the Same Association . . . . . 56
2.4.4 The DRC Judge and the Single Judge of the PSC . . . . . 56
2.4.5 Conclusion . . . . . 58
2.5 Applicable Law . . . . . 60
2.5.1 National Law . . . . . 60
2.5.2 Applicable Edition RSTP . . . . . 64
2.6 Admissibility . . . . . 66
2.7 Representation . . . . . 70
2.8 Withdrawal and Challenges . . . . . 71
2.9 Petitions . . . . . 73
2.10 Evidence . . . . . 77
2.11 Burden of Proof . . . . . 82
2.12 Renouncement of Rights . . . . . 84
2.13 Non Ultra Petitum . . . . . 86
2.14 Amendment of Claim . . . . . 87
2.15 Counterclaim . . . . . 88
2.16 Intervening Party . . . . . 89
2.17 Costs . . . . . 90
2.17.1 Costs of FIFA Proceedings . . . . . 90
2.17.2 Procedural Compensation . . . . . 93
2.18 Provisional Measure . . . . . 93
2.19 Prescription . . . . . 96
2.20 Decision . . . . . 99
2.20.1 General . . . . . 99
2.20.2 Form and Contents . . . . . 100
2.20.3 Service and Publication . . . . . 101
2.20.4 Enforcement . . . . . 102
2.20.4.1 General . . . . . 102
2.20.4.2 Disciplinary Committee . . . . . 103
2.21 Court of Arbitration for Sport . . . . . 105
2.21.1 General . . . . . 105
2.21.2 Background . . . . . 106
2.21.3 Relevant Procedural Aspects . . . . . 107
References . . . . . 110

aruiz@isdemasters.com

## Part II Decisions

**3 Introduction to Classification of Decisions** . . . . . 113

**4 Medical Examination** . . . . . 117
4.1 Introduction . . . . . 117
4.2 Information About the Player . . . . . 118
4.3 Medical Result . . . . . 119
4.4 Conclusion . . . . . 123

**5 Visa and Work Permit** . . . . . 125
5.1 Introduction . . . . . 125
5.2 Visa . . . . . 126
5.3 Work Permit . . . . . 128
5.4 Conclusion . . . . . 130

**6 Employment Contract** . . . . . 131
6.1 Introduction . . . . . 132
6.2 Negotiations . . . . . 136
6.3 Invalid Conditions Precedent . . . . . 139
6.4 Essentialia Negotii . . . . . 141
6.5 Formal Aspects . . . . . 143
6.5.1 Form . . . . . 143
6.5.2 Length . . . . . 145
6.5.3 Signature . . . . . 146
6.5.4 Language . . . . . 150
6.6 Payments . . . . . 152
6.6.1 Salaries . . . . . 152
6.6.2 Bonuses . . . . . 156
6.7 Conclusion . . . . . 159
Reference . . . . . 161

**7 Unilateral Extension Option** . . . . . 163
7.1 Introduction . . . . . 164
7.2 DRC Jurisprudence . . . . . 165
7.2.1 Decisions Between 2004 and 2006 . . . . . 165
7.2.2 Decisions Between 2007 and 2009 . . . . . 168
7.2.3 Decisions After 2010 . . . . . 173
7.3 CAS Jurisprudence . . . . . 177
7.4 Conclusion . . . . . 186
7.4.1 General . . . . . 186
7.4.2 Relevant Criteria . . . . . 187
References . . . . . 191

**8 Termination** . . . . . 193
8.1 Introduction . . . . . 194
8.2 Mutual Agreement . . . . . 195
8.3 Relegation Clause . . . . . 200

aruiz@isdemasters.com

8.4 Probation Period . . . 203
8.5 Period of Notice . . . 205
8.6 Just Cause . . . 208
8.6.1 For the Club . . . 208
8.6.1.1 Performance Player . . . 209
8.6.1.2 Played Matches . . . 216
8.6.1.3 Injury . . . 219
8.6.1.4 Absence . . . 224
8.6.1.5 Misbehaviour . . . 229
8.6.1.5.1 General . . . 229
8.6.1.5.2 Drug Abuse . . . 233
8.6.1.5.2.1 DRC Jurisprudence . . . 233
8.6.1.5.2.2 *Mutu* Cases . . . 235
8.6.1.5.3 Alcohol . . . 238
8.6.1.5.4 Conclusion . . . 239
8.6.2 For the Player . . . 240
8.6.2.1 Outstanding Salary . . . 240
8.6.2.2 Exclusion and Deregistration . . . 254
8.7 Sporting Just Cause . . . 260
8.7.1 Introduction . . . 260
8.7.2 Requirements . . . 261
8.7.2.1 Established Professional . . . 262
8.7.2.2 Appearance Professional . . . 263
8.7.2.3 "15-Day Term" . . . 263
8.7.3 CAS and DRC Jurisprudence . . . 263
8.7.4 Final Remarks . . . 266
8.8 Conclusion . . . 268
References . . . 271

**9 Compensation** . . . 273
9.1 Introduction . . . 274
9.2 Calculation of the Compensation . . . 276
9.3 Compensation to Be Paid by the Club to the Player . . . 286
9.3.1 General . . . 286
9.3.2 DRC Approach . . . 287
9.3.2.1 General . . . 287
9.3.2.2 Adjustment Amount of Compensation . . . 288
9.3.2.3 Behaviour Parties . . . 289
9.3.2.4 Permanent Incapacity . . . 293
9.4 Compensation to Be Paid by the Player to the Club . . . 294
9.4.1 General . . . 294
9.4.2 DRC Approach . . . 299
9.4.3 Breach of Contract and the Protected Period . . . 300
9.4.3.1 Introduction . . . 300

aruiz@isdemasters.com

9.4.3.2 *Webster* Case . . . 302
9.4.3.3 *Matuzalem* Case . . . 304
9.4.3.4 *De Sanctis* Case . . . 305
9.5 Conclusion . . . 312
Reference . . . 314

**10 Sporting Sanctions** . . . 315
10.1 Introduction . . . 315
10.2 Sporting Sanctions on Player . . . 316
10.2.1 Four-Month Rule . . . 318
10.2.2 Aggravating Circumstances . . . 321
10.3 Sporting Sanctions on Club . . . 323
10.3.1 Inducement . . . 325
10.4 Conclusion . . . 330
Reference . . . 330

**11 Training Compensation** . . . 331
11.1 Introduction . . . 333
11.2 Developments After Bosman . . . 335
11.2.1 Bernard Case . . . 335
11.2.2 Wilhelmshaven Saga . . . 337
11.3 When Is Training Compensation Due? . . . 340
11.3.1 First Professional Contract . . . 340
11.3.2 Subsequent Transfer . . . 342
11.4 Difference Between Amateurs and Professionals . . . 344
11.4.1 Introduction . . . 344
11.4.2 DRC Jurisprudence . . . 345
11.4.3 CAS Jurisprudence . . . 353
11.4.4 Conclusion . . . 358
11.5 Responsibility of the New Club . . . 360
11.5.1 General . . . 360
11.5.2 Player Passport . . . 363
11.5.3 Entitlement of the National Association . . . 364
11.6 Loan of Professional . . . 365
11.7 When Is Training Compensation *not* Due? . . . 372
11.7.1 General . . . 372
11.7.1.1 Exceptions Worldwide . . . 372
11.7.1.1.1 Circumvention . . . 376
11.7.1.1.2 Prescription . . . 379
11.7.1.1.3 Women's Football . . . 382
11.7.1.2 Exceptions Within the EU/EEA . . . 382
11.7.1.2.1 General . . . 382
11.7.1.2.2 Free Movement of Players . . . 384
11.7.1.2.3 General Rule: Contract Offer to Professionals and Amateurs . . . 387

aruiz@isdemasters.com

11.7.1.2.4 Prerequisites of Article 6 Para 3 Annex 4 . . . . . 392
11.7.1.2.4.1 "60-Day Obligation" and "Equivalent Value" . . . . . 392
11.7.1.2.4.2 Registered Mail . . . . . 393
11.7.1.2.5 Justification . . . . . 399
11.7.1.2.5.1 General . . . . . 399
11.7.1.2.5.2 DRC Jurisprudence . . . 400
11.7.1.2.5.2.1 Decisions Between 2004 and 2010 . . . . . 400
11.7.1.2.5.2.2 Decisions After 2010. . . . 403
11.7.1.2.5.3 CAS Jurisprudence . . . 406
11.8 Waiver of Rights . . . . . 410
11.8.1 General . . . . . 410
11.8.2 Decisions Between 2004 and 2010 . . . . . 411
11.8.3 Decisions After 2010 . . . . . 416
11.8.4 Conclusion . . . . . 422
11.9 Calculation of the Amount . . . . . 423
11.9.1 General . . . . . 423
11.9.2 Worldwide . . . . . 425
11.9.3 Within EU/EEA . . . . . 427
11.10 Completion of the Training . . . . . 428
11.10.1 General . . . . . 428
11.10.2 DRC Jurisprudence. . . . . 428
11.10.3 CAS Jurisprudence . . . . . 432
11.10.4 Conclusion . . . . . 435
11.11 Clearly Disproportionate Rule . . . . . 437
11.12 Conclusion . . . . . 443
References . . . . . 446

**12 Solidarity Mechanism** . . . . . 447
12.1 Introduction . . . . . 448
12.2 Domestic Transfers. . . . . 450
12.3 Responsibility of the New Club . . . . . 452
12.3.1 Calculation . . . . . 452
12.3.2 Distribution. . . . . 454
12.3.2.1 General . . . . . 454

aruiz@isdemasters.com

12.3.2.2 Decisions . . . . . 455
12.3.2.3 Conclusion . . . . . 464
12.3.3 Player Passport . . . . . 465
12.4 Entitlement of the National Association. . . . . 466
12.5 Prescription. . . . . 470
12.6 Contingent Payments . . . . . 471
12.7 Loan . . . . . 472
12.8 Exchange of Players . . . . . 473
12.9 Buy-Out Clause . . . . . 477
12.10 Default Interest . . . . . 480
12.11 Conclusion . . . . . 481
Reference. . . . . 482

**13 Final Conclusions** . . . . . 483

**Index**. . . . . 491

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# Abbreviations

| | |
|---|---|
| BGH | German Bundesgerichtshof |
| CAS | Court of Arbitration for Sport |
| CAS Code | CAS Code of Sports-related Arbitration |
| CHF | Swiss Franc |
| CJEU | Court of Justice of the European Union |
| CO | Swiss Code of Obligations |
| DRC Judge | Single Judge of the DRC |
| DRC or Chamber | Dispute Resolution Chamber |
| EC | European Commission |
| EU | European Union |
| EURO | EUR |
| FA | Football Association |
| FBO | Dutch Federation of Professional Football Clubs |
| FIFA | Fédération Internationale de Football Association |
| FIFA Commentary | Commentary on the Regulations of the Status and Transfer of Players |
| FIFA Comparison | Comparison of the FIFA regulations version July 2001 and following Circulars with the new FIFA regulations version December 2004 |
| GBP | British Pounds |
| ICAS | International Council of Arbitration for Sport |
| IRTC | International Registration Transfer Certificate |
| ITC | International Transfer Certificate |
| KNVB | Royal Netherlands Football Association |
| NDRC | National Dispute Resolution Chamber |
| NDRC Regulations | National Dispute Resolution Chamber Standard Regulations |
| PILA | Private International Law Act |
| Procedural Rules | Rules governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber |
| PSC | Players' Status Committee |
| RSTP | Regulations on the Status and Transfer of Players |



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| | |
|---|---|
| SCC | Swiss Civil Code |
| SFT | Swiss Federal Tribunal |
| Single Judge | Single Judge of the PSC |
| TFEU | Treaty on the Functioning of the European Union |
| TMS | Transfer Matching System |
| TPO | Third-Party Ownership |
| UEFA | Union Européenne de Football Association |

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# Foreword

*Its competence and the applicable regulations having been established, the members of the Dispute Resolution Chamber went on to deal with the substance of the matter and started by acknowledging the facts of the case and the arguments of the parties as well as the documents contained in the file.*

These or very similar words are contained in hundreds of decisions of the FIFA judiciary bodies. What follows, in all those decisions, is the dealing with thousands of personal stories, raised claims, advanced objections, submitted allegations and, yes, also legal arguments made by the parties before FIFA.

Since their creation, the FIFA judiciary bodies and in particular the FIFA Players' Status Committee (PSC) and the FIFA Dispute Resolution Chamber (DRC), together with their Single Judges, have rendered several thousand decisions. And even though "nobody is perfect" and no adjudicatory body of this world can claim never to take a wrong decision, the work of the FIFA judiciary bodies has helped solving a huge number of disputes in quite an efficient manner, providing the parties with a judiciary, objective assistance that may still be considered to be sometimes too slow, but which is also rather inexpensive and pretty much well-fitted for an international environment like the one of international football.

It is praiseworthy that FIFA publishes a large number of decisions of the PSC and the DRC on its website on a regular basis. However, the handling and the analysis of such decisions is not easy. If one looks for instance at the more than 2000 decisions of the DRC currently available online, one will see that they are first very numerous and second divided in simply four categories: labor-related disputes, training compensation, solidarity matters and disputes relating to overdue payables.

Back in the years 529 to 534 p. Chr., the Eastern Roman Emperor Justinian ordered the collection of all sources of Roman jurisprudence, and so the admirable Corpus Iuris Civilis was put together, a fundamental work providing an overview on the quite chaotic Roman legal system existing at that time.



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Today, almost identically, the present book, prepared under the wise guidance of my dear friend Frans de Weger, provides the reader—or even: the "user"—with a great access to the body of the jurisprudence of the FIFA DRC: DRC decisions are selected and commented, and a clear structure of topics is established, by attributing the DRC decisions to several classes of disputes.

The reading and the consultation of this excellent book, including the good introductory chapters, can only be strongly recommended to lawyers involved in football-related matters. Both the more unexperienced law student and the well-versed attorney will be able to draw very useful information from a rich pool of interesting materials.

The author and the editors of this book can only be thanked by all those who love football—those who have the chance to work on football-related matters.

Zurich
August 2016

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# Author's Note

In the first edition of this book reference is made to the relevant decisions issued by the FIFA Dispute Resolution Chamber ("the DRC") from the date of its existence in 2001 until 2006. Now, in 2016, in this second edition, reference is made to the relevant decisions from 2001 until 2016. More than 15 years' worth of DRC decisions.

During the years the jurisprudence of the DRC has become increasingly "well-established". The decisions by the DRC are more and more extensive and Single Judges are getting more involved (to reduce the workload). Further, we also note a positive development with regard to the length of the DRC procedures, sharpening deadlines and limiting the exchange of correspondence in procedures, also considering that FIFA introduced the so-called fast track procedure of Article 12bis of the FIFA Regulations on the Status and Transfer of Players ("the RSTP"). Step by step, a swifter dispute resolution process has finally been created by FIFA.

However, it shouldn't be left unmentioned that the length of the procedures before the DRC can still be shortened. In comparison to the procedures before the Court of Arbitration for Sport ("the CAS"), the DRC could also be stricter with regard to deadlines in procedures. Considering the well-established DRC jurisprudence that has been created over the years since 2001, the DRC must also remain open to new developments in international football law and cannot be immune under all circumstances from the impact and influence of European law, leading CAS jurisprudence and Swiss law. The existence and creation of "well-established jurisprudence" bears the risk of becoming less accessible for 'outside' developments.

Although by no means exhaustive, this book aims to provide an overview of the "well-established jurisprudence" of the DRC. However, as always, the devil is in the details. One must be aware that relying on an individual decision by the DRC can be quite risky since it happens that the DRC (especially in the past) deviated from its standard line but in later decisions reverts to its former "well-established jurisprudence". Nowadays and as said before, the jurisprudence has become increasingly "well-established" and these kinds of divergent decisions are more and more exceptional. Furthermore, I make exact references and stay



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close to the relevant considerations made in the decisions by the DRC to gain a broad(er) and more precise knowledge of the general view of the committee. Due to the increasing internationalization of the professional football world, the DRC decisions become more and more important within the international field of professional football, which will also have its impact, directly or indirectly, at national level (certainly in the long run), such as for national arbitration tribunals. By making exact references to the general considerations of the DRC in its decisions over the years, the flipside of the coin is that it is not a 'nice romantic novel' to read. It must therefore be considered as a work of reference.

Let me stress that the FIFA jurisprudence is of utmost importance. First of all, taking into consideration that the CAS is the appeal committee which makes these awards at least as interesting, FIFA, however, sometimes maintains its own line even if the CAS has a different point of view. In this regard, it must be mentioned that less than 5 % of the DRC decisions is annulled by the CAS which means that most of the DRC decisions can therefore be seen as final and binding. Moreover, not all parties have the financial means to appeal to the CAS or the (low) amount at stake does not make it worthwhile (taking into account the relatively high arbitration costs before the CAS) to appeal against the DRC decision before the CAS (on the understanding that also a dispute with a low amount at stake does not necessarily mean that it is not an interesting case from a legal point of view). In other words, in many DRC cases, the DRC is the last resort. Therefore, for legal advisors to operate quickly and adequately in the dynamic world of international professional football, secure and up-to-date knowledge of the DRC jurisprudence and its continuing and rapid developments, is obviously indispensable. It must finally be noted that the DRC jurisprudence is quite consistent (more consistent than the jurisprudence of the CAS in relation to certain subjects) and with its well-established jurisprudence, contributes to more legal uniformity, equality and certainty.

This edition is more practical due to my experience and activities over the last few years as a senior legal counsel at the Dutch Federation of Professional Football Clubs ("FBO") in procedures before the DRC, as well as (previously before I was appointed as a CAS Arbitrator) the CAS, the appeal committee of the DRC. This second edition addresses many issues on the understanding that experience teaches that there are many legal pitfalls with regard to several subjects which the DRC has to deal with. This edition has a scientific as well as a practical character and is useful for both the practitioner and the scientist. It goes without saying that this book is especially a useful and practical tool for those actually acting in legal procedures before the DRC, such as international football lawyers and clubs' legal counsels.

Having said that, this edition is not only provided with references to decisions by the DRC, but also, if necessary, to relevant decisions by the FIFA Players' Status Committee ("the PSC"), which are also published since 2011 on FIFA's website, in order to better understand certain considerations of the DRC. Furthermore, in order to place the DRC decisions in the right legal perspective, reference is also made to leading awards issued by the CAS. However, since the essence of this book is "the DRC", many references to the CAS and the PSC

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cases are especially made in the footnotes in order to maintain focus on the DRC decisions. The reference to the CAS jurisprudence in the footnotes, which is by no means exhaustive, is mainly meant to better find one's way in the CAS jurisprudence and so to ease finding the relevant CAS jurisprudence. Also, attention will be brought to relevant *unpublished* decisions issued by the DRC, the PSC and CAS awards. As a side-note, it must be mentioned that during the writing of this second edition, it came to my knowledge that FIFA apparently decided, for unknown reasons, to remove certain earlier published decisions from the current list of decisions on its (new) website (which means that certain DRC decisions cannot be found on FIFA's current website anymore). Having decided to make reference to these removed decisions in this second edition anyway, in order to show all relevant legal thoughts of the Chamber, however, I felt forced to share this knowledge in this Author's Note.

In my point of view, this edition is improved and is more 'mature' in comparison to the first edition. But it is also far more extensive. And not forgetting, it is obviously up-to-date. Please forgive me if I am not exhaustive with regard to all the subjects and with regard to the DRC (and especially the CAS) jurisprudence. I tried to be as complete as possible (which is also difficult due to the existence of many—not less important—unpublished decisions). As the reader will notice for several subjects, a short conclusion has been included for ease of reference, where reference is made in a nutshell to the well-established DRC jurisprudence. In a manner of speaking, merely reading this part would be enough to gain general knowledge of the vision of the DRC. I sincerely hope you find this second edition worth reading and that it helps us all with our cases in the future.

2016 Frans de Weger

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# Part I
# Introduction

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# Chapter 1
# Background Dispute Resolution Chamber

**Abstract** As an introduction this chapter first considers the background of the FIFA Dispute Resolution Chamber ("the DRC"). Subsequently, FIFA's Regulations on the Status and Transfer of Players ("the RSTP"), its history and its various editions as from 2001 will be given attention. When taking decisions, the DRC applies the RSTP as the main source of law when judging a dispute relating to the international transfer of players, their status and their eligibility to participate in organised football. The RSTP aims to regulate international transfer law when judging a dispute between member associations and to establish legal basic principles that guarantee uniform and equal treatment of all participants in the international professional football world.

**Keywords** Regulations on the Status and Transfer of Players · Players' Status Committee · Bosman · FIFA Commentary · FIFA Comparison 2001 and 2005 · FIFA circulars

## Contents

1.1 Introduction ..... 4
1.2 Regulations on the Status and Transfer of Players ..... 6
1.2.1 Introduction ..... 6
1.2.2 History ..... 6
1.2.3 *Bosman* Case ..... 7
1.2.4 Post-*Bosman* Period ..... 8
1.2.5 2001 Edition ..... 10
1.2.6 2005 Edition ..... 11
1.2.7 FIFA Comparison 2001 and 2005 ..... 13
1.2.8 FIFA Commentary ..... 14
1.2.9 2008 Edition ..... 16

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1.2.10 2009 Edition ..... 17
1.2.11 2010 Edition ..... 18
1.2.12 2012 Edition ..... 19
1.2.13 2014 Edition ..... 20
1.2.14 2015 Edition ..... 21
1.2.15 2016 Edition ..... 24
References ..... 24

## 1.1 Introduction

Needless to say, organised football can only attain uniformity, equality and certainty on a worldwide scale if certain fundamental principles and basic rules apply to all participants in professional football. As the organiser of international football, the Fédération Internationale de Football Association ("FIFA") was established in 1904 to achieve these goals. According to its own statutes, FIFA exists to improve the game of football among other things, whereby improvement can be interpreted in the broadest sense of the word. Not only improvement with regard to rules on the field, but also with regard to rules off the field. During the transfer of a player between national associations, for example, the same rules must apply to all participants concerned. In its quest to establish uniformity, equality and certainty, FIFA had to create a single legal playing field within the international football world. Therefore, FIFA introduced the Players' Status Committee ("the PSC") to legally decide on international football disputes. This Standing Committee had to provide the international football world with legal certainty relating to players' status matters.[1]

Continuing its search for further professionalism, in 2001 FIFA set up the Dispute Resolution Chamber ("the DRC" or "the Chamber"). This committee was established to take over certain disputes from the PSC and specifically to resolve legal disputes regarding the international status and transfer of players. As we will see later on, its competence not only extends to cases relating to labour disputes with an international dimension, but also to disputes concerning training compensation and solidarity contribution. In general, this committee decides on basic issues such as a breach of contract, with or without *just cause*, or *sporting just cause*. Today, the PSC still has an influence on the DRC (at least from a theoretical and regulatory point of view). From the FIFA Statutes it is derived that the PSC committee shall be responsible for the work of the DRC.[2]

[1]FIFA Statutes, 2016 edition, Article 39 under g.

[2]FIFA Statutes, 2016 edition, Article 46 para 2. A further indication that the PSC can be seen as the 'umbrella organisation' of the DRC is Article 23 para 3 of the RSTP, 2016 edition, which states that in case of uncertainty as to the jurisdiction of the PSC or the DRC, the chairman of the PSC shall decide which body has jurisdiction. Furthermore, in the first published decisions of the DRC, for example the DRC decision of 21 November 2003, no. 113291, the Chamber was described as 'The Dispute Resolution Chamber of the Players' Status Committee', as the Chamber was also mentioned in the 'Regulations *for* the Status and Transfer of Players, 2001 edition'.

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The DRC is very important to FIFA's aim to achieve the aforementioned global uniformity, quality and certainty.[3] In that respect one should note that the DRC is *not* an arbitral tribunal, such as the Court of Arbitration for Sport ("the CAS"). The DRC only resolves and settles disputes. Decisions by the DRC do not have binding opinion enforcement and can only be enforced through the statutes and regulations of FIFA, as we will see later on. Nevertheless, the decisions of the DRC obviously have a huge impact since, through these decisions, FIFA has a major influence on international football and all its participants. Due to the increasing internationalisation and the huge influence that the DRC decisions have through its own channels on the participants in the international football world, it is justified that more public attention is given by FIFA and its member associations to the decisions of the DRC.

Although the main emphasis of this book is described in Part 2, in which all the relevant decisions of the DRC are discussed and classified into different categories, we will start by looking at the most relevant judicial aspects in relation to this Chamber in order to better understand the material part of the decisions and the well-established jurisprudence of the DRC. When taking decisions, the DRC applies the Regulations of the Status and Transfer of Players ("the RSTP") whilst taking into account all relevant arrangements, laws and/or collective bargaining agreements that exist on a national level, as well as the specificity of sport.[4] As we will see later on, the RSTP is the main source of law for the DRC when judging a dispute relating to the international transfer of players, their status and their eligibility to participate in organised football.[5] According to the official Commentary on the Regulations of the Status and Transfer of Players ("the FIFA Commentary"), these fundamental rules must be considered as compulsory and uniformly applicable in the same way all over the world.[6] They aim to regulate international transfer law when judging a dispute between member associations and establish basic principles that guarantee the uniform and equal treatment of all participants in the football world.[7] In this first chapter, the RSTP will be discussed in more detail. In that respect, the history of the RSTP will be discussed briefly, followed by a clearly structured survey of the subsequent editions of the RSTP issued by the FIFA since 2001.

[3]The DRC is not a 'standing committee' of FIFA like the PSC (FIFA Statutes, 2016 edition, Article 21 para 4 in conjunction with Article 39 under g).

[4]RSTP, 2016 edition, Article 25 para 6.

[5]Furthermore, the RSTP also establishes rules regarding the release of players for association teams and the player's eligibility to play for such teams. FIFA Commentary, explanation Article 1 para 1, pp. 7–8.

[6]FIFA Commentary, explanation Article 1 para 1, p. 8.

[7]FIFA Commentary, explanation Article 1 para 2, p. 8.

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## 1.2 Regulations on the Status and Transfer of Players

### *1.2.1 Introduction*

The most important judicial ground for the judgments of the DRC is the 'Regulations on the Status and Transfer of Players', also known as the RSTP. As mentioned above, these regulations establish rules regarding the international transfer of players, the status of players, their eligibility to participate in organised football as well as the release of players for association teams and the players' eligibility to play for such teams. In other words, through these rules FIFA provides the international football world with a normative basis regarding the legal status and transfer of players.

With regard to the most recent version, the 2016 edition, we must remember that these rules are based on many earlier editions and therefore have a long history. The first regulations were initially adopted in April 1991 and subsequently amended by the FIFA Executive Committee and came into force respectively in December 1993, December 1996, May 1997, September 1997, July 2001, July 2005,[8] January 2008, October 2009, October 2010, December 2012, August 2014 and 1 April and 1 October 2015. The current version of the RSTP, the edition of 2016, was officially approved by the FIFA Executive Committee on 17 March 2016, and these regulations came into force on 1 June 2016.[9]

### *1.2.2 History*

In 1982, the first developments took place regarding international transfers for players in Europe. It was UEFA, the Union of European Football Associations, which produced the first regulations regarding the transfer of players in September 1982, also known as the "Principles of Cooperation between Clubs of different National Associations of the EEC Countries". According to these regulations, football players were only free to conclude a contract with another foreign club after the expiry of their contract. Subsequently, the former and the new club could determine a transfer compensation. In the event that the clubs were unable to agree on a reasonable transfer sum, a committee appointed by UEFA would be competent to determine a reasonable transfer sum for the player. However, UEFA regulations also provided for a maximum transfer compensation for a player in the amount of CHF 5,000,000.[10]

[8]As a side-note, since the 2008 edition, the regulations are called 'FIFA Regulations on the Status and Transfer of Players'. The editions before 2008 were called: 'FIFA Regulations of the Status and Transfer of Players'. In this context, it is therefore called 'the FIFA Commentary on the Regulations of the Status and Transfer of Players'.

[9]RSTP, 2016 edition, Article 29.

[10]Van Staveren 2003, p. 226.

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FIFA followed UEFA and its first transfer regulations were adopted in April 1991. In 1992, FIFA subsequently modified these first international regulations and as from 1 January 1994 the new FIFA regulations, which were called the "Regulations governing the Status and Transfer of Players 1994", applied to all participants in international football. The same principle applied to amateurs and non-amateurs alike: compensation was compulsory in the case of a transfer of a player between clubs from different national associations. FIFA made a distinction between an amateur and a non-amateur. Pursuant to the first five Articles of the 1994 Regulations governing the Status and Transfer of Players, a non-amateur was defined as a player registered with a national association who has a written contract and is paid more than the expenses he incurs in return for his football activity. Further, FIFA emphasized for the first time in these regulations that a football player was only free to conclude an employment contract with another football club if the employment contract with his present club had expired or would expire within 6 months.

At this time, FIFA was the only international football organisation which was competent to establish rules and to give decisions in relation to the legal status and transfer of players. Up until then, FIFA did not have to take any other organisations into account. FIFA was the monopolist that made the rules and its members just had to comply with these rules. However, it was the European Commission that felt that the 1994 Regulations governing the Status and Transfer of Players could not be maintained because of crucial judicial shortcomings, and had to be amended.

### *1.2.3 Bosman Case*

FIFA's exclusive position of power finally came to an end with a judgment by the CJEU on 15 December 1995 in the famous *Bosman* case, which had a huge impact on the international football world.[11] This case can be considered as one of the most important sports cases to appear before the Belgian courts, and in relation to European sports law is possibly the most significant case.[12] *Bosman* is and always will be a landmark judgment in international sports law. By its decision in 1995, the Court of Justice of the European Union ("the CJEU") stressed that sport, just like any other economic activity, is subject to ordinary rules of European law.[13] This decision by the CJEU found FIFA's transfer system incompatible with EU law.

[11]Case C-415/93 *Union Royale Belge des Sociétés de football association ASBL v. Jean-Marc Bosman Royal Club Liègois SA v. Jean-Marc Bosman. SA d'Economic Mixte Sportive de l'Union Sportive du Littoral de Dunkerque, Union Royale Belge des Sociétés de Football Association ASBL, Union des Associations Européennes de Football Union des Association Européennes de Football v. Jean-Marc Bosman* [1995] ECR I-4837.

[12]Wise and Meyer 1997, pp. 1104–1105.

[13]Blanpain 2006, p. 116.

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The Belgian professional football player Jean-Marc Bosman refused to sign a new contract offered by his club, the first division club RC Liège. In April 1990, the club offered him a new 1-year contract at BFR 120,000 per month, the minimum permitted by Belgian rules and a quarter of his previous salary.[14] In turn, Bosman refused the club's proposal and was subsequently placed on the transfer list. Several other clubs were interested in the player and eventually a deal was signed between Bosman, RC Liège and the French Second Division club Dunkerque. However, RC Liège had some concerns about Dunkerque's financial position and suddenly cancelled the negotiations. Bosman started proceedings against his club RC Liège with the competent Belgian Court in Liege. The Court of Appeal in Liège suspended the case and asked for a preliminary decision by the CJEU. The questions asked by the Court of Appeal were: "*Are Articles 48, 85 and 86 of the Treaty of Rome of 25 March 1957 to be interpreted as: (a) prohibiting a football club from requiring and receiving payment of a sum of money upon the engagement of one of its players who has come to the end of his contract by a new employing club (b) prohibiting the national and international sporting associations or federations from including in their respective regulations provisions restricting access of foreign players from the European Community to the competitions which they organise?*".[15] The CJEU now had to determine in this case the legal status of the transfer regulations concerned.

The CJEU finally decided that professional football, insofar as it constitutes an economic activity, is subject to community law. The football associations are obliged to comply with basic legal principles, including the right of employees within Europe to freedom of movement. Aside from the fact that the decision banned restrictions on foreign EU players within national leagues (no limitation on foreign players for all member states in the EU), it was finally decided by the CJEU that an amount of transfer compensation to be paid by a club for a player who had ended his contractual relationship with his former club, was not permitted and was in violation of the fundamental principle of free movement of people within the European Union.[16]

### *1.2.4 Post-Bosman Period*

After the decision of the CJEU, the football clubs were now forced to respond to the new situation. The clubs wanted to prevent players reaching the end of their employment contract and leaving for free. So they started negotiating contracts

[14]Weatherill 2014, pp. 90–91.

[15]Weatherill 2014, pp. 91–92.

[16]Drolet 2006, p. 66.

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for substantially longer periods. Clubs were tempted to draft appropriate clauses in the players' contracts which allowed the clubs to secure compensation for their loss.[17] Another method devised by the clubs was to insert clauses in the employment contracts whereby the clubs unilaterally reserved the right to extend the agreement, the so-called unilateral extension option. Later on in this book, the validity of the unilateral extension option and the DRC's (and the CAS') point of view will be discussed extensively. Hence, it was no longer efficient to train the players themselves. The clubs now asked extremely high transfer sums if a player wanted to leave his club before his contract expired. Ultimately this created a situation whereby the biggest clubs attracted all the good players and smaller clubs faced financial difficulties. Understandably, after the *Bosman* case these new circumstances eventually had a very negative impact on the international football world.

Since the *Bosman* case, a professional football player is free to move to any new football club of his choice at the end of his contract, and his new club is obliged to pay a transfer sum to his former club.[18] Therefore, as a result of the imbalance which had arisen in the international football world since the *Bosman* case in 1995, FIFA was forced to find a solution. FIFA's transfer rules were severely affected by this ruling.[19] FIFA had to react by revising its rules on international transfers in order to align them with the CJEU judgment in the *Bosman* case. FIFA realised that the civil courts were not going to help the international football world. It therefore had to look for a solution among its own rules for the instability that had arisen in the international professional football world. Finally, the European Commission started making objections against the transfer rules of FIFA and UEFA. FIFA started making new regulations to replace the 1994 Regulations governing the Status and Transfer of Players and which had to maintain contractual stability for players, their transfer status and the training facilities. A start was finally made with the creation of a new RSTP.

In 1997 a new version of the RSTP was sent to the European Commission for assessment. At first, the European Commission did not agree with the contents of these regulations, still feeling that these regulations did not comply with the European rules. For example, the European Commission had serious issues with the fact that the regulations allowed the transfers of players under the age of 18 years. Neither could it agree with the fact that FIFA excluded proceedings by the civil courts. Therefore, FIFA had to initiate a new plan for the RSTP that complied with the European rules.

As a result of the objections by the European Commission against the FIFA rules, FIFA started a dialogue with the European Commission in order to discuss

[17]Weatherill 2014, p. 67.

[18]See also Blanpain 2003, p. 98.

[19]Weatherill 2005, p. 5.

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a new concept for transfer rules. The European Commission was of the opinion that the new FIFA regulations were free to contain provisions with regard to the transfer of players, contractual stability and training compensation for players. However, the European Commission found it to be of utmost importance that the new FIFA regulations complied fully with European regulations. The European Commission again emphasized that the new FIFA regulations could not obstruct seeking redress from the civil courts and pointed out that the national laws of the countries concerned had to be obeyed at all times. Finally, as a result of the debate between FIFA and the European Commission, FIFA drew up the new FIFA regulations, the 2001 edition.

### *1.2.5 2001 Edition*

In October 2000, FIFA and UEFA sent a joint suggestion for new rules to the European Commission. In 2001, this led to a gentleman's agreement between FIFA and the European Commission. It could be seen as a mixture of the strict requirements by the European Commission and the special requests of FIFA. After much negotiation, the new rules were finally adopted by the FIFA Executive Committee on 5 July 2001 and came into force on 1 September 2001. The new rules were the subject of negotiations with the European Commission. Mario Monti, the European Commissioner for competition at that time, was assumed to have been personally involved in drafting the new transfer rules of FIFA which also became known in the international football world as the so-called "Monti-rules".[20]

The new RSTP 2001 edition, guaranteed the contractual stability of the players' contracts and regulated the international transfer of players properly. More importantly, the new rules that now replaced the 1994 Regulations governing the Status and Transfer of Players complied with the demands of the European Commission. In this regard 3 important pillars were eventually inserted in the RSTP.

Contracts had to be concluded for a minimum of 1 year and a maximum of 5 years. This corresponded with the main objectives of FIFA, namely, to create more certainty. Furthermore, the new regulations introduced two transfer registration periods, i.e. a transfer period during the winter and a transfer period during the summer. Players were only allowed to transfer internationally during these two transfer periods. Finally, FIFA also introduced a protection system for the international transfer of minors. As mentioned earlier, generally minors aged under 18 from outside the confederation of Europe, were not obliged to transfer to another association.

[20]Drolet 2006, p. 67.

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The 2001 edition of the RSTP also gave rise to the DRC, as mentioned earlier.[21] Aside from the urgent necessity with regard to the right of any player or club to seek redress before a civil court in disputes between clubs and players, the 2001 edition enabled a dispute resolution system to be established. In future, the basic elements, such as whether a contract was breached, with or without *just cause* or *sporting just cause*, would have to be decided on by this DRC of the FIFA Players' Status Committee. The rules with regard to the procedure before the DRC were laid down in the so-called "Procedural Rules for the FIFA Players' Status Committee and the Rules Governing the Practice and Procedures of the Dispute Resolution Chamber".[22] Furthermore, in relation to the 2001 edition of the RSTP, the rules were provided with the "Regulations Governing the Application of the RSTP". These regulations provided more precise details relating to the legal status and international transfer of players.[23] Last but not least, the 2001 edition of the RSTP also contained provisions that regulated the compensation to be paid by clubs for the training and education of young players.

### *1.2.6 2005 Edition*

At its meeting held in Zurich on 18 and 19 December 2004, the FIFA Executive Committee adopted the reviewed "Regulations for the Status and Transfer of Players". These regulations, 2005 edition, replaced the special regulations governing players' eligibility to play for association teams dated 4 December 2003, the RSTP of 5 July 2001, as well as all subsequent amendments, including all the relevant Circulars of FIFA that were issued before these regulations finally came into force. The new regulations, 2005 edition, were officially adopted by the FIFA Executive Committee on 18 December 2004 and were eventually implemented on 1 July 2005.[24]

[21]RSTP, 2001 edition, Article 42 para 1 under b.

[22]Procedural Rules for the FIFA Players' Status Committee dated 21 February 2003 and the Rules Governing the Practice and Procedures of the Dispute Resolution Chamber dated 28 February 2002.

[23]Regulations Governing the Application of the Regulations for the Status and Transfer of Players 2001 edition.

[24]RSTP, 2005 edition, Article 29 paras 1–2.

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The reasons for these amendments were explained by FIFA in its Circular no. 959.[25] FIFA explained that the new rules had a new layout, a more 'user-friendly structure', as well as 5 technical annexes. According to FIFA, the new rules were meant to improve the old rules. New formal and material elements had been included, such as a list of the most current definitions, a title to every provision and with regard to jurisdiction, a clear description of the competences of both the PSC and the DRC. Moreover, based on the positive experiences with the Single Judge of the PSC, also at the level of the DRC, the so-called "DRC Judge" was introduced in the 2005 edition.

Drolet defined the 2001 edition of the RSTP rules and the Application Regulations as "not crystal clear" and "vague". In his opinion, the 2005 rules had to be seen more as an adjustment than a new set of rules. The new rules attempted to fix some of the problems discovered in the 2001 rules.[26] In my opinion, the new rules of the 2005 edition were certainly clearer and had a better structure. However, the new rules were not only given a new layout and 'user-friendly structure', as mentioned in FIFA Circular no. 959. As we will see later on, in the 2005 edition of the new FIFA rules, it must be mentioned that FIFA also implemented new material rules at certain times.

As mentioned before, the 2005 edition of the RSTP established rules regarding international transfers of players, the status of players, their eligibility to participate in organised football, as well as the release of players for association teams

[25]In a decision by the DRC on 22 July 2004, the DRC clarified that Circulars are an administrative instrument, which—as sources of law within the FIFA legal system—are hierarchically subordinated to the FIFA Regulations. Accordingly, the useful and legitimate aim of Circulars is to implement, detail and interpret the FIFA Regulations. However, the Regulations must remain the main source of law when having to judge a dispute; DRC 22 July 2004, no. 74477. See also the CAS jurisprudence in this regard. In CAS 2004/A/785 *T. v. L.*, award of 30 August 2005, the CAS Panel noted that Circulars are not regulations in a strict legal sense, they reflect the understanding of FIFA and the general practice of the federations and associations belonging to it. The CAS Panel also considered Circulars to be relevant for the interpretation of FIFA regulations. See also CAS 2004/A/594 *Hapoel Beer-Sheva v. Real Racing Club de Santander S.A.D.*, award of 1 March 2005, CAS 2006/A/1018 *C.A. River Plate v. Hamburger S.V.*, award of 10 November 2006, CAS 2004/A/797 *Confederação Brasileira de Futbol (CBF) v. Bayer 04 Leverkusen Fussball*, award of 25 January 2006, CAS 2009/A/1908 *Parma FC S.p.A. v. Manchester United F.C.*, award of 9 July 2010, CAS 2004/A/593 *Football Association of Wales (FAW) v. UEFA*, award of 6 July 2004 and CAS 2007/A/1320-1321 *Feyenoord Rotterdam v. Clube de Regatas do Flamengo*, award of 26 November 2007. Also in the latter case the CAS Panel stated that although Circulars are not regulations in a strict legal sense, they reflect the understanding of FIFA and the general practice of the federations and associations belonging to it. In other words, the Panel also considers Circulars to be relevant for the interpretation of the RSTP. However, in view of the nature of the Circulars, a strictly word-oriented interpretation of the Circulars should not prevail over an intention-oriented interpretation. When interpreting the RSTP, FIFA's true intention shall be sought without exclusive regard to the literal meaning of the Circulars. The CAS Panel has to interpret the latter according to the requirements of good faith and in line with common usages. Finally, consistent practice within FIFA can help in interpreting how FIFA, as an association, and its direct and indirect members, have understood and applied FIFA Regulations.

[26]Drolet 2006, p. 70.

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and players' eligibility to play for such teams. These fundamental rules are compulsory and uniformly applicable all over the world and aim to regulate international transfers between member associations and to establish basic principles that guarantee the uniform and equal treatment of all participants, which is also one of FIFA's main objectives.[27]

In principle, FIFA does not interfere in the day-to-day business of the national associations, as long as there are no severe infringements of the FIFA Statutes or regulations.[28] However, following the FIFA Commentary, the autonomy of the associations is limited by the basic principles of the regulations that have to be observed at all times and in particular by those provisions that are binding on a national level and have to be included without modification in the associations' regulations.[29] One of the fundamental principles on which the FIFA regulations are based is that the national associations must provide for appropriate means to protect the principle of contractual stability between players and clubs.[30]

### *1.2.7 FIFA Comparison 2001 and 2005*

FIFA published a document in which it compared the 2001 edition of the FIFA regulations with the revised FIFA regulations in the 2005 edition, which is called "Comparison of the FIFA regulations version July 2001 and following Circulars with the new FIFA regulations version December 2004" ("the FIFA Comparison"). In the FIFA Comparison, the relevant modifications between the two editions are outlined in more detail and short comments from FIFA are included.[31] Almost every provision of the RSTP, 2005 edition, lists the material changes in comparison to the RSTP 2001.

For example, in the 2005 edition, the new definition of the previously mentioned "non-amateur" became "professional",[32] the International Registration Transfer Certificate ("the IRTSC") is now called the International Transfer Certificate ("the ITC"), the first registration period was not allowed to exceed 12 weeks and in the 2005 edition this was reduced to 6 weeks. In the 2001 edition, a minor was allowed to be transferred if his family moved for reasons not linked to football. In the 2001 edition, this was limited since the word "family" is now replaced in this new 2005 edition by "his parents".

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[27]FIFA Commentary, explanation Article 1 para 2, p. 9.

[28]FIFA Commentary, explanation Article 2 para 1, p. 9.

[29]FIFA Commentary, explanation Article 1 para 2, p. 9.

[30]FIFA Commentary, explanation Article 1 para 3, p. 9.

[31]Comparison of the FIFA Regulations version July 2001 and following Circulars with the FIFA Regulations version December 2004.

[32]According to the FIFA Commentary, the new terminology is more appropriate as it reflects the evaluation of professionalism in football over the years. FIFA Commentary, explanation Article 2, p. 10.

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A relevant difference between the two editions, which must be noted in this regard, is the concept of the so-called *sporting just cause*. In Article 15 of the RSTP 2005 it was stated that the examples of *sporting just cause* in Article 24 of the 2001 edition had been deleted, such as injury, suspension, a player's field position, etc. Only three conditions that were introduced to apply *sporting just cause* still remain. The player must be an established professional and have appeared in fewer than 10 % of the official matches during the season. In this case, he can terminate the contract in the 15 days following the last official match of the season of the club where he is registered. In other words, the possibilities for a *sporting just cause* have been restricted. The latest jurisprudence and current view of the DRC (and the CAS) with regard to the concept of *sporting just cause* will be discussed extensively later on in this book.

Regarding the protection of minors, there is another important difference which cannot be left unmentioned since the code of conduct provided for in the 2001 edition has been deleted. Article 22 states that the generic term "dispute between players and clubs" has been replaced by disputes between clubs and players in relation to the maintenance of contractual stability if there has been an ITC request that the employment-related disputes between a club and a player must have an international dimension and that disputes related to training compensation and the solidarity mechanism must have arisen between clubs belonging to different associations.

Furthermore, with regard to Articles 23 and 24 of the RSTP 2005 edition, the 4 FIFA bodies such as the DRC, the PSC, the DRC Judge and the Single Judge of the PSC and their competences have been specified together with their function and jurisdiction. In Article 7 of Annex 4 and Article 2 para 4 of Annex 5 the FIFA Disciplinary Committee and not the PSC is now competent to impose disciplinary measures on clubs or players that do not observe the obligations set out in these annexes. As can be seen, the FIFA Comparison finally briefly lists the most important differences between the RSTP 2001 edition and the RSTP 2005 edition.

### *1.2.8 FIFA Commentary*

In December 2006, FIFA published the so-called "Commentary on the Regulations for the Status and Transfer of Players" ("the FIFA Commentary")[33] on its website. This is an extensive 150-page commentary. Like all FIFA regulations, it is published in the 4 official languages.[34] A commentary has been given by FIFA in relation to this subject with nearly every provision of the 2005 edition. These explanations, in principle, are based on the jurisprudence of the competent

[33]FIFA Commentary on the Regulations for the Status and Transfer of Players. See also FIFA Circular no. 1075 dated 18 January 2007.

[34]FIFA Commentary, General Remarks under 1, p. 4.

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decision-making bodies of FIFA, such as the PSC and the DRC, including the DRC Judge and the CAS.[35] The FIFA Commentary is therefore a very important document and useful instrument for a better understanding of the decisions of the DRC, on the proviso that the FIFA Commentary gives an explanation of the provisions related to the 2005 edition.

Despite the fact that the FIFA Commentary is a very useful instrument according to the DRC, for example in its decision of 16 April 2009, commentaries on regulations or other legislation are utilities to facilitate the interpretation of the relevant provisions but do not constitute a source of (regulatory) law and cannot, consequently, be concurrent to provisions contained in regulations or legislation. That is, the language of a provision governs its interpretation where the language is clear and explicit and does not involve an ambiguity or absurdity.[36] In line with the DRC, the CAS is also of the explicit opinion that the FIFA Commentary is no more than a guideline for the interpretation of the FIFA regulations.[37] According to the CAS, although the FIFA Commentary is not binding, it must be seen as an interpretative approach, which is likely to give rise to a certain degree of certainty among sports professionals.[38] The FIFA Commentary also provides for an explanation to the provisions of the 2005 edition. It must be stressed that on some points it is outdated.[39]

Although the FIFA Commentary is meant to be a *commentary* and should therefore be exclusively intended as a clarification and a further explanation of the provisions in the RSTP 2005 edition, on some points the FIFA Commentary more or less creates its own kind of law. With regard to the FIFA Commentary, for certain issues we will see that FIFA gives more than an explanation based on the jurisprudence of the competent bodies and gives its own interpretation of provisions of the RSTP.[40] For example, in Article 18 para 3 of the RSTP it states that a club intending to conclude a contract with a professional must inform his current club in writing before entering into negotiations with that professional. According to this Article, the only obligation of a potential new club is to inform the club with which the player is currently contracted in writing. A fax, letter or e-mail may therefore suffice. Following a strict interpretation of this Article, it is irrelevant whether or not the current club agrees with the negotiations between its player and

[35]FIFA Commentary, General Remarks under 2, p. 4.

[36]DRC 16 April 2009, no. 49444.

[37]See for example, CAS 2008/A/1453 *Elkin Soto Jaramillo & FSV Mainz 05 v. CD Once Caldas & FIFA*, award of 10 July 2008, CAS 2008/A/1469 *CD Once Caldas v. FSV Mainz 05 & Elkin Soto Jaramillo*, award of 10 July 2008, CAS 2012/A/2908 *Panionios GSS FC v. Parná Clube*, award of 9 April 2013 and CAS 2012/A/2698 *AS Denizlispor Kulübü Dernegi v. Wescley Pina Gonçalves*, award of 28 November 2012.

[38]CAS 2007/A/1369 *O. v. FC Krylia Sovetov Samara*, award of 6 March 2008.

[39]See also FIFA Circular no. 1075.

[40]In CAS 2014/A/3710 *Bologna FC 1909 S.p.A. v. FC Barcelona*, award of 22 April 2015, the Panel was of the opinion that the FIFA Commentary may not be interpreted in a way that contradicts the clear wording of an Article (para 57).

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a new club. However, despite the fact that there is a loophole in the RSTP with regard to Article 18, pursuant to the FIFA Commentary with regard to Article 18 point 4, the club with which the player is contracted "must agree to the discussion between its player and the prospective new club".[41] According to the FIFA Commentary, without this agreement the new club may even be in a situation of inducing the player to breach his contract if it continues negotiations with the player. Following the FIFA Commentary, one can see that the prospective new club is obliged to have the approval of the current club. However, on this point it must be noted, that the FIFA Commentary is not in line with the regulations. Here FIFA is following its own line and does not base this on its own regulations or on jurisprudence of the DRC. Although the DRC had thus far never provided for the answer and the RSTP is also not clear on this point, the FIFA now provides for the answer through its own FIFA Commentary.

### *1.2.9 2008 Edition*

On 29 October 2007, the 2005 edition was amended by the FIFA Executive Committee. The amendments came into force on 1 January 2008. In its Circular 1130, FIFA gave a further explanation with regard to these new regulations. In the Circular it was explicitly stated that the 2008 edition not only contained certain purely linguistic amendments but also additions and amendments to their content.[42] A linguistic amendment which is worth mentioning, was related to the new name of the 2008 edition compared to the former edition of the RSTP, 2005 edition. Where the 2005 edition was named "Regulations for the Status and Transfer of Players", the 2008 edition was named "Regulations on the Status and Transfer of Players".

The most important material amendment of the 2008 edition concerns the new provision of Article 18bis. According to the 'definition list' of the RSTP, this Article is binding on a national level and has to be included without amendment in association regulations. In the first paragraph of Article 18bis, it states that no club shall enter into a contract which enables any other party to that contract or any third party to acquire the ability to influence employment and transfer-related matters, its independence, its policies or the performance of its teams. With regard to the consequences of any breach in this respect, in the second paragraph it was stated that the FIFA Disciplinary Committee may impose disciplinary measures on clubs that do not observe the obligations set out in said Article. There is not much

[41]FIFA Commentary, explanation Article 18, p. 54.

[42]RSTP, 2008 edition, Article 29 para 2.

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jurisprudence by the DRC with regard to this provision (neither from the PSC[43] nor from the CAS[44]). We take note of the DRC decision of 30 November 2007, in which case the Chamber explicitly decided that a football player can only be bound by an employment contract to a football club, but not to a company that is not a football club. Despite the fact that the player concerned ceded the use and marketing of his personality and his transfer rights to a company, the DRC stated that players and entities other than football clubs cannot conclude an employment contract or any comparable kind of contract binding the player to the entity in an employment-relationship manner.[45] In another DRC case of 2 November 2007, the DRC decided that since 1 September 2001, the date of the entry into force of the completely renewed version of the FIFA regulations, the concept of the so-called "federative rights" to players no longer exists. In this decision, the DRC noted that it had been replaced by the principle of maintaining contractual stability between the contracting parties. Also in this decision, the DRC stressed that a professional football player and a club may only be bound by an employment contract.[46]

### *1.2.10 2009 Edition*

On 18 December 2008, 19 March 2009 and 29 September 2009, the 2008 edition was amended by the FIFA Executive Committee, which edition came into force on 1 October 2009.[47] In its Circular no. 1206, FIFA gave a further explanation to these new regulations and emphasized that an appointed sub-committee of the PSC was now charged with the examination and approval of every international transfer of minors, and every first registration of a minor player who is not a national of the country in which he wishes to be registered for the first time. In this respect it must be noted that the approval must be obtained prior to any request from an association for an ITC and/or a first registration. Furthermore, the revised regulations also contained a new Annex 2 which regulates the administrative procedure governing the applications for a first registration and the international transfer of minor players.

[43]PSC 24 April 2012, no. 412155.

[44]See for example, CAS 2011/A/2653 *FC Shakhtar Donetsk v. CPF Karpaty*, award of 27 April 2012. With regard to the concept of "economic rights" see among others CAS 2004/A/635 *RCD Espanyol de Barcelona v. Club Atletico Vélez Sarsfield*, award of 27 January 2005, CAS 2004/A/662 *RCD Mallorca v. Club Atletico Lanus*, award of 8 March 2005, and CAS 2008/A/1482 *Genova C.F.C. v. C.D. Maldonado*, award of 9 February 2009.

[45]DRC 30 November 2007, no. 117311.

[46]DRC 2 November 2007, nos. 117953a and 117953b. See also DRC 27 April 2007, no. 47216, no. 47321 and no. 47408.

[47]RSTP, 2009 edition, Article 29 para 2.

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An important change that had not been mentioned in the said Circular with regard to the 2009 edition compared to the 2008 edition, which is quite remarkable due to its serious consequences, is the amendment with regard to Article 5 para 3 of Annex 4, more specifically regarding the calculation of training compensation. In the 2008 edition, it is stated that in order to ensure that training compensation for very young players is not set at unreasonably high levels, the training costs for players for the seasons between their 12th and 15th birthdays (i.e. four seasons) shall be based on the training and education costs of category 4 clubs. In the 2009 edition it was added that this exception, however, shall not be applicable where the event gives rise to the right to training compensation occurring before the end of the season of the player's 18th birthday, the so-called "exception to the exception rule". In this regard it must be stressed that in order to correctly calculate the amount due for training compensation, it is of utmost importance to establish which edition is applicable to the specific matter, since this can lead to different outcomes having substantial financial consequences for clubs. As we will see, the existence of the "exception to the exception rule" in the 2009 edition and its removal later on (in 2014), created much legal uncertainty.

### *1.2.11 2010 Edition*

On 7 June 2010, the 2009 edition of the RSTP was amended and the 2010 edition was approved by the FIFA Executive Committee, which came into force on 1 October 2010[48] (as well as a few marginal adaptations to the Rules governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber[49]).

The amended regulations included a completely new Annex 3/3a, which concerned a Transfer Matching System ("TMS"), the Annex of which comprised 9 Articles and formed the regulatory framework for the use of a TMS, whereby it must be noted that a major part of the said Annex was dedicated to the administrative procedure governing the transfer of professionals between associations, as mentioned in Circular 1233. In the Circular it was further stated that an extra clarification was needed with regard to Article 17 para 3 of the RSTP, which provision is related to imposing sporting sanctions on a player, in order to bring the wording of the relevant provision into line with the long-standing and the well-established DRC jurisprudence.

[48]RSTP, 2009 edition, Article 29.

[49]The Rules governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber, Article 4, Article 13 para 1 and Article 15 para 1 were amended.

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### *1.2.12 2012 Edition*

On the occasion of its meeting held in Zurich, Switzerland, on 27 September 2012, the FIFA Executive Committee approved a series of amendments to the RSTP (as well as a marginal adaptation to the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber, which will be discussed later[50]). The 2012 edition, finally came into force on 1 December 2012.[51]

Article 12 of the RSTP 2012 edition was substantially amended, as mentioned in FIFA Circular no. 1327, in order to put an end to the existing lack of clarity and to enhance legal security, on the understanding that it should allow for better control by the FIFA Disciplinary Committee over very long disciplinary sanctions imposed on a national level. But also with regard to Article 17 para 4, which provision is related to the imposition of sporting sanctions being imposed on clubs that were found to be in breach of contract or found to be inducing the breach during the so-called "Protected Period", which will be discussed later. In FIFA Circular no. 1327 it was stated that further clarification was needed in this respect in order to bring the wording of the relevant provision into line with the long-standing and well-established jurisprudence of the DRC with the aim to close any possible loopholes regarding the implementation of sporting sanctions. Therefore, Article 17 para 4 of the RSTP, 2012 edition, stated that the club shall be able to register new players, either nationally or internationally, only from the next registration period following the complete serving of the relevant sporting sanction. In particular, as also follows from the aforementioned Article 17 para 4, that club may not make use of the exception and the provisional measures as stipulated in Article 6 para 1 of the RSTP to register football players at an earlier stage.

In addition, an interesting amendment is made with regard to Annex 3 of the RSTP, more specifically the "provisional registration". In this Annex a change is made to the number of days that an association must wait before registering a player on a provisional basis after having received no response to the relevant request for the ITC. In the former 2010 edition, in Article 8 para 2 sub 6, Annex 3, it stated that if a new association does not receive a response to the ITC request within 30 days of the request being made, it shall immediately register the professional player with the new club on a provisional basis. In the new Article 8 para 2 sub 6, Annex 3, this period of 30 days is reduced to *15 days*.

[50]It contained an amendment with regard to Article 15 para 1 that was going to contribute to enhanced legal security with regard to decisions notified to the parties without grounds and the applicable deadlines.

[51]RSTP, 2009 edition, Article 29.

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### *1.2.13 2014 Edition*

Through its Circular no. 1356, FIFA stated that on the occasion of its meeting held on 20/21 March 2013, the FIFA Executive Committee adopted further amendments to Annex 1, Article 1 and Annex 1, Article 3 para 2 of its new regulations, which were necessary to provide the adequate regulatory basis in support of the release of football players to association teams in line with the new concept.

Via Circular no. 1356, FIFA informed its members that new principles, as laid down in the 2014 edition, were going to be applicable and coming into force as of 1 August 2014. In order to avoid any misunderstandings, FIFA emphasized that the new concept and amended provisions only concerned the release of male players to their association teams. The FIFA women's international match calendar and the respective release rules were not going to be affected.

Via Circular no. 1437, the FIFA Executive Committee approved another remarkable amendment to Annex 4, Article 5 para 3 of the RSTP, which also came into force on 1 August 2014. As mentioned previously, both in the 2008 and 2009 editions of the RSTP, it stated that to ensure that training compensation for very young players was not set at unreasonably high levels, the training costs for players for the seasons between their 12th and 15th birthdays (i.e. 4 seasons) had to be based on the training and education costs of category 4 clubs. As also mentioned previously in the 2009 edition, FIFA introduced the "exception to the exception rule" and it was added by FIFA that this exception, however, shall not be applicable where the event gives rise to the right to training compensation occurring before the end of the season of the player's 18th birthday. In Circular 1437, FIFA referred to Annex 4, Article 5 para 3 of the RSTP, and, for unknown reasons, brought the scope of the relevant provision back to its original wording regarding the amount of training compensation and international transfers of players aged under 18, which will be discussed more extensively in Chap. 11. In other words, the "exception to the exception rule" as mentioned in Annex 4, Article 5 para 3 of the RSTP was suddenly removed from the RSTP as from the 2008 edition. In Circular no. 1437, FIFA also mentioned by that in keeping with the principle under which a provision could not be applied retrospectively, in its jurisprudence the DRC had yet to apply the amendment introduced on 1 October 2009.[52] Furthermore, according to FIFA, in this Circular it appeared that applying the higher costs of the actual category to the training years of very young players

[52]As we will see later on in this book, with regard to the amendment in the 2009 edition of the RSTP, which came into force on 1 October 2009, it is important to stress that the DRC decided that it could not apply the said amendment retroactively, which indirectly follows from CAS 2014/A/3500 *FC Hradec Kralove v. Genoa Cricket and Football Club*, award of 23 September 2014. In FIFA Circular no. 1437 dated 23 July 2014 this was also confirmed as FIFA referred to the general principle under which a provision could not be applied retroactively. It cannot be left unmentioned that in a more recent case before the CAS, it can be derived indirectly that the said amendment could be applied with retroactive effect; See CAS 2014/A/3652 *KRC Genk c. LOSC Lille Métropole*, award of 5 June 2015.

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would not be justified. In FIFA Circular no. 1437 reference was made to FIFA Circular no. 1356. It is not clear why FIFA suddenly (in the middle of a transfer period) deleted the "exception to the exception rule" and thereby referred to the argument that higher costs of the actual category to the training years of very young players would not be justified. In fact, when FIFA removed the "exception to the exception rule" in the 2014 edition of the RSTP, this situation did not differ because higher costs had also not been justified in 2008 when it introduced the "exception to the exception rule". In other words, it is questionable whether the argument of the avoidance of higher costs was FIFA's actual argument to delete and remove the "exception to the exception rule". In fact, it is difficult to understand why the passage of time changed FIFA's point of view in this regard. Practice teaches that the amendment also brings about much legal uncertainty for clubs. This legal issue and its consequences will also be discussed in Chap. 11 of Part II.

### *1.2.14 2015 Edition*

On the occasion of its meeting on 25 and 26 September 2014, the FIFA Executive Committee adopted a decision of general principle on the regulatory approach of a ban on third-party ownership of players' economic rights ("TPO") with a transitional period as expressed in Circular 1464 dated 22 December 2014. At a later meeting held on 18 and 19 December 2014, the FIFA Executive Committee approved new provisions to be included in the RSTP concerning the concept of third-party ownership of players' economic rights as well as third-party influences on clubs.

In the 2015 edition, a new Article 18*ter* was introduced and Article 18*bis* was (slightly) amended on the understanding that a definition of "third party" was also included in the RSTP. These changes came into force on 1 January 2015. The new Article 18*ter* of the RSTP contains the interdiction for clubs and players to enter into agreements with third parties, in which the third party is entitled to participate in compensation payable in relation to the future transfer of a player, or is assigned any rights in relation to a future transfer or transfer compensation. This interdiction came into force on 1 May 2015 on the understanding that agreements covered by the ban prior to 1 May 2015 may continue to be in place until their contractual expiration. However, according to the validity of new agreements covered by the pertinent prohibition which are signed between 1 January and 30 April 2015, they may not have a contractual duration of more than 1 year beyond the date of them being signed, according to FIFA Circular no. 1464.

Finally, in Circular no. 1464 it was emphasized that, as was already the case for Article 18*bis* of the RSTP, the FIFA Executive Committee decided to include the new Article 18*ter* as mentioned in the 2015 edition in the list of provisions which are binding on a national level and must be included in the associations' regulations.

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Via its Circular no. 1468, FIFA informed its members about several amendments to the RSTP. New formal and material elements were included in a new edition of the RSTP.[53] Although FIFA makes a distinction in its Circular no. 1464 with regard to amendments that will come into force on 1 March and 1 April 2015, the RTSP 2015 edition itself does not make this distinction as in Article 29 of the RSTP it states that the new 2015 edition will come into force on 1 April 2015.

In Circular no. 1468, FIFA stresses that in order to strengthen the protection of minors and due to the increased number of international transfers of players younger than 12, the FIFA Executive Committee has approved a reduction in the age limit for which an lTC is required for an international transfer up to the age of 10. In other words, in respect of Article 9 para 4 (and Article 19 para 4) of the RSTP 2015 edition, member associations will now be obliged to submit applications for approval of any international transfer of a minor or first registration of a minor foreign player to the subcommittee appointed by the PSC for any player from the age of 10.

A very important addition to former editions of the RSTP, is the inclusion in the RSTP 2015 of an Article regarding overdue payables. The introduction of this Article aims at establishing a stronger system on overdue payables (towards players and clubs). In this respect, the DRC and the PSC will have a wide scope of discretion when imposing sporting sanctions, such as a ban on registering any new players for 1 or 2 registration periods. It was also noted by FIFA that this new Article 12bis will remain without prejudice to the application of further measures relating to maintaining contractual stability between professional players and clubs. FIFA felt it needed to introduce such a provision in order to ensure that clubs (better) comply with their financial contractual obligations towards other clubs and players.

According to the above Article 12bis, clubs are required to comply with their financial obligations towards players and other clubs. Any club found to have delayed a due payment for more than 30 days without a prima facie contractual basis may be sanctioned. In this regard, it is important to be aware that in order for a club to be considered as having overdue payables in the sense of this Article, the player of the club (the creditor) must have notified the debtor club in writing and have demanded a deadline of at least 10 days for the debtor club to comply with its financial obligations. Sanctions can be imposed by the DRC or the PSC (or its Single Judges), like a warning, a reprimand or a fine, but also a ban on registering new players, either nationally or internationally for 1 or 2 full and consecutive registration periods.[54]

[53]Via this Circular, FIFA also introduced several amendments to the Rules governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber ("Procedural Rules").

[54]See Shoichi 2015. See for example DRC 12 June 2015, no. 0615532, DRC 3 July 2015, no. 07156413, DRC 8 July 2015, no. 0715508, DRC 16 September 2015, no. 0915970, DRC 1 October 2015, nos. 10151062 and 1015648 and DRC 17 August 2015, nos. 0815801 and 0815802, DRC 10 September 2015, no. 0915670, DRC 13 October 2015, no. 10151251, DRC 15 October 2015, no. 10151105, DRC 1 October 2015, no. 1015648 and DRC 1 October 2015, no. 10151062. In the DRC decisions of 27 October 2015, no. 10151248 and DRC 4 February 2016, no. 02161733, the DRC decided that in the event that the amount due to the claimant party was not paid by the respondent party within the stated time limit, the respondent shall be banned from registering any new players, either nationally or internationally, for the next entire registration period following the notification of the present decision.

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In addition, in its Circular no. 1468, FIFA also refers to other amendments which will be discussed throughout the book. For example, an amendment with regard to Article 22 under b, which concerns the division of jurisdiction between the DRC and National Dispute Resolution Chambers ("NDRC"), in order to better clarify the pertinent aspects. Further to this, an amendment concerned Article 24 para 2 of the RSTP in order to further strengthen the efforts made for a faster and more efficient dispute resolution, and the competence of the chairman and deputy chairman of the DRC was extended so as to grant them Single Judge competences relating to training compensation and solidarity mechanism disputes. Obviously, formal adaptations had to be made in a new edition as result of the new regulation regarding intermediaries, i.e. Regulations on Working with Intermediaries, which came into force on 1 April 2015. According to these regulations, FIFA decided to conduct an in-depth reform of the players' agents system through a new approach based on the concept of intermediaries and that the current system should be abandoned and replaced by a registration system to be established for intermediaries.[55]

Finally, via Circular no. 1500, FIFA informed its members that on the occasion of its meeting on 20 and 21 March 2014, the FIFA Executive Committee approved a completely new Annex 6 to be included in the RSTP, which concerned claims related to training compensation (Article 20 of the RSTP) and the solidarity mechanism (Article 21 of the RSTP).[56] According to the Circular, FIFA (Transfer Matching System GmbH) had been working on the creation and implementation of an adequate system to properly manage claims through the TMS. The new system involves the way claims will be managed, thereby making use of a more up-to-date system (TMS) rather than the current paper-based process, according to FIFA. The new Annex 6 of the RSTP establishes a procedure by means of which all claims related to training compensation and the solidarity mechanism will be managed through TMS, which, according to FIFA, should lead to a more effective way of handling claims.[57] FIFA emphasizes in its Circular that the new Annex 6 does not have any impact on substantial aspects relating to the principles of training compensation and the solidarity mechanism. In other words, the substantial aspects, as will be discussed later in this book, will remain unchanged. In light of the new Annex 6, it is interesting to note that in order to ensure a more efficient procedure concerning claims related to training compensation and the solidarity mechanism, a sub-committee appointed by the DRC, which is composed of all members of the DRC each of whom is able to pass a decision as a Single Judge, is created. The new Annex 6 of the RSTP finally came into force on 1 October 2015. That means, as from 1 October 2015, all claims related to training compensation and the solidarity mechanism have to be submitted and managed through FIFA TMS.

[55]See FIFA Circular no. 1468 dated 23 January 2015.

[56]As follows from FIFA Circular no. 1500, the current Annex 6 of the RSTP which governs the Rules for the Status and Transfer of Futsal Players, will continue as Annex 7 of the RSTP with its current wording unchanged as of 1 October 2015.

[57]According to FIFA, the new system is closely related to the existing handling of applications in relation to the protection of minors.

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### *1.2.15 2016 Edition*

Via FIFA Circular no. 1542, FIFA informed its members regarding several amendments to the RSTP which were approved by the FIFA Executive Committee on the occasion of its meeting held in Zurich, Switzerland, on 17 and 18 March 2016. The changes came into force on 1 June 2016. Most of the changes deal with Annex 1 to the RSTP, which governs the release of players to association teams. Following this Circular, the amendment to Annex 1 of Article 6 of the RSTP aims at having a uniform approach with respect to possible breaches of FIFA regulations. According to FIFA, they should be dealt with by FIFA's judicial bodies in application of the FIFA Disciplinary Code. Further to this, the Circular stresses that the very specific provisions of Annex 1 Article 1 para 11 of the RSTP concerning the consequences of a late return of a player to his club after international duty will remain within the competence of the PSC. The other changes in the RSTP concern the provisions on the protection of minors. In this respect, the wording of Article 19 paras 3 and 4 of the RSTP has been amended in order for it to adequately reflect the well-established jurisprudence of the Sub-Committee of the PSC in relation to the so-called "five-year rule". According to FIFA and following this Circular, the aforementioned rule created by jurisprudence allows for the first registration of a minor player for a club in a territory of a country of which he is not a national, provided that he has lived continuously for at least five years in that territory immediately prior to the intended first registration. Said rule is already included as an application of its own in TMS. As such, the current amendment of the provision does not constitute any change to the existing practice and constant jurisprudence.

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# Chapter 2
# Procedural Aspects

**Abstract** This chapter looks at the procedural rules that are outlined in the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber ("Procedural Rules"). In this chapter all relevant procedural aspects, such as the jurisdiction of the DRC, its composition, applicable law, procedural aspects, such as withdrawal and challenges, the entities which are entitled to lodge a claim before the DRC, the procedural costs and the manner of enforcement of the decisions, will be discussed extensively. Finally, in this chapter the appeal procedure before the CAS will also be brought to the readers' attention.

**Keywords** Procedural rules · Composition · Jurisdiction · Applicable law · Litispendency · Res iudicata · Forum shopping · Culpa in contrahendo · Admissibility · Withdrawal · Challenges · Burden of proof · Renouncement of right · Non ultra petitum · Counterclaim · Intervening party · Prescription · Provisional measure · CAS

## Contents

2.1 Introduction ..... 26
2.2 Procedural Rules ..... 28
2.3 Composition ..... 30
2.4 Jurisdiction ..... 31
2.4.1 Civil Court ..... 31
2.4.2 The PSC ..... 35
2.4.3 The DRC ..... 39
2.4.3.1 General ..... 39
2.4.3.2 "*Sub a Procedure*": ITC Request ..... 41
2.4.3.3 "*Sub b Procedure*": Employment-Related Disputes ..... 42
2.4.3.3.1 General ..... 42
2.4.3.3.2 International Dimension ..... 46
2.4.3.3.3 Independent Arbitration Tribunal ..... 50

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aruiz@isdemasters.com

2.4.3.4 Training Compensation and Solidarity Mechanism ..... 55
2.4.3.5 Solidarity Mechanism Between Clubs Belonging to the Same Association ..... 56
2.4.4 The DRC Judge and the Single Judge of the PSC ..... 56
2.4.5 Conclusion ..... 58
2.5 Applicable Law ..... 60
2.5.1 National Law ..... 60
2.5.2 Applicable Edition RSTP ..... 64
2.6 Admissibility ..... 66
2.7 Representation ..... 70
2.8 Withdrawal and Challenges ..... 71
2.9 Petitions ..... 73
2.10 Evidence ..... 77
2.11 Burden of Proof ..... 82
2.12 Renouncement of Rights ..... 84
2.13 Non Ultra Petitum ..... 86
2.14 Amendment of Claim ..... 87
2.15 Counterclaim ..... 88
2.16 Intervening Party ..... 89
2.17 Costs ..... 90
2.17.1 Costs of FIFA Proceedings ..... 90
2.17.2 Procedural Compensation ..... 93
2.18 Provisional Measure ..... 93
2.19 Prescription ..... 96
2.20 Decision ..... 99
2.20.1 General ..... 99
2.20.2 Form and Contents ..... 100
2.20.3 Service and Publication ..... 101
2.20.4 Enforcement ..... 102
2.21 Court of Arbitration for Sport ..... 105
2.21.1 General ..... 105
2.21.2 Background ..... 106
2.21.3 Relevant Procedural Aspects ..... 107
References ..... 110

## 2.1 Introduction

After having discussed the judicial field of the RSTP, it is also important to acquire broader knowledge of the relevant procedural aspects relating to this Chamber, the judicial sphere within which the Chamber has to operate, such as the course of the proceedings. These procedural rules are outlined in more detail in the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber ("Procedural Rules"), on the understanding that FIFA has also placed so-called "*Frequently Asked Questions*" documents on its website www.fifa.com in order to gain more information.[1] In this chapter all relevant procedural aspects, such as the jurisdiction of the DRC, its composition, applicable law, procedural aspects such as withdrawal and challenges, the entities which are entitled to

[1]Dispute Resolution Chamber. http://www.fifa.com/governance/disciplinary/dispute-resolution-system.html. Accessed 26 July 2016.

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lodge a claim before the DRC, the procedural costs and the manner of enforcement of the DRC decisions will be discussed. Finally, the procedure before the CAS will be brought to the readers' attention, which cannot be left unmentioned as the decisions reached and issued by the DRC may be appealed before the CAS.

To begin with, the proceedings and deliberations of the DRC, including those of the DRC Judge, which will be discussed later, generally take place at FIFA headquarters in Zurich, Switzerland, subject to exceptions.[2] As stated earlier, the DRC was only created by FIFA in 2001 and its first decision was dated 22 November 2002.[3] The DRC has issued many decisions since then. However, the problem we (still) face is that FIFA does not publish all the DRC decisions on its website. Following the Procedural Rules, should decisions be of general interest, they *may* be published.[4] Consequently, it is difficult to estimate how many decisions have been taken by the DRC. Since the first decision in 2002 until the end of 2015, more than 2000 decisions were published on the FIFA website (for unclear reasons, however, FIFA recently decided to remove certain decisions previously published on its website from the list).[5]

Following the Procedural Rules, as a general rule the proceedings before the DRC are conducted in writing.[6] However, if the circumstances appear to warrant it, the parties may be summoned to attend an oral hearing.[7] For example, in a DRC decision of 28 September 2007, the DRC emphasized that as a general rule, proceedings before the DRC shall be conducted in writing. The Chamber deemed that the case did not contain any particular factual difficulty which might justify the necessity that the parties attend an oral hearing in order to present their case directly before the Chamber. Therefore, the DRC was unanimously of the opinion that the presence of the parties before the Chamber would not provide it with any new relevant factual information.[8] In an earlier case of 17 August 2006 before the DRC, the Chamber decided that oral hearings will only be held in the event of the DRC requiring oral arguments or testimonies of any witnesses or experts.[9] In other words, it can be concluded that in case a dispute contains any particular factual difficulty which might justify the necessity that the parties attend an oral hearing in order to present their case directly before the Chamber, or in case the DRC requires oral arguments or testimonies of any witnesses or experts, an oral hearing can be held and the DRC might deviate from its general line to conduct the procedure in writing.

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[2]Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber, 2015 edition, Article 10.

[3]DRC 22 November 2002, no. 300702.

[4]Procedural Rules, 2015 edition, Article 20.

[5]Dispute Resolution Chamber. http://www.fifa.com/about-fifa/official-documents/governance/dispute-resolution-chamber.html. Accessed 26 July 2016. For the sake of completeness, it is worth mentioning that the decisions of the PSC are also published. http://www.fifa.com/about-fifa/official-documents/governance/player-status-committee.html. Accessed 26 July 2016. The first decision of the PSC as published on the FIFA website is dated 21 November 2011.

[6]Procedural Rules, 2015 edition, Article 8.

[7]Procedural Rules, 2015 edition, Article 11 para 1.

[8]DRC 28 September 2007, no. 9719.

[9]DRC 17 August 2006, no. 86137.

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As we will see in Chap. 3 of part II, all relevant DRC decisions are classified according to various subjects. However, before analysing the most relevant decisions, which is the essence of this book, it is useful to have broader knowledge of the most relevant procedural aspects in relation to the DRC. Once we understand the judicial framework and the limited field and scope within which the DRC has to operate, we have a solid foundation and will have a better understanding of the DRC decisions. All the relevant procedural aspects will now be discussed. Aside from this, it must be mentioned that in this chapter, only the DRC decisions pertaining to *procedural issues* will be discussed on the understanding that the relevant DRC decisions with regard to its material content will be analysed per relevant subject in Chap. 3 of part II. Furthermore, it is important to know for the time being, that DRC decisions can only be enforced through its own FIFA channels. Finally, another important aspect is that decisions reached by the DRC or the DRC Judge may be appealed before the CAS. All these principles are laid down in the "*Rules Governing the Procedures of the PSC and the Dispute Resolution Chamber*", also called the Procedural Rules, which will be addressed first.

## 2.2 Procedural Rules

According to Article 25 para 7 of the RSTP, the detailed procedure for the resolution of disputes arising from the application of the RSTP is further explicitly outlined in the Procedural Rules.[10] Initially, there were the Procedural Rules of the FIFA PSC dated 21 February 2003 and the Rules Governing the Practice and Procedures of the DRC dated 28 February 2002. These rules were replaced by the new Rules Governing the Procedures of the PSC and the DRC which were approved by the FIFA Executive Committee on 29 June 2005 and which came into force on 1 July 2005.[11] The 2005 edition of the Procedural Rules finally constituted a new set of procedural rules that were applicable to both the PSC as well as to the DRC.[12]

Since 2008 the Procedural Rules have been amended and the 2005 edition of the Procedural Rules has been replaced. The new rules, the 2008 edition, were approved by the FIFA Executive Committee on 27 May 2008 and came into force on 1 July 2008. A very important amendment in the 2008 edition in comparison to the 2005 edition, is the fact that in the 2008 edition it states that there are now costs related to procedures before the DRC. Until 1 July 2008 no costs were related to these procedures. For example, according to para 1 of Article 17 of the Procedural Rules, 2008 edition, an advance of costs was not only payable for proceedings before the PSC and the Single Judge (with the exception of proceedings relating to the provisional registration of players), but also for proceedings before the DRC in relation to disputes regarding training compensation and the solidarity

[10]RSTP, 2016 edition, Article 25 para 7.

[11]Procedural Rules, 2005 edition, Article 18 para 3.

[12]As was pronounced in FIFA Circular no. 959 dated 16 March 2005.

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mechanism. According to the second paragraph of said provision, no advance of costs shall be paid for proceedings before the DRC in relation to disputes regarding training compensation and the solidarity mechanism if the value of the dispute does not exceed CHF 50,000.[13] With regard to the actual costs, a maximum amount of CHF 25,000 was levied in connection with proceedings not only of the PSC and the Single Judge (with the exception of proceedings relating to the provisional registration of players), but also as from 2008 for proceedings before the DRC relating to disputes regarding training compensation and the solidarity mechanism. However, as mentioned in Article 18 para 2 of the 2008 edition, DRC proceedings relating to disputes between clubs and players in relation to the maintenance of contractual stability as well as international employment-related disputes before the DRC between a club and a player, were still free of charge.

As from 2012, the 2008 edition of the Procedural Rules has also been amended and replaced by the 2012 edition. The "2012 rules" were approved by the FIFA Executive Committee on 27 September 2012 and came into force on 1 December 2012. The 2012 edition of the Procedural Rules is applicable to proceedings submitted to FIFA on or after the date on which these rules came into force.[14] Finally, as from 1 April 2015 a new version of the Procedural Rules has been issued by FIFA, the 2015 edition.

It can be inferred from the 2015 edition of the Procedural Rules that FIFA is actually trying to make the existing dispute resolution system faster and more efficient, which is one of the weaker points of the FIFA procedures. For example, in this new edition, a new para 4 to Article 9 has been added, which will limit the parties' possibilities to change their requests and arguments after the closure of an investigation, also in order to contribute to faster procedures. Aside from this, a new para 5 to Article 9 and a new para 3 to Article 19 were added in order to have a more concrete and explicit legal basis which allows the FIFA administration, according to FIFA Circular 1468, in the absence of direct contact details, to continue the practice as it is today, to notify the parties about documents and decisions via the member associations involved.[15] With the aforementioned intention of making the existing dispute resolution system faster and more efficient, as well as attempting to further harmonize the application of deadlines, according to the literal text of FIFA Circular no. 1468, amendments were made to Article 16 paras 10–12 of the Procedural Rules, which concern time limits and the possible extension of deadlines. Obviously, Article 6 para 1 of the Procedural Rules had to be amended due to the new Regulations on Working with Intermediaries, which came

[13]As stipulated in Article 17 para 4 of the Procedural Rules, 2015 edition, an advance of costs is calculated according to the value of the dispute. If the amount in dispute is up to CHF 50,000, the advance of costs is CHF 1000, if the amount in dispute is up to CHF 100,000, the advance of costs is CHF 2000, if the amount in dispute is up to CHF 150,000, the advance of costs is CHF 3000 and if the amount in dispute is up to CHF 200,000, the advance of costs is CHF 4000. From CHF 200,001, the advance costs is CHF 5000.

[14]Procedural Rules, 2012 edition, Article 21.

[15]According to FIFA Circular 1468, the new provisions correspond to the existing regulatory framework within the FIFA Disciplinary Code.

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into force as of 1 April 2015, as a result of which the "licensed players' agents" were definitely deleted from (and not replaced yet by the "intermediaries" on) the list of parties that are entitled to lodge a formal claim before the PSC or the DRC.

Finally, it is important to establish which edition is applicable to the case at hand. So, in each decision under "*considerations*", before entering the context of the specific matter at hand, the DRC first assesses and decides whether it is competent to deal with the matter at stake and in this regard refers to the Procedural Rules in order to decide which version of the Procedural Rules is applicable.[16] Article 21 para 1 of the Procedural Rules states that the Procedural Rules of 2015 are applicable to proceedings submitted to FIFA on or after the date on which these Procedural Rules came into force. In other words, in the event that the case was submitted to FIFA before 1 April 2015, then the former Procedural Rules, 2012 edition, are applicable and shall be applied to the case.[17]

## 2.3 Composition

The DRC meets in the form of a panel and adjudicates, in principle, in the presence of at least 3 members, including the chairman or the deputy chairman. In practice we note that the DRC regularly passes decisions in a composition of 5 (or more) members.[18] According to the FIFA Commentary, the composition must be based on the fundamental principle of equal representation of players and clubs. In total, the DRC has 24 members, in which 12 members represent the players and are proposed by the players' associations and 12 members are proposed by the clubs or leagues. The FIFA Executive Committee will formally appoint the proposed members of the DRC committee, together with the chairman as well as the deputy chairman.[19]

The DRC members may not and are not allowed to perform different functions in the same matter. They must refrain from attempting to influence other bodies and committees and they must maintain strict confidentiality concerning all information that comes to their attention while exercising their office and is not mentioned in the decision. In particular, they are obliged to respect the secrecy of deliberations.[20]

It is furthermore important to mention that if the case is of a simple nature, then it may be handled and decided on by a single judge, the so-called DRC Judge. In such event, the DRC members will designate a DRC Judge from among its members.[21] The aspect of the DRC Judge will be reviewed more extensively later in this book.

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[16]See for example, DRC 17 August 2006, no. 862.

[17]Procedural Rules, 2015 edition, Article 21 para 2.

[18]The list of DRC members is placed on the website of FIFA. http://www.fifa.com/about-fifa/committees/committee=1889876/index.html. Accessed 26 July 2016.

[19]FIFA Commentary, explanation Article 24, p. 72. Procedural Rules, Article 4.

[20]Procedural Rules, 2015 edition, Article 5 para 7.

[21]RSTP, 2016 edition, Article 24 para 2.

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## 2.4 Jurisdiction

### *2.4.1 Civil Court*

Article 68 para 2 of the FIFA Statutes stipulates that recourse to ordinary courts of law is prohibited unless specifically provided for in the FIFA regulations.[22] To ensure that the associations do not address the civil courts, they are obliged to insert a clause in their statutes stipulating that their clubs and members are in turn prohibited from taking a dispute to ordinary courts.[23] However, in general, the national law of many countries provides for the compulsory jurisdiction of ordinary courts in the case of employment-related disputes. Hence, parties can decide to submit a labour dispute to a competent ordinary court, because the choice of judge is a fundamental right that cannot be denied. Players and clubs are therefore entitled to seek redress before a civil court as an exception to the statutory principles of the FIFA Statutes.[24] In this regard, we take note that the DRC will declare parties inadmissible in case the parties contractually decided to submit a labour dispute to a competent ordinary court. For example, in its case of 16 October 2014, the DRC stressed that the RSTP do not prohibit players and clubs from referring employment-related disputes that have possibly arisen to the local, national courts.[25] The DRC concluded that the claimant's claim was inadmissible. Following the FIFA Commentary, some national legislation does not even allow labour disputes to be referred to a deciding body other than civil courts before the dispute has arisen.[26]

Parties may decide to divert from the choice of judge if there is no compulsory jurisdiction of ordinary courts and refer the matter to (national or international) sports arbitration. However, according to the principle of "*litispendency*", a case pending before civil courts cannot be dealt with by sports arbitration.[27] The DRC explicitly forbids a party to address several civil courts and then address FIFA if the decision of the civil court does not satisfy the party concerned, known as "*forum shopping*". The DRC deems it of utmost importance that the practice of parties to have their legal cases heard by several decision-making bodies aimed at

[22]FIFA Statutes, 2016 edition, Article 59 para 2.

[23]In a decision of the DRC of 4 February 2005, a player went straight to the Labour Tribunal Court of the country concerned without having ever lodged a formal financial complaint with FIFA against the claimant and moreover never asked for assistance in relation with his ITC. The DRC was of the opinion that "*this behaviour contradicts the basic football rules and must be strongly reprimanded*". DRC 4 February 2005, no. 25820.

[24]FIFA Commentary, explanation Article 22, p. 64.

[25]DRC 16 October 2014, no. 10143276.

[26]FIFA Commentary, explanation Article 22, p. 64.

[27]FIFA Commentary, explanation Article 22, p. 64. See also CAS 2012/A/2983 *Aris Football Club v. Marcio Amoroso dos Santos & FIFA*, award of 22 July 2013.

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obtaining the most favourable judgment, must be strictly forbidden.[28] The DRC is of the opinion that players and clubs are entitled to seek redress before a civil court for employment-related disputes, since for such issues, the choice of judge is a fundamental right that cannot be denied. However, as already mentioned, parties may decide and are free to divert from the choice of judge and instead refer the matter to sports arbitration.[29]

In a decision by the DRC of 15 February 2008, the claim of a player was inadmissible due to the fact that the DRC was not competent.[30] In this case the Chamber indicated that the competence of the DRC, without prejudice to the right of any player or club, is to seek redress before a civil court in disputes between clubs and players. In other words, also from this decision of the DRC it follows, that a dispute between a club and a player can be referred to ordinary courts. The DRC established that clause 13 of the relevant employment contract was to be considered a choice of forum that attributed exclusive jurisdiction to the regional Labour Court in order to deal with any possible dispute between the contractual parties. The DRC decided that it was not competent to decide on the present dispute between the player and the club, and that the player's claim against the club was not admissible.

In a decision by the DRC of 3 July 2008, the parties concerned brought their cases before several courts, more specifically before the national civil court, thenational dispute resolution chamber, the DRC and also the CAS.[31] The facts in this case were as follows. On 19 June 2002 a Slovenian player and the club O signed an employment contract valid from 19 June 2002 until 30 May 2004. On 8 March 2005, the player turned to FIFA due to the non-payment of his salary. The player

[28]DRC 21 November 2006, no. 1161241. In a decision by the DRC of 21 February 2006 with regard to a dispute between a player and a club, the Chamber concluded that it could not protect the player's stance. By referring the question with regard to his registration to a civil court the player had infringed Article 61 para 2 of the FIFA Statutes. With regard to the contractual dispute, the player preferred to revert to the decision-making bodies of the football instances. The DRC however decided that such forum shopping cannot be accepted, in particular in view of the disrespect of the FIFA Statutes. As a consequence, the DRC decided as a result thereof not to enter into the consideration of the player's claim. One can see that the DRC is very rigorous regarding the way to civil courts. See also DRC 21 February 2006, no. 26267, and DRC 2 November 2007, no. 117309.

[29]Following the DRC jurisprudence it is not relevant whether the case is initiated based on sub a or sub b of Article 22 RSTP, the so-called "*sub a or b-procedure*", as will be introduced in this chapter later on. See DRC 2 November 2007, no. 1171310.

[30]DRC 15 February 2008, no. 28747. During the year 2012, 1787 claims were lodged before the various decision-making bodies, i.e. DRC, DRC Judge, PSC and its Single Judge.

[31]DRC 3 July 2008, no. 78662. See also DRC 16 April 2009, no. 49024, in which case the DRC decided that it is not possible to lodge a claim before the DRC as well as a national committee. In this case, the Chamber considered that the player, by lodging a second claim before the national deciding body, recognized, by action implying his intention, the competence of the national committee.

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pointed out that a decision was already passed in his favour by the national disciplinary committee on 13 October 2003. The player asserted that he had been unable to find a new club due to the unlawful behaviour of the club. Therefore he suffered a loss and claimed compensation. According to the club the player was not able to lodge a new claim against the club because the matter had already been decided by a national dispute resolution chamber. The player disagreed with the club's position asserting that the matter that was lodged before the national dispute resolution chamber was another case relating to his earned salary for the previous football season. The player also started a procedure before the national civil court. On 21 February 2006 the DRC decided it was not competent to deal with this matter. On appeal the CAS decided to set aside the decision by the DRC and referred the case back. The club and the player reiterated their position before the DRC. With regard to the club's argument disputing the competence of the DRC, the Chamber noted that the claim before the national dispute resolution chamber did not appear to include any claim for breach of contract or compensation for breach of contract. The DRC also deemed that the case before the civil court was also not related to nor constituted a claim for breach of contract. In this case the club failed to prove that an independent arbitration tribunal had been established on a national level. With regard to the contents of this case the DRC came to the conclusion that the club had in fact acted in breach of the employment contract by undisputedly having failed to remit the player's remuneration during a considerable period of time. The DRC decided that the club was liable to pay to the player EUR 20,000 as compensation for breach.

In a decision by the DRC of 1 March 2012, club A, the respondent in this procedure, allegedly lodged a claim against player G, the claimant, on 23 June 2011 at the country C District Court regarding termination of the employment contract and compensation. However, on 21 July 2011, the player lodged a claim at FIFA against the club maintaining that the club terminated the employment contract without *just cause*. The club contested FIFA's competence. The DRC acknowledged that the club contested the competence of FIFA invoking "*lis pendens*" on the basis that the club had lodged a claim against the player at the country C District Court. According to the DRC, recourse to arbitration is considered a basic principle despite the exception contained in Article 22 of the RSTP, which allows players and clubs to seek redress before a civil court. The DRC decided in the matter at hand that it was competent to deal with this case.[32] In the matter at hand, the club had lodged a claim against the player at the country C District Court prior to the claim of the player at the DRC. Although the DRC found itself competent to decide upon the matter at hand, it is crucial to take note of the fact that in this case (a) the club had failed to provide substantial evidence demonstrating that it actually had lodged a genuine claim at the country C court, (b) the club did not refute the player's representation as regards the country C procedure and did not follow formalities with regard to the notifications of summons, (c) the club had not provided

[32]DRC 1 March 2012, no. 3122113. See also DRC 31 July 2013, no. 07131395.

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the DRC with evidence that the player was properly informed of the pending proceeding before the district court and (d) the parties did not include a well-drafted jurisdiction clause. In other words, if (a) the club had not failed to provide substantial evidence demonstrating that it actually had lodged a genuine claim at the country C court, (b) the club did refute the player's representation as regards the country C procedure and did follow the formalities with regard to the notifications of summons, (c) the club had provided the DRC with evidence that the player was properly informed of the pending proceeding before the district court and (d) the parties did include a well-drafted jurisdiction clause, the DRC would most likely not be competent to deal with the case. It is at least interesting to take note of these aspects for future cases regarding the competency of the DRC.

The FIFA Commentary furthermore refers to the fact that despite being entitled to lodge a claim in relation to an employment dispute at an ordinary court of law, parties prefer to refer their litigations to sports-deciding bodies for a variety of reasons.[33] In general, sports arbitration is a fast-decision-making system. As we will see later on, the DRC will have to adjudicate within 60 days of receipt of the request.[34] Also the sport specialist's knowledge is a decisive factor in avoiding the civil court and opting for sports-deciding bodies, such as the DRC. A final important aspect, in my opinion the most relevant one, is the possibility for FIFA to enforce the decisions throughout its own FIFA channels.[35] It must be noted that it is generally difficult to enforce a decision of an ordinary court or an arbitration court in a foreign country. According to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards held in New York on 10 June 1958, only 156 countries declared that they apply the Convention for the recognition and enforcement of awards.[36] This means that in certain countries there is no legal way to enforce an arbitral decision.[37] FIFA is competent to respond directly to a member that infringes the rules. It is for that reason that parties prefer the DRC as a sports-deciding body.

Finally, the principle of "*res iudicata*" is relevant to keep in mind. According to this principle, the judicial decisions have become definite and can no longer be called into question, which is underlined by the DRC in a decision of 16 August 2006.[38] In another case before the DRC of 16 November 2012, the DRC discusses the conditions with regard to the principle of *res iudicata*. The DRC noted in this respect that the claimant party had already lodged a claim in the present matter on 13 September 2009 involving the same parties, which was decided by the DRC on

[33]FIFA Commentary, explanation Article 22, p. 65.

[34]RSTP, 2016 edition, Article 25 para 1.

[35]FIFA Commentary, explanation Article 22, p. 65.

[36]This Convention will apply to the recognition and enforcement of arbitral awards made in the territory of a state other than the state where the recognition and enforcement of such awards are sought. As of June 2015, 156 countries can be entitled as state party. See also The New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. http://www.newyorkconvention.org/. Accessed 26 July 2016.

[37]FIFA Commentary, explanation Article 22, remark 99, p. 65.

[38]DRC 17 August 2006, no. 861307.

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6 May 2010. Therefore, the DRC first had to establish if they had competence to deal with the claim at stake by virtue of the legal principle of *res iudicata*. The Chamber wished to emphasize that the application of such legal principle must be analysed *ex officio* by the deciding body and deemed it appropriate to recall that on the basis of the principle of *res iudicata*, a decision-making body is not in a position to deal with a claim in the event that a deciding body has already dealt with the exact same matter and already passed a final and binding decision relating to such matter. Indeed, the parties to the dispute as well as the deciding authority were bound by the final and binding decision previously passed. In continuation, the Chamber stated that the decision by the DRC of 6 May 2010 was final and binding, which is one of the criteria to establish as to whether the principle of *res iudicata* is applicable. Further to this, the DRC underlined that the principle of *res iudicata* is applicable if cumulatively and necessarily the parties to the disputes and the object of the matter in dispute are identical. The DRC determined that the object of the matter in both disputes was not identical and that, therefore, the claim was not affected by the principle of *res iudicata*.[39]

### *2.4.2 The PSC*

Without prejudice to the right of any player or club to seek redress before a civil court for employment-related disputes, which was one of the requirements of the European Commission, as explained before, FIFA is competent regarding cases such as those mentioned in Article 22 of the RSTP, 2016 edition. In this light and according to this Article, FIFA makes a distinction between the competence of the PSC as defined in Article 23 of the RSTP and the DRC as mentioned in Article 24 of the RSTP.

As mentioned in the introduction, (at least from a theoretical point of view) the PSC plays an important role in relation to the DRC, which can be derived from several provisions in the regulations. For example, Article 54 para 2 of the FIFA Statutes, which explicitly states that the PSC shall be responsible for the work of the DRC.[40] As mentioned previously, but worth mentioning again in this part of

[39]DRC 16 November 2012, no. 11121309. See also CAS 2006/A/1029 *Maccabi Haifa FC v. Real Racing Club Santander*, award on 2 October 2006, in which case the issue of "res iudicata" was also discussed. In this case it was decided that 3 elements of res judicata exist, namely (a) the same persons (eadem personae), (b) the same object (eadem res) and (c) the same cause (eadam causa petendi). For the exception of "res iudicata" to be successfully admissible, it is necessary that all three elements be concurrently present. See also DRC 23 July 2015 no. 07151614 and DRC 27 November 2014, no. 11142430.

[40]FIFA Statutes, 2016 edition, Article 46 para 2. Further to this, another indication that the PSC can be seen as the "umbrella organisation" of the DRC is Article 23 para 3 RSTP, 2016 edition, in which it is stated that in case of uncertainty as to the jurisdiction of the PSC or the DRC, the chairman of the PSC shall decide which body has jurisdiction. Furthermore, in the first published DRC decisions, for example the DRC decision of 21 November 2003, no. 113291, the Chamber was described as '*The Dispute Resolution Chamber of the Players' Status Committee*', as the Chamber was also mentioned in the Regulations for the Status and Transfer of Players, 2001 edition.

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the book, another signal for the influence of the PSC on the DRC can be underlined by making reference to Article 23 para 2 of the RSTP as well as Article 3 of the Procedural Rules, 2015 edition, in which provisions are laid down that in case of uncertainty regarding the jurisdiction of the PSC or the DRC, the chairman of the PSC shall decide which body (the DRC or the PSC) has jurisdiction. Nowadays, the PSC also still has general competence on matters relating to the players' status that do not concern disputes related to the competence of the DRC.[41]

Just like the DRC, pursuant to Article 23 para 4 of the RSTP, the PSC will generally adjudicate in the presence of at least 3 members, including the chairman or the deputy chairman.[42] The said provision further describes that the case may be settled by a Single Judge if it is of "*such a nature*". According to Article 23 para 3, "*such a nature*" can be described as a case that is considered to be urgent or raises no difficult factual or legal issues or in case it concerns a decision on the issuance of international clearance in accordance with Annex 3, Article 8, and Annex 3a of the RSTP. In that event that the chairman or a person appointed by him, who must be a member of the committee, may adjudicate as a Single Judge. In this regard it must be noted that decisions of both the PSC and the Single Judge may be appealed before the CAS, which procedure will be discussed later in this book.

Pursuant to Articles 22 and 23 of the RSTP, the PSC committee has general competence with regard to employment-related disputes between a club or an association and a coach of international dimension. However, if there is an independent arbitration tribunal guaranteeing fair proceedings on a national level, not the PSC, but this national committee will be competent to handle the matter.[43]

The PSC is furthermore competent with regard to all other disputes between clubs belonging to different associations that do not fall within the explicit remit of the DRC.[44] Aside from this, the PSC has competency regarding:

[41]RSTP, 2016 edition, Article 22 under f.

[42]The list of members of the PSC is placed on the FIFA website. http://www.fifa.com/about-fifa/committees/committee=1882032/index.html. Accessed 26 July 2016.

[43]This follows from the RSTP, 2016 edition, Article 22 under c.

[44]RSTP, 2016 edition, Article 23 para 1 in conjunction with Article 22 under c and f. In DRC decision a decision by the DRC of 11 March 2005 regarding an international transfer, the DRC decided that it was not competent to handle this matter. In this case there was a financial dispute between the parties resulting from the transfer of a Brazilian player. The DRC had decided earlier that the case at hand should be considered as a dispute over the interpretation and execution of a transfer contract that had been signed between the buying and selling clubs. Therefore, the DRC was of the opinion that these disputes did not fall within their remit and that the PSC was the competent body. DRC 11 March 2005, no. 35671. The PSC is not competent with regard to disputes related to the solidarity mechanism either, which also follows from DRC 28 August 2013, no. 08131586.

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- the written, substantiated request of a player who wishes to exercise his right to change associations;[45]
- any disputes concerning matters related to the protection of minors;[46]

[45]Regulations governing the Application of the Statutes, 2016 edition, Article 8 para 3.

[46]RSTP, 2016 edition, Article 19 paras 4–5 and Annex 2 and 3. Pursuant to Article 19 para 1 RSTP, international transfers of players are only permitted if the player is over the age of 18. However, according to para 2, 3 exceptions to this rule apply: (a) The player's parents move to the country in which the new club is located for reasons not linked to football. (b) The transfer takes place within the territory of the European Union (EU) or European Economic Area (EEA) and the player is aged between 16 and 18. In this case, the new club must fulfil minimum obligations. (c) The player lives no further than 50 km from a national border and the club with which the player wishes to be registered in the neighbouring association is also within 50 km of that border. The maximum distance between the player's domicile and the club's headquarters shall be 100 km. In such cases, the player must continue to live at home and the two associations concerned must give their explicit consent. The conditions of this provision shall also apply to any player who has never previously been registered with a club and is not a national of the country in which he wishes to be registered for the first time. According to para 4, every international transfer according to para 2 and every first registration according to para 3 is subject to the approval of the subcommittee appointed by the PSC for that purpose. The application for approval shall be submitted by the association that wishes to register the player. The former association shall be given the opportunity to submit its position and the sub-committee's approval shall be obtained prior to any request from an association for an ITC and/or a first registration. Any violations of this provision will be sanctioned by the FIFA Disciplinary Committee in accordance with the FIFA Disciplinary Code. In addition to the association that failed to apply to the sub-committee, sanctions may also be imposed on the former association for issuing an ITC without the approval of the sub-committee, as well as on the clubs that reached an agreement for the transfer of a minor. Pursuant to para 5, the procedures for applying to the sub-committee for a first registration and an international transfer of a minor are contained in Annex 2 of the RSTP. Aside from the aforementioned three conditions, there are two other conditions. In the first place, the sub-committee appointed by the PSC has confirmed that a foreign minor who has been living for at least five years in the country where he wishes to be registered at a club for the first time should be considered a national of that country from a sporting point of view. In other words, an application for the registration of a foreign minor under these circumstances is regularly being granted Via FIFA Circular no. 1542, FIFA informed its members regarding changes in the RSTP concerning the provisions on the protection of minors. From the Circular it follows that the wording of Article 19 paras 3 and 4 of the RSTP has been amended in order for it to adequately reflect the well-established jurisprudence of the Sub-Committee of the PSC in relation to the so-called "five-year rule". According to FIFA and following that which is set out in this Circular, the aforementioned rule created by jurisprudence allows for the first registration of a minor player for a club in a territory of a country of which he is not a national, provided that he has lived continuously for at least five years in that territory immediately prior to the intended first registration. Said rule is already included as a separate application in TMS. As such, the current amendment of the provision does not constitute any change to the existing practice and constant jurisprudence. The current Article 19 para 3 of edition 2016 now reads as follows: "The conditions of this article shall also apply to any player who has never previously been registered with a club, is not a national of the country in which he wishes to be registered for the first time and has not lived continuously for at least the last five years in said country." In the current Article 19 para 4 of edition 2016 it is added: "…. as well as every first registration of a foreign minor player who has lived continuously for at least the last five years in the country in which he wishes to be registered ....". Further to this, 2 other conditions can be derived from case CAS 2008/A/1485 *FC Midtjylland A/S v. FIFA*, award of 6 March 2009. The international transfer of minors is allowed in cases where the players concerned could establish without doubt that the reason for relocation to another country was related to their studies, and not to their activity as football players. Further to this, the international transfer is also allowed in cases in which the association of origin and the new club of the players concerned have signed an agreement with the scope of a development programme for young

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- the (withdrawal of a) provisional registration of a player;[47]
- issues in relation to the release of players;[48]
- any claims for recovering solidarity contribution in case of unjustified payment[49]; and
- disputes whereby a match agent is involved.[50]

Footnote 46 (continued)

players under certain strict conditions (agreement on the academic and/or school education, authorisation granted for a limited period of time). In this *Midtjylland* case it was also decided that Article 19 RSTP applies equally to amateur and professional minor players. Article 19 is there to protect minor player without any specification as to the status of these players. For further relevant jurisprudence of the CAS in this regard, see also CAS 2012/A/2862 *FC Girondins de Bordeaux v. FIFA* (Vada II), award of 11 January 2013, from which award it follows that in case a player aged 16 (or 17) years is transferred from outside the EU to a country inside the EU and the player has a European passport, the player is entitled to claim a transfer on the basis of Article 19 para 2 RSTP despite the fact it contains no transfer within the EU. See also CAS 2005/A/955 *Càdiz C.F., SAD v. FIFA and Asociación Parguaya de Fútbol*, award of 30 December 2005, CAS 2007/A/1403 *Real Racing Club de Santander SAD v. Club Estudiantes de la Plata*, order of 12 December 2007, CAS 2005/A/956 *Carlos Javier Acuña Caballero v. FIFA and Asociación Parguaya de Fútbo*l, award of 30 December 2005 and CAS 2013/A/3140 *A. v. Club Atlético de Madrid SAD & Real Federación Española de Fútbol (RFEF) & FIFA*, award of 10 October 2013. In the latter case it was decided that Article 19 RSTP sets key principles designed to protect the interests of minor players. Therefore, it must be applied in a strict, rigorous and consistent manner, which means that there can be no other exceptions to the principle of Article 19 RSTP than those carefully drafted in para 2 of said provision. According to the CAS, Article 19 para 2 lit. a RSTP aims to protect the young player who follows his family moving abroad for personal reasons, and not the parents who follow their child in view to integrate at a club situated abroad. The test is thus, according to the CAS, to assess the true intention and motivation of the player's parents. The CAS decided that the player's parents did not move to Spain for reasons linked to football. See also TAS 2011/A/2494 *FC Girondins de Bordeaux c. FIFA* (Vada I), award of 22 December 2011. In the latter award the CAS stressed that the rationale of Article 19 para 2 lit. a RSTP is to allow a minor player to follow his or her family and not to allow a family to follow its child. In CAS 2014/A/3793 *FC Barcelona v. FIFA*, award of 24 April 2015 (operative part of 30 December 2014). In the latter case, it was established by the CAS that FC Barcelona had breached the rules regarding the protection of minors and the registration of minors attending football academies, Article 19 and Article 19bis of the RSTP. See also CAS 2014/A/3611 *Real Madrid FC v. FIFA*, award of 27 February 2015.

[47]RSTP, 2016 edition, Annex 3, Article 8.2 paras 6–7. See also CAS 2011/A/2354 *Elmir Muhic v. FIFA*, award of 24 August 2011. See also Wild 2011, p. 263, in which book reference is made to the cases CAS 2003/O/530 *AJ Auxerre v. Valencia and M. Sissoko*, award of 27 August 2004, and CAS 2004/A/791 *La SASP Le Havre Athletic Club and l'Association Le Havre Athletic Club* v. *FIFA and Newcastle United and M. Charles N'Zogbia*, award of 27 October 2005 (reference to this award was made in DRC 28 September 2007, no. 97938; see also DRC 9 November 2004, no. 114667–09, and DRC 26 November 2004, no. 114667–26).

[48]RSTP, 2016 edition, Annex 1, Article 6 para 2 in conjunction with 3.

[49]If the new club paid the entire amount of compensation to the former club without having deducted the 5 % solidarity contribution, the claim for recovering the amount paid in excess would have to be filed with the PSC, which can be based on Article 22 under f of RSTP, 2016 edition. See also FIFA Commentary, explanation Article 24, p. 73, footnote 108.

[50]Procedural Rules, 2015 edition, Article 6 para 1. See also the FIFA website. http://resources.fifa.com/mm/document/affederation/administration/02/55/56/57/rulesgoverningtheproceduresofthepscandthedrc(april2015)_neutral.pdf. Accessed 26 July 2016. A distinction is made between "club-club-disputes", "coach-disputes" and "players' and match agent disputes".

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In addition to the above, it must be mentioned that the PSC also had competence before 1 April 2015 in the event that a national association had rejected an applicant for a players' agent's licence fairly, and it was competent in case it concerned a dispute in which a players' agent had provided services to a player.[51]

## *2.4.3 The DRC*

### 2.4.3.1 General

As stated above, the jurisdiction of the DRC is defined in Article 22 and Article 24 of the RSTP. With regard to its jurisdiction and with reference to Article 3 para 1 of the Procedural Rules, also under the part "*considerations*" of the decision, and after the Chamber has determined exactly which edition of the Procedural Rules is applicable to the matter at hand, subsequently (mostly in the second paragraph of the "*considerations*"), and before entering into the substance of the matter, the DRC examines its jurisdiction in light of Articles 22 to 24 of the RSTP, 2016 edition.[52]

According to the above and the current version of the RSTP, 2016 edition, the DRC will therefore adjudicate on the disputes in accordance with these Articles 22 to 24, however, with the exception of the issuance of an ITC. Although it is not explicitly mentioned in the RSTP, and as already mentioned in the above, contractual disputes related to the *issuance* of an ITC will be settled by the PSC.[53]

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[51]In the decisions regarding players' agents (currently named "intermediaries"), reference was made to Article 30 para 2 of the former Players' Agents Regulations ("PAR"), 2008 edition, from which it followed that FIFA was competent to deal with international disputes in connection with the activities of licensed players' agents, i.e. individuals who hold a valid players' agent license issued by the relevant member association. Pursuant to the aforementioned provision, in the case of international disputes in connection with the activity of players' agents, a request for arbitration proceedings could be lodged with the PSC. See also PAR, 2008 edition, Article 4 para 3. Aside from this, the PSC approved the players' agents regulations of the national associations, according to the preamble of the PAR. Following Article 1 para 3 of the former PAR, 2008 edition, it did not cover any services which may be provided by players' agents to other parties such as managers or coaches. Furthermore, the PSC did not have jurisdiction in a dispute between an agent and his client, if the representation contract(s) was (were) not concluded between the player/club and the agent personally (which principle applies even in cases where the agent is the sole proprietor of the company). In other words, it was an ongoing practice of the PSC that they will not appear to be in a position to hear claims of players' agents against clubs when the contract at the base of the relevant dispute was concluded with a company. Lastly, it is interesting to note that the PSC or the Single Judge (as the case may be) did not hear any case subject to these regulations if more than 2 years had lapsed after the event giving rise to the dispute, or more than six months had lapsed since the players' agent concerned had terminated his activity. The application of this time limit was examined *ex officio* in each individual case by the PSC.

[52]See for example DRC 22 July 2004, no. 74557.

[53]This can be derived from the RSTP, 2016 edition, Article 24 para 1, and Annex 3, Article 8.2 paras 6–7, which stated, among other things, that the professional player, the former club and/or the new club are entitled and have been given the facility to file a claim with FIFA in accordance with Article 22 of the RSTP.

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According to Article 22 in conjunction with 24 of the RSTP, the DRC has jurisdiction with regard to:

1. disputes between clubs and players in relation to the maintenance of contractual stability where there has been an ITC request and a claim from an interested party in relation to said ITC request, in particular regarding the issue of the ITC, sporting sanctions or compensation for breach of contract (the so-called "*sub a procedure*");[54]
2. employment-related disputes between a player and a club of an international dimension (the so-called "*sub b procedure*"); the aforementioned parties may, however, explicitly opt in writing for such disputes to be decided by an independent arbitration tribunal that has been established at national level within the framework of the association and/or a collective bargaining agreement. Any such arbitration clause must be included either directly in the contract or in a collective bargaining agreement applicable to the parties. The independent national arbitration tribunal must guarantee fair proceedings and respect the principle of equal representation of players and clubs;[55]
3. disputes relating to training compensation and the solidarity mechanism between clubs belonging to different associations;[56] and
4. disputes relating to the solidarity mechanism between clubs belonging to the same association provided that the transfer of a player at the basis of the dispute occurs between clubs belonging to different associations.[57]

In view of the above and as referred to in Chap. 1 of this book, it must be mentioned that in the 2015 edition an amendment with regard to Article 22 under b was added, which concerned the division of jurisdiction between the DRC and NDRC's, in order to better clarify the pertinent aspects. In the 2014 edition and former editions of the RSTP, Article 22 under b was described less extensively as it was mentioned in the former Article 22 under b that the DRC was competent in case of employment-related disputes between a player and a club of an international dimension, unless an independent arbitration tribunal guaranteeing fair proceedings and respecting the principle of equal representation of players and clubs has been established at national level within the framework of the association and/or a collective bargaining agreement.[58]

As regards point 4 above, and as mentioned previously in Chap. 1, via FIFA Circular no. 1500, as from 1 October 2015, a new system has been created to properly manage claims through the TMS regarding training compensation and the solidarity mechanism. As a consequence to all of this, a sub-committee has been appointed by the DRC, which comprises only DRC members, each of whom is

[54]RSTP, 2016 edition, Article 22 under a.

[55]RSTP, 2016 edition, Article 22 under b.

[56]RSTP, 2016 edition, Article 22 under d.

[57]RSTP, 2016 edition, Article 22 under e.

[58]RSTP, 2016 edition, Article 22 under b.

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able to pass a decision as a Single Judge. Therefore, Article 24 of the RSTP has been amended in such a way that a new para 3 has been included in this provision, from which it follows that training compensation and the solidarity mechanism claims handled through TMS will be decided on by the sub-committee of the DRC. As mentioned, the exact procedure is described in Annex 6 of the RSP, 2016 edition.

In the following paragraphs, the above 4 special cases that fall within the remit of the DRC will be discussed and reviewed in more detail on the understanding that the DRC jurisprudence related to Article 22 under b is related to former editions as from the 2014 edition. However, only with regard to the abovementioned matters will the DRC be competent to decide upon the case. For example, in a decision by the DRC of 11 March 2005 regarding an international transfer, the DRC decided that it was not competent to handle this matter. In this case there was a financial dispute between the parties resulting from the transfer of a Brazilian player. The DRC decided earlier that the case at hand should be considered as a dispute about the interpretation and execution of a transfer contract that had been signed between the buying and selling clubs. Therefore, the DRC was of the opinion that these disputes did not fall within their remit and that the PSC was the competent body. The Chamber finally concluded that it was not competent to deal with this claim, which should be forwarded to the next available meeting of the PSC, or, alternatively, the Single Judge of the PSC.[59]

#### 2.4.3.2 "*Sub a Procedure*": ITC Request

In the first place, the DRC is competent in case it concerns a so-called "*sub a procedure*". Pursuant to Article 22 sub a of the RSTP, the DRC is competent in case of disputes between players and clubs in relation to the maintenance of contractual stability where there has been an ITC request and a claim from an interested party in relation to said ITC request, in particular regarding the issue of the ITC, sporting sanctions or compensation for breach of contract. In other words, if there is an ITC request from a national association, the DRC will automatically have jurisdiction.

For the sake of completeness, a player who is registered with a club that is affiliated to an association will not be eligible to play for a club affiliated to a different association, unless an ITC has been issued by the former association and received by the new association. Until the ITC has been received by the new association, the professional is not eligible to play in official matches for his new club. As an example, if a player is transferred from the German professional football club Bayern München to the Italian professional football club AC Milan, the Italian football association will ask for an ITC from the German football association.

[59]DRC 11 March 2005, no. 35671. As said previously, if there is doubt with regard to the jurisdiction of the PSC or the DRC, the chairman of the PSC decides which body (the DRC or the PSC) will eventually have jurisdiction. See FIFA Commentary, explanation Article 23, p. 66.

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Within the following seven days after the date of the ITC request, the German football association will issue the ITC to the Italian football association or inform the Italian association that the ITC cannot be issued because the contract between Bayern München and the player concerned has not expired or that there has been no mutual agreement regarding its termination.[60]

In my opinion, the fact that the DRC automatically has jurisdiction in the case of an ITC request and in the event of a claim from an interested party in relation to such ITC request, could promote (the risk of) "*forum shopping*". The "only" action one party has to take to establish jurisdiction of the DRC is to request an ITC. The possible negative effect is explained in the following situation. Because decisions by certain national arbitral tribunals sometimes differ from decisions by the DRC with regard to the same subject, obviously parties would prefer to bring their claim to the instance where they expect to be most successful. An example is the unilateral extension option. The Dutch KNVB Arbitration Tribunal decided twice that the unilateral extension in the contract of the player is valid. For example, in the case between Trabelsi and Ajax, the extension option was valid. However, if Arsenal, who had shown interest in this player at that time, had informed Ajax that it was interested in the player, then the English Football Association could have requested an ITC from the Dutch Football Association. The DRC would then automatically be competent to decide on the same clause, the same unilateral extension option in the same contract. In line with its ongoing jurisprudence with regard to the validity of the unilateral extension option, it was not unlikely that the DRC would have decided that the same unilateral extension option might be invalid. In other words, if the player and the potential new club Arsenal created a "*FIFA forum*", the outcome of the same case might have been different and might have been in favour of the player.[61]

### 2.4.3.3 "*Sub b Procedure*": Employment-Related Disputes

#### 2.4.3.3.1 General

In the second place, aside from the *sub a procedure*, according to Article 24 para 1 and Article 22 under b of the RSTP, 2016 edition, the Chamber is also competent if it concerns an employment-related dispute between a player and a club of international dimension, the so-called "*sub b procedure*". In this regard, in Article 22 under b, FIFA added that the aforementioned parties may, however, explicitly opt in writing for such disputes to be decided on by an independent arbitration tribunal

[60]RSTP, 2016 edition, Annex 3, Administrative Procedure Governing the Transfer of Players between Associations, Article 8.1 para 1, and Article 8.2 para 4 under a and b.

[61]Aside from the aspect and potential risk of "*forum shopping*", if FIFA would have decided differently as compared to the outcome of a national arbitrational court, this would also lead to an undesirable situation which is not in line with the main purpose of FIFA, namely to create uniformity, equality and certainty for the international football world.

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that has been established on a national level within the framework of the association and/or a collective bargaining agreement. Any such arbitration clause must be included either directly in the contract or in a collective bargaining agreement applicable to the parties. The independent national arbitration tribunal must guarantee fair proceedings and furthermore respect the principle of equal representation of players and clubs.[62] In this regard, it must be noted that any defence or lack of jurisdiction must be raised prior to a defence on the merits, as follows from the jurisprudence of the DRC.

Several elements mentioned in Article 22 under b of the RSTP, 2016 edition, are interesting to take note of, on the understanding that this Article has been amended (extended) in the 2015 edition. As we will see, the ongoing jurisprudence of the DRC with regard to Article 22 under b of the RSTP would more than likely have led to this amendment in 2015. The new amendments are a kind of codification of the jurisprudence. In this respect, it must be mentioned that the jurisprudence of the DRC relating to Article 22 under b is only related to former editions of the RSTP. However, several aspects in connection with Article 22 under b of the RSTP, are interesting and will be brought to the readers' attention.

Firstly, the DRC is competent in the event of an "*employment-related dispute*".

In a decision by the DRC of 25 August 2006, the DRC emphasized that it has no competence to deal with disputes related to image rights and therefore the player had to be referred to the competent national tribunals.[63] However, with regard to image rights (related) disputes, the DRC Judge also decided (in another case) that such conclusion might be different if specific elements of the separate agreement suggest that it was in fact meant to be part of the actual employment relationship.[64]

So too in a case of 13 December 2013, the DRC Judge referred to the jurisprudence of the Chamber in this regard, which has established that if there are separate agreements, as a general rule, the Chamber tends to consider the agreement on image rights as such and does not have the competence to deal with it.[65] However, such conclusion might be different if specific elements of the separate agreement suggest that it was in fact meant to be part of the actual employment relationship. In the case at hand, the DRC Judge concluded that such elements appear to exist. In particular, the agreement contains *inter alia* provisions regarding bonuses directly related to the achievement of sporting objectives, which are typical for employment contracts and not for image rights agreements. Also, the image rights agreement contains provisions regarding accommodation, flight tickets and the use of a car, which again, are typical for employment contracts. The DRC Judge decided not to consider the image rights agreement as such, but determined that

[62]RSTP, 2016 edition, Article 22 under b. See also CAS 2008/A/1517 *Ionikos FC v. C.*, award of 23 February 2009.

[63]DRC 25 August 2006, no. 86613. See also 12 March 2009, no. 39274.

[64]DRC 13 December 2013, no. 12131045. See also Blackshaw et al. 2005.

[65]DRC 13 December 2013, no. 12132433.

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said agreement was in fact an additional agreement to the employment contract instead. In a DRC case of 17 January 2014, the DRC decided accordingly, and established that the image rights agreement was in fact an additional agreement to the employment contract instead.[66] With regard to the reimbursement of stolen goods, the DRC Judge referred to Article 22 of the RSTP and consequently emphasized that, as a general rule, it is not competent to decide upon matters of insurance, but that such affairs fall under the jurisdiction of the competent national authorities. Also with regard to insurance matters, the DRC is not competent, as decided in its case of 11 March 2011.[67]

In a case relating to a "training agreement", the DRC concluded that the training agreement did not constitute an employment contract but rather an instrument intended to safeguard and protect the rights of a player in formation.[68] The DRC underlined in this regard that its jurisdiction was limited to considering disputes arising from an "employment contract". As a result, the Chamber adjudicated that it was not competent to decide on the consequences of a possible breach of the training agreement or of the non-respect of the formal prerequisites for an early termination of the relevant agreement concluded between the player and the club. Yet, it is important to determine that the dispute is actually "employment-related", otherwise the DRC will decided that it is not competent to deal with the case. The DRC also lacks competence to deal with disputes arising out of rent-contracts.[69]

In its decision of 7 June 2013, the Chamber acknowledged that the respondent contested the competence of FIFA's deciding bodies to adjudicate on the present matter, asserting that the dispute was not an "*employment-related dispute*".[70] However, the Chamber considered that the 2 agreements signed in August 2009 had not put an end to the contractual relationship between the parties, since the claimant remained bound to the respondent, with the latter trying to loan the claimant to another club. Since no loan was eventually agreed upon, the claimant continued to be contractually bound to the respondent. In this respect, the Chamber deemed that the conclusion of the agreement in August 2009 should be considered in light of the employment contract signed in July 2008, the former being a direct consequence and closely related to the signing of the latter. The Chamber was of the opinion that the present dispute was an employment-related dispute that fell under its jurisdiction.

[66]DRC 17 January 2014, no. 114396. See also DRC 30 August 2013, no. 08133402. See also DRC 10 February 2015, no. 02151030 and DRC 28 March 2014, no. 03141211. In the latter case, the DRC referred to its jurisprudence according to which, when an agreement bearing the title "image rights agreement" also includes typical elements of an employment contract, this agreement is considered as part of the employment contract. The Chamber considered the player's claim to be admissible. See also CAS 2014/A/3579 *Anorthosis Famagusta FC v. Emanuel Perrone*, award of 11 May 2015 and CAS 2015/A/3923 *Fábio Rochemback v. Dalian Aerbin FC*, award of 30 October 2015.

[67]DRC 11 March 2011, no. 311896.

[68]DRC 26 November 2004, no. 114667–26, and DRC 9 November 2004, no. 114667–09.

[69]DRC 3 September 2015, no. 091511705.

[70]DRC 7 June 2013, no. 06132378.

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In the past, the DRC jurisprudence showed that parties were able to claim financial damages based on the principle of *culpa in contrahendo* according to which it follows that parties who enter into negotiations may end up paying damages as a result of terminating negotiations without *just cause*. For example, in a decision of 12 January 2006, the DRC decided that, the fact that parties enter into negotiations, could result in the obligation to pay damages as a result of terminating negotiations without *just cause*.[71] Also, in its decision of 26 October 2006, the Chamber concluded that no valid employment contract was concluded between the parties, but the factual relationship had to be taken into consideration.[72] The player concerned brought his claim before the DRC, requesting that it be declared that a valid employment contract had been concluded between him and the club concerned. The Chamber went on to state that the aforementioned actual circumstances of the present matter, particularly the participation of the player in three preparatory matches with the club, led to the conclusion that a factual employment relationship should be taken into consideration. Given that a factual employment relationship had been established between the player and the club in which the player had rendered services to the club, and given the fact that the player did not bear any responsibility for the actual termination of the aforementioned factual employment relationship or the non-finalisation of a formal employment contract, the Chamber deemed that the player was entitled to receive compensation from the club, despite the fact that no formal and valid written employment contract had been concluded between the parties. The Chamber deemed that on account of its stance, the club concerned had to be called to account for its responsibilities pertaining to failure of the envisaged transaction.[73] Also, in its decision of 15 February 2008, the DRC referred to the principle of *culpa in contrahendo*.[74] In this case it was decided by the Chamber that the concept of *culpa in contrahendo* imposes a mutual duty of care on parties negotiating a contract and can, under certain circumstances, result in the liability of a party preventing a contract from being concluded for financial damages suffered by the other party whilst relying on the validity of the forthcoming contract.

As from 2008 no decisions of the DRC are published from which it follows that compensation can be awarded on the so-called principle of *culpa in contrahendo*. For example, in the DRC decision of 21 September 2012, the Chamber had to decide to whether or not an employment contract between the parties had been concluded.[75] The application of the "*burden of proof*" principle in the present matter, led the members of the DRC to conclude that it was up to the player to prove that the employment contract, on the basis of which he claims compensation for breach of contract from the respondent, indeed existed. Generally, the DRC held

[71]DRC 12 January 2006, no. 16830.

[72]DRC 26 October 2006, no. 1061318. See also DRC 12 October 2006, no. 1061118.

[73]DRC 23 February 2007, no. 27409.

[74]DRC 15 February 2008, no. 28079.

[75]DRC 21 September 2012, no. 912213.

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that it could not assume that an employment contract had been concluded by and between the parties simply based on circumstances, which may be likely, but does not provide certainty of the signing of a contract. In addition, the Chamber agreed that it must be very careful in the acceptance of documents, other than the employment contract, as evidence for the conclusion of a contract. In respect of the aforegoing, the Chamber had to conclude that the documents presented by the claimant did not prove beyond doubt that the respondent and the claimant had validly entered into an employment contract. Furthermore, even if it would have been possible to establish, on the basis of the documents on file other than an employment contract, that the parties had entered into a labour agreement, the Chamber wished to highlight that it would need to be in possession of such labour agreement in order to be able to properly assess the claim of the claimant.[76]

Also, in a decision by the DRC of 28 June 2013, the DRC concluded that the parties had not signed a valid and binding employment contract, since the document named "*Variazione di Tesseramento*" lacks all the *"essentialia negotii"* to be considered a valid employment contract.[77] The DRC decided that, since no employment contract was concluded between the claimant and the player, there was no possibility for the Chamber to assess whether or not such alleged employment contract had been terminated by the player. Therefore, the complaint had to be rejected.

As can be derived from Article 22 sub b of the RSTP, 2016 edition, two further aspects relating to the employment-related disputes should be considered and must be taken into consideration with regard to the jurisdiction of the DRC, namely (a) whether there is international dimension, and also (b) whether the national association concerned has an independent arbitral tribunal guaranteeing fair proceedings and respecting the principle of equal representation of players and clubs within the framework of the association and/or a collective bargaining agreement.

#### 2.4.3.3.2 International Dimension

With regard to the jurisdiction of the DRC in relation to employment-related disputes, another requirement according to Article 22 under b of the RSTP, 2016 edition, is the presence of the "*international dimension*". The DRC has handed down numerous decisions in which the term "*international dimension*" came up for consideration.[78] From the consistent jurisprudence of the DRC it can be derived that the dispute has an international dimension (and the DRC is thus competent in the

[76]See also PSC 23 September 2014, no. 09141041.

[77]DRC 28 June 2013, no. 06132647.

[78]DRC 1 June 2005, no. 65349, DRC 23 March 2006, no. 631290, DRC 27 April 2006, no. 46610, DRC 17 August 2006, no. 86174, and DRC 26 October 2006, no. 1061318.

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concept of the *sub b procedure* to adjudicate and to handle a case) when 2 parties have different nationalities and then claim against each other.[79]

In a decision of 2 November 2005, the DRC also emphasized that a dispute has an international dimension when 2 parties of clearly different nationalities claim against each other. However, when both parties have the same nationality, the dispute will be considered to be national or internal, which mean that the rules and regulations of the member association will be applied to the matter, and the deciding bodies, in accordance with the relevant provisions, are obliged to decide on the issue.

In a decision of 3 October 2008, the DRC also referred to the international dimension.[80] The DRC underlined that, as a general rule, the international dimension is represented by the fact that the player of the relevant club affiliated to the association, is not a national of that country. The DRC was of the opinion that the dispute was between a club and a player from the same country. Furthermore, the DRC emphasized that the dispute did not arise from the rights and obligations agreed upon in an employment contract. As a result, and due to the lack of an international dimension, the DRC decided that the present claim was inadmissible.

With regard to this "*international dimension*", in the case of 7 February 2014, the DRC decided that when both parties have the same nationality, the dispute shall be considered as national or internal, with the consequence that the rules and

[79]In the concept of Article 22 under a of the RSTP, 2016 edition, the so-called "*sub a procedure*", FIFA Commentary states that when a player signs for a club affiliated to *another* association as a result of an employment-related dispute, it is irrelevant whether the player has the nationality of the country where the former club was domiciled. The registration of the player following the termination of the contract determines whether the dispute is national or international. For example, if the player registers at a new club in the same association where his former club is domiciled, the dispute is national. If the player registers at a club in another association and there is an ITC request, the dispute is international. According to FIFA Commentary, such international disputes are referred to the DRC with regard to the substance of the matter. See FIFA Commentary, explanation Article 22, p. 66. For example, in a DRC decision of 9 November 2004, the player had concluded "*a contrat stagiaire*" with a French club, valid from 1 July 2003 until 30 June 2004. After the contract expired, the player signed an employment contract with an English club. On 13 August 2004, the English Football Association asked the French Football Federation to issue the ITC for the player. The French Football Federation refused to issue the ITC. On 19 August 2004, the English Football Association asked FIFA to order the French Football Federation to issue the ITC. On 2 September 2004, FIFA ordered the French Football Federation to issue the ITC. In the same letter, FIFA authorised the English Football Association to provisionally register the player. On 14 September 2004, the French club appealed to the CAS and asked for a suspension of the registration and on 6 October 2004 the CAS suspended the registration of the English Football Association until the final DRC decision. The DRC considered that it was competent to judge in this case, because of the international dimension. In line with the above, it is clear and it explicitly follows that the DRC may adjudicate on all cases and disputes where an ITC is involved. See also DRC 9 November 2004, no. 114667–09, and DRC 26 November 2004, no. 114667–26. The DRC further decided that, before it takes a final decision, it will give the parties the option to resolve their problems amicably. If the parties cannot reach an amicable settlement, then the Chamber will reconsider the case at a future meeting.

[80]DRC 3 October 2008, no. 1081355.

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regulations of the association concerned shall be applied to the matter, and the deciding bodies are to decide on the issue in accordance with the relevant provisions.[81] If FIFA's deciding body would deal with such internal matters, the internal competence of FIFA members would be violated. These principles of delimitation between the competence of FIFA and the competence of the associations, are primordial for the reciprocal recognition of the organizations and autonomy of FIFA and the member associations. The Chamber turned its attention to circumstances surrounding the double citizenship of a player. The Chamber has observed that more and more players with two or more nationalities have appeared in the world of football, and that FIFA and its deciding bodies are confronted with an augmented number of cases, which concern double citizenship. In this respect, the DRC emphasized that a player's nationality is expressed by his passport(s) or identification documents, but that in the framework of plural citizenship a player could, under certain circumstances, possibly invoke a "*sportive nationality*". The "*sportive nationality*", generally, is linked to the concrete situation of the registration of a player at a club affiliated to the specific association domiciled in a country of which the player also is a national, in compliance with the rules of registration and eligibility for a club of the association concerned. In such situations, both the club and the player may reap benefits from the "*sportive nationality*". For example, the player being registered as a "*local player*" does not charge any quota of foreign players and would have no difficulty in obtaining a visa or work permit, if at all required. Furthermore, any possible restriction on the number of foreign players in the country would not be applicable in such situation. Obviously, such circumstances are to the benefit of both the club and the player. The Chamber recalled the crucial fact that the claimant, who holds the nationality of both country P and country J, was registered with the respondent as a country P player and not as a country J player. The Chamber then turned to the claimant's argument in accordance with which, on the basis of his country J nationality, the matter at stake should be dealt with by FIFA and not by the national deciding bodies of country P. In this respect, the DRC analysed the employment contract and established that such contract was concluded by the parties making reference to the country P nationality of the claimant. Moreover, the DRC noted that the Football Association of country P confirmed that the claimant was registered, during the term of the contract, as a country P national and that he even played for the national team of country P. Especially due to the fact that the country P/country J claimant was registered as a country P player with the respondent, the case of the

[81]DRC 7 February 2014, no. 02143217. See also DRC 25 April 2014, no. 04143063. In the latter case, the DRC also pointed out that when both parties have the same nationality, the dispute shall be considered as national or internal, with the consequence that the rules and regulations of the association concerned shall be applied to the matter, and the deciding bodies are to decide on the issue in accordance with the relevant provisions. If FIFA's deciding body would deal with such an internal matter, the internal competence of FIFA members would be violated. These principles of delimitation between the competence of FIFA and the competence of the associations are primordial for the reciprocal recognition of the organizations and autonomy of FIFA and its member associations.

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claimant in question comes under the jurisdiction of the football association in the country concerned (i.e. country P), as a result of which FIFA cannot intervene due to a lack of jurisdiction over the matter. Consequently, the DRC finally decided in the matter at hand, that the present claim was inadmissible.

In another more recent unpublished case of the DRC of 25 April 2014, the DRC also turned its attention to circumstances surrounding the double citizenship op a player. The DRC has observed that more and more players with two or more nationalities have appeared in the world of football, and that FIFA and its deciding bodies are confronted with an augmented number of cases, which concern double citizenship. In this case, the DRC emphasized that a player's nationality is expressed by his passport(s) or identification documents, but that in the framework of plural citizenship a player could, under certain circumstances, possibly invoke a "*sportive nationality*". The "*sportive nationality*", generally, is linked to the concrete situation of the registration of a player at a club affiliated to the specific association domiciled in a country of which the player is also a national, in compliance with the rules of registration and eligibility for a club of the association concerned. In such situations, both the club and the player may reap benefits from the "*sportive nationality*". For example, the player being registered as a "*local player*" does not charge any quota of foreign players and would have no difficulty in obtaining a visa or a work permit, if at all required. Furthermore, any possible restriction on the number of foreign players in the country would not be applicable in such situation. Obviously, such circumstances are to the benefit of both the club and the player. In this case, it was decisive under which citizenship the player actually signed the contract and under which citizenship he was registered with the club concerned. In this case, the club was affiliated to an association of a country, for which the player had the citizenship of that same country. There was no international dimension as the player was formally not a foreigner in the country concerned. As a result thereof, the DRC had no jurisdiction in this matter.

In line with the above and according to several other DRC decisions, FIFA bodies such as the DRC are competent to deal with disputes related to the transfer of a player exclusively where there is a so-called *international impact*.[82] In several cases, the DRC refers to its own well-established jurisprudence according to which, in employment-related disputes between a club and a player that has international dimension, the main criterion is that the parties do not belong to the same country. In line with the above, the international dimension is simply represented by the fact that the player concerned is a foreigner in the country concerned. The jurisdiction of FIFA will then be established and the dispute will then fall within the remit of the DRC.[83]

[82]DRC 26 November 2004, no. 114667–26, and DRC 1 June 2005, no. 65349.

[83]FIFA Commentary, explanation Article 22, p. 66.

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#### 2.4.3.3.3 Independent Arbitration Tribunal

Aside from the "*international dimension*" discussed above, another important requirement in relation to employment-related disputes, according to Article 22 under b of the RSTP, is that the Chamber only has jurisdiction when no independent arbitration tribunal within the framework of the association and/or a collective bargaining agreement exists on a national level, and that fair proceedings and respecting the principle of equal representation of players and clubs is guaranteed.[84] In other words, the DRC has no jurisdiction and a *sub b procedure* cannot be initiated, if an independent arbitration tribunal is established on a national level and respects the principles of equal representation of players and clubs with an independent chairman within the framework of the association and/or a collective bargaining agreement.[85]

Following consistent jurisprudence of the DRC, a valid arbitration clause referring to an arbitration court on a national level, must explicitly be included in the employment contract. This can also be derived from Article 22 under b of the RSTP, 2016 edition since it was added as from the 2015 edition that the parties may, however, (and if they want the DRC to be competent, must) explicitly opt in writing for such disputes to be decided by an independent arbitration tribunal that has been established on a national level within the framework of the association and/or a collective bargaining agreement. In other words, a clear reference to the competence of the national arbitration tribunal must be included in the employment contract. This can be inferred and follows from the well-established jurisprudence of the DRC.

For example, in its decision of 2 November 2007 the Chamber decided, that following a general principle of arbitration procedures without a valid arbitration agreement, the competence of a specific arbitration body per se cannot be established.[86]

A clear and explicit reference to the specific arbitration body that will be the competent body to adjudicate on the pertinent matter must be included in the employment contract. The player must be aware at the time of signing the contract that the parties will be submitting potential disputes related to their employment relationships to this body.[87] If the contract is not provided with such a clause, it is not the national arbitration court, but the DRC who will be competent to handle the case. For example, in a decision of 17 August 2006, the DRC decided that the competence of a national body must be explicitly stipulated by the parties in the relevant contract, at least with a clear reference to the national regulations providing for such competence.[88] It is therefore strongly recommended not only to

[84]RSTP, 2016 edition, Article 22 under b in conjunction with Article 24.

[85]DRC 17 August 2006, no. 861174.

[86]DRC 2 November 2007, no. 2117.

[87]FIFA Commentary, explanation Article 22, remark 101, p. 66.

[88]DRC 17 August 2006, no. 86999.

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explicitly provide an arbitration clause in the contract, but also to make a clear reference to the national regulations providing for such competence if the parties prefer to refer their dispute to the DRC. For example, in a case before the Chamber of 17 August 2012, the contract concerned clearly did not refer to a national dispute resolution chamber or any similar arbitration body as meant in Article 22 of the RSTP. Therefore, the Chamber finally deemed that said clause did not constitute an arbitration clause, but rather a clause concerning a choice of law.[89]

In its case of 6 March 2013, the DRC Judge was of the opinion that it was competent to handle the case between the parties and referred to the contents of a relevant contract and agreement and underlined that it did not contain any jurisdiction clause, i.e. both the contract and the agreement did not contain a provision referring to the competence of any national dispute resolution chamber or any similar arbitration body of the country C Football Association for disputes arising from the execution of the contract or agreement. Therefore, the DRC Judge deemed it obvious that the parties in the present dispute had never agreed to submit any possible dispute to the relevant arbitration bodies of the country C Football Association.[90]

From the DRC case of 17 January 2014 it appeared, that a reference was made by the parties to a collective bargaining agreement, in which provisions for the dispute resolution body were contained, was not valid according to the DRC.[91]

Multiple decisions come to the fore where the parties did not provide the contract with a clear arbitration clause. In these decisions the DRC decided that the arbitration clauses were rather vague. For example, in a DRC decision of 6 March 2013, the DRC Judge acknowledged that the respondent contested the competence of FIFA's deciding bodies on the basis of Article 3 a) of the contract, highlighting that the contract parties had agreed to submit any dispute to the "*relevant committee*" of the country C Football Association.[92] However, the DRC Judge outlined in the matter at hand that the contents of the relevant provision regarding the arbitration was rather vague and that said clause did not explicitly refer to a national dispute resolution chamber or any similar arbitration body in the sense of Article 22 under b of the RSTP. As a result thereof, the Chamber decided it was competent.[93]

In the decision of the Chamber of 27 February 2014, the DRC found that the arbitration clause was clear.[94] With regard to the contract, the DRC analysed whether it was competent to deal with disputes arising from this contract and referred to Article 22 under b. The DRC established that it was not competent to

[89]DRC 17 August 2012, no. 8122302.

[90]DRC 6 March 2013, no. 031322423. See also DRC 27 February 2014, no. 02143259.

[91]DRC 17 January 2014, no. 01143276.

[92]See also DRC 28 March 2014, no. 03142693, and DRC 28 March 2014, no. 03141211.

[93]DRC 6 March 2013, no. 03132697. See also DRC 26 October 2012, no. 10121653, DRC 25 October 2012, no. 10121186, DRC 7 June 2013, no. 06131674, and DRC 15 March 2013, no. 03132656.

[94]DRC 27 February 2014, no. 02142682.

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adjudicate on this specific case since (a) the jurisdiction clause in the contract was clear and exclusive in favour of the PEEOD and the Court of Arbitration of the country G Football Federation; and (b) the CAS confirmed that the relevant country G deciding bodies fulfilled the requirements of equal representation and having an independent chairman and guaranteeing fair proceedings, i.e. the relevant country G deciding bodies were therefore competent to adjudicate on disputes between players and clubs.[95]

Secondly, it is important to be aware that parties must actually invoke the arbitration clause. For example, in a decision of 10 June 2004, the DRC decided that it was also competent to deal with a dispute, "*even if written agreements signed between the parties involved in the dispute contain a clause by means of which the jurisdiction of another body is referred to*". In this case, neither the player nor the club had invoked the relevant clause in their claim or response to the claim.[96] In a decision of 26 November 2004 with regard to the same issue, the Chamber decided accordingly.[97] In a more recent case of 31 October 2013, the DRC decided it was competent to decide upon the case since the claimant did not contest the competency.[98]

In the third place, we note the fact that it is of the utmost importance that the independent arbitration tribunal, established on a national level, respects the principles of equal representation of players and clubs with an independent chairman within the framework of the association and/or a collective bargaining agreement. In this regard, it is well-established jurisprudence of the DRC that even if the contract at the basis of the present dispute would have included a valid and clear arbitration clause in favour of a national dispute resolution, the respondent referring to this clause must be able to prove that, in fact, the national dispute resolution chamber meets the minimum procedural standards for independent arbitration tribunals as laid down in Article 22 under b of the RSTP, in FIFA Circular no. 1010 as well as in the FIFA National Dispute Resolution Chamber Standard Regulations (NDRC Regulations). In FIFA Circular no. 1010, dated 20 December 2005, it explicitly states that "*the parties must have equal influence over the appointment of arbitrators. This means, for example, that every party shall have the right to appoint an arbitrator and the two appointed arbitrators appoint the chairman of the arbitration tribunal*". Furthermore, in said FIFA Circular 1010 it also states that "*where arbitrators are to be selected from a predetermined list, every interest group that is represented must be able to exercise equal influence over the compilation of the arbitrator list*".

The DRC committees refer in their decisions to the general principle of equal representation of players as well as of clubs, and in this regard, emphasizes that

[95]See DRC 17 January 2014, no. 0114044.

[96]DRC 10 June 2004, no. 64357.

[97]DRC 26 November 2004, no. 114628, DRC 11 March 2005, no. 35284, DRC 1 June 2005, no. 65412, DRC 1 June 2005, no. 65414, and DRC 17 August 2006, no. 86833.

[98]DRC 31 October 2013, no. 10131629.

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this principle is one of the most fundamental elements to be fulfilled for a national dispute resolution chamber to be recognized. For example, in the case before the DRC of 17 August 2012, the Chamber stressed that even if the contract would have included a valid arbitration clause, the respondent was unable to prove that the said national DRC met the minimum procedural standards for independent arbitration tribunals as laid down in the RSTP. The national regulations did not meet the principle of equal representation as established by FIFA. In conclusion, the DRC finally assumed that the claim concerned was admissible.[99]

It is the party that refers to the arbitration clause and objects to FIFA's competence (and thus not the party that contests the national body's competence) that must prove that the national dispute resolution chamber meets the minimum procedural standards for independent arbitration tribunals as laid down in Article 22 sub b of the RSTP, in FIFA Circular no. 1010, as well as in the FIFA National Dispute Resolution Chamber Standard Regulations (NDRC Regulations). In that respect, the party must provide FIFA with the relevant documents to prove that a national body is competent to deal with the case in an official FIFA language.

In the DRC case of 6 March 2013, the DRC Judge deemed that it was obvious that the parties to the dispute had never agreed to submit any possible dispute to the relevant arbitration bodies of the country C Football Association. The DRC Judge noted that, although having been asked to do so, the respondent did not provide a translated version of the documents, in its submission it only enclosed the documents in the country C language. In view of the aforegoing and taking into consideration Article 9 of the Procedural Rules, the DRC Judge decided that it could not take the relevant documents which were not translated into one of the four FIFA languages into consideration.[100]

In its case of 13 October 2010, the DRC noted that the player concerned contested the competence of the deciding bodies of the Football Federations of R and F and, consequently, refused to participate in the procedure pending in country R. The player pointed out, in any case, that the matter at hand had been pending before the deciding bodies of FIFA since 3 February 2010, i.e. before a claim had been lodged by the club before the Football Federation of F. The DRC turned its attention to the principle of equal representation of players and clubs and underlined that this principle was one of the most fundamental elements to be fulfilled, in order for a national dispute resolution chamber to be recognized as such. The DRC was eager to point out, that in view of the Regulations of the Football Federation of R, the respective jurisdiction of these two deciding bodies did not appear to depend on the nature of the dispute, but rather on the participation of the club involved in a possible dispute in the *"First League National Championship"* or not. As a side-note, the DRC was eager to point out that the framework of jurisdiction of the DRC of F—contrary to the framework of jurisdiction of the NDRC of the Football Federation of R—was not clearly defined by the Football

[99]DRC 17 August 2012, no. 8122302. See also DRC 4 July 2003, no. 730291, DRC 10 June 2004, no. 6400276, DRC 1 June 2005, no. 65349, and DRC 28 March 2008, no. 381130.

[100]DRC 6 March, no. 03132423.

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Federation of R Regulations, Article 26.8. In light of the documentation provided by the Football Federation of R, the DRC was of the unanimous opinion that the DRC of F did not fulfil one of the *conditionae sine qua non* stipulated in Article 22 under b of the RSTP—and illustrated in Article 3 para 1 of the FIFA NDRC Regulations—being, that the national independent arbitration tribunal needs to respect the principle of equal representation between players and clubs. Indeed, the DRC highlighted that, since the DRC of F was composed of five members: one chairman, one deputy chairman and three members, whose nominations shall exclusively be approved by the Executive Committee of F, the said arbitration tribunal did not appear to comprise an equal number of players' and clubs' representatives, in light of the documentation provided. The DRC summarized that the DRC of F, which passed the decision at hand, was not constituted in accordance with the fundamental and explicit principle of equal representation of players and clubs, and therefore did not fulfil the minimum procedural standards laid down in Article 22 under b of the RSTP, FIFA Circular no. 1010 and the NDRC Regulations.[101]

In its case of 25 April 2013, the Chamber acknowledged that the respondent contested the competence of FIFA's deciding bodies on the basis of clause 6 of the employment contract. The DRC noted that clause 6 of the employment contract did not refer to a specific national dispute resolution chamber or any similar arbitration body in the sense of Article 22 under b of the RSTP. Therefore, the members of the Chamber deemed that said clause could not serve as a basis for the jurisdiction of the Sporting Dispute Resolution Chamber of the country P Football Association. Subsequently, the Chamber referred to Article 9 para 1 under e of the Procedural Rules which stipulates that all documents of relevance to the dispute, shall be submitted in the original version as well as translated into one of the official FIFA languages. However, the Chamber acknowledged that the documents provided by the respondent were only provided in its translated version. This means that the Chamber did not have at its disposal the original version of the relevant documentation and, therefore, the Chamber could not establish with certainty whether the Sporting Dispute Resolution Chamber of the country P Football Association complied with the standards of an independent arbitration tribunal guaranteeing equal representation and fair proceedings. Finally, the DRC emphasized that it cannot ground its decision on the basis of documentation that is incomplete. So the Chamber finally concluded that the respondent's objection to the competence of FIFA to adjudicate the dispute thus had to be rejected.[102]

In the DRC decision of 17 May 2013, the prerequisite of equal representation is not only mentioned in the RSTP, but also in FIFA Circular no. 1010 as well as in Article 3 para 1 of the NDRC Regulations, which illustrates the aforementioned principle as follows: *"The NDRC shall be composed of the following members,*

[101]DRC 13 October 2010, no. 10102536. See also DRC 6 March 2013, no. 03132697, DRC 26 October 2012, no. 10121653, and DRC 7 June 2013, no. 06131674.

[102]DRC 25 April 2013, no. 04131433.

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*who shall serve a four-year renewable mandate: (a) a chairman and a deputy chairman, chosen by consensus, by the players' and club representatives* […]*; (b) between three and ten players' representatives who are elected or appointed, either on proposal of the players' associations affiliated to FIFPro, or, where no such associations exist, on the basis of a selection process agreed to by FIFA and FIFPro; (c) between three and ten club representatives* […]." In this respect, FIFA Circular no. 1010 states the following: "*The parties must have equal influence over the appointment of arbitrators. This means, for example, that every party shall have the right to appoint an arbitrator and the two appointed arbitrators appoint the chairman of the arbitration tribunal* […]. *Where arbitrators are to be selected from a predetermined list, every interest group that is represented must be able to exercise equal influence over the compilation of the arbitrator list.*" In continuation, the DRC Judge noted that, according to the translated version of para 16 of the country S Football Association Rules, the decisions of the country S Football Association Arbitration Court have the same legal effect as a final judgment of an ordinary court. In this regard, the DRC Judge held and decided that it does not see that the relevant provisions allow for a possible appeal of the decisions of the country S Football Association Arbitration Court and that it is therefore doubtful whether the principle of fair proceedings is guaranteed.[103]

We also took note of DRC decisions in which reference was made to the CAS decisions regarding whether or not the national arbitration committee fulfilled the requirements of equal representation, and of an independent chairman, and guaranteed fair proceedings. For the DRC the conclusion of the CAS Panel is important in this context. For example, in a case of 24 May 2014, the DRC took into account that the CAS had previously issued an award, whereby it decided that the national arbitration bodies of the country G Football Federation fulfilled the requirements of equal representation, and of an independent chairman, and guaranteed fair proceedings, in compliance with the applicable standards.[104] As a result thereof, FIFA was not competent.

#### 2.4.3.4 Training Compensation and Solidarity Mechanism

Further to the above, the DRC is competent with regard to disputes relating to training compensation and the solidarity mechanism between clubs belonging to different associations.[105] As mentioned previously via FIFA Circular no. 1500, with effect from 1 October 2015 a newly created sub-committee only comprising DRC members, each of whom is able to pass a decision as a Single Judge, was appointed by the DRC. Obviously, where it concerns a dispute between clubs belonging to the same association, the competency of the court will be appointed

[103]DRC 17 May 2013, no. 05131423. See also DRC 13 December 2013, no. 12131045.

[104]DRC 27 May 2014, no. 05142694.

[105]RSTP, 2016 edition, Article 22 under d in conjunction with Article 24.

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in the relevant national regulations.[106] The DRC may review disputes concerning the amount of training compensation payable and will use its discretion to adjust this amount if it is clearly disproportionate in the case under review.[107] Hereafter, we will see that with regard to disputes relating to the *calculation* of training compensation and solidarity contribution, the Single Judge of the DRC, the so-called DRC Judge, is competent to deal with this matter.[108] In Chaps. 11 and 12 of Part II, the DRC decisions in relation to the concept of training compensation and the solidarity mechanism will be discussed, and the relevant rules and jurisprudence in this regard will be handled.

#### 2.4.3.5 Solidarity Mechanism Between Clubs Belonging to the Same Association

According to Article 22 under e and Article 24 para 1 of the RSTP, the DRC is also competent to assess disputes relating to the solidarity mechanism between clubs belonging to the same association, on the proviso that the transfer of a player which forms the basis of the dispute, occurs between clubs belonging to different associations on the understanding that the sub-committee appointed by the DRC was created, via FIFA Circular no. 1500, with effect from 1 October 2015. The DRC decisions in relation to the training compensation and the solidarity mechanism will be discussed in the second part of this book.

### *2.4.4 The DRC Judge and the Single Judge of the PSC*

As a result of the positive experience with the Single Judge of the PSC, a similar figure has been introduced by FIFA with the DRC as from the RSTP 2005 edition.[109] The Single Judge of the DRC is officially called the "*DRC Judge*". The identity and jurisdiction of the Single Judge of the PSC and the DRC Judge is detailed in Article 23 para 4 and Article 24 para 2 of the RSTP, 2016 edition.[110] If

[106]There is an exception, as will be discussed in Chap. 12 of Part II, to the rule that FIFA's solidarity mechanism does not apply to national transfers: if the association concerned has included a clear clause in its own regulations, thereby acknowledging the obligation to pay an amount of solidarity contribution as a consequence of domestic transfers. See FIFA Commentary, explanation Article 1, p. 128.

[107]RSTP, 2016 edition, Annex 4, Article 5 para 4. Circular 959 dated 16 March 2005.

[108]It is important to emphasize that the Single Judge of the PSC is competent to decide on the calculation of the amount of solidarity contribution. If the new club paid the entire amount of compensation to the former club without having deducted the 5 % solidarity contribution, the claim for recovering the amount paid in excess has to be lodged with the PSC (RSTP, Article 22 under e). FIFA Commentary, explanation Article 24, p. 73, footnote 108.

[109]FIFA Commentary, explanation Article 24, p. 72.

[110]Procedural Rules, 2015 edition, Article 3 para 2.

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the DRC Judge is to be installed, the members of the DRC will designate a DRC Judge for the clubs as well as a DRC Judge for the players from among its members.

One of the amendments in the 2015 edition of the RSTP concerned Article 24 para 2 of the RSTP to further strengthen the efforts made for a faster and more efficient dispute resolution. In this respect, the competence of the chairman and deputy chairman of the DRC was expanded so as to grant them Single Judge competences relating to training compensation and the solidarity mechanism disputes.

The DRC generally adjudicates in the presence of at least three members, including the chairman or the deputy chairman, pursuant to Article 24 para 2 unless the case is of such a nature that it may be settled by a DRC Judge. If the matter will be settled by a DRC Judge, the members of the DRC shall then designate a DRC Judge for the clubs and one for the players from among its members. In this regard, the DRC Judge may adjudicate in the following cases:

a. all disputes up to a litigious value of CHF 100,000;
b. disputes relating to training compensation without complicated factual or legal issues, or in which the DRC already has a clear, established jurisprudence; and
c. disputes relating to solidarity contributions without complicated factual or legal issues, or in which the DRC already has a clear, established jurisprudence.

The disputes in points b. and c. above may also be adjudicated by the chairman or the deputy chairman as Single Judges. From Article 24 para 2 of the RSTP, 2016 edition, it follows that the DRC Judge, as well as the chairman or deputy chairman of the DRC (as the case may be), is obliged to refer cases concerning fundamental issues to the DRC. The DRC shall consist of equal numbers of club and players' representatives, except in those cases that may be settled by a DRC Judge, whereby each party shall be heard once during the proceedings.[111] It must further be emphasized that following the FIFA Commentary, the DRC Judge is also competent with regard to the *calculation* of training compensation and solidarity contribution.[112]

The question is what can be seen as cases without complicated factual or legal issues or cases in which the DRC already has a clear, established jurisprudence? We may assume that all the jurisprudence in which the DRC refers to the "well-established jurisprudence" in its decisions, could at least be considered as "DRC Judge proof". According to the FIFA Commentary, the disputes to be decided by the DRC Judge must be so-called "*clear-cut cases*" in which the facts and figures are clear and unquestionable, but where the player's new club is refusing to make the payment without a valid reason. If it cannot be viewed as a "*clear cut case*" and the case is more complicated according to Article 24 para 2 of the RSTP, the DRC Judge is then obliged to submit these fundamental issues to the Chamber.[113]

[111]On the understanding that decisions reached by (the DRC or) the DRC Judge may be appealed before the CAS.

[112]FIFA Commentary, explanation Article 24 para 2, p. 73.

[113]RSTP, 2016 edition, Article 24 para 2.

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Following the FIFA Commentary, a fundamental issue is the situation that is not covered by the existing jurisprudence for which decisions within the Chamber are essential. Furthermore, according to the FIFA Commentary, a fundamental issue can be assumed in a case where the existing jurisprudence of the DRC needs to be expanded or amended. In the last place, a fundamental case can be defined as a situation that has a major impact on the daily application and interpretation of the RSTP.[114] In all these cases, the DRC Judge will refer the case to the Chamber.

Aside from the DRC Judge, we also have the Single Judge of the PSC. Following Article 23 para 4 of the RSTP, the Single Judge of the PSC is competent in cases that are urgent or raise no difficult factual or legal issues, and for decisions on the provisional registration of a player in relation to international clearance in accordance with Annex 3, Article 8, and Annex 3a. In that case, the chairman or a person appointed by him, who must be a member of the committee, may adjudicate as a Single Judge. Following the FIFA Commentary, the Single Judge provides major flexibility by arranging meetings at short notice to deal with cases. Given the increasing number of cases, the Single Judge has become increasingly important, if not indispensable.[115] In recent years, we have noted that the Single Judge of the PSC and the DRC Judge too, have issued more and more decisions, because the DRC and the PSC have created a well-established jurisprudence.

In view of the above it must be noted that, as also mentioned previously, via FIFA Circular no. 1500 with effect from 1 October 2015, a sub-committee appointed by the DRC was created with regard to claims relating to training compensation and the solidarity mechanism that are now dealt with via TMS. This sub-committee only comprises DRC members, each of whom is able to pass a decision as a Single Judge. As also follows from Article 3 of Annex 6 of the RSTP, each member of the sub-committee is able to pass decisions as a Single Judge.

### *2.4.5 Conclusion*

Following Articles 22 and 24 of the RSPT, it can be concluded that the DRC is competent with regard to disputes between players and clubs in respect of the maintenance of contractual stability where there has been an ITC request and a claim from an interested party in relation to said ITC request, particularly regarding the issue of the ITC, sporting sanctions or compensation for breach of contract (the so-called "*sub a procedure*"). Aside from this, the DRC is competent if it concerns employment-related disputes between a player and a club of international dimension, unless an independent arbitration tribunal guaranteeing fair proceedings and respecting the principle of equal representation of players and clubs has

[114]FIFA Commentary, explanation Article 24, p. 73.

[115]FIFA Commentary, explanation Article 23 para 3, p. 70.

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been established on a national level within the framework of the association and/or a collective bargaining agreement, on the understanding that the aforementioned parties may, however, explicitly opt in writing for such disputes to be decided by an independent arbitration tribunal that has been established on a national level within the framework of the association and/or a collective bargaining agreement. In this context, any such arbitration clause must be included either directly in the contract or in a collective bargaining agreement applicable to the parties, and the independent national arbitration tribunal must also guarantee fair proceedings, and respect the principle of equal representation of players and clubs (the so-called "*sub b procedure*"). Further, the DRC is competent in cases of disputes relating to training compensation and the solidarity mechanism between clubs belonging to different associations, and disputes relating to the solidarity mechanism between clubs belonging to the same association, provided that the transfer of a player at the basis of the dispute occurs between clubs belonging to different associations.

In relation to employment-related disputes, the *sub b procedure*, we face some further restrictions. The first requirement according to Article 24 under b of the RSTP, 2016 edition, is the presence of the *international dimension*. From the jurisprudence of the DRC it can be inferred that the DRC is competent when a player signs with a club affiliated to *another* association as a result of an employment-related dispute.

Furthermore, and also in relation to the *sub b procedure*, it is important to note that the jurisdiction of the DRC is excluded if an independent arbitration tribunal exists on a national level and guarantees fair proceedings and respects the principle of equal representation of players and clubs. In that respect, it is decisive that the arbitrational court on a national level respects the principle of equal representation of players and clubs and has been established within the framework of the association and/or a collective bargaining agreement. In this regard, firstly it is of crucial importance that a valid arbitration clause referring to an arbitration court on a national level, is explicitly included in the employment contract. Based on the DRC jurisprudence, the contract should not only be provided with an arbitration clause, but parties should also make a clear reference to the national regulations providing for such competence. The jurisprudence of the DRC further shows that there are a lot of cases in which the DRC decides that the arbitration clause is rather vague and is thus not valid. Again, a clear and explicit reference to the competence of the national arbitration tribunal must be included by the parties in the employment contract. Furthermore, in order to make the national arbitration court competent, it is important that one of the parties actually invokes the arbitration clause. If neither the player nor the club invokes the arbitration clause in their claim or response to the claim, it is not the national arbitration court, but the DRC who is the competent body to decide.

Finally, and also in relation to the *sub b procedure*, the jurisprudence of the DRC also points out that it is of utmost importance that the independent arbitration tribunal that is established on a national level respects the principles of equal representation of players and clubs, with an independent chairman within the framework of the association and/or a collective bargaining agreement. In this

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regard, it is well-established DRC jurisprudence that even if the contract at the basis of the dispute would have included a valid and clear arbitration clause in favour of a national dispute resolution, if a party disputes the competency of the national arbitration court, the other party in the dispute referring to the arbitration clause must prove that, in fact, the national dispute resolution chamber does meet the minimum procedural standards for independent arbitration tribunals as laid down in Article 22 under b of the RSTP, in FIFA Circular no. 1010 and the FIFA National Regulations. If this party is unable to prove that the national regulations meet the principle of equal representation as established by FIFA, the national arbitration court is not admissible.

Notwithstanding the above, the PSC still holds general competence on players' status matters that concern all other disputes. More specifically, the PSC committee has general competence with regard to employment-related disputes between a club or association and a coach of international dimension, unless an independent arbitration tribunal guaranteeing fair proceedings on a national level exists (as a result of which this national committee will be competent to handle the matter), all disputes between clubs belonging to different associations and regarding the request of a football player who wishes to exercise his right to change associations, any disputes concerning matters related to the protection of minors, the (withdrawal of a) provisional registration of a player, issues in relation to the release of players, and with regard to claims for recovering solidarity contribution in case of unjustified payment, and disputes that involve a match agent.

If the case is of a less complicated nature, it can be dealt with by a Single Judge, on the understanding that we have the Single Judge of the PSC and the Single Judge of the DRC, the so-called DRC Judge. As mentioned earlier, the Single Judge of the PSC and the DRC Judge have limited competences. The FIFA Commentary shows that the DRC is also competent regarding the *calculation* of training compensationand solidarity contribution. The Single Judge of the PSC can also be competent in cases that are urgent or raise no difficult factual or legal issues, and for decisions on the provisional registration of a player in relation to international clearance in accordance with Annex 3, Article 8, and Annex 3a of the RSTP.

## 2.5 Applicable Law

### *2.5.1 National Law*

In their application and adjudication of law, the DRC will apply the FIFA statutes and regulations such as the RSTP, whilst taking into account all relevant arrangements, laws and/or collective bargaining agreements that exist on a national level, as well as the specificity of sport.[116] The DRC will therefore not only decide on

[116]Procedural Rules, 2015 edition, Article 2. See also RSTP, 2016 edition, Article 25 para 6.

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the grounds of the applicable RSTP, but, according to the RSTP also the Procedural Rules. The Chamber must also take into account elements such as the national law of the country concerned as well as collective bargaining agreements that exist on a national level. In view thereof, one is immediately aware of an area of tension between the RSTP and the national laws of the countries concerned. An important question is, which rules prevail? What happens if the DRC is of the opinion that a clause is invalid, while according to national law, this same clause should be considered as valid? What if the parties have chosen a certain national law to be applicable for their case? Is the DRC obliged to follow this national law and to what extent must it be taken into account? There are many examples in which this tension between the RSTP and national law comes to the fore.

It can be assumed that the RSTP is the main ground for the judgement of the DRC. However, within this operational field, according to the RSTP and Procedural Rules, the DRC has been limited by the national laws of the countries concerned and the collective bargaining agreements that exist on a national level. So the deciding bodies such as the DRC have been given guidelines by FIFA. These guidelines reflect national particularities such as national law, as well as the specific role played by sport, also known as "the specificity of sport". However, it must also be noted that the FIFA Commentary explicitly states that the Chamber has a certain amount of discretion as to how the guidelines may be applied to the particular case at hand.[117]

In their adjudication of law, the jurisprudence of the DRC teaches that the RSTP is the main source of law and most important ground. In my point of view this is quite understandable (although not always to the satisfaction of the parties concerned), since the DRC created its own well-established jurisprudence during the (last few) years. It would be quite impractical and will also be to the detriment of uniformity, equality and certainty on a worldwide scale, if certain fundamental principles and basic rules do not apply to all participants in professional football, if, due to the influence of national laws, the DRC decisions vary substantially in their outcome with regard to the same legal subjects. It can be inferred from DRC jurisprudence that the RSTP is leading and that national laws are quite (and have increasingly become) inferior. From a formal point of view, the DRC takes into account the national law, which is laid down in and can be inferred from the applicable Procedural Rules and the RSTP, but in reality we face and experience that national laws are not decisive for the DRC. As an example, in a decision of 6 August 2009, with regard to the question on which rules prevail, the DRC considered the jurisprudence of the CAS, in particular CAS 2005/A/983, which states that the RSTP has supremacy over national laws in cases regarding transfers of players between football clubs from different associations.[118] Also, as regards collective bargaining agreements that exist on a national level and to which reference is made by one of the parties, in the DRC decision of 28 September 2007, the Chamber explicitly referred to a decision of the Single Judge in which the latter

[117]FIFA Commentary, explanation Article 25, p. 77.

[118]DRC 6 August 2009, no. 89145. See also DRC 6 August 2009, no. 89391.

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emphasized that provisions of a collective agreement for professional football have a national impact and thus cannot have any effect in another country.[119]

Analysing the DRC decisions leads to the conclusion that national laws will not be taken into account, especially when it conflicts with the well-established jurisprudence. In the DRC decision of 26 October 2012, the club referred to Article 2 of the employment contract which states that *"[…] the first 12 months of the player's contract is considered as probation according to the Termination Law of 1967"*. In other words, the club referred to national law, i.e. the Termination Law of 1967, in order to be entitled to terminate the employment contract. However, the DRC deemed it appropriate to analyse the question whether such clause inserted in an employment contract could be considered valid. In that regard, the Chamber deemed that the application of the abovementioned rule was arbitrary, since it leads to an unacceptable result based on non-objective criteria, which entitled the respondent to unilaterally terminate the contract during the first 12 months of the contract. The DRC Judge emphasized that the lack of objective criteria due to the application of the relevant rule, led to an unjustified disadvantage of the claimant's financial rights. In this regard, the DRC considered that the possibility granted to the respondent to prematurely terminate the contract within its first year, without the need to indicate any reasons for it and only based on the fact that such period is to be considered as a probation period, appeared to be of a highly subjective nature, which means that, de facto, it was left to the complete and utter discretion of the respondent whether or not it was willing to continue the contractual relationship. In view of the aforegoing, the Chamber decided that Article 2 of the contract invoked by the respondent to terminate the contract was clearly potestative and that, consequently, the respective argument by the respondent could not be upheld by the DRC. The DRC concluded that, in accordance with the general legal principle of *pacta sunt servanda*, the respondent had to fulfil its obligations as per the employment contract.[120] This case shows that the Chamber did not follow the national law to which the club referred.

In a more recent (unfortunately) unpublished DRC decision of 27 February 2014, the DRC also wished to point out that when deciding a dispute before the DRC, FIFA's regulations prevail over any national law chosen by the parties. In this regard, the Chamber emphasized that the main objective of the FIFA regulations is to create a standard set of rules to which all the actors within the football community are subject to and can rely on. This objective would not be achievable, according to the DRC, if the DRC would have to apply the national law of a specific country on every dispute brought before it. Therefore, the Chamber deems that it is not appropriate to apply the principles of a particular national law to the present affair, which concerns alleged outstanding remuneration only, but rather the RSTP, general principles of law and, where possible, the DRC's

[119]DRC 28 September 2007, no. 97938.

[120]DRC 26 October 2012, no. 10121653.

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well-established jurisprudence.[121] In line with the unpublished case of 27 February 2014, also in a DRC case of 15 October 2015, the Chamber wished to point out that when deciding a dispute before the DRC, FIFA's regulations prevail over any national law chosen by the parties.[122]

Also, in the DRC decision of 27 February 2014, the DRC was quite clear. In this case the employment contract contained a jurisdiction clause and a clause which stipulated that country P's civil law was applicable to the employment contract.[123] The club was of the opinion that civil law had to be applied to the employment contract. Where the club claimed that civil law had to be applied in this case, the DRC, however, stressed that FIFA's regulations prevail over any national law chosen by the parties. The DRC was of the opinion that it is in the interest of football that the termination of a contract is based on uniform criteria rather than on provisions of national law chosen by the parties. The Chamber deemed that it is not appropriate to apply the principles of a particular national law to the termination of the contract but rather the RSTP's general principles of law, and, where possible, the Chamber's well-established jurisprudence. It is therefore vital to mention that FIFA's regulations prevail over any national law chosen by the parties, as was also literally decided in the unpublished case of 16 October 2014. The main objective of the FIFA regulations is to create a standard set of rules, according to the DRC, which all the actors within the football community are subject to and can rely on. This would not be achievable if the DRC would have to apply the national law of a specific country on every dispute brought before it.

As regards the above, and following the given examples, the RSTP often prevails above national law. In fact, jurisprudence shows that FIFA's regulations prevail over any national law chosen by the parties even if a party claims national law is applicable to the case. In my point of view, it is justified that the RSTP can overrule national law, but this should not be justified under all circumstances. The DRC can take into account several elements, for example whether (a) the parties have explicitly laid down in the employment contract that a certain national law must be applicable for their case, (b) whether, the national law concerned is

[121]In another unpublished DRC decision of 10 April 2015, the respondent stated that Uzbekistan law had to be applicable to the case and referred to this national law. However, the Chamber highlighted that the main objective of FIFA regulations is to create a standard set of rules to which all the actors within the football community are subject to and can rely on. This objective would not be achievable if the DRC would have to apply national law of a specific country on every dispute brought before it. This should apply, in particular, to the termination of a contract. In this respect, the DRC wished to point out that it is in the interest of football that the termination of a contract is based on uniform criteria rather than on provisions of national law that may vary considerably from country to country. Therefore, in this case the DRC finally deemed that it was not appropriate to apply the principles of a particular national law to the termination of the contract but rather the RSTP's general principles of law and, where possible, the Chamber's well-established jurisprudence.

[122]DRC 15 October 2015, no. 1015863.

[123]DRC 27 February 2014, no. 02142147.

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mandatory which must be demonstrated and invoked by the party claiming that national law is applicable; (c) the deviation from national law should, in principle, pursue a legitimate objective and should be considered as a vital issue, such as the protection of minors; and (d) the deviation should not be in conflict with the well-established jurisprudence of the DRC.

It is not only Article 17 that refers to the fact that compensation for breach shall be calculated with due consideration of "the law of country concerned", but also Article 2 of the Procedural Rules that states that in their application and adjudication of law, the PSC and the DRC shall also apply the laws that exist on a national level. If FIFA's regulations prevail under all circumstances, this would make the contents of the aforementioned provisions completely superfluous. In Chap. 3, we will also see that certain DRC decisions are not in line with certain national laws.[124] It can therefore be concluded that certain DRC decisions can be characterised as *Lex Sportiva*. In other words, the Chamber often takes into account the specificity of the football sport, at some points to the detriment of the relevant national laws.

### *2.5.2 Applicable Edition RSTP*

It is because of the different editions of the RSTP, that the DRC first establishes which version of the RSTP applies to the case that is submitted to FIFA. In each DRC decision under "*consideration*", after the DRC has established which Procedural Rules are applicable to the matter in conformity with Article 21 paras 1 and 2, and after having established its competence in accordance with Article 24 paras 1 and 2 in relation to Article 22 under b of the RSTP, the Chamber analyses which version of the RSTP applies.

In order to define which version of the regulations applies to the claim in question, *the date of the submission of the claim* is the most relevant criterion. Therefore, the general rule is that any case that has been brought to the DRC before the most recent version of the RSTP rules came into force, the 2016

[124]For example, on the one hand, in the Netherlands our Dutch KNVB Arbitration Tribunal had to adjudicate in a case between AFC Ajax N.V. against Hatem Belgacem Trabelsi. In this case the Dutch Arbitration Tribunal decided that a unilateral extension option in favour of Ajax according to the Dutch national law was valid. See Dutch KNVB Arbitration Tribunal, 4 June 2004, no. 1022. Also in a more recent case between player Timo Letschert and Roda JC of 29 August 2014, no. 1408, our Dutch KNVB Arbitration Tribunal decided that the unilateral extension option concerned was valid. On the other hand, with regard to this specific subject, the DRC is of the opinion that if the extension option is unilateral in favour of the employer and the player has no say whatsoever in the right of the club to extend the contract or not, such a unilateral extension option is not valid and cannot be binding. This leads to the conclusion that if the unilateral extension option is permitted according to national law, it still risks being deleted and overruled by the opinion of the DRC if this same case is brought before the DRC. In my view, this also creates a lack of certainty and uniformity. Obviously, FIFA can only create the abovementioned equality, uniformity and certainty if the same rules apply to all participants on an international level.

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edition, will be assessed according to the previous regulations.[125] In other words, to establish which edition of the RSTP applies to a case, the date on which the case is brought to FIFA must be determined first and is generally the decisive factor regarding the edition.[126]

Notwithstanding the above, in 2005 FIFA concluded that, according to the above general rule, the date of submission of the claim was the only relevant criterion by which to define which version of the RSTP should apply to the case. FIFA realised that a decision on certain claims thus only depended on their date of submission. This led to the negative result that certain claims should be accepted if they were submitted after the date that the RSTP came into force, but the same claims would have had to be rejected if they were submitted before this date. FIFA concluded that the date on which the facts that led to the claim had occurred was not taken into consideration. So in 2005 FIFA decided that this situation was clearly in violation of the procedural principles of equality, uniformity and legal certainty, one of the main purposes of FIFA. This resulted in the modification of Article 26 of the RSTP, 2005 edition.[127] In FIFA Circular no. 995, FIFA gave a more detailed explanation regarding the applicable regulations. The submission of the claim is (still) the most decisive criterion, but in said Circular FIFA provided 3 exceptions to this general rule, on the understanding that "*any cases not subject to this general rule shall be assessed according to the regulations that were in force when the contract at the centre of the dispute was signed, or when the disputed facts arose*".

The above 3 exceptions are now also laid down in Article 26 of the current 2016 edition. Firstly, we still face the exception of disputes regarding training compensation. In fact, on the one hand the 2001 edition of the RSTP establishes that training compensation is calculated by multiplying the training costs of the new club corresponding to the category of the training club by the years of training with the former club.[128] On the other hand, the 2005 and later editions of the RSTP state in Annex 4 Article 5 para 2 that training compensation is calculated by taking the training costs, and thus only the category of the new club, multiplied by the number of years of training with the former clubs. Secondly, there is the exception of disputes regarding the system of the solidarity mechanism. Since the 2005 edition of the RSTP came into force, loans were also subject to the same rules that applied to player transfers, including the provisions on training compensation and the system of the solidarity mechanism.[129] In the third place, there is still the exception of labour disputes related to contracts signed before 1 September 2001.[130] These

[125]RSTP, 2016 edition, Article 26 para 1.

[126]FIFA Commentary, explanation Article 26, p. 79.

[127]FIFA Circular no. 995 dated 23 September 2005.

[128]FIFA Commentary, explanation Article 25, p. 79.

[129]FIFA Commentary, explanation Article 25, p. 80.

[130]FIFA Commentary, explanation Article 25, p. 79.

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contracts, in application of former Article 46 para 3 of the 2001 edition of the RSTP, will have to be governed by the 1997 edition of the RSTP.[131]

## 2.6 Admissibility

In accordance with Article 6 para 1 of the Procedural Rules, 2015 edition, and Article 22 under a until f, of the RSTP, 2016 edition, parties of FIFA are:

- member associations;
- clubs;
- players;
- coaches; or
- licensed match agents.[132]

The above mentioned parties are entitled to lodge a claim and thus have standing to sue before FIFA. Via its Circular no. 1468, in the 2015 edition and as a result of the new regulations regarding intermediaries, i.e. Regulations on Working with Intermediaries, which came into force on 1 April 2015, FIFA informed its members on the amendment of Article 6. The amendment concerned the deletion of the licensed players' agents from the list of parties that are entitled to lodge a claim and thus have standing to sue before the PSC and DRC. In order to avoid any doubt and misunderstanding, in a new para 2 of Article 23 of the RSTP, 2015 edition, it was in the 2015 edition and is in the current 2016 edition explicitly laid down by FIFA that the PSC will not have jurisdiction to hear any contractual disputes involving intermediaries.

In several cases before the DRC, the Chamber was of the opinion that it was not in a position to intervene if an unlicensed players' agent was involved. Due the fact that the unlicensed players' agent was not entitled to lodge a claim with the DRC and a party was not entitled to lodge a claim against an unlicensed agent, in such cases the DRC was not competent to decide on the matter at hand. Also in a case dated 11 March 2005, the DRC decided that it could not intervene in the refund of an amount by a non-licensed players' agent, because the person representing the player at the signature of the contract was not a licensed players' agent (on the understanding that this case was not dealt with under the former editions as from edition 2015 edition of the RSTP).[133]

In a decision of 4 April 2007, the DRC referred to Article 6 para 1 of the Procedural Rules which clearly establishes that only "members of FIFA, clubs, players, coaches or licensed match and players' agents" can be parties in proceedings pending before the decision-making bodies of FIFA. In this case there was a

[131]FIFA Commentary, explanation Article 25, p. 80.

[132]Procedural Rules, 2015 edition, Article 6 para 1.

[133]DRC 11 March 2005, no. 35174. See also DRC 2 November 2005, no. 115780.

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dispute involving the X Sports Association and another club. The Chamber held that, whereas the one club was duly affiliated to its national football federation, it had to be established whether the entity X Sports Association was a club that was affiliated to the football federation and thus a holder of the active legitimation under the terms of Article 6 para 1 of the Procedural Rules, to file a claim before the competent bodies of FIFA. The DRC first of all drew attention to the considerations of the CAS in an (unfortunately unmentioned) earlier case, in which it was expressed that X Sports Association is not a club but rather an association aggregating youth football clubs and organizing competitions and activities for them. With due regard for the relevant findings of the CAS according to which the X Sports Association was rather an association than a club, the DRC deemed that it had no alternative but to conclude that the X Sports Association had failed to provide the DRC with sufficient evidence proving that, on the date of its petition, the X Sports Association was a club duly affiliated to the football federation and entitled to constitute a party to procedures before FIFA following Article 6 para 1 of the Procedural Rules.[134]

Also, in the case of 25 April 2013, the DRC referred to Article 6 para 1 of the Procedural Rules. On 12 June 2007, a player and a company *"Company M."* signed an agreement entitled *"contract of services"*, valid from 1 July 2007 until 30 June 2010, which stated that *"the* [company]*, according to its agreement with* [the club]*, is in possession of the utilisation rights of the football teams of* [the club]*, as an advertisement carrier"*. Consequently, the parties agreed that *"the* [player] *transfers the exclusive rights of the marketing and PR—connected to his person and activities as a footballer—to the* [company]*, and gives advertisement facilities during the duration of the present contract"*. By means of a letter dated 14 May 2008 sent to the player, the club terminated the contract on the basis of its clause 2 as of 30 June 2008. On 22 March 2010, completed on 3 June 2010, the player lodged a claim before FIFA against the club requesting the payment of EUR 14,550 on the basis of the *"contract of services"*. The DRC referred to Article 6 para 1 of the Procedural Rules, according to which only members of FIFA, clubs, players, coaches or licensed match and players' agents are admitted as parties before FIFA's relevant decision-making bodies. The Chamber agreed that the company cannot be considered to be a party in the sense of Article 6 para 1 of the Procedural Rules. The DRC concluded that FIFA is not competent to deal with any claim based on the *"contract of services"* concluded between the claimant and the company, since said contract is not signed with a party as established in Article 6 para 1 of the Procedural Rules and, moreover, since said contract does not include any employment-related clauses. The Chamber highlighted that such conclusion is in line with well-established jurisprudence of the DRC. Consequently, the Chamber decided that the claimant's claim based on the *"contract of services"* is not admissible.[135]

[134]DRC 4 April 2007, no. 47510b. See also DRC 10 August 2007, no. 87505, and DRC 8 June 2007, no. 671337.

[135]DRC 25 April 2013, no. 04133208.

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One must draw a distinction between the admissibility of a party before the DRC and before the PSC. The aforementioned association, the coach and the licensed match agent are not entitled to lodge a claim before the DRC. These parties are exclusively entitled to bring their claim before the PSC.[136] In other words, for these 2 parties, as well as for clubs dealing with counterparties other than players, the DRC will not be the competent body to deal with the matter concerned. Therefore, with regard to the admissibility of entities before the DRC, one can say that only clubs (on the understanding that the claim is lodged against a player), players and national football associations (in relation to training compensation and the solidarity mechanism) are admissible and entitled to lodge a claim before the DRC.[137]

It must further be noted that professional as well as amateur players are entitled to lodge a claim before the DRC.[138] The same principle applies to the clubs. Professional and amateur clubs are entitled to lodge a claim before the DRC. Pursuant to the list of definitions of the RSTP, 2016 edition, the former club and the new club are respectively called "*the club that the player is leaving*" and "*the club that the player is joining*". Obviously both clubs, the former and the new club, may have the status of amateur club. Consequently, both clubs are entitled to lodge a claim before the DRC, since the RSTP, 2016 edition, apply to them both. The fact that amateur clubs can bring their claim to the DRC can also be derived from numerous DRC decisions in which amateur clubs act in the procedure as claimant.[139]

In respect of the above, it can be derived that FIFA only intervenes in conflicts involving and between member associations, clubs, players, coaches and match agents. As a consequence of this, applications from or against other entities or subjects are not admissible in light of the aforementioned regulations. This also means

[136]In a decision of the PSC of 23 September 2014, no. 09141090, the PSC decided that the legal heir of a coach (in this procedure the coach passed away during the investigation phase) is not a party indicated in Article 6 para 1 of the Procedural Rules as a result of which the Single Judge was not in a position to deal with the dispute. With reference to this case it is to be expected that the DRC will follow the same line since the Single Judge emphasized that the decision-making bodies of FIFA have a very strict framework limited by its own regulations, and that it may not act outside the limitations established by said regulations. See also Vandellos.

[137]Furthermore, it is important to know that a claim will only be dealt with by the DRC if there is a legitimate reason for dealing with this claim. Procedural Rules, 2015 edition, Article 5 para 4. See also DRC 10 August 2011, no. 811829.

[138]DRC 22 July 2004, no. 7481. At the time that the player lodged his claim, he was registered as an amateur. However, the actual dispute was related to his previous employment contract concluded with a former club.

[139]See for example DRC 28 September 2006, no. 96338. In this case the club transformed from a professional club to an amateur club (at the end of the 2002/03 season). See also DRC decision of 23 February 2007, no. 271322, with regard to the successor of a former club. In this case the DRC unanimously decided that the successor must be considered as the club that entered into the contractual relationship with the player via the employment contract concluded with the former club. Therefore the successor was liable for any commitment entered into by the respondent towards the player.

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that in case a party, in the sense of Article 6 para 1 of the Procedural Rules, starts a procedure before the DRC of the PSC against a party who is not a party in the sense of Article 6 para 1 of the Procedural Rules, the DRC or the PSC will not handle the case. There is no standing to be sued.

Finally, with regard to the admissibility, it is worth mentioning that FIFA used to be of the opinion that, as a general rule, their services and decision-making bodies, such as the DRC, PSC and the Disciplinary Committee, were not in a position to deal with cases of clubs which were in a bankruptcy proceeding, i.e. *inter alia* under administration. Due to the CAS jurisprudence, this is no longer common practice and has been corrected in the meantime.[140] For example, in CAS 2012/A/2754 it states: "*FIFA's deciding bodies are competent as long as they are asked to address the issue of the recognition of the claim. It is only when they are seized with a request for the enforcement of the claim, that FIFA's Disciplinary Code comes into play and that "disciplinary proceedings, may be closed if (…) a party declares bankruptcy*".[141] In other words, currently FIFA's services and decision-making bodies, such as the DRC and the PSC, will deal with cases of clubs which are in a bankruptcy proceeding, i.e. *inter alia* under administration. However, according to Article 107 sub b of the FIFA Disciplinary Code, the proceedings before *FIFA's Disciplinary Committee* may be closed if a party declares bankruptcy. In other words, the FIFA Disciplinary Committee is only engaged when a decision of the FIFA DRC is not complied with.[142] As a side-note, and as we will see further in this chapter, if one of the parties will not abide by the decision of the DRC, the matter can be passed on to the FIFA Disciplinary Committee.[143] For example, in the event that, based on a DRC decision, any amounts due are not paid within the stated time limit, the matter will be submitted, upon request, to the FIFA Disciplinary Committee for consideration and a formal decision to be made.

In a DRC decision of 31 October 2013, the DRC decided that it had no competence due to the fact the club was not affiliated anymore to the national association. The DRC acknowledged that, according to the information received from the country G Football Federation on 28 December 2012, the professional club M was no longer affiliated to the country G Football Federation due to its relegation to the amateur division. In addition, the country G Football Federation clarified that, as a result of its relegation, the professional club ceased its operations and its founding

[140]CAS 2011/A/2343 *CD Universidad Católica v. FIFA*, award of 1 March 2012. See also CAS 2012/A/2750 *Shakhtar Donetsk v. FIFA & Real Zaragoza*, award of 15 October 2012.

[141]CAS 2012/A/2754 *UC Sampdoria v. Club San Lorenzo de Almagro & FIFA*, award of 8 February 2013.

[142]See also CAS 2011/A/2586 *William Lanes de Lima v. FIFA & Real Bétis Balompié*, award of 3 October 2012.

[143]In a case before the PSC of 30 January 2012, the Single Judge of the PSC pointed out that, in principle, FIFA's Disciplinary Committee may only execute decisions taken by the competent FIFA deciding bodies and therefore concluded that the present matter should be heard and decided by the PSC; See PSC 30 January 2012, no. 1121193.

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sports association entered the amateur competition. The Chamber took into account that from the information contained in the TMS, which only includes professional clubs, it can be noted that club M, had been inactive and not been participating since 2011. The Chamber concluded that the data contained in the TMS confirmed the information provided by the country G Football Federation in connection with the status of the respondent, club M, and therefore they had no reason to doubt the accuracy of the respective statements made by country G. The Chamber recognized that the respondent, i.e. the club with which the claimant had signed the contract at the basis of the present dispute, was no longer affiliated to the country G Football Federation. Consequently, bearing in mind Article 6 para 1 of the Procedural Rules, in accordance with which parties are members of FIFA, clubs, players, coaches or licensed match agents and players' agents, the DRC decided that it had no competence to enter into the substance of the present matter due to the fact that the respondent was not affiliated to its relevant member association.[144]

Also in a recent DRC decision of 12 December 2013, the respondent party claimed that the claimant appeared to be in bankruptcy proceedings and therefore deemed that FIFA was no longer competent to deal with the present claim.[145] In this regard, the Chamber pointed out that according to the official statement of 1 July 2013 issued by the Football Association of country A, the claimant, however, was still affiliated and actively participating in its competitions. Therefore, the Chamber recalled the contents of Article 6 para 1 of the Procedural Rules which establishes that clubs which are under the auspices of one of FIFA's member associations, are legitimate parties before FIFA's deciding bodies. Consequently, and since the matter concerned a dispute between parties belonging to two different associations, the DRC confirmed that it was competent to deal with this matter.

## 2.7 Representation

A party wanting to submit a claim before the DRC may use the services of a representative. According to Article 6 para 2 of the Procedural Rules, parties may appoint a representative.[146] However, a written power of attorney is compulsory and will be requested by the DRC from such representatives. Following the "*Frequently Asked Questions documents"* as placed on the website of FIFA, the power of attorney, inter alia, must authorise the representative to act on behalf of the party in the relevant matter before the competent decision-making bodies of FIFA.[147]

[144]DRC 31 October 2013, no. 10132786.

[145]DRC 12 December 2013, no. 12132748.

[146]Procedural Rules, 2015 edition, Article 6 para 2.

[147]Dispute Resolution Chamber. http://www.fifa.com/governance/disciplinary/dispute-resolution-system.html. Accessed 26 July 2016.

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A written power of attorney must be correctly drafted. As also mentioned in the "*Frequently Asked Questions documents*" the power of attorney should make a clear reference to the parties involved in the dispute, it has to be dated and signed by the relevant party, and should have been issued recently.[148] Furthermore, the petitions submitted to the DRC must also contain the name and address of the legal representative, if applicable, as well as the power of attorney.[149] Following numerous DRC decisions, most parties actually use the services of a representative.[150]

## 2.8 Withdrawal and Challenges

Pursuant to Article 7 para 1 of the Procedural Rules, regarding the concept of withdrawal, the members of the PSC and the DRC may not exercise their office in any cases in which they have a personal and/or direct interest. In such cases, the member in question shall disclose the reasons for withdrawing in sufficient time.[151]

It would be quite logical that the members of the DRC are of a different nationality than the parties involved in the dispute. In other words, the member in question should not exercise his office in case it has the nationality of one of the parties. Particularly if the chairman has the same nationality as one of the parties. Irrespective of the fact of any impartiality, it should in any case remove any possible appearance of partiality, especially when you consider that DRC members generally adjudicate in the presence of at least three members, including the chairman or the deputy chairman, whereby the chairman has the casting vote in case of a tie between the other two members.[152] If the chairman has the same nationality as one of the parties, in case of a tie between the two other members, the chairman then has the final vote.

Another example regarding the concept of withdrawal, in line with the above, was given in a DRC decision of 4 February 2005 where the DRC took note of the issue raised by a Spanish club with regard to the composition of the DRC Chamber, especially regarding the nationality of two of its members, namely Mario Gallavotti and Michele Colucci, both Italians.[153] In view of such a request, both Mario Gallavotti and Michele Colucci decided of their own volition, to leave the chamber during the course of the debate on the subject of this dispute and

[148]It must explicitly follow from the power of attorney that the representative is appointed in the proceedings in front of FIFA.

[149]Procedural Rules, 2015 edition, Article 9 under b.

[150]See for example DRC 12 January 2006, no. 16453. In this case player X was represented by Mr Y. See also DRC 10 August 2008, no. 871322.

[151]Procedural Rules, 2015 edition, Article 7.

[152]Procedural Rules, 2015 edition, Article 14 para 1.

[153]DRC 4 February 2005, no. 25960a.

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consequently did not take part in this judgement. The chairman and the two members of the DRC were then left to pass a decision on the matter at hand in accordance with the Procedural Rules.

In line with the abovementioned point of view regarding the different nationalities of parties and DRC members, more specifically with regard to the position of the chairman, in the case before the DRC of 17 August 2012, we finally do take note of the fact that this is an important element. In the said case, the Chamber pointed out that contrary to the information contained in FIFA's letter dated 10 August 2012, by means of which the parties were informed of the composition of the DRC, the chairman in question refrained from participating in the deliberations due to the fact that he had the same nationality as one of the parties involved in the matter, i.e. club A. Therefore, the Chamber finally adjudicated in the presence of four DRC members, two club representatives and 2 player representatives.[154] In a similar DRC decision of 26 April 2012, the Chamber was also eager to emphasize that contrary to the information contained in FIFA's letter dated 20 April 2012, by means of which the parties were informed of the composition of the Chamber, the Chairman, Mr. Geoff Thompson (England), refrained from participating in the deliberations in the case at hand, due to the fact that he had the same nationality as the respondent party in the procedure. Finally, the DRC adjudicated the case in the presence of four members.[155]

In the DRC case of 26 October 2012, the DRC was also eager to emphasize that, contrary to the information contained in FIFA's letter dated 19 October 2012, by means of which the parties were informed of the composition of the Chamber, member Q and member R refrained from participating in the deliberations in the case at hand, due to the fact that member Q had the same nationality as the claimant party and that, in order to comply with the prerequisite of equal representation of club and player representatives, member R also refrained from participating. Finally, the DRC adjudicated in the presence of three members.[156] A similar case in this regard is the DRC case of 28 June 2013, whereby the DRC was eager to emphasize that contrary to the information contained in FIFA's letter dated 24 June 2013, by means of which the parties were informed of the composition of the DRC, member Mr. M and member Mr. G refrained from participating in the deliberations in the case at hand, due to the fact that member Mr. M had the same nationality as the claimant and that, in order to comply with the prerequisite of equal representation of club and player representatives, member Mr. G also refrained from participating and the DRC finally adjudicated in the presence of three members.[157]

Also in the case before the DRC of 27 May 2014, two members of the DRC, members Mr. E and Mr. M, refrained from participating in the deliberations, due

[154]DRC 17 August 2012, no. 812019.

[155]DRC 26 April 2012, no. 412107.

[156]DRC 26 October 2012, no. 10121653.

[157]DRC 28 June 2013, no. 06132458. See also DRC 29 November 2013, no. 1113766.

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to the fact that Mr. E had the same nationality as a party involved in the present proceedings.[158] In order to comply with the prerequisite of equal representation of club and player representatives, member Mr. M also refrained from participating and thus the DRC finally adjudicated the case in the presence of 3 members.[159]

Finally, aside from the concept of withdrawal, members of the DRC may also be *challenged* by the parties if there is legitimate doubt about their independence and impartiality. A challenge must be made under consequence of a forfeit within five days of the grounds for the challenge coming to light, otherwise the parties shall forfeit the right to make a challenge. These motions must be substantiated and, if possible, supported by evidence. If the member concerned disputes the allegations raised, the DRC will reach a decision on the challenge in the absence of the said member.[160] In the event that the Chamber is no longer able to function as a consequence of challenges, the Executive Committee will make a final decision on the challenges and, if necessary, appoint an ad hoc committee to deal with the material facts of the case.[161]

## 2.9 Petitions

Pursuant to Article 9 of the Procedural Rules, petitions must be submitted in one of the four languages (English, French, German, Spanish) via the FIFA general secretariat.[162] First of all, it is interesting to note that submissions will not be considered by the DRC if it is *not* submitted in one of the four FIFA languages.

For example, in a DRC decision of 27 April 2007, the Chamber noted that one of the parties took position in the dispute, however, without providing a translation of its submission into one of the official FIFA languages despite having been asked to do so by FIFA on several occasions. Therefore, the Chamber deemed that this party's submission could not be considered and in this way this party renounced its right to defence and accepted the allegations of the claimant.[163] In a similar case before the DRC of 28 March 2012, the Chamber also underlined that the respondent party sent a letter to FIFA allegedly providing its position in its native language, but without providing FIFA with the relevant translation into one of the four official languages, despite several requests. In addition, the Chamber remarked that the country C Football Federation sent the cited respondent's correspondence to FIFA and provided a short explanation of its contents. However, the

[158]DRC 27 May 2014, no. 05142461.

[159]See also DRC 28 August 2014, no. 0814312.

[160]Procedural Rules, 2015 edition, Article 7 para 2.

[161]Procedural Rules, 2015 edition, Article 7 para 3.

[162]FIFA Statutes, 2016 edition, Article 9 para 1. See also the "*Frequently Asked Questions documents*" as placed on the website of FIFA.

[163]DRC 27 April 2007, nos. 471066a, 471066b, 471066c and 471066d.

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country C Football Federation did not submit to FIFA any power of attorney despite being requested to do so by the FIFA administration.[164] Also, in its decision of 6 March 2013, the DRC Judge noted that, although having been asked to do so, the respondent did not provide a translated version of the documents it enclosed in its submission in the country C language only. Taking Article 9 of the Procedural Rules into consideration, the DRC Judge decided that it could not take into account the relevant documents which were not translated into an official FIFA language.[165]

As soon as the submitted petition is submitted to the FIFA General Secretary, the latter will forward the submitted petition to the PSC or the DRC (depending on the case). In the event that the petition is submitted to the wrong FIFA office (for example the PSC instead of the DRC), then onward transmission of the petition to the correct office (the DRC) will be effected *ex officio* by the wrong FIFA office (the PSC).[166] This also follows from the well-established jurisprudence of the DRC in cases whereby a petition is submitted by a party to the wrong FIFA office.[167]

According to the aforementioned Article 9 para 1 of the Procedural Rules, 2015 edition, petitions before DRC (and PSC) must contain the following particulars:

- the names and addresses of the parties;[168]
- the name and address of the legal representative, if applicable, and the power of attorney;
- the motion or the claim;
- a representation of the case, the grounds for the motion or claim and details of the evidence;
- documents of relevance to the dispute, such as contracts and previous correspondence with regard to the case in the original version and, if applicable, translated into one of the four official languages (evidence);
- the names and addresses of other natural and legal persons involved in the case concerned (evidence);
- the amount in dispute, insofar as it is a financial dispute;
- proof of payment of the relevant advance of costs for any proceedings before the PSC or the Single Judge, or for any proceedings related to disputes concerning training compensation or the solidarity mechanism; and
- the date and a valid signature.

[164]DRC 28 March 2012, no. 03122286.

[165]DRC 6 March 2013, no. 03132423. See also DRC 27 February 2013, no. 02131190, and DRC 25 April 2013, no. 02131190.

[166]Procedural Rules, 2015 edition, Article 16 para 4.

[167]See for example, DRC 12 December 2013, no. 12132748.

[168]In addition to the requirements as laid down in Article 9 para 1 of the Procedural Rules, 2015 edition, the "*Frequently Asked Questions documents*" as placed on the website of FIFA, further mentions that a fax number of the parties is also needed.

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In the event that the petition does not satisfy one of the abovementioned requirements, the petition will be returned for redress along with a warning that the petition will not be dealt with in the event of non-compliance.[169] However, it must be stressed that any petitions with improper or inadmissible contents will be rejected immediately.[170]

In case the petition has been submitted to the FIFA General Secretary, a written confirmation will then be sent to the claimant.[171] In general, if there is no reason not to deal with a petition, the petition will be sent to the opposing party of the person affected by the petition, setting a time limit for a statement or reply. According to Article 16 para 11 of the Procedural Rules and amended in its 2015 edition, time limit for the answer and for possible second submissions, if applicable, shall be 20 days (on the understanding that in any urgent cases, the time limit may be reduced).[172] In this regard, regulatory time limits may generally not be extended.[173]

If no statement or reply is received before the time limit expires, a decision will be taken on the basis of the documents on file.[174] As mentioned before, it is possible to ask for an extension, pursuant to Article 16 para 12 of the Procedural Rules. However, the DRC (as well as the PSC) must take into consideration the principle of expeditious execution of the proceedings. With regard to the time limits, Article 16 of the Procedural Rules further specifies the rules in detail.

In case of late submissions it is at the discretion of the judicial body to determine whether the party's position should be taken into account, despite the fact that a decision will be taken on the basis of the documents on file if no statement or reply is received before the time limit expires. In this regard, a new para 4 to Article 9 of the Procedural Rules of the 2015 edition has been added, as introduced in FIFA Circular 1468. According to this new paragraph, the parties shall not be authorized to supplement or amend their requests or their arguments, to produce new exhibits or to specify further evidence on which they intend to rely, after notification of the closure of the investigation.[175] We have to await further jurisprudence by the DRC, knowing that the DRC jurisprudence, thus far, shows that the DRC was not stringent on time limits (compared to the CAS, for example).

[169]Procedural Rules, 2015 edition, Article 9 para 2.

[170]Procedural Rules, 2015 edition, Article 9 para 2.

[171]Procedural Rules, 2015 edition, Article 6 para 3.

[172]Procedural Rules, 2015 edition, Article 16 para 11.

[173]Procedural Rules, 2015 edition, Article 16 para 10.

[174]Procedural Rules, 2015 edition, Article 9 para 3. A second exchange of correspondence will only be instituted in special cases.

[175]The FIFA administration may, however, request additional statements and/or documents at any time.

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In its case of 28 October 2011, the DRC Judge decided that it would be unreasonable not to consider the respondent's statements, which were submitted only a few weeks after the given time limit.[176] Also the PSC case of 16 February 2012, the PSC decided that it was at its discretion to determine whether the party's position should be taken into account. Since the respondent's statement was not submitted to FIFA unreasonably late and in view of its contents, the PSC decided to accept the statement of the respondent.[177] Also, in the DRC decision of 17 May 2013, the DRC Judge clarified that it is at his discretion to determine whether a party's position, in this matter the respondent, should be taken into account and decided that it would be unreasonable not to consider the respondent's statements, which were remitted only a few weeks after the given time limit.[178] The jurisprudence so far, has shown that if it is unreasonable not to consider a party's late statements, late submissions will then be admitted.

In its case of the DRC of 4 October 2013, the Chamber explicitly noted that the respondent, for its part, failed to present its response to the claim of the player in a timely manner, despite having been duly invited to do so. The Chamber, in particular, noted that the respondent submitted its position on the claim to FIFA after the investigation phase in the present matter had been concluded and even after the parties had been informed of the date of the present meeting as well as of the composition of the Chamber. Therefore, the Chamber decided that the respondent's submission in that case could not be taken into account. The DRC finally concurred that it had to take a decision upon the basis of the documents already on file, in other words, upon the statements and documents presented by the claimant.[179] This also follows from the DRC decision of 27 November 2014.[180]

In principle, an exchange of correspondence will take place, which can also be derived from Article 9 para 3 of the Procedural Rules, 2015 edition, which provision states that there will only be a second exchange of correspondence in special cases. For example, in the case of the PSC decision of 21 November 2011, the Single Judge decided that the claimant had submitted additional statements in relation to the other club's reply, although the claimant club was specifically requested by FIFA to provide its position with regard to the other club's counterclaim only.[181] Therefore, the Single Judge decided that there was no need for a second exchange of correspondence and, consequently, decided not to take into account the unsolicited additional statements. However, there are still legal disputes

[176]DRC 28 October 2011, no. 1011192.

[177]PSC 12 February 2012, no. 212411.

[178]DRC 17 May 2013, no. 05131423. See also DRC 9 March 2011, no. 5112307, from which case it can be derived that the DRC will consider one party's comments admissible even if they are submitted a few weeks after the time limit set by the FIFA administration.

[179]DRC 4 October 2013, no. 1013439.

[180]DRC 27 November 2014, no. 1114239.

[181]PSC 21 November 2011, no. 11111511.

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between parties before the DRC in which a second exchange of correspondence between the parties does take place.[182]

## 2.10 Evidence

According to Article 12 of the Procedural Rules, evidence consists of party testimony, witness testimony, documents, expert reports, real evidence and all other pertinent evidence, on the understanding that evidence will further be heard only in respect of facts relevant to the case.[183] In this regard, and pursuant to Article 12 para 4 of the Procedural Rules, the PSC and the DRC may also consider evidence not presented by the parties, which was also contained in a DRC decision of 28 September 2006.[184] Finally, attention must also be paid to the fact that the DRC is free to evaluate the evidence.[185] In other words, and pursuant to Article 12 para 6 of the Procedural Rules, evidence will be considered subject to discretion by the DRC, in which the Chamber will take into account the conduct of the parties during the proceedings, especially any failure to comply with a personal summons, a refusal to answer questions, or the withholding of requested evidence.[186]

The DRC had to deal with several cases where questions were raised with regard to issues relating to evidence. For example, in the case of 28 September 2006, the DRC noted that as regards the player's registration period with the club, there was a discrepancy between the statement of the club and the Player Passport presented by the Football Federation. The club failed to present documentary evidence in support of its allegation that the player had remained registered with the club until 31 December 1996. The DRC concurred that the relevant registration period must be established on the basis of the documentary evidence presented by the Football Federation, i.e. the Player Passport. Bearing in mind Article 7 of the RSTP, 2016 edition, the DRC emphasized that a Player Passport commonly constitutes the main documentary evidence pertaining to the period of registration of a football player with a club.[187]

In a decision of 21 November 2006, a player requested FIFA's assistance claiming 3 month's salary owed by the club. The Chamber pointed out that a document signed by the relevant parties, in principle, is written proof of a valid contract and

[182]See for example DRC 31 October 2013, no. 10131039.

[183]Procedural Rules, 2015 edition, Article 12 paras 1–2.

[184]DRC 28 September 2006, no. 96338. Procedural Rules, 2015 edition, Article 12 para 4.

[185]For example, a copy of a cheque does not prove beyond doubt that the amount referred to on such cheque has indeed been received by the claimant, according to the DRC. See DRC 23 January 2013, no. 0113531.

[186]Procedural Rules, 2015 edition, Article 12 para 6.

[187]DRC 28 September 2006, no. 96338.

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cannot be declared invalid for a simple allegation.[188] Moreover, the DRC remarked that the party making an allegation has to reasonably sustain the burden of proof in order to preserve the legal principle of legal security. The DRC concluded that the player's allegation regarding the invalidity of the termination of the agreement was not sufficiently proven. The DRC finally decided that the player concerned had not presented any written document substantiating the costs in relation to his medical treatment.[189]

Furthermore, any documents closely linked to a party may not fulfil the requirements of objectivity and impartiality and may thus not be admitted as valid evidence in the sense of Article 12 of the Procedural Rules. From a DRC decision of 21 November 2006, it can be derived that a witness testimony of a player of the club cannot be considered as an impartial witness, especially since the player is employed by the club. In the case at hand, the Chamber stated that the player could not be considered as an impartial witness and that the respondent club could not provide any documentary evidence to substantiate its allegations apart from the player's statement. Therefore, the Chamber finally considered in the matter at hand, that the allegation of the respondent club was ungrounded and therefore had to be rejected due to lack of probative force of the statement submitted by the club.[190]

In line with the above, in the case of 28 March 2012, the DRC asserted that the burden of proof in this case lay with the club. The Chamber noticed that the only documentation provided by the respondent club were personal statements from the club's employees or persons otherwise appointed by the club. The DRC emphasized that the information contained in a statement made by a person closely linked to the club, which moreover, is not supported by any additional documentation whatsoever, is mainly of a subjective perception and might be affected by various contextual factors; so the credibility of such type of documentation is quite limited.[191]

Also, a written statement from a club's coach and a medical report issued by the club's doctor can generally not be relied upon, according to the DRC. For example, in the decision of 6 March 2013, the DRC Judge concluded that the

[188]In this respect, it is important to know that the agreement between the professional and the club must be in writing pursuant to Article 2 para 2 of the RSTP, 2016 edition. According to Article 8 of the RSTP, 2016 edition, a copy of the player's contract with the national association concerned must then be submitted. The DRC further refutes that a document signed by the relevant parties, in principle, is written proof of a valid contract and cannot be declared invalid for a simple allegation. See also the DRC decision of 21 November 2006, no. 116339. In its decision of 24 March 2004 the DRC decided that the party who claimed that only the contract deposited with the association was applicable, contravened the basic principle of *venire contra factum propia*. See DRC 24 March 2004, no. 34325.

[189]DRC 21 November 2006, no. 116339.

[190]DRC 21 November 2006, no. 611147a. See also an unpublished decision of 6 November 2014, in which case the DRC considered that the documentation could not be considered impartial and, as a result, decided not to give any weight to the relevant statements.

[191]DRC 28 March 2012, no. 3121241.

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written statement from the club's coach and a medical report issued by the club's doctor cannot be relied upon, since these documents were issued by persons closely linked to the respondent and, as such, do not fulfil the requirement of objectivity and impartiality.[192]

In the DRC decision of 15 March 2013, the DRC also decided that submitted documents could not be taken into consideration. In this case, the Chamber concluded that the documents submitted by the respondent in its defence, consisting of internal accounting extracts, could not be relied upon, since these documents were issued by the respondent and, as such, according to the DRC, do not fulfil the requirement of objectivity and impartiality. Consequently, the Chamber concurred that these documents shall not be taken into consideration and that the parties' arguments based on these documents shall not be analysed further.[193]

Furthermore, the DRC also often deals with cases in which parties refer to and substantiate their claim with internet extracts or internet communications. The DRC is quite reluctant to accept evidence such as internet extracts or internet communications. However, relevant in this regard is whether or not the statements regarding the evidence are contested by the other party. For example, in its decision of 1 March 2012, the DRC decided that the documentation presented by the claimant in support of its petition, i.e. a website printout, could not be accepted. The DRC duly noted that the respondent had, in fact, not contested that the claimant actually participated in those matches nor that he was entitled to such bonuses. Instead, the respondent merely relied on its statement that the document presented by the claimant was not acceptable as evidence. In light of these circumstances, the Chamber could not agree with the respondent's point of view that the claimant's claim pertaining to EUR 8500 as bonus for matches should be rejected.[194]

In a case before the DRC of 7 April 2011, the DRC had to decide whether or not an employment contract had been concluded between a player and a club. The DRC firstly referred to Article 12 para 3 of the Procedural Rules (burden of proof), according to which, any party claiming a right on the basis of an alleged fact, shall carry the respective burden of proof. The application of this principle in the present matter led the DRC to conclude that it was up to the player to prove that the employment contract, on the basis of which he claims compensation for breach of contract from the club, indeed existed. Due to the fact that the claimant failed to present any other document proving beyond doubt that in fact an employment contract had duly been signed by and between the claimant and the respondent, the DRC agreed that an internet communication, i.e. the print-out of the respondent's internet homepage, could not be considered sufficient evidence demonstrating a

[192]DRC 6 March 2013, no. 03131723. See also DRC 6 March 2013, no. 0313379.

[193]DRC 15 March 2013, no. 03132824.

[194]DRC 1 March 2012, no. 3122113. See also CAS 2008/A/1705 *Grasshopper and Alianza*, award of 18 June 2009, in which case the CAS Panel admitted the printouts presented by Grasshopper were obtained from the internet, given that Alianza did not invalidate these pieces of evidence with its own records.

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contractual link between the parties. Therefore, the DRC decided that, since the claimant had not been able to prove beyond doubt that an employment contract had validly been concluded between himself and the club, there was no possibility for the DRC to examine whether such alleged contract had been breached.[195]

Also in the DRC case of 28 March 2012, we face the issue in which evidence is not contested as result of which the submitted documents can be admitted as evidence in the sense of Article 12 of the Procedural Rules. In this case, the Chamber took note that at the beginning of this procedure, the claimant had merely stated an alleged transfer amount and later provided evidence, i.e. a media report, which stated that the player was transferred in August 2008 from the club involved to the respondent for an amount of EUR 1,000,000. In this context, the Chamber deemed appropriate to point out that, as a general rule, media evidences are not sufficient to prove alleged facts pursuant to Article 12 of the Procedural Rules. However, the Chamber added that for the sake of good order, it is always necessary to take into consideration the particulars of the case. In continuation, the Chamber focused its attention on the matter at stake and took note that after the claimant had submitted the media evidence supporting its allegations to FIFA, i.e. that the player was transferred in August 2008 from the club involved to the respondent for an amount of EUR 1,000,000, the respondent did not contest the cited allegation and did not submit any further comment. In particular, the Chamber reproached the behaviour of the respondent who firstly submitted its alleged position to FIFA written in an unofficial language, and secondly, after having the opportunity to provide FIFA with its comments in connection to the media evidence submitted by the claimant, it did not react at all. In this way, the Chamber finally unanimously agreed that the respondent party therefore tacitly accepted the claimant's allegations.[196]

In the case before the DRC of 27 February 2013, the claimant enclosed and referred to several internet extracts of January 2012, which indicated that the player had signed with the respondent club. In this case, the Chamber noted the documents enclosed with the claimant's claim, respectively dated 9 and 14 January 2012, were prior to the registration of the player with the respondent. The DRC noted in this regard that these documents were extracts from the

[195]DRC 7 April 2011, no. 411330.

[196]DRC 28 March 2012, no. 03122286. Further to this, in the decision of the PSC of 15 August 2012, the Single Judge of the PSC noted that the claimant had provided several press articles and printouts from the internet as well as the statements of certain former employees of the respondent attesting that he had already been dismissed by the respondent at the beginning of February 2010, while the respondent had based its assertion on the termination letter. The Single Judge, referring to the principle of burden of proof recalled that while the termination letter had undisputedly been issued by respondent and received by the claimant towards the end of February 2010, the documentary evidence provided by the claimant in support of the allegations that his dismissal had taken place beforehand, mainly consisted of third party evidence, the authenticity of which could not be verified with certitude and which, consequently, could not amount to a comparable proof of an alleged fact as the termination letter itself. See PSC 15 August 2012, no. 08122106.

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respondent's website and equally considered that the respondent, in its reply, had not provided any clarifications in relation to the contents of such documentation. Hence, considering that the contents of the relevant documentation remained uncontested by the respondent, the Chamber deemed that it was clear that in fact the player had already joined the respondent in January 2012, i.e. prior to the player's registration with club F in February 2012.[197]

As a side-note, in some *PSC* cases, the PSC also had to decide on the validity of the evidence and in which cases press articles and printouts were submitted to the PSC by one of the parties. From these cases we note that if a party provides the PSC with evidence in support of its allegations that mainly consists of '*third party evidence*', the authenticity of which could not be verified with certitude, the said evidence will consequently not be comparable proof of an alleged fact by the PSC.[198] However, if it concerns a press release which is published by the club on its own website and not been questioned by the parties, the PSC can take the said evidence into account.[199]

The DRC can take into consideration internet extracts as exclusive evidence in case it concerns an announcement by a club on its own website, for example that a player signed a contract with a club. In the case before the DRC of 31 October 2013, it concluded that there were numerous elements speaking in favour of a situation of circumvention of the RSTP, as result of which the DRC held that the respondent should be considered as the player's new club.[200] In this case, the DRC referred to the fact that the respondent club, according to its own website, had already signed a contract with the player in August 2011. This also follows from a decision of the PSC of 28 August 2013, in which case the PSC stated that the information published on the website of a board member of the club could also be taken into account.[201]

It is also noteworthy to refer to the case of the DRC of 27 February 2014. In this case, the Chamber highlighted that a certain course of events to which the respondent referred, was never contested by the claimant and thus remained uncontested.[202]

Finally, for the sake of completeness, it is not unlikely that the DRC will decide that information contained in emails is not valid evidence (under all circumstances). In an unpublished case by the PSC of 8 August 2011, the PSC was eager

[197]DRC 27 February 2013, no. 0213936. See also 18 June 2009, no. 69816. In the latter case the DRC decided that, as a general rule, press releases do not constitute appropriate documentary evidence.

[198]PSC 15 August 2012, no. 08122106.

[199]PSC 19 March 2014, no. 0314713. See also DRC 18 June 2009, no. 69816. See also CAS 2010/A/2145/2146/2147 *Morgan de Sanctis & Sevilla FC SAD v. Udinese Calcio S.p.A.*, award of 28 February 2011.

[200]DRC 31 October 2013, no. 10131359.

[201]PSC 28 August 2013, no. 0813715.

[202]DRC 27 February 2014, no. 0214390.

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to point out that, in principle and based on the PSC's approach when dealing with evidence submitted in the form of e-mails, information contained in those e-mails is generally not considered as legally binding. Therefore, the PSC did not take into account the contents of the relevant mail. Although this is a decision issued by the PSC and the decision was not published, it is vital to take note of this and to take this into account for future DRC cases. In this context, in a DRC decision of 31 July 2013, it did not take into account an e-mail of a Financial Director of the club. In this case, the DRC pointed out that an e-mail of the respondent's Financial Director was of a non-official nature, did not contain any expression of the parties' mutual agreement and, therefore, could not be considered as a legally binding document upon which a party could claim the execution of any legal obligations whatsoever.[203] In other words, the DRC may be reluctant in future to establish e-mails as valid evidence.

## 2.11 Burden of Proof

Following Article 12 of the Procedural Rules, the general rule is that any party deriving a right from an alleged fact carries the burden of proof.[204] As mentioned in the "*Frequently Asked Questions documents*" as placed on FIFA's website, any party claiming a right on the basis of an alleged fact shall carry the burden of proof with any written evidence it deems useful in its support, translated, if necessary, into one of the four official FIFA languages. In accordance with the legal principle of the burden of proof, which is a fundamental part of every legal system, a party is obliged to prove allegations presented in a legal action if it wishes to use them as the basis for a claim.

In the past, if the name of a player's agent did not appear in the contract, despite that a licensed players' agent was involved and therefore the name of the agent had to be mentioned in the player's contract, the burden of proof in the event of a dispute rested with the party claiming that the agent participated in the negotiations.[205]

In several decisions the DRC makes reference to the burden of proof. For example, in a decision of 13 May 2005, the DRC also stated that in accordance with the legal principle of the burden of proof, a party must demonstrate allegations presented in a legal action if it wishes to use them as the basis for a claim. In this respect, the Chamber stated that the player's allegation of the rescission of the employment contract by the club at the beginning of July 2003 was not based on any evidence.[206]

[203]DRC 31 July 2013, no. 07133206.

[204]Procedural Rules, 2015 edition, Article 12 para 3.

[205]FIFA Commentary, explanation Article 18, p. 52, footnote 88.

[206]DRC 13 May 2005, no. 55359.

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In another DRC decision dated 21 November 2006, the Chamber concluded that no compensation for breach of contract without *just cause* (in conformity with Article 17 of the RSTP) was due in the matter at hand. In this respect, the DRC referred to the leading Article 12 para 3 of the Procedural Rules, in accordance with which a party deriving a right from an alleged fact carries the burden of proof.[207]

In the decision of 28 September 2006, the DRC decided that pursuant to the legal principle of the burden of proof which is the basis of every legal system, a party deriving a right from an asserted fact must prove the relevant fact. Due to the lack of proof with regard to the club's allegations related to the fulfilment of its financial obligations towards the player for the 2004 season, and bearing in mind its considerations in connection with the flight ticket, the DRC decided that the club had to pay the player with regard to the employment contract for the 2004 season.[208]

In several cases before the DRC, the Chamber had to deal with contradictory statements by (one of) the parties. For example, in its case of 6 March 2013, the DRC Judge had to deal with contradictory statements by a player. In this case, the DRC Judge finally decided that, in view of the contradictory statements by the player as well as taking into account the lack of documentary evidence, the claimant player had not sufficiently substantiated his claim, as the player did not present any conclusive documentary evidence which adduced that the amount of EUR 9610 was indeed still owed to him by the club.[209]

It is of paramount importance to substantiate all claims. In the DRC decision of 14 August 2013, the DRC Judge concluded that the claimant had substantiated his claim pertaining to outstanding monthly salary with sufficient documentary evidence. However, as to the match bonuses requested by the claimant, the DRC Judge established that the claimant did not provide documentary evidence regarding his entitlement to the aforementioned bonuses for match appearances, i.e. the claimant had not provided any documentation that he had indeed participated in any matches. The DRC Judge decided that the claimant's request in relation to the bonuses for match appearances should be rejected.[210] In the decision of 1 October 2015, the DRC Judge took into account that the respondent, for its part, failed to present its response to the claim of the claimant, despite having been invited to do so. In this way, the DRC Judge considered that the respondent renounced its right to defence and thus accepted the allegations of the claimant. Taking into account the documentation presented by the claimant in support of his petition, the DRC Judge concluded that the claimant had not fully substantiated his claim pertaining to overdue payables with pertinent documentary evidence in accordance with Article 12 para 3 of the Procedural Rules. That is, there is no contractual basis

[207]DRC 21 November 2006, no. 116218.

[208]DRC 28 September 2006, no. 961007.

[209]DRC 6 March 2013, no. 03132373.

[210]DRC 14 August 2013, no. 0813427.

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relating to the claimant's claim pertaining to the bonus of USD 750 relating to *"the qualification of the respondent in the semi-finals of the national cup"*. The DRC Judge finally decided to reject this part of the claimant's claim.[211]

## 2.12 Renouncement of Rights

It is essential to realise that a party can bear the risk of renouncing its rights.[212] In this context, one can refer to Article 9 para 3 of the Procedural Rules, 2016 edition, which states that if there is no reason to deal with a petition, it will be sent to the opposing party or the person affected by the petition, setting a time limit for a statement or reply. If no statement or reply is received before the time limit expires, a decision will be taken on the basis of the documents on file and as result thereof the party that did not react before the time limit, bears the risk of renouncing its rights.

For example, in a case of 2 November 2005, the DRC decided on a contractual dispute that had arisen between an Armenian player and a Lebanese club. In this case the club never took a position in the dispute, despite having been asked to do so by the FIFA administration on several occasions. The DRC pointed out that if no reply to the claim is received from the club, the case will be decided only on the basis of the facts and evidence from the player. The DRC reproached the behaviour of the club and underlined that the club concerned had renounced its right to defence and thus accepted the allegations of the player. In this case, the DRC finally decided in favour of the player due to the club's lack of action.[213]

We noted a substantial number of DRC decisions in which a party does not respond before the time limit expires, or does not respond at all.

In a DRC case of 2 November 2007, with regard to the allegations of a club, according to which it did not receive the payment of a 5 % portion of the compensation paid to the player's previous club, the DRC stated that the other party had failed to provide FIFA with any statements regarding the complaint and had thus renounced its rights to defence. In other words, the members of the DRC concluded in this case, that the allegation had been accepted by that club, that he had not received the payment of the solidarity contribution.[214]

With regard to the above, the DRC requests a party (on several occasions) to take a position in the dispute and thus to respond in good time. In a case before the DRC of 19 February 2009, the Chamber also referred to the principle of

[211]DRC 1 October 2015, no. 10151062.

[212]See for example DRC 28 July 2005, no. 75377, DRC 12 January 2006, no. 16716, DRC 27 April 2006, no. 461150, DRC 28 September 2006, no. 96392, and DRC 21 November 2006, no. 611814.

[213]DRC 2 November 2005, no. 115334.

[214]DRC 2 November 2007, no. 117420. See also DRC 14 September 2007, nos. 971056a, 971056b and 971056c, and DRC 27 April 2007, no. 47849.

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renouncement of rights.[215] In this case of 19 February 2008, club A contacted FIFA to demand the payment of the relevant portion of solidarity contribution for the transfer of the player from club R to club O. However, the latter did not respond to several communications from FIFA. The Chamber focused on the behaviour of club O during the procedure of the present matter and remarked that it never took position despite being requested to do so. The DRC therefore emphasized that club O renounced its rights of defence. The DRC therefore finally concluded that club A was entitled to receive solidarity contribution paid by club O to R for the transfer of the player in accordance with Annex 5 Article 1 of the RSTP.[216]

Also, in the DRC decision of 31 July 2013, the DRC decided that the respondent, for its part, failed to present its response to the claim of the player, despite having been invited to do so. In this way the respondent renounced its right to defence, so the DRC accepted the allegations of the claimant.[217]

If a party fails to present its response to the claim of the other party, despite having been invited to do so, it generally renounces its right. However, it is of the utmost importance that the claim is substantiated with sufficient documentary evidence. This is also confirmed in a more recent DRC decision of 18 March 2014, in which case the DRC Judge noted that the respondent had also failed to present its response to the claim of the claimant, despite having been invited to do so.[218] By not presenting its position to the claim, the DRC Judge was of the opinion that the respondent party renounced its right of defence and, thus, accepted the allegations of the claimant party, on the understanding that the DRC Judge concluded that the claimant had substantiated his claim pertaining to outstanding remuneration with sufficient documentary evidence. This can also be derived from the case of 27 May 2014, in which the claimant claimed bonuses whilst the respondent did not respond to the claim.[219] The DRC recalled the general legal principle of the burden of proof and observed that the claimant had not presented any documentary evidence regarding his entitlement to the bonus in question, i.e. the claimant had not provided any documentation that the club had indeed remained in the country I Super League. The DRC decided that the claim had to be rejected. Also in the decision of the DRC of 6 November 2014, the claim was not sufficiently substantiated.[220]

[215]DRC 19 February 2009, no. 29953b, and DRC 7 May 2008, no. 581140b. See also DRC 12 March 2009, no. 39778.

[216]See also for example DRC 28 May 2010, no. 510583, and DRC 13 December 2010, no. 1210534.

[217]DRC 31 July 2013, no. 07131192. See also DRC 31 July 2013, no. 07131192, DRC 10 July 2013, no. 07132410, DRC 25 April 2013, no. 04131433, DRC 17 January 2014, no. 001143001, and DRC 7 February 2014, no. 02143251.

[218]DRC 18 March 2014, no. 0314130. See also DRC 18 March 2014, no. 0314195.

[219]DRC 27 May 2014, no. 05142679.

[220]DRC 6 November 2014, no. 1114424.

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In a more recent DRC decision the claimant's claim was also rejected despite the fact that the counterparty renounced its right. In the decision of 27 August 2014, the DRC Judge observed that the respondent failed to present its response to the claim of the claimant, despite having been invited to do so.[221] In this way, the DRC Judge deemed that the respondent renounced its right of defence. The DRC Judge turned his attention to the claim of the claimant and noted that he was requesting alleged outstanding remuneration for the 2011/2012 season, particularly for the months of March, April and May 2012. In this context, and making reference to Article 12 para 3 of the Procedural Rules—which stipulates that any party claiming a right on the basis of an alleged fact shall carry the burden of proof—the DRC Judge concluded that the claimant had not provided any evidence of a contractual relationship with the respondent for the 2011/2012 season, for which he claimed outstanding remuneration. As a consequence, since the claimant had failed to prove having concluded an employment contract valid for the period for which he claims outstanding remuneration, the DRC Judge decided that the claim had to be rejected. In other words, despite the fact that the respondent renounced its right, the claimant's claim was still rejected by the DRC Judge due to the lack of evidence.

In line with the above, it is also important to remember that if accusations are not contested, a party bears the risk that the DRC will accept the accusations. For example, in a case before the DRC of 27 February 2014, the Chamber noted from the documentation submitted by the respondent, that the player apparently took part in the UEFA Under-17 European Championship tournament in country J. In particular, the Chamber noted that the player apparently left the claimant's training facilities in order to join country I's U-17 national team on 25 September 2007, that the tournament ended on 3 October 2007 and that the player never returned to the claimant before being transferred to club R. The DRC highlighted that such course of events was never contested by the claimant and thus remained uncontested.[222]

## 2.13 Non Ultra Petitum

When a party claims a certain amount before the DRC, the DRC will not adjudicate more than the amount of the claim of the party, also known as the principle of *non ultra petitum*. In such cases, the DRC refers to the *non ultra petitum rule*, as a result of which the Chamber cannot adjudicate more than is claimed by a party.[223]

In a case of 28 July 2005 before the DRC relating to training compensation, the Chamber stated that for the year in which it trained the player, the club would be

[221]DRC 27 August 2014, no. 08141425.

[222]DRC 27 February 2014, no. 0214390.

[223]DRC 9 November 2004, nos. 114707 and 114708, DRC 2 November 2005, no. 115236, and DRC 12 January 2006, no. 16309.

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entitled to training compensation in the amount of EUR 60,000. However, the DRC noted that in its claim submitted to the DRC, the club only requested EUR 50,000. Consequently, and in conformity with the principle of *non ultra petitum*, the DRC finally decided that it was not in a position to grant the club the amount of EUR 60,000, but only the amount of EUR 50,000 as was claimed by the claimant.[224]

In another case before the DRC of 2 November 2005, a player only claimed the amount of USD 300,000. According to the principle of *non ultra petitum*, also in this case the Chamber finally decided that the club concerned was only required to pay the player the amount of USD 300,000 for salary, sign-on fees and bonuses.[225]

## 2.14 Amendment of Claim

Although this is not laid down in the RSTP or the Procedural Rules, from the jurisprudence of the DRC it follows that a party is entitled to amend its claim during the procedure before the DRC. This can be derived from several cases before the DRC, such as the DRC case of 25 April 2013, in which case the claimant lodged a claim against the respondent before FIFA on 25 January 2010, requesting to be awarded an amount of EUR 93,600. Subsequently, on 28 September 2011, FIFA received an unsolicited additional position from the claimant, amending his initial claim only in the total amount that he requested. The new amount requested by the claimant before the DRC was EUR 81,406.16.[226]

Via its Circular no. 1468, FIFA introduced a new para 4 to Article 9 of the Procedural Rules in its 2015 edition. As mentioned previously, the parties shall not be authorized to supplement or amend their requests or their arguments, to produce new exhibits or to specify further evidence on which they intend to rely, after notification of the closure of the investigation, on the understanding that the FIFA administration may, however, at any time request additional statements and/

[224]DRC 28 July 2005, no. 75231. As a side-note, a party can be given the option to pay in instalments. In its case of 9 May 2011, the DRC took note of the fact that the respondent acknowledged its debt in the amount of EUR 20,000 and proposed to settle the matter by paying said amount to the claimant. The DRC observed that the claimant requested the payment of the mentioned amount in one single instalment and that the respondent proposed to pay the amount in dispute in several instalments. In view of all the above, the DRC Judge concluded that the due amount of should be paid in two instalments in order to ensure a proper solution to the present dispute in the interests of both parties. DRC 9 May 2011, no. 5113444.

[225]DRC 2 November 2005, no. 115236. Also the CAS decided in CAS 2008/A/1644 *Adrian Mutu v. Chelsea Football Club*, award of 31 July 2009, that even though it had full power to review the facts and the law of the case, the arbitral nature of the CAS proceedings obliges the Panel to decide on all claims submitted, but at the same time prevents the Panel from granting more than what the parties are actually asking for.

[226]DRC 25 April 2013, no. 04131433.

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or documents. In other words, this means that an amendment of claim will not be admitted (any longer) after notification of the closure of the investigation by FIFA.

In principle, the counterparty has the right to respond to the amended claim in absence of which the counterparty renounces its right. In a case the DRC Judge noted that the respondent had been given the opportunity to reply to the amended claim submitted by the claimant, but that the respondent had failed to present its response in this respect. In this way, so the DRC Judge deemed, the respondent renounced its right of defence and thus accepted the allegations of the claimant.[227] This can also be derived from the DRC case of 10 July 2013. In this case the claimant lodged a complaint before FIFA on 27 April 2012, claiming the amount of USD 188,500 plus interest, made up of USD 100,000 as an outstanding amount for the season 2009–2010 as well as USD 88,500 as compensation. On 11 June 2012, the parties reached an agreement to resolve the matter amicably. According to the *"protocol"* which was signed by both parties, the respondent accepted still owing USD 75,000 to the claimant regarding the contract, thus, in order to settle its debts, would pay to the claimant the amount of USD 57,500 in instalments. On 30 July 2012, the claimant stated that the respondent had not yet fulfilled its obligations in connection with the protocol and, after amending his claim, requested the payment of the amount of USD 75,000 plus interest at the rate of 5 % p.a. as from 10 July 2012. However, despite having been invited by FIFA to provide its position in respect of the amended claim of the claimant, the respondent did not respond to the amended claim.[228]

In the case of 6 March 2013, the DRC Judge took due note that the claimant originally requested the amount of USD 1,358,938 regarding outstanding remuneration, in consideration of the contract. The DRC Judge further noted that the respondent partially accepted the claimant's claim, by paying the claimant the total remuneration in the currency of country U 4,854,948 as established in the agreement. The DRC Judge finally acknowledged that the claimant amended his initial claim, by accepting that the aforementioned payment had been made.[229]

It is of vital importance that the amended claim does not lack any clarity. For example, in the DRC case of 7 February 2014, the claimant also amended its claim. However, the DRC was eager to emphasize in this case that the breakdown of the amounts claimed by the claimant in his modified claim lacked certain clarity.[230]

## 2.15 Counterclaim

As with the entitlement of a party to amend its claim, the possibility of the submission of a counterclaim is not laid down in the RSTP or the Procedural Rules (although it can indirectly be derived from Article 17 paras 3 and 5 of the

[227]DRC 10 July 2013, no. 07132410.

[228]DRC 10 July 2013, no. 07132410.

[229]DRC 6 March 2013, no. 0313789.

[230]DRC 7 February 2014, no. 02143251.

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Procedural Rules, 2015 edition where reference is made to a counterclaim). However, in this regard, from the DRC jurisprudence it explicitly follows that a party can submit a counterclaim during a DRC procedure.[231] Following several DRC decisions, one can see that this is possible.[232] The party may then generally give its reaction and respond to the counterclaim. Finally, the DRC will give its final decision on both the submitted claim and the counterclaim in one decision.

In a DRC decision of 31 October 2013, the player lodged a claim before FIFA on 27 August 2012 for breach of contract and compensation for breach of contract against the club, requesting that the club be ordered to pay the total amount of EUR 14,000. In its response, the club claimed that, in keeping with the club's common practice, the player was requested, on numerous occasions, to visit the club's offices in order to receive his monthly salary, which had always been paid to the player in the same manner; however, he failed to do so. The club rejected the player's arguments and lodged a counterclaim against him for the payment of compensation for breach of contract without *just cause*. In this case, the DRC finally decided that the claim of the claimant, player L, was partially accepted. The counterclaim of the respondent, club D, was rejected and the respondent had to pay to the claimant the amount of EUR 4000.[233] From this case, it follows that a party may insert a counterclaim and that a final decision will be given on both the claim as well as the counterclaim.[234]

## 2.16 Intervening Party

The Procedural Rules and the RSTP neither provide for rules for a party who wishes to intervene in the DRC proceedings. However, according to various DRC decisions, an *intervening* party is entitled to be and can get involved in the procedure.[235]

For example, in a DRC decision of 27 April 2006, a player acting in this procedure as claimant was transferred in 1996 from a national club to club B in another country. In 1999 the player transferred to club C, who acted as the intervening party. On 25 August 2003, a transfer contract for the player was concluded between the latter club and new club D, acting in this procedure as the respondent. The respondent appeared to be prepared to pay the solidarity contribution to the clubs which were entitled to receive it and which were involved in the player's

[231]Filing a counterclaim in an appeal procedure before the CAS after 1 January 2010 is no longer possible.

[232]DRC 26 November 2004, 114628, DRC 28 July 2005, no. 75923, DRC 23 September 2005, no. 95855, DRC 17 August, nos. 861174 and 861307.

[233]DRC 31 October 2013, no. 10132457.

[234]DRC 18 December 2012, no. 12121204.

[235]DRC 23 September 2005, no. 95168, DRC 27 April 2006, no. 46400, DRC 28 September 2006, no. 96633, DRC 23 March 2006, no. 36446, and DRC 21 November 2006, no. 6111183a.

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training and education in accordance with the applicable FIFA regulations. On 5 December 2003 and 15 January 2004, the intervening party submitted statements to FIFA regarding the distribution of the solidarity contribution for the player. The intervening party objected to the respondent withholding the solidarity contribution for several reasons. The DRC finally decided that the respondent should pay the claimant a certain amount as solidarity contribution in relation to the transfer of the player from the intervening party to the respondent. Finally, the members of the chamber furthermore stated that the intervening party's position should be rejected, since solidarity contribution is an independently existing claim besides training compensation.[236] Furthermore, in a DRC decision of 25 April 2013, an intervening party was also involved in the procedure. However, despite having been invited by FIFA to do so in the matter at hand, the intervening party concerned did not submit any comments to the DRC.[237]

In conclusion, a party can intervene in a procedure before the Chamber. Especially, in decisions with regard to training compensation and the solidarity mechanism, an intervening party becomes involved in the DRC procedure. This is quite logical due to the fact that the new club is often obliged to pay a solidarity contribution or an amount of training compensation to several former clubs involved which take the position that they are entitled to receive a certain amount.[238]

## 2.17 Costs

### *2.17.1 Costs of FIFA Proceedings*

Following the "2005 edition", the edition that came into force on 1 July 2005, and former editions of the Procedural Rules, the general rule was that the costs of proceedings before the DRC and the DRC Judge were free of charge.[239] In other words, there were no costs related to these procedures. However, as from the "2008 edition" of the Procedural Rules, the edition that came into force on 1 July 2008, and as also laid down in the current Procedural Rules, edition 2015, we note nowadays, that only the aforementioned "*sub a and b procedures*" are free of charge. No costs will thus be charged if it concerns DRC proceedings relating to disputes between clubs and players in relation to the maintenance of contractual stability and ITC requests ("*sub a procedure*") and the employment-related disputes with international dimension ("*sub b procedure*").[240]

[236]DRC 27 April 2006, no. 46400.

[237]DRC 25 April 2013, no. 04132000. See also DRC 31 October 2013, no. 10132457.

[238]See also DRC 12 December 2013, no. 12131160.

[239]Procedural Rules, 2005 edition, Article 15 para 2. See also RSTP, 2005 edition, Article 25 para 2.

[240]Procedural Rules, 2015 edition, Article 18 para 2. See also RSTP, 2016 edition, Article 25 para 2.

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In respect of the above, we can conclude that all (other than *sub a* and *sub b*) proceedings before FIFA are *not* free of charge on the understanding that neither will costs be levied for proceedings relating to the provisional registration of players.[241] In accordance with Article 25 para 2 of the RSTP and Article 18 of the Procedural Rules, 2015 edition, the maximum costs of proceedings before the PSC including the Single Judge (with the exception of proceedings relating to the provisional registration of players), as well as proceedings before the DRC including the DRC Judge, in relation to disputes regarding training compensation and the solidarity contribution, shall be set at a maximum amount of CHF 25,000—and shall normally be paid by the unsuccessful party and thus in consideration of the parties' degree of success in the proceedings (where, in special circumstances, the costs may be assumed by FIFA), taking into account that the allocation of the said costs will be explained in the decision itself.[242] As also follows from the FIFA Commentary, taking into account (a) the outcome of the proceedings, (b) the conduct and (c) financial resources of the parties, as a general rule the costs related to the DRC procedure will generally be borne by the unsuccessful party.[243] Further, we note the fact that, in the event that a party generates unnecessary costs on account of its conduct, costs may be imposed upon it, irrespective of the outcome of the DRC proceedings.

With regard to the exact amount of the procedural costs, Annex A of the Procedural Rules points out that the procedural costs will be levied in accordance with a fixed table, whereby the extent of the costs is subject to the amount in dispute. For example, if the amount in dispute is up to CHF 50,000 the procedural costs are up to CHF 5000. In the event the amount in dispute is up to CHF 100,000 the costs are up to CHF 10,000. In the event the amount in dispute is up to CHF 150,000 the procedural costs are up to CHF 15,000. In case the amount in dispute is up to CHF 200,000, the procedural costs are up to CHF 20,000. With regard to any disputes higher than CHF 200,000 the procedural costs are up to CHF 25,000.[244]

In accordance with Article 15 of the Procedural Rules, the PSC, the DRC, the Single Judge and the DRC Judge may decide not to communicate the grounds, which will be discussed more extensively in the following paragraphs, in which the parties then have 10 days from receipt of the findings of the decision to request the grounds of the decision, in writing. With regard to the procedural costs, Article 18 para 3 of the Procedural Rules, states that no fees shall be charged if a party decides not to request the grounds of a decision once the findings have been communicated.[245]

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[241]Procedural Rules, 2015 edition, Article 18 para 1.

[242]RSTP, 2016 edition, Article 25 para 2.

[243]FIFA Commentary, explanation Article 25, p. 75.

[244]Procedural Rules, 2015 edition, Annex 1.

[245]Procedural Rules, 2015 edition, Article 15 para 1 and Article 18 para 3. With regard to Article 15 of the Procedural Rules, see CAS 2011/A/2563 *CD Nacional v. FK Sutjeska*, award of 30 March 2012. See also CAS 2011/A/2436 *Associação Académica de Coimbra-OAF v. Suwon Samsung Bluewings FC*, award of 25 May 2012.

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Finally, parties must be aware that an *advance of costs* is payable for proceedings before the PSC and the Single Judge (with the exception of proceedings relating to the provisional registration of players), as well as for proceedings before the DRC in relation to disputes regarding training compensation and the solidarity mechanism. However, aside from the "*sub a and sub b procedures*", no advance of costs needs to be paid for proceedings before the DRC in relation to disputes regarding training compensation and the solidarity mechanism if the value of the dispute does not exceed CHF 50,000.[246] In this regard, the advance of costs shall be duly considered in the decision regarding costs in accordance with Article 18 of the Procedural Rules, 2015 edition.[247] Furthermore, the advance of costs for disputes relating to training compensation or the solidarity mechanism shall be reimbursed to the party concerned if all parties to the dispute accept the FIFA administration's proposal regarding the amounts owed and the calculation of such amounts (see also Article 13 of the Procedural Rules).[248]

In addition to the above, the advance of costs is also subject to the amount in dispute. In the event that the amount in dispute is up to an amount of CHF 50,000, the amount related to the advance of costs is CHF 1000. If the amount in dispute is up to CHF 100,000, the advance of costs are CHF 2000. If the amount in dispute is up to CHF 150,000, the amount related to the advance of costs is CHF 3000. If the amount in dispute is up to CHF 200,000, the amount related to the advance of costs is CHF 4000 and with regard to amounts in dispute higher than CHF 200,001, the advance of costs is CHF 5000.

By absence of which the claim is not immediately inadmissible (since petitions that do not comply with one of the requirements in relation to Article 9 para 1 of the Procedural Rules, will only be returned for redress with a warning that the petition will not be dealt with in the event of non-compliance), one should be aware that pursuant to Article 17 para 3 of the Procedural Rules, the advance of costs must be paid by the claimant or counterclaimant at the time that the claim or counterclaim is lodged, as stated in Article 9 para 1 of the Procedural Rules.[249] This can also be derived from Article 17 para 5 of the Procedural Rules, in which Article it stipulates that if a party fails to pay the advance of costs accordingly when submitting a claim or counterclaim, the FIFA administration shall allow the party concerned ten days to pay the relevant advance. However, failure to do so will (again) result in the claim or counterclaim of the party not being heard.[250]

[246]Procedural Rules, 2015 edition, Article 17 para 2.

[247]Procedural Rules, 2015 edition, Article 17 para 6.

[248]Procedural Rules, 2015 edition, Article 17 para 7.

[249]Procedural Rules, 2015 edition, Article 17 para 3 and Article 9 para 1.

[250]Procedural Rules, 2015 edition, Article 17 para 5.

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### *2.17.2 Procedural Compensation*

As laid down in Article 18 para 4 of the Procedural Rules and as follows from the decisions of the DRC and PSC, FIFA is quite clear in that no procedural compensation shall be awarded in proceedings before the PSC and the DRC.[251] In other words, if a player or a club claims legal fees for the declarations of its legal adviser or lawyer, in all cases the DRC will decide not to grant any legal fees whatsoever. This is the well-established and consistent jurisprudence of the DRC.

The DRC does not make any exceptions in this respect. For example, in a decision of 11 March 2005, the DRC considered that with regard to the demand submitted by the party, according to which any amount awarded to the other party in the present matter should be deducted from a debt the relevant club has towards it, the DRC considered that both matters were completely independent and separate from each other and therefore decided to reject any possible compensation of credits.[252] In a decision of 2 November 2005 regarding legal fees and other expenses, the DRC stated that the player did not quantify or specify these compensations at all, nor did he provide the FIFA administration with any evidence. Consequently, the DRC decided not to award these claimed remunerations. Nevertheless, the DRC also considered rejecting the claim with regard to covering any legal or other fees, because, in accordance with the well-established jurisprudence of the DRC, no procedural compensation are awarded in proceedings before the DRC.[253] Finally, in a DRC decision of 26 October 2006, the Chamber also decided that no procedural compensation would be awarded in proceedings of the DRC and reference was also made to Article 15 paras 2 and 3 of the Procedural Rules.[254] Also, in more recent decisions by the Chamber, such as the decision of 31 July 2013, the DRC decided as such, in accordance with its well-established jurisprudence.[255]

## 2.18 Provisional Measure

The question is whether the DRC is competent to give a provisional decision. This specific competence is not explicitly regulated in the applicable rules. No DRC decisions are published on the website of FIFA from which it follows that the

[251]Procedural Rules, 2015 edition, Article 15 para 3. In a CAS procedure the CAS Panel can decide that a party is obliged to pay the procedural costs of the counterparty. In this context, see for example R64.4 of the Procedural Rules of CAS. As a general rule, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, particularly the costs of witnesses and interpreters.

[252]DRC 11 March 2005, no. 35185.

[253]DRC 2 November 2005, nos. 6585 and 115999.

[254]DRC 26 October 2006, no. 1061318. See also DRC 3 July 2008, no. 78662.

[255]DRC 31 July 2013, no. 071311395.

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DRC or the DRC Judge declares itself competent in order to decide on the basis of a provisional measure.[256] However, unpublished case law of the DRC shows that, in order not to hinder the player's career and in light of the request for provisional measures, the DRC can be competent to pass a *prima facie* decision with regard to the elements that are of relevance for the possible granting of provisional measures in the sense of Article 6 para 1 of the RSTP.[257] In this unpublished case law the DRC decided it was competent to pass a *prima facie* decision on said elements for the sole purpose of the possible registration of the player with his new club outside the registration period. From this jurisprudence the conclusion must be drawn, that the DRC is thus competent to pass a *prima facie* decision with regard to this particular element in light of Article 6 para 1 of the RSTP, which directly affects the player's possibility to pursue his career. It must be taken into account that the pertinent appreciation of the DRC of that specific aspect is a very limited one, exclusively within the scope of possibly granting of provisional measures, which also follows from this case law. Moreover, that particularly its appreciation is without any kind of prejudice to any future decisions that the Chamber will have to pass with regard to its competence to deal with the substance of the dispute arisen between the player and the club, and if applicable, also with regard to the substance of the matter.

It must further be noted that the Single Judge of the PSC, in any event, is competent to decide on the provisional registration of a player for a club in exceptional circumstances.[258] For example, an immediate provisional registration can be issued by the *new national association* if the new association does not receive a response to an ITC request from the former association within 15 days after submitting the ITC request.[259] The provisional registration will then become permanent 1 year after the ITC request. If, during this 1-year period, the former association presents valid reasons by submitting a claim before the PSC explaining

[256]Under the CAS Code, parties may apply for provisional or conservatory measures before the CAS, however, only after all internal legal remedies provided for in the rules of the federation or sports-body concerned have been exhausted. See the CAS Code, edition 1 January 2016, Article R37. Following the CAS jurisprudence there are 3 requirements for the granting of provisional measures (i.e. irreparable harm, likelihood of success on the merits of the appeal, and balance of interest). See for example, CAS 2007/A/1403 *Real Racing Club de Santander SAD v. Club Estudiantes de la Plata*, order of 12 December 2007.

[257]See DRC 21 November 2011 and DRC 30 November 2015. From this jurisprudence of the DRC it follows that according to Article 6 para 1 of the RSTP, FIFA may take provisional measures in order to avoid abuse where a contract between a player and his previous club has been terminated by the player with or without *just cause*.

[258]FIFA Commentary, explanation Article 22, p. 66.

[259]RSTP, 2016 edition, Annex 3, Article 8.2 para 6. See also RSTP, 2016 edition, Annex 3a, Article 3 para 5. For the avoidance of misunderstanding, in the latter provision reference is made to 30 days.

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why it did not respond to the ITC request, the Single Judge of the PSC will then be entitled to and may withdraw the provisional registration as issued previously.[260]

If the former association *does* reply to the new association, for example by informing the latter that the player is still contracted to its club or that a contractual dispute exists, from the FIFA Commentary it follows that the *new association* is then *not* entitled to issue an immediate provisional registration.[261] In that case, the former association replies to the new association that the ITC cannot be issued because the contract between the former club and the professional has not expired or that there has been no mutual agreement regarding its early termination, the Single Judge of the PSC is then legally entitled to issue a provisional registration.

In this context, the player as well as the former club and the new club are entitled to lodge a claim with FIFA. As follows from the FIFA Commentary, at this stage the procedures within FIFA will provisionally be split. In this context, the DRC will decide in the procedure whether or not the employment contract has been breached or whether the presence of a *just cause* exists. Aside from the DRC procedure, the procedure relating to provisional measures, particularly relating to the provisional registration of the player for the new club, is exclusively within the remit of the PSC who, in turn, has entrusted the Single Judge to deal with these matters. The Single Judge of the PSC will then be asked to pronounce on the provisional registration for the new club after considering whether the interests of the player from irreparable harm, the likelihood of success of the player on the merits of the claim, and whether the interests of the player outweigh those of the opposing party (the so-called balance of convenience of interests), according to the FIFA Commentary. If these conditions are met, the Single Judge will then authorise the new association to provisionally register the player for the new club.[262] If, as is also stated in the FIFA Commentary, the conditions are not met or if the evaluation of the Single Judge does not yet enable the responsibilities to be ascertained in a provisional manner, the Single Judge will not give provisional authorisation and the DRC will have to pronounce first on the substance of the matter. Once the DRC has decided on the breach of the contract and consequently on the financial and sporting consequences, the ITC can be issued in favour of the new association.[263]

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[260]RSTP, 2016 edition, Annex 3, Article 8.2 para 6. See also RSTP, 2016 edition, Annex 3a, Article 3 para 5 and RSTP, 2016 edition, Article 23 para 4, in which it is laid down in the latter Article that, in cases that are urgent or raise no difficult factual or legal issues, and for decisions on the provisional registration of a player in relation to international clearance in accordance with Annex 3, Article 8, and Annex 3a, the chairman or a person appointed by him, who must be a member of this committee, may then adjudicate as a Single Judge.

[261]FIFA Commentary, explanation Annex 3, p. 104, footnote 139. A decision regarding the provisional registration would not affect the sporting results of the new club for the games in which the player participated, but the player only loses eligibility to play for the new club once the provisional registration has been withdrawn. See in this regard FIFA Commentary, explanation Annex 3, p. 104, footnote 140.

[262]Practice has shown that the Single Judge of the PSC can adjudicate within 7 days.

[263]FIFA Commentary, explanation Annex 3, p. 106.

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## 2.19 Prescription

Pursuant to Article 25 para 5 of the RSTP, 2016 edition, the DRC will not hear any case subject to the RSTP if more than 2 years have lapsed since the event giving rise to the dispute. In other words, a party waives its right to lodge a claim before the Chamber if more than 2 years have lapsed. The period of limitation in which a claim may be lodged is examined *ex officio* by the DRC while considering the formal aspects.[264] The FIFA Commentary for example, provides for transfer compensation which is paid in 5 equal instalments. Here FIFA indicates that the event giving rise to the dispute is the date on which the last instalment matured.[265]

The jurisprudence of the DRC is quite clear in this respect. It is well-established jurisprudence of the DRC, that the Chamber will not hear any case subject to the RSTP if more than 2 years have lapsed since the event giving rise to the dispute.

In a case before the DRC of 28 July 2005, the club stated that the claim was prescript. The DRC turned to the club's argument that the player's claim was already prescript and in this regard, referred to Article 44 of the RSTP, 2001 edition, in connection with Article 4 of the Procedural Rules, according to which the DRC will not address any dispute if more than 2 years have lapsed since the facts leading to the dispute arose. Therefore, on account of the aforementioned provision, the DRC decided that the right to claim for the salary instalments from December 2001 to April 2002 should be considered as prescript and that the DRC therefore was not in a position to handle this part of the claim. As far as the second part of the player's request was concerned, i.e. the payment of salary of May 2002, the DRC stated that between the origin of this part of the claim on 5 May 2002 and its submission to FIFA on 30 April 2004, 2 years had not yet lapsed. The DRC stated that, taking into consideration the aforementioned provision, the right to claim for the salary instalment of May 2002 was not prescript. Therefore, the Chamber decided that the club should pay the player a certain amount as salary for the month of May 2002.[266]

In a case before the DRC of 12 January 2006, the DRC concluded that between the date when the facts leading to the dispute arose, i.e. 30 June 2002 (the date of signing the employment contract between the player and the club) and the submission of the claim to FIFA on 15 March 2005 by the claimant, another club, more than 2 years had lapsed. The DRC finally concluded that the club's claim for training compensation of the player concerned should be considered as prescript.[267]

In line with the FIFA Commentary that provides for the example relating to transfer compensation which is paid in equal instalments, the DRC decided

[264]FIFA Commentary, explanation Article 25, para 5, p. 76.

[265]FIFA Commentary, explanation Article 25, para 5, p. 76.

[266]DRC 28 July 2005, no. 75559.

[267]DRC 12 January 2006, no. 16432. See also DRC 27 April 2006, no. 46610.

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accordingly in its cases of 27 April 2006. In this case, the DRC took into account that the relevant instalments should have been paid on 4 September 2003 and the claim was received on 7 March 2005. The Chamber concurred that the claim with regard to the first instalment in the amount of EUR 28,548 due on 4 September 2002 could not be considered, since over 2 years and 6 months had lapsed. Therefore, the DRC finally concluded that it could only consider the claim with regard to the second instalment due as at 4 September 2003.[268]

In the case of 3 October 2008, the DRC stated that the player had signed a professional contract on 21 December 2002 and was registered as a professional on 10 August 2002. In the matter at hand, club K lodged a claim for training compensation before FIFA against club C on 22 January 2007, and therefore the DRC decided that more than 2 years had lapsed since the event giving rise to the dispute. The DRC stressed that its jurisprudence confirmed the obligation of the club training and educating players, to follow the career of the player when they intend to claim training compensation before FIFA's decision-making bodies.[269]

Also, in the case of 31 July 2013, the Chamber took note of the formal objection of the respondent, according to which the claimant's amendment of 8 November 2012 should be considered as time-barred, since it was submitted more than 2 years after the event giving rise to the dispute, i.e. the player's termination letter of 3 August 2010. The Chamber referred to Article 25 para 5 of the RSTP in connection with the Procedural Rules, which stipulates that the decision-making bodies of FIFA shall not hear any dispute if more than 2 years have lapsed since the facts leading to the dispute arose, and that the application of this time limit shall be examined *ex officio* in each individual case. The DRC finally deemed that the objection of the respondent was rejected and that the amendment of 8 November 2012 was not affected by prescript and, therefore, was admissible.[270]

In its case of 27 August 2014, the DRC Judge duly noted that due to the fact that the employment contract at the basis of the dispute was concluded on 14 August 2010, and that the claimant had lodged his claim on 26 June 2013, he should examine if the present claim should be considered as time-barred.[271] The DRC Judge referred to Article 25 para 5 of the RSTP, which, in completion to the general procedural terms outlined in the Procedural Rules, clearly establishes that the decision-making bodies of FIFA shall not hear any dispute if more than 2 years have lapsed since the event giving rise to the dispute arose and that the application of this time limit shall be examined *ex officio* in each individual case. The DRC Judge deemed it fundamental to underline that in order to determine whether he could hear the present matter, he should, first and foremost, establish what is *"the event giving rise to the dispute"*, i.e. what is the starting point of the time period of

[268]DRC 27 April 2006, no. 46610. See also DRC 17 August 2006, no. 86119, and DRC 4 April 2007, no. 47932a.

[269]DRC 3 October 2008, no. 108488.

[270]DRC 31 July 2013, no. 07132435. See also DRC 23 January 2013, nos. 01132519 and 01131531.

[271]DRC 27 August 2014, no. 08142998.

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2 years as set out under Article 25 para 5 of the RSTP. The DRC Judge referred to the claim of the claimant, according to which the latter requested outstanding salary amounting to USD 10,000. The DRC Judge emphasized that the claimant would be time-barred to claim any amount that would have fallen due prior to 27 June 2011. The DRC Judge underlined that the claimant did not provide any information, let alone documentation relating to the due dates of the amounts claimed, although the claimant was requested on several occasions to provide the FIFA administration with further information with regard to his claim. On account of the aforegoing, and considering the complete lack of indication by the claimant as to the due date(s) of the claimed amounts, the DRC Judge deemed, on the basis of the entire documentation, that he was not in a position to conclude that the amounts claimed by the claimant party were not time-barred, as per Article 25 para 5 of the RSTP.

Take into account that also part of a claim of a claimant party can be prescript, as follows from the DRC decision of 27 February 2014, the Chamber focused its attention (only) on part of the claimant's claim. In this case, the respondent stated that the claim of the claimant must be considered time-barred by the statute of limitations in accordance with Article 25 para 5 of the RSTP.[272]

It can be concluded that the jurisprudence of the DRC is quite clear with regard to the "*prescription term*". The DRC jurisprudence leaves no room for any exceptions. The DRC will not hear any case subject to the RSTP, if more than 2 years have lapsed since the event giving rise to the dispute. However, from a CAS case of 24 September 2013, it can be inferred that the limitation period of Article 25 para 5 of the RSTP can be interrupted under circumstances.[273] With regard to the limitation period of 2 years set out in Article 25 para 5 of the RSTP, the CAS stressed in this case that there is no provision providing for the consequences of a possible amicable agreement between parties to postpone the due date for payment of certain amounts. According to the CAS, there is also no provision providing for the possible interruption of the prescription period or a provision specifically determining that the limitation period of 2 years can be interrupted under any circumstances. The CAS held that, where the RSTP contains a *lacuna*, or at least an ambiguity, that should be encouraged in the spirit of good relations in the world of sport. According to the CAS, in this specific case it must be possible for a limitation period to be interrupted if the parties have mutually agreed on a new payment schedule, especially if the debtor asked for it and the *bona fide* creditor relies on such new payment schedule. Therefore, it must be taken into consideration that in future cases, the DRC committees may decide that the prescription term can be interrupted in the event that the parties have mutually agreed on a new payment schedule, especially if the debtor asks for it and the *bona fide* creditor relies on such new payment schedule.

[272]DRC 27 February 2014, no. 02143259.

[273]CAS 2012/A/2919 *FC Seoul v. Newcastle Jets FC*, award of 24 September 2013.

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## 2.20 Decision

### *2.20.1 General*

As a general rule, the DRC will adjudicate within 60 days and the DRC Judge will adjudicate within 30 days of receiving a valid request, as laid down in Article 25 para 1 of the Procedural Rules.[274] The limit of 60 and 30 days respectively, can obviously only be complied with if the parties cooperate in the procedure and are willing to provide comprehensive positions within the granted deadlines.[275]

The decisions taken by the DRC are effected by a simple majority vote after secret deliberations. All members in attendance and the chairman have one vote each. Abstentions are not permitted. In case of a tie, the chairman will cast the final vote.[276]

Furthermore, it is important to realise that decisions may also be taken by way of circulars.[277] The decisions will be communicated to the parties in writing. In urgent cases, with the exception of Article 15 of the Procedural Rules (decisions without grounds), the grounds of the decision may be communicated within 20 days of notification of the findings of the decision.[278] The FIFA General Secretariat is finally entitled to announce the decision in the name of and on behalf of the DRC.[279]

Albeit in theory and in accordance with the Procedural Rules, the DRC must adjudicate within 60 days and the DRC Judge must adjudicate within 30 days of receiving a valid request. In practice we note that the DRC and the DRC Judge (as well as the PSC and the Single Judge of the PSC) will not adjudicate within the aforementioned deadline. In practice, we experience that there is a delay in procedures before the DRC and the DRC Judge (as well as the PSC and the Single Judge of the PSC) on the understanding that FIFA is trying to resolve this problem, as also appears from the recent procedural amendments as passed in the editions 2015 of the Procedural Rules and the RSTP, this can be inferred from the amendment with regard to Article 24 para 2 of the RSTP to further strengthen the efforts made for a faster and more efficient dispute resolution, in which the competence of the chairman and deputy chairman of the DRC was extended to grant them Single Judge competences relating to training compensation and the solidarity mechanism disputes. However, here too from a formal point of view, the DRC does not comply with the deadline as laid down in Article 25 para 1 of the RSTP in conjunction with Article 5 para 6 ("*The Players' Status Committee and the DRC shall perform the duties entrusted to them with due expedition*") of its

[274]RSTP, 2016 edition, Article 25 para 1.

[275]FIFA Commentary, explanation Article 25, p. 75.

[276]Procedural Rules, 2015 edition, Article 14 para 1.

[277]Procedural Rules, 2015 edition, Article 14 para 1.

[278]Procedural Rules, 2015 edition, Article 14 para 2.

[279]Procedural Rules, 2015 edition, Article 14 para 3.

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own Procedural Rules. There can be no misunderstanding that said Articles clearly obligate FIFA to conduct the proceedings before the DRC (at least) in an expeditious manner.

In the past, the CAS Panels have dealt with several decisions with regard to the principle of "*Denial of Justice*".[280] In these decisions, the CAS clearly stated that if a body refuses without reasons to issue a decision or delays the issuance of a decision beyond a reasonable period of time, there can be a Denial of Justice, opening the way for an appeal against the absence of a decision. CAS Panels emphasized that the absence of a reaction can be considered as a decision, which is then final.[281]

### *2.20.2 Form and Contents*

The written DRC decisions will at least contain the date of the decision (on the understanding that decisions taken by way of a circular, will contain the date of completion of the circular process), the names of the parties and any representatives. Further, the decision is provided with the names of the members participating in the decision taken by the decision-making body, the claims and/or the motions submitted by the parties, and a brief description of the case. The DRC decision or the DRC Judge must also mention the reasons for the findings, the outcome of the evaluation of evidence, and the findings of the decision.[282] Regarding the form and contents, any obvious mistakes in decisions may be corrected by the DRC or the DRC Judge, *ex officio* or on application.[283] In any event, no disadvantage may accrue to any party from an erroneous announcement in a DRC decision.[284]

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[280]See for example CAS 97/169 M, CAS 2004/A/659 *Galatasaray SK v. FIFA and Club Regatas Vasco da Gama & F.J.*, award of 17 March 2005, CAS 2005/A/994, CAS 2005/A/899 *FC Aris Thessaloinki v. FIFA & New Panionios N.F.C.*, award of 15 July 2005 and CAS 2007/A/1251 *Aris FC v. FIFA*, award of 27 July 2007. See also CAS 2011/A/2436 *AC Coimbra v. Bluewings FC*, award of 25 May 2012, and CAS 2011/A/2563 *CD Nacional v. FK Sutjeska*, award of 30 March 2012. See also CAS 2008/A/1705 *Grasshopper v. Alianza Lima*, award of 18 June 2009.

[281]Until so far, no FIFA decisions are challenged based on "*Denial of Justice*". However, in the event that serious delays in the procedures before the DRC or the DRC Judge (as well as the PSC and the Single Judge of the PSC) continue, FIFA must take into account that the delays in the DRC procedures can trigger parties to bring their case to the CAS as a result of which the delay in the procedure can be established as a delay beyond a reasonable period of time. In other words, then there might be a "Denial of Justice". In CAS 2014/A/3620 *Us Città di Palermo v. Club Atlético Talleres de Córdoba*, award of 19 January 2015, the Panel also made reference to the duration of the FIFA proceedings and, due to the length of it, the Panel decided to reduce the costs for the FIFA proceedings.

[282]Procedural Rules, 2015 edition, Article 14 para 4.

[283]Procedural Rules, 2015 edition, Article 14 para 5.

[284]Procedural Rules, 2015 edition, Article 14 para 6.

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Irrespective of the above, the DRC can also decide not to communicate the grounds of the decision and instead to communicate only the findings of the decision. At the same time, the parties shall be informed that they have ten days from receipt of the findings of the decision, to request the grounds of the decision in writing, and that failure to do so will result in the decision becoming final and binding and the parties then being deemed to have waived their right to file an appeal.[285] The time limit to file an appeal begins upon receipt of the motivated decision.[286]

### *2.20.3 Service and Publication*

Decisions will be sent to the parties directly, with a copy sent to the respective associations.[287] Notification is deemed to be complete at the time that the decision is received by the party, at least by fax, on the understanding that notification of a representative shall be regarded as notification of the party.[288] Decisions which are communicated by fax will be legally binding. Alternatively, in the absence of direct contact details, decisions intended for the parties in a dispute, particularly clubs, are addressed to the association concerned with the instruction to forward the decisions immediately to the relevant party. These decisions are considered to have been communicated properly to the ultimate addressee four days after communication of the decisions to the association. Failure by the association to comply with the aforementioned instruction may result in disciplinary proceedings in accordance with the FIFA Disciplinary Code, as follows from Article 19 para 3 of the Procedural Rules. It must be noted that not all DRC decisions are published on the official FIFA website. Decisions, if they are of general interest, may be published by the General Secretariat in a form determined by the DRC, e.g. condensed in the form of a media release. Due restraint will be exercised when publishing. Following a substantiated request by a party, certain elements of the decision may be excluded from publication.[289] In order to create more uniformity, certainty,

[285]Procedural Rules, 2015 edition, Article 15 para 1. See also CAS 2011/A/2563 *CD Nacional v. FK Sutjeska*, award of 30 March 2012. According to this case, it was possible to appeal before the CAS after the 10 day period as stated in Article 15 of the Procedural Rules until 21 days after receipt of the unmotivated FIFA verdict. However, this is "repaired" as from 2012 edition of the Procedural Rules.

[286]Procedural Rules, 2015 edition, Article 15 para 2. See also Procedural Rules, 2015 edition, Article 16 para 13, in which it states that the time limit for filing an appeal shall always begin on receipt of the full version of the decision. Furthermore, all decisions that lead to sporting sanctions may only be communicated with grounds. See Procedural Rules, 2015 edition, Article 15 para 4. The DRC may decide that the amount due must be paid in instalments. See DRC 12 December 2013, no. 12133757.

[287]Procedural Rules, 2015 edition, Article 19 para 1.

[288]Procedural Rules, 2015 edition, Article 19 para 2.

[289]Procedural Rules, 2015 edition, Article 20.

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equality and transparency for all participants in the international football world, obviously all DRC decisions should be published by FIFA on its own website and not just a selection from it.

## *2.20.4 Enforcement*

### 2.20.4.1 General

DRC decisions are solely decisions regarding *dispute resolution*. As mentioned before, the DRC decisions are in no way arbitral awards, such as the decisions of the CAS, nor can the DRC decisions be described as binding advisories. As was stated by the CAS in its award of 1 June 2010 between FC Sion and Al Ahly, FIFA proceedings are not court proceedings, and neither arbitral proceedings. Rather, they are "*intra-association proceedings*", based on the private autonomy of the association, which, by definition lack the procedural rigour that one can find in true court proceedings.[290] Consequently, the DRC decisions cannot be enforced by the parties through the bailiffs or national civil courts. The DRC decisions can only be enforced via FIFA channels, i.e. through disciplinary power.

Nevertheless, enforcement through FIFA's own association law is a very efficient method of enforcement.[291] This method of enforcement can be presumed to be a satisfactorily working system. Aside from there being some exceptions, parties are willing to cooperate in case of a reprimand. As mentioned, it is generally difficult to enforce a decision of a civil court or an arbitration court in a foreign country. According to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards held in New York on 10 June 1958, as of 1 January 2015, 156 countries declared that it applies the Convention to the recognition and enforcement of awards.[292] This means that in certain countries, there is no legal way to enforce an arbitral award.[293] FIFA is competent to respond directly to a country that infringes the rules. Moreover, parties prefer the DRC as a sports-deciding body (apart from the fact that the DRC procedures still have delay), because the members of the Chamber are specialists in the football world and, FIFA can enforce the decisions through its own disciplinary power. This all makes the above method of enforcement through its own organisation powerful and very effective.

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[290]CAS 2009/A/1880 *FC Sion v. Fédération Internationale de Football Association (FIFA) & Al-Ahly Sporting Club* and CAS 2009/A/1881 *E. v. Fédération Internationale de Football Association (FIFA) & Al-Ahly Sporting Club*, award of 1 June 2010.

[291]In my view this should be another reason why more publicity should be given to the DRC decisions.

[292]This Convention will apply to the recognition and enforcement of arbitral awards made in the territory of a state other than the state where the recognition and enforcement of such awards are sought.

[293]FIFA Commentary, explanation Article 22, remark 99, p. 65.

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### 2.20.4.2 Disciplinary Committee

If one of the parties will not abide by the decision of the DRC, the matter can be passed on to the FIFA Disciplinary Committee.[294] In each DRC decision, under the part "*Decisions of the Dispute Resolution Chamber*", we note that the DRC emphasizes that, in the event that any amounts due, based on the verdict, are not paid within the stated time limit, the matter will be submitted, upon request, to the FIFA Disciplinary Committee for consideration and a formal decision. The FIFA Disciplinary Committee will then decide which matters will be appropriate to force the parties to abide by the decision. If the matter is forwarded to the FIFA Disciplinary Committee, disciplinary sanctions may be imposed upon the debtor. According to Article 62 para 2 of the FIFA Statutes, the Disciplinary Committee may pronounce the sanctions described in the Statutes and the FIFA Disciplinary Code on members, officials, players and match agents. Anyone who fails to pay another person (such as a player, a coach or a club) or FIFA a sum of money in full or in part, even though instructed to do so by a body or an instance of FIFA or the CAS, following Article 64 para 1 of the FIFA Disciplinary Code, will be fined for failing to comply with a decision, will be given a final deadline by the judicial bodies of FIFA in which to pay the amount due or, if it is a club, will be warned and notified that, in case of default or failure to comply with a decision within the period stipulated, points will be deducted or demotion to a lower division ordered.[295] A transfer ban may also be pronounced. A ban on any football-related activity may also be imposed against natural persons, according to Article 64 para 4 of the FIFA Disciplinary Code.[296]

The FIFA Disciplinary Committee, which is equal to the competence of any enforcement authority, cannot review or modify the substance of a previous decision which is final and binding and has thus become enforceable. In other words, it is not allowed to analyse the case decided by the FIFA judicial body, i.e. to check the correctness of the amount ordered to be paid, but it has a sole task to analyse if the debtor complied with the final and binding decision rendered by the FIFA judicial body.

In its Circular no. 1270 of 21 July 2011, FIFA also referred to the range of application of Article 64 of the FIFA Disciplinary Code, which concerns the enforcement of decisions rendered by the CAS as result of which it is now

[294]In a case before the PSC of 30 January 2012, the Single Judge pointed out that, in principle, FIFA's Disciplinary Committee may only execute decisions taken by the competent FIFA deciding bodies and therefore concluded that the present matter should be heard and decided by the Players' Status Committee. See PSC 30 January 2012, no. 1121193.

[295]FIFA Disciplinary Code, 2011 edition (adopted by the FIFA Executive Committee on 30 May 2011), Article 64 para 1.

[296]FIFA Disciplinary Code, 2011 edition, Article 64 para 4.

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exclusively limited to those cases that had previously been dealt with by a FIFA body or committee.[297]

The FIFA Executive Committee appoints the members of the FIFA Disciplinary Committee and the Appeal Committee for at least 8 years. Furthermore, the committee meetings are deemed to be valid if at least three members are present.[298] In general, there are no oral statements and the FIFA Disciplinary Committee decides on the basis of the file.[299] As mentioned earlier and as opposed to DRC proceedings pursuant to Article 107 of the FIFA Disciplinary Code, proceedings before the FIFA Disciplinary Committee may be closed if a party declares bankruptcy.

In general, a decision of the FIFA Disciplinary Committee can be challenged before the Appeal Committee of FIFA if the decision is not declared final by the relevant FIFA regulations, in which the decision of the Appeal Committee will be irrevocable and binding on all the parties, on the understanding that the decision of the Appeal Committee in appeal can finally be challenged before the CAS.[300] However, as laid down in Article 64 para 5 in connection with Article 74 of the FIFA Disciplinary Code, any appeal against a decision passed in accordance with the above Article 64 of the FIFA Disciplinary Code (which is applicable in case of non-compliance of FIFA DRC decisions), must be lodged with the CAS directly.[301]

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[297]Furthermore, in view of the fact that not only natural persons and clubs but also member associations may be considered as offenders, the FIFA Disciplinary Code has an explicit provision applicable to associations. Aside from this, according to FIFA Circular 1270, in order to extend the responsibility for enforcing decisions onto the associations, a provision has been added to the FIFA Disciplinary Code, according to which the association of the deciding body shall bear the responsibility for enforcing any financial or non-financial decision that has been pronounced against a club by a court of arbitration within the relevant association or by a national dispute resolution chamber, both of which must be duly recognized by FIFA. Following said Circular, the same principle applies to a financial or non-financial decision pronounced against a natural person, with the slight but crucial difference that should the natural person be registered (or otherwise have signed a contract in the case of a coach) with a club affiliated to another association in the meantime, the new association shall bear the responsibility for enforcing the relevant decision. Reference must also be made to Article 14 para 1 lit a of the FIFA Statutes, 2016 edition, according to which members have to comply fully with the Statutes, regulations, directives and decisions of FIFA bodies at any time, as well as the decisions of the CAS passed on appeal on the basis of Article 57 para 1 of the FIFA Statutes (from which it follows that FIFA recognises the independent Court of Arbitration for Sport (CAS) with headquarters in Lausanne (Switzerland) to resolve disputes between FIFA, member associations, confederations, leagues, clubs, players, officials, intermediaries and licensed match agents).

[298]FIFA Disciplinary Code, 2011 edition, Article 81 para 1 and Article 82 para 1.

[299]FIFA Disciplinary Code, 2011 edition, Article 11 para 1.

[300]FIFA Statutes, 2016 edition, Article 55 para 3. See also FIFA Disciplinary Code, 2011 edition, Article 126 paras 1–2 and Article 128.

[301]FIFA Disciplinary Code, 2011 edition, Article 64 para 5 and Article 74.

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## 2.21 Court of Arbitration for Sport

### *2.21.1 General*

As follows from Article 24 of the RSTP, decisions reached by the DRC or the DRC Judge may be appealed before the CAS. Each DRC decision or the DRC Judge is provided with a document called "*Directions with regard to the appeals before CAS*", in which document it is laid down that any party intending to challenge a final decision issued by the DRC, must file a statement of appeal with the CAS within a 21-day time limit from receipt of the grounded decision challenged. This also follows from Articles 57 and 58 of the FIFA Statutes and R47 of the CAS Code of Sports-related Arbitration ("the CAS Code").[302] The provisions of the CAS Code are applicable to the CAS proceedings, in which it is important to note that the CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law.[303]

After analysing the material part of DRC decisions, which will be discussed in more detail in Part II of this book, we can conclude that in the last few years the DRC has created well-established jurisprudence with regard to its international football-related disputes. However, a problem we experience, is the fact that not all decisions are published on the website. As said previously, only in cases of general interest may the DRC decision be published.[304] In other words, it is possible that the DRC deviates from the general line in *unpublished* decisions. We cannot exclude this with full certainty. In this context, we also face this same problem with the CAS awards since not all decisions are published either, whereby there is an extra complication with regard to the jurisprudence of the CAS. From a formal and legal point of view, the CAS is not bound and not obliged to follow earlier jurisprudence due to an absence of the so-called "*Stare Decisis-principle*". However, in my point of view, this will and should not mean that the CAS Panels do not have to take into account the outcome of previous decisions. In other words, and also in order to attain more uniformity, equality and legal certainty on a worldwide scale, they cannot deviate under all circumstances, also according to the CAS jurisprudence.[305] As mentioned by Blackshaw, in the interests of comity and legal certainty, the CAS Panels usually follow earlier jurisprudence in order

[302]FIFA Statutes, 2016 edition, Article 58 para 1. See also the CAS Code, edition 1 January 2016, Article R47.

[303]CAS Code, edition 1 January 2016, Article R49. For more information, see www.tas-cas.org Accessed 26 July 2016. The precise address of the CAS is Avenue de Beaumonzt 2, CH-1012 Lausanne (Switzerland). See also FIFA Statutes, 2016 edition, Article 57 para 2.

[304]Procedural Rules, 2015 edition, Article 20.

[305]CAS 2004/A/628 *IAAF v. USATF & Y*, award of 28 June 2004, and CAS 2008/A/1545 *Andrea Anderson* et al. *v. IOC*, award of 16 July 2010.

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(also for the CAS) to build up a so-called *Lex Sportiva*.[306] In this context, the CAS Panels have declared that they are disposed to follow the earlier CAS decisions for reasons of comity and legal predictability in international sports law.[307] In other words, in line with the DRC jurisprudence, the CAS Panels also create a *Lex Sportiva*, but it is important to take into consideration and be aware of the absence of the "*Stare Decisis-principle*".[308]

### *2.21.2 Background*

The CAS, with its headquarters in Lausanne, Switzerland, was established in 1984 to settle sports-related disputes via arbitration following the Statutes of the Bodies Working for the settlement of sports-related Disputes.[309] In this regard, from the website of the CAS it follows that the CAS was placed under the administrative and financial authority of the International Council of Arbitration for Sport ("the ICAS").[310]

Under an agreement between FIFA and the International Council of Arbitration for Sport, the jurisdiction of the Arbitration Tribunal for Football (TAF) is exercised by the CAS. FIFA has recognized CAS since December 2002 to resolve disputes between FIFA members, confederations, leagues, clubs, players, officials and licensed match agents.[311] In its Circular no. 827, FIFA outlined that after "*intense and very constructive discussions with the International Council of Arbitration for Sport*", FIFA finally agreed to recognize the jurisdiction of the CAS. Since then CAS has been ready to act as an appeal committee for decisions taken by the DRC after 11 November 2001.[312] One can say that as from 2002, the

[306]Wild 2011, p. 6. Blackshaw also refers to CAS 97/176 *UCI v. J. 7NCK*, award of 28 August 1998. See also Kaufmann-Kohler G and Rigozzi A 2015, International Arbitration: Law and Practice in Switzerland, Oxford University Press, Corby Northans.

[307]Blackshaw et al. 2006, pp. 249–250; Mr Frank Oschütz also refers in this regard to CAS 96/149 *A.C. v. FINA*, award of 13 March 1997 (CAS Digest I, pp. 251, 258; p. 250, footnote 21).

[308]See for example, two awards of the CAS regarding the issue of loan: CAS 2012/A/2908 *Panionios GSS FC v. Parná Clube*, award of 9 April 2013, and CAS 2013/A/3119 *Dundee United FC v. Club Atlético Velez Sarsfield*, award of 20 November 2013, whereby both panels surprisingly came to a different conclusion. See also Monbaliu 2014. In my opinion the "stare decisis-principle' cannot be a license to deviate from such important legal basic principles such as loan and the applicability of training compensation. See also the following two CAS awards: CAS 2014/A/3652 *KRC Genk c. LOSC Lille Métropole*, award of 5 June 2015 and CAS 2014/A/3500 *FC Hradec Kralove v. Genoa Cricket and Football Club,* award of 23 September 2014. In both CAS cases the CAS Panels also came to a different and opposing conclusion with regard to the questions whether or not a provision had to be interpreted with retroactive effect.

[309]CAS Code, edition 1 January 2016, Article S20.

[310]See the website of the CAS. http://www.tas-cas.org/en/index.html. Accessed 26 July 2016.

[311]FIFA Statutes, 2016 edition, Article 57 para 1.

[312]FIFA Circular no. 827 dated 10 December 2002.

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CAS fills the need for a specialised body to resolve sporting disputes with the exclusion of the civil court system. As also mentioned by Blackshaw, since FIFA agreed to use the CAS as a final court for the football-related appeal disputes in 2002, the workload of the CAS has increased substantially (for example, in 2014 the CAS had to deal with exactly 432 cases).[313]

In order to resolve sports-related disputes through arbitration and mediation, 2 bodies were created, namely the ICAS and the CAS.[314] The CAS is composed of 2 divisions: (a) the Ordinary Arbitration Division; and (b) the Appeals Arbitration Division. The Ordinary Arbitration Division consists of panels whose task it is to resolve disputes submitted to the ordinary procedure. The Appeals Arbitration Division consists of panels whose task is to resolve disputes relating to the decisions of sports-related bodies such as the DRC, amongst others. According to the CAS Code, the CAS was set up by the International Olympic Committee, which rules on the basis of FIFA rules, the Code of Sports-related Arbitration and, additionally, Swiss law.[315]

Legal disputes before the CAS may arise out of an arbitration clause inserted in a contract or regulations, or a later arbitration agreement (the so-called "*O procedures*"), or it could involve an appeal against a decision rendered in a sports-related dispute (the so-called "*A procedures*"), such as the DRC or the DRC Judge (or the PSC or the Single Judge of the PSC). In this regard and in accordance with the CAS Code, the CAS resolves disputes through the appeals arbitration procedure relating to decisions of sports-related bodies such as the DRC, insofar as the statutes or regulations of the said sports-related bodies or a specific agreement so provide.[316]

### *2.21.3 Relevant Procedural Aspects*

According to the CAS Code, the working languages in principle are French and English (and not also Spanish and German as for the DRC).[317] However, parties may request that a language other than French or English be selected, provided that the Panel and the CAS Court Office agree.[318] Furthermore, as with the DRC procedures, parties may be represented or assisted by persons of their choice.[319]

Furthermore, parties may apply for provisional or conservatory measures under the CAS Code before the CAS, however, only after all internal legal remedies

[313]Wild 2011, p. 9.

[314]Statutes of the Bodies Working for the Settlement of Sports-related Disputes, Article S.1.

[315]For an extended view, see Reeb 2006.

[316]CAS Code, edition 1 January 2016, Article R27.

[317]See Rigozzi and Hasler 2013. See also Mavromati and Reeb 2015.

[318]CAS Code, edition 1 January 2016, Article R29. CAS includes a Court Office composed of the Secretary General and one or more Counsel, who may represent the Secretary General when required. See CAS Code, edition 1 January 2016, Article S.22.

[319]CAS Code, edition 1 January 2016, Article R30.

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provided for in the rules of the federation or sports-body concerned have been exhausted.[320] As we have seen before, neither the RSTP nor the Procedural Rules (formally) leave room for the DRC to take provisional measures in a procedure, as opposed to the Single Judge of the PSC (who is competent to decide on the provisional registration of a player for a club in exceptional circumstances).

In order to be admissible before the CAS, the appellant must submit a statement of appeal that contains, among other things, relevant elements such as the name and address of the respondent, a copy of the decision appealed against, and the appellant's request for relief. If applicable, an application to stay the execution of the decision appealed against, together with reasons (in other words: the statement of appeal filed with the CAS does not automatically stay the execution of the decision challenged, save for the decisions of a financial nature).[321] Furthermore, a copy of the provisions of the statutes or regulations, or the specific agreement providing for appeal for the CAS and evidence of the payment of the Court Office fee of CHF 1000—, must be provided to the CAS.[322] The statement of appeal must be submitted to CAS within a 21-day time limit from receipt of the grounded decision challenged, following Article 24 of the RSTP, Article R49 of the CAS Code and Article 67 of the FIFA Statutes.[323]

With regard to the costs and aside from the Court Office fee of CHF 1000—, it is further worth mentioning that the CAS also determines the possible advance of costs that the parties must pay to the CAS within a certain time limit.[324] In the absence of payment of such advance of costs, the appeal shall be deemed withdrawn and the CAS shall terminate the arbitration. In this context, it is of interest that, in principle, both the appellant and the respondent need to pay an equal share of the advance of costs. However, for example if the appellant paid its share, but the respondent has not, from CAS Code it follows, more specifically Article R64.2, if a party fails to pay its share, the other may substitute for it. In other words, if the respondent does not pay its share of the advance of costs and (also) the appellant does not pay the respondent's part within the time limit fixed by the CAS, the appeal shall be deemed withdrawn and the CAS shall terminate the arbitration.[325]

The statement must further contain the appointment of the arbitrator chosen by the appellant from the CAS list, unless the parties have agreed to a Panel

[320]CAS Code, edition 1 January 2016, Article R37.

[321]Under well-established CAS jurisprudence, a decision of a financial nature issued by a private Swiss association is not enforceable whenever it is appealed and that, consequently, it may not be stayed. See for example, CAS 2004/A/780 *Christian Maicon Henning v. Prudentópolis SC & Prudentópolis SC v. Christian Maicon Henning & Eintracht Frankfurt Fußball AG*, award of 18 July 2005. See also CAS 2004/A/780 *Christiaan Maicon Henning v/Prudentopolis Esporte Clube* & FIFA, award of 6 January 2005.

[322]CAS Code, edition 1 January 2016, Article R64.1.

[323]The time limits before the CAS are much stricter than time limits in FIFA procedures.

[324]CAS Code, edition 1 January 2016, Article R64 and R65.

[325]In practice we take note of the fact that respondents do not pay their part. In other words, the other party will often (have to) pay.

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composed of a sole arbitrator. In this regard, it is important to know that the appellant as well as the respondent in the procedure before the CAS is entitled to appoint an arbitrator, contrary to the DRC procedures. The President of the Appeals Arbitration Division shall then appoint the President of the CAS Panel. In principle, we note the fact that the arbitration procedure is allocated to a Panel composed of 3 arbitrators and constituted following the rules provided by Articles R50 and R54 of the CAS Code.

The statement of appeal must finally be sent to the CAS Court Office in as many copies as there are parties and arbitrators, together with one additional copy for the CAS and one additional copy for FIFA (in principle, a minimum of 6 copies in all).[326]

Within 10 days following the expiry of the time limit for the filing of the statement of appeal, the appellant shall file with the CAS an appeal brief stating the facts and legal arguments giving rise to the appeal, together with all exhibits and specifications of other evidence upon which it intends to rely, failing which the appeal shall be deemed withdrawn.[327] In its written submissions, the appellant shall verify any witnesses, including a brief summary of their expected testimony, and experts, stating their area of expertise, whom it intends to call at the hearing and state any other evidentiary measure which it requests. Within 20 days from the receipt of the appeal brief, the respondent shall submit an answer to the CAS which includes a statement of defence, any lack of jurisdiction, and any exhibits, on the understanding that, in contrast to the FIFA DRC procedures, as from 1 January 2010, the CAS appeals procedure no longer provides for the possibility of filing *counterclaims*.[328]

After the written proceedings, in contrast to the DRC procedures that are conducted in writing (unless the circumstances appear to warrant it to attend an oral hearing), following Article R57 para 2 of the CAS Code, an oral hearing will generally be held, unless, but always after consulting with the parties, the Panel may deem itself to be sufficiently well informed about the matter at hand.

It must further be stressed that the CAS has full power to hear the case *de novo*. It may thus issue a new decision which replaces the decision challenged, or annul the decision and refer the case back to the competent authority for a new decision.[329]

In contrast to the procedural compensation in DRC procedures, in which it is laid down in Article 18 para 4 of the Procedural Rules, and as also follows from the DRC decisions (and those of the PSC), that no procedural compensation shall be awarded in proceedings before the PSC and the DRC, the CAS, however, is free to determine the final amount of the costs of the arbitration and to determine which party shall bear the arbitration costs or in which proportion the parties shall

[326]CAS Code, edition 1 January 2016, Article R31.

[327]CAS Code, edition 1 January 2016, Article R51. See Article R56 and R57.

[328]As follows from CAS 2010/A/2108. See also CAS Code, edition 1 January 2016, Article R55.

[329]CAS Code, edition 1 January 2016, Article R57.

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share them, as follows from Articles R64.4 and R64.5 of the CAS Code. Pursuant to Article R64.5 of the CAS Code, as a general rule, the CAS Panel has discretion to grant the prevailing party a contribution towards its legal fees and other costs.

In view of the above, a summary and/or a press release setting out the results of the proceedings shall finally be made public by the CAS, unless both parties agree that it should remain confidential. A copy of the award is notified to FIFA.

As from 2015, an e-filing service of procedural documents is created by the CAS. This e-filing service can be activated after the opening of arbitration proceedings by the CAS Court Office. This implies, as also explicitly follows from the CAS website, the prior filing of a request for arbitration by a party in accordance with Article R38 of the CAS Code or a Statement of Appeal in accordance with Article R48 by facsimile or courier, within the deadline set out in Article R49 of the CAS Code, as well as the allocation of a specific case number for the arbitration proceedings in question.[330]

Finally, although this lies beyond the scope of this book, it is worth mentioning that the awards of the CAS may be appealed before the Swiss Federal Tribunal ("SFT"). However, the grounds to annul a CAS award, are very limited and mainly procedural ones (i.e. violation of the right to be heard, problems of jurisdiction etc.). In this respect, the SFT is only entitled to review the merits of the case if it violates fundamental principles of law, the so-called public order (Article 190 para 2 under e of the Private International Law Act), i.e. the principles of equity and good faith, protection of personality rights, the principle of pacta sunt servanda.

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[330]See also http://www.tas-cas.org/en/e-filing/e-filing.html. Accessed 26 July 2016. From the CAS website it follows, each case is identified by the number allocated to it in the CAS Roll. In order to benefit from the e-filing service for the case in question, the user(s) must send a written request to the CAS Court Office by way of the "Case Registration Form".

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# Part II
# Decisions

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# Chapter 3
# Introduction to Classification of Decisions

**Abstract** In this chapter an introduction is given of the various subjects that will be discussed in the second part of this book, the well-established jurisprudence. This chapter outlines the structure of the subsequent chapters in Part 2 of this book.

**Keywords** Lex Sportiva · Introduction to classification · Explanation structure chapters Part 2

Having discussed the background of the RSTP, its various editions and the most relevant procedural aspects with regard to the DRC, in the following chapters we will discuss the various DRC decisions which are brought to the readers' attention. In these chapters the decisions will be classified into different subjects.

Since the day of its creation, more than 2000 decisions have been published on FIFA's website.[1] In that respect, it must be noted (again) that FIFA does not publish all the DRC decisions on its website. The exact number of decisions taken by the DRC during the recent years is therefore difficult to estimate. Further, it must be noted that certain elements of the official DRC decisions might be excluded from publication. As also referred to previously, the decisions of the Chamber will be published "*only in case of general interest*" as mentioned in the Procedural Rules.[2]

As will be noted in the following chapters, with regard to certain important subjects, the DRC follows its own line and sometimes strongly deviates from the relevant national law in relation to the same subject. Although all DRC decisions are

[1]See Dispute Resolution Chamber. http://www.fifa.com/about-fifa/official-documents/governance/dispute-resolution-chamber.html. Accessed 26 July 2016.

[2]Procedural Rules, 2015 edition, Article 20. My conclusions in Part II are based on the information as given in the decisions as published on the website of FIFA.

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based on general principles of international labour law, we will see that on some points the DRC makes its own "*football law*", which can be characterised as "*Lex Sportiva*". The specificity and principles of the professional international football sport form an essential fundament in the DRC decisions, as we will note in the following chapters. Also, where the DRC substantially differs from the point of view of national laws and national courts, this will be outlined, and reference will be made to this principle of *Lex Sportiva*. In the conclusion of each subject, it will be mentioned whether one can speak of a *Lex Sportiva* related to that specific subject.

In the following chapters the published DRC decisions are analysed and the most relevant ones are classified into various subjects.[3] The most important considerations which come across in the various decisions will be highlighted and the well-established jurisprudence per subject will be brought to the readers' attention. First a general view will be given for each subject before discussing the most important DRC decisions in relation to this specific subject. Finally, in the conclusion, comments will be given with regard to the relevant decisions, followed by a short summary.

Not only will the various subjects of DRC decisions be discussed in a logical order of events (starting with the medical examination, the conclusions of the employment contract, compensation, sporting sanctions, etc.), but in the following chapters the published DRC decisions themselves between 2002 and 2016 will be discussed per subject in a chronological order of time in order to have value in optima forma as a work of reference. In this way the developments in the jurisprudence can also be experienced better. Furthermore, certain *unpublished* decisions will be discussed, including a relevant unpublished decision regarding the unilateral extension option. In the latter decision, the criteria in relation to the validity of the unilateral extension option in favour of the club were specifically mentioned (and to my knowledge) for the first time in DRC history. Only if this is crucial and necessary for a better comprehension, reference also will be made to *PSC* cases. For the sake of good order, this book would not be complete without mentioning leading cases before the CAS. For example, with regard to the unilateral extension option it is important to be aware of the CAS jurisprudence, also in order to better understand the DRC decisions and to anticipate future DRC decisions. Furthermore, not only will explicit reference be made to the CAS jurisprudence with regard to the famous Article 17 cases, such as "*Webster*", "*Matuzalem*" and "*De Sanctis*", but also to training compensation and the solidarity mechanism. However, many references to the CAS awards will be made in footnotes as the focus and essence of this book will obviously be placed on the DRC decisions.

In the following chapters, attention will first be given to the medical examination (Chap. 4), the work permit and the visa (Chap. 5), and the opinion of the DRC in relation thereto will be analysed. After this period, parties then generally enter

[3]Because of their significance, some decisions of the DRC will be discussed more extensively. For example, the famous *Mutu case*, in which the contract of the player was unilaterally terminated by the club as a result of the player's drug abuse, will be discussed in more detail. If needed and if it has added value, reference will be made to leading awards by the CAS.

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into an employment agreement and therefore the most relevant formal aspects such as the specific form and length of the employment contract will be discussed, as well as the period of notice and aspects such as salary payments will be dealt with in line with the opinion of the DRC (Chap. 6). Special attention will then be given to the unilateral extension option, because of its significant importance and its frequent use in the professional football world (Chap. 7). After discussing this important clause, the termination of the employment contract by players and clubs will be reviewed in accordance with the standards of the DRC (Chap. 8). The essence of this chapter focuses on these "termination cases". The principle that contracts may only be terminated by either party without consequences in cases of *just cause*, will be discussed in detail. Specific attention will be paid to compensation (Chap. 9), including the amount and the sporting sanctions (Chap. 10). Finally, the jurisprudence and applicable rules on training compensation (Chap. 11) and the solidarity mechanism (Chap. 12) will be discussed. In the final conclusions (Chap. 13), the *Lex Sportiva* will emerge and be discussed.

Bearing the above in mind and in the context of *Lex Sportiva*, it must further be noted that it is also (at least) unpleasant that certain clauses in the employment contracts of players are considered to be valid on a national level and are decided by the DRC as invalid on an international level (which, for that reason, also requires precise knowledge of the jurisprudence). Or vice versa. For example, the unilateral extension option which gives the club the right to unilaterally extend the contract with the player. So far, the national arbitral tribunal of the Royal Netherlands Football Association has decided twice that an extension option is valid, while the DRC is of the opinion that the extension option which is solely and exclusively to the benefit of the club, must be considered invalid (on the understanding that the CAS is increasingly inclined to accept the validity of the clause). In line with this important subject, all sorts of other legal issues will be analysed in the following chapters and an adequate legal survey of the most relevant legal issues in the DRC's point of view will be provided, which aim to contribute to greater legal certainty, conformity and transparency within the football world and to provide the reader with an adequate and complete survey of the DRC's legal thoughts as they have developed since 2002.

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# Chapter 4
# Medical Examination

**Abstract** According to the RSTP and following the well-established jurisprudence of the DRC, a contract may not be made subject to a successful medical examination. Any such conditions that are included in a contract will not be recognized by the DRC and the contract will be considered valid. If, after signing the employment contract, the player does not appear to be medically fit, the player can successfully claim validity of his contract before the DRC if the club has terminated the employment contract. The player can also claim financial damages. The point of view of the DRC with regard to the medical examination is clear and homonymous. This chapter looks at the well-established jurisprudence of the DRC.

**Keywords** Medical examination · Medical health · Concealing information · Medical result · Injury

## Contents

4.1 Introduction ..... 117
4.2 Information About the Player ..... 118
4.3 Medical Result ..... 119
4.4 Conclusion ..... 123

## 4.1 Introduction

If a player and a club have an oral agreement with regard to the arrival of the player at a club, the club will usually subject the player to medical tests before signing the employment contract. In everyday practice in the professional football world, these tests will generally be performed before the contract is signed.

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Sometimes, however, the club and the player sign an employment contract before the medical tests have been carried out and subsequently make the outcome of the medical test conditional for the validity of the signed employment contract. Because of the extreme time limits within which players and clubs have to operate, they sometimes feel obliged to sign the employment contract prior to these medical tests. However, following the well-established DRC jurisprudence, a contract may not be made subject to a successful medical examination. In this regard, the DRC jurisprudence demonstrates that it is important for a club to gather all relevant information and to be properly informed about the physical condition of the player before entering into a contract. According to the FIFA Commentary, the player's prospective new club is required to undertake all necessary investigations and to take all appropriate steps before concluding a contract.[1]

## 4.2 Information About the Player

Prior to concluding a contract, the club must ascertain that the player complies with the necessary physical, technical or mental conditions required to play football. In a DRC decision of 4 February 2005, the Chamber took into consideration the position of the club, according to which the relevant contract signed with the player should not be considered valid as the player did not comply with the necessary physical, technical or mental conditions required to play football, nor did his administrative file allow him to be registered and play for it. In this respect, the Chamber referred to Article 30 of the RSTP, 2001 edition, which stipulates that "*the player's prospective new club will be required to make any necessary investigations, studies, tests and/or medical examination or to take any appropriate action before concluding the contract, otherwise it will be liable to pay the amount of the wage due*". Therefore, the DRC rejected the arguments presented by the club and considered the employment contract, as concluded with the player, to be valid and binding for both parties.[2]

It follows from the jurisprudence that it is the responsibility of the new club to be informed about the player's career before signing the employment contract, as follows from a decision of 26 October 2006. In this case, the DRC added that the contract concluded between the parties did not contain any clause stipulating the condition that the player had previously played for a first division club. On account of these considerations, the Chamber stated and decided that, by not verifying the relevant facts about the player, the club had taken the risk of not being accurately informed about the player's career and was provided with inaccurate

[1]FIFA Commentary, explanation Article 18, p. 55.

[2]DRC 4 February 2005, no. 25566.

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information on the player's former club. This did not constitute a valid reason for the unilateral termination of the contract by the club.[3]

It sometimes happens that a player conceals information regarding his medical health at the time of signing the employment contract with a club. In a case before the DRC of 30 November 2007, the Chamber had to decide on the information that had been given by the player before signing the contract. After signing the contract the player concerned had broken his tibia and was not able to play for several months. However, at the time of signing the employment contract with club B the player had not disclosed that he had previously broken his tibia in exactly the same place. In the first instance the club wanted to rescind the contract with the player, but decided later not to do so and to give the player some time to recover. When the recovery did not go well enough, according to the club, the club nevertheless rescinded the employment contract. The player objected and turned to FIFA. He claimed outstanding salary, medical costs and compensation for breach of contract. The DRC finally decided that a valid employment contract was concluded between the parties, which held all the "*essentialia negotii*". In this case the DRC found it of the utmost importance that although the player had, at the time of signing the contract, not disclosed that he had already broken his tibia in the past, the club had not rescinded the contract in first instance. According to the DRC, the employment contract between the parties was therefore still valid. According to the Chamber the club had tacitly accepted the validity of the contract by giving the player the time to recover. Furthermore, the DRC emphasized that an injury is not a valid justification to reduce the salary of the player and therefore condemned the club to pay the outstanding salary to the player in full. Following this decision, it would be interesting to know what the DRC would have decided if the player had rescinded the contract in the first instance. Due to the fact that the player had been given the time to recover, in this case the club had waived its rights.[4]

## 4.3 Medical Result

In the process of gathering all the necessary information about the player's health, a medical test will generally take place prior to the conclusion of the employment contract in order to determine the player's physical fitness. The DRC is of the explicit opinion that the medical test must take place before signing the employment contract, as described below. However, due to the extreme time constraints of

[3]DRC 26 October 2006, no. 1061118. During the contractual period it's the duty of the player to keep the club informed about his whereabouts and his state of health; See DRC 10 August, no. 87783. See also CAS 2008/A/1593 *Kuwait Sporting Club v. Z. & FIFA*, award of 30 December 2008. From the latter CAS award it follows that the insertion of a clause in an employment contract which subjected the transfer to a successful medical examination is illegal and contradictory to Article 18 para 4 of the RSTP.

[4]DRC 30 November 2007, no. 117356.

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transfer windows, the club sometimes feels obliged to sign the contract prior to the outcome of a medical test. Clubs try to resolve this by providing the employment contract with a provision stating that the validity of the contract depends on the positive result of the medical test. These clauses, however, are not valid according to DRC decisions and are in contradiction to the rules of FIFA.[5]

The club has to arrange any necessary medical examination before concluding the agreement. In a DRC decision of 21 November 2003, the DRC decided that the player had not presented any documents corroborating the claimed costs for medical treatment and that the relevant sum therefore could not be awarded to the player.[6] The Chamber had to decide whether the provision stated in the employment contract was valid. According to this provision, the parties agreed that the contract would not come into effect prior to the player passing the medical examination at a hospital designated by the club. In other words, if the player did not pass the medical examination, the club had the right to unilaterally terminate the contract. The club was claiming that the two agreements concluded on 5 January 2003, namely the employment contract and the "payment agreement", were valid. The DRC stated that Article 30 of the RSTP, 2001 edition, gives clear and unmistakable indications with regard to the relationship between medical examinations and the validity of an employment contract; due to its unambiguous wording, the relevant clause leaves no room for misinterpretation, the provision is mandatory and calls for strict application. Therefore, the DRC decided that the provision in relation to the medical test was null and void as, contrary to the RSTP, it makes the relevant agreement conditional upon the positive results of a medical examination. The question whether the medical examination was carried out prior to the signing of the agreements or not, could remain open. According to the DRC in this case, the club had to arrange any necessary medical examination before concluding the agreements following Article 30 para 2 of the RSTP, 2005 edition.

It is strongly advisable to wait for the medical results before signing a contract. For example, in a case of the DRC of 10 June 2004, the Chamber had to decide on the validity of the employment contract if the medical test was made conditional for the validity of this contract. This was a decision issued under the RSTP, 2001 edition. Article 30 para 2 of the RSTP, 2001 edition, states that the player's prospective new club is required to carry out any investigation, studies, tests and/or medical examination before concluding the contract, otherwise it will be liable to

[5]In CAS 2009/A/1856-1857 *Fenerbahçe Spor Kulübü v. Stephen Appiah*, award of 7 June 2010, it was decided that a player also has a right to appropriate medical treatment in case he is injured. If the club refuses to provide him with treatment, the player has a *just cause* to terminate the contract. However, the CAS Panel established in this case that a club does not infringe its duty of care and cannot be held responsible for complications arising following surgical intervention if it has placed its medical staff at the disposal of its player, then sought help from one of the most sophisticated and well-equipped medical establishments in Turkey with many specialized physicians, and then even allowed its player to undergo another medical treatment with other foreign specialists.

[6]DRC 21 November 2003, no. 113291.

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pay the full amount of the salary due. The Chamber explained that, according to Article 30 para 2 RSTP, 2001 edition, a club has to wait for the medical results before signing the employment contract. If a club signs a contract before it has received the test results and then dismisses the contract because of negative test results, it must bear the consequences of the signed contract according to the aforementioned Article 30 para 2 of the RSTP, 2001 edition. The DRC noted that the respective club made the player concerned undergo a medical test before signing the employment contract. Further, it noted that the club did not complete the test phase before signing the contract. According to Article 30 para 2 of the mentioned regulations and in light of the above explanations, the DRC decided that due to its conduct, the club was liable to bear the consequences of the signed contract.[7]

In line with the above decision of 30 November 2007, and so too in the DRC decision of 17 August 2006, the player was accused of deceiving the club by signing a statement in the player's certificate that he had no health problems before he signed the contract. In this case the DRC had to decide on the following facts.[8] On 27 October 2005, a player, the claimant, lodged a claim at FIFA against club B from another country, the respondent, through the football association of his country of origin. The player stated that on 17 June 2005 the parties signed an employment contract for the period from 1 July 2005 to 30 June 2006. The player explained that he had injured himself during training after signing the contract on 1 July 2005. The club had sent him to his country of origin to recover. When the player tried to return to the club, neither he nor the football association of the country of his origin was able to establish contact with the respondent club. The respondent replied that the parties had agreed that the contract would be invalid if the player did not pass all of the medical examinations to its satisfaction. In line with its allegation, the club referred to clause 7 of the employment contract, stating: "*It is understood that the player has to pass all medical exams in the satisfaction of the club not later than the 31st of July 2005*". In other words, the player was obliged to take all of the medical examinations to the club's satisfaction by 31 July 2005. The club mentioned that, contrary to these requirements, the player had not undergone medical examinations after signing the contract but had gone to the first training session. Before the training had begun, the player had run around the pitch and within five minutes had claimed he had pain in his knee. A visit to the doctor then confirmed that he had serious knee problems. The player had allegedly deceived the club by signing a statement in the player's certificate that he had no health problems before he signed the contract. The DRC decided that Article 18 para 4 of the RSTP, 2005 edition, was applicable for the case at hand. In this Article it was laid down that the validity of a contract between a professional and a club may not be made subject to a positive medical examination. Therefore, medical examinations will be carried out by the player's prospective new club prior to

[7]DRC 10 June 2004, no. 6400581.

[8]DRC 17 August 2006, no. 861174.

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concluding the contract. In the case at hand, however, it was a fact that the parties had agreed to the medical examination being conducted prior to the 31 July 2005, which meant that it took place after the parties signed the relevant contract. In its final conclusion the DRC said that clause 7 *in fine* of the contract was in violation of Article 18 para 4 of the RSTP and was not binding, respectively null and void.

With regard to the above, one notable difference must be mentioned in relation to the rules of FIFA over the years. The RSTP, 2001 edition, was provided with the provision that stated: "*The player's prospective new club will be required to make any necessary investigations, studies, tests and/or medical examination or to take any appropriate action before concluding the contract, otherwise it will be liable to pay the amount of the wage due*". However, as from the RSTP 2005 edition, the RSTP is provided with the provision that "*The validity of a contract may not be made subject to a positive medical examination and or the granting of a work permit*" on the understanding that in Article 18 para 4 it was further stated that: "*The validity of a contract may not be made subject to a successful medical examination and/or the grant of a work permit*". Although it is not explicitly mentioned in the current Article of the 2016 edition, in order to avoid any misunderstanding and for the sake of completeness, it is still the responsibility of the prospective new club to undertake all the necessary investigations, studies, tests and/or medical examination or any appropriate action before concluding the contract with the player. This can be derived from the DRC decision of 26 October 2006, in which the 2005 edition was applicable to the matter at hand. In that case, the club needed to be accurately informed about the player's career.[9] It was decided that the prospective new club had to acquire all the relevant information about the player. According to the DRC, if the club is provided with inaccurate information about the player's former club, this does not constitute a valid reason for the club to unilaterally terminate the contract.

In a DRC decision of 8 June 2007, the DRC referred to the general principle according to which the club's obligations includes being responsible for its players in case of injury occurring during the validity and performance of the employment contract, especially if, as in the case at hand, the injury is caused during the period that a player rendered his services to his club in fulfilment of his contractual obligations. This principle is essential within the scope of the provisions related to the maintenance of contractual stability between professionals and clubs as contained in Article 13 *et seq.* of the regulations. According to the DRC, any conclusion establishing the contrary, would prejudice the weaker contracting party (the employee). As a result to this principle, it is particularly the club's obligation to pay the medical costs incurred by a player following his inability to work. Further, the DRC reiterated in this case that in the employment contract in question, the club had committed to pay health treatment and therapy expenses to the player.[10] Also in its more recent decision of 7 July 2015, the DRC decided that the validity of a contract may not be made subject to a successful medical examination.[11]

[9]DRC 26 October 2006, no. 1061118.

[10]DRC 8 June 2007, no. 67909.

[11]DRC 7 July 2015, no. 0715437.

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In view of the above, it is quite clear that the DRC, in accordance with the RSTP, is of the opinion that the validity of a contract between a professional and a club may not be made subject to a positive medical examination. However, it must be stressed that a loan or transfer agreement can be made subject to a positive medical examination. For example, in the DRC decision of 19 March 2013, on application of Article 18 para 4 of the RSTP, the DRC Judge drew attention to the fact that its wording clearly applies to contracts between players and clubs as already indicated by the title of said article, "*Special provisions relating to contracts between professionals and clubs*".[12] Hence, said article does apply to transfer and loan agreements. In this context, the DRC Judge was eager to emphasize that the RSTP is based on the following concept: firstly, the player's former club and the new club should agree to and sign the relevant contract regarding the transfer of the player. Then, the medical examination should be performed and only then, with these prerequisites established and after careful investigation and taking all appropriate steps, the player and his new club should sign an employment contract. Consequently, neither the spirit nor the purpose of the RSTP can prevent two clubs from making a transfer or loan agreement subject to a successful medical examination. However, every possible manner of abuse needs to be prevented. On application of these considerations to the loan agreement and the disputed clause, in this case the DRC Judge finally found that there were no indications for a possible abuse by the respondent, especially since the relevant medical examinations had been conducted immediately after signing the loan agreement and the respondent provided the necessary medical documentation.[13]

## 4.4 Conclusion

According to Article 18 para 4 of the RSTP, 2016 edition, the validity of a contract may not be made subject to a successful medical examination (and or the granting of a work permit or visa which will be addressed in the next chapter). Any such conditions that are included in an employment contract will not be recognized by the Chamber and the contract will still be considered valid without this invalid clause. This means that the new club's failure to respect the contract represents an

[12]DRC 19 March 2013, no. 03131648.

[13]See also CAS 2013/A/3314 *Villarreal CF SAD v. SS Lazio Roma S.p.A.*, award of 7 March 2014. In this case, it was decided by the CAS that transfer agreements between football clubs can legitimately be made subject to a player passing a medical examination. Indeed, the prohibition laid down in Article 18 para 4 of the RSTP belongs to Section IV of the regulations, which concerns the "maintenance of contractual stability between professionals and clubs", and is expressly qualified as a "special" provision "relating to contracts between professionals and clubs". See also an unpublished decision by the Single Judge of the PSC of 26 August 2014. As follows from PSC 19 March 2013, no. 03131648, it was stressed that also a loan agreement can be made subject to a positive medical examination.

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unconditional breach of contract without *just cause*.[14] The vision of the Chamber with regard to the medical test following the abovementioned decisions is very clear. The clause in an employment contract stating that the validity of a contract is subject to a positive medical examination is not valid. If, after signing the employment contract, the player does not appear to be medically fit, the player can hold the club to his employment contract. The DRC protects the player in this regard. The player can then claim financial damages if the club has terminated the employment contract.

According to the national labour law of various countries, it is sometimes possible to make the validity of the employment contract conditional upon the positive result of a medical examination of an employee.[15] However, although certain national laws do permit an employer to unilaterally terminate the contract with its employee in case of an unsuccessful result of the medical test, FIFA rightly differs on this point in my opinion. International professional football needs to have legal certainty. A player should be protected with regard to his medical condition and the validity of his employment contract. As far as certain national laws decide that an employer has the right to unilaterally terminate the employment contract with its employee in the case of negative medical test results, there is a *Lex Sportiva*, which is justified and will have priority before the DRC and the CAS above these national civil laws.

[14]FIFA Commentary, explanation Article 18 para 4, p. 55.

[15]For example, in the Netherlands. The "*Wet Medische Keuringen*" [Medical Examinations Act] does not prohibit any parties from making the employment contract subject to the result of a medical examination. See for example the decision of the District Court of Sittard of 10 March 1981, National Case-Law Number AI6903, Prgno. 1670.

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# Chapter 5
# Visa and Work Permit

**Abstract** According to the RSTP and following the well-established jurisprudence of the DRC, a contract may not be made subject to a visa or a work permit. Any such conditions that are included in a contract between a player and a club will not be recognized by the DRC and the contract will be considered valid. If, after signing the contract, no visa or work permit is issued and the club terminates the contract, the player can claim the validity of his contract before the DRC. The DRC protects the player. The player can claim financial damages if the club has terminated the contract. The DRC's point of view is clear with regard to visas and work permits. This chapter looks at the well-established jurisprudence.

**Keywords** Visa · Work permit

## Contents

5.1 Introduction ..... 125
5.2 Visa ..... 126
5.3 Work Permit ..... 128
5.4 Conclusion ..... 130

## 5.1 Introduction

In many countries a foreign player is obliged to have a visa or work permit in order to be able to play for the club of the country concerned. The Chamber is of the explicit opinion that the responsibility for obtaining a visa or work permit lies

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with the club, although it is important to emphasize in that, in this respect, the player must cooperate fully in the efforts aimed at obtaining the visa or the work permit.[1]

## 5.2 Visa

In the case of an international transfer, it is sometimes necessary for a foreign player to obtain a visa for the country of his prospective new club. The DRC has issued various decisions in relation to the new club's obligations towards the professional player when acquiring a visa for the legitimate residence of the player.

It is the responsibility of the club to provide the player with a visa. In a case before the DRC of 4 February 2005 with regard to a dispute between a player and a club, the DRC decided that it is the club's responsibility to arrange the entry visa for the player. In this case, on 29 October 2003 the player received a deportation order issued by the local government, as a result of which he had to leave the territory of the Republic on 31 October 2003 because he had no permit to stay. The DRC stressed that the club had not undertaken any action, or at least not the necessary ones, to prevent the execution of the deportation order, nor had it ever taken any steps to provide the player with a visa by the time the contract was concluded.[2]

In case a club cannot present any evidence that it provided a player with a valid visa which would enable him to resume his duty, the consequences thereof will be for the account of the club. In a DRC decision of 12 January 2006, a player and a club had signed an employment contract on 26 February 2003 which was valid until 25 June 2005. The player informed the DRC that he had played for the club until the end of the 2002/03 season and that, on 24 August 2003, after the club had been eliminated in the UEFA Champions League, the club had informed him that he should start looking for another club. Although he had only played for the club for a very short time, he left to find a new club. In September 2003, he returned to the club, but by this time his visa had expired (on 20 September 2003 to be precise). According to the player, he had tried to obtain a visa that would allow him to enter into the country, but at the particular consulate he had been told that he needed the club's authorisation for this purpose. The player felt that the club had failed to provide the particular consulate in Portugal with the necessary documents for him to obtain the relevant visa. This meant that not only had he not received any remuneration since the end of the 2002/03 season, but he was also prevented from playing for his club. The player informed the DRC that he had contacted the

[1]Also the CAS jurisprudence shows that the lack of a work permit is not a valid reason for a club to terminate the contract (of a coach). See, for example, CAS 2007/A/1205 *S. v. Litex Lovech*, award of 6 June 2007.

[2]DRC 4 February 2005, no. 25488.

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club several times to resolve the visa problem. However, the club did not agree with this version. The club was of the opinion that according to the new national legislation, they could no longer register foreign players who had no right to work in the country. According to the player, the DRC decided that, despite his continuous efforts to contact the club to resolve the visa problem, the latter had always failed to provide the particular consulate in Portugal with the necessary documents for him to obtain the relevant visa. Finally, the Chamber decided that the club had failed to provide FIFA with evidence demonstrating that it had effectively contacted the player to resume his duty after September 2003 and also with evidence demonstrating that it had provided him with a visa which would allow him to resume his duty.[3]

In a DRC decision of 27 April 2007, the Chamber had to decide on a visa. The Chamber emphasized that, as a general rule, it falls within the responsibility and remit of a club to ensure that the necessary visa/permit is obtained for a player. Furthermore, for the sake of good order, the DRC deemed it important to underline that the disputed Article 3.3 of the relevant contract was not only contradictory to this general rule, but also explicitly contrary to Article 18 para 4.[4]

According to the DRC, it is a basic legal principle of labour law that an employer has to provide his employees with a residence permit (if applicable). In a DRC decision of 8 June 2007, the DRC reiterated this. If an employer does not undertake the necessary actions to provide his employees with a residence and/or work permit, and if this compels the player to leave the country where he is employed, and therefore to quit his employment, then this is basically to be considered as an unjustified breach of the employment contract by the employer. To this end, the DRC explicitly referred to the contents of Article 18 para 4 of the RSTP, which clearly states that the validity of a contract may not be made subject to a positive result of a medical examination and/or the granting of a work permit. The Chamber deemed that, although the aforementioned Article does not specifically mention the necessity for a club to ensure that the player's residence permit is obtained, the sense of this Article requires that any such conditions that are included in a contract are not recognized. The essence of this provision is to require a club to undertake all the necessary investigations and to take all appropriate steps before concluding a contract. Once a contract is signed, all parties involved can rely in good faith on it being respected throughout its agreed validity.[5]

During the years it has become well-established jurisprudence that the validity of a contract may not be made subject to the granting of a work permit and the DRC does not deviate from its consistent standpoint. For example, in a DRC decision of 13 December 2010, the DRC again referred to Article 18 para 4 of the RSTP which stipulates, inter alia, that the validity of a contract may not be made

[3]DRC 12 January 2006, no. 16107.

[4]DRC 27 April 2007, no. 47704. See also DRC 12 January 2007, no. 17688.

[5]DRC 8 June 2007, no. 67909. See also DRC 13 June 2008, no 38621.

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subject to the granting of a work permit. In this respect, the DRC Judge referred to the well-established DRC jurisprudence and stressed that the responsibility to obtain the necessary visa prior to the signing of the contract or during its period of validity is incumbent on the club and that the latter's argumentation was not allowed.[6]

## 5.3 Work Permit

In some countries, a foreign employee must (also) have a work permit before he is able to play for the club concerned. As with the DRC decisions regarding the visa for a player, the DRC decisions also indicate that the club, as the employer, is responsible for obtaining the work permit. The DRC decisions are explicitly based on the general rule that the employer, in other words the club, must arrange the work permit for the employee, the player. Furthermore, according to Article 18 para 4 of the RSTP, 2016 edition, it is further explicitly stipulated that the validity of a contract may not be made subject to the granting of a work permit.[7] The CAS jurisprudence is in line with the DRC jurisprudence with regard to this issue.[8]

As with the visa, an employer is obliged to undertake the necessary action to provide his employees with a work permit. In a decision before the DRC of 11 March 2005, the club did not provide the player with a work permit. The player claimed that in order to force him to leave the club, the club had not undertaken the necessary steps to provide him with a new visa, not even after he reminded the club to do so. The DRC stated that it is a basic principle of labour law that an employer must provide his employees with a work permit, if necessary. If an employer does not undertake the necessary action to provide his employees with a work permit, and if this forces the player to leave the country in which he is employed and therefore quit his work, this could be seen as an unjustified breach of contract by the employer.[9]

The employer is also responsible for the extension of residence and work permits.[10] For example, in a DRC decision of 1 June 2005, a player and a club signed an employment contract which was valid from 1 June 2002 until 30 July 2007. The player told the DRC that the club had neither paid his salary nor certain bonuses. However, the club responded that the player's residence and work permit

[6]DRC 13 December 2010, no. 1210266.

[7]With reference to Section 669 para 3 under h of Book 7 of the Dutch Civil Code, it can be derived that an employer is entitled to annul the employment contract with the employee in the event that the employer does not obtain a work permit.

[8]CAS 2013/A/3089 *FK Senica, A.S. v. Vladimir Vukajlovic & FIFA*, award of 30 August 2013.

[9]DRC 11 March 2005, no. 35131.

[10]See also CAS 2014/A/3706 *Christophe Grondin v. Al-Faisaly Football Clu*b, award of 17 April 2015.

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had expired on 30 June 2003. The club thought that this permit could only be extended by the player personally. According to the club, the player did not undertake the necessary steps to extend his residence and work permit and therefore the club felt that the player had breached the employment contract. In this case, the DRC stated that it is a basic principle of labour law that an employer must provide its employees with residence and work permits, if this is required. If an employer does not undertake the necessary actions to provide its employees with residence and work permits, and if this forces the player to leave the country in which he is employed and therefore quit his work, this can be considered as an unjustified breach of contract by the employer. The DRC stated that if an employer alleges that it does not bear any responsibility for the extension of the residence and work permit of the player, it is up to the employer to prove this allegation. The employer failed to prove this allegation and it therefore had to be presumed that it bore the responsibility for the extension of the residence and work permit of the player.[11]

In line with the above, in its DRC decision of 8 June 2007 with regard to the work permit, the Chamber also concluded that—as a basic principle—clubs are held responsible for the obtaining *and* extension of work permits. The Chamber finally concluded that the club had terminated the contract without *just cause*.[12]

During the years the DRC has not deviated from its consistent jurisprudence. Also, in more recent decisions, the Chamber confirms its well-established jurisprudence in this respect. For example, in its decision of 4 October 2013, the Chamber referred to its consistent jurisprudence and emphasized that the responsibility to obtain the necessary work permit or visa to enable a player to render his services to the club, is incumbent on the club, i.e. the respondent party in this case.[13] The club is required to undertake all appropriate steps to duly obtain a work permit for the claimant not only before concluding the relevant contract, but, as the case may be, also for the duration of said contract. In the absence of proof to the contrary, the DRC stated that the required work permit or visa had not been obtained by the club.

For the sake of completeness, the same applies if the employee is a coach. In its case of 5 June 2013, the Single Judge of the PSC pointed out that it is the duty and responsibility of the employer to make sure that the relevant application for a work permit is duly completed and submitted to the relevant authorities in good time so as to ensure that all the necessary steps to obtain the work permit in question, are fulfilled.[14] The Single Judge of the PSC concluded that it was the exclusive responsibility of the respondent to secure the relevant work permit for the claimant.

[11]DRC 1 June 2005, no. 65332 and DRC 23 June 2005, no. 65939.

[12]DRC 8 June 2007, no. 67909.

[13]DRC 4 October 2013, no. 1013439.

[14]PSC 5 June 2013, no. 0613864.

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## 5.4 Conclusion

In most countries specific foreign players must have a visa or work permit to be able to play for the club of that country. In the international professional football world, the DRC is of the opinion that the responsibility for the visa lies with the club. In cases relating to the issuance of a visa, the DRC regularly points out that the club must undertake the action, or at least take the necessary ones, to provide the player with the required documents by the time the employment contract is concluded. With regard to the work permit, the DRC also states that it is a basic principle of labour law that an employer must provide his employees with residence and work permits, if this is required. In order to avoid any misunderstanding, clubs are not only held responsible for the obtaining, but also for the extension of work permits. According to the Chamber, if an employer does not undertake the necessary actions to provide its employees with a residence and work permit, and if this forces the player concerned to leave the country of the club where he is employed and must therefore quit his work, this can be considered as an unjustified breach of contract.

To conclude this chapter, it needs to be stressed that the player must cooperate in full with efforts to obtain the visa or work permit. Following the FIFA Commentary, the player must put himself at the club's disposal and supply the prospective club with all the necessary information and documents in order to facilitate these tasks. Furthermore, if the club does not apply due diligence when signing a player, it cannot claim later that the failure to fulfil a contract was based on the fact that the player had not received a work permit or a visa.[15] Therefore, the aforementioned view of the DRC is fully justified, since it is reasonable that it is the club's main responsibility to obtain the required visa or work permit. It is understandable that this must be done prior to signing the employment contract.

[15]FIFA Commentary, explanation Article 18 para 4, p. 55. See also DRC 27 November 2014, no. 1114239.

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# Chapter 6
# Employment Contract

**Abstract** This chapter looks at the employment contract between a player and a club. Not only can the employment contract not be made subject to a successful medical examination and/or the granting of a visa or a work permit, but jurisprudence also shows that there are also other invalid conditions precedent, which will be brought to the readers' attention. In relation to the employment contract, the so-called *essentialia negotii* will be discussed. This chapter will also focus on the so-called Protected Period of an employment contract and the formal aspects of the employment contract, such as the form and minimum and maximum length of the contract. We will see that the current RSTP provides for various requirements regarding the validity of an employment contract. After the formal elements, the remunerations relating to the employment contract will be handled, such as the salary and bonuses. These issues will be dealt with in relation to the DRC's point of view.

**Keywords** Employment contract · Essentialia negotii · Pacta sunt servanda · Protected Period · Culpa in contrahendo · Salaries · Bonuses

## Contents

6.1 Introduction ..... 132
6.2 Negotiations ..... 136
6.3 Invalid Conditions Precedent ..... 139
6.4 Essentialia Negotii ..... 141
6.5 Formal Aspects ..... 143
6.5.1 Form ..... 143
6.5.2 Length ..... 145
6.5.3 Signature ..... 146
6.5.4 Language ..... 150
6.6 Payments ..... 152
6.6.1 Salaries ..... 152
6.6.2 Bonuses ..... 156
6.7 Conclusion ..... 159
Reference ..... 161

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## 6.1 Introduction

In the international football world, it is common that all relevant rights and obligations between players and clubs are recorded in an employment agreement. In this context, reference is made to the fact that a football player can only be bound by an employment contract to a football club, but not to a company which is not a football club.[1] For example, in a legal dispute before the DRC of 30 November 2007, the Chamber explicitly decided that players and entities other than football clubs cannot conclude an employment contract or any comparable kind of contract binding the player to the entity in an employment-relationship.[2]

In the professional football world, employment contracts are generally concluded for a predetermined period. According to Article 18 para 2 of the RSTP, 2016 edition, the minimum length of the employment contract will be from the date of its entry into force until the end of the season, while the maximum length of the contract will be for 5 years. Contracts of any other length of time will only be permitted when consistent with national laws. According to Article 1 para 3 under a of the RSTP, 2016 edition, this provision is binding on a national level and must be included.[3]

This chapter will now focus on the employment contract between a player and a club. However, before the employment contract is discussed, first the relevant judicial aspects with regard to the negotiations will briefly be brought to the readers' attention. When entering into the matter of the employment contract, it is important to be aware, that the employment contract cannot be made subject to certain circumstances, such as the validity of a contract between a professional and a club may not be made subject to a successful medical examination and/or the granting of a visa or a work permit, as discussed before. However, the jurisprudence of the DRC shows that there are also other invalid conditions precedent, which will be brought to the readers' attention in this chapter. From the DRC jurisprudence it can also be inferred that for an employment contract to be considered as valid and binding, it must at least contain the name of the parties, the object, the duration of the

[1]DRC 2 November 2007, no. 117953a and b. See also DRC 22 June, no. 67286 and DRC 27 April 2007, no. 47216, no. 47321 and no. 47408.

[2]See DRC 30 November 2007, no. 117311. As from the RSTP, 2008 edition, Article 18bis was introduced and stipulates that no club shall enter into a contract which enables any other party to that contract or any third party to acquire the ability to influence its employment and transfer-related matters, its independence, its policies or the performance of its team.

[3]Although this discussion falls beyond the scope of this book, in the decision by first instance the German Labour court of Mainz in the so-called *Müller case*, it was decided that, despite having an employment contract for a predetermined period of time, Müller should have been employed by football club Mainz 05 for an indefinite period, which decision was based on national law implementing Directive 1999/70. See ArbG Mainz, AZ: 3 CA 1197/14, decision of 13 March 2015. This decision in first instance showed the impact of European law on football. However, on 17 February 2016, the Landesarbeitsgericht Rheinland-Pfalz ruled in appeal that the contested fixed term contract period between player and club can be justified based on the objective reason of the nature of the work; LAG Rheinland-Pfalz, 4 Sa 202/15, decision of 17 February 2016.

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employment relationship, the salary and the signatures of the parties. Therefore, in relation to the employment contract, the so-called *essentialia negotii* will also be dealt with. After a short introduction of the Protected Period of an employment contract, the formal aspects of the contract itself will be discussed, such as the form and length of the contract. We will see that the current RSTP provides for various requirements with regard to the employment contract. After the formal elements, the remunerations relating to the employment agreement will be dealt with, such as the salary and bonuses. These issues will be discussed in relation to the DRC's point of view.

It must be noted in this introduction, that a professional is not entitled to enter into more than one contract for the same period. From Article 18 para 5 of the RSTP, 2016 edition, it explicitly follows that if a professional enters into more than one contract covering the same period, the provisions set out in Chapter IV (*Maintenance of contractual stability between professionals and clubs)* shall apply. In other words, sporting sanctions can then be imposed upon the parties. For example, in a case of 27 November 2014, in which case the Chamber referred to the aforementioned Article 18 RSTP, the player entered into 2 contracts. Therefore, the Chamber established that the contractual breach had occurred within the Protected Period as result of which it imposed a sanction on the player, consisting of a restriction of 4 months on his eligibility to participate in official matches.[4] However, in respect of possible sporting sanctions to be imposed on the club, the DRC considered that the club did not induce the player to breach the contract because it had concluded a transfer agreement with the player's former club and was therefore not aware of the contractual situation between the player and the club.[5]

It must also be taken into account that an employment contract and a transfer agreement are independent from one another and produce independent legal effects, as is evident from a DRC decision of 18 March 2010, in which case player held that the validity of an employment contract is dependent on the conclusion of a transfer agreement between the club with which the player is currently under contract and his potential new club.[6] The DRC considered the player's assumption

[4]DRC 27 November 2014, no. 1114239.

[5]See also DRC 18 March 2010, no. 310149.

[6]DRC 18 March 2010, no. 310149. As a side-note, with regard to the differences between a loan agreement and a transfer agreement in respect of sell-on clauses, see CAS 2007/A/1219 *Club Sekondi Hasaacas FC v. Club Borussia Mönchengladbach*, award of 9 July 2007, and CAS 2012/A/2733 *Stichting Heracles Almelo v. FC Flora Tallinn*, award of 27 November 2012. With regard to the concept of 'sell-on clauses' in general, see also CAS 2005/A/848 *Sport Club Internacional vs. Bayer 04 Leverkussen*, award of 23 February 2006, CAS 2013/A/3054 *Club Atlético River Plate v. US Città di Palermo*, award of 13 September 2013, CAS 2014/A/3508 *FC Lokomotiv v. Football Union of Russia & FC Nika*, award of 23 March 2015, CAS 2012/A/2875 *Helsingborgs IF v. Parma FC S.p.A.*, award of 28 February 2013, CAS 2010/A/2098 *Sevilla FC v. RC Lens*, award of 29 November 2010, and CAS 2009/A/1756 *FC Metz v. Galatasaray SK*, award of 12 October 2009. In CAS 2013/A/3054 *Club Atlético River Plate v. US Citta di Palermo*, award of 13 September 2013, it was decided by the CAS Panel that there is a duty of information of the club having control of the transfer when 2 clubs share the economic rights over a player. See also CAS 2015/A/4197 *FC Utrecht B.V. v. Swansea Cify AFC Limited*, award of 25 May 2016.

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that the employment contract had to be considered as having no legal effect in view of the fact that a transfer agreement was never concluded between the club and the president. The DRC was eager to emphasize that, although they may concern the same player and a transfer in principle constitutes a tripartite situation requiring all parties' consent, a transfer agreement and an employment contract are 2 independent contracts which do not have the same object. The DRC stated, on the one hand, that a transfer agreement is usually concluded between 2 clubs and pertains mainly to the financial and administrative aspects of the transfer of a player. The DRC pointed out that an employment contract, on the other hand, is concluded between a club and a player and provides for the employment-related obligations of each party, i.e. in general, for the player to perform his duty as a football player, and for the club to remunerate the player for his services. The DRC concluded that an employment contract and a transfer agreement are independent from one another and produce independent legal effects. According to the DRC, contrary to the player's assumption, the validity of an employment contract could not be considered as being dependent on the conclusion of a transfer agreement.[7]

There are 3 more aspects that must be mentioned as preliminary remarks.

Firstly, it follows from Article 18 para 2 of the RSTP, 2016 edition, that players under the age of 18 cannot conclude contracts for a period longer than 3 years, and that parties are forbidden to insert clauses that refer to periods longer than 3 years.[8] This provision leaves no space for any other interpretation, to assume that unilateral extension options will not be allowed to be inserted in contracts with minors whereby the total duration (the original contract plus the extension period) exceeds and refers to a period longer than 3 years.

Secondly, the so-called "Protected Period". A club and a player that enter into an agreement should, in principle, respect and honour the contractual obligations during the term of the contract, also known as the principle of *pacta sunt servanda*.[9] FIFA therefore introduced the Protected Period, which was meant to safeguard the maintenance of contractual stability. The Protected Period was the period of 3 entire

[7]See also DRC 18 May 2010, no. 5101020. See also CAS 2008/A/1593 *Kuwait Sporting Club v. Z. & FIFA*, award of 30 December 200. As a side-note, it must be mentioned that a club is under no obligation to accept the player back during the period in which he was entitled to be contracted to the club on loan. The CAS Panel referred to Article 10 para 4 of the FIFA Commentary, which reads: "*During the period that the player is on loan, the effects of the employment contract with the club of origin are suspended, i.e. the club of origin is not obliged to pay the player's salary and to provide him with adequate training and/or privileges or entitlements as foreseen in the contract*".

[8]RSTP, 2016 edition, Article 18 para 2. See also DRC 7 April 2011, no. 411852. In this case the Chamber emphasized that the respondent clearly was under the age of 18 when he signed this contract and, in this regard, referred to Article 18 para 2 of the RSTP, in accordance with which players under the age of 18 may not sign a professional contract for a term longer than 3 years. Any clause referring to a longer period shall not be recognized. See also CAS 2005/A/835 & 942 *PSV N.V. v. FIFA & Federaçao Portuguesa de Futebol and PSV N.V. v. Leandro do Bomfim & FIFA*, award of 3 February 2006.

[9]See also a DRC decision of 12 January 2007, no. 17606.

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seasons or 3 years, whichever comes first, following the entry into force, if such contract was concluded prior to the 28th birthday of the professional, or to a period of 2 entire seasons or 2 years, whichever comes first, following the entry into force of a contract, if such contract was concluded after the 28th birthday of the professional. FIFA was of the opinion that unilateral termination of a contract without a justified reason, especially during the Protected Period, had to be vehemently discouraged.[10] In other words, during the Protected Period it had to be made much more difficult for one of the parties to unilaterally terminate the employment contract. The Protected Period plays a key role with regard to the amount of financial compensation in the case of a unilateral termination, but also regarding the sporting sanctions to be imposed. It must further be noted that, if the parties agree to extend the contract, the Protected Period will start again.[11] Parties then aim at longer contractual stability.[12]

Thirdly, it must be stressed that in case of ambiguous contract terms, the contract terms will be interpreted against the party who drafted the contract. For example, in its case of 17 August 2012, the DRC referred to the general rule in accordance with which ambiguous contract terms are interpreted against the party who drafted the contract.[13] The DRC wished to specify that both the agreement and the loan agreement were drafted in the language of country L, i.e. the country in which the respondent is located, whereas the player is of G nationality. Additionally, the DRC noted that the agreement was handwritten and drafted on a paper bearing the respondent's name and symbol at the top. The Chamber finally concluded that, it was most likely the respondent who drafted the terms of the 2 agreements in the matter at hand and that, in view of the resulting ambiguity of their coexistence, the interpretation of their conflicting contents was to be made in favour of the claimant.[14] Also, in the DRC case of 23 January 2013, the DRC remarked that a specific clause in the employment contract was drafted in rather ambiguous terms.[15] Therefore, the DRC held that, agreements drafted in ambiguous terms can only be held against the party who drafted the agreement in question, i.e. the claimant.[16]

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[10]FIFA Commentary, explanation Article 13, p. 38.

[11]RSTP, 2016 edition, Article 17 para 3, last sentence.

[12]FIFA Commentary, explanation Article 17, p. 50, Footnote 87.

[13]DRC 17 August 2012, no. 812482.

[14]Reference can also be made to CAS 2004/A/642 *Hertha BSC Berlin v. G. and Club Atlético River Plate & RCD Mallorca*, award of 1 March 2005. In this case, the CAS Panel decided that if the meaning of a provision is clear, parties are not allowed to adduce evidence of their intentions. Furthermore, we can derive from this case that it is relevant who drafted the contract.

[15]DRC 23 January 2013, no. 01131666.

[16]See also CAS 2012/A/2738 *FK Teplice a.s. v. Eintracht Frankfurt Fussball AG*, award of 16 July 2012. From this case it follows that the interpretation rule according to which a disputed provision should be comprehended in favour of the party who is not the drafter of the contract, has no material relevance in a case where the wording of the provision in question is sufficiently clear. See also CAS 2009/A/1773 *Borussia Vfl 1900 Mönchengladbach v. Club de Fútbol América S.A. de C.V. (Asociación Atlética Argentinos Juniors/Argentina)* and CAS 2009/A/1774 *Borussia Vfl 1900 Mönchengladbach v. Club de Fútbol América S.A. de C.V. (Club Atlético Independiente/Argentina)*, award of 3 November 2009.

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## 6.2 Negotiations

Before the player and club enter into an employment contract, negotiations are held. Due to the registration periods and their strict time limits, parties often have to act very quickly to conclude an employment contract. In most cases, medical tests are required, sometimes a work permit or a visa must be arranged and there are the discussions with regard to the salary of the player. The enormous pressure involved in these matters sometimes makes it difficult for parties to finalise the deal within the fixed time limits. As a result, this might lead to the cancellation of the negotiations.

Parties who enter into negotiations could end up paying damages as a result of ending negotiations without *just cause*. According to the legislation of several countries, negotiations may not be stopped abruptly and the party who wishes to do so might be held liable for *culpa in contrahendo*. However, as from 2008 we note that parties will not be awarded with any compensation by the DRC any longer due to the so-called principle of *culpa in contrahendo*. Previously, reference was made to leading jurisprudence of the DRC in this respect.[17]

Before entering into a contract, it is important to be aware of the judicial risks regarding the negotiation process. With regard to the period prior to the start of negotiations by the parties and before entering into a contract, according to Article 18 para 3 of the RSTP, 2016 edition, a club intending to conclude a contract with a professional must inform the current club in writing of the player concerned before entering into negotiations with that player.[18] The question is now: does the current club also have to give its consent to the negotiations of the potential new club and its player? Or does it suffice that the current club only has to be informed? Although there are no DRC decisions regarding this specific issue and there seems to be a loophole as regards the provision itself, the FIFA Commentary does seem to clarify things. The club with which the player is contracted, the current club, explicitly *needs to agree* to the discussion between its player and the prospective new club. Obviously, only as far as it concerns a player who has an employment contract with his club, as stated in the provision itself. Without an agreement between the current club and the potential new club, the latter may even, following the FIFA Commentary, be in a situation of inducing the player to breach his contract if it continues the negotiations with the player.[19] If Article 18 para 3 of the RSTP, 2016 edition, has been violated in the concept of establishing

[17]See DRC 12 January 2006, no. 16830, DRC 26 October 2006, no. 1061318, DRC 12 October 2006, no. 1061118, DRC 23 February 2007, no. 27409, DRC 23 February 2007, no. 27409, DRC 15 February 2008, no. 28079, and DRC 21 September 2012, no. 912213.

[18]According to Article 1 of the RSTP, 2016 edition, this provision is binding on a national level.

[19]FIFA Commentary, explanation Article 18 para 3, p. 54.

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the financial compensation in accordance with Article 17 para 1 of the RSTP, 2016 edition, this element could also be taken into consideration to concretize the concept of "*specificity of sport*". This can also be inferred from the CAS case in 2008 between the player Ali Bouabé and Sporting Lokeren Oost-Vlaanderen c. Association Sportive des Forces Armées Royales (ASFAR).[20] In this case, the CAS referred to the bad faith of the Belgian club Sporting Lokeren, who, despite a fax dated 2 September 2005 sent by the Deputy Chairman of the ASFAR informing that the player was under contract until 31 August 2006 with the club Moroccan, had continued its relationship with the player and asked FIFA to issue an ITC. In that case, the CAS Panel decided that the Belgian club violated Article 18 of the RSTP which stated, that a club intending to conclude a contract with a professional must inform his current club in writing before entering into negotiations with that professional. This would mean that if clubs disobey Article 18, this could be taken into consideration to concretize the concept of specificity of sport.

In Article 18 para 3 of the RSTP, 2016 edition, it is explicitly stipulated that a professional will only be free to conclude a contract with another club if his contract with his present club has expired or will expire within 6 months. Any breach of this provision will be subject to appropriate sanctions. It must be noted that Article 18 para 3 of the RSTP may only be seen as a right for the player and may by no means be understood as an exoneration for a potential new club from its duty of care consisting of contacting in writing a player's current club before entering into contractual negotiations with a player, as decided in a case of 27 November 2014.[21]

Further, in a DRC decision of 13 May 2005, the Chamber considered that the player never informed his new club that he was still under contract with his former club.[22] The player even signed the employment contract with his new club, regardless of the fact that he was still contractually bound to another club. The DRC pointed out that it is undisputable that the player concerned did not respect the contractual obligations undertaken in the employment contract concluded with his club. Therefore, the DRC decided that the player had to refund to the club the amount of USD 40,000 received as a signing-on fee. The DRC also went on to analyse the sporting sanctions to be imposed on the player for having caused the breach without *just cause*. Finally, the player was sanctioned by means of a restriction of 4 months on his eligibility to participate in any official football matches.

It is vital to emphasize that it is the clubs' responsibility to be properly informed about the player's history before concluding the employment contract with the player. In a DRC decision of 25 August 2006, the DRC referred to the due

[20]TAS 2007/A/1314 *Ali Bouabé & Sporting Lokeren Oost-Vlaanderen c. Association Sportive des Forces Armées Royales (ASFAR)* and TAS 2007/A/1315 *Hassan El Mouataz & Sporting Lokeren Oost-Vlaanderen c. Association Sportive des Forces Armées Royales (ASFAR)*, award of 31 January 2008.

[21]DRC 27 November 2014, no. 1114239.

[22]DRC 13 May 2005, no. 55484.

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diligence requested of a club in that it shall verify that it does not take a player under contract who still has a valid contract with another club.[23] The DRC stated in said case that a player and/or his players' agent or even the association of the former club of the player must ascertain upon request from the club wishing to engage the player, that there is no contractual link between the player and another club and, on the proviso that no indications to the contrary appear, the new club is generally allowed to trust on the information received. Also, in its DRC decision of 26 October 2006, the Chamber noted that if a club is interested in signing an employment contract with a new player, it is the responsibility of the new club to be inform about the player's career, before signing an employment contract.[24] The DRC stated that by not verifying the relevant facts concerning the player, the club concerned had taken the risk of not being accurately informed about the player's career and that being provided with inaccurate information on the player's former club, is not a valid reason for the unilateral termination of the employment contract.

Also in a DRC decision of 30 November 2007, the Chamber pointed out that if a player and/or his player's agent or even the association of the former club of the player ascertain upon request of the club wishing to engage the player, that there is no contractual link between the player and another club and on the proviso that no indications to the contrary appear, the new club is generally allowed to trust on the information received.[25] This was also decided in the DRC decision of 28 September 2007, in which the deciding authority deemed that in cases where a player and/or his players' agent ensure that no contractual link to another club exists, even corroborating this by means of apparent documentary evidence, on the proviso that no indications to the contrary appear, the new club generally in good faith has to be protected in trusting on the information received. However, in this DRC decision it was also emphasized that it is always advisable for a new club to check with the association of the former club what the contractual situation of the player actually is before signing him up.[26]

Finally, in order to avoid any doubt and misunderstanding, it is common practice and also legally permitted that parallel negotiations take place. In a DRC decision of 23 February 2007, the DRC had to decide on the conclusion of a transfer agreement between 2 clubs which was a condition *sine qua non* to the conclusion of a legally binding employment contract between the potential new club and the player.[27] The DRC reproached the player's and the former club's disreputable behaviour of simultaneously conducting negotiations with other clubs in a rather misleading way. However, it stated that no provision prohibits parallel negotiations with various parties and that such practice is probably widespread. The DRC

[23]DRC 25 August 2006, no. 86712.

[24]DRC 26 October 2006, no. 1061118.

[25]DRC 2 November 2007, no. 1171309.

[26]DRC 28 September 2007, no. 9719.

[27]DRC 23 February 2007, no. 27409.

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decided that it cannot be established whether the club and the player concerned concluded a legally binding employment contract.[28] Furthermore, reference must be made to a DRC decision of 26 October 2006, in which it was decided that no valid employment contract had been concluded between the parties.[29] The Chamber added that the contract negotiations conducted between the 2 parties prior to the handing over of documents, did not have a binding character as they actually had to be regarded as mere statements of intention showing the general willingness to enter into a contractual relationship.

In its decision of 27 November 2014, it can be concluded that the Chamber will find it of the utmost importance that prior to signing an employment contract, the potential new club must take necessary measures to establish whether or not a player is contractually bound to another club. In other words, also from this DRC case it can be concluded that a club must exercise due diligence to be informed of a player's contractual position.[30] Also in its case of 27 November 2014, the Chamber decided the club concerned did not exercise the due diligence in order to inform itself as the player's contractual situation.[31]

## 6.3 Invalid Conditions Precedent

Pursuant to Article 18 para 4, RSTP, 2016 edition, the validity of a contract between a professional and a club may not be made subject to a successful medical examination and/or the granting of a work permit. These 2 circumstances are explicitly laid down in the RSTP. However, in this context, the jurisprudence of the DRC also shows that there are other circumstances that cannot be considered as valid circumstances to make the employment contract conditional.

For example, from the DRC jurisprudence it follows that an employment contract cannot be made subject to the issuance of an ITC. In its case of 23 September 2005, the DRC underlined that the validity of an employment contract cannot be subjected to the issuance of the player's ITC and therefore the contract was considered to be valid and binding. The DRC deemed that, despite the fact that the issuance of the ITC generally is the sole responsibility of the player's new club

[28]In CAS 2014/A/3573 *Damian Alejandro Manso v. Al Ittihad Club*, award of 29 January 2015, the CAS Panel appreciated that in some countries and in some cultures it may be considered particularly offensive or even outrageous if an employee simultaneously negotiates in parallel with more than one potential employer. However, the CAS found in this case it was not for them to criticise any such cultural or moral attitude. For the purposes of the case this attitude was irrelevant.

[29]DRC 26 October 2006, no. 1061318.

[30]DRC 27 November 2014, no. 1114239.

[31]DRC 27 November 2014, no. 1114239.

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and its respective association, the fact that, in the matter at hand, the parties had voluntarily and contractually agreed to transfer such onus to the player concerned, should be interpreted as a wish of the parties concerned not to apply such rule.[32]

Furthermore, the DRC will not accept that the employment contract is subject to the non-registration or non-approval of the employment contract under national rules. This is consistent jurisprudence of the DRC.[33] Also, in the DRC case of 27 August 2009, regarding rules on the registration and/or approval of contracts under national sporting regulations (generally issued by member associations), the Chamber deemed it fit to refer to its consistent jurisprudence relating to labour disputes in which a club contests the validity of an employment contract concluded between a player and a club due to the non-registration or non-approval of such contract under national rules. The DRC decided that the non-registration or non-approval of an employment contract of a player, in principle, does not render the signed employment contract invalid and cannot be held against the player as a valid argument.[34]

Both the RSTP as well as the DRC's well-established jurisprudence are very clear in determining that the validity of an employment contract cannot be made conditional upon the execution of (administrative) formalities, such as, but not limited to, the registration procedure in connection with the international transfer of a player, which is the sole responsibility of a club and on which a player has no influence. For example, in its DRC decision of 25 October 2012, the Chamber explicitly confirmed this. The DRC decided that the respondent party had terminated the contract unilaterally without *just cause* on 15 January 2012 and that it therefore had to be held liable.[35] This was also decided in the case of the DRC of 15 March 2013. In this case, the DRC noted that the respondent party held that the employment contract could not be properly registered within the PFL due to the claimant's fault, the latter not providing the relevant documentation. In this context, the Chamber considered it relevant to recall its consistent jurisprudence in accordance with which the validity of an employment contract cannot be made conditional upon the execution of (administrative) formalities, such as, but not limited to, the registration procedure in connection with the international transfer of a player, which is the sole responsibility of a club and on which a player has no influence.[36] The previous viewpoint was also confirmed in more recent case law, such as DRC decisions of 23 July 2015 and 7 February 2014, in which cases the DRC considered it relevant to recall its well-established jurisprudence.[37]

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[32]DRC 23 September 2005, no. 95121.

[33]DRC 9 November 2009, no. 114707. See also DRC 12 January 2006, no. 35712. See also CAS 2008/A/1453 *Elkin Soto Jaramillo & FSV Mainz 05 v. CD Once Caldas & FIFA* and CAS 2008/A/1469 *CD Once Caldas v. FSV Mainz 05 & Elkin Soto Jaramillo*, award of 8 July 2008.

[34]DRC 27 August 2009, no. 89733. See also DRC 16 July 2010, no. 791002.

[35]DRC 25 October 2012, no. 10121176.

[36]DRC 15 March 2013, no. 03132656.

[37]DRC 23 July 2015, no. 0715452 and DRC 7 February 2014, no. 0214780.

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In its decision of 28 June 2013, the DRC highlighted that the fundamental disagreement between the parties of the present dispute and, thus, the central issue of the matter at hand, was whether the employment contract signed between the parties constituted a valid and binding contract between the parties.[38] In this case the employment contract was subject to the condition that a loan agreement would have had to be signed between the clubs concerned and one of the clubs would have had to send the relevant ITC. Furthermore, the respondent also invoked another provision of the contract, which stipulated that if, as a consequence of the foreign player's quota restrictions or other causes, the player cannot be registered, the contract is null and void. Bearing Article 18 para 4 of the RSTP in mind, the Chamber considered it relevant to recall its jurisprudence in accordance with which the validity of an employment contract cannot be made conditional upon the execution of (administrative) formalities, such as, but not limited to, the registration procedure in connection with the international transfer of a player, which is the sole responsibility of a club and on which a player has no influence. Bearing in mind that, according to Annex 3 of the RSTP, an ITC request depends on the new club's application to the new association to register a professional, the club is actually in a position to prevent the occurrence of the condition precedent of receipt of an ITC by wilfully choosing not to proceed with the application for an ITC request. In line with the Chamber's consistent jurisprudence, the DRC finally concluded that the respondent's arguments regarding the conditions precedent could not be upheld.[39]

## 6.4 Essentialia Negotii

As mentioned in the introduction, for an employment contract to be considered as valid and binding, from DRC jurisprudence it follows that it must at least contain the name of the parties, the object, the duration of the employment relationship, the salary and the signatures of the parties concerned; the so-called *essentialia negotii*.

No valid and binding employment contract will be established if the contract is not provided with the signatures of the parties. This can be inferred from the DRC decision of 10 May 2012, in which the DRC Judge wished to emphasize that for an employment contract to be considered as valid and binding, it must at least contain the abovementioned elements, i.e. the name of the parties, the object, the duration of the employment relationship, the salary and the signatures of the parties.[40] In this case, the DRC Judge came to the conclusion that the contract lacked one of the *essentialia negotii*. The contract was not provided with the signatures of

[38]DRC 28 June 2013, no. 06131375.

[39]See also DRC 31 October 2013, no. 1013136.

[40]DRC 10 May 2012, no. 512476.

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the parties, in order to be considered as a valid and binding employment contract. The DRC Judge established that neither of the parties was bound by the document and according to the DRC Judge, no breach of contract had been committed.[41]

Also, in its case of 1 March 2012, the Chamber highlighted that, in order for an employment contract to be considered as valid and binding, apart from the signatures of both the employer and the employee, it should also contain the "*essentialia negotii*" of an employment contract, such as the parties to the contract and their role, the duration of their employment relationship as well as the remuneration.[42] Consequently, the Chamber concluded in this case, that as from 1 January 2011, the contract was no longer binding due to the absence of the claimant's salary.

In its case of 28 March 2012, the DRC concluded that all essential elements were included in the relevant agreement: the parties, the duration, the signatures of both parties as well as the agreed obligations of the parties, particularly the remuneration.[43] Therefore, the DRC concluded that the private agreement clearly represented the basis of an employment relationship and also contained all the essential elements of an employment contract. The Chamber therefore decided that the private agreement concluded by the parties, was to be considered as a valid and a legally binding employment agreement that created obligations for the parties.

In another case of 28 March 2012, the Chamber also referred to the "*essentialia negotii*" of an employment contract, in accordance with which such contract must contain the duration, the subordination of the employee to the employer, the personal performance and the remuneration.[44] The Chamber emphasized that the financial terms for the second year of the contract were missing and, therefore, the prerequisites for a valid employment contract were not given for the second year. As a consequence, the Chamber came to the firm conclusion that the parties had concluded an employment contract valid as from 1 July 2008 until 30 June 2009.

In a decision of 28 June 2013, the DRC deemed it important to highlight that, in order for an employment contract to be considered as valid and binding, apart from the signatures of both the employer and the employee, it should also contain the *"essentialia negotii"* of an employment contract, such as the parties to the contract and their role, the duration of their employment relationship as well as the remuneration.[45] The Chamber concluded that the parties had not signed a valid and binding employment contract, since the document named "*Variazione di Tesseramento*" lacks all the *"essentialia negotii"* to be considered as a valid employment contract. The DRC decided that, since no employment contract was concluded between the claimant and the player, there was no possibility for the Chamber to enter into the question whether or not such alleged employment

[41] See also DRC 25 September 2014, no. 09142368.

[42] DRC 1 March 2012, no. 3121034.

[43] DRC 28 March 2012, no. 3121533.

[44] DRC 28 March 2012, no. 3122702.

[45] DRC 28 June 2013, no. 06132647.

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contract had been terminated by the player. Therefore, the complaint of the claimant was rejected.

Sometimes one of the parties is of the opinion that it concerns a pre-contract as a result of which there is no valid contract and the party is not bound to the other party. This, however, is not correct. From the DRC decision of 27 November 2014 it follows that a pre-contract can also be seen as a valid contract. In order for the DRC to establish that it is a valid and binding employment contract, apart from the signatures of both parties, it is relevant that the contract contains the *essentialia negotii* of an employment contract, such as the parties to the contract and their role and the duration of the employment relationship.[46]

## 6.5 Formal Aspects

### *6.5.1 Form*

Article 2 para 2 of the RSTP, 2016 edition, states that the employment agreement must be in writing. According to numerous DRC decisions, the Chamber decides accordingly and it is clearly indicated that the employment agreement between the professional and the club must be in writing.[47] This is a prerequisite to determine the status of the player. The DRC emphasizes that the requirement is the existence of a written contract which is duly registered in the respective federation.[48] We must also note in this regard, relevant CAS jurisprudence that shows, in principle, that an agreement between 2 parties does not have to follow any specific form and may in fact, simply result from a verbal agreement on the understanding that the parties opting to conclude non-written agreements may obviously face increased challenges in terms of proof.[49]

In a DRC decision of 22 July 2004, the DRC noted that the last written employment contract between the player and the club expired on 20 November 2003 and

[46]DRC 27 November 2014, no. 1114239. See also DRC 12 April 2005, no. 45406, DRC 28 July 2005, no. 75860, DRC 13 June 2008, no. 681246, DRC 10 January 2008, no. 18745, DRC 24 October 2011, no. 10111169, DRC 26 October 2006, no. 1061098, DRC 26 October 2006, no. 1061097, DRC 26 October 2006, no. 1061118, DRC 26 November 2004, no. 114124. With regard to the difference between a 'contract' and a 'pre-contract', see CAS 2008/A/1589 *MKE Ankaragücü Spor Külübü v. J.*, award of 20 February 2009. See also CAS 2004/A/691 *FC Barcelona SAD v. Manchester United FC*, award of 9 February 2005.

[47]DRC 24 October 2005, no. 105874(2) and no. 105874.

[48]DRC 4 February 2005, no. 25820. See also CAS 2013/A/3207 *Tout Puissant Mazembe v. Alain Kaluyituka Dioko & Al Ahli SC*, award of 31 March 2014.

[49]See CAS 2013/A/3091 *FC Nantes v. FIFA & Al Nasr Sports Club,* award of 2 July 2013, CAS 2013/A/3092 *Ismaël Bangoura v. Al Nasr Sports Club & FIFA*, award of 3 June 2013, CAS 2013/A/3093 *Al Nasr Sports Club v. Ismaël Bangoura & FC Nantes*, award of 2 July 2013.

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that it was only extended until 20 December 2003, when the club ended its participation in the final phase of the second tournament.[50] Moreover, it was noted that the club acknowledged the lack of a written employment contract between the parties for the 2004 season, despite claiming the existence of an oral agreement binding the player to it for such a period. In this respect, the Chamber emphasized that "every player designated as a non-amateur by his national association must have a written employment contract with the club employing him". Consequently, the Chamber finally concluded in this matter that the football player stopped being contractually bound to the club on 20 December 2003 and was thus a free agent.

Verbal agreements will generally not be taken into consideration by the DRC. For example, in DRC decision of 22 July 2004, the Chamber deemed it appropriate to declare that it could only decide on the basis of documents duly signed by the parties and that, in accordance with the Procedural Rules, verbal agreements would therefore not be taken into consideration. In light of this, the Chamber unanimously came to the conclusion that it was not established that the player signed an employment contract with the club on 1 September 2002 valid until the end of the 02/03 season and that it therefore had to reject the claim of the Libyan Club.[51]

If the offer is not accepted, no employment contract exists. In a DRC decision of 26 October 2006, the DRC decided that no valid employment contract was concluded between the parties because the offer had not been accepted by the player.[52] After examining 2 documents, copies of which were included in the file in the matter at hand, the Chamber noted that these 2 documents had not been signed by the player. Referring to the general principle that every contract requires an offer and an acceptance of the offer, the Chamber finally concluded that the offer of the club for employment had not been followed by an acceptance of the offer by the player. Therefore, the DRC came to the conclusion that no valid employment contract had been concluded between the player and the club.

It is not uncommon in professional football that players and clubs sometimes sign 2 employment contracts with the same club, whereas these contracts often differ in the financial conditions. In most cases only one contract will then be registered with the association concerned. In a DRC decision of 4 April 2007, the Chamber emphasized that it is well-known that clubs and players sign a standard/official employment contract which is usually registered within the relevant association and a private employment contract which frequently provides for better financial conditions for the players. The DRC maintained in this case that such conduct, in principle, is reproached if it is used to mislead the players and affect their contractual rights, which rather seems not have been the case in the present matter.[53]

[50]DRC 22 July 2004, no. 7472A.

[51]DRC 22 July 2004, no. 74165. See also DRC 24 October 2005, no. 105874(2).

[52]DRC 26 October 2006, no. 1061318.

[53]DRC 4 April 2007, no. 47139.

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### 6.5.2 Length

Generally in professional football, employment contracts are concluded for a predetermined period of time. According to Article 18 para 2 of the RSTP, 2016 edition, the minimum length of the employment contract will be from the date of its entry into force until the end of the season, while the maximum length of the contract will be five years. Contracts of any other length will only be permitted if consistent with national laws. According to Article 1 para 3 under a of the RSTP, 2016 edition, this provision is binding on a national level and must be included.

As mentioned before, pursuant to Article 18 para 2, RSTP, 2016 edition, players under the age of 18 may not sign a professional contract for a term longer than three years. Any clause referring to a longer period will not be recognized. Contrary to the professional football employment contracts between clubs and players aged 18 or older, which may be concluded for a maximum of five years, FIFA is of the opinion that minors should be protected by reducing the maximum length of professional contracts to three years. FIFA feels obliged to safeguard the interests of young players and not hinder their progress through an extensive tie to a club. Any clauses signed for a longer period in contracts will not be recognized by the football authorities. In the event that the contract is signed for longer than a term of three years, only the first three years of the contract will be considered as valid. After the end of the third year, the player will then be free to leave the club unless he explicitly or de facto accepts the extension.[54] For example, in a case of 22 July 2004, the DRC decided that a contract with a minor for a period of five years was invalid.[55]

In a DRC decision of 24 October 2005, a club understood that its employment contract with player B was valid and binding for both parties and requested the immediate intervention of the DRC.[56] In reply, the player claimed that the contract that he signed with his club was invalid because it only had a six-month duration, which according to him contravenes the rules of FIFA. The Chamber rejected the argument concerning the duration of the player's employment contract with the club which would allegedly imply the contract's nullity, based on Article 4 para 2 of the RSTP, 2014 edition. The DRC was of the opinion that the minimum duration of an employment contract must be seen in connection with Article 5 para 2 of the RSTP, 2001 edition, which allowed only one transfer per player in the same sports season over a period of 12 months. The DRC referred to FIFA Circular no. 867, which stated that the wording of the aforementioned legal ground must be understood to apply only to the sports season rather than to the calendar year. The DRC was of the opinion that a contract signed for the remaining duration of a sports season must therefore be considered as valid. In this decision, the DRC

[54]FIFA Commentary, explanation Article 18 para 2, p. 53. RSTP, 2016 edition, Article 18 para 2, last 2 sentences.

[55]DRC 22 July 2004, no. 74234.

[56]DRC 11 March 2005, no. 35144 b.

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emphasized that Article 18 para 2 of the RSTP, of the former 2005 edition, stipulated that the minimum length of a contract is from the date of its entry into force to the end of the season.

### *6.5.3 Signature*

The employment contract must be signed by both parties. This means that the player and the club must sign the employment contract. Although this is not stated in the RSTP, the DRC is very clear on this point. If one of the parties does not sign the employment contract, the contract is invalid.[57] In the event that one of the parties used a licensed players' agent, then the name of the agent must also be mentioned in the employment contract itself. This was explicitly stipulated in Article 22 para 3 of the Players' Agent Regulations, 2008 edition. In the current Article 18 para 1 of the RSTP, 2016 edition, it states that if an intermediary is involved in the negotiation of a contract, he shall be named in that contract. However, for sake of clarity and to avoid any misunderstanding, it is of no relevance in relation to the *validity* of the employment contract whether or not it is signed by the agent.

In a case before the DRC of 11 March 2005, the Chamber rejected the argument raised by the player, according to which his employment contract with the club should be considered as invalid due to the fact that it was not signed by his agent.[58] Also, in a case of 23 March 2006, the Chamber underlined that there is no obligation contained in the applicable regulations of FIFA preventing a player and a club from signing an employment contract without contacting the player's agent beforehand. If the agent of a player is not involved in the conclusion of an employment contract, his name is not to be mentioned in that contract.[59]

The DRC has given various decisions in which the protection of the minor has priority. In the DRC decision of 12 April 2005 the Chamber decided that an employment contract with a minor is void if the contract is not co-signed by his parents. Consequently, the Football Association of the club St. G. was entitled to register him for his affiliated club with immediate effect. Furthermore, the Football Association of club G should issue the relevant ITC on behalf of the Football Association of the club St. G. without further delay.[60] The Chamber is very strict with regard to the co-signing of the guardians, all aimed at providing the minor with maximum protection.

From the DRC jurisprudence we can infer that an employment contract of a minor must be co-signed by his guardian. For example, in a decision of 23 March 2006, the Chamber had this opinion.[61] In the view of the Chamber, the minor

[57]DRC 26 October 2006, no. 106672.

[58]DRC 11 March 2005, no. 35144b.

[59]DRC 23 March 2006, no. 36619.

[60]DRC 12 April 2005, no. 45196.

[61]DRC 23 March 2006, no. 36619.

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should be protected in the best possible way. In another DRC decision of 23 March 2006, the Chamber decided and also clarified that clubs and players can only conclude employment contracts without same having to be co-signed by the player's legal representative/guardian as soon as the player, in accordance with the national law, has reached maturity.[62]

From jurisprudence it can also be concluded that the signature of the representative of the player, such as an intermediary, cannot replace the signature of the player. In its DRC decision of 28 September 2007, the Chamber was of the unanimous opinion that when acting as the representative of the player, the agent's attitude was not in line with due diligence. The DRC emphasized that the pre-contractual correspondence between an agent and a club cannot legally bind the player in the sense of a conclusion of a contract. In this respect, the Chamber was also eager to emphasize that the signature of an employment contract, in any case, has to be considered as a strictly personal right of the employee and therefore the signature of a players' agent cannot replace the signature of the player.[63] The DRC stressed that this consideration is also in line with the regulations, according to which the agent shall be *named* in the contract, if he is involved in the negotiation of a contract. The DRC stressed that neither the regulations nor the Players' Agents Regulations of FIFA provided for the possibility of an agent signing an employment contract on behalf of the player he represents.[64]

Although this seems quite logical, the DRC emphasized in a case of 10 August 2007, that if there are no indications to hand, the relevant employment contract does not need the signatures of the parties on every single page of that employment contract.[65]

In response as to who is authorised to bind the club, the DRC decided that it is always the president who is authorised to bind the club, even if the Chamber of Commerce demands the signature of 2 club officials, according to the DRC in its decision of 26 October 2006.[66] This was confirmed by the DRC in another decision of the same date on 26 October 2006.[67] In this regard, the DRC stated that the alleged necessity of 3 signatures for the validity of an employment contract is a club-internal proxy rule which is not known to third parties and therefore does not

[62]DRC 23 March 2006, no. 36882.

[63]See also CAS 2007/A/1429 *Bayal Sall v. FIFA and IK Start* and CAS 2007/A/1442 *ASSE Loire v. FIFA and IK Start*, award of 25 June 2008. As also follows from the latter case, the stating of an incorrect date of birth does not make a contract invalid.

[64]DRC 28 September 2007, no. 97938.

[65]DRC 10 August 2007, no. 871283. Handwritten additions that are only undersigned by one of the parties will not be taken into consideration by the DRC. See DRC 30 November 2007, no. 1171304. See also CAS 2007/A/1429 *Bayal Sall v. FIFA and IK Start* and CAS 2007/A/1442 *ASSE Loire v. FIFA and IK Start*, award of 25 June 2008. From the latter case it follows that the absence of initials of the parties on every separate page of the contract does not lead to an invalidity of the contract.

[66]DRC 26 October 2006, no. 106399.

[67]DRC 26 October 2006, no. 1061097.

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have any legal effects on the validity of the present contract unless the contracting partner, in this case the player, is clearly informed about the respective rule. The DRC noted that the club had failed to provide any kind of evidence to corroborate its allegation that the player had indeed been informed that the signature of the President of the club was not sufficient for the validity of the contract. The DRC also stated that the player was not obliged to verify whether or not the President of the club was solely empowered to sign a contract. As in the present case where the signature of the club's President is concerned, the player could assume that as the highest possible representative of the club, he is authorised to sign individually. The DRC then turned its attention to the argument of the club that the contract includes 3 lines, i.e. allegedly space for 3 signatures. The DRC stated that by simply providing space for 3 signatures, it could not be concluded that the club had informed the player about the necessity of 3 signatures from the club. In conclusion, the DRC finally stated that the club's argument that the contract is not valid due to the absence of 2 signatures, should be rejected. The DRC was of the opinion that the contract had therefore been duly signed by both parties.[68] In a DRC decision of 7 May 2008, the DRC not only confirmed that both parties are obliged to sign the employment contract, but it also decided that the player could understand in good faith that the person who signed on behalf of the club was duly empowered by the club to represent it.[69] Also in its case of 10 August 2011, the respondent rejected the claimant's claim entirely, since the vice president had no authority to sign. The termination agreement therefore had no legal force, according to the club. The DRC turned its attention to the respondent's allegation that the termination agreement had not been signed by its competent representative in accordance with its internal regulations and recalled that, as a general rule and in accordance with its well-established jurisprudence, the internal proxy rule of one of the parties to a contract cannot have legal effect on the validity of the contract itself, unless the contracting party has been duly informed of its contents. The DRC recalled in this case that the respondent had not provided any evidence in support of the allegation that the claimant had ever been informed of the contents of its internal proxy rule. The claimant therefore had no knowledge of the internal proxy rule. As result, according to the DRC, the claimant could assume in good faith that this person was duly authorized to act and sign on the club's behalf. The termination was therefore valid.

Sometimes it appears that the signature(s) on the contract is/are false. In principle, the national civil judge will conduct a thorough investigation as to whether the signature is false or not. Sometimes it may even become a criminal procedure if a criminal offence has been committed. In the case of a forged signature in the employment contract, the DRC pointed out in several decisions that it is not competent to decide whether or not a signature is a forgery. Indeed, such a matter will

[68]See also DRC 20 July 2012, no. 7121848.

[69]DRC 7 May 2008, no. 58996.

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be referred to a criminal court.[70] The DRC follows a very strict rule in this matter and gives the impression that it is not able to investigate whether the signature is forged or not. It could be said that the DRC (at least) was very strict in case of a forged signature. The DRC thoroughly investigated the authenticity of the signature and is quite quick to point out that the parties must address the criminal court in their own country. The DRC could, however, conduct a more thorough investigation into the authenticity of the signature.[71] Also in a DRC decision of 27 April 2006, the DRC stated that, as a general rule and with the possible exception of cases of evident divergence of the signatures, as long as the falsification of a signature or a document is not established by a final and binding decision of a competent criminal authority, the DRC has to presume the authenticity of the signature or the document in question.[72] However, eventually in this case the DRC also emphasized that it was allowed to adjudicate with regard to the authenticity of the signature 'in case of evident divergence of the signatures'. This is a very interesting opening with regard to this specific subject. Since this case we have noted a more proactive stance by the Chamber.[73]

In view of the above, the DRC is not competent to decide upon matters of criminal law. In a DRC decision of 4 April 2007, the Chamber also decided that it was not competent to decide upon matters of criminal law, such as the alleged forged signature or document, whereas such affairs fall under the jurisdiction of the competent national criminal authority. In this case the DRC referred to this general rule, but also emphasized that the player could have proven otherwise by a neutral expertise or a decision by the competent criminal authority on a national level.[74]

In a decision of 21 August 2008, the DRC also had to establish whether or not there still was a valid employment contract between the player and club K. With regard to the player's accusation of forgery, the DRC attached importance to clarifying that it was not competent to adjudicate in criminal offences, such as the alleged forgery of a signature. It was important in this case that the DRC added that it was up to the party invoking a forgery of a signature to initiate the corresponding proceedings before a competent penal authorities. Such steps did not appear to have been taken by the player concerned as result of which the Chamber recalled that the authenticity of a signature was to be presumed until evidence to

[70]DRC 11 March 2005, no. 35239. See also DRC 9 January 2009, no. 19968.

[71]In a case before the DRC of 8 June 2007, the Chamber emphasized that FIFA is not competent to decide upon matters of criminal law, such as document forgery. Consequently, the Chamber decided to refer the respondent to the competent national authorities in order to obtain a binding decision regarding the alleged forgery of the relevant confirmation. DRC 8 June 2007, no. 67344. See also DRC 27 April 2007, no. 47126.

[72]DRC 27 April 2006, no. 46294.

[73]See also Vandellos. With regard to the provision for a handwriting expert, see also CAS 2012/A/2957 *Football Club Khimki v. Eljver Raça*, award of 5 February 2014. See also DRC 30 July 2014, no. 0714210. See also CAS 2014/A/3852 *Ascoli Calcio 1898 S.p.A. v. Papa Waigo N'diaye & Al Wahda Sports and Cultural Club*, award of 11 January 2016.

[74]DRC 4 April 2007, no 47345.

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the contrary was presented, unless an evident and manifest difference between the signatures could be ascertained.[75]

Bearing in mind the claimant's implicit allegation of forgery, the DRC emphasized in its case of 15 March 2013, that, as a general rule, the DRC is not the competent body to decide upon matters of criminal law, such as allegedly forged signatures or documents, but that such affairs fall within the jurisdiction of national penal courts. However, also in this case we see that the DRC is more active in this regard, compared to its previous decisions regarding forged signatures. The DRC decided that, after a thorough analysis of the documents, particularly in comparing the relevant signatures, the Chamber had no other option but to conclude that, for a layman, the claimant's signatures on the various documents available, including the challenged document, seemed to be alike. Therefore, the Chamber concluded that the third agreement between the parties must be considered a legally binding agreement.[76]

Also, in its case of 17 January 2014, the DRC considered it appropriate to remark that, as a general rule, FIFA's deciding bodies are not competent to decide upon matters of criminal law, such as the ones of alleged forged signatures or documents, and that such affairs fall within the jurisdiction of the competent national criminal authority.[77] After a thorough analysis of the documents available on file, particularly in comparing the relevant signatures of respondent 1 on the various documents submitted in this case, the Chamber had no other option but to conclude that, for a layman, the signatures on such documents appeared to be the same.[78]

### *6.5.4 Language*

The employment contract is usually written in English or the language of the country of the club. However, FIFA does not provide for any mandatory rules with regard to the language of the employment contract as a result of which one may therefore conclude that the parties are entirely free to choose the language of the contract.

In a decision of 4 February 2005, the DRC decided that in a contractual dispute between the parties involved, the FIFA regulations do not oblige the parties to sign a contract drawn up in one of the official FIFA languages.[79] The only requirements stated by the FIFA regulations are the existence of a written contract duly

[75]DRC 21 August 2008, no. 88210. See also DRC 10 July 2013, no. 07131183.

[76]See also DRC 4 October 2013, no. 1013417.

[77]DRC 17 January 2014, no. 0114844.

[78]See also DRC 2 July 2015, no. 0715381.

[79]DRC 4 February 2005, no. 25820.

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registered in the respective federation. In this context, on 13 August 2003 the player and the club signed an employment agreement written in Arabic. The DRC was of the opinion that this contract was legally binding between the parties because it fulfilled all the legal requirements under the national law concerned and the FIFA regulations. The player stated that at the time of signing the contract with the club in Arabic, the club had acted in bad faith by not providing him with a copy of same, duly translated into English, French, German or Spanish, as required by FIFA. The DRC explicitly underlined that fact and stressed that the regulations of FIFA do not oblige the parties to sign an employment contract drawn up in one of FIFA's official languages, as claimed by the player in this case. As said, the only requirements stated by FIFA regulations are the existence of a written contract duly registered in the respective federation.

In several decisions, such as in the decision of the Chamber of 30 November 2007, the DRC decided and confirmed that signing a contract in spite of not knowing its exact contents due to the language of the contract or due to any other reason, is to be considered as gross negligence, and the consequences thereof shall not have to be borne by the other party to the relevant contract.[80] The DRC is very clear regarding this issue. A party who signs a document of legal importance without knowledge of its precise contents, generally does so at its own risk.[81] In that respect, as also noted in its decision of 10 August 2007, if the player had really not understood the terms of the employment contract he entered into with the club, he could have asked for a translation prior to signing such document.[82]

It is a general rule that a party signing a document of legal importance without having knowledge of its precise contents does so at its own risk. For example, in its DRC decision of 15 June 2011, the Chamber had to decide whether a valid contract had been entered into between the claimant and the respondent on 1 April 2008.[83] The DRC recalled that the player asserted that he did not "*voluntarily or willingly*" sign a new employment contract with the club. The DRC noted in this respect that the player asserted that the club took advantage of the player's ignorance of the H language to mislead him on the nature of the document at stake, so as to finally obtain his signature on said contract. The DRC deemed it important to refer to its consistent jurisprudence applicable to similar situations and the fact that a party is not able to understand the contents of a document that he/she signed, is not a valid reason to consider that such document shall be deprived from producing legal effects. In other words, the DRC held that in such situation, and as

[80]DRC 30 November 2007, no. 117311. See also DRC 6 May 2010, no. 510141.

[81]See DRC decisions of 28 September 2007, no. 97460 and no. 971002. See also DRC 22 June 2007, no. 67675. See also CAS 2009/A/1956 *Club Tofta Itróttarfelag, B68 v. R.*, award of 16 February 2010, CAS 2013/A/3375, *KSC Lokeren v. Omer Golan & Maccabi Petach Tikva FC*, and CAS 2013/A/3376, *Omer Golan & Maccabi Petach Tikva FC v. KSC Lokeren*, award of 22 August 2014.

[82]DRC 10 August 2007, no. 871283.

[83]DRC 15 June 2011, no. 611025.

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a general rule, a party signing a document of legal importance without having knowledge of its precise contents does so at its own risk.

In its case of 10 July 2013, the DRC Judge deemed it appropriate to emphasize that a party signing a document of legal importance without precisely specifying its contents, generally does so at its own risk and is consequently liable to bear the possible legal consequences arising from the execution or non-execution of such document.[84] Therefore, the DRC Judge concluded that the settlement agreement was valid which clearly specified that the debt of the respondent towards the claimant was no longer claimable.[85]

## 6.6 Payments

### *6.6.1 Salaries*

In a DRC decision of 8 June 2007, the Chamber decided—in view of the absence of an agreement between the parties with regard to the due date for the payment of salary—to use the established labour practice as a point of reference and emphasized that, an employee's salary was generally paid at the end of each month, when the payable services had already been rendered.[86] Furthermore, it is important to realize that the currency in which the salaries are to be paid is that of the currency stipulated in the contract. In a DRC decision of 28 September 2006, the Chamber had to adjudicate in a dispute between a player and a club regarding the currency amongst other things.[87] On 28 September 2001, the player and the club signed an employment contract valid from the date of signature until 28 September 2006. The DRC turned its attention to the contradictory positions of the parties in the present dispute to the amount paid to the player in advance, and in particular the currency to which the advance payment refers. The Chamber remarked that the player confirmed the receipt of an advance payment in the amount of 325,000 "rubles". The DRC was of the opinion that the decisive and crucial currency to be taken into account is the one to which the employment contract at the basis of the present dispute refers.

It is possible that 2 identical employment contracts are signed between a player and a club. In a case before the DRC of 26 October 2006, the Chamber stated that it is possible that 2 identical employment contracts are signed between a player and a club, differing only in the indicated salary.[88] Regularly, according to the DRC, the contract stipulating a lower remuneration is deposited with the

[84]DRC 10 July 2013, no. 0713775.

[85]See also DRC 14 August 2013, no. 08132573.

[86]DRC 8 June 2007, no. 6733.

[87]DRC 28 September 2006, no. 96157.

[88]DRC 26 October 2006, no. 106678.

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respective federation, whereas the other agreement, indicating the actual salary, is only known to the contract parties. However, in such cases, in the event of disputes regarding the salary effectively agreed upon, the DRC takes the higher salary into account to prevent the respective players from being victimized by this practice.

In a DRC decision of 12 January 2007, the DRC emphasized that it is common practice that the mandatory payments of an employee are deducted from the salary by the employer after which the employee is paid the net amount.[89]

We have also noted cases in which the salary of a player is reduced by the club on a unilateral basis with reference to the contract. However, this is not permitted. For example, in a DRC decision of 11 March 2005, the DRC had to decide about a contractual dispute between a French player and a Turkish club.[90] The DRC decided that the insufficient and poor performance level was no valid reason to pay the player less salary. The DRC adjudicated compensation to the player. The parties signed an employment contract on 23 August 2004 for the 2004/05 season under the following basic financial terms: a USD 50,000 net cash payment, as well as a monthly remuneration of USD 7,000. The Chamber finally commented that the player's poor performance could have been addressed in several alternative ways, none of which included withholding the basic contractual obligation towards the player. According to the DRC, the non-fulfilment of such basic contractual obligation like the payment of salary may not be used as a tool to sanction a player for disappointing performance levels. Therefore, the Chamber decided that the poor performance level of the player was not a valid reason to pay the player less salary.

As a general rule, low performance of a player cannot be considered a reason for the club to unilaterally reduce payments to the player. In another case which came before the DRC on 27 April 2006 relating to the same issue, the DRC firstly focused on the player's remark regarding the 4 disciplinary sanctions imposed by the club. In fact, the club established in its relevant list a total amount of USD 3,639 as fines imposed on the player based on low performance of the entire team. The DRC outlined that, as a general rule, low performance cannot be considered a reason for the club to reduce payments to the player because it is unilaterally determined by the club and based on pure subjective criteria. Therefore, the members of the Chamber concluded that this imposition of fines by the club cannot be accepted and cannot be deducted from monies payable to the player.[91]

In a decision of 12 January 2006, a player and a club signed an employment contract on 26 February 2003 valid until 25 June 2005.[92] According to contract, the player only received a salary if he played a certain number of matches. The player had not received any remuneration since the end of the 2002/03 sporting

[89]DRC 12 January 2007, no. 171082.

[90]DRC 11 March 2005, no. 3542.

[91]DRC 27 April 2006, no. 46290.

[92]DRC 12 January 2006, no. 16107.

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season because he had not played the required number of matches. The DRC concluded that the application of such a clause is arbitrary since it is at the club's discretion to decide how many matches the player plays. According to the DRC, this was unacceptable.

The unilateral revision of the salary of the player by a club cannot be accepted. In a case before the DRC of 12 January 2007, the Chamber was of the opinion and stated that the unilateral revision of the salary of the player by a club, as a general rule, cannot be permitted, even if a contractual clause grants this right to the club, because such a clause would disturb the necessary balance of rights and duties of the parties to a contract in an inadmissible way.[93]

Also, in its decision of 14 September 2007, the DRC had to decide about a deduction by the club from the player's salary. The club had sanctioned all the players of the team because of its poor sporting results and therefore reduced their salaries by 50 %. The DRC decided that clause 6 of the employment contract to deduct 50 % of the salaries of all the players because of the poor sporting results by the team was not valid, because such clause was arbitrary and not based on objective criteria. The club was therefore condemned to pay the outstanding salary to the player in full.[94]

Furthermore, the parties must explicitly stipulate in the employment contract whether the payments are net or gross. In its deliberations of its decision of 27 April 2006, the DRC turned to the question on whether the financial entitlements of the player are payable net or gross. In this regard, the members of the Chamber noted that neither the employment contract signed on 2 August 2004 nor the "private agreement" specifies whether the sums payable to the player are net or gross amounts. The DRC departed from the principle that monies must be considered to be payable gross, i.e. the amounts being subject to deduction of social insurance premiums and taxed. In the absence of a specific clause in the relevant employment contract, the monies are payable net. Consequently, and the party having substantiated that taxes were deductible from the monies payable to the other party in accordance with the employment contract, the Chamber concluded that the amount of EUR 9,328 was deductible from the aforementioned amount of EUR 44,000. The DRC therefore concluded that this party was entitled to receive the net amount of EUR 34,672.[95]

In its DRC decision of 16 November 2012, the Chamber agreed that a decrease in any payments to the player by the club could not have been validly applied on the basis of Article 3.5.5 due to the unilateral and arbitrary character of such clause.[96] Furthermore, Article 4.4 of the contract merely referred to a suspension

[93]DRC 12 January 2007, no. 17848.

[94]DRC 14 September 2007, no. 9729. See also DRC 22 June 2007, no. 671086.

[95]DRC 27 April 2006, no. 46831. See also DRC 20 August 2014, no. 08143653.

[96]DRC 16 November 2012, no. 11121922.

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of the player's receivables for a period of absence and, thus, on this basis the respondent party would not have been in the position to cancel payments due to the claimant in accordance with the contract and its annex.[97]

Clubs must be aware that if parties agree upon a salary in which part of the salary is subject to the player's participation, in general the DRC will not agree with this construction. In a case before the DRC of 18 December 2014, the Chamber decided that such clauses are invalid due to their unilateral character. Therefore, in this case the player was entitled to receive his full salary regardless of the participation.[98] This can also be derived from the DRC case of 18 March 2014, in which the DRC concluded that the clauses regarding the reduction of the player's salary and the possible termination of the contract were unilateral and only to the benefit of the club. The DRC wished to highlight that, potestative clauses, i.e. clauses that contain obligations in which fulfilment is conditional upon an event that one party controls entirely, cannot be considered since they generally limit the rights of the other contractual party excessively and lead to an unjustified disadvantage. The DRC came to the conclusion that the club had breached its financial obligations towards the player and that the player had *just cause* to terminate the employment contract.

Also, in a case of the DRC of 28 March 2015, according to the contract the club could reduce the player's salary depending on the amount of time the player participated in matches. The DRC concluded that the clauses regarding the reduction of the player's salary and the possible termination of the contract were unilateral and only to the benefit of the club. The Chamber wished to highlight that, potestative clauses, i.e. clauses that contain obligations in which fulfilment is conditional upon an event that one party controls entirely, cannot be considered since they generally limit the rights of the other contractual party excessively and lead to an unjustified disadvantage. The DRC came to the conclusion that the club had breached its financial obligations towards the player and that he had *just cause* to terminate the contract.[99]

As a final note it must be noted that if there is no fixed date of payment of the salary due, the DRC is of the opinion that the salary is payable on the last day of each month. For example, in its decision of 17 January 2014, the DRC Judge observed that the contract at the basis of the present dispute did not stipulate any specific due date for the player's monthly remuneration and that, according to the DRC, it must therefore be considered that such remuneration is payable on the last day of each month.[100]

[97]See also DRC 12 December 2013, no. 12131160.

[98]DRC 18 December 2014, no. 1214600.

[99]DRC 28 March 2015, no. 0314132.

[100]DRC 17 January 2014, no. 01143342. See also CAS 2014/A/3679 *FC Dacia Chisinau v. Goran Stankovski*, award of 17 February 2015.

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### 6.6.2 Bonuses

In the international professional football world, it is usual for players to receive other remunerations such as bonuses on top of their salary. In a case of 9 November 2004, the DRC decided on the performance of the player and the bonuses payable to him. The Chamber decided that clauses stipulating performance-related pay are common in the employment contracts of footballers. These clauses usually refer to the number of matches in which a player is fielded, often distinguishing between games won and games drawn.[101] Furthermore, according to the DRC, these clauses generally refer to the number of matches and not the number of minutes played, since a club is unlikely to risk not fielding a player for reasons relating to a performance-related clause but it may well try and control the total number of minutes played by a particular player by substituting the latter when it feels that a match is as good as won. Furthermore, it is easier for both parties to establish the number of matches that a footballer has played rather than to verify how many minutes a player performed.

A clause that the payment of bonuses would be withheld if the team dropped into the league relegation zone is not valid according to the DRC. In a decision of 1 June 2005, the DRC decided on a contractual dispute between a player and a club regarding outstanding bonuses. The members of the Chamber discussed the contents of the relevant internal rules, in particular the chapter referring to the bonuses and Article 5 which stipulates: "*In case that the team falls into the endangered zone on the league table the owner, the managing director or the chief trainer may withhold or withdraw the payment of bonuses*". The DRC concluded that the club's decision to withdraw payment of the contractually agreed bonuses based on the cited Article cannot be supported by FIFA. In this respect, the DRC deemed that the aforementioned rule is ambiguous and its application arbitrary, since it leads to an unacceptable result based on non-objective criteria. As a result, the DRC finally concluded that the player was entitled to receive the relevant bonuses.[102]

In a case of 26 November 2006, the DRC noted that according to the relevant supplement to the employment contract, the player was entitled to receive a bonus to the amount of USD 5,000 for each goal scored or assisted by him. But the said entitlement was applicable to winning games completed by the club in official matches of the League or the Cup. The Chamber considered that the official statistics issued by the Football Association, i.e. the player's official "match history 2004/05" constituted the basis for establishment of the number of goals scored and assists to goals provided by the player in official matches of the aforementioned competitions. Furthermore, the Chamber stated that the player failed to provide FIFA with any adequate documentary evidence regarding the number of goals scored and assisted

[101]DRC 9 November 2004, no. 114441.

[102]DRC 1 June 2005, no. 6526.

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by him. The DRC acknowledged that according to the applicable statistics issued by the Football Association, the player scored 5 goals in winning games completed by the club in official matches of the relevant competitions.[103]

It is vital to be aware of the fact that performance-related bonuses can be potestative and as a result the bonuses need to be paid by the club to the player. In a DRC decision of 30 November 2007, a player and a club concluded an employment contract dated 1 February 2006 valid until 30 June 2006.[104] On 21 August 2006, the player submitted a formal complaint to FIFA against the club due to outstanding bonuses. The club was of the opinion that the player had not fulfilled the criteria for the payment of bonuses. The Chamber considered that the performance-related criteria to which the payments were allegedly linked appeared to be of a highly subjective nature, entailing that it is left to the complete and utter discretion of the club whether or not it is willing to pay the relevant bonuses to the player. It was also noted by the DRC that the bonuses constituted a substantial part of the remuneration for the player's services, especially in relation to the relatively low monthly salary of the player concerned. The DRC decided that the player was entitled to receive the outstanding bonuses from the club for the total amount of USD 110,000.[105]

In a DRC decision of 29 November 2013, the Chamber considered that the bonuses were handwritten in the version of the contract submitted by the claimant, while the version of the contract submitted by the respondent did not include any reference to bonuses.[106] The DRC took note that the clause inserted in the version of the contract provided by the claimant was vague and did not establish the purpose of the bonuses. Moreover, in view of its undeniably variable character and uncertainty from one season to another, the Chamber could not establish beyond doubt that the claimant would have been paid bonuses and, if any, in what proportion. Consequently, the DRC had no other alternative but to refuse to take into consideration said bonuses while assessing the residual value of the contract. The DRC also recalled the principle of burden of proof and stressed that the claimant had neither presented any documentary evidence proving that he would have been entitled to bonus payments nor explained the purpose of the bonuses concerned.

In a DRC decision of 7 February 2014, a claim for bonuses was rejected.[107] In this case, aside from the employment contract, the parties signed a document called Appendix 1, which established "*Special Conditions for the Contract*", according to which the claimant was entitled to receive additional amounts. On 1

[103]DRC 26 November 2006, no. 116336.

[104]DRC 30 November 2007, no. 1171304.

[105]Handwritten additions that are only undersigned by one of the parties will not be taken into consideration by the DRC. See DRC 30 November 2007, no. 1171304.

[106]DRC 29 November 2013, no. 11133071.

[107]DRC 7 February 2014, no. 0214728.

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September 2010, the claimant was transferred to the Club B, from country T. On 15 February 2012, the claimant lodged a claim against the respondent before the DRC claiming EUR 277,753.43 net as well as USD 12,666 net. The respondent alleged that the monthly salary of USD 2,000 specified in the contract would already be included in the amount of EUR 2,000,000 stipulated in the appendix, as established in Article 6 of the contract. Equally, the respondent emphasized that, as per Article 6 of the contract, the claimant's remuneration was to be paid out in currency of country R, which occasioned the difference claimed by the claimant. In addition, the respondent rejected the claimant's request to be awarded the bonus amounting to EUR 100,000 since the claimant was no longer employed by the respondent by the time it qualified for the official UEFA competition. Finally, the respondent acknowledged still owing to the claimant the amount of EUR 14,686. The DRC first focused its attention on the respondent's argument, according to which the salary of USD 2,000 established in the contract was already included in the remuneration stipulated in the appendix, as per the contract. The DRC observed that the contract did not establish the inclusion of the contractual remuneration in the amount stipulated in the appendix. On the contrary, the Chamber observed that the contract even mentions that *"the special conditions* […] *in the Appendix* [are] *part of the present labour agreement"*, thus implying a relation of complementarity between the contract and the agreement. Therefore, the financial terms of the contract and of the appendix are to be considered as independent and complementary and the respondent's objection in this regard cannot be upheld. The DRC focused its attention on the respondent's argument, according to which the amounts claimed by the claimant as being outstanding, are the result of the conversion of the claimant's remuneration into the currency of country R, as established in Article 6 of the contract. In this respect, the Chamber considered that the respondent did not provide any documentary evidence in support of the aforementioned argument. The Chamber concluded that the respondent was not able to provide any substantial evidence of the payment of the claimant's remuneration, according to the contract and appendix, or to provide any reasons to justify the failure for making those payments. Thus, in accordance with the general legal principle of *pacta sunt servanda*, the respondent was to be held liable for the payment of outstanding remuneration to the claimant for the total amounts of EUR 177,753.43 and USD 12,666. Having established the aforementioned, the Chamber began to analyse the claimant's request for the payment of the allegedly outstanding bonus for qualification to an official UEFA competition in the amount of EUR 100,000. The DRC noted that while the claimant claims his entitlement to receive the aforementioned amount, the respondent deems that such amount is not due, since the claimant was no longer employed by it at the time that the season ended on 28 November 2010. In this respect, the Chamber pointed out that it is an undisputed fact by the parties that the claimant was transferred to club B on 1 September 2010. Therefore, by the time the club officially qualified for the UEFA competition, i.e. end of the season, he was indeed no longer employed by

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the club. The DRC determined that the claimant was not entitled to receive the bonus of EUR 100,000. The claim was only partially accepted.[108]

In a case of 9 May 2014, the DRC decided on the claimant's request of EUR 46,000 related to the match payments for the season 2011/2012, the Chamber stressed that the payment of such bonuses are linked to matches to be played in the future, i.e. after the termination of the relevant contract, and therefore, is entirely hypothetical.[109] Consequently, the Chamber decided not to take these into account.

The DRC is of the explicit opinion that the payment and amount of bonuses that are linked to matches that are to be played in the future, i.e. to matches that take place after a termination of an employment contract, will not be awarded. Also, in a case before the DRC of 30 July 2014, the player claimed this kind of bonus.[110] As regards this part of the claim, which related to the estimated loss of EUR 10,000 in bonuses, the Chamber stressed that the payment and the amount of such bonuses were linked to matches that were to be played in the future, i.e. to matches that took place after the termination of the relevant contract, and therefore, were hypothetical. Consequently, the DRC decided to reject this part of the player's claim. However, it must be taken into account that the CAS decided in an award in 2015 that the condition stated in the contract for the bonuses to be paid was that the contract was still valid. The DRC erroneously decided that the participation of the player in the match was decisive for the payment. Therefore, the CAS decided that since the player's contract had not been terminated when the team participated in the 2013 Copa Libertadores, and despite the fact that the player did not actually participate in any of those games, the bonuses were finally due.[111]

## 6.7 Conclusion

We have noted that a football player can only be bound to a football club by an employment contract. With regard to the negotiations, we noted further that, according to Article 18 para 3 of the RSTP, 2016 edition, a club intending to conclude a contract with a professional must inform the current club in writing of the

[108]As a side-note, in proceedings before the PSC regarding disputes between coaches and clubs, it is worth mentioning that coaches are (only) entitled to receive bonuses for results achieved while they are still working for their clubs. However, if the claim is related to the results achieved during the rest of the season, i.e. when the coach is no longer working for the club, the coach should not be entitled to receive any additional compensation (unless this was contractually agreed to otherwise). See PSC 19 March 2013, no. 0313992.

[109]DRC 9 May 2014, no. 05141729.

[110]DRC 30 July 2014, no. 0714643.

[111]See also TAS 2015/A/3871 *Sergio Sebastián Ariosa Moreira c. Club Olimpia* and TAS 2015/A/3882 *Club Olimpia c. Sergio Sebastián Ariosa Moreira*, award of 29 July 2015.

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player concerned before entering into negotiations with that player, on the understanding that the club with which the player is contracted, i.e. the current club, explicitly needs to agree to the discussions between its player and the prospective new club. Without an agreement between the current club and the potential new club, the latter may even be in a position of inducing the player. In Article 18 para 3 of the RSTP, 2016 edition, it is stipulated that a professional will only be free to conclude a contract with another club if the contract with his present club has expired or will expire within 6 months. Any breach of this provision will be subject to appropriate sanctions. It is the clubs' responsibility to be properly informed about the player's history before concluding the employment contract with the player and that it is does not contract a player who still has a valid employment contract with another club.

Aside from the fact that the employment contract cannot be made subject to a successful medical examination and/or the granting of a work permit, pursuant to Article 18 para 4 of the RSTP, 2016 edition, we also face other invalid conditions precedent as can be derived from the DRC jurisprudence (and are not explicitly laid down in the regulations). For example, the DRC will not accept that the employment contract is subject to the non-registration or non-approval of the contract under national law. In this regard, according to the DRC, the validity of an employment contract cannot be made conditional upon the execution of (administrative) formalities, such as, but not limited to, the registration procedure in connection with the international transfer of a player (including foreign player's quota restrictions), which are the sole responsibility of a club and on which a player has no influence.

In order for an employment contract to be considered as valid and binding, the jurisprudence of the DRC provides that the contract must at least contain the name of the parties, the object, the duration of the employment relationship, the salary and the signatures of the parties, the *essentialia negotii.* If one of the *essentialia negotii* is absent, no valid contract is established.

With regard to the formal aspects of the employment contract, according to various DRC decisions, the Chamber is of the explicit opinion that the professional football contract must be in writing. With regard to the length of the contract, the minimum length of the employment contract is from the date of its entry into force until the end of the season, while the maximum length of the contract will be 5 years. Contracts of any other length will only be permitted when consistent with national law. Players under the age of 18 are not permitted to sign a professional contract for a term longer than 3 years. Any clause in a contract with a minor referring to a longer period than 3 years will not be recognized by FIFA. Furthermore, the contract must be signed by both parties. Although this is not stated in the RSTP, the DRC is very clear, when one of the parties does not sign the contract, the contract is invalid. The DRC finds it important to stress that FIFA regulations do not oblige the parties to sign a contract in one of the official FIFA languages. The only requirements are the existence of a written contract which is duly registered in the respective federation.

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Finally, with regard to the player's salary, the parties have to explicitly stipulate in the employment contract whether the payments are net or gross. We have noted cases in which the salary of the player is reduced by the club on a unilateral basis. However, in general this will not be accepted by the DRC. In respect of the bonuses for players, it is common practice in the international professional football world that players receive other remunerations over and above their salary, such as bonuses. The DRC is of the opinion that clauses stipulating performance-related pay are indeed common in the employment contracts of footballers and that these clauses usually refer to the number of matches in which a player is fielded for the club.

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# Chapter 7
# Unilateral Extension Option

**Abstract** This chapter focuses on the unilateral extension option, which is a very popular clause in international football. The most relevant decisions of the DRC as well as those of the CAS will be discussed in this regard. The use of unilateral extension options is quite problematic in international football. The DRC is of the opinion that the clauses generally have a disputable validity and are not valid since they excessively restrict the freedom of the player. In this chapter the conditions derived from the jurisprudence, under which this clause can be considered as valid, will be outlined and brought to the readers' attention.

**Keywords** Unilateral extension option · Potestative · Pacta sunt servanda · Portmann criteria

## Contents

7.1 Introduction ..... 164
7.2 DRC Jurisprudence ..... 165
7.2.1 Decisions Between 2004 and 2006 ..... 165
7.2.2 Decisions Between 2007 and 2009 ..... 168
7.2.3 Decisions After 2010 ..... 173
7.3 CAS Jurisprudence ..... 177
7.4 Conclusion ..... 186
7.4.1 General ..... 186
7.4.2 Relevant Criteria ..... 187
References ..... 191

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## 7.1 Introduction

The extension option is the right of the player and/or club to extend the period which is stipulated by the parties in an employment contract. In the daily practice of international professional football, we usually find unilateral extension options solely in favour of the club. In the previously mentioned *Bosman* case of 1995, the CJEU decided that transfer compensation to be paid by a club for a player who had terminated his contractual relationship with his former club, was not permitted and was in violation of the free movement of people within the European Union. Since then clubs have had to prevent the situation in which their professional football players, at the end of their contracts, were able to leave for free. Therefore, after *Bosman* the use by clubs and players of the unilateral extension option in favour of the clubs increased significantly.

The DRC as well as the CAS, being the authoritative committees on an international level in the world of professional football, provided the football world with several decisions relating to this subject. However, the DRC and the CAS seem to have a different point of view with regard to this specific clause. Due to this divergence on an international level, there is uncertainty under what circumstances a unilateral extension option can be valid. In this chapter all relevant decisions of both committees regarding the unilateral extension option will be discussed and analysed to find out under which conditions an extension option can be valid. This chapter contains an extensive survey of all relevant decisions by the DRC and the CAS.

Firstly, the relevant decisions of the DRC will be discussed and analysed. In that respect, the most important decisions will be dealt with in a chronological order since the first published decision in 2004 up to the present. Since parties have the option to appeal against decisions of the DRC before the CAS, the decisions of the CAS will also be analysed and discussed. The conclusion of this chapter contains a summary of the general line of the DRC and the CAS in respect of the unilateral extension option, and closes with a response to three important questions: what conclusions can be drawn from analysing the jurisprudence; what can be expected from future DRC and CAS decisions; and under what circumstances can a valid unilateral extension option be valid?

Only the *jurisprudence* related to the unilateral extension option will be discussed since the regulations of FIFA do not contain any provisions in respect thereof. However, it must be noted that the RSTP does provide for a provision relating to the contracts of minors. In the RSTP rules, it states that players under the age of 18 cannot conclude contracts for a period longer than 3 years and that parties are forbidden to insert clauses that refer to longer periods than 3 years.[1] This provision leaves no room for any other interpretation, in assuming that

[1]RSTP, 2016 edition, Article 18 para 2. See also DRC 7 April 2011, no. 411852. In this case the Chamber emphasized that the first respondent was clearly under the age of 18 when he signed this contract and, in this regard, referred to Article 18 para 2 of the Regulations, in accordance with which players aged under 18 may not sign a professional contract for a term longer than 3 years. Any clause referring to a longer period shall not be recognized.

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unilateral extension options (since they undoubtedly refer to longer periods) are not allowed to be inserted in contracts with minors that have a duration of 3 years.

Furthermore, apart from the jurisprudence, it is relevant to keep Circular no. 1171 of FIFA of 24 November 2008 in mind. This Circular provides for the minimum requirements for players' contracts. Remarkably, from one of the minimum requirements it follows that unilateral extensions are not permitted and that extension and termination rights are only permitted if the clause is reciprocal and so in favour of both parties. Aside from this, the RSTP and other FIFA Circulars do not provide for any provisions related to the unilateral extension option as a result of which the decisions of the DRC and the CAS are even more relevant in this respect.

## 7.2 DRC Jurisprudence

### *7.2.1 Decisions Between 2004 and 2006*

The cases before the DRC point out that the Chamber generally finds unilateral extension options problematic. In the DRC's opinion, a unilateral extension option excessively restricts the freedom of a party. The DRC stresses that unilateral options, in principle, do not match with the general principles of labour law.

The first published decision by the DRC to be discussed is the case of 22 July 2004.[2] In this case the player concerned signed an employment contract for the period from 30 July 2003 until 30 June 2004. The contract was provided with a unilateral extension option in favour of the club with the possibility for the club to extend each year up to a consecutive total of 4 years. It was agreed in the contract that the club had to inform the player five days before the beginning of the transfer period if it wanted to extend the contract. Furthermore, the club had the obligation to inform the player about the new conditions of the extended contract. On 24 July 2004, the club informed the player that they wanted to extend the employment contract from 1 July 2004 until 30 June 2005 based on the same conditions as stated in the current contract. The player, however, did not agree and disputed the validity of the clause.

In the above case the DRC had spoken for the first time with regard to the validity of the unilateral extension option.[3] The DRC decided in this case, that uni-

[2]DRC 22 July 2004, no. 74508.

[3]In an unpublished DRC decision of 24 March 2004, the DRC had to decide with regard to the transfer of a player, in which the old club refused to release the player as the club was of the opinion that the player was still contractually bound to the club. The club pointed out that if the contract terminates, the internal rules of the relevant national association provided for the option to unilaterally extend the contract by one more year based on the same conditions as in the current contract. This option can be seen as a tacit prolongation if the club did not inform the player not to start negotiations for a new contract. The DRC could not agree with the club's point of view. Although the decision was not published, the decision can be consulted in the Dutch former magazine (SZ 375) Anton Sportzaken 2004/2 (no. 29) C3.

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lateral extension options are generally problematic, since they excessively restrict the freedom of a party who cannot make use of this clause (the player). The DRC decided that the option concerned was not reciprocal since the right to extend was exclusively left to the discretion of one party (the club). In this specific case the extension option was solely in favour of the club. The club as the employer was the stronger party in the relationship. By the club referring to the clause in order to extend the contract the player had no substantial advantage since the conditions remained unaltered. The DRC clearly pointed out in this decision that unilateral options, in principle, do not match with the general principles of labour law. The DRC did not motivate this, but the DRC clearly emphasized that unilateral extension options are generally not permitted. Despite the clear considerations of the DRC, in this decision the DRC does create some openings to create a valid option. Following this decision one questions what the DRC would have decided if the conditions in the new contract had altered in such a manner that the salary would be substantially increased. The club appealed the decision before the CAS, which will be discussed later.

In the next case the DRC provides for more aspects in order to decide whether a unilateral extension option is valid or not. In a DRC decision of 13 May 2005, the DRC had to decide on the validity of the option.[4] In a player's contract a unilateral extension option was inserted in favour of the club for a period of 3 years. On 1 February 2005, the player decided to dispute the validity of the clause before the DRC. The player pointed out that he could not agree with the extension as provided for in the contract. However, he was willing to continue negotiations for a new contract. The negotiations eventually ended badly and the club's point of view remained unaltered and stated that the option was valid. The club also pointed out that the player had accepted a payment of EUR 1,950 after the extension as a result of the new contract and that he had also played in official matches after the extension. The club emphasized in this DRC procedure that the player, having taken this stance, indirectly accepted the unilateral extension option. In this decision, the DRC decided that a clause that gives one party the right to unilaterally extend or terminate the contract, without providing the counterparty with that same rights, is a clause with disputable validity. According to the DRC the unilateral extension option concerned had a potestative nature, since the contract did not provided for the new financial conditions and were not accepted after the negotiations between the parties.[5] The DRC did not find it relevant that the player played several matches after the extension, since the player had the reasonable assumption that the negotiations would end successfully in respect of the financial conditions. The moment he realised that the negotiations would not end successfully, the player left the club. The DRC finally concluded that the contract had ended on 31 December 2004 and that no valid extension of the contract had been established. As in the previous case, here one could also question what the

[4]DRC 13 May, no 55161.

[5]A potestative clause can be considered as a condition that its fulfilment is made subject to the will of one of the parties.

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Chamber would have decided if the new conditions would have established a substantial advantage for the player.

In the following DRC case of 21 February 2006, a player signed a contract for the duration of 1 year on 31 July 2003.[6] The contract was provided with a unilateral extension option in favour of the club. The club had the right to unilaterally extend the contract on an annual basis for a total of four consecutive years. It is interesting to note in this case that the contract was extended for a year from 1 July 2004 until 30 June 2005 and that the player accepted the first extension. For the season 2005/2006 the club again wanted to unilaterally extend the employment contract. The player did not agree with this second extension, also because he had not received his salary for more than two months. The club finally brought the case before the DRC. With regard to the general validity of the unilateral extension option in the above case, the DRC referred to its prior jurisprudence regarding this subject. In this case too, the DRC pointed out that the unilateral extension option is not valid due to its potestative nature, unless the new contract provides for new financial conditions and that the conditions were accepted after parties had negotiated this. That was not the case here. As a result of the extension for the period 2005/2006 the player did not have a substantial advantage because the conditions remained unaltered. The DRC decided that the unilateral extension option is generally not valid. However, the DRC emphasized that the player indirectly accepted the extension option having taken this stance, because he continued to take part in training sessions and he even played official matches after the extension. The DRC also pointed out that the player went to FIFA on 22 November 2005, almost five months after continuation of the extended contract (which he disputed). As a result of these circumstances, the Chamber was of the opinion that the extension option was valid.

The abovementioned case is very interesting for a variety of reasons. Aside from the fact that it is the first published case in which the DRC decided that a unilateral extension is valid, one notices that the DRC comes up with more considerations in respect of the unilateral extension option. In this case, the DRC also gave us more openings for a valid unilateral extension option. What's interesting, is that the option concerned is to be considered valid, not only because the player had a substantial advantage, but first and foremost because the player's stance was decisive in respect thereof. In this regard reference is made to the FIFA Commentary in which it is stated that the contract of a minor can be longer than 3 years if the player explicitly or de facto accepted the extension.[7] Furthermore, it was relevant for the DRC that the player brought his case before the DRC *five months* after the start of the extended contract he disputed. Moreover, the player even played official matches after the extension. What is of importance here is that, in the aforementioned case (of 13 May 2005, no. 55161) the DRC did not

[6]DRC 21 February 2006, no. 261245. See also an previously published case of the DRC of 24 October 2005, no. 105874 (2).

[7]See FIFA Commentary, p. 53, Footnote 90.

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take into account a similar argument from the club. In that case the club also pointed out that the player played several official matches and even accepted a payment of EUR 1,950 as a result of the new contract. It could have been decisive in the prior case (of 13 May 2005 no. 55161) that the negotiations were still pending, as a result of which the player would have been left with the reasonable assumption that these negotiations would end successfully. In the present case, negotiations had not taken place. In other words, there are significant differences between both cases as a result of which it seems fair to decide that the unilateral extension option, in this case, is valid. Last but not least, a decisive argument in this case in order to decide whether the option is valid, might be the fact that the player had already accepted the first extension option, although the DRC did not consider this as a decisive argument. However, it can be concluded and is interesting to note that in the case at hand the DRC takes into account all particular circumstances to decide upon the validity of the option.

One month later, more precisely on 23 March 2006, the DRC again decided on the unilateral extension option.[8] In this case too, the DRC came up with the same considerations and provided for openings under which circumstances an option can be valid. In prior cases the question was what the DRC would have decided if the contract provided for conditions that could have been seen as a substantial advantage. What is interesting in this case, is that even if the conditions bring a substantial advantage for the player, the unilateral extension option can nonetheless be invalid. The DRC decided that there must be significant gain for the player. Furthermore, the Chamber decided that the player did not sign another document (aside from the employment contract) in which he explicitly agreed to the extension of the contract. It must be noted that the DRC does not refer to this issue in its considerations. However, by making note of this fact, it can still be seen as an important matter. Finally, the DRC made reference (for the first time) to the duration of the new contract, in this case 2 years. The DRC had not made reference to this fact previously. The DRC was of the opinion that the 2 year period was a seriously long time. The DRC decided that this option excessively curtailed the freedom of the player and this was a disproportional advantage for the club. As a result the DRC decided that the unilateral extension option in favour of the club was not valid. The circumstances that appeared in prior cases that could make a unilateral extension option a valid clause, were not present in the matter at hand.

### *7.2.2 Decisions Between 2007 and 2009*

In the following unpublished case, for the first time the DRC creates complete clarity and even strict conditions under which the unilateral extension option can

[8]DRC 23 March 2006, no. 36858.

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be valid.[9] In this DRC case of 12 January 2007, the Romanian player Lucian Sanmartean and the Greek club Pananthinaikos concluded an employment contract on 14 July 2003. The employment contract commenced on 15 July 2003 and ended on 30 June 2006. At the end of the contractual period the club reserved the right to unilaterally extend the contract each year for a total of two consecutive years. The salary for the first year was USD 180,000, which would increase by an amount of USD 20,000 per year. For the potential fifth year the salary would be USD 260,000. On the same date the player and the club also signed a standard agreement, separately from the private employment agreement. On 14 November 2006, the player went to the DRC and asked the DRC to establish that the contract between him and the club was terminated. The player referred to a case before the CAS (TAS 2005/A/983&984 Club Atlético Peñarol v. Carlos Heber Bueno Suárez, Christian Gabriel Rodríguez Barrotti & Paris Saint-Germain, which case will be extensively discussed later). The club was of the opinion that the option was valid and referred to another case before the CAS (CAS 2005/A/973 Pananthinaikos FC v/Sotirius Kyrgiakos, which case will also be extensively discussed later).

The DRC, first of all, made a note of the CAS case that the player referred to.[10] This CAS case can be seen as leading in respect of the unilateral extension option. The DRC decided that the system of the unilateral extension option is generally not compatible with the RSTP. However, the DRC also noted that, in consideration 110 of that same case, five elements were mentioned to establish whether an extension option can be valid. In its consideration no. 9 the DRC emphasized the following:

> However, the Chamber also acknowledged that in pt. 110 of the said decision of the CAS, five elements were established which were to be analysed in order to decide upon the validity of a club's option to unilaterally renew an employment contract, if at all.

The DRC referred to the following conditions:

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

[9]DRC 12 January 2007. Unfortunately, this case is not published. In the report by Compaire et al. 2009 reference is made to the DRC case *Club Atletico Lanus v. Javier Alejandro Almiron & Polideportivo Ejido SAD (FIFA 07/00789)*. However, neither is this case published. The unilateral extension option in the latter case was not valid because the decisive argument was that the player was absolutely aware of the unilateral extension option. According to the DRC, the player therefore explicitly accepted this clause.

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

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5. The option shall be clearly established and emphasized in the original contract so that the player is conscious of it at the moment of signing the contract.[11]

In the following considerations the DRC discusses these conditions.

As for the first condition, the DRC points out that the maximum duration can be 5 years.[12] The duration in this case was not excessive, because the total period (original contract including the option years) did not exceed the 5 year term.

As for the second condition, due to the fact that the option must be invoked within an acceptable deadline before the end of the current contract, the DRC decided that five days before the opening of the transfer period was too short. As a result thereof, the player was left in uncertainty nearly till the last moment. This was a huge disadvantage for the player as a result of which the short term was not accepted by the DRC.

In continuation, the DRC put the third condition to the test and established that the salary deriving from the option right was defined in the original contract.

The fourth condition comprised that one party shall not be at the mercy of the other party with regard to the contents of the employment contract. In this respect the DRC associated it with the question whether a salary increase existed after the club had invoked the option. Here the DRC referred to the CAS case to which the club referred.[13] If the option had been invoked in that matter the salary in the first year was 25 % and in the second year 100 %. In the present case before the DRC the increase was 9 % for the first year and 8.33 % for the second year. The DRC concluded that the position in the negotiations was not equal and that there was no apparent gain for the player as a result of the extension. For that reason the player was at the mercy of the club with regard to the content of the employment contract. Despite the fact the club concerned did not speak of "*significant*", as the DRC did in its case of 23 March 2006 (no. 36858), it becomes increasingly clear what the words "substantial advantage" in substance mean.

With regard to the last condition, the DRC was of the opinion that the clause concerned was established in the original contract. However, the DRC noted in that respect that the option was mentioned in the middle of both contracts without emphasizing it. As a result, the extension option was not inserted in the contract in a proper manner. The player was not made fully aware of it.

Eventually, taking the circumstances of the case into account, the DRC decided on the basis of the five elements that the unilateral extension option was not valid.

It must be noted in this matter that the DRC also pointed out that the player in the relevant CAS case to which the club referred to, explicitly accepted the first extension and only disputed the second extension. According to the DRC this was an important matter for the CAS to decide as it did. Finally, it is significant to

[11]The unilateral extension option could also be laid down in a document other than the employment contract in which the player explicitly agrees to this clause. See for example the DRC decision of 23 March 2006, no. 36858.

[12]RSTP, 2016 edition, Article 18 para 2.

[13]CAS 2005/A/973 *Pananthinaikos FC v. Sotirius Kyrgiakos*, award of 10 October 2006.

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be aware that the DRC emphasized that the unilateral extension option can still be invalid, even if a unilateral extension corresponds with the five elements. This can be derived from the words "*if at all*"' as considered in point 9 of the DRC decision. In other words, the DRC points out that even if the unilateral extension option can be seen as valid, the five elements are at least of crucial importance. This can be seen as another presumption that the DRC is extremely reluctant regarding legally valid unilateral extensionoptions.

Although it now might be presumed that the DRC is absolutely clear with regard to the unilateral extension option and the conditions under which it is valid, the following case brings back the uncertainty again.[14] In the DRC decision of 30 November 2007 the DRC does not refer to the five elements of the aforementioned case. In the present case a player and a club signed an employment contract on 1 June 2003 valid until 31 May 2005. The contract was provided with a unilateral extension option in favour of the club. The club had the right to extend the contract for two seasons. The option had to be invoked before 30 April 2005 and the player's salary was substantial. On 8 June 2005 the player informed the club by letter that the agreement terminated on 31 May 2005 and asked the club to pay his outstanding salary. On 23 June 2005 the player brought his case before the DRC.

The DRC had to decide whether the unilateral extension option concerned was valid. The DRC outlined that in the past few years many decisions by the DRC and the CAS had been dealt with on this subject. According to the DRC the general conclusion in these cases was that the unilateral extension option is not valid. In this matter the DRC referred to the CAS case of 2005/A/983 (which will be discussed later) in which the CAS decided that the system of the unilateral extension option is not compatible with the system and rules of FIFA. The DRC did not have to decide any further on this option since the club had not invoked the option within the contractual term ending on 30 April 2005. The DRC decided that the contract between the player and the club was not valid on the basis of that ground.

It is quite remarkable that the DRC in this case does not refer to the previously mentioned conditions in the case of 12 January 2007. It can be said that the unilateral extension option generally seems to be more invalid than originally thought. The DRC refers to a consideration of a prior CAS decision and lays emphasis on the fact that the unilateral extension option does not match with the RSTP. Despite the fact the DRC did not have to decide on the content of the option itself, it does give rise to the suspicion, particularly by referring to considerations of the relevant CAS case which mentions that the extension option does not fit with the rules of FIFA, the 'option' is generally not valid.[15]

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[14]DRC 20 November 2007, no. 117707.

[15]In this respect it is remarkable that the DRC explicitly refers to the case before the CAS in which the unilateral extension option was invalid (TAS 2005/A/983&984 *Club Atlético Peñarol v. Carlos Heber Bueno Suárez, Christian Gabriel Rodríguez Barrotti & Paris Saint-Germain*, award of 12 July 2006), whereas the DRC could also have referred to the other CAS case, in which the CAS had decided that the unilateral extension option was valid (CAS 2005/A/973 *Pananthinaikos FC v. Sotirius Kyrgiakos*, award of 10 October 2006). The DRC case aptly gives rise to the suspicion that the conclusion would not have been positive on the validity of the unilateral extension option concerned if the DRC had to decide on its content. Unfortunately this cannot be said due to the fact that the DRC did not have to decide on the content of the option.

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Also, the following case does not give rise to the suspicion that the DRC is quite accessible for arguments that the unilateral extension option can be considered as valid.[16] In the case of 7 May 2008 the committee reiterated that unilateral extension options, in accordance with its prior jurisprudence, are clauses with a disputable validity. A clause that gives a party the unilateral right to terminate or extend the contract, without allowing the counterparty those same rights, is a clause with a doubtful nature. In this case the DRC decided that the option was exclusively in favour of the club, as being the stronger party in the relationship. The DRC was of the opinion that the clause was not valid as a result of its unilateral character. According to the Chamber the option clause was not legally binding on the player.

An interesting aspect in this case, is that the DRC is relatively curt with regard to the unilateral extension option and simply decided that the option was not valid. The reason for discussing this case is that the DRC again refers to its prior jurisprudence on the option and remarkably enough, does not refer to the conditions as mentioned in the case of 12 January 2007. Taking note of this decision without being aware of the general case history on this subject, one could justifiably presume that, in the eyes of the DRC, all extension options are invalid.[17]

In a DRC decision of 9 January 2009, a club and a player signed an official employment contract on 22 July 2005 valid from 1 July 2005 until 31 May 2009.[18] The employment contract contained a unilateral extension option for the duration of one season. The financial conditions in the contract remained unaltered. On 22 January 2008, the club informed the player that the club invoked the unilateral extension option concerned for the new season. On 4 February 2008, the DRC received a claim from the club in which it informed FIFA that the player breached the contract and that he was absent without a valid reason since December 2007. In the case at hand the Chamber had to decide whether a valid termination of the contract existed and what the extent of a potential compensation would be.

The DRC noted in the above case that the club had already invoked the option on 22 January 2008 for the season 2009/2010. In other words, 16 months before expiry of the current contract and—even more remarkable—thirteen days before the club filed a claim at the DRC. According to the DRC, this aptly gave rise to the suspicion that the unilateral extension option was only invoked to establish a higher compensation. Again the DRC referred to its prior jurisprudence regarding

[16]DRC 7 May 2008, no. 58860.

[17]Also, in a DRC decision of 7 May 2008, no. 58996, reference was not made to the DRC decision of 12 January 2007. In this case the DRC is also consistent regarding the option and decided that it was not valid. Also in a DRC decision of 10 August 2007, no. 87875, the DRC decided that the unilateral extension option concerned was not valid. Unfortunately, this decision is not available on the website of FIFA at present, since it is under construction. It is worth noting that in that decision too, reference was not made to the prior decision (and the mentioned conditions) of the DRC of 12 January 2007.

[18]DRC 9 January 2009, no. 19174.

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options and outlined that a unilateral extension option is generally not valid, since it excessively curtails the freedom of the player and as a result thereof, leads to an unjustified disadvantage of the player's rights, particularly if the player's salary did not increase. In this case, the DRC again shows that the particularities of the case play an important (or even a crucial) role for the committee to decide whether the option is valid or not. The fact that the option was invoked only thirteen days before filing the claim gives serious rise to the suspicion that the option was invoked only for a higher compensation, as was decided by the DRC. The question is what would the DRC have decided if a substantial salary increase did exist? In a prior case we noted that even if a substantial salary existed, a unilateral extension option can still be invalid due to the particularities of the case. For example, in the case of 21 February 2006 (no. 261245), the Chamber decided that the unilateral extension was valid, not only because the player had a substantial advantage, but because the player's stance played an important role and gave cause for validity. In other words, it could be presumed in this case, that the unilateral option was not valid due to the club's stance, even if a substantial salary increase had taken place. Again, the particularities of the case seem to be of crucial importance.

### *7.2.3 Decisions After 2010*

In a case before the DRC of 18 March 2010, the DRC also had to decide on the validity of the unilateral extension option.[19] On 2 February 2005, a player, born on 24 August 1985, and club B signed an employment contract valid from the date of its signature on 30 June 2006. A clause in the contract granted the right to the club to extend the first contract up to two times, in periods of 1 year. On 1 July 2007, the player and club T signed a contract of employment valid for three seasons and the football federation of club T asked FIFA to intervene in order to obtain the ITC. The player stated he was a free agent since the unilateral extension option was invalid and referred to the jurisprudence in respect thereof by both the DRC as well as the CAS. Club B argued before the DRC that the option was valid since the club substantially increased the player's salary by 20 %. The player informed FIFA that it had indeed recognized the first option. However, the fact that he accepted the first extension does not recognize the validity of the second because an illegal rule cannot validate the practice. The player was also of the opinion that the unilateral extension option was invalid because it did not comply with any of the requirements as laid down in the legal opinion of Prof. Portmann, in which report Prof. Portmann discusses the validity of the unilateral extension option.[20]

In the above case, the DRC took note that the option could be exercised up to two times and that each option was limited to a duration of 1 year. The DRC

[19]DRC 18 March 2010, no. 310607.

[20]Portmann 2007, pp. 6–16.

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referred to the jurisprudence of the CAS and confirmed that this case law established that, in principle, the unilateral choices in favour of clubs cannot be admitted, and that they excessively restrict the player's freedom and lead to unjustified inequality between the rights of the player and the club. The system of unilateral extension options is also contrary to the principles of freedom of contract and of freedom of work. The DRC considered it appropriate to emphasize that when a player wants to play for a club in the country concerned, it had to comply with the applicable regulation and that these rules state that the club who incorporates a player, must formalise the contract with a unilateral extension option for the club. The DRC highlighted that, a player wishing to play football in the country had no choice. Either, he signs the contract containing the unilateral extension or waives to play in the country concerned. Contractual freedom is therefore considerably restricted. The DRC decided that the option could not be accepted and that this type of option violates legal certainty. The DRC also noted that the player had expressed its opposition to the continuation of the relationship by the notice, given by way of a letter, with regard to the first option. However, the player accepted the first option. The DRC stressed that accepting the first option does not recognize the validity of the second one, since it may not validate the practice. The Chamber also considered it appropriate to emphasize the principle of uniformity that should prevail in international sports issues and in particular, football. The Chamber finally stressed that this principle is essentially based on the concept of "specificity of sport" and is essential to preserve legal certainty, the rationality and maintenance of clear rules in the international arena.

The above decision is a very important one on the unilateral extension option. The DRC found it important to highlight that the report by Prof. Portmann, in which the criteria as were laid down in the DRC case of 12 January 2007, was a doctrinal study of a specialist on the matter, but that it was only made to indicate guidelines and suggestions. In the DRC's view, the report had no binding effect. In other words, the message of this DRC case: meeting the five criteria may not be sufficient. The particular circumstances of each case will (now) be (even) more decisive. For example, in this case a relevant aspect to come to the conclusion that the option was invalid, was the fact that when a player wanted to play for a club in the country concerned, it had to comply with the applicable regulations and that these rules state that the club who incorporates a player, must formalize the contract with a unilateral extension option for the club. The player therefore had no choice. The DRC literally said that this type of option cannot be valid. This type of option could also be exercised up to two times. In order to establish a valid option, the conclusion is that each case shall be decided on its relevant circumstances, as follows from the jurisprudence. Although the DRC stressed in this case that accepting the first option does not recognize the validity of the second one since it may not validate the practice, the DRC, in a case of 7 June 2013, decided that the player, by leaving the club and signing a contract with a new club, had de facto accepted an invalid clause.[21]

[21]DRC 7 June 2013, no. 06132616.

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In its decision of 17 August 2012, the DRC had to analyse the contents of Article 3 of an employment contract and the circumstances of its application in the case.[22] The wording of Article 3 of the contract, both in its original version in French as well as in its translation into English, mentions the possibility of one automatic renewal, for one season only, if no offer equal to or higher than EUR 500,000 was made for the transfer of the player. In this regard, and before analysing the contents of the aforementioned provision of the contract, the Chamber deemed it important to remind the parties of the contents of Article 18 para 2 of the RSTP, which states "*The minimum length of a contract shall be from its effective date until the end of the season, while the maximum length of a contract shall be five years. Contracts of any other length shall only be permitted if consistent with the national laws. Players under the age of 18 may not sign a professional contract for a term loner than three years. Any clause referring to a longer period shall not be recognized*". The DRC concluded that, in view of exhausting the legal effects of Article 3 of the contract and in line with the provision of Article 18 para 2 of the RSTP, the renewal of the player's contract with the club for season 2010/2011 could not be considered. The Chamber rejected the club's argument that the contract would have been renewed automatically for the season 2010/2011, since its interpretation would lead to the conclusion of the existence of a contract with an indefinite duration, which would not be in line with Article 18 para 2 of the RSTP.

In a decision of 31 July 2013, the DRC had to determine whether the employment contract signed between the club and the player was validly extended and whether it was still in force when the latter signed the new contract with club M.[23] The Chamber subsequently note that the controversy at the base of the aforementioned dispute fundamentally lies on the validity of the execution of the extension clause contained in Article 2 of the contract and the annex. The Chamber concluded that, by carrying out the procedure for the extension of the contract for seasons 2010/2011 and 2011/2012 for the country B Football Association, while being aware of the player's clear refusal to such extension, the club acted unilaterally and in bad faith, consequently causing the invalidity of such extension, as it lacks one of the fundamental elements of validity of a contract, namely, agreement by both contractual parties. The DRC finally concluded in this case that, on 8 August 2010, the player was no longer contractually bound to the club and, as such, was free to enter an employment relationship with any club of his choice. As a consequence, the DRC deemed and therefore underlined that neither the player breached his employment contract with the club, nor had the new club M induced any type of breach.

The DRC deemed that, in the above case of 31 July 2013, it is also crucial to analyse the circumstances under which the extension option contained in the contract was executed. The Chamber pointed out that the parties have fundamentally

[22]DRC 17 August 2012, no. 812104.

[23]DRC 31 July 2013, no. 07132435.

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divergent positions: on the one hand, the claimant claims that the extension of the employment contract was validly concluded, since the option had been stipulated in the original employment contract duly signed by both parties, executed within the established deadline and not explicitly refused by the player, who began executing the new contract, tacitly accepting its continuation. On the other hand, the respondent club and the player claim that the claimant acted contrary the RSTP and in bad faith, as it, despite being aware of the player's refusal to extend the contract, unilaterally executed the extension option against the player's will. It is important to note the fact that the DRC deemed it appropriate to remind the parties of the basic elements of a valid contract, namely an offer, consisting of an expression of willingness to contract a specific set of terms with a view that they are accepted by its counterparty and that both sides will become contractually bound, and an acceptance of said offer, consisting of an expression of absolute and unconditional agreement on all the terms set out in the offer. In this case it is also interesting to mention that players refused to acknowledge receipt of the claimant's letter of 24 March 2010, which could be considered as a clear sign of disagreement with the execution of the option to extend the employment contract. Also the fact that the claimant was aware of the player's lack of interest in prolonging the contractual relationship was confirmed and a relevant element in this case. The player's arguments that the contract could not be considered as valid due to his unawareness of the existence of the extension option in the contract, since the latter was only drafted in a foreign language as a result of which he did not understand it, was rejected by the DRC. The Chamber explicitly stated in this case that a party signing a document of legal importance, as a general rule, does so at its own risk.

For the validity of a unilateral extension option it is of importance that the option is duly exercised. In a case before the DRC of 31 July 2014, a club and a player signed an employment contract which was valid from 31 July 2008 until 30 June 2009.[24] The contract contained a clause according to which the club could unilaterally extend the duration of the contract for two additional years. If the club wanted to extend the duration of the contract, it was obligated to inform the player about this before 29 May 2009. As of July 2008 the player was loaned to another club until 30 June 2009. On 29 April 2009 the club sent a fax to an address in country A stating it wanted to extend the duration of the contract. The player claimed never having received the said fax and signed a new employment contract with another club which was valid from 7 July 2009 until 30 May 2011. On 8 September 2009 the club lodged a claim before FIFA, claiming compensation for a breach of contract. According to the club both the player and the new club were jointly and severally liable for said breach. The player and the new club rejected the club's claim, stating that the duration of the employment contract between S and P was not extended properly. The player and the new club also contested the validity of the unilateral extension clause. The DRC came to the conclusion that

[24]DRC 31 July 2014, no. 07141003.

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the claimant club had not informed the player properly about its wish to extend the duration of the contract, since the club had sent a fax to an address in country A while it knew the player was playing and living in another country. The DRC agreed that, having established that the contractual requirement for the unilateral extension option to be duly exercised had not been fulfilled, the question as to whether the relevant unilateral extension option as such is considered valid and legally binding, does not need to be examined further. However, the DRC deemed it fit to express its strong doubts regarding the validity of such unilateral clauses, referring to its consistent jurisprudence in such matters. As a result of the aforegoing the Chamber came to the conclusion that the player had not breached the contract with the club. The claim of the club was therefore rejected.

## 7.3 CAS Jurisprudence

The first CAS case to discuss is the case of 20 May 2005 between Apollon Kalamarias F.C. and Oliveira Morais which concerns the club's appeal of the DRC decision of 22 July 2004.[25] The DRC had decided that the unilateral extension option clause was invalid and that the player's contract had ended on 30 June 2004. On 6 August 2004, Apollon Kalamarias F.C. appealed this decision, stating that the full duration of the player's contract did not exceed the maximum of 5 years and the financial conditions in the option period had been negotiated. The player maintained that he was not aware of the effect of the extension option and that the club had not informed him properly.

The CAS considered whether the player knew the contents of the signed contract and the consequences of its contents, and concluded that the option was mentioned in the signed contract, so the player's statement that he was unaware of the club's option right could not be followed. However, the CAS did maintain that the option clause was purely unilateral in favour of the club. In addition, the CAS concluded that the fact that the club had the right to extend the contract up until only five days before the start of the transfer period, was unreasonable towards the player. If the club had decided not to extend the player's contract, the player would not have had enough time to find a new club, according to the CAS. It is for the aforementioned reasons that the CAS finally decided that the unilateral extension

[25]CAS 2004/A/678 *Apollon Kalamarias F.C. v. Oliveira Morais*, award of 20 May 2005. This concerns the appeal procedure of the case before the DRC of 22 July 2004, no. 74508. Another (prior) decision which also covered the unilateral extension option is TAS 2003/O/530 *A.J. Auxerre Football c. Valencia CF, SAD & M. Mohamed Lamine Sissoko*, award of 27 August 2004. In this case the club tried to convert a 'trainee' contract into a professional contract using an extension. Another case was CAS 2005/A/906 *K. v. FC Iraklis*, award of 5 December 2005. In this case the CAS decided that the said option was invalid since the renewal had not been defined. The right of renewal was, therefore, not validly concluded.

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option was not valid. This case does not contain particularly interesting considerations made by the CAS Panel about the validity of a unilateral extension option in general, but it should be noted that this decision is in line with the DRC decisions. The CAS was quite clear about their statement that the player must have a clear advantage from the option.[26]

The case before the CAS of 12 July 2006 between Club Atlético Peñarol and Carlos Heber Bueno Suárez, Christian Gabriel Rodríguez Barotti & Paris Saint-Germain—due to its impact in Uruguay and other parts of South America—is called the South American *Bosman case*.[27] In this case, the CAS decided for two Uruguayan players and an Uruguayan club. Relevant parts of CAS' considerations in this case cover the question relating to the applicable law, which falls beyond the scope of this chapter. Nonetheless, this case is a very important for unilateral extension options. The most important elements will be discussed.

The Uruguayan "Football Player's Statute" states that the contract of a player can be extended by a total of two seasons. Hence, Uruguayan Football uses a system that has the same effect as contractual unilateral option clauses. If a club extends the employment contract, the conditions of the employment contract shall not automatically be increased: the player's salary only increases with the Consumer Price Index. Bueno and Rodriguez refused to accept the extension of their contracts. After they were suspended and did not play for four months, they both signed an employment contract with the French club Paris Saint-Germain. The Uruguayan club brought the case before the DRC, stating that the players—induced by Paris Saint-Germain—had breached their contract by signing a contract with the French club. The DRC decided that the right to extend was purely unilateral and therefore invalid.[28] The club finally appealed against the DRC decision before the CAS.

The CAS started by establishing which law was applicable in this case. The CAS referred to a legal opinion of Prof. Portmann. In his article, Portmann gives an explicit review of the case at hand. Portmann maintains that Uruguayan Law should be applicable. After maintaining that applicable law can only be set aside by principle of public policy, he then analyses the opportunities to set aside Uruguayan Law and thus sets aside the unilateral extension options. Prof. Portmann maintains that an "excessive commitment" is a principle of public policy in both international law and Swiss law and therefore could set aside the relevant Uruguayan law. In other words: should the unilateral extension option in favour of the club be considered as an excessive commitment by the player, the relevant Uruguayan law could be set aside. Portmann then gives 5 criteria (which

[26]In addition, this case should be considered interesting, because the CAS referred to one of its decisions stating that national federations should consider principles of cross-border competitions.

[27]TAS 2005/A/983&984 *Club Atlético PeÑarol v. Carlos Heber Bueno Suárez, Christian Gabriel Rodríguez Barotti & Paris Saint-Germain*, award of 12 July 2006.

[28]The DRC decision is not published on the FIFA website.

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were mentioned while discussing the DRC case of 12 January 2007) on the basis of which a specific unilateral extension option right should be judged to answer the question whether the extension right is to be considered as an excessive commitment.

The DRC used Portmann's criteria in its decision of 12 January 2007 and gave them significant value for the outcome of the case. The criteria are being used in football practice all over the world and are highly valued. During an earlier research one of the authors questioned whether the criteria should be considered as leading and as highly valued as footballing practice has shown. The main question in that research was, had the CAS intended to use Portmann's criteria as decisive?

The CAS mentions Portmann's criteria and applies them to the present case in one sentence under point 110 of its decision:

> …in this case, the regulations in the case meet hardly any of the criteria which Prof. Portmann mentions in order for a unilateral option system, which Prof. Portmann confirms does not comply with material Swiss law, to be considered. (…) These criteria are …

The CAS then emphasizes that Portmann's analysis is based on different conclusions on which law should be applicable. Looking at the way that the CAS award is formulated and its structure, the CAS mentions Portmann's criteria in that part of its decision where the scope of Article 25 of the FIFA RSTP is being assessed, which reads: "*The Players' Status Committee*, *the Dispute Resolution Chamber, the single judge or the DRC judge (as the case may be) shall, when taking their decisions, apply these regulations whilst taking into account all relevant arrangements, laws and/or collective bargaining agreements that exist at national level, as well as the specificity of sport*".

Hence, it must be emphasized that Portmann's criteria are mentioned and discussed in that part of the CAS decision that assesses the question of applicable law. From point 113 of its decision, the CAS assesses the validity of a unilateral extension option. The CAS clearly maintains that the system of unilateral options in favour of the club are not compatible with FIFA regulations:

> 123. Only the most talented players can hope to escape from this deadlock one day: when a club believes it will be able to obtain a worthwhile transfer fee: It will ask the player to agree to the transfer which the club has negotiated. It will then be very difficult for the player to refuse this offer, the risk being that he will be kept on under the financial conditions which the automatic extension system helps to impose.
>
> 124. Albeit in another form, this Uruguayan system does in fact appear to reintroduce transfer rights for clubs which are similar to those abolished by the successive reforms to the FIFA Regulations in 1997, 2001 and 2005. Agreeing to the introduction of systems of this kind and allowing them to continue to be applied would amount to draining the successive reforms which led to the abolition of the previous transfer system of their principal substance.
>
> 125. In this respect, normative standards allowing the unilateral extension of contracts and especially those which make this compulsory are, at the very least, contrary to the spirit of the FIFA Regulations. They effectively bypass the basic principles of the new FIFA regulations which very particularly protect the interests of training clubs through training

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> compensation and the solidarity contribution (chapter VI of the 2005 FIFA Regulations), as well as the interests of all clubs, by maintaining contractual stability between clubs and professional players (chapter IV of the 2005 FIFA Regulations).
>
> 126. The principle of contractual stability is a value which the FIFA Regulations rightly recognize and uphold for the purposes of the new regulations. It is not admissible that this protection of the contents of a contract between clubs and players can be bypassed in order to serve only the interests of one party, in this case the club, which does not itself have to make a commitment.
>
> 127. So the Court of Arbitration considers that the unilateral contract renewal system is not compatible, in its very principle, with the legal framework which the new FIFA rules were designed to introduce.
>
> 128. In any case, the taking into account of any such system is ruled out pursuant to Article 25 para 6 of the Regulations. As we have seen, this provision, does not allow the taking into account of any rules which are, as in this case, incompatible with those of the FIFA Regulations.
>
> 129. By redundancy, it clear that in spite of the absence of any provision expressly ruling out the compulsory unilateral option renewal system in the FIFA Regulations, a system of this kind is in any case contrary to the Swiss law which is applicable secondarily in cases where the FIFA rules are not themselves complete.

When the CAS starts assessing whether the unilateral extension at hand is valid, Portmann's criteria are never mentioned. Instead, the CAS draws the above-mentioned clear conclusions. In the case at hand, the CAS had to assess the validity of the unilateral extensions based on the Uruguayan system, instead of a unilateral extension option on which the player was contractually bound, and was therefore not bound by the *pacta sunt servanda* principle. One might state that such a circumstance ensures that the considerations in this case cannot be leading when assessing the validity of a unilateral extension option which is controlled by the *pacta sunt servanda* principle. However, it must be noted that the aforementioned consideration 127 clearly states that the unilateral renewal system—by its very principle—is not compatible with the legal framework which the FIFA rules were designed to introduce. The system's principle (briefly: unilateral extensions in favour of the club) is to be considered as incompatible with FIFA regulations. Contractual unilateral extension options share this principle. The fact that the basis of this principle now lies in contractual freedom, rather than regulations, law or collective bargaining agreements, does not alter this. Based on this decision, the DRC might have overestimated the criteria's value in its case of 12 January 2007.

In the case before the CAS between Pananthinaikos Football Club and Sotirios Kyrgiakos of 10 October 2006, the CAS declared the unilateral extension option as valid.[29] The player signed a 2 year employment contract, which contained two unilateral extension options: one for two more years, and one for another year. Since the extension option was mentioned in the contract, the CAS seemed to take the *pacta sunt servanda* principle as a starting point. Secondly, the CAS considers

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

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it relevant that unilateral extension options are considered valid in applicable national law. The CAS also emphasizes in point 59 of its decision, prior jurisprudence of the CAS and the DRC clearly state, that the unilateral extension clause is one of disputable validity. Because none of the CAS decisions have ever stated unilateral extension options are invalid—under any circumstances—every case should be analysed and decided on considering all relevant circumstances. In this case, all relevant circumstances pointed towards the validity of the clause. The player had admitted that—albeit indirectly—he had been aware of the fact that he was committed to the club for a period of 5 years. As a result of every extension, the player received a significant salary increase and had accepted the first extension of two years without protesting against its effects. By accepting the first extension the player concerned had—consciously—accepted the effect of the extension options.[30]

It is also an important award because of the fact that the CAS clearly emphasizes that the relevant circumstances of each and every case can and will be decisive. The previously mentioned Portmann report was ignored and none of its criteria are mentioned. The CAS emphasized the value of FIFA's principle of contractual stability by using the *pacta sunt servanda* principle as a starting point. It is also noteworthy to refer to the link between this specific CAS decision and the mentioned DRC decision that declares a unilateral extension option valid: in both cases, the player had already accepted the first extension in his contract, without protesting against its effect.

In the fourth CAS case to discuss between Club Atlético Boca Juniors and Genoa Cricket and Football Club S.p.A. of 31 January 2007, a 15-year-old player signed a contract with Boca Juniors.[31] The club had included two unilateral extension options in the contract, claiming the right to extend the contract twice, for

[30]See also the case of CAS 2006/O/1055 *Del Bosque* et al. *v. Besiktas*, award of 9 February 2007. In this case it was decided that the validity of the unilateral extension option allowing the club to terminate the agreement after one year, while the claimants were bound for the full contractual term, would have been questionable anyway. The Panel accepts that in terms of publicity, media coverage and direct as well as indirect repercussions, an immediate layoff indisputably has a far more negative impact than the non-continuation of an employment contract finishing in an orderly manner at the end of the season.

[31]CAS 2006/A/1157 *Club Atlético Boca Juniors v. Genoa Cricket and Football Club S.p.A.*, award of 31 January 2007. A prior CAS case that dealt with a unilateral extension option was TAS 2006/A/1082-1104 *Real Valladolid CF SAD v. Diego Barreto Cáceres & Club Cerre Porteno*, award of 19 January 2007. In this case the unilateral extension option was considered invalid, because of its incompatibility with FIFA regulations. In this case, the CAS referred to its decision in the aforementioned CAS decision of 12 July 2006, 2005/A/983 and 984 *Club Atlético Peñarol v. Carlos Heber Bueno Suárez, Christian Gabriel Rodríguez Barrotti & Paris Saint-Germain*, award of 12 July 2006. See also CAS 2007/A/1219 *Club Sekondi Hasaacas FC v. Club Borussia Mönchengladbach*, award of 9 July 2007. In this case, the CAS referred to the fact that the validity and enforceability of a unilateral extension option clause is disputed under Swiss law. The CAS decided that even if the former club in the present case had exercised its option in a timely manner, the player could have possibly contested the extension of the contract and thus his obligation to return to the former club.

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periods of one year each. When the player signed a three-year contract with club Genoa, Boca Juniors blocked the transfer because it maintained that the player was still bound by his contract. Boca maintained that it had successfully extended the contract. The Single Judge of the PSC now had to decide whether the player should receive a provisional transfer certificate granting him the right to provisionally transfer to Genoa. Referring to the DRC and CAS jurisprudence considering the unilateral extension option, the Single Judge granted the player permission to transfer. The Single Judge stressed that both the DRC and the CAS had—in general—disputed the validity of the unilateral extension option. The club had provided the Single Judge with the mentioned Portmann report. The Single Judge maintained that the case did not gratify all of its criteria. The club appealed the decision before the CAS.

The CAS decided that the Single Judge had clearly stated that the club had been unable to show that the unilateral extension option was valid. What's interesting about this case is not so much that the CAS agrees with the decision of the Single Judge, but what's more interesting is the CAS' statement, that it did not agree with the way the Single Judge had arrived at its decision. The CAS maintained that the Single Judge had awarded too much weight to the Portmann report. The CAS panel maintained that it did not want to award the report such value, and that it has difficulty following the way Portmann reaches his conclusions. Any further decisions on the aspect were needless, because the CAS wanted to rule this decision in a broader context. Eventually, the CAS ruled in favour of the player, based on other arguments than the invalidity of an option clause in general.[32] The CAS explicitly emphasized in this award that nothing that it had stated should be taken as an indication that the CAS had formed any view as to whether the unilateral extension option in the player's contract was valid and enforceable. However, this case can still be seen as being interesting on the issue of unilateral extension options. More specifically, despite the fact that the aforementioned statements regarding the validity of the option can be considered as an *obiter dictum*, the CAS did lift a corner of the veil regarding its point of view on the opinion of Prof. Portmann. The statements regarding the unilateral extension option show that the international footballing community has considered Portmann's criteria as leading, while the CAS does not seem to share this analysis. The CAS is now also reticent of this report's value. The CAS' statement in this case, reviewed in conjunction with the fact that in the case of 10 October 2006, the CAS has ignored the Portmann report and its criteria, should lead to the conclusion that meeting the Portmann criteria alone might not be enough and should therefore not be considered leading in the assessment of the validity of unilateral extension options.

In a case before the CAS of 7 June 2010 between Fenerbahçe Spor Kulübü and Stephen Appiah, the CAS decided as a side-note on the unilateral extension

[32]The arguments were mainly based on the fact that the player was a minor and thus, falls beyond the scope of this chapter.

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option.[33] With regard to its judgement regarding the option, this case can also be considered as an obiter dictum, just like the case before the CAS of 2007 between Boca Juniors and Genoa (CAS 2006/A/1157 Club Atlético Boca Juniors v. Genoa Cricket and Football Club S.p.A., 31 January 2007). The CAS referred to the well-established jurisprudence of the DRC and the CAS that unilateral extension options are unlawful and as a general rule, will not be binding. The CAS decided that the validity and enforceability of the unilateral extension option in the employment contract of the player Stephen Appiah with the Turkish club Fenerbahçe is not accepted under Swiss law (and referred to the case of the CAS 2005/A/983&984 Penarol c. Bueno, Rodriquez & PSG). Furthermore, the CAS noted that when the unilateral extension option of the player concerned was exercised (i.e. on 22 January 2008) the dispute between the parties was already a matter of fact. In this case the player was injured for a long period as a result of which the Panel noted that any reasonable club still having a long period of time to exercise an option, would wait and only execute the option in relation to an injured player after the full recovery of such player and not while the player's physical health is unclear. Therefore, the CAS was satisfied that the execution of the unilateral extension option was artificial and aimed to increase the claim for compensation in the financial dispute that was already launched. Finally, the CAS was of the opinion that Fenerbahçe's right to extend the contract for the 2009/2010 season must be dismissed without further consideration. What's interesting in this case is that Fenerbahçe executed the option during the period that the player was injured. The CAS noted it was therefore quite remarkable that the club did not wait to execute the option until the player was fully recovered. Just as the DRC decided in its case of 9 January 2009 (in which the club executed the option 16 months before expiry of the employment contract concerned; no. 19174), the CAS stressed that the execution of the option was only invoked by Fenerbahçe in order to establish more financial compensation.

In a case before the CAS of 28 September 2011 between Shakhtar Dontesk and Ilson Pereira Dias Junior, parties argued and discussed whether or not a clause in the employment contract of player Pereira with Shakhtar Donetsk had to be established as a unilateral extension option.[34] The clause was drafted as follows:

> The present contract is valid from July 30, 2007 till June 30, 2011. The Player and the Club have agreed that unless the Club sells the Player's right during 2 first seasons of this Contract validity, the parties shall sign new three seasons Labour contract on the same conditions valid until June 30, 2012. If the player refuses to extend this Contract he shall pay to the Club the fine equal to the Player's salary per 5$^{th}$ season stipulated in Appendix I of this Contract.

Since the player was not transferred to a third party within the first two seasons of the employment agreement, Shakhtar Donetsk asked the player to sign the new

[33]CAS 2009/A/1856 *Fenerbahçe Spor Kulübü v. Stephen Appiah* and CAS 2009/A/1856 *Stephen Appiah v. Fenerbahçe Spor Kulübü*, award of 7 June 2010.

[34]CAS 2010/O/2132 *Shakhtar Dontesk v. Ilson Pereira Dias Junior*, award of 28 September 2011.

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contract valid until 30 June 2012. On 14 December 2009, the club requested the player in writing via a Notary Public to sign, and warned the player about breach of contract if he failed to do so. On 9 January 2010 the player's legal representative sent a communication to the club in which he mentioned that the clause concerned was unilateral and could thus not be enforced by the club.

In the procedure before the CAS, Shakthar Donetsk stated that the clause was valid. According to the club, it was not a unilateral option, but a contractual promise which can be enforced by either of the parties. Even if the clause was not considered a contractual promise, it should at least be deemed as a reciprocal extension option clause, which is valid. Even if the clause was a unilateral option, it would be valid given that neither the FIFA nor the CAS jurisprudence nor Ukrainian law, consider such option clauses null and void per se and in the present case, all the validity prerequisites of this kind of option would be met (no excessive duration, exercise of the option with a reasonable advance to the date of expiry, determination of the salary in the original contract, one of the parties not being at the discretion of the other on the contents of the contract, and clarity of the option in the original contract). Furthermore, the clause was drafted as per the player's petition, being on the basis of the contract proferentum rule principle, the referred clause had to be interpreted in favour of the party which was not interested in it. The player was of the opinion that the clause was not a contractual promise, but a unilateral option for the club to extend the contract. Therefore, this extension option was null and void. In its reply, the player stated that it did not draft or request to include the said provision, as a result of which the contract proferentum rule cannot be applied.

The CAS started analysing the clause concerned and did not share the player's review on its alleged invalidity. According to the clause's wording, if the player was not transferred within the first two contractual seasons, both parties—and not only the player, according to the CAS—were bound to enter into a new contract under conditions previously stipulated in the contract. According to the Panel, this meant that both the player and the club could compel the counterparty to conclude the agreed extension of the agreement. This was not a unilateral right of the club. It was drafted in the interests of or to the detriment of one of the parties only. Furthermore, the event triggering the obligation of the parties to conclude a new contract also depended on both parties' willingness. The consent of both the player and the club would have been necessary for a transfer. Finally, the fact that the clause only foresaw the consequences of its potential breach by the player does not mean that if it the club was the one breaching the clause, this would have no consequence. If the club had breached its obligation under the said clause, the player could have asked the enforcement of the clause, offering to the club his working services, and claiming the salary for the full extended duration of the employment period. Based on the aforegoing, the CAS decided the clause was valid and binding for both parties. Although it did not concern a unilateral extension option, this case is interesting.

In the CAS case of 4 March 2014 between *Grêmio Foot-ball Porto Alegrense and Maximiliano Gastón López* the CAS Panel explicitly referred to the

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aforementioned criteria.[35] Although the clause did not represent a standard "unilateral extension option", the CAS made reference to the DRC jurisprudence regarding unilateral extension options and lists 7 elements to determine validity. The CAS Panel decided that in order to determine whether a unilateral extension clause can be considered as valid or not, the following conditions must be taken into consideration. The potential maximal duration of the labour relationship should not be excessive; The option should be exercised within an acceptable deadline before the expiry of the current contract; The salary reward deriving from the option right should be defined in the original contract; One party should not be at the mercy of the other party with regard to the contents of the employment contract; The option should be clearly established and emphasized in the original contract so that the player is conscious of it at the moment of signing the contract; The extension period should be proportional to the main contract; and it would be advisable to limit the number of extension options to one. The CAS decided that even assuming that the clause could be considered as a unilateral extension clause, the CAS is not convinced that its alleged unilateral nature could lead to its invalidity. The Panel referred to the CAS 2005/A/973, which held that whether or not an extension clause is acceptable must be assessed on a case by case basis, with the deciding body having to look not only at the wording of the said clause, but also at the factual background and circumstances which contributed to its insertion, particularly the parties' attitude during the negotiations and performance of the employment agreement. It is also important to note that the CAS Panel decided that an acceptable deadline is crucial. The CAS decided in this regard that it is generally unreasonable for a club to wait until only a few days before the start of the transfer period before exercising its right to extend an employment contract with a player. According to the CAS, the player has the right to know well in advance whether or not the club would be extending the employment agreement so that he can take advantage of the transfer period and look for another club and thus avoid having to find himself unemployed if the club decides not to extend his employment agreement.

In an award of the CAS of 22 August 2014, the (majority of the) CAS Panel found the unilateral extension option valid. The CAS Panel referred to the well-established jurisprudence of the DRC and made reference to CAS 2005/A/983 & 984 from which it follows that unilateral options as such are not invalid. The (majority of the) CAS Panel found that the clause concerned was drafted clearly and validly and that the factual circumstances of its exercise justified that the option was validly exercised. In this case it was relevant that the option was in compliance with the Collective Bargaining Agreement for professional football players in Belgium and that all the circumstances pointed towards validity.[36] It was also of relevance in this case that the player did not object at any time to the

[35]CAS 2013/A/3260 *Grêmio Foot-ball Porto Alegrense v. Maximiliano Gastón López*, award of 4 March 2014.

[36]The criteria for validity are laid down in Article 15 of the Collective Bargaining Agreement for professional football players in Belgium (dated 2 July 2013).

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extension of the contract. Instead, the player accepted the payments of salary after the extension and continued training with the club, which was established as evidence by the (majority of the) CAS Panel of the player's acceptance of the unilateral extension option.[37]

## 7.4 Conclusion

### *7.4.1 General*

After analysing the jurisprudence of the DRC and the CAS, it can be concluded that, to date, neither committee has found a uniform answer to the question relating to the validity of unilateral extension options. The DRC seems to have a general way of analysing the validity, maintaining that the clauses in general have a disputable validity and are generally not valid. The DRC constantly refers to its own jurisprudence regarding the unilateral extension option, which means that it has tried to formulate a starting point when assessing its validity. The CAS does no such thing, dealing with each case individually and making the relevant circumstances decisive in each case on the understanding that recent awards show more consistency and make reference to 7 important elements. However, the CAS is not bound to prior jurisprudence due to the absence of the "Stare Decisis-principle". But as said previously, this does not mean that the CAS Panels are permitted to deviate under all circumstances[38]

Nonetheless, a general conclusion can be drawn: unilateral extension options are—by definition—generally incompatible with FIFA regulations and principles of global labour law. Indeed, the DRC ruled only in exceptional cases in favour of a valid option.[39] Two of these cases (a DRC decision and a CAS award) had the extraordinary circumstance of the player accepting an earlier option that was based on the same option clause. In these two cases both players only started protesting when their clubs had already extended their contract for the second time (in the DRC case the player even brought his case to the DRC five months after the commence of the extended contract).

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[37]CAS 2013/A/3375, *KSC Lokeren v. Omer Golan & Maccabi Petach Tikva FC*, and CAS 2013/A/3376, *Omer Golan & Maccabi Petach Tikva FC v. KSC Lokeren*, award of 22 August 2014. See also CAS 2014/A/3852 *Ascoli Calcio 1898 S.p.A. v. Papa Waigo N'diaye & Al Wahda Sports and Cultural Club*, award of 11 January 2016. In the latter case the CAS Panel decided, among other things, that the two-year extension of the employment contract could be understood as being reasonable, even if the original duration was only valid for one year. The CAS Panel referred to the same 7 conditions as mentioned in CAS 2013/A/3260 *Grêmio Foot-ball Porto Alegrense v. Maximiliano Gastón López*, award of 4 March 2014.

[38]CAS 2004/A/628 *IAAF v. USATF & Y*, award of 28 June 2004, and CAS 2008/A/1545 *Andrea Anderson* et al. *v. IOC*, award of 16 July 2010.

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

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After analysing all relevant jurisprudence of the CAS and the DRC, we can conclude that both the DRC and the CAS have not gone so far as to declare unilateral extension options invalid *under any circumstance*. The DRC refers to its jurisprudence in similar cases, but rules every case on the basis of specific relevant circumstances. The CAS solely bases its decisions on the circumstances of the case at hand. For example, in the aforementioned case before the CAS of 10 October 2006 (2005/A/973) and 22 August 2014 (CAS 2013/A/3375 & 3376), all relevant circumstances pointed towards the validity of the clause. In the CAS decision of 12 July 2006 (2005/A/983&984), the CAS refers to the opinion of Prof. Portmann. In his article, Portmann gives an explicit review of the case at hand. Portmann gives us 5 criteria on the basis of which a specific option right should be judged in order to answer the question whether the extension right is to be considered as an excessive commitment or not. In its decision of 12 January 2007, the DRC used Portmann's criteria as leading for valid options. However, on the validity of unilateral extension options it is worth noting that after the cases before the DRC of 12 January 2007 and the CAS of 12 July 2006 (2005/A/983&984), in later cases the DRC never referred directly to the criteria of Prof. Portmann. Moreover, in later cases the DRC is extremely reluctant in establishing unilateral extension options as valid. The CAS is also reluctant and states in the case of 7 June 2010 between the player Appiah and club Fenerbahçe (2009/A/1856), that the validity of a unilateral extension option is not accepted. However, in more recent cases, as said above, such as the CAS case of 4 March 2014 between Grêmio Foot-ball Porto Alegrense and Maximiliano Gastón López the CAS Panel indicates further (with reference to several criteria), that an extension option can be seen as valid.[40] So, a relevant question here is, what will the DRC and the CAS decide in the future if they have to adjudicate whether a unilateral extension option must be considered valid or not?

### *7.4.2 Relevant Criteria*

In order to create and establish a valid unilateral extension option, it is advisable to meet at least the criteria as laid down in the unpublished DRC decision of 12 January 2007, the CAS decision in the Bueno & Rodriguez case (2005/A/983 & 984) (and as discussed by Prof. Portmann), and as laid down in the award of CAS of 4 March 2014 between Grêmio Football Porto Alegrense and Maximiliano Gastón López.[41]

[40]See also CAS 2014/A/3852 *Ascoli Calcio 1898 S.p.A. v. Papa Waigo N'diaye & Al Wahda Sports and Cultural Club*, award of 11 January 2016.

[41]See also CAS 2014/A/3852 *Ascoli Calcio 1898 S.p.A. v. Papa Waigo N'diaye & Al Wahda Sports and Cultural Club*, award of 11 January 2016.

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In the first place, the potential maximal duration of the employment contract may not be excessive. With respect to the maximum duration, the duration of the original contract and the so-called renewal years must be enumerated. According to Article 18 para 2 of the RSTP, 2016 edition, the maximum duration of an employment contract is five years. This is the decisive element to determine whether the maximum duration is excessive.

From the second criterion it follows that the unilateral extension option is exercised by the club within an acceptable deadline before expiry of the current employment contract. In the DRC decision of 22 July 2004, five days was (indeed) much too short. This is understandable since the employee cannot be kept in a position of too much uncertainty. The option must therefore be exercised early enough to give the player adequate opportunity to continue his career without interruption at another club, should the club not wish to extend the contract.[42]

Thirdly, the salary reward deriving from the option right must be defined in the original contract. Sometimes the club omits the amount of the salary, simply because it wants to wait for progress and to see if the player meets with its expectations. The player must be given certainty about his new salary.[43]

In the fourth place, one party may be at the mercy of the other party with regard to the contents of the employment contract. In this respect, the salary increase after exercising the option is the most important indication for establishing whether the party is at the mercy of the other party with regard to the contractual contents. In my opinion, the salary should increase substantially. An increase of 25 % in the first option year, i.e. from EUR 58,695 to EUR 73,168, and 100 % in the second option year, could be called substantial. In the DRC decision of 12 January 2007, there was a 9 % increase in the first option year and an 8.33 % increase in the second option year, which cannot be considered as a substantial increase. There must be an apparent financial gain for the player from the unilateral extension. In other words, new financial conditions must therefore be accepted through negotiation by both parties.

The fifth criterion is that the option must be clearly established and emphasized in the original contract so that the player is aware of it at the time of signing the contract. The club should explicitly emphasize that a unilateral extension option is stipulated in the contract. In the aforementioned DRC decision of 12 January 2007, the clause was mentioned in the middle of the contract. The DRC underlines the fact that the extension option must be mentioned at the end and it must be emphasized. This will ensure that the player is fully aware of the unilateral extension option. In order to avoid any misunderstanding, a club should therefore explicitly mention the extension option in the contract. In this respect, a club can put the extension option in bold letters above the player's signature. It is highly unlikely that a player can substantiate that he was not aware of the option. As also

[42]See also the DRC case of 31 July 2014, no. 07141003.

[43]See DRC 28 March 2012, no 3122702. In this case, the Chamber emphasized that the financial terms for the second year of the contract were omitted and, therefore, the prerequisites for a valid employment contract were not given for the second year.

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referred to in the DRC case of 17 August 2012 (no. 812104) and many other DRC cases, a party signing a document of legal importance, generally does so at its own risk.[44]

It should be noted from the analysed jurisprudence that one of the main criteria is deemed to be the most important by the DRC and the CAS: the player should receive a significant increase in salary due to the extension. However, after having read the decisions of the DRC and the CAS, it can be concluded that the criteria of Prof. Portmann must not be interpreted as absolutely leading by the CAS and the DRC in future cases. In the case before the CAS between Bueno & Rodriguez of 12 July 2006 (2005/A/983 & 984), the CAS panel warns that in future cases, the CAS might be more than sceptical with regard to the validity of unilateral extension options. The message here is: please be aware, that meeting the five criteria may not be sufficient. Nonetheless, a general declaration of invalidity under any circumstances is not expected. The use of unilateral extensions is common in professional football all over the world, and openly declaring such clauses as invalid under any circumstances would have serious consequences. Therefore, each case shall be decided on the basis of the relevant circumstances of that specific case, which was also explicitly confirmed by the CAS Panel in its recent award of 4 March 2014 between Grêmio and López.[45]

In view of the above, however, the DRC and the CAS will be more inclined to declare an extension option as valid, if all 5 criteria are met. To be sure and to increase any chances of validity, it would be advisable to add more conditions to the list, two of which were also introduced by the CAS in its award of 4 March 2014 between Grêmio Foot-ball Porto Alegrense and Maximiliano Gastón López.[46]

Firstly, it is advisable that the extension period is proportional to the main contract. For example, a main contract for the period of 1 year, with an extension option for 4 years falls within the 5-year maximum that is mentioned in RSTP. These clauses, however, can be considered as a disguised probation period solely in favour of the club and cannot be considered as legally valid. This can also be derived more indirectly from the DRC decision of 23 March 2006 (no. 36858).[47]

Secondly, it would be advisable to limit the number of extension options to one. For example: a player's contract is signed for a period of one year. The contract

[44]See for example DRC 9 May 2011, no. 5112306, and DRC 27 March 2014, no. 03143008.

[45]See also CAS 2014/A/3852 *Ascoli Calcio 1898 S.p.A. v. Papa Waigo N'diaye & Al Wahd Sports and Cultural Club*, award of 11 January 2016.

[46]See also CAS 2014/A/3852 *Ascoli Calcio 1898 S.p.A. v. Papa Waigo N'diaye & Al Wahda Sports and Cultural Club*, award of 11 January 2016.

[47]In the Netherlands there was a case whereby the Dutch KNVB Arbitration Tribunal decided in the case AFC Ajax N.V. against Hatem Belgacem Trabelsi, that the unilateral extension option in favour of Ajax was valid according to Dutch national law. See Dutch KNVB Arbitration Tribunal, 4 June 2004, no. 1022. In a later case before our Dutch KNVB Arbitration Tribunal between Timo Letschert and Roda JC of 29 August 2014, no. 1408, the Dutch KNVB Arbitration Tribunal decided that a clause in which the initial contract was five months and the optional period was two years, was not excessive.

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contains a unilateral extension option that gives the club the right to extend the contract twice, by one year each time, as was the case in the matter between Boca Juniors and Genoa Cricket and Football Club S.p.A. of 31 January 2007 (CAS 2006/A/1157), in which a 15–year–old player signed a contract with the club Boca Juniors. Again, the total period of 5 years (main contract of three years and two extensions of one year) falls within the RSTP and matches the five criteria as mentioned by the DRC and the CAS, but it still bears a substantial risk that the DRC or the CAS will consider this kind of unilateral extension option as an unreasonable commitment of the player, as being the weaker party in the employer-employee relationship.

In summary, based on the jurisprudence of the DRC and the CAS regarding the unilateral extension option, it is to be recommended that 7 criteria are met (at least):

a. The potential maximal duration of the employment contract may not be excessive thereby taking into account that the maximum period will not exceed the "*5 year term*" of Article 18 para 2 of the RSTP, 2016 edition;
b. The unilateral extension option must be exercised by the club within an acceptable deadline before expiry of the current employment contract;
c. The salary reward derived from the option right must be defined in the original contract;
d. One party may not be at the mercy of the other party with regard to the contents of the employment contract. In this respect, the salary derived from the option right must correspond with a 'substantial salary increase';
e. The option must be clearly established and emphasized in the original contract so that the player is aware of it at the time of signing the contract;
f. The extension period is proportional to the main contract in which the extension period may not exceed the duration of the original contract; and
g. The number of unilateral extension options must be limited to one.

In addition to the above criteria, even if all these criteria are met, this still does not automatically mean that the extension option will be valid anyway: Vice versa, if one of the above conditions is not met, this does not automatically mean that the option is not valid. A declaration of validity appears to be dependent on another requirement, which cannot easily be put into words, but comes down to the fact that the relevant circumstances of a specific case shall always be decisive, as stressed by the CAS Panel in the recent CAS case of 4 March 2014 between Grêmio Football Porto Alegrense and Maximiliano Gastón López.[48] In this regard, it was noted that the factual background and circumstances which contributed to the insertion of the unilateral extension option, the parties' attitude during the negotiations, and the performance of the employment agreement are of importance.

[48]See also CAS 2014/A/3852 *Ascoli Calcio 1898 S.p.A. v. Papa Waigo N'diaye & Al Wahda Sports and Cultural Club*, award of 11 January 2016.

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In this regard it is vital to establish and to get answers to the following questions. Had the player accepted an earlier extension or not? Was the player assisted and represented during the negotiations of the employment contract by, for example, a lawyer or intermediary? If the player was assisted by a lawyer or an intermediary, the original imbalance between an employer and an employee is more balanced. In that respect we should also keep in mind that it is well-established jurisprudence of the DRC that a player is responsible for the contents of his employment contract.[49] Furthermore, several other questions can be posed, such as: did the player explicitly agree with the effects of the unilateral extension option (in writing, verbally or can it be drawn from his stance)? How did the player behave after the club's extension? Did the player accept an earlier option in his contract (although accepting a first option does not recognize the validity of a second one anyway since it may not validate the practice)? Did the player still play in official matches and did the player keep training with his team after the extension (and for how long)? Did the club only invoke the unilateral extension option in order to establish that it can then claim higher financial compensation? In conclusion, aside from the above criteria, all the relevant circumstances of a specific case must be considered in order to establish the validity of the clause on the proviso that it is to be recommended that all the above-mentioned seven criteria are met.

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[49]DRC 30 November 2007, no. 117311, DRC 28 September 2007, no. 97460 & 971002, DRC 22 June 2007, no. 67675, and DRC 10 August 2007, no. 871283. See also CAS 2013/A/3375, *KSC Lokeren v. Omer Golan & Maccabi Petach Tikva FC*, and CAS 2013/A/3376, *Omer Golan & Maccabi Petach Tikva FC v. KSC Lokeren*, award of 22 August 2014.

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# Chapter 8
# Termination

**Abstract** This chapter addresses the termination of the employment contract between the player and the club. Here it will be brought to the readers' attention under which circumstances a unilateral termination by a party is justified and accepted by the DRC. This chapter will first look at the mutual termination agreement, the probation period and the relegation clause. Subsequently, it will be analysed when *just cause* is present for players and clubs according to the leading jurisprudence. After analysing the DRC jurisprudence, certain guidelines can be derived from the decisions on *just cause* for the club. Various situations will be assessed in this chapter, such as the poor sporting performance of a player, the consequences if the player does not meet the requirement of a minimum number of matches or scored goals, the situation of unauthorised absence of the player for trainings or matches, and situations in relation to the player's misbehaviour, such as drugs and alcohol abuse. Also, in the event that the player wishes to unilaterally terminate his contract with the club without any financial consequences, we note in this chapter that there must be *just cause*. For example, if the player has not received his salary for a substantial period of time, *just cause* exists. This is the most common form of *just cause* for players. Furthermore, we note that *just cause* can also exist if a player is sent to training out of the permanent (first) team of the club and that *just cause* might also exist if a player is not registered by a club. In the final part of this chapter the *sporting just cause* will also be brought to the readers' attention.

**Keywords** Pacta sunt servanda · Protected Period · Just cause · Unilateral termination · Mutual agreement · Relegation clause · Potestative clause · Probation Period · Period of notice · Performance of player · Injury of player · Absence of player · Misbehaviour of player · Drugs · Alcohol · Outstanding salary · Deregistration · Sporting just cause

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## Contents

8.1 Introduction ..... 194
8.2 Mutual Agreement ..... 195
8.3 Relegation Clause ..... 200
8.4 Probation Period ..... 203
8.5 Period of Notice ..... 205
8.6 Just Cause ..... 208
8.6.1 For the Club ..... 208
8.6.1.1 Performance Player ..... 209
8.6.1.2 Played Matches ..... 216
8.6.1.3 Injury ..... 219
8.6.1.4 Absence ..... 224
8.6.1.5 Misbehaviour ..... 229
8.6.1.5.1 General ..... 229
8.6.1.5.2 Drug Abuse ..... 233
8.6.1.5.2.1 DRC Jurisprudence ..... 233
8.6.1.5.2.2 Mutu Cases ..... 235
8.6.1.5.3 Alcohol ..... 238
8.6.1.5.4 Conclusion ..... 239
8.6.2 For the Player ..... 240
8.6.2.1 Outstanding Salary ..... 240
8.6.2.2 Exclusion and Deregistration ..... 254
8.7 Sporting Just Cause ..... 260
8.7.1 Introduction ..... 260
8.7.2 Requirements ..... 261
8.7.2.1 Established Professional ..... 262
8.7.2.2 Appearance Professional ..... 263
8.7.2.3 15-Day Term ..... 263
8.7.3 CAS and DRC Jurisprudence ..... 263
8.7.4 Final Remarks ..... 266
8.8 Conclusion ..... 268
References ..... 271

## 8.1 Introduction

Pursuant to Article 13 of the RSTP, 2016 edition, the contract between a professional and a club can only be terminated on expiry of the term of the contract or by mutual agreement. The main purpose of this provision is that parties who enter into an agreement should respect and honour the contractual obligations during the term of the contract, also known as the principle of *pacta sunt servanda*. Therefore, FIFA introduced the "Protected Period", which was meant to safeguard the maintenance of contractual stability, which corresponds to a period of three full seasons or three years, whichever comes first, following the entry into force, if such contract was concluded before the 28th birthday of the professional, or corresponds to two full seasons or two years, whichever comes first, following the entry into force of a contract, if such contract was concluded after the 28th birthday of the professional. FIFA was of the opinion that a unilateral termination of an employment contract by

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a club or a player without justified reason, especially during the Protected Period, had to be vehemently discouraged.[1] During the Protected Period it had to be made much more difficult to unilaterally terminate the employment contract.

However, according to Article 14 of the RSTP, the principle of respect of contract is not absolute. The situation could be that there was too much strain on the patience of one of the parties to respect the employment contract. FIFA therefore devised the possibility that in the case of a valid reason by either of the parties, the so-called *just cause*, the employment contract may be unilaterally terminated by either party with no consequences of any kind. In other words, there are no consequences in the event of *just cause*, which means that the party who terminates the contract on *just cause* is not obliged to pay any compensation to the other party, nor can sporting sanctions be imposed on him. FIFA can then take provisional measures if *just cause* exists for one of the parties, including the most useful provisional measure: allowing the player to register at a new club.[2]

Where there is *just cause* for the player, he is free to leave the club. Where there is *just cause* for the club, the latter is released from its obligations as stipulated in the contract with its player with immediate effect. This rule can be seen as a "*lex specialis*" of the general rule, which is stated in Article 16 of the RSTP, that a contract cannot be unilaterally terminated during the course of a season.

The obligation to pay compensation and the related sporting sanctions that may be imposed by FIFA will be discussed in the following chapters. In this chapter it will be brought to the readers' attention under which circumstances a unilateral termination is justified on the understanding that, generally a reciprocal approach is applied to cases concerning the termination of contracts. In essence, this means that the termination of a contract by a player without *just cause* and the termination of a contract by a club with *just cause* leads to the same consequences. In this chapter it will be analysed when *just cause* exists for players and clubs to unilaterally terminate the contract according to the DRC (and the CAS). The definition of *just cause* and whether *just cause* exists will be established in accordance with the merits of each particular case.[3] All *just causes* for players and clubs will be classified. Each paragraph will be finalised with a short conclusion and a summary of the well-established jurisprudence of the DRC (and the CAS) with regard to the *just cause*. Where *just cause* exists, its criteria will be outlined. First, we will discuss the relevant jurisprudence regarding termination with mutual consent, the relegation clause, the probation period and the period of notice.

## 8.2 Mutual Agreement

According to Article 13 of the RSTP, 2016 edition, parties may terminate their agreement by mutual consent. In order to prove such an agreement of termination, arrangements preferably need to be laid down in an agreement.

[1]FIFA Commentary, explanation Article 13, p. 38.
[2]FIFA Commentary, explanation Article 6, p. 24.
[3]FIFA Commentary, explanation Article 14, p. 39.

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A mutual agreement on early termination of an employment contract is considered admissible since it requires both parties to negotiate the terms on which they are willing to accept a rescission of an otherwise valid contract. For example, in a decision of 10 June 2004, the DRC was of the opinion that the FIFA RSTP assumes the principle that the parties have entered a contractual obligation for a fixed period of time.[4] This engagement can only be rescinded under circumstances that justify a unilateral termination of the contract by one of the parties for *just cause* or if the parties mutually agree on an early termination of their contractual relationship. Such an agreement must be found when the parties are faced with circumstances that motivate an early termination of their engagement. Under particular circumstances, the DRC can admit arrangements whereby the parties have established and agreed on the terms of an early termination of a contract in the employment contract itself. In order to accept such an arrangement, the DRC must ascertain 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. Essentially, the rescission clause contained in the contract must provide for terms that are acceptable to both the employer and the employee. The rescission clause concerned was unilateral and to the benefit of the club only.

In another DRC case of 21 November 2006, the parties drew up a termination letter of contract, which was decided as being valid and binding between the parties.[5] One of the parties claimed that the termination agreement was not valid because it was forced upon him. The DRC started by acknowledging that both parties had signed an employment contract on 2 September 2002 expiring on 31 August 2003. Moreover, the DRC noted that on 26 May 2003 both parties concluded a document called "termination letter of contract", with which the relevant parties ended their contractual relationship. The DRC deemed it appropriate to focus on the player's allegation stating that he had signed the termination agreement under pressure from the club. The Chamber pointed out that a document signed by the relevant parties, in principle, is a written proof of a valid contract and cannot be declared invalid by a simple allegation. The DRC committee remarked that the party (the player in this case) who makes an allegation has to sustain the burden of proof in order to preserve the legal principle of legal security. Finally, the DRC decided that the player's position, that the termination agreement was invalid, could not be upheld by the DRC. In view hereof, the DRC concluded that the termination agreement dated 26 May 2003 was legally valid and binding between the relevant parties. Therefore, and based on the terms agreed by the player and the club in the referred termination agreement, the player was entitled to receive financial compensation from the club.

In a case before the DRC of 22 June 2007, an annex of a termination agreement which was signed by both the player and the club had the following clause: "*Upon confirmation by the claimant that he found a new club, the contract… will be terminated pursuant to terms agreed upon in the agreement*".[6] On September 2006, the

[4]DRC 10 June 2004, no. 64132.

[5]DRC 21 November 2006, no. 116338. See also DRC 30 November 2007, no. 117549.

[6]DRC 22 June 2007, no. 67675.

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player informed the club that he had not found a new club and, therefore, wanted to keep playing for the club. The club now maintained that the player had been acting disloyally and that he had mislead the club by intentionally making them sign a termination agreement that differs from the draft that the club had presented to the player, even though the club did not know the agreement had been modified. The Chamber emphasized that a party signing a legal document, without knowing its contents, does so at its own risk. Therefore, the fact that the player had modified the agreement before presenting it to the club for signing, was to be considered as an act of bad faith, but could not constitute *just cause* for termination of the contract. The DRC maintained that the club had breached the contract without *just cause* and had to pay compensation. When calculating the compensation due, the Chamber did, however, take note of the fact that the player had acted in bad faith.

In the event that a player signs a cancellation agreement this means acceptance of the termination of the contract by mutual consent. In a DRC decision of 14 September 2007, the Chamber deemed that a certain clause in the contract lacked objective criteria for the termination of the contractual relationship. The Chamber pointed out that the clause concerned applied the player's performance as the decisive criterion for the termination of the contract. Furthermore, the Chamber emphasized that the relevant termination clause only provided the club but not the player with a right to terminate the contract. Moreover, the Chamber stated that the termination of the contract for non-objective criteria would also lead to an unjustified disadvantage of the claimant's financial rights. Referring to its jurisprudence, the DRC stated that if such termination clause would be accepted, this would create a disproportionate repartition of the rights of the parties to an employment contract, to the strong detriment of the claimant. The DRC reached the conclusion that, by signing the cancellation agreement in question the player legally accepted the termination of the contract by mutual consent. Therefore, the DRC stated that, despite of the established invalidity of the contractual termination clause, the contract was not unilaterally terminated by the club but was terminated by mutual agreement of the contractual parties.[7]

It is relevant to actually conclude a termination agreement if both parties want to terminate by mutual agreement, as follows from jurisprudence. For example, in a DRC case of 13 October 2010, there was a discussion whether it could be demonstrated that the parties terminated their relationship despite no termination agreement being signed.[8] In this case, the Chamber recalled the general rule according to which, in order to validly conclude a termination agreement, an accordance of the will of two parties is required and that such will is represented by each party's signature in the respective document. Here, the respondent could not provide such termination agreement or any other relevant documentation, which would have had to be duly signed by each party, the Chamber deemed that the respondent could not provide sufficient proof regarding the alleged conclusion of a termination agreement. The Chamber was not convinced by the mere allegation that the parties had concluded such an agreement orally.

[7]DRC 14 September 2007, no. 97775.

[8]DRC 13 October 2010, no. 10102000.

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Deductions are only permitted insofar as the deductions have been stipulated by the parties in the termination agreement. In a DRC decision of 9 May 2011, a player and a club signed an employment contract, valid from the date of its signature until the end of the 2009/2010 season.[9] On 10 January 2010, the player and the club signed a second contract in accordance with which the player was entitled to receive additional amounts. On 31 March 2010, the player and the club signed a termination agreement terminating their contractual relationship with immediate effect. On 27 July 2010, the player lodged a claim with FIFA requesting the payment of EUR 7000 based on the termination agreement. The club rejected the claim since it had to pay several bills on account of the player. The DRC Judge was eager to emphasize, in this case, that a termination agreement, by definition is concluded between two parties in order to settle any disputes, and particularly any outstanding amounts which were due should have explicitly been mentioned in the termination agreement. Therefore, and since no deduction whatsoever had been stipulated by the parties in the termination agreement, the DRC Judge found no reason to deduct any amounts in this matter. The DRC Judge therefore ruled that the full outstanding amount should be paid to the claimant in accordance with the termination agreement. Following this DRC case, parties must take into account that deductions are only permitted insofar as and as long as the deductions have been stipulated by the parties in the termination agreement itself.

In the case of 10 August 2011, a player, the claimant in this procedure, and club P, the respondent, signed an employment contract valid from its signature until 31 May 2010.[10] On 7 July 2009, both parties signed a termination agreement. On 21 May 2010, the claimant lodged a claim with FIFA against the respondent requesting the latter to pay the total amount of USD 245,250. In its response dated 2 July 2010, the respondent rejected the claimant's claim entirely, since the vice president had no authority to sign. The termination agreement therefore had no legal force, according to the club. The DRC turned its attention to the respondent's allegation that the termination agreement had not been signed by its competent representative in accordance with its internal regulations. The DRC recalled that, as a general rule and in accordance with its well-established jurisprudence, the internal proxy rule of one of the parties to a contract cannot have legal effect on the validity of the contract itself unless the contracting party has been duly informed of its contents. The DRC recalled that the respondent had not provided any evidence in support of the allegation that the claimant had ever been informed of the contents of its internal proxy rule. The claimant therefore had no knowledge of the internal proxy rule. As a result thereof, the claimant could assume in good faith that this person was duly authorised to act and sign on the club's behalf. The termination was therefore valid and binding, according to the Chamber.

There must be a legal basis to deduct any amounts regarding a termination agreement. In a DRC decision of 29 August 2011, a player and a club signed a termination agreement, by means of which the parties decided to terminate "*all agreements and/or*

[9]DRC 9 May 2011, no. 5112306. See also DRC 27 March 2014, no. 03143008.

[10]DRC 10 August 2011, no. 8112295.

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*any supplementary agreements*" concluded between the parties.[11] On 26 July 2010, the player lodged a claim before FIFA against the club for breach of the termination agreement. In this respect, the claimant indicated that he had not been paid the amount due under the termination agreement and, therefore, claimed the outstanding amount of EUR 16,300, plus interest and legal fees. The club rejected the claimant's arguments and justified the non-payment by arguing that it had to pay for the repair of the car it had provided to the claimant, which was returned by the claimant in a "*bad condition*". The respondent deemed that this amount had to be deducted from the sum of EUR 13,000, which is the amount stipulated in the termination agreement if the respondent paid the claimant before 31 May 2010. The DRC Judge recalled that the parties had signed a termination agreement by which they had agreed to mutually terminate their employment relationship and that the termination agreement stipulated that "*with this documents is to be confirmed that all Articles of the Contract of Employment have been fully performed with respect and honour from both sides*". Furthermore, the said termination agreement provided for the payment of the amount of EUR 16,300, and, should this amount be paid by the club to the player before 31 May 2010, a deduction of EUR 3300 would be made from the said amount. After having agreed to the termination of the employment contract by means of a termination agreement, the club could not contest the contents of said termination agreement on the basis of an alleged breach of the employment contract. Therefore, the DRC Judge was of the opinion that, aside from the payment of the amount of EUR 16,300, the parties had agreed that they had no further claims against each other. The DRC Judge found that there was no basis to deduct any amounts as claimed by the respondent and ruled that the full amount should be paid to the claimant by the respondent. Again it is confirmed by the DRC that it is of crucial importance to take into account that any deductions will only be permitted insofar as the deductions have been stipulated in the termination agreement.[12]

The constant jurisprudence of the DRC points out that a party signing a document of legal importance without precisely specifying its content, as a general rule, does so on its own responsibility. Obviously, this also applies to termination agreements. In its case of 10 July 2013, the DRC Judge deemed it appropriate to emphasize that a party signing a document of legal importance without precisely specifying its content, as a general rule, does so on its own responsibility and is consequently liable to bear the possible legal consequences arising from the execution or non-execution of such document.[13] Therefore, the DRC Judge finally concluded that the settlement agreement concerned was a valid document which clearly specified that the debt of the respondent towards the claimant was no longer claimable.

In conclusion, the above jurisprudence teaches that parties may terminate their agreement by mutual consent. In order to prove such an agreement of termination, the arrangements need to be laid down in an agreement. In this regard and with reference to constant jurisprudence of the DRC, it is established that a party signing a document of legal importance without precisely specifying its content, as a general

[11] See also DRC 29 August 2011, no. 8112316.

[12] See also DRC 2 October 2012, no. 10123433.

[13] DRC 10 July 2013, no. 0713775. See also DRC 10 July 2013, no. 0713775, and DRC 14 August 2013, no. 08132573.

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rule, does so on its own responsibility. Furthermore, following the DRC jurisprudence, clubs must take into account that the DRC will only accept deductions insofar as these have been stipulated by the parties in the termination agreement.

## 8.3 Relegation Clause

Parties sometimes prefer to insert a contractual clause in the employment contract with regard to potential future relegations (or promotions). For example, if the club will relegate in future from a higher to a lower division, the employment contract will be terminated, either automatically or by legal action of one of the parties. The DRC issued a few decisions on this topic, which will be discussed below.

In a case before the DRC of 10 August 2007, the Chamber referred to the legal principle that the parties to an employment contract may agree that the anticipated termination of a short term contract is subject to the fulfilment of a condition, as long as such condition is not of a potestative nature, i.e. not dependent on the will of a party to the contract or a third party. According to the DRC, the condition of the relegation of a club is certainly not a potestative condition, since such relegation depends on other circumstances than the will of a party to the employment contract. In the DRC's view, it has to be presumed that the will of clubs and players is always to avoid relegation. The fulfilment of the condition of relegation therefore solely depends on sporting circumstances. As a result, the Chamber was of the opinion that the condition of relegation is a casual condition, and not a potestative condition, so the Chamber concluded in this case that parties to an employment contract are generally entitled to stipulate that the termination of a contract is subject to a casual condition.[14]

In a DRC decision of 18 June 2009, the player and the club had also agreed on the so-called relegation clause, stating that if the club relegated, the employment contract would automatically end. Hence, the club stated that—over the months after the club had relegated—it did not owe any salary to the player. The Chamber concluded that the relegation clause was indeed valid, though an additional month's salary was due, in order to serve as a notice period.[15]

Despite the above cases, in two cases of 10 May 2012 the DRC Judge came to the conclusion that the relegation clause was *invalid* since it was unilaterally applicable in the event of an unsuccessful sporting performance by the club.[16] The DRC Judge established that the clause was only to the benefit of the club, and thus had a unilateral character, in addition to the failure of the respondent to present documentation corroborating its allegations relating to the implications of Article

[14]DRC 10 August 2007, no. 87677. A casual condition is one which depends upon chance and is not within the control of either party to a contract.

[15]DRC 18 June 2009, no. 69311.

[16]DRC 10 May 2012, nos. 5121238 and 5121239.

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4 of the employment contract, if at all valid, such clauses cannot be taken into consideration and that the respondent's arguments in this case had to be rejected.

The above DRC decision of 10 May 2012 is also an interesting and remarkable DRC decision since we can derive from this case that a so-called relegation clause is *not* valid. The DRC is inconsistent on the validity of a relegation clause since it was decided in prior DRC decisions of 10 August 2007 (no. 87677) and 18 June 2009 (no. 69311) that the relegation clauses in these specific matters were indeed valid and binding.[17]

In the case before the DRC of 7 February 2014, Article 13 para 3, the contract was provided with the following clause: "*In case the first team drops to the first class during the first season thereof, the contract shall be deemed null with satisfaction of both parties without any financial liability on either party. In case the team remains in the professional league, this contract shall be deemed in force and valid*".[18] In view of this clause, the Chamber deemed that Article 13 para 3 of the contract consisted of an objective and reciprocal provision, which had been agreed upon and accepted by both parties. Thus, the DRC deemed that such clause was applicable in the present dispute and that the contract should be considered as automatically terminated at the end of the 2009/2010 season. The respondent/counter-claimant's argument in this regard was, therefore, accepted.

Also the CAS had to deal with the question whether a relegation clause is valid or not. In the case before the CAS of 2008/A/1447 (E. v. Diyarbakirspor) (which is the appeal procedure of the abovementioned DRC case of 10 August 2007 no. 87677[19]), the CAS decided that the clause which stated that the club was entitled to terminate the contract due to a relegation of the team from the first to the second division, was valid. The CAS finally decided that a contractual clause like the one in this case is valid, as long as such condition is not of a potestative nature, i.e. thus not depending on the will of one of the parties to the contract or a third party.

In view of the above, we note that the DRC jurisprudence is not consistent. It is quite remarkable that the DRC committees have two (diametrically) different approaches on this topic. In my opinion, as with the validity of unilateral extension options, the specific circumstances of the case are also decisive in this regard. The bottleneck seems to be the '*potestative nature*' of the clause. In this respect it seems to be of utmost importance how the specific clause is drafted, aside from the fact that the clause must always be drafted clearly.[20]

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[17]See also DRC 15 March 2013, no. 0313496, and DRC 26 October 2012, no. 10121653.

[18]DRC 7 February 2014, no. 0214233.

[19]In this CAS decision, CAS 2008/A/1447 *E. v. Diyarbakirspor*, award of 29 August 2008, the CAS Panel erroneously referred to the DRC decision of 10 August 2006.

[20]In the DRC case of 1 June 2005, the contract provided for the following clause: "*In case that the team falls into the endangered zone on the league table the owner, the managing director or the chief trainer may withhold or withdraw the payment of bonuses*". The DRC concluded that the club's decision to withdraw payment of the contractually agreed bonuses based on the cited Article, cannot be supported by FIFA. In this respect, the DRC deemed that the aforementioned rule was ambiguous and its application arbitrary, since it leads to an unacceptable result based on non-objective criteria. As a result, the DRC finally concluded that the player was entitled to receive the relevant bonuses; DRC 1 June 2005, no. 6526.

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In fact, the specific relegation clause in the cases of 10 August 2007, no. 87677, which was confirmed by the CAS in its case of 2008/A/1447, and the DRC case of 18 June 2009, no. 69311, was described by the parties as a clause in which no doubts on the termination of the contract were present. In these cases the contract was terminated *automatically* in the event of a future relegation. However, in the two DRC cases of 10 May 2012 (nos. 5121238 and 5121239) the relegation clause was described as follows: "*The Club and the Player hereby agree that in case the Club plays for any reason during the validity of the Player´s employment with club A, in the SECOND or Lower Division of the country C League, the Club has the right to terminate the Player's contract and the Player shall be free to be registered to in any Club of his own choice. The Club and/or the Player, in that event, accepts that such termination is for just cause and shall not be entitled to any compensation*". This can also be derived from the case of the DRC of 1 June 2005, regarding the payment of bonuses in case of relegation. In the latter case the provision was ambiguous and its application arbitrary, according to the DRC. There was no automatic termination but a unilateral right of the club to terminate the contract. In other words, in all these cases there was a certain discretion for the club to decide to terminate the contract due to the relegation.[21] It is of utmost importance to note this difference and thus to draft the clause in an unambiguous way and not to leave any discretionary room for discussion on its termination.

Furthermore, it is important to establish on whose initiative the clause was inserted in the contract. In my opinion, it would be made more difficult for a player to claim that a relegation clause is invalid, if the clause was inserted on his initiative.[22]

In addition, in my viewpoint it is also important to establish whether the player was represented or not during the negotiations of the employment contract by a lawyer or an intermediary. If the player is assisted and represented, the original imbalance between an employer and an employee is more balanced (so too with regard to the validity of this clause). In accordance with the well-established jurisprudence of the DRC, a player is responsible for the contents of a contract.[23] This does not mean the player then renounces his right to further legal protection, but in the event of disputes and discussions regarding questionable clauses, this can be an important element.

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[21]DRC 1 June 2005, no. 6526.

[22]The contract proferentum principle is relevant, as was also referred to by Shakthar Donetsk in CAS 2010/O/2132, award of 28 September 2011. In the case CAS 2004/A/643 *Hertha BSC Berlin v. G. and Club Atlético River Plate & RCD Mallorca*, award of 1 March 2005, the CAS Panel decided that if the meaning of a provision is clear, it is not permissible for the parties to adduce evidence of their intentions. Furthermore, we derive from this case that it is absolutely relevant who drafted the contract. In the aforementioned CAS award of 1 March 2005, the contract was drafted by the club's in–house lawyer, as a result of which the CAS Panel was of the opinion that the provision of the contract must, based on well-established principles, be construed contra proferentum.

[23]DRC 30 November 2007, no. 117311, DRC 28 September 2007, no. 97460 and no. 971002, DRC 22 June 2007, no. 67675, and DRC 10 August 2007, no. 871283.

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## 8.4 Probation Period

The probation period is a provision laid down by the parties in the employment contract as a result of which they may unilaterally terminate the contract with immediate effect and without being obliged to give any reason to the other party during a predetermined period. The probation period is generally a short period, for example one or 2 months as from the start of the contract. During that period, the parties may observe each other and may decide to terminate the agreement promptly without giving any reason and without paying any compensation to the injured party. Most national legislations allow a probation period in the employment agreement. However, the DRC has a different opinion in this respect.

The DRC is of the opinion that probation periods are usually not allowed. With regard to the agreed probation period, the DRC recalled that such clauses generally are not acceptable as they do not respect the spirit of the regulations.

However, in a case of 11 March 2005, the player accepted the termination of the contractual relationship during the probation period. Consequently, the DRC deemed in view of the specificities of the case, that the relevant clause could be tolerated.[24]

But in a DRC decision of 12 January 2006, the Chamber stated that a probation period of a player is not admissible in contracts of football players. As a consequence, the Chamber finally explicitly decided in the matter at hand, that such a clause has to be qualified as not admissible, respectively, null and void.[25]

In a case of the DRC of 27 April 2006, the Chamber again referred to its prior jurisprudence which stated that a clause that only benefits one party and not the other is a clause of doubtful validity. However, in this case, the DRC decided that this clause was not valid because it creates disequilibrium between the rights and obligations of the player and the club. The probation clause does not justify the unilateral termination of the contract by the club. The DRC finally concluded that the club breached the employment contract and had no *just cause* in unilaterally terminating the employment contract during the probation period on grounds that the player did not perform well enough. Therefore, the player may claim compensation. The DRC finally concluded that the club should pay compensation.[26]

In another case which came before the DRC on 17 August 2006, the DRC decided that after having discussed the issue at length, probation periods in football-related employment contracts were unacceptable. Indeed, probation periods usually only favour the employer, i.e. the party that generally has the stronger bargaining power. Furthermore, by nature, probation periods tend to contradict one of the main pillars of both the previous and the current version of the RSTP, i.e. the

[24]DRC 11 March 2005, no. 35174.

[25]DRC 12 January 2006, no. 16695.

[26]DRC 27 April 2006, no. 461021. See also DRC 12 January 2006, no. 16695.

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maintenance of contractual stability and the rules related to contractual stability. If clubs and/or players are entitled to end an employment contract invoking a probation period, players in particular may have difficulty in finding other employment. In addition, such termination of contract would be in violation of the main principle of Article 13 of the RSTP. Regardless of the above, in this case the probation period clause is undoubtedly potestative, the club being the sole party able to terminate the contract during the probation period on the basis of the relevant provision. In light of the aforegoing, the DRC agreed that the probation period inserted in the employment contract cannot justify the premature termination of the relevant employment contract.[27]

In its decision of 26 October 2012, the Chamber deemed it appropriate to analyse whether such clause inserted in an employment contract could be considered valid or not.[28] The Chamber deemed that the application of the abovementioned rule was arbitrary, since it leads to an unacceptable result based on non-objective criteria, which entitled the respondent to unilaterally terminate the contract during the first 12 months of the contract. The DRC emphasized that the lack of objective criteria by the application of the relevant rule lead to an unjustified disadvantage of the claimant's financial rights. The Chamber considered that the possibility granted to the respondent to prematurely terminate the contract within its first year, without the need to indicate any reasons for it and only based on the fact that such period is to be considered as a probation period, appeared to be of a highly subjective nature, entailing that, de facto, it is left to the complete and utter discretion of the respondent whether or not it was willing to continue the contractual relationship. In view of the aforegoing, the Chamber was of the opinion that Article 2 of the employment contract invoked by the respondent to terminate the contract was clearly potestative and that, consequently, the respective arguments of the respondent could not be upheld by the Chamber.

In conclusion and with reference to the above jurisprudence, the Chamber is of the opinion that, other than exceptional cases, potestative clauses are generally not acceptable as they do not respect the spirit of the regulations. Such clauses tend to contradict one of the main pillars of the RSTP, i.e. the maintenance of contractual stability and the rules related to contractual stability. In other words, a clause that only benefits one party and not the other is a clause with doubtful validity and creates disequilibrium between the legal rights and obligations of a player and a club.

[27]DRC 17 August 2006, no. 86833. See also DRC of 14 September 2007, no. 7924. In this decision the Chamber highlighted that, in general, potestative clauses, i.e. clauses that grant a right in favour of one contractual only, cannot be considered since they generally limit the rights of the other contractual party in an excessive manner and lead to an unjustified disadvantage of the latter towards the other.

[28]DRC 26 October 2012, no. 101211653.

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## 8.5 Period of Notice

According to the DRC decisions, it is questionable whether parties may agree to a period of notice in the contract. For example, can a clause which gives the club the right to unilaterally cancel the employment contract within a specified period of time, be considered a valid clause? And what if the other party is (not) provided with similar rights? The Chamber, however, is not entirely clear on this point.

In the DRC decision of 12 January 2006, the DRC turned its attention to clause 14 of the employment contract, according to which the club had the right to unilaterally terminate the contract within the first ten days excluding all claiming rights of the player.[29] After extended deliberations, the DRC considered that such a clause creates a disequilibrium between the rights and obligations of the player and the club. Moreover, since the right to terminate the contract was left exclusively at the discretion and subjective criteria of the club, i.e. the stronger party in the employment relationship, the clause was not valid.

However, in a decision of 21 November 2006, the DRC was of the opinion that the club had validly terminated the employment contract based on clause 3.4 of the relevant employment contract.[30] The DRC noted that the aforementioned clause gives *both* parties the right to terminate the employment contract upon written notice of one month, that in the event of the contract being terminated by the club, the player could retain the signing-on fee in the amount of USD 140,000 as well as all monthly salary payments in the amount of USD 14,000 that had been made until then, and that the player would also be entitled to a monthly salary of USD 14,000 for the time covered by the notice period. The DRC duly analysed clause 3.4 of the relevant employment contract concerning the termination of the contract. In this respect, the members of the DRC noted that the aforementioned contractual termination clause provides for a right to both parties to terminate the relevant contract. Furthermore, the DRC acknowledged that, in the case of termination of the contract by either party, the aforementioned clause grants compensation payable to the other party. Finally, the DRC noted that said clause contains a one month notice period to be respected by the respective terminating party. On account of the above, the DRC concluded that clause 3.4 of the relevant contract should therefore be considered as totally valid and legally binding. Consequently, the DRC decided that the club did not breach the relevant employment contract without *just cause* but in accordance with clause 3.4 of the relevant employment contract, which was signed and approved by both parties.

In a DRC decision of 23 February 2007, the Chamber had to decide whether a clause in a player's contract which stated that the club had the right to terminate the contract by giving the player one month's salary, was valid. The Chamber emphasized that in accordance with the principle of maintenance of contractual

[29]DRC 12 January 2006, no. 16695.

[30]DRC 21 November 2006, no. 116218.

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stability between professionals and clubs, an employment contract between a player and a club should only be terminated on expiry of the contract or by mutual agreement. The DRC referred to the fact that the parties contractually agreed under Article 9 of the relevant employment contract that the club could prematurely terminate the employment contract by paying to the player one month's salary as compensation. In order to avoid any misunderstanding, the DRC remarked that the relevant employment contract was also written in English and each page was signed by the player. Therefore, the DRC concluded that both contractual parties were duly aware of all contractual provisions and in particular, of the club's entitlement to prematurely terminate the employment contract by compensating the player with one month's salary. Finally, the DRC concluded that in accordance with the legal principle of *pacta sunt servanda* the club was entitled to terminate the contract by paying one month's salary to the player as compensation without being held liable to pay any further compensation.[31]

However, in the case of 3 October 2008, we see that such clauses can be potestative. In this case the contract contained a clause which stated that "*the parties also agreed that the club would have the right to terminate the contract on 30 June 2008 without any further financial obligations*".[32] With regard to this termination clause, the DRC stressed it was a potestative clause, which was not acceptable. The responsibility of the club could not be diminished by reference to this clause.

In a DRC decision of 15 June 2011, the player and the club provided their employment contract with a provision, more specifically Article 6, that stipulated that at the end of the season 2010-2011 i.e. 30/5/2011, "*the Employer will have the right to end the contract of employment with the Employee by notifying the latter by correspondence, and the Employee will have no right to damages or claims*".[33] On 26 January 2011, the player lodged a claim against the club before FIFA claiming that, on 17 January 2011, the club had terminated the employment contract without *just cause*. In this case, the DRC deemed it important to highlight that Article 6 of the employment agreement, in accordance with which the respondent would have been in the position to unilaterally terminate the employment contract at the end of the first season, was not acceptable due to its potestative character. Indeed, such clause appears to be unilateral and to the benefit of the respondent only, who, according to the wording of said clause, was able to terminate the contractual relation with the claimant at its sole discretion and without any justification. Therefore, the Chamber agreed that such clause is unacceptable and could not be validly invoked as a legal basis for a unilateral termination of the employment contract. The DRC further went on to deliberate in this matter as to whether the player's alleged misbehaviour, indifference and missed training, which were invoked by the respondent in its defence, could be considered as *just cause* for the

[31]DRC 23 February 2007, no. 27958.

[32]DRC 3 October 2008, no. 10895.

[33]DRC 15 June 2011, no. 611286.

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respondent to prematurely terminate the employment relationship. The Chamber pointed out that the player's alleged misbehaviour and missing a training session could not constitute, per se, a valid reason for the termination of an employment contract. Only a breach or misconduct of a certain severity would justify the termination of a contract without prior warning. In other words, only when there are objective criteria which do not reasonably expect a continuation of the employment relationship between the parties, may a contract be terminated prematurely. Hence, if there are more lenient measures which can be taken for an employer to assure the employee's fulfilment of his contractual duties, such measures must be taken before terminating an employment contract. A premature termination of an employment contract can only be an *ultima ratio*. The DRC further deemed that the respondent had already acted in breach of the employment contract prior to terminating it via the letter dated 17 January 2011, by failing to pay the claimant's salary over a considerable amount of time (3 months). The DRC decided that the respondent had terminated the employment contract unilaterally and without *just cause*. The DRC decided that the respondent was liable to pay the claimant the amount of EUR 13,561.17 relating to payments due to the claimant from October 2010 to 17 January 2011 in accordance with the contract. The DRC determined that the amount of compensation payable by the respondent to the claimant had to be assessed in application of the other parameters set out in Article 17 para 1 of the RSTP. The DRC decided to partially accept the claimant's claim and that the respondent did not have to the entire residual value of the employment contract, but the amount of EUR 45,000, which was considered by the DRC as reasonable and proportionate as compensation for breach of contract in this case.

In a case of the DRC of 31 October 2013, the Chamber considered that the option granted to the respondent club to prematurely terminate the employment contract by paying the claimant player a relatively insignificant amount of compensation, appeared to be of a highly arbitrary nature, entailing that, de facto, it is left to the complete and utter discretion of the club whether or not it was willing to continue the contractual relationship with the player.[34] The DRC was of the opinion that Article 10 of the contract invoked by the club to terminate the contract on 24 May 2011 was clearly potestative and that, consequently, the respective arguments of the respondent in this respect could not be upheld by the DRC.

Subject to exceptions, reciprocity seems to be the key principle for the DRC. In a DRC decision of 7 February 2014,[35] the DRC pointed out that the clause in the contract on which the club's claim was founded, was taken into consideration due to its lack of reciprocity. Clauses that are generally unilateral and only in favour of one of the parties will not be accepted by the DRC. In its case of 27 February 2014, Article 10 of the contract stipulated: "*The club has the right to inform the*

[34]DRC 31 October 2013, no. 10132005.

[35]DRC 7 February 2014, no. 0214233.

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*player in writing to terminate the contract between them at the end of the season during its validity within fifteen days after last national official match for the club. In this case the player does not deserve any compensation for the rest of the period of the contract the player will receive his financial dues up to the end of the contract*".[36] As to this Article 10 of the contract, the Chamber ruled that the clause had a unilateral character and was only in favour of the club. The clause could not be accepted.

It can be concluded that, in accordance with the jurisprudence of the DRC, subject to a few exceptions, clauses that are unilateral and only in favour of one of the parties will most likely not be accepted by the DRC. In this context, the period of notice must be considered and analysed. These clauses have a unilateral character if they are only in favour of the club. In other words, if the right to terminate the contract is left exclusively to the discretion and the subjective criteria of the club, i.e. the stronger party in the employment relationship, the clause is generally not valid. However, if the clause provides a right for both parties to terminate the relevant contract we may conclude that the DRC has a different view and under circumstances will accept such a clause. It will also be important to establish that on unilateral termination of the contract by either party, the clause must at least grant compensation payable to the other party.

## 8.6 Just Cause

### *8.6.1 For the Club*

If the club wants to unilaterally terminate the contract with the player without any consequences, then *just cause* must exist. In a DRC decision of 2 November 2007, it confirms that a clause in which the club can unilaterally terminate the contract at any point in time and having to pay a compensation, is not valid. According to the DRC, this would create a disproportionate repartition of the rights of the parties to an employment agreement, to the strong detriment of the player.[37] In a DRC decision of 28 September 2007, the Chamber considered that the unilateral termination of the employment contract was clearly a disproportionate measure. In this context, the Chamber referred to its well-established jurisprudence and to the legal principle of proportionality, according to which every sanction following an action should be in proportion to the severity of the action itself. Furthermore, the Chamber recalled that the unilateral termination of an employment contract, being the most severe penalisation in contractual relationships, should be applied as *ultimo ratio* only. Consequently, and since milder sanctions such as a fine could

[36]DRC 27 February 2014, no. 02142790.

[37]DRC 2 November 2007, no. 21113. See also DRC 22 July 2004, no. 74653.

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have been imposed, the Chamber deemed in this case that the unilateral termination cannot be considered as being in conformity of the said legal principle of proportionality.[38] This was also in its DRC decision of 15 March 2013, in which the Chamber was eager to emphasize that only a breach or misconduct of a certain severity justifies the termination of a contract without prior warning.[39] Only when there are objective criteria which do not reasonably expect a continuation of the employment relationship between the parties, may a contract be terminated prematurely. Hence, if there are more lenient measures which can be imposed for an employer to ensure the employee's fulfilment of his contractual duties, such measures must be taken before terminating an employment contract. A premature termination of an employment contract can only be seen as an *ultima ratio*.

In the following paragraphs, various situations will be discussed and subjected to the criterion of *just cause*. After analysing the DRC jurisprudence, certain guidelines can be derived from the decisions on *just cause* for the club. Various situations will be assessed, such as *just cause* relating to the poor sporting performance of a player, the consequences if the player does not play the contractually agreed number of matches or goals scored, the unauthorised absence of the player during training or matches, any misbehaviour of a player, such as drugs and alcohol abuse. In the following paragraphs, reference will be made to the DRC decisions and certain relevant cases of the CAS (often in footnotes) where *just cause* is present. However, decisions will also be discussed in cases where *just cause* does *not* exist, to try to find a definition under which circumstances the existence of *just cause* is present and justifies a termination.

#### 8.6.1.1 Performance Player

The DRC deals with many cases in which the contract of the player is unilaterally terminated by the club due to the fact that the performances of the player do not match the club's expectations. However, according to the DRC, a player's lack of performance cannot constitute *just cause* for a club to terminate the contract.

In a case which came before the DRC on 26 November 2004, the Chamber decided that the clause in an employment contract which stated that the club may terminate the employment contract when the player's performance no longer meets the club's requirement, cannot be defined as *just cause* and is therefore not valid.[40] On 1 November 2003, the parties signed an employment contract valid from 1 November 2003 until 31 October 2005. In line with Article 2.8, the club was entitled to unilaterally terminate the contract after 15 days on written notification of contract termination for reasons of a disciplinary nature or linked to a decline in the player's performance which thus failed to meet the club's

[38]DRC 28 September 2007, no. 97748.

[39]DRC 15 March 2013, no. 03132558.

[40]DRC 26 November 2004, no. 114534.

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requirements. On 1 April 2004, the player was notified in writing of the premature termination by the club of his employment contract. According to the relevant document, the player's contract was terminated due to a decline in the player's performance and his inability to meet the club's performance requirements. The DRC finally decided no *just cause* existed.

The DRC is quite clear and emphasizes that, despite the contents of a contract, a player's lack of performance cannot and does not constitute *just cause* for a club to unilaterally terminate an employment contract. In a DRC decision of 1 June 2005, the DRC also decided that a player's lack of performance is no *just cause* for a club to unilaterally terminate an employment contract.[41] On 15 February 2004 the player and the club signed an employment contract valid for a period of 4½ months. In this case, the employment contract contained the provision that the club could unilaterally terminate its employment relationship with the player due to his alleged lack of performance. The relevant clause stipulated that the player must follow the training instructions and maintain the performance for which the club had signed him, otherwise this would be considered as a breach of the contract. Subsequently, on 27 February 2004 and based on the said provision, the club unilaterally terminated the contract. In his claim, the player denied the alleged lack of performance, but, above all, underlined that such a reason could not be considered as *just cause* for unilaterally terminating an employment contract. The DRC emphasized that, despite the contents of the contractual clause, a player's lack of performance cannot and does not constitute *just cause* for a club to unilaterally terminate an employment contract. The Chamber deemed that in view of its potestative nature, the contractual clause could not have any effect. After having vehemently rejected the validity of the clause, the DRC finally concluded that the club concerned had terminated its employment contract with the player without *just cause*.

In a case which came before the DRC on 23 June 2005 regarding a contractual dispute between the parties, the DRC decided that a player's lack of performance, lack of commitment and lack of productivity could not be considered as *just cause* for terminating an employment contract.[42] On 1 March 2003, the player and the club signed an employment contract valid until 1 March 2004. The contract was provided with the clause that the contract could be terminated at the initiative of the football club if it deemed the professional and sports skills of the footballer to be inadequate, or due to the footballer's non-fulfilment or inappropriate fulfilment of his obligations pursuant to this contract. The club asserted that an amicable settlement had been reached between the parties on 1 June 2003 regarding the termination of the employment contract. However, according to the club, the player refused to sign it at the last minute. Therefore, the club decided to terminate the contract based on the player's alleged lack of commitment and productivity. The

[41]DRC 28 July 2005, no. 75975.

[42]DRC 23 June 2005, no. 65657.

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club stated that the player's performance was extremely poor and that he made no effort to improve same during training. The DRC finally decided that a player's lack of performance cannot be considered as *just cause* for terminating the mentioned employment contract.

Not only is poor performance no reason for termination, but it is also no reason for a reduction of the salary. In the DRC decision of 11 March 2005, the DRC had to decide on a contractual dispute between a French player and a Turkish club.[43] The DRC decided that the insufficient and poor performance level was no valid reason to pay the player less salary. The DRC commented that the player's poor performance could have been addressed in several alternative ways, none of which include withholding the basic contractual duties towards the player. According to the Chamber, the non-fulfilment of such basic contractual obligations such as the payment of salary, may not be used as a tool for a club to sanction a player for disappointing performance levels.

A contractual clause which states that a player's lack of performance is *just cause* for a club to unilaterally terminate an employment contract has a potestative nature and is not valid. In a case which came before the DRC on 28 July 2005 regarding a contractual dispute between a player and a club, the DRC decided that a player's lack of performance was no *just cause* for a club to terminate an employment contract.[44] A contractual clause with a potestative nature is not valid. After having vehemently rejected the validity of the contractual clause, the DRC concluded that the club had terminated its contract with the player without *just cause*.

The imposition of fines on a player based on his low performance are also not valid. In its case of 27 April 2006, a player and club A signed an employment contract on 19 June 2002 valid for the season 2002/2003 expiring on 30 June 2003.[45] On 16 January 2004 the player communicated directly in writing to the club that it breached the employment contract due to non-payment of USD 32,750 as appearance fees. On 4 January 2005, the player lodged a formal complaint against club A at FIFA. Club A stated that it had paid all monies that it was obliged to pay in accordance with the contract and submitted a list of payments. Club A imposed fines on the player based on his low performance. The player asked the DRC to order club A to pay USD 42,750. Also in this case, the DRC outlined that low performance, in general, cannot be considered a reason for the club to reduce payments to the player, because it is unilaterally determined by the club and based on pure subjective criteria. The DRC concluded that the imposition of fines by the club cannot be accepted and deducted from monies payable to the player.

It was also decided by the DRC that the clause in the employment contract relating to the player's inability to fit into the team's playing system could not be

[43]DRC 11 March 2005, no. 3542.

[44]DRC 28 July 2005, no. 75975.

[45]DRC 27 April 2006, no. 46290.

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considered a valid reason to terminate the employment contract. This was decided as such, in the case which came before the DRC on 17 August 2006.[46] In this dispute, on 9 March 2005 the player and the club signed an employment contract valid from 9 March 2005 until 9 June 2005. With regard to the player's performance, Article 4 of the contract indicated that the player would be given a performance report according to the guidelines issued by the football association concerned after every game played by him. If his performance was rated poor, he would be given a written warning in the first instance and a final warning in the second instance, after which he would be subject to disciplinary action. On 20 June 2005, the player turned to FIFA maintaining that the club had erroneously terminated his contract after having only played one match. According to the notice of termination of the player's employment contract, the reason for terminating the contract was that the player did not fit in well to the team's playing system. The DRC concluded that this clause could not be considered a valid reason to terminate an employment contract. The DRC was of the opinion that the club had no *just cause* to terminate the employment contract.

Although it seems to be clear following the decisions of the DRC that a club cannot unilaterally terminate the contract due to the player's low performance, there are exceptions. For example, one should be aware that if a club does not qualify itself for a tournament or competition, the player's contract can automatically terminate. Following two decisions of the DRC in 2007, which will be discussed hereafter, there may be a risk that the collective low performance of an entire team, by not achieving a specific tournament or the failure of the team during a competition, will result in the termination of an individual employment contract.

In a case before the DRC of 2 November 2007, a player and a club concluded an employment contract valid from 18 July 2006 until 18 July 2007. The employment contract was provided with a clause that if the club's team did not qualify itself for the final tournament, the contract automatically ended at that premature time. The club's team did not qualify itself for the final tournament and stated that consequentially the employment contract had terminated on 1 October 2006, the date of the final match. The player did not agree, addressed FIFA and claimed salary over the period from 1 October 2006 until 18 July 2007. The DRC decided, without any further motivation, that the clause in the contract was valid and that the contract ended on 1 October 2006. The club was condemned to pay the salary over October 2007, but that it was not clear whether the club was obliged to pay the salary over October or not. For that part, the DRC gave the benefit of the doubt to the player.[47] According to this case, the collective performance of a team can result in the termination of an individual contract.

[46]DRC 17 August 2006, no. 86833. See also DRC 12 January 2006, no. 16695, and DRC 27 April 2006, no. 46290.

[47]DRC 2 November 2007, no. 117466.

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In another case the ending of a contract was also subject to the successful sportive developments in a tournament and competition. In this case of 22 June 2007, the player's contract was provided with a clause which stated that the contract was valid for the period from the time that the club played in the '*Copa de Verona 2005*', subsequently in the "*Copa Sudamerica 2005*", and in the "*Campeonatos Officiales de la L.F.P.B. 2005*", and then in all the immediately following championships. On 11 January 2006, the player concerned signed a new employment contract with club A. The player assured club A that he was a free agent and that he was not contractually bound to another club. Club B filed a claim at FIFA and stated that the player was still under contract with its club and that the player had to resume duties at his club. The DRC concluded that clause 4 of the contract was not clear and precise about the termination of the contract and therefore decided that after the official championships of 2005 the player was a free agent and free to sign at the club of his choice. According to the DRC clause 4 was against the principle of legal certainty because the parties did not know the exact ending of the contract. The clause was excessive and disproportionate and could mean that the player also had to play for club B during the whole season of 2006 and so forth. In January 2006 the player was therefore allowed to sign a new employment contract with club A.[48] This is also a very important decision, because, the clause should have been clearer and more precise about the ending of the contract. In relation to the DRC decision of 2 November 2007, there is a risk for a player that his contract can be terminated if it is provided with a clause in which the ending of the contract referred to, is the unsuccessful performance of the entire team during a competition or by missing a final tournament.

In the following DRC case of 23 February 2007, the Chamber came up with a remarkable decision.[49] On 1 January 2006 a player and club Y signed an employment contract valid from 1 January 2006 until 31 December 2006. On 12 July 2006 the player contacted FIFA arguing that, on 1 May 2006, club Y had informed him via telephone that it was no longer interested in his services and referred to the following clause in the contract which stated that club Y was obliged to terminate the contract by giving one month's compensation if the player does not show performance both in technique and physically. The DRC unanimously concluded that in accordance with the general legal principle of *pacta sunt servanda* club Y was entitled to prematurely terminate the employment contract by paying one month's salary to the player as compensation without being liable to pay any further compensation. This is quite a remarkable decision since the DRC is of the opinion that the clause that made reference to the right of the club to terminate the contract by paying one month's salary in case of termination due to technical shortcomings, was valid. This is contrary to its general line since a player's lack of performance cannot be considered as *just cause* for terminating the employment contract.

[48]DRC 22 June 2007, no. 67236.

[49]DRC 23 February 2007, no. 27958.

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Often there can be no doubt whether the clause is potestative and unacceptable. For example, in a case before the DRC of 4 April 2007, a player's contract was provided with a clause according to which the club had the right to unilaterally terminate the contract every month if the player did not show good technical and physical achievements in a few matches. The DRC had to decide on this clause and recalled, in accordance with its well-established jurisprudence, that a clause which gives the right to one party to unilaterally terminate the contract, without providing the counterparty with the same right, is considered problematic as it creates disequilibrium between the parties which has to be avoided. The aforementioned particularly applied to employment relationships as the employee risks personal dependence on the employer. The Chamber was of the opinion that the option of the unilateral termination of the contract is clearly only to the benefit of the club and could be exercised by them throughout the entire contract period. The DRC stated that the aforementioned unilateral termination right provided the club with an advantage and an excessive power over the player who had no benefit on his side. The Chamber therefore finally concluded that the clause concerned was unfair and inadmissible.[50]

In a DRC decision of 2 November 2007, the Chamber referred to its established jurisprudence according to which an alleged poor performance of a player could not justify a premature termination of an employment contract by a club, as the assessment of the performance of a player is a subjective perception which could not be measured on an objective scale, and therefore has to be considered as inadmissible grounds for a premature termination of an employment contract.[51]

Clauses relating to technical tests that unilaterally terminate the contract will not be considered valid. In the case before the DRC of 7 April 2011, the DRC had to decide on a clause relating to technical tests.[52] The Chamber acknowledged that the assessment of the performance of the player on the pitch is left entirely to the

[50]DRC 4 April 2007, no. 471208.

[51]DRC 2 November 2007, 1176975. See also DRC decision of 28 September 2007, no. 971239, DRC 10 August 2007, no. 87597, DRC 22 June 2007, no. 67176, and DRC 31 October 2008, no. 108728. In its decision of 31 October 2008, the Chamber referred to its well-established jurisprudence with regard to the poor performance of a player. The DRC underlined that a player's poor performance, in principle, does not constitute a valid reason to unilaterally terminate an employment contract. The DRC particularly underlined the general lack of objective criteria while assessing a player's performance and held that such reasoning could not serve as *just cause* for the club to terminate the contract with its player. See also DRC 10 January 2008, no. 181247. In this case the DRC explicitly referred to the fact that according to well-established jurisprudence of the DRC the poor performance of a player cannot be accepted as *just cause* for the termination of the contract by a club.

[52]DRC 7 April 2011, no. 411438.

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discretion of the club. In the light of such potestative character of the pertinent part of the contract clause, and in accordance with the Chamber's constant jurisprudence, the DRC wished to highlight that said clause was not acceptable and could not be validly invoked as a legal basis for the entry into force and/or a unilateral termination of an employment contract. The Chamber noted, in addition to being potestative, that said contractual condition clearly not in line with the RSTP, in accordance with which inter alia the validity of an employment contract between a player and a club cannot be made conditional upon the positive results of a medical examination, or technical tests for that matter. In fact, the player's prospective new club is required to undertake any necessary investigations, studies, tests and/or medical examination or to take any appropriate action before concluding the contract. In view of this, the Chamber concurred that the parties had entered into a valid contract on 5 October 2003.[53]

In a DRC decision of 29 November 2013, the Chamber pointed out that a party may terminate an employment contract for *just cause* at any time (cf. Article 14 of the RSTP).[54] The Chamber noted in this case, that the respondent had terminated the contract for "*negative situations*" (in accordance with clause 4.2 (c) of the contract), indicating the alleged poor performance and unprofessional behaviour of the claimant as reasons for premature termination of the employment contract. The Chamber referred to its well-established jurisprudence, according to which an alleged poor performance of a player cannot justify premature termination of an employment contract by a club, as the assessment of the performance of a player is a subjective perception which could not be measured on an objective scale and therefore, has to be considered as inadmissible grounds for premature termination of an employment contract. The Chamber took into account that such clause appears to be unilateral and only to the benefit of the respondent. Moreover, this criterion of "*negative situations*" could not be taken into account and left to the discretion of the respondent to unilaterally terminate the contract. In light of such a potestative character of the relevant contract clause, the members of the Chamber agreed that clause 4.2 (c) of the contract was not acceptable.

Fines can also not be imposed on a player due to bad sporting performances. In its case of 25 April 2013, the DRC concurred that the fines imposed on the claimant by the respondent shall not be taken into consideration, since (a) a fine based on bad sporting performances cannot be considered valid and (b) a fine based on the absence of a player after the player terminated the employment relationship

[53]Also in a case before CAS of 12 August 2010, the CAS decided that inadequate sporting performance cannot constitute *just cause* for a club to terminate the employment contract; CAS 2010/A/2049 *Al Nasr Sports Club v. F.M.*, award of 12 August 2010. There is no breach of duty to work if the player does not play at the level expected by the club. This longstanding CAS case law was recalled in the cases CAS 2009/A/1784, award of 27 August 2009, CAS 2009/A/1932, award of 19 March 2010, and CAS 2010/A/2049, award of 12 August 2010.

[54]DRC 29 November 2013, no. 11133071.

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cannot be justified.[55] Furthermore, from this case it follows that the imposition of a fine, or any other available financial sanction in general, shall not be used by clubs as a means to set off outstanding financial obligations towards players. Consequently, the Chamber decided to reject the respondent's argument.[56]

According to the above decisions and numerous following decisions of the Chamber, one can see that the DRC is generally of the opinion that a clause in an employment contract which states that the club may terminate the employment contract when the player's sporting performance no longer meets the club's requirement, cannot be defined as *just cause* and is not valid. The DRC deems that in view of its potestative nature, such contractual clauses cannot have any effect. However, we take note of the Chamber's decisions in which the collective low performance of an entire team, by not achieving a specific tournament or failure by the team during a competition, might result in a justified termination of an individual contract.

#### 8.6.1.2 Played Matches

In a DRC decision of 4 February 2005, a Chinese club and a football player from Serbia & Montenegro signed an employment contract valid from 8 March 2003 until 28 February 2006.[57] On 1 March 2004, the club unilaterally terminated the employment contract based on Article 8.1, from which it followed that:

> If the starting appearance is less than 70% out of the whole CFA League A games (only starting appearance or total appearance time per game no less than 45 min can be counted) by his own will, Party A has the right to terminate this agreement and transfer Party B to other football club, except for injuries which should be confirmed by the doctors or hospital appointed by Party A.

According to the club, the statistics of CFA League A games in 2003 showed that B, the player concerned, had a 64 % starting appearance rate and that he had

[55]DRC 25 April 2013, no. 04132387.

[56]See also DRC 28 March 2014, no. 03141211. In this case, the DRC pointed out that the player's level of fitness could not be a reason for the contract to become null and void. Also the CAS is quite clear in this respect. See CAS 2012/A/2844 *Gussev Vitali v. C.S. Fotbal Club Astra & RPFL*, award of 7 June 2013. Here it was stressed by the Sole Arbitrator that a player's low performance does not constitute a valid reason to unilaterally terminate an employment contract. See also DRC 17 August 2014, no. 08143257, in which case the DRC Judge highlighted that a fine of EUR 6000 was imposed on the player by the club by means of a decision of the club's board of directors rendered on 21 May 2012. The DRC concurred that, as opposed to the issue relating to outstanding payments on the basis of the agreement/contract, the execution of the disciplinary measure passed by the club, did not fall within the competence of the DRC Judge. Indeed, the execution of the internal decision relating to this fine is to be dealt with by the competent national authorities. Consequently, the DRC Judge agreed that the club's debt towards the player on the basis of the agreement/contract cannot be compensated with the aforementioned fine of EUR 6000. As a result, the DRC Judge rejected the club's respective argument.

[57]DRC 4 February 2005, no. 25247.

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only played in 18 of the 23 games of the 2003 season. Consequently, now that the player's starting appearance was less than 70 % of all CFA League A games in 2003, the club could rescind the player's contract. The player claimed that he had made appearances in more than 70 % of the games because Article 8.1 of the contract clearly mentions "*if starting appearance is less than 70 %… by his own will*". According to the player, this meant that any lack of appearance due to a decision made beyond the player's control, such as a coach's decision to keep him on the bench, should not be considered a non-appearance in terms of Article 8.1. The DRC concluded that the clause in question was not drafted clearly and therefore left room for interpretation. It was thus necessary, according to the Chamber, to understand what concrete meaning the parties intended this provision to have when the contract was drafted. The members of the DRC unanimously decided that this clause should be considered logical and thus acceptable. It was acknowledged that if Article 8.1 could not be invoked by the club at the end of every playing season, the incorporation of this clause in the contract would be pointless. The Chamber could not agree with the player's reasoning regarding the phrase "*by his own will*", which he meant as any non-appearances that may have occurred outside of his scope of influence, such as a decision by the coach not to field him, should not be taken into consideration when calculating his appearance percentage. On the one hand, the DRC was of the opinion, which was particularly objectionable, was that the clause offered ample opportunity for the club to misuse its position and unilaterally cancel the contract, simply by preventing the player from participating in over 70 % of the season's matches. Its questionability is increased by the fact that this clause did not offer reciprocal opportunities for a premature termination of the contract by the player. On the other hand, the DRC was of the opinion that it was also important to consider that Article 8.1 could not be invoked by the club at any arbitrary moment during the season, but was restricted to one point in time after completion of each full playing season. This provided the player with some legal certainty and stability. The DRC emphasized that the contents of Article 8.1 was explicitly accepted by both parties when they signed the contract. The DRC concluded that the clause was acceptable, despite its questionable aspects. The DRC decided in this case that the club's application of said Article 8.1 for the premature termination of the employment contract with the player, was not an unjust cancellation of the contract.

Following the above DRC decision on 4 February 2005, the Chamber was of the opinion that *just cause* existed for the club as a result of the fact that the player did not play enough. In my opinion, this decision is rather remarkable because the clause must be considered as potestative since it is the coach, as an extension of the club, who is entitled to put the player on the bench. The circumstance that the clause could not be invoked during the season should not be of such importance, that this clause was considered valid. However, the fact that this was restricted to a single point in time after completion of each full season was crucial for the DRC to determine that the player was provided with some legal certainty and stability. Furthermore, the DRC also emphasized that the contents of the relevant clause was explicitly accepted by both parties when they signed the contract. In my

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opinion, this should not prevail since this clause has an undisputedly invalid character. Moreover, on the one hand the DRC is of the opinion that a clause which states that the club is entitled to unilaterally terminate the contract because the player did not play enough matches is valid, while on the other hand, the Chamber is of the opinion that a similar clause is invalid if it is related to the salary, as was outlined in its decision of 27 April 2006.[58] The consequences of the termination are much heavier than the consequences of a salary reduction, but still the termination in this case was accepted and the salary reduction in the other case was not permitted.

In a decision of 28 September 2006, the Chamber decided that a termination clause referring to a number of played matches was not valid.[59] In this case, the DRC unanimously concluded that the application of the provision contained in Article 8 para 2 of the employment contract concerning the number of matches the player had to play was arbitrary, since it was up to the club to decide how many matches the player would have played. Moreover, the DRC deemed it appropriate to underline that football is played in a team, whereby success can only be achieved when the members of a team work together. The obligation imposed on a player in an employment contract that he has to obtain a certain number of goals within one season otherwise his employer may terminate the contract, is clearly in contrast to the spirit of the game and contradicts the fundamental aim of team play. Therefore, the Chamber finally concluded that the above clauses as stipulated in the employment contract, i.e. Article 8 para 2 and Article 5 para 7, were unacceptable and certainly did not contain valid reasons to terminate the contract.

In a DRC case of 28 March 2015, the player signed an employment contract which was valid from 1 March 2013 until 30 November 2014. According to the contract the club could reduce the player's salary depending on the amount of time the player participated in matches. The contract further stipulated that the club could unilaterally terminate the contract at the end of the 2013 season if the player participated in less than 80 % of the matches, without having to pay any compensation to the player. On 11 December 2013 the player lodged a claim before FIFA claiming a total amount of USD 589,960 for outstanding salary and legal expenses. The club rejected the player's claim, stating that it had the right to reduce the player's salary due to the time the player participated in matches. The club further stated that the contract had automatically ended because the player did not play in at least 80 % of the matches. The DRC came to the conclusion that the clauses regarding the reduction of the player's salary and the possible termination of the contract were unilateral and only to the benefit of the club. In this context and for the sake of completeness, the members of the Chamber wished to highlight that potestative clauses, i.e. clauses that contain obligations in which fulfilment are conditional upon an event that one party controls entirely, cannot be considered

[58]DRC 27 April 2006, no. 46290.

[59]DRC 28 September 2006, no. 96391.

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since they generally limit the rights of the other contractual party in an excessive manner and lead to an unjustified disadvantage of the latter towards the other. The DRC came to the conclusion that the club had breached its financial obligations towards the player and that he had *just cause* to terminate the contract.[60]

According to the above decisions, it is quite uncertain how the DRC would decide in future on the termination of a contract relating to a number of played matches. The DRC once decided that such a clause can be valid if the clause is restricted to a single point in time after completion of each full playing season and cannot be invoked during the season at any arbitrary moment. In view of the DRC, this could provide the player with some legal certainty and stability. In that respect an important factor to establish that such a clause is valid, is that such a clause is explicitly accepted by both parties when they signed the contract. However, we can derive from a more recent case, which is much fairer in my opinion, that such clause can be seen as arbitrary by the DRC since it is up to the club to decide how many matches the player will play. Termination clauses relating to a number of matches, at least bear a substantial risk of being assessed as invalid.

#### 8.6.1.3 Injury

The DRC is of the opinion that as a basic principle in labour law, if an employee is injured, this generally does not constitute *just cause* for the employer to unilaterally terminate the employment contract prematurely and therefore to cancel payment of the player's salary. Eventually, the DRC will conclude that a premature and unilateral termination of an employment contract by a club is not justified.

In a decision of 13 May 2005, the DRC concluded that the club had terminated the employment contract without *just cause*, because the player was injured.[61] On 9 January 2003, the player and the club signed an employment contract valid for the 2003 sporting season. The player claimed that he suffered a serious knee injury during a match in the club's service on 5 April 2003 and that, as a result of this injury, the club informed him, in front of his team colleagues, that it would not count on him any longer. The player subsequently left the club and returned to his country. In order to recover from his injury, the player underwent surgery to his knee on 5 May 2003. The player was now claiming the payment of his salary for the entire contract period. The club unilaterally terminated its relevant employment contract with the player based on Article 12b of the player's contract, according to which a club could release a player at any time prior to the expiry of the contract, without being responsible for any further payments. The DRC emphasized that this cannot and does not constitute *just cause* for a club to unilaterally terminate its employment contract with a player. The DRC concluded that the player's knee injury was in fact suffered in the club's service and therefore the

[60]DRC 28 March 2015, no. 0314132.

[61]DRC 13 May 2005, no. 55230.

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club was responsible for covering the costs, as well as the costs incurred during the rehabilitation process. As a result, the Chamber decided that the club had terminated the contract without *just cause*.

In a decision of 28 July 2005, a player and a club had signed an employment contract valid from 1 October 2003 until 31 May 2004.[62] In clause 12 of the contract it was stipulated that the player "*will receive free medical treatment according to the system applied in the country of the club Y*". On 30 October 2003, the player suffered a knee injury during training with his club's team. Three days later, the player travelled to his home country for surgery and medical treatment with the club's permission. The player wrote to the club asking whether he was required to return for the recovery period or whether he could remain in his home country, but received no response. The knee surgery cost USD 6620. The club informed the player that pursuant to clause 12 of the employment contract, it was only required to pay to him USD 4000, as this would be the cost of the same surgery in the club's country. The DRC finally decided that as a basic principle in labour law, if an employee is injured, this generally does not constitute *just cause* for the employer to terminate the employment contract prematurely and unilaterally and therefore to cancel payment of the player's salary. Eventually, the DRC concluded that the premature and unilateral termination of the employment contract by the club was not justified.

The DRC is of the opinion that if a termination is accepted as a termination with *just cause*, this would create a disproportionate repartition of the rights of the parties to an employment contract, to the detriment of the player. In a DRC decision of 12 January 2006, the club indicated that the reason for the premature termination of the employment contract was the player's injury.[63] The DRC stated that, according to its constant and persistent jurisprudence, the premature and unilateral termination of an employment contract by a club because of a player's injury, was always considered termination of the contract without *just cause*. The Chamber stated that the fact that a player was injured during the course of an employment contract was clearly no *just cause* for the club to prematurely and unilaterally terminate the employment contract. The DRC concluded that the employment contract between the player and the club was terminated without *just cause*.

It is the club's obligation to continue to pay the player's salary during his inability to work due to an injury caused during the fulfilment of his employment contract. In a DRC decision of 15 February 2008, the DRC referred to the general principle, according to which it falls within the club's obligations, to be responsible for its players in the case of injury caused in relation with the player's professional activity.[64] According to the Chamber, this principle is essential within the

[62]DRC 28 July 2005, no. 75570.

[63]DRC 12 January 2006, no. 16828.

[64]DRC 15 February 2008, no. 28580.

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scope of the provisions relating to the maintenance of contractual stability as contained in Article 13 et seq. of the RSTP. Any conclusion establishing the contrary would mean to prejudice the weaker contracting party, the employee. Following the DRC, it is particularly the club's obligation to continue to pay the salary of the player during his inability to work due to an injury caused during the fulfilment of his employment contract. Finally, the DRC decided that an injury cannot be considered a valid reason to unilaterally and prematurely terminate the employment contract.

If the parties state in the contract that the club will have the right to prematurely terminate the contract based on an injury or sporting performance of its counterparty, the DRC is of the opinion that this is not valid, since it is of a highly subjective nature, entailing that, de facto, it will then be left to the complete and utter discretion of the club whether it was willing to continue the contractual relationship or not. For example, in a case before the DRC of 10 December 2009, a player and a club provided the contract with a clause (Article 6.5) that stipulated that "*While determining during medical examination problem in Player's back which may cause future injury both party agree: If Player is not able to continue his career in relevant level or cannot play more than 2 months Club is entitled to cancel the contract*".[65] The DRC, however, deemed that clause 6.5 of the contract was ambiguous and that its application was arbitrary, since it lead to an unacceptable result based on non-objective criteria, which entitled the club to unilaterally terminate the contract if the player was not able to play for more than 2 months. The Chamber emphasized that the lack of objective criteria by the application of the relevant rule lead to an unjustified disadvantage of the player's financial rights. The Chamber was eager to emphasize that, according to its well-established jurisprudence, a player's injury does not constitute *just cause* in the sense of Article 14 of the RSTP for a club to terminate a contract. Moreover, the Chamber, referring to Article 18 para 4 of the RSTP, also emphasized that once the parties concluded an employment contract, they had the obligation to implement its terms and a club could not unilaterally question the validity of the contract during its course based on the physical state of a player and, *a fortiori*, based on a medical examination that a player would have to undergo after or even prior to the signature of the relevant agreement. For the assessment of the applicable amount of compensation, the Chamber referred to Article 17 para 1 of the RSTP, in particular to the non-exhaustive enumeration of the objective criteria which needs to be taken into account. The DRC referred to a case before the CAS and recalled that "*[…] a player has to make reasonable efforts to seek other employment possibilities and, in the event he finds a new club, the damage has to be reduced for the amount the player was able to earn elsewhere*." Particularly in view of the original duration of the contract, the player's contractual entitlements, his financial claim as well as the general obligation of the player to mitigate his damages, the DRC decided that not the entire

[65]DRC 10 December 2009, no. 129880.

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remaining value of the contract, but the amount of EUR 100,000 was to be considered reasonable.

In a decision before the DRC of 10 December 2009, the Chamber made a clear statement on the validity of clauses like the one at hand and deemed that the termination clause relating to an injury was ambiguous and that its application was arbitrary, since it lead to an unacceptable result based on non-objective criteria, which entitled the club to unilaterally terminate the contract if the player was not able to play for more than 2 months.[66] The Chamber emphasized that the lack of objective criteria by the application of the relevant rule lead to an unjustified disadvantage of the player's financial rights. The DRC considered that the possibility granted to the club to prematurely terminate the contract based on an injury or sporting performance of its counterparty, appeared to be of a highly subjective nature, entailing that, de facto, it was left to the complete and utter discretion of the club whether or not it was willing to continue the contractual relationship. In that context, the Chamber was eager to emphasize that, according to its well-established jurisprudence, and as a general rule, a player's injury does not constitute a *just cause* in the sense of Article 14 of the RSTP for a club to unilaterally terminate a contract. The Chamber gives a good summary of its reasons to declare these clauses invalid.

Sometimes the DRC makes reference to the contents of Article 18 para 4 of the RSTP, in which it states that the validity of a contract cannot be made subject to successful medical examination, as it did in the above case of 10 December 2009. For example, in its DRC decision of 28 March 2012, in that context, the Chamber was eager to emphasize that, according to the well-established jurisprudence of the DRC, and as a general rule, a player's injury does not constitute a *just cause* in the sense of Article 14 of the RSTP for a club to terminate an employment contract.[67] Moreover, the Chamber, referring to the contents of Article 18 para 4 of the RSTP, in this case also emphasized that once the parties have concluded an employment contract, they have the obligation towards each other to implement its terms and a club could not unilaterally question the validity of the contract during its course based on the physical condition of a player.

Also in the following decision, reference was made to Article 18 para 4 of the RSTP. In the DRC decision of 28 June 2013, the Chamber recalled that the respondent's primary position was that the contract, in fact, terminated on 1 May 2011, i.e. the day on which medical specialists, following examinations undertaken at the club's initiative, issued an advice that the player should end his professional career, which according to the club, means a permanent incapacity to play on a professional level.[68] The Chamber, though, agreed that the contract cannot automatically be considered terminated on the day that said medical advice was

[66]DRC 10 December 2009, no. 129881.

[67]DRC 28 March 2012, no. 3122702.

[68]DRC 28 June 2013, no. 06131988.

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issued, irrespective of any implications that such medical advice may have, and, consequently, the Chamber could not uphold the club's viewpoint. In view of the main reason as the basis of the termination of the contract, i.e. the player's medical condition, the Chamber wished to emphasize that on the basis of Article 18 para 4 of the RSTP and the Chamber's respective jurisprudence, a club wishing to employ a player has to exercise due diligence and carry out all relevant medical examination prior to entering into an employment contract with a player. The DRC noted that the player had been medically checked and cleared prior to signature of the contract by and between the parties. The Chamber also took into account that the player had rendered his services to the club for almost an entire season. The DRC further took into consideration that an injury or health condition of a player cannot be a valid reason to cease the payment of a player's remuneration and to terminate an employment contract.[69] Further, the Chamber took into account that the respondent had ceased the payment of the player's remuneration as early as April 2011. The DRC agreed that permanent incapacity, in itself, is no valid reason to unilaterally terminate an employment contract. However, such specific circumstance will have an effect on the amount of compensation, in the light of the bilateral character of an employment contract and the circumstance that in the event of permanent incapacity to play, a player is no longer in the position to render his services to the club. The DRC finally rejected the respondent's counterclaim and decided that the club unilaterally terminated the contract without *just cause*.[70]

As will be discussed in the next chapter and despite the fact that an injury is no reason for a valid termination by the club, it must be taken into account that permanent incapacity can have an effect on the amount of compensation to be paid by the club to the player due the injury. For example, in its case of the DRC of 7 February 2014, the DRC highlighted that although permanent incapacity in itself cannot be considered as a valid reason to unilaterally terminate an employment contract, such specific circumstance will however have an effect on the amount of compensation, in the light of the bilateral character of an employment contract and the circumstance that in the event of permanent incapacity to play, a player is no longer in the position to render his services to the club.[71] The DRC decided that the respondent was not liable to pay any outstanding remuneration to the claimant. The DRC partially accepted the claimant's claim. Taking into consideration Article 17 paragraph of the RSTP, the DRC decided that the claimant was entitled to receive compensation for the termination of the contract without *just cause* on the

[69]See also TAS 2015/A/3871 *Sergio Sebastián Ariosa Moreira c. Club Olimpia* and TAS 2015/A/3882 *Club Olimpia c. Sergio Sebastián Ariosa Moreira*, award of 29 July 2015. See also DRC 28 March 2014, no. 03141211. In this case, the DRC pointed out that the player's level of fitness could not be a reason for the contract to become null and void.

[70]In its decision of 31 October 2013, the Chamber reminded the parties of its well-established jurisprudence, according to which an injury or health condition of a player cannot be considered as a valid reason to cease payment of a player's remuneration and to unilaterally terminate an employment contract. See DRC 31 October 2013, no. 10132005.

[71]DRC 7 February 2014, no. 02141221.

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basis of the contract. In this regard, the permanent incapacity to play professional football was taken into consideration in the determination of the compensation.

It is usual that, according to the well-established and constant jurisprudence of the DRC, the premature and unilateral termination of an employment contract by a club because of an injury, must be considered as a termination of the contract without *just cause*. The DRC is of the firm opinion that as a basic principle in labour law, if an employee is injured, in principle this does not constitute a *just cause* for terminating the employment contract prematurely and unilaterally and therefore to cancel payment of the player's salary. Over the years, the DRC consistently refers to its well-established jurisprudence in this respect and repeatedly emphasizes that the lack of objective criteria by the application of the relevant rule leads to an unjustified disadvantage of the player's financial rights. The DRC considers that the possibility granted to the club to prematurely terminate the contract based on an injury or sporting performance of its counterparty appears to be of a highly subjective nature. It is left to the complete and utter discretion of the club whether or not it was willing to continue the contractual relationship. Therefore, the DRC is eager to emphasize that, according to its well-established jurisprudence, and as a general rule, a player's injury does not constitute a *just cause* in the sense of Article 14 of the RSTP for a club to terminate a contract. Although permanent incapacity in itself cannot be considered as a valid reason to terminate an employment contract, such specific circumstance might however have an effect on the amount of compensation, in the light of the bilateral character of an employment contract and the circumstance that in the event of permanent incapacity to play, a player is no longer in the position to render his services to the club.

#### 8.6.1.4 Absence

The DRC is of the opinion that the absence of a player can constitute *just cause* for a club to unilaterally terminate the employment contract. However, it must concern a lengthy absence of a player from his club without authorisation and without other *just cause*. It is of vital importance that the unauthorised absence must be demonstrated by the club. In that event, the DRC jurisprudence shows that absence can be considered as an unjustified breach of the employment contract by the player. Analysing the jurisprudence leads to the conclusion that the DRC is quite reluctant to establish a valid *just cause* to terminate the contract by the club.

In general, it is important to establish whether or not any official matches were scheduled during the absence of the player. In a case of 10 June 2004, the DRC noted that during the one month when the player stayed away from his employer club, no official matches were scheduled in the national league of his national football federation.[72] Therefore, the absence of the player did not pose a serious

[72]DRC 10 June 2004, no. 6400276.

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problem to the club. As a result, the DRC concluded that the restriction imposed on the player not to participate in any official football matches for 4 months was not an appropriate sanction. The Chamber stated that it would have been more appropriate in this case if the player had been fined. Therefore, the restriction should be lifted.

In a DRC decision of 28 July 2005, the DRC decided that the player's two-day absence from training with the club clearly did not constitute *just cause* for the club to prematurely and unilaterally terminate the employment contract in question.[73] On 14 October 2003, a player informed FIFA that his club had terminated his employment contract unilaterally on 26 March 2003 due to an injury, without proving that an injury was the reason of the contract termination. The player informed FIFA that the club had not paid his salary since January 2003. The club stated that the employment contract was terminated on 27 March 2003 due to the player's absence without permission from the club's training on 25 and 26 March 2003. The DRC concluded that if an employee is absent for a short period of time from work, the employer should first contact him to remind him of his labour obligations. In general, an absence lasting a few days does not constitute *just cause* for the employer to immediately terminate the employment contract, prematurely and unilaterally. The DRC stated that the player's two-day absence from training with the club clearly did not constitute *just cause* for the club to terminate the employment contract unilaterally. The DRC outlined that the club would have been entitled to take sanctions against the player, such as a fine, for not appearing at the training.

In a case of 12 January 2006, the DRC decided on the absence of the player from training. The DRC had to decide whether the player's absence for a week may be considered *just cause* for the club to terminate the employment contract unilaterally.[74] The DRC considered whether absence from the team's training can generally constitute *just cause* for a club to unilaterally terminate the employment contract. The DRC underlined that a player's absence from the team's training sessions for such a short period as one week cannot and does not constitute *just cause* for a club to unilaterally terminate an employment contract, as happened in the present case. The DRC finally concluded in this specific matter that the club concerned had unilaterally terminated the employment contract without *just cause*.

Sometimes a player justifies the unauthorised absence because of family reasons. However, in a DRC decision of 23 March 2006, the DRC declared that family reasons, as in this case being the ill health of the player's mother, cannot be considered as *just cause* for a player to leave his club without being given permission.[75]

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[73]DRC 28 July 2005, no. 75368. See also DRC 22 November 2002, no. 300702. This is the only decision which was published on the official website of the FIFA in 2002. For unknown reasons FIFA removed the decision from the list. See also DRC 10 June 2004, no. 6400276.

[74]DRC 12 January 2006, no. 16828.

[75]DRC 23 March 2006, no. 36460.

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In a DRC decision of 23 March 2006, the DRC was of the opinion that the absence of the player concerned was illegitimate for three of the 4 months of absence. Therefore, the DRC decided that the absence concerned should be considered a lengthy absence of unjustified absence. As a side-note, in this decision, the Chamber also noted the fact that it was undisputed that the club declared on its website that the player had left the club for family reasons. The DRC, however, not only took note of club's position that such statement was made only to preserve a good image of the player, but that it did not reflect the reality. The DRC concluded that the reason of the player's absence had not been established. Moreover, even presuming that family reasons were the basis of the player's absence, the club did not state on its website that the player's absence was authorised.

With regard to the suspension of payment of salary during a player's absence, the Chamber reiterated that a long-lasting absence of a player from his club without authorisation and without other *just cause* is a justifying reason for the suspension of payment of the player's salary and, moreover, is to be considered as an unjustified breach of the employment contract by the player.[76] In a similar context, in its decision of 18 December 2012, the Chamber recalled that the player had not been able to provide evidence demonstrating that he was authorised by the club to be absent from 7 July 2008 until 19 September 2008. Accordingly, the Chamber took into consideration that the club may have had valid reasons not to proceed with payment of the player's remuneration during the said period of time.[77]

The DRC underlined in a decision of 28 September 2006, that as a general rule, lengthy absence of a player from his club without authorisation and without other *just cause* should be considered as an unjustified breach of the employment contract by the player.[78] The club stated that all players in the team had gone on holiday at the end of October 2005 but this player had failed to return. This was the reason why it had wanted to terminate the employment contract with the player. The club informed him accordingly via fax without receiving any feedback from the player. According to the employment contract, all players must return on time after their holidays. Because the player had not returned after the holiday and had already trained on a trial basis with other clubs, the club was of the opinion that the player had breached the employment contract. The DRC decided in this case that a lengthy absence of a player from his club without authorisation and without *just cause*, without making reference to an exact period, is an unjustified breach of the employment contract by the player.

Sometimes the DRC is more precise with regard to the exact period during which the player is absent. In its decision of 14 September 2007, the Chamber decided on the absence of a player during his contractual period. The DRC recalled that the reason that the employment contract had to be considered as

[76]DRC 23 March 2006, no. 36460.

[77]DRC 18 December 2012, no. 12121204.

[78]DRC 28 September 2006, no. 96391.

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prematurely terminated was the unauthorised absence of the player from work during a period of more than one month. The Chamber pointed out that, in spite of the circumstances that the player may have had legitimate reasons to leave the club, i.e. for medical treatment the player should have obtained the club's written consent to do so and he should have resumed duty with the club immediately after his recovery.[79]

In the context of absent players, the FIFA Commentary speaks of *just cause* for the club if a player displays an uncooperative attitude ever since his arrival at the club and sums up several unacceptable situations. The player does not follow the directives given by the coach; The player regularly argues with his team mates and often fights with them. The player leaves the club and does not appear for training in the following days. After two weeks of unjustified absence from training, the club decided to terminate the contract. FIFA is of the opinion that this can be *just cause* for the club to unilaterally terminate the contract without any consequences.[80]

If a club authorises a player to look for a new club, the DRC will be of the opinion that if the player does not find a new club the contract will remain valid and the player must return without any further or additional request from the club once the registration period comes to an end. This can be inferred from the DRC decision of 26 January 2011. The DRC concurred that the club had authorised the player to look for a new club, *e contrario* the Chamber was of the opinion that if the player had not found a new club the contract remains legally valid and the player should have returned without any further or additional request from the club once the registration period had ended, i.e. by the end of August 2009.[81]

In a DRC decision of 12 December 2013, the Chamber observed that in spite of having been temporarily authorised to search for new employment, the respondent player has failed to resume his activities with the claimant on three different occasions, i.e. on 5 January 2011 after the end of his holidays, on 4 February 2011 after the player requested his return, and on 16 February 2011 after the expiry of the authorisation dated 8 February 2011.[82] The DRC pointed out that the player had failed to submit any kind of evidence in relation to his exclusion from training and only contacted the club in connection to this and alleged outstanding remuneration on 15 March 2011. The Chamber finally decided that the player was to be held responsible for breach of contract without *just cause* and that, consequently, the contract should be considered as terminated by the respondent in March 2011.

In general, a 5-day absence of a player will not be sufficient to terminate the contract. In a DRC decision of 28 June 2013, the DRC wished to emphasize that a 5-day absence of a player, even if duly corroborated with relevant documentation,

[79]DRC 14 September 2007, no. 97280.

[80]FIFA Commentary, explanation Article 14, p. 40.

[81]DRC 26 January 2011, no. 1111740.

[82]DRC 12 December 2013, no. 12131160.

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cannot be considered *just cause* to terminate an employment contract, particularly without any previous warning.[83] From this case it can not only be derived that a 5-day absence is insufficient, but also that it is advisable to warn the player (in writing) before terminating an employment contract due to an unauthorised absence. Further, an invalid absence of several days, can also be considered as a factor to reduce the compensation that needs to be paid by the club.[84]

In general, also a period of 10-day absence of a player will not be sufficient to terminate the contract. For example, in its DRC decision of 27 February 2014, the DRC concluded that even a 10-day absence of a player cannot be considered *just cause* to terminate a contract, particularly without any previous warning.[85] Again, prior warning is relevant (and therefore strongly advisable) in this regard.

If a player does not join the club after the end of his holidays, this can be *just cause* for the club. In its case of 28 March 2014, the DRC concluded that the player had unilaterally terminated the contract by not joining the club after the end of his holidays. In this respect, the DRC considered the fact that the club sent the player to train with the reserve team or youth team is not enough reason to justify the unilateral termination of the contract. In particular, the DRC considered that, even if the contract establishes that the player is a professional, the club can still decide whether the player needs to train with the reserve team, if necessary for his preparation. Moreover, the club demonstrated that the player participated in trainings with the reserve team during the contract prior to termination.[86]

As regards the absence of a player, it is also vital to take into account that the club must warn the player and provide proof during proceedings that it had actually informed the player about the start of the new season. In a DRC case of 28 March 2014, the Chamber decided that there was no *just cause* for the club to terminate the contract, especially since the club did not warn the player, nor did it prove that it had informed the player about the start of the new season. The DRC finally decided that the club was liable for the premature termination of the contract.[87]

The DRC is of the opinion that the absence of a player can generally constitute *just cause* for a club to unilaterally terminate the employment contract. The period of two weeks in combination with regular misbehaviour (see FIFA Commentary) or just one month of unauthorised absence (jurisprudence) can be considered as a

[83]DRC 28 June 2013, no. 06131988.

[84]DRC 23 February 2007, no. 27835.

[85]DRC 27 February 2014, no. 02141999.

[86]DRC 28 March 2014, no. 0314734.

[87]DRC 28 March 2015, no. 03143127. In the DRC decision of 28 August 2014, no. 08143234, the Chamber decided that the club had not been able to prove that it had indeed requested the return of the player to continue their relationship. In view of the considerable period of non-communication between the parties, it could be concluded that both parties, in fact, no longer had any interest in continuing the employment contract.

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valid *just cause* for the club. However, the DRC underlines that a player's absence from the team's training sessions for a short(er) period, such as a few days, a week or even 10 days, cannot and does not constitute *just cause* for a club to unilaterally terminate an employment contract. In that respect it is relevant whether official matches were scheduled during the period of absence. If there are no official matches scheduled during the period of absence, the absence of the player could possibly not be considered as a serious problem to the club. Aside from this, family reasons will not be considered as valid reasons to be absent. In the context of more lenient measures to be taken by an employer to ensure the employee's fulfilment of his contractual duties, whereas such measures must be taken before terminating an employment contract, it is also important that the employer always contacts an absent player to remind him of his labour obligations, for example, a written warning. This is fair, because a premature termination of an employment contract must only be considered as an *ultima ratio*. In order to avoid misunderstandings, it must be noted from the jurisprudence that a long-lasting absence of a player from his club without authorisation and without other *just cause* is a justifying reason for the suspension of payment of the player's salary.

As a final note, with regard to the behaviour of the player and his illegal absence, a few days' absence does not constitute a valid reason for the termination of a contract by the club. However, the DRC jurisprudence does point out that a few days of unauthorised absence of a player can affect the amount of compensation and can result in a reduction.[88]

#### 8.6.1.5 Misbehaviour

##### 8.6.1.5.1 General

The DRC jurisprudence also shows that *just cause* can exist in case of misbehaviour by a player, though it can be inferred that same is related to strict prerequisites. The question whether or not *just cause* exists will be subject to the specific circumstances of the case. From the DRC jurisprudence it can be derived that several elements will be taken into account by the Chamber.

In a decision of 2 November 2007, the DRC decided that a player's one-time assault of a team mate, notwithstanding if same is verbally or physically, could not constitute a valid reason for the termination of a labour relationship.[89] In other words, the Chamber decided in this case that this does not construe *just cause*.

Terminating the contract due to the fact that a player had led a woman to his private room during the club training period, will also not be accepted by the DRC. In a DRC decision of 19 February 2008, a player and a club entered into an

[88]DRC 23 February 2007, no. 27835.

[89]DRC 2 November 2007, 2117.

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employment contract from 1 March 2008 to 30 October 2008.[90] The contract stated that the club had to pay the player a monthly salary of USD 5000. The player's contract stated, among other things, that the contract may be cancelled if the player seriously violates regulations or match disciplines of the club. On 3 August 2008 the club "fired" the player due to the fact that he led a woman to his private room during the club training period. The player was of the opinion that the club was not entitled to terminate the contract legitimately and therefore asked for payment of USD 5000 for the outstanding salary of July 2008 as well as compensation amounting of USD 17,550 for the remainder of the contract. The player also held that the club had already dealt with the incident by internally suspending the player for two league games and ordered him to train with the second team for two weeks. The DRC had to deliberate whether the player's action of leading the woman into his private room during the training camp of his team can be considered as *just cause* for the club to prematurely terminate the employment relationship. The Chamber pointed out that a player's one-time action of bringing a woman into his private room while being in a training camp with his team, could not constitute a valid reason for the termination of a labour relationship. Under such circumstances the player committing such disciplinary infractions would also have to be warned beforehand of the possible consequences of his actions if they were repeated. The DRC also noted that, by being suspended from participating in the club's first team's training and matches, the player had already been sanctioned for not duly complying with his contractual obligations. The DRC stated that following the legal principle "*ne bis in idem*", in accordance with which no individual shall be sanctioned twice for the same cause of action, the player could not, at a later stage, be sanctioned a second time by the respondent club by being dismissed.

Following the FIFA Commentary, one refers to *just cause* for the club if a player displays an uncooperative attitude, the player does not follow the directives given by the coach, he regularly argues with his team-mates and often fights with them. In combination with the fact that the player leaves the club and does not appear for training in two weeks of unjustified absence, FIFA is of the opinion that the club is entitled to terminate the contract without any consequences and that *just cause* exists.[91]

Take into consideration that a player has a duty of loyalty that is infringed if he adopts an improper behaviour, for instance if this behaviour can qualify as racist. In a case before the CAS of 12 August 2010, the CAS recalled that if the club intended to terminate the employment contract for such reason, it had to do so within the shortest space of time after the incident had occurred.[92] Furthermore,

[90]DRC 19 February 2008, no. 29708.

[91]FIFA Commentary, explanation Article 14, p. 40.

[92]CAS 2010/A/2049 *Al Nasr Sports Club v. F. M.*, award of 12 August 2010.

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the alleged improper behaviour had to be of a certain seriousness. In this case, it was not even sure that the behaviour of the player could qualify as being racist, also since the national association had only sanctioned him with a rather routine sanction. In addition, the club had not reacted until 4 months after the incident had occurred. The Sole Arbitrator therefore came to the conclusion that, under these circumstances, the club had no *just cause* for terminating the employment contract.

In a DRC decision of 8 June 2007, the Chamber decided and reiterated that the player's disloyal attitude and the resultant loss of trust and cooperation, the player's repeated rejections to terminate the contract by mutual consent and the player's alleged unsatisfactory sporting performance, could not constitute a breach of contract that has reached such a level that the party suffering the breach, i.e. the club in this case, would be entitled to terminate the contract unilaterally.[93]

As mentioned, repeated incidents must have taken place and in each respect the player must also be warned beforehand. In a DRC decision of 2 November 2007, the DRC had to decide whether a player's assault against a team mate on one occasion is *just cause* for the club to prematurely terminate the contract.[94] The DRC decided this was not the case, and stated that the party should only have the right to terminate the contractual relationship as *ultima ratio*, i.e. in case of repeated incidents of such kind. The DRC decided that a player would also have to be warned beforehand of the eventual consequences of his actions if they were to be repeated.

There must be objective criteria which do not reasonably permit to expect a continuation of the employment relationship between the parties. In a DRC decision of 17 May 2013, the player found that the club had not submitted any documentary evidence demonstrating the player's alleged misconduct referred to by the club.[95] Furthermore, the DRC Judge highlighted that, prior to having terminated the employment contract, the club had not warned the player of any misconduct. The DRC Judge inevitably came to the conclusion that the argument of the club that the termination of the contract was justified by the player's misconduct and disrespect of his contractual obligations, was to be rejected. The DRC Judge was eager to emphasize that only a breach or misconduct of a certain severity justifies the termination of a contract without prior warning. Only when there are objective criteria which do not reasonably permit to expect a continuation of the employment relationship between the parties, may a contract be terminated prematurely. According to the DRC, if there are more lenient measures which can be taken for an employer to ensure the employee's fulfilment of his contractual duties, such measures must be taken before terminating an employment contract. A premature termination of an employment contract can only be seen as an *ultima ratio*.

[93]DRC 8 June 2007, no. 67675.

[94]DRC 2 November 2007, no. 2117.

[95]DRC 17 May 2013, no. 05132419.

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Neither can missing two training sessions justify the unilateral termination of a contract. In the case of 27 February 2013, the Chamber noted that there was no evidence submitted by the club that the player was indeed supposed to return to country C on 5 July 2010.[96] However, regardless of the question whether the player was supposed to return to country C to partake in the two training sessions on 5 and 6 July 2010, the Chamber was of the opinion that the club, did not have *just cause* to prematurely terminate the employment contract with the player, since such breach could not legitimately be considered as being severe enough to justify the termination of the contract, and that there could have been more lenient measures taken (e.g. a suspension or a fine) to sanction the absence of the player concerned for only two training sessions.

It is of utmost importance that the existence of documentary evidence with regard to any misconduct is present in order to establish *just cause* for a club. For example, in its DRC decision of 10 February 2015, the DRC Judge had to deliberate whether the player's alleged serious misconduct, which was invoked by the club in its defence, could be considered as *just cause* for the club to prematurely terminate the employment relationship.[97] The DRC Judge deemed it necessary to highlight that the club did not submit any documentary evidence with regard to the player's alleged misconduct and therefore the actual existence thereof could neither be established. Notwithstanding the aforegoing, the DRC Judge also pointed out that the player's alleged misconduct, i.e. his unprofessional behaviour during a first division league match on 12 January 2013, could not per se constitute a valid reason for the termination of an employment contract. Only a breach or misconduct which is of a certain severity would justify the termination of a contract. In other words, only when there are objective criteria which do not reasonably permit to expect a continuation of the employment relationship between the parties, may a contract be terminated prematurely. Hence, if there are more lenient measures which can be taken for an employer to ensure the employee's fulfilment of his contractual duties, such measures must be taken before terminating an employment contract. A premature termination of an employment contract can only ever be an *ultima ratio* measure. The DRC Judge was of the opinion that the objective circumstances at the time did not provide the club with *just cause* to prematurely terminate the contract concluded with the player, since there would have been more lenient and proportionate measures to be taken, in order to sanction the alleged misconduct, which was apparently the cause of the termination of the employment relationship by the club. The DRC Judge finally decided that there was no *just cause* to unilaterally terminate the employment relationship between the player and the club.

Based on the above cases, we note that *just cause* relating to misbehaviour by a player is generally related to strict prerequisites to establish its validity and will not be accepted easily by the Chamber. The question whether *just cause* actually

[96]DRC 27 February 2013, no. 02132606.

[97]DRC 10 February 2015, no. 02151030.

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exists for a club or not, will depend on the specific circumstances of the case. However, there are some elements to take into account. For example, we note that *one-time* misbehaviour, such as a player's one-time assault of a team mate or a player leading a woman into the hotel room once during a training camp, will in principle not automatically establish a valid reason for unilateral termination. Furthermore, we note that a player must be warned beforehand of the eventual consequences of his actions if these were to be repeated. Another important element is whether a player has already been sanctioned for not complying with his contractual obligations, such as a suspension from participating in the club's first team's training and matches. The "*ne bis in idem*" principle, in accordance with which no individual shall be sanctioned twice for the same cause of action, generally forbids another punishment, such as a termination, as this would be another sanction for the same misbehaviour. Finally, in order to increase the chance of a valid *just cause*, it is to be recommended that a club to take immediate action after the observation of potential misbehaviour.

#### 8.6.1.5.2 Drug Abuse

##### 8.6.1.5.2.1 *DRC Jurisprudence*

There are relatively few cases before the DRC regarding drugs or doping issues. From the jurisprudence of the DRC we derive that a positive result of a doping test can constitute *just cause* for a club to unilaterally terminate a contract. In this context, we assume that the use of drugs, such as cocaine, will be established as a valid reason to unilaterally terminate the contract with the player.[98]

In a decision of 21 February 2006, the DRC decided that a positive result of the doping test could have constituted *just cause* for the club to unilaterally terminate the employment contract.[99] On 13 January 2003, a player and a club signed an employment contract valid until 30 June 2006. During the 2003/04 season, the player was transferred on a loan basis to another club. On 27 March 2004, the player underwent a doping test and, according to the report issued afterwards, the player tested positive for banned substances. Towards the end of April 2004, the player and the club prematurely terminated their employment relationship, which had nothing to do with the positive result of the test. On 18 June 2004, the relevant body of the football federation decided to suspend the player in question for a period of one year for doping. The FIFA Disciplinary Committee extended the aforementioned suspension of the player in question on a worldwide basis. On 25 September 2004, the club informed the player in writing that it considered the cancellation agreement to be null and void, because they found out about the player's 12-month suspension. The club was of the opinion that the player had obtained the

[98]See also Duval 2015.

[99]DRC 21 February 2006, no. 26439.

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agreement in a fraudulent manner. The club pointed out that if it had been informed of the player's suspension, it would never have concluded the cancellation agreement. In that case, it would rather have terminated the player's contract with *just cause*. The club informed the player of the termination of his contract as a consequence of his use of banned substances and reiterated that the cancellation agreement was null and void since it must be considered as an agreement based on a fraudulent action on the part of the player. The DRC agreed with the club that the positive result of the doping test could have constituted *just cause* for the club to unilaterally terminate the employment contract. The DRC decided finally that the club could not be held liable for the execution of the cancellation agreement into which it had entered with the player.

In a DRC decision of 12 January 2007, the club concerned stated in its response that it had lost interest in the player after having been informed that the player was disqualified by the Control and Disciplinary Committee of the Football Federation of club C due to use of drugs.[100] The DRC decided that although in jurisdictional practice, a positive doping test of a player generally, and always under consideration of and without prejudice to the specific circumstances of a concrete case, is considered to be *just cause* for a club to terminate an employment contract, it is to be emphasized that an employment contract is not automatically annulled due to a positive doping test, but as a general rule, an explicit termination is needed so too in such circumstances. Based on this case, it must be underlined that it is very important for clubs that a formal termination needs to take place in case of a positive doping test.

In a DRC decision of 7 February 2014, in December 2009, a test performed on the occasion of a match, identified the possible use of prohibited substances by the player.[101] On 31 December 2009, the player was provisionally suspended until further notice. On 3 January 2010 the player participated in a hearing at NADO. On 10 January 2010, the player requested permission to travel to country M, undergo additional tests and return within one week. On or about 10 February 2010, the player returned to the club. On 16 February 2010, the player was found guilty of doping. On 17 February 2010, the player once again requested permission to undergo additional medical tests and return within 21 days. On 2 March 2010, the 2-year suspension was extended worldwide by FIFA. On 1 September 2010, NADO cancelled his suspension. The player did not return to the club after 17 February 2010. On 26 September 2010 club R from country M requested an ITC for the player. Club E was of the opinion that the player had breached and terminated the contract without *just cause* on 17 February 2010 and therefore lodged a claim before FIFA on 3 January 2011. The club claimed the amount of USD 1690,000 from the player based on a clause in the contract that stipulated: "*Should the second party [the player] terminate this contract while effective, he*

[100]DRC 12 January 2007, no. 17595.

[101]DRC 7 February 2014, no. 0214233.

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*shall pay to the first party the remaining contract value in full from date of termination*". The player rejected the club's claim and lodged a claim against the club, claiming USD 30,000 for a breach of contract because the club did not support him in proving his innocence and because the club failed to pay his salary since the time that NADO had suspended him. The DRC decided that the contract was indeed to be considered automatically terminated at the end of the season 2009/10. Thus, the DRC decided that the period between the breach of contract without *just cause* by the player and the automatic termination of the contract at the end of season 2009/2010 was to be taken into account for the calculation of the amount of compensation due to the club in the present dispute. In addition, the Chamber was of the opinion that attenuating circumstances are applicable in order to reduce the amount of compensation, like the fact that the club did not suffer any financial loss during the player's absence, the player's innocence was confirmed and that payment of the player's remuneration was suspended from January 2010, even though the decision of 16 February 2010 had not yet become final and binding. The DRC therefore decided to reduce the compensation for breach of contract by one-third and established that the player had to pay a compensation for breach of contract of USD 60,000. Club R, in line with Article 17 para 2 of the RSTP, was held severally and jointly liable.

#### 8.6.1.5.2.2 *Mutu Cases*

On 12 August 2003, the Romanian player Adrian Mutu was transferred from the Italian club AC Parma to Chelsea Football Club. The player entered into a five year contract with Chelsea which was to expire on 30 June 2008. For the release of the player, Chelsea paid EUR 22,500,000 to Parma. Between May and September 2004, Mutu took cocaine on at least four or five occasions. A drug test held by the FA, was declared positive for cocaine on 11 October 2004. In a letter dated 28 October 2004, Chelsea informed Mutu that his contract was terminated for gross misconduct. On 4 November 2004, the FA Disciplinary Commission confirmed the positive result of the drug test and suspended Mutu until 18 May 2005. The FA Disciplinary Commission imposed a GBP 20,000 fine on the player. On 12 November 2004, FIFA confirmed the FA Disciplinary Commission's decision and adopted the suspension to apply worldwide. Mutu appealed against the decision before the CAS.

The CAS considered that the player had unilaterally breached the contract by taking cocaine and that Chelsea was therefore permitted to terminate the contract unilaterally on the basis of Article 21 of the RSTP, 2001 edition.[102] The CAS decided that there was serious misconduct by the player when using substances forbidden in sport and for that reason, the club may terminate the employment contract unilaterally and the player was liable to pay damages and be imposed with sporting sanctions.

[102]CAS 2005/A/876 *Adrian Mutu v. Chelsea Football Club*, award of 15 December 2005.

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In January 2005, Mutu moved to Italy. Firstly, he was registered with the Italian club AS Livorno, but played with Juventus FC, as soon as the suspension ceased to have effect. Then in July 2006 Mutu was transferred to AC Fiorentina. On the basis of the decision of the CAS, Chelsea addressed the DRC to claim compensation from Mutu.[103] The DRC however decided that it was not competent to hear the case as another deciding body, i.e. the Appeal Committee, had already decided on the triggering elements and that it could not therefore partially decide only on the compensation to be paid by Mutu. This dispute should also be decided by the Appeal Committee. The DRC decided that this matter should be considered as having been submitted to FIFA on 4 February 2005 and the DRC subsequently concluded that the previous Procedural Rules (2001 edition) on matters pending before the decision-making bodies of FIFA, applied to the matter at hand. Once the applicable regulations in respect of the proceedings were established, the DRC focussed on the contents of the club's submissions dated 4 February 2005 and referred to as "*Application for an award of compensation*". In any case, the Chamber, by its own nature, was unable to consider any partial claim such as this claim, which was the result of an existing decision passed by a different deciding body.

In other words, the DRC stated it could call on an enduring jurisdictional tradition in international football-related disputes and could not confine itself to granting the exequatur to a decision passed by a different (national) body. As a result, it was emphasized that, according to a teleological rather than a semantic interpretation of the relevant provisions, in compliance with the general legal principle whereby *electa una via non datur recursus ad alteram*, once the parties have agreed to refer their dispute to a certain decision-making body, this authority will decide on the entire matter. In this matter, the parties agreed in writing to refer the dispute to the Appeal Committee, which therefore appeared to be the body competent to decide every aspect of the dispute. The DRC was unable to consider the claim lodged by Chelsea as confirmed by the CAS. The DRC decided that it did not have jurisdiction to pass a decision in the dispute between the club Chelsea and the player Adrian Mutu.

On 22 December 2006, Chelsea lodged a new appeal before the CAS seeking the annulment of the above DRC's decision. On 21 May 2007, a CAS panel upheld Chelsea's appeal, set aside the DRC's decision, and reverted the matter back to the DRC.[104] According to the CAS Panel, the DRC did have jurisdiction in order to determine and impose the appropriate sporting sanction and/or order for compensation, if any, arising out of the dispute between Chelsea and player Mutu.

On 6 August 2007, on the basis of the last CAS award, Chelsea filed a reamended application with the DRC for an award of compensation, seeking damages it suffered. On 14 September 2007, Mutu submitted to the DRC a brief requesting

[103]DRC 26 October 2006, no. 106176.

[104]CAS 2006/A/1192 *Chelsea Football Club v. Adrian Mutu*, award of 21 May 2007.

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its rejection, and asking FIFA to open an investigation against Chelsea for having used and/or dealt with unlicensed agents. On 7 May 2008, the DRC issued a(n unpublished) decision that the claim from Chelsea was partially accepted. The DRC decided that the player had to pay the amount of EUR 17,173,990 to Chelsea.

On 2 September 2008, Mutu filed a statement of appeal with the CAS and asked to set aside the challenged DRC decision and to decide that no compensation was due.[105] In its third decision, the CAS finally dismissed the appeal filed by Mutu, against the decision rendered by the DRC on 7 May 2008 in which he was ordered to pay EUR 17,173,990 in compensation to his former club, Chelsea FC, for breach of contract. The CAS finally decided that the award of compensation on the basis of the unamortized acquisition costs was not only explicitly provided in the FIFA RSTP, but also consistently upheld in earlier CAS jurisprudence. According to the CAS Panel, this criterion was also equally consistent with English law. According to the CAS, when Chelsea terminated the player's contract due to Mutu's breach without *just cause*, it still had the right to claim compensation for the costs incurred relying on Mutu's promised performance. The CAS explicitly stated that Chelsea was not required to try to transfer (for a fee) Mutu before exercising its right to terminate the employment contract, since such attempt could be construed as an implied affirmation of the contract, thereby depriving Chelsea of the option to terminate it.

The *Mutu saga* did not end with the abovementioned decisions and the story continued with a petition which was submitted by Chelsea to FIFA on 15 July 2015, against Juventus and Livorno. On the understanding that the player did not pay the abovementioned amount of EUR 17,173,990, with reference to Article 14 para 3 of the RSTP, 2001 edition, Chelsea applied for a declaration that Juventus and Livorno were held liable for payment of compensation to Chelsea. In order to complete the *Mutu saga*, on 25 April 2013 the DRC issued another decision. In this DRC case, the Chamber was bound by several previous decisions in which it had already been determined that the player had breached his employment contract. In other words, the only question that had to be addressed by the DRC during these proceedings was the question whether or not Juventus and/or Livorno were to be held jointly responsible for payment of the amount of compensation by the player. With reference to Article 17 para 2 of the RSTP, from which it follows that "*if a professional is required to pay compensation, the professional and his new club shall be jointly and severally liable for its payment*", the DRC issued an (unfortunately unpublished) decision which made the Italian clubs Juventus and Livorno both jointly responsible with player Mutu to pay EUR 17,173,990 due to the club Chelsea.

[105]CAS 2008/A/1644 *Adrian Mutu v. Chelsea Football Club*, award of 31 July 2009.

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The above DRC case finally proceeded to the CAS for the fourth time as both Juventus and Livorno did not agree with the aforementioned DRC decision and filed separate appeals before the CAS. With a final CAS "award" in 2015, the series of legal battles came to a definite end. In this last CAS case of 21 January 2015, the CAS Panel finally decided that the appealed DRC decision of 25 April 2014 was set aside as a result of which Juventus and Livorno were not held jointly and severally liable for the payment of EUR 17,173,990 due to Chelsea by player Mutu. The CAS decided that the player was the author of his misfortune and Chelsea was not required to terminate the employment contract if they still valued his services and preferred to hold him to his contract. Chelsea was entitled, not obliged to dismiss him.[106] In other words, from this last CAS case it can be concluded that new clubs cannot be held jointly and severally liable for any payment the player has to pay his former club if the former club unilaterally terminated the contract with the player. According to the CAS, in this latest case in the Mutu saga, a new club cannot be held jointly and severally liable where it was a former club's decision to dismiss with immediate effect a player who, in turn, had no intention to leave the club in order to sign with another club and where the new club has not committed any fault and/or was not involved in the termination of the employment relationship between the old club and the player. These findings do not compromise contractual stability.

#### 8.6.1.5.3 Alcohol

There is no DRC jurisprudence available among the published decisions in which alcohol abuse led to a justified termination of the employment contract. It is interesting to experience to what extent any alcohol abuse can result in the presence of *just cause* for a club to unilaterally terminate an employment contract. In this regard, the following CAS case can provide keystones to the DRC for the future.

In the case before the CAS of 16 February 2010, the player Ralph van Dooren, a Dutch national, played for Club Tofta Otrottarfelag, a football club in the Faroe Islands, during the 2007 Faroese football season, which ended in October 2007.[107] On 26 January 2008, the player signed a new contract with Tofta, valid from 3 February 2008 until 31 October 2008. Tofta alleged that the player did not appear at the training sessions as expected by the club. Tofta also alleged that it became clear that the player was not ready to make necessary efforts to get physically fit for playing at his best. The club stated the player was very drunk the night before an important derby match was scheduled. The player, however, explained that the reason for his lack of physical performance was an old injury. On 29 April 2008,

[106]CAS 2013/A/3365 *Juventus FC v. Chelsea FC* and CAS 2013/A/1366 *A.S. Livorno Calcio S.p.A. v. Chelsea FC*, award of 21 January 2015.

[107]CAS 2009/A/1956 *Club Tofta Otrottarfelag, B68 v. Ralph van Dooren*, award of 16 February 2010.

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the club terminated the employment contract of the player with immediate effect. The reason, among other things, was the player's alcohol abuse. The player filed a request at FIFA claiming compensation. The player won this case as a result of which the club appealed before the CAS. In this case the CAS Panel decided that the RSTP does not provide for a definition of *just cause*. Case law has been developed by the CAS on this issue. It has been considered for instance, that if the player does not provide the club with his working capacity, this constitutes a serious breach of duty which can justify unilateral termination of the contract, for example if the player does not even report for work (see CAS 2006/A/1082-1104, '*Valladolid v/Barreto Caceras and Cerro Porteno*'). The athlete is obliged to do whatever is necessary on his part to maintain his working capacity. If he breaches this, it can constitute *just cause* for termination, as accepted by a CAS Panel in a case in which the player had consumed cocaine (CAS 2005/A/876, '*Mutu v/Chelsea*', p. 13). 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 unilateral termination of the contract. There is also no breach of duty to work if the player does not play at the level required by the club (see 2003/O/535; in which case the CAS denied that the reduced sporting performances of the player is not *just cause*, except in the case where it is established that the player deliberately decided to player beneath his potential). Furthermore, it has been considered that it is up to the party invoking *just cause* to establish the facts founding such *just cause*. In the present case the CAS stated that the club did not establish the existence of *just cause*. Even if the coach alleges that a player is guilty of alcohol abuse, this does not show that the player deliberately had the intention to play beneath his potential. The CAS also stressed that the termination with immediate effect is to be applied as *ultima ratio*.

#### 8.6.1.5.4 *Conclusion*

Following the above decisions of the DRC (and the CAS), it is to be expected that in future the DRC will rule that the positive result of the doping test can be constituted as *just cause* for the club to unilaterally terminate the employment contract with the player. In line with the *Mutu* case, in the event that it is established that a player used drugs, *just cause* for the club might be accepted and the club will then be permitted to unilaterally terminate the employment contract and as a result thereof sue the player for financial compensation. On the abuse of alcohol and with the knowledge that there are no decisions present among the published cases, the DRC might decide in future that the abuse of alcohol can be constituted as *just cause* for the club to unilaterally terminate the employment contract with the player. Obviously, the player is obliged to do whatever is necessary on his part to maintain his working capacity. However, not under all circumstances can the abuse of alcohol lead to a justified termination. Only if it can be demonstrated that the player deliberately had the intention to play beneath his potential. The logical nexus between the level of playing and the abuse of alcohol must be present and must be demonstrated by the club claiming the termination.

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### *8.6.2 For the Player*

In the event that the player wants to unilaterally terminate the contract with the club without any consequences, there must also be *just cause*. For example, no *just cause* exists for the player on the basis of his duties related to military service.[108] However, if the player has not received his salary for a substantial period of time, in the opinion of the DRC and the CAS *just cause* does exist. This type of *just cause* is the most common in the area of *just causes* for players.[109] As a result thereof, this type of *just cause* will be addressed extensively. Furthermore, we will note that *just cause* can also exist if a player is sent to training other than with the permanent (first) team, under the strict condition that the employment contract contains a provision that he may only train with the first team of the club. Further, we will note that *just cause* might exist if a player is not registered by a club.

#### 8.6.2.1 Outstanding Salary

The DRC and the CAS are of the opinion that, as a general rule, the persistent failure of a club to pay the salary of a player during a certain period should be considered an unjustified breach of an employment contract by the club. In that case, there is the existence of *just cause* for the player, as a result of which he may unilaterally terminate the contract without having to pay any compensation or risking sanctions being imposed on him by FIFA. In the following paragraphs the situation of unpaid salaries will be discussed and subjected to the criterion of *just cause* for a player. Several criteria need to be met in order to establish a valid *just cause* for a player to validly, unilaterally terminate his contract with the club.

This section is more or less a summary in a chronological order of the DRC (and the relevant CAS) decisions. In this way, not only is the chronological order of developments in the DRC (and the CAS) jurisprudence dealt with, but it also shows the (sometimes diametric) contradictions within and between the DRC (and the CAS) jurisprudence. For example, on the one hand the DRC cases show that a written warning prior to termination of a contract based on *just cause* due to outstanding salary is a strict requirement. On the other hand, in several DRC cases a written warning is not necessary. The same as with the CAS jurisprudence, which is of utmost importance to refer to in this chapter, because of the sometimes inconsistent outcomes in various DRC cases. In this paragraph, conclusions will be drawn and concurrent criteria will be provided that have been created by the DRC (and the CAS) over the years in international legal disputes relating to unpaid salaries. Certain guidelines that follow from the DRC (and the CAS) jurisprudence

[108]DRC 2 November 2007, no. 117923.

[109]For example and as a side-note, obviously financial difficulties are not a valid reason for non-payment or the delay of payment of transfer fees. See PSC 21 January 2013, no. 01132563. See also CAS 2012/A/3035 *Parma FC SpS v. VFL Wolfsburg*, award of 26 March 2013, and CAS 2006/A/1008 *Rayo Vallecano de Madrid SAD v. FIFA*, award of 21 August 2006.

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will be given to determine under which circumstances *just cause* actually exists if a club does not pay a player his salary for a substantial period of time.

Firstly, it must be established that the club has seriously neglected its financial obligations towards the player. In a DRC decision of 10 June 2004, the Chamber noted that on the date of receipt of the player's claim on 16 February 2004, the club had not paid the player's monthly salary for over four months and two of the four instalments pertaining to the signing-on fee remained unpaid.[110] Therefore, the DRC concurred that the club had indeed seriously neglected its financial obligations towards the player. Therefore, the Chamber decided that the club was had committed a unilateral breach of the employment contract without *just cause*.

In general, the persistent failure of a club to pay the salary of a player without *just cause* should be considered an unjustified breach of an employment contract by the club. However, in a DRC decision of 23 March 2006, the DRC decided that the non-payment of one monthly salary is not *just cause* for a player to leave his club without permission.[111] On 1 February 2004, a player and a club concluded an employment contract from 1 February 2004 to 1 February 2007, stipulating a monthly salary of USD 10,000. On 10 March 2005, the player notified the club in writing that he had unilaterally terminated the contract, due to the club's non-fulfilment of its financial obligations. On 13 April 2005, he signed a new employment contract with another club. The football association of his new club requested authorisation from FIFA to provisionally register the player in question. The Single Judge of the PSC authorised the football association of the new club to provisionally register the player in order not to hinder his career and thereby stated that any request for compensation and sports sanctions for breach of contract did not hinder the player's provisional registration for his new club. The DRC finally stated that, as a general rule, the persistent failure of a club to pay the salary of a player without *just cause* should be considered an unjustified breach of an employment contract by the club. The DRC referred to the fact that at the time of the first unauthorised departure of the player, one month's salary was unpaid. The DRC deliberated whether the non-payment of one month's salary was *just cause* for a player to leave his club without permission, but came to the conclusion that one month's outstanding salary does not allow the player to leave his club without authorisation.

In line with the above, the Chamber also reiterated that the persistent failure of a club to pay the salary of a player for one and a half months does not constitute *just cause* for the player to unilaterally terminate his employment contract. This was decided in a DRC decision of 26 October 2006.[112] In July 2004, the player and the club concluded an employment contract. In addition to this contract, the parties concluded another agreement stipulating the financial conditions. On 10 October 2005, the player lodged a complaint with FIFA against the club, claiming that the

[110]DRC 10 June 2004, no. 64133.

[111]DRC 23 March 2006, no. 36460. See also DRC 8 June 2007, no. 67229, and DRC 22 June 2007, no. 67620.

[112]DRC 26 October 2006, no. 1061207.

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latter had breached the contract. He asserted that salary to the amount of USD 6000 net were outstanding for the first season (2004/05) for the following months:

- USD 2000 for October 2004 (he was paid only USD 2000);
- USD 2000 for November 2004 (he was paid only USD 2000); and
- USD 2000 for June 2005 (he was paid only USD 2000).

The DRC added that the alleged outstanding amount of USD 6000 which is equivalent to one and a half months of the player's salary could not be considered in the present case as substantial enough to justify a premature termination of an employment contract. The DRC concluded that the relevant alleged outstanding salary did not constitute *just cause* for the unilateral termination of the contract.

In its jurisprudence regarding outstanding salary, the DRC refers to general principles of labour law that the persistent failure of a club (employer) to respect its contractual obligations towards a player (employee) without *just cause* is to be considered as an unjustified breach of an employment contract by the club. Considering this principle, in a case before the DRC of 12 January 2007, the Chamber had to deliberate whether or not the behaviour of the club was to be considered as a persistent failure to comply with its contractual obligations towards the player. In the present case, the club concerned had not paid the player's salary from November 2003 to May 2004, i.e. over 7 months. Therefore, it was decided that the behaviour of the club had to be considered as a persistent failure to comply with its financial obligations towards the player.[113] In this decision, the DRC also decided that the relevant compensation to be paid by the club was also subject to the behaviour of the player concerned. The Chamber did decide that the non-payment of the salary over 7 months was to be considered as an unjustified breach of an employment contract by the club. However, the DRC concluded that both parties had a reason to terminate the employment contract in question, it was a situation of mutual fault, and therefore, the player shall not receive any compensation for breach of contract by the club. The Chamber finally decided that the club only had to pay USD 35,000 to the player due to outstanding salary.

Reference to the behaviour of the player was also made in the case before the DRC of 23 February 2007.[114] As far as compensation for breach was concerned in this case, the DRC deemed it appropriate to generally highlight that the relevant compensation to be paid by the club concerned must be slightly reduced as the player's own misbehaviour (i.e. reassuming his duties with a delay of two days due to unspecified family reasons) must also be taken into account. Another interesting element in this case to reduce the compensation was the fact that the player found a new club to play for and was not unemployed for a long period. Furthermore, it is important to note that the DRC underlined that it can be established as an act of bad faith if a player claims more than he is entitled to.

Another important element regarding the issue of outstanding payments for a player, is the fact that the player specifies the exact amount which is outstanding.

[113]DRC 12 January 2007, no. 17595.

[114]DRC 23 February 2007, no. 27835.

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The DRC decided that if the player is not precise on this point, from the DRC's point of view, such stance does not speak in favour of the player's good faith.[115]

Furthermore, it is an important element whether or not the player accepted any postponement regarding outstanding payments. In a DRC decision of 8 June 2007, *just cause* did not exist because the DRC concluded that the player had, by accepting the postponements of some instalments, consented to delayed payments. The DRC concluded that due to his earlier acceptance of a different payment plan, the player's request was not justified in this matter and thus had to be rejected.[116]

Although the DRC is not consistent on this point, it can be concluded that the player, in principle, always needs to warn the club in writing before terminating the contract. This is confirmed by the DRC in its decision of 10 August 2007.[117] In this DRC case on the precondition of a written warning prior to termination of the employment contract, the members of the Chamber pointed out that, even without being stipulated in an employment contract, this was a procedure regularly confirmed and applied by the DRC and the CAS. The DRC held that, even in the absence of a clause prescribing a written warning prior to the termination of an employment contract for arrears of salary, according to the jurisprudence of the CAS it was questionable whether delayed payments of salary justified an extraordinary contract termination without prior warning. The DRC deemed it of importance to point out that a decisive element determined by the CAS in this respect was whether the debtor simply refused to make a payment or whether there were circumstances which could easily be resolved by a warning notice.[118]

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[115]DRC 23 February 2007, no. 27698.

[116]DRC 8 June 2007, no. 67770.

[117]DRC 10 August 2007, no. 87745.

[118]In an award of 23 February 2009, the CAS decided that an employment contract which has been concluded for a fixed term can only be terminated prior to expiry of the term of the contract if there is *just cause*. *Just cause* exists when the party who terminated, cannot be expected to continue the employment relationship in good faith. See CAS 2008/A/1517 *Ionikos FC v. C.*, award of 23 February 2009. For example, a grave breach of duty by the employee is *just cause*, according to the CAS. A valid reason for the unilateral termination of the contract has to be admitted when the essential conditions under which the contract was concluded are no longer present, whereas only a breach which is of a certain severity justifies termination of a contract without prior warning. From the player's perspective, the main cause for termination of an employment contract is because of *non-payment or late payment of the remuneration owed under the contract*. In the cases CAS 2008/A/1517 *Ionikos FC v. C.*, award of 23 February 2009, and CAS 2008/A/1589, award of 20 February 2009, the CAS Panels confirmed that the players were entitled to terminate their employment contracts due to the seriousness and the repetition of the violations by the clubs concerned. Also in its award of 29 February 2009, the CAS Panel decided that a player has *just cause* to terminate the employment agreement if his employer has not met its obligations as an employer, i.e. it has not paid the player's salary and did not react when the player formally offered his services, making himself available to his employer and requesting access to his employer's facilities. See CAS 2008/A/1589 *MKE Ankaragücü Spor Külübü v. J.*, award of 29 February 2009. The party in breach must compensate the other party, considering all claims based on the employment agreement. 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. See also CAS 2006/A/1100 *Eltaib and Gaziantepspor*, award of 15 November 2006.

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Furthermore, it is important that the player offers his services during the contractual period. In a DRC decision of 28 September 2007, the DRC decided as such, and emphasized that as a general principle, a club is obliged to remunerate a player, as agreed between the parties, for the period of time during which he has rendered his services to the club, unless the club can justify the non-payment of the agreed remuneration. In this case the DRC wished to stress that during the period from September 2006 until 15 December 2006, the player could not adequately prove that he had offered his services and thus was not able to substantiate his entitlement to receive his contractually owed salary for this period.[119]

In its DRC decision of 5 December 2008, the Chamber deemed appropriate to point out that, on numerous occasions, it upheld the unilateral termination of an employment contract by players who had, depending on the particular circumstances of the relevant case at stake, not received their salaries for two or more months.[120] This is a very important decision with regard to the period that the outstanding amounts are due in order for a player to demonstrate that *just cause* exists and to unilaterally terminate the contract due to outstanding salary. In the past the DRC decided several times that *just cause* existed if the salary of the player is outstanding for more than three months. In this decision, the DRC referred to the so-called "two-month rule". The DRC did underline that a minor delay of merely five days could not be considered as *just cause*, particularly like the case at hand, where the club had fully and properly complied with its financial obligations for almost an entire year and the player never placed the club in default regarding outstanding payments. One can also note the importance of placing a club in default.

The "two-month rule" was also mentioned in other cases, such as a case before the DRC of 19 February 2009.[121] The DRC was of the opinion that in this case more than two month's salary was to be considered as unpaid at the time of the player's submission of the claim before FIFA. Therefore, the DRC was of the opinion that the player had *just cause* to terminate the employment relationship with the club.

In the DRC's opinion it is common knowledge that the sport of football is subject to cyclical situations in which clubs are often led to make payments outside of the schedules contractually agreed. In its case of 5 May 2009, the DRC decided that these circumstances must be taken into consideration by anyone when lodging a claim.[122] In this decision, the DRC seems to provide parties who are obliged to pay, with some leeway regarding outstanding payments.

[119]DRC 28 September 2007, no. 97545. See also DRC 8 June 2007, no. 6733. In this case the DRC pointed out that, according to its long-standing jurisprudence, a delay of salary payments of a couple of days could not be considered *just cause* for the termination of an employment contract.

[120]DRC 5 December 2008, no. 128557.

[121]DRC 19 February 2009, no. 29908.

[122]DRC 15 May 2009, no. 59269.

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A written warning prior to terminating the contract is not always an absolute and decisive factor.[123] In a DRC decision of 10 December 2009, the player did not serve a default notice and the Chamber turned to the club's position that the player had to serve a default notice before terminating the contract. The DRC pointed out that the relevant Article 10 of the employment contract with the club did not include any such obligation for the player for the said article to be validly applied.[124]

The well-established jurisprudence of the DRC with regard to the exact period of months that the salary is outstanding, is not as "well-established" as initially thought, since the DRC Judge, in its decision of 9 May 2011, referred to the well-established jurisprudence in this respect and stated that *just cause* exists if the club fails to pay the player salary for a period for more than three consecutive months. In this matter, the respondent breached the contract without *just cause*.[125] In this case, the DRC Judge explicitly referred to the period of "3 months" despite the fact that the claimant player had informed the respondent club several times of its arrears of salary payments since January 2009.

Despite the abovementioned DRC decision of 9 May 2011, in a DRC decision of 7 September 2011, the DRC however, again recalled that it had, on numerous occasions, upheld the unilateral termination of an employment contract by players who had, depending on the particular circumstances of the relevant case at hand, not received their salaries for two or more months.[126] The DRC finally concluded that the delay of three and a half months in the fulfilment by the respondent of its financial obligations is already a sufficiently long period of time to justify a unilateral termination of the employment contract by the player.

[123]In the award of 16 October 2012, the CAS Panel emphasized that non-payment of remuneration constitutes *just cause* for termination, under the condition that the outstanding amount may not be insubstantial or completely secondary and the employee has given a warning to the employer, arguing a breach of contract. See CAS 2011/O/25211 *Matteo Ferrari v. Besiktas Futbol Yatirimiari San. Ve Tie. A.S.*, award of 16 October 2012. Reference was also made to the decision CAS 2006/A/1180, marg. no. 8.4, and CAS 2006/A/1100, marg. no. 8.2.5 ff. Despite the fact that the contract contained a clause whereby the player had to warn the club in case of outstanding salary and "*if the club does not pay the due amount within 15 days after receiving this notification, the present agreement shall automatically terminate for just cause*", the player had sent a written notification, but the player did not wait for the fifteen days. Contrary to the club's opinion, according to the CAS Panel, the player did not have to wait until the end of the 15 day period.

[124]DRC 10 December 2009, no. 129795.

[125]DRC 9 May 2011, no. 5112513.

[126]DRC 7 September 2011, no. 9111901. In an unpublished DRC decision of 1 February 2012, the DRC reiterated that it had, on numerous occasions, upheld the unilateral termination of an employment contract by players who had, depending on the particular circumstances of the relevant case at hand, not received their salaries for two or more months. In this case, the DRC concluded that the delay of 2 months is already a sufficiently long period of time to justify a unilateral termination of the employment contract. See also DRC 25 September 2014, no. 09143007.

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In an important DRC decision of 24 November 2011, the DRC points out that two conditions need to be met: the salary which is paid late by the club is not insubstantial or completely secondary; and the player must, prior to terminating the employment contract, issue the club with a warning. The DRC went on to deliberate whether, the player had *just cause* or not to prematurely terminate the employment contract on 3 May 2009.[127] The Chamber first of all pointed out that, although the FIFA RSTP does not define when there is *just cause* to terminate an employment contract in the sense of Article 16 of the RSTP, the Chamber referred to the fact that the DRC has developed a jurisprudence, which has been confirmed by the CAS on several occasions, and which establishes that late payment of remuneration by an employer, in principle, does constitute *just cause* for the termination of an employment contract. Indeed, the club's payment obligation is its main obligation towards the player. If no payment of the salary is made repeatedly by the date designated in the employment contract, this may obviously cause the player's confidence to be lost in the proper fulfilment of future obligations by the club. However, the DRC was keen to underline that the right of the player to terminate an employment contract with *just cause* in a situation of late payment by the club of his salary, would only be given if the following two conditions are met: firstly, that the salary which was paid late by the club is not insubstantial or completely secondary; and secondly, that the player has, prior to terminating the employment contract, issued the club with a warning, in other words, drawn the club's attention to the violation of the contractual terms. The Chamber found that both prerequisites for invoking *just cause* to terminate the relevant employment contract were, *in casu*, indeed met. As a consequence, the DRC decided that the club was found to be in breach of contract, and, in particular, in accordance with its long-standing and well-established jurisprudence, that this breach has reached such a level that the player suffering from the breach, was entitled to terminate the contract unilaterally before its agreed term.

In the DRC case of 26 April 2012, the DRC concluded that the salary for one month, September 2009, was outstanding.[128] However, in this case, the DRC finally came to the conclusion that the respondent's behaviour in the present matter constituted a clear breach of contract, since the club had not registered the player and even banned him from the team's activities. As a result thereof, the DRC decided that the respondent's behaviour constituted a clear breach of contract, which, in accordance with its well-established jurisprudence, had reached such a level that the claimant suffering the breach was entitled to unilaterally terminate his contractual relationship.

In line with former jurisprudence regarding outstanding salaries and the exact period in this respect, in the DRC decision of 18 December 2012, it was reconfirmed by the Chamber that one month's outstanding salary does not construe *just cause*.[129]

[127]DRC 24 November 2011, no. 1111796.

[128]DRC 26 April 2012, no. 412871.

[129]DRC 18 December 2012, no. 12121204.

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Despite the fact that it follows from the DRC decision of 24 November 2011 (no. 1111796), that the player must always, prior to terminating the employment contract, issue the club with a warning, from the DRC decision of 23 January 2013, it follows that it is not always a prerequisite to place the club in default before terminating the contract due to outstanding salary. In this case, the Chamber noted that the respondent club's defence was merely based on alleged formalities relating to the question whether the claimant player duly placed the respondent in default of its contractual obligations in the context of Article 6 para 2 of the contract.[130] The Chamber stressed that the respondent had not contested that, at the time when the claimant alleged having notified the respondent of the termination of the employment contract in the event of the time limit for payment having lapsed without remedy of breach by the club, i.e. on 31 December 2010, the signing-on fee of EUR 60,000 as well as the amount of EUR 70,000 relating to the player's monthly salary, had remained unpaid. The Chamber concurred that, irrespective of the issue whether the player validly placed the club in default or terminated the employment contract in writing, the question whether the employment contract had been terminated with or without *just cause*, shall be analysed on a case-by-case basis taking into account all of the circumstances surrounding it. Having said that, the Chamber pointed out that, in this case, it has remained uncontested that since the starting date of the employment contract until the end of December 2010, the claimant had only received EUR 10,000 from the respondent instead of the amount of EUR 120,000, which includes EUR 60,000 relating to the signing-on fee that fell due on 1 September 2010, and thus EUR 50,000 of which had remained outstanding for more than 90 days, as well as EUR 60,000 relating to the claimant's monthly salary of EUR 20,000 each falling due on the 30th day of each month as from September 2010 up to and including November 2010. The DRC further took into account that the respondent, neither within the context of the claimant's notice dated 27 December 2010 nor until today, has remitted any payments to the claimant. It also took into account that the club had not indicated any (valid) reasons that could possibly have justified the non-payment of the claimant's remuneration during such a considerable length of time. The DRC finally decided to reject the arguments put forward by the club and established that the club had failed to comply with its contractual obligations.

In line with the above, and so too a very short notice period of only one day in a written warning by the player for his club to pay the outstanding salary, does not invalidate the existence of *just cause*. For example, in the DRC decision of 27 February 2013, we note that a very short notice period of only one day in a written warning by the player for his club to pay the outstanding salary, does not affect the existence of a valid *just cause*.[131] The outcome in this case is also in line with the

[130]DRC 23 January 2013, no. 0113797.

[131]DRC 27 February 2013, no. 02131190.

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above decision of 10 December 2009 (no. 129795), whereby *just cause* was present for the player to terminate the contract while there was no written warning.

Sometimes parties define the just cause in the employment contract. In a DRC decision of 15 March 2013, the parties agreed upon a clause whereby the player was entitled to unilaterally terminate the contract if he did not receive his salary for 3 months. However, despite this clause, the player unilaterally terminated the employment contract after two months. The Chamber did not accept this and upheld its jurisprudence of the minimum period of "*3 months delay*".[132] The Chamber referred to the fact that the "*90-day-delay of payment*" clause had to be considered as valid since it was established by the free will of the parties. Therefore the player was not entitled to unilaterally terminate the contract after only two months.

Also, in the so-called *Ribery* case, a CAS decision of 24 April 2007 between the Turkish club Galatasaray and Ribery and Olympique Marseille, the Panel ruled that the "non-payment or late payment of remuneration by an employer, in principle—and particularly if repeated as in the present case—does constitute *just cause* for termination of the contract". The employer's payment obligation is its main obligation towards the employee.[133] If he fails to meet this obligation, the employee can no longer be expected to continue to be bound by the contract in future. Whether the employee falls into financial difficulty by reason of the late or non-payment, is irrelevant. The only relevant criterion is whether the breach of obligation is such that it causes the confidence to be lost, which the one party has in the future performance in accordance with the contract. This is the case when there is a substantial breach of a main obligation such as the employer's obligation to pay the employee. However, the CAS stressed that *just cause* is subject to two conditions. In the first place, the amount paid late by the employer may not be "insubstantial" or completely secondary. Secondly, a prerequisite for terminating the contract because of late payment is that the employee must have given a warning.[134] In other words, the employee must have drawn the employer's attention to the fact that its conduct is not in accordance with the employment contract.[135] From this case it can further be derived that parties are free to further specify their "own" *just cause* since the CAS decided that, in principle, the parties can specify in the contract when there is *just cause*. This follows from Article 22 para 1 of the RSTP, 2001 edition. For if, pursuant thereto, the parties are free to arrange in the

[132]DRC 15 March 2013, no. 03132433.

[133]CAS 2006/A/1180 *Galatasaray SK v. Frank Ribéry & Olympique de Marseille*, award of 24 April 2007.

[134]The CAS held that even the non-payment of one month's salary does not provide the right to terminate employment contracts in the absence of a demand for payment. See CAS 2005/A/893 *Metsu v. Al-Ain Sports Club*, award of 16 February 2006.

[135]See also CAS 2005/A/893 and CAS 2006/A/1100, marg. no. 8.2.5 et seq. See also CAS 2005/A/937 *Györy Eto v. Mr. Marko Kartello*, award of 7 April 2006 and CAS 2005/A/866 *F.C. Hapoel KIA Beer-Sheva v. Siston*, award of 30 March 2006.

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contract the method of compensation for breach of contract, then in principle the same must apply to specifying when there is *just cause*, according to the CAS.[136]

It must be taken into consideration that parties can agree upon a so-called grace period. For example, in a case of the DRC of 6 November 2014, the player received monthly instalments from the club, each with a grace period of 90 days, as was concluded in the employment contract. The player claimed outstanding salary and was of the opinion that the grace period was not valid. The Chamber finally noted that the said wording was included in the contract and the agreement as a result of mutual consent of the parties and, therefore its legal consequences were accepted by the player. The Chamber recalled in this respect that the inclusion of such stipulations in a contract, regarding the payment date of remuneration, is not prohibited by the RSTP. The DRC determined in this regard that the grace period for the payment of salary established in the contract and the agreement, had to be considered as valid since it was established by the free will of the parties.[137] The DRC case was appealed before the CAS. In its award the CAS

[136]In a case before the CAS of 29 September 2009, CAS 2009/A/1765 *Sport Lisboa E Benfica v. Club Atlético de Madrid SAD & FIFA*, the CAS Panel also referred to this case. See also CAS 2007/A/1320-1321 *Feyenoord Rotterdam v. Clube de Regatas do Flamengo*, award of 26 November 2007. Also in other CAS cases, the CAS had to decide on outstanding salaries. For example, in the award of the CAS of 29 August 2008, the CAS Panel stressed that the definition of *just cause* in Article 14 of the FIFA RSTP (in this case 2005 edition), and whether *just cause* exists, is established on a case-by-case basis. See CAS 2008/A/1447 *E. v. Diyarbakirspor*, award of 29 August 2008. According to the CAS, if we fall back on Swiss law, an employment contract which has been concluded for a fixed term can only be terminated prior to expiry of the term of the contract if there is *just cause*, which can be established as any circumstance, the presence of which means that the party that terminated cannot be expected to continue the employment relationship in good faith. The CAS decided that the non-payment or late payment of remuneration by an employer, in principle, does constitute *just cause* for termination of the contract for the employer's payment obligation is its main obligation towards the employee. If it fails to meet its obligation, the employee can no longer be expected to continue to be bound by the contract in the future. For the interpretation of the compensation of Article 17 of the FIFA RSTP 2005 apply the principles of Swiss employment law and the existing CAS jurisprudence. According to the Swiss Code of Obligations, the injured party receives integral reparation of his damages and compensation taking into account all claims arising from the employment relationship. According to Swiss legal doctrine, the injured party is entitled to integral reparation of its damages. According to the CAS, the damages taken into account are not only those that may have caused the act or the omission that justify the termination but also the positive interest. The positive damages of the employee are the salary and other material income that he would have had if the contract had been executed until its natural expiration.

[137]DRC 6 November 2014, no. 11141064. As a side-note, many cases before the PSC concern claims by coaches against clubs for outstanding salary. The jurisprudence of the PSC shows that one month's outstanding salary is not enough and does not justify a premature and unilateral termination. See PSC 15 August 2012, no. 08122106. However, from the jurisprudence it follows that 2 months is enough. PSC 15 August 2012, no. 8121992 and PSC 15 August 2012, no. 8121464. In these cases the PSC is of the opinion that the breach of contract perpetrated by a club has then reached such a level that could justify a termination of the agreement between the club and the coach. In the event that the parties agree upon a shorter period than 2 months, for example a clause that "*All the payments shall be paid to the Head Coach by the club on time and*

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ruled that the agreed 'grace period' was valid. The CAS Panel decided that the club, in accordance with the agreed grace period, was entitled to wait up to 90 days to pay the amount in question, within which period the player was not entitled to seek remedies for breach as a result of non-payment.[138]

In the very interesting *Bangoura* case of 2 July 2013, the case before the CAS between FC Nantes, Al Nasr Sports Club and the player Ismäel Bangoura, the CAS had the opportunity of specifying in its jurisprudence that while the FIFA rules do not define the concept of *just cause*, reference should be made to the applicable law (CAS 2006/A/1062; CAS 2008/A/1447).[139] Furthermore, this case was important to mention because, for a party to be allowed to legally terminate an employment contract, it must have warned the other party, in order for the latter to have had the chance, if it deemed the complaint to be legitimate, to comply with its obligations. In view of the above, the Panel, together with the FIFA DRC, considers that, by not making the advance payment as agreed for the 2011/2012 season in full on its contractual due date, i.e. 1 September 2011, Al Nasr did not fully comply with its contractual obligations towards the player. However, not every breach of contract justifies early termination of a contract (CAS 2006/A/1180) and, there has to be *just cause* for such termination. The Panel therefore had to determine whether the failure by Al Nasr to pay half of the advance payment constituted *just cause* allowing the player to have terminated the employment contract. As set out above, based on well-established jurisprudence of the CAS, non-payment or late payment of a player's salary by his club may constitute *just cause* for terminating the employment contract (CAS 2006/A/1180; CAS 2008/A/1589; Judgement 4C.240/2000 of 2 February 2001). The Panel could follow the player and FC Nantes' position with regard to the fact that the non-payment of the second instalment of EUR 180,000 should be considered as *just cause* for the termination of the employment contract by the player. Established jurisprudence of the CAS in this regard, and the FIFA Commentary in Article 14 RSTP, refers to an important factor (in cases in which non-payment was held to constitute

Footnote 137 (continued)
*if the club delays more than 25 days from the due time of each payment, it will be deemed as the termination of the contract by the Club and The Club shall pay the compensation amount mentioned in Article 8-2 of the contract to The Head Coach*", this clause will be leading. See PSC 30 January 2012, no. 112275. In other words, contractual arrangements can justify earlier termination. See also DRC 17 January 2014, no. 0114044.

[138]See CAS 2015/A/3993 *Patrick Leugueun Nkenda v. AEL Limasol FC*, award of 14 January 2016.

[139]CAS 2013/A/3091 *FC Nantes v. FIFA & Al Nasr Sports Club*, CAS 2013/A/3092 *Ismaël Bangoura v. Al Nasr Sports Club & FIFA* and CAS 2013/A/3093 *Al Nasr Sports Club v. Ismaël Bangoura & FC Nantes*, award of 2 July 2013. When Swiss law applies, as in the particular case, Article 337 para 2 of the Swiss Code of Obligations ("CO") provides that "*Any circumstances which, according to the rules of good faith, mean that the party who has given notice of termination cannot be required to continue the employment relationship, shall be deemed good reason*". The concept of *just cause* as defined in Article 14 RSTP must therefore be likened to that of "good reason" within the meaning of Article 337 para 2 CO.

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*just cause*), being persistence or repetition of the non-payment of salary. In this case, there is no repetition of the non-payment, the advance of salary consisted of one single payment, albeit one which was not timeously made by Al Nasr. Moreover, there was no evidence of any official/written advance warning from the player as regards his intention to terminate the employment contract should he not receive payment forthwith. As noted above, this is (another) prerequisite for valid termination for *just cause* due to late payment.

From the above jurisprudence of the DRC and the CAS, it follows that the jurisprudence is not always clear and congruent. Is two or three months outstanding salary enough? Is the player obliged to send a written warning under all circumstances? What are the exact consequences of defining *just cause* in the contract? The DRC and the CAS jurisprudence point out that when the club has omitted and persisted in failing to pay the salary to the player in time over a lengthy period, in the opinion of both committees the player is entitled to unilaterally terminate the contract and will consequently be free to leave the club. However, it is important to note that only a few days' delay in paying the salary of the player by the club would not justify the termination of an employment contract.[140] The DRC also decided on several occasions that a delay of one month or one and a half months does not justify the termination of the employment contract.[141] The DRC is of the explicit opinion that the persistent failure of a club to pay the salary of a player without *just cause* for at least three months can be considered as *just cause* for the player to unilaterally terminate his employment contract.[142] In more recent cases we also note the fact that, under special circumstances, a period of two months can suffice.[143] As regards this period, we note that the DRC is not quite clear on this point.[144] It is therefore strongly advisable that players are reluctant with the "two–month rule". Not only because the DRC jurisprudence is inconsistent regarding the exact period (and taking into account that the CAS will hold on to the "three-month rule"), but also since the DRC seems to be of the opinion that the sport of football is subject to cyclical situations in which clubs are often led to make payments outside of the schedules contractually agreed.[145] In other words, the DRC provides the clubs with some leeway with regard to outstanding payments. Furthermore, it is also important that the amount outstanding *in total* must correspond to a period of two or three months. In other words, if a player did not get paid half of his salary for a period of three months, this only corresponds to one and a half months in total, which will not

[140]See for example DRC 5 December 2008, no. 128557. See also DRC 8 June 2007, no. 6733.

[141]See for example DRC 23 March 2006, no. 36460, DRC 26 October 2006, no. 1061207, and DRC 22 June 2007, no. 67620.

[142]DRC 10 June 2004, no. 64133.

[143]See for example DRC 5 December 2008, no. 128557, and 7 September 2011, no. 9111901.

[144]See DRC decision of 9 May 2011, no. 5112513.

[145]DRC 5 May 2009, no. 59269.

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suffice according to the Chamber. Furthermore, the DRC decided in this case that the amount that is outstanding must be substantial.[146]

It is not only a prerequisite that an amount of unpaid salary is outstanding for a period of two or three months, in other words, it is not insubstantial and completely secondary, as can be derived from the DRC case of 24 November 2011 (no. 1111796), in order for a player to be entitled to terminate his employment contract on grounds of *just cause*, but from the jurisprudence we can further derive that other important conditions also need to be met or at least should be taken into account.

First of all, it is advisable that the player summons the club in writing if there are outstanding amounts. Although, at this point it is not clear whether this is a strict prerequisite since the DRC came up with various outcomes on this particular point. On the one hand it is a strict prerequisite, as was decided in several DRC cases, whereby the "prior written warning" was mentioned as strict prerequisite.[147] In this regard, a written warning is a prerequisite in any event if the parties have contractually agreed that a warning is a strict prerequisite.[148] On the other hand, the DRC jurisprudence states that a written warning is not a prerequisite, whereby we also note that a very short notice period of only one day in a written warning by the player towards the club, does not invalidate the existence of *just cause*.[149] Nonetheless, it would be highly recommended and advisable, not only in line with the CAS jurisprudence (which is more consistent on this point), but also in line with the rules of fairness and principles of good faith, that a player must summon the club in advance. It seems fair that the CAS is more inclined to decide that a written warning by a player is a prerequisite, especially in cases which could easily be resolved by a warning notice, unless the breach is of a certain severity that a unilateral termination without a prior written warning is justified.[150]

Furthermore, it is of the utmost importance that the player offered his services in the period of time during which the amount was outstanding.[151] In other words, it is sincerely advisable that the player continues his obligations towards the club despite the fact that the club fails to pay his salary. Otherwise the player cannot substantiate his entitlement to receive his contractually owed salary during the unpaid period. Also factors such as whether the player specified the amount that is outstanding in a concrete way[152] and whether or not the player accepted an

[146]CAS 2005/A/893 *Metsu v. Al-Ain Sports Club*, award of 16 February 2006.

[147]DRC 24 November 2011, no. 111796.

[148]See for example DRC 10 December 2009, no. 129795.

[149]DRC 27 February 2013, no. 02131190. The outcome in this case is also in line with the above decision of 10 December 2009, no. 129795, whereby *just cause* was present while there was no written warning.

[150]CAS 2005/A/893 *Metsu v. Al-Ain Sports Club*, award of 16 February 2006.

[151]DRC 28 September 2007, no. 97545. See also DRC 8 June 2007, no. 6733.

[152]DRC 23 February 2007, no. 27698.

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previously made payment plan to pay in different instalments[153] can be decisive to establish *just cause*.

We can also conclude that following the jurisprudence, parties are free to define the *just cause* in the contract. For example, if parties agree that *just cause* exists if the salary of the player is outstanding for a period of 45 days, with reference to the DRC and the CAS jurisprudence, *just cause* does exist for the player in the event that the salary is outstanding for 45 days. However, if parties stipulate in the employment contract that *just cause* exists if the salary is outstanding for 120 days, it is uncertain what the DRC will decide if the player terminates his contract after 90 days. With reference to the DRC decision of 15 March 2013 (no. 03132433), the Chamber might then uphold the clause of 120 days since it was established by the free will of the parties. In this regard it can be noted that parties can agree upon a so-called "grace period", as follows from the DRC decision of 6 November 2014 (no. 11141064), in which case the DRC decided that a contractual grace period of 90 days, had to be considered as valid since it was (also) established by the free will of the parties.[154] It can be questioned whether this is right in the context of employees waiving basic rights in advance in favour of the employer, as mentioned in the *Ribery* case.[155]

Finally, players who claim outstanding amounts due to unpaid salary before the DRC can also claim compensation as a result of the unjustified breach of contract by the club. In this respect, the (mis)behaviour of the player will be taken into account. In prior cases before the DRC, we note that compensation can be reduced due to the player's own misbehaviour.[156] For example, an act of bad faith is the fact that the player claims more than he is entitled to.[157] Also if the player does not specify the exact amount outstanding, this will not speak in his favour.[158] Another element for the deciding bodies to reduce the compensation is the circumstance that the player was not unemployed for a long period and had soon found a new club.[159]

[153]DRC 8 June 2007, no. 67770.

[154]DRC 6 November 2014, no. 11141064. As said before, in appeal the validity of the "grace period" was confirmed by the CAS; See CAS 2015/A/3993 *Patrick Leugueun Nkenda v. AEL Limasol FC*, award of 14 January 2016.

[155]In a case before the CAS of 2009, CAS 2009/A/1765 *Sport Lisboa E Benfica v. Club Atlético de Madrid SAD & FIFA*, award of 29 September 2009, the CAS Panel also referred to this case. See also CAS 2007/A/1320-1321 *Feyenoord Rotterdam v. Clube de Regatas do Flamengo*, award of 26 November 2007.

[156]DRC 12 January 2007, no. 17595.

[157]DRC 23 February 2007, no. 27835.

[158]DRC 23 February 2007, no. 27698.

[159]DRC 23 February 2007, no. 27835.

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### 8.6.2.2 Exclusion and Deregistration

Let it first be noted that the fact that a player signs an employment contract with a club does not automatically entitle the player to play, as was decided by the DRC in its decision of 1 June 2005.[160] In other words, as long as the player is regularly paid his salary and the club respects all other contractual obligations, a player must accept that he might not be lined up. In this case, the club complied with its financial obligations towards the player. Therefore, the DRC decided that by not fielding the player, the club did not breach the relevant employment contract. The decision on the lining-up of a player in a match is normally left entirely to the discretion of the club, which discretion is also fully respected by the Chamber.[161] However, we note cases in which the player is not only not fielded, but is excluded also from (first) team activities. In several cases this was discussed by the Chamber.

In a DRC decision of 17 August 2006, the parties included a clause in the employment contract relating to the performance of the player.[162] The contract included a clause that the player was appointed to stay in the first team regardless of his performances. In this decision the DRC stated that even if the performance of a player had not been at the expected high level, the club had, by explicitly putting this clause in the employment contract, undertaken the commitment to allow the player into its first team. The DRC concluded that the club concerned had, by preventing the player from training and playing in the first team, violated this clause.

Following a DRC decision of 8 June 2007, it shows that *just cause* can exist for a player if the player is sent to training out of the permanent (first) team if—and that seems to be the decisive element—the employment contract contains a clause that the player may only train with the first team.[163] In this case the DRC turned its attention to the fact that the player concerned was sent to training out of the permanent team of the club. The DRC took note that the employment contract did not contain any clause that the player may only play and train with the first team. Consequently, the DRC deemed that this fact neither constituted *just cause* for the player to prematurely terminate the employment contract signed with the club. It would have been interesting to know what the DRC would have decided if the player's contract did contain such a clause. As a result of the fact that the employment contract in this case did *not* contain a clause that the player may only train with the first team, the DRC decided that there was no *just cause* for the player to prematurely terminate the employment contract signed with his club. According to this DRC decision it seems likely that the DRC is of the opinion that *just cause*

[160]DRC 1 June 2005, no. 65850.

[161]DRC 9 May 2014, no. 05143281.

[162]DRC 17 August 2006, no. 86154.

[163]DRC 8 June 2007, no. 67229.

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exists if the player is sent to training out of the permanent (first) team if the player's contract contains a clause that the player may only train with the first team.[164]

In the aforementioned DRC case of 26 April 2012, the player was banned from the team's activities.[165] In combination with the fact that one month's salary was outstanding and the fact that the player was not registered by the club, the DRC decided that the club's behaviour constituted a clear breach of contract, which, in accordance with its well-established jurisprudence, had reached such a level that the player suffering the breach was entitled to terminate his contractual relationship.

The period during which a player is excluded, is also important with regard to whether or not the player was excluded legitimately. In a case before the DRC of 15 March 2013, the Chamber decided that as a consequence of all the allegations combined with the documentation provided by the claimant, the Chamber considered that the respondent was responsible for the breach of contract without *just cause*, consisting of the player's exclusion from trainings, from both the first and second teams, in a decisive phase of preparation for the upcoming season.[166] Consequently, the Chamber concluded that the player had a valid reason to unilaterally terminate his contractual relationship with the respondent club and that it should be considered a well-founded *just cause*, according to the DRC.

In a DRC case of 13 December 2013, the DRC Judge established that the club had no longer been interested in the player's services by excluding him from training.[167] Such conduct, in the DRC Judge's view, also constitutes a clear breach of contract. The DRC Judge concluded that the club had seriously neglected not only its financial obligations towards the player, but also its non-financial obligations.

In the event that a club does not register a player at its national association as a result of which a player cannot play in the competition, this can be considered as a valid reason to terminate the contract. In another DRC case of 12 December 2013, the Chamber considered that it remained undisputed that the claimant player did not receive any remuneration since the beginning of the season 2012/2013 as well as that the claimant was not registered for the respondent for the relevant season.[168] At this point, the Chamber considered that, regardless of the fact that

[164]In a Dutch case, the Dutch KNVB Arbitration Tribunal had to decide on a similar issue. In this case the player Perez was not permitted to train any longer with the first team of Ajax and was relegated by his coach Marco van Basten to the second team. The player went to court to challenge this decision. The Dutch KNVB Arbitration Tribunal decided that as a result of the fact that the employment contract contained a clause which stated that the player had to be "available for matches and training of the first and second team", the player had no legal ground to challenge the decision of Ajax to play in the second team. Therefore Ajax was permitted to ban the player from training with the first team. See Dutch KNVB Arbitration Tribunal 29 August 2008, no. 1214.

[165]DRC 26 April 2012, no. 412871.

[166]DRC 15 March 2013, no. 03132433.

[167]DRC 13 December 2013, no. 12131045.

[168]DRC 12 December 2013, no. 12132884.

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the claimant terminated the contract officially in writing on 12 November 2012, after the claim was lodged, the respondent had failed to register the claimant for the season 2012/2013. On this point, the DRC first considered it important to point out, that among a player's fundamental rights under an employment contract, is not only his right to a timely payment of his remuneration, but also his right to access training and to be given the possibility to compete with his fellow team mates in the team's official matches. In this context, the DRC emphasized that by refusing to register a player, a club is effectively barring, in an absolute manner, the potential access of a player to competition and, as such, violating one of his fundamental rights as a football player. The sole fact of not registering the player, thus preventing him from rendering his services to the club, in itself constitutes a serious breach of contract, according to the Chamber.

Also, in an unpublished DRC decision of 28 March 2014, a player was excluded from training with the team. The DRC considered it important to point out that among a player's fundamental rights under an employment contract, is not only his right to a timely payment of his remuneration, but also his right to be given the possibility to compete with his fellow team mates in the team's official matches. The DRC emphasized that the non-registration of a player effectively bars, in an absolute manner, the potential access of a football player to competition and, as such, violates one of his fundamental rights as a football player.

In line with the DRC decision of 12 December 2013 (no. 12132884), in the DRC decision of 27 February 2014, the Chamber went on to deliberate whether the player was deregistered by the club, and if it can be considered as *just cause* for the player to have prematurely terminated the employment relationship.[169] In this case, the DRC considered that at the time of the termination of the contract, i.e. on 26 July 2011, despite the arguments of the club that the deregistration was not definitive and that the player could still be registered until September 2011, the player had good reason to believe that his registration would not occur. Consequently, and considering the situation of the player at the time of termination, the Chamber was of the opinion that the objective circumstances at that time did provide the player with *just cause* to prematurely terminate the employment contract. At this point, the DRC considered it important to point out, that among a player's fundamental rights under an employment contract, is not only his right to a timely payment of his remuneration, but also his right to access training and to be given the possibility to compete with his fellow team mates in the team's official matches. The DRC stressed that by refusing to register a player, a club is effectively barring, in an absolute manner, the potential access of a player to competition and, as such, violating one of his fundamental rights as a football player.[170]

[169]DRC 27 February 2014, no. 02142436.

[170]In an unpublished case of the DRC of 21 May 2015, the player was merely informed that he *might* be re-registered.

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It must be taken into account that even if the employment contract establishes that the player is a professional, the club can still decide whether the player needs to train with the reserve team (youth/amateur team), if necessary for his preparation. In other words, the club has a certain discretion in this regard. Moreover, in this case it was relevant that the club had demonstrated that the player participated in trainings with the reserve team during the contract prior to the termination, which did not speak in favour of the player. This follows from a case before the DRC of 28 March 2014.[171]

The CAS also had to deal with similar issues as mentioned above. For example, in a case before the CAS of 6 February 2012, the CAS decided that there are circumstances when a club may deem it necessary for a player to train alone, for example if his fitness has dropped below the level of that of his team mates, if his body mass index was too high, if he was recovering from an injury, etc., but then only until his fitness had recovered, his body mass improved, his injury healed, etc. However, the CAS Panel equally noted that football is a team sport and that the majority of training would need to be as part of a team or squad and with a football.[172] The CAS Panel also determined that any instructions regarding training should be reasonable. However, in this case the CAS Panel could not ultimately go so far as to say there is a fundamental right for all players to always train together, the facts of each case must be considered. In this case the player had to train alone in the snow at temperatures of −10 to −15 °C, there was no mention of training with a football, there was no mention of a coach being with him, there were no other players. Furthermore, the programme set did not appear to be designed specifically for the player to achieve any particular purpose, nor was the purpose behind the individual training programme particularly clear according to the CAS Panel.[173]

In the previously mentioned award of 16 October 2012, it was also decided by the CAS that *just cause* for termination will also be admitted in the event that a professional player is excluded from the first squad for good, without a reasonable decision and the coach calls him an "idiot" and a "betrayer". A professional

[171]DRC 28 March 2014, no. 0314734.

[172]CAS 2011/A/2428 *Igor Strelkov v. CJSC FC Krylia Sovetov*, award of 6 February 2012.

[173]In an award of 23 February 2009, the CAS decided that a valid reason for the unilateral termination of the contract has to be admitted when the essential conditions under which the contract was concluded are no longer present, whereas only a breach which is of a certain severity justifies termination of a contract without prior warning. CAS 2008/A/1517 *Ionikos FC v. C.*, award of 23 February 2009. A club is in abuse of its rights—and therefore the player may terminate the employment relationship with *just cause*—if the club requires from the player to attend training sessions at odd times, such as at 7:00 am on January 1st, while the rest of the team is officially on Christmas leave. See also CAS 2009/A/1956, award of 16 February 2010 and CAS 2009/A/1932, award of 19 March 2010. Also in CAS 2008/A/1517 *Ionikos FC v. C.*, award of 23 February 2009 and CAS 2008/A/1589, award of 20 February 2009, the CAS Panels confirmed that the players were entitled to terminate their employment contracts due to the seriousness and repetition of the violations by the clubs concerned.

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sportsman, like a professional football player, has a particular interest in continuing his training in order to keep his value in the labour market, so that his future is not jeopardized.[174]

From the CAS jurisprudence it also follows that it is important to establish whether or not the employment contract contains a clause that the player may only train with the first team. In a CAS case of 17 April 2013, it was undisputed that the player was sent to the second team of the club.[175] However, the player considered this a clear violation of the terms of the contract, because he was hired only to play in the first team. The club, however, considered that the transfer to trainings with the second line-up of the team was not a violation. Following the content of the contract and the Ukrainian Labour Law, the CAS found that, contrary to what the player expressed, the club was allowed to relegate the player to the second team of the same club without violating the player's rights. The Panel did not find any part in the contract that the player was only entitled to play in the first team. From this case it can be inferred that there could be circumstances when a club may deem it necessary for a player to train alone. However, there is no fundamental right of a player to always train with his squad; the facts of each case must be considered.

Also, in the *Bangoura* case of 2 July 2013, the case before CAS between FC Nantes, Al Nasr and Ismäel Bangoura, with regard to the deregistration as such, the Panel stated that there may be an infringement upon the player's personal rights.[176] The CAS agreed with the DRC in its (unpublished) decision, which, in the case at hand, concluded that "*among a player's fundamental rights under an employment contract, is not only his right to a timely payment of his remuneration, but also 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 that "*by "de-registering" a player, even for a limited time period, a club is effectively barring, in an absolute manner, the potential access of a player to competition and, as such, is violating one of his fundamental rights as a football player*" and that therefore "*the de-registration of a player could in principle constitute a breach of contract since it* de facto *prevents a player from being eligible to play for his club*". As such, while deregistration might, in principle, constitute a valid reason justifying termination, the Panel concluded that in the specific circumstances of the case at hand, it does not.

Based on the above decisions, we derive that *just cause* exists for a player if the player is sent to training out of the permanent (first) team if, in any event the employment contract contains a clause that the player may only train with the first

[174]See also CAS 2011/O/25211 *Matteo Ferrari v. Besiktas Futbol Yatirimiari San. Ve Tie. A.S.*, award of 16 October 2012. Reference was also made to the award CAS 2006/A/1180, marg. no. 8.4 and CAS 2006/A/1100, marg. no. 8.2.5 ff.

[175]CAS 2012/O/2991 *Derek Boateng v. Dnipro Dnipropetrovsk*, award of 17 April 2013.

[176]CAS 2013/A/3091 *FC Nantes v. FIFA & Al Nasr Sports Club*, CAS 2013/A/3092 *Ismaël Bangoura v. Al Nasr Sports Club & FIFA*, CAS 2013/A/3093 *Al Nasr Sports Club v. Ismaël Bangoura & FC Nantes*, award of 2 July 2013.

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team. We also note that *just cause* might exist if a club requires the player to attend training sessions at odd times, such as at 7:00 am on 1 January, while the rest of the team is officially on Christmas leave. The CAS jurisprudence also shows that a club can let a player train alone. However, only under special circumstances. For example, in the event that the player's fitness has dropped beneath the level of his team mates, if the player's body mass index was too high, if the player was recovering from an injury, etc., but then only until his fitness has recovered, his body mass improved, his injury healed, etc. The CAS Panel equally noted in this case, that football is a team sport and that the majority of training for a football player would need to be as part of a team or squad and with a football.[177]

In the case between player Salkic and the Football Union of Russia and the professional football club Arsenal, the CAS Panel dealt with several questions. In this case the CAS Panel determined that the contract entitled the Russian club to assign the player to the backup team for matches, without any reason being required as a precondition, but that there must be limits to such assignment, so as not to infringe the player's rights. Faced with the limited evidence before it and the submissions by the Russian club that the player would have rejoined the first team after his training with the backup team during the winter break when no one was playing any matches, the CAS Panel was satisfied that the said assignment was temporary. It was undisputed by the parties that forcing a player to train alone in circumstances as the player in CAS 2011/A/2428 faced would breach a player's rights, but in the case at hand, the player trained with the backup team on a proper pitch (perhaps with some ice or frost on it, but not in feet of snow), in a team environment and with a qualified coach (perhaps not as qualified as the head coach, but suitably qualified nonetheless). There was no evidence before the Panel that there was any danger for the player that he couldn't train with a ball and with a team. As such, the Panel determines there was nothing in the facilities provided that infringed upon the rights of the player. The CAS was satisfied that the temporary assignment of the player, at a time when there were no matches being played, potentially on the basis of the head coach's view of the player's footballing condition and with no loss in contractual benefits such as pay, being assigned to the backup team to train with other players in a team environment, could potentially have breached the player's rights or discriminate against him, but did not give rise to sufficient grounds (especially after only 7 days) for the player to terminate his contract. As a result of him leaving the club on the 8th day and failing to return, after notifications from the club requesting him to return, resulted in the club then validly terminating the contract.[178]

The period during which a player is excluded, is also important with regard to whether or not the player was excluded legitimately. In a case before the DRC of

[177]See also CAS 2014/A/3679 *FC Dacia Chisinau v. Goran Stankovski*, award of 17 February 2015.

[178]CAS 2014/A/3642 *Erik Salkic v. Football Union of Russia & Professional Football Club Arsenal*, undated award. See also CAS 2007/A/1369 *O. v. FC Krylia Sovetov Samara*, award of 6 March 2008.

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15 March 2013, the DRC decided that as a consequence to all the allegations combined with the documentation provided by the claimant, the Chamber considered that the respondent was responsible for the breach of contract without *just cause*, consisting of the player's exclusion from trainings, from both the first and second teams, in a decisive phase of preparation for the upcoming season.[179] Consequently, the Chamber concluded that the player had a valid reason to unilaterally terminate his contractual relationship with the respondent club and that it should be considered a well-founded *just cause*, according to the DRC.

Also, in the event of a deregistration of a player, we can conclude that the competent authorities of the DRC (and the CAS) may decide that there is an infringement upon the player's personal rights. From the DRC (and the CAS) jurisprudence it follows that among a player's fundamental rights under an employment contract, is not only his right to a timely payment of his remuneration, but also 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 that by deregistering a player, even for a limited time period, a club is effectively barring, in an absolute manner, the potential access of a player to competition and, as such, is violating one of his fundamental rights as a football player, and that the deregistration of a player could therefore constitute a breach of contract and *just cause* for a player to terminate his contract.

In view of the above jurisprudence, it can be noted that several elements are interesting to take into account on the question whether or not the exclusion is legally permitted, and to avoid an infringement of the player's rights. For example, whether or not the contract provides for a clause that the player is only entitled to perform in the first team. Furthermore, it is important to establish the exact reason for the relegation to a second team and whether or not the decision for the relegation is of a temporary or definitive nature, as was decided in the jurisprudence. Important too, is whether or not the player receives his salary during the exclusion. We also note the fact that the player cannot be forced to train alone under all circumstances and that the training facilities are also of relevance.

## 8.7 Sporting Just Cause

### *8.7.1 Introduction*

The employment contract can also be terminated in case of a *sporting just cause*.

In Article 15 of the RSTP, 2016 edition, the *sporting just cause* is defined as follows:

> An established professional who has, in the course of the season, appeared in fewer than ten per cent of the official matches in which his club has been involved may terminate his

[179]DRC 15 March 2013, no. 03132433.

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> contract prematurely on the grounds of sporting just cause. Due consideration shall be given to the player's circumstances in the appraisal of such cases. The existence of sporting just cause shall be established on a case-by-case basis. In such a case, sporting sanction shall not be imposed, though compensation may be payable. A professional may only terminate his contract on this basis in the 15 days following the last official match of the season of the club with which he is registered.[180]

Following the definition of *sporting just cause*, we immediately see some fundamental differences with the aforementioned *just cause*. In the first place, *sporting just cause* is exclusively a possibility for the *player* (not the club) to unilaterally terminate the employment contract.[181] Secondly, no sporting sanctions will be imposed on the player as is the case with *just cause*, but, contrary to the consequences of *just cause*, compensation may be payable in case of *sporting just cause*. Compensation *may* be payable but this, in no way is definitive. It depends on the merits of the case. The club may lose its entitlement to compensation if the player can prove that the club has completely neglected the player from a sporting point of view, as it was not interested in his services.[182] Furthermore, the invocation of *just cause* is not related to a period of time, whilst the invocation of *sporting just cause* is restricted to "*15-day term*". Following Article 15 of the RSTP, 2016 edition, a professional may only terminate his contract with the club on the basis of *sporting just cause* in the 15 days following the last official match of the season of the club with which the player was registered.

In the following paragraphs the requirements will be discussed, so too in view of the DRC jurisprudence. However, the awards of the CAS will also be brought to the readers' attention since these decisions give a further explanation on the concept of *sporting just cause*, thereby noting that the CAS issued more relevant awards than the DRC. Aside from this, the CAS awards might have relevant impact on future DRC decisions regarding the further development of and interpretation of *sporting just cause*.

### *8.7.2 Requirements*

Following Article 15 of the RSTP, edition 2016, there are three mandatory conditions for a player to be entitled to claim *sporting just cause*. Firstly, the player is recognised as an *established professional*. Secondly, he has not played in more than 10 % of the official matches of his club. In this respect, it must be noted that

[180]In the former 2001 edition of the RSTP, the concept of *sporting just cause* had a broader application. Former conditions such as injury, suspension, player field position, etc., no longer apply.

[181]See also CAS 2012/A/2844 *Gussev v. C.S. Fotbal Club Astra & RPFL*, award of 2 February 2015. From this case it follows that it is well-established CAS jurisprudence that only a player can raise the grounds for *sporting just cause*.

[182]FIFA Commentary, explanation Article 15, p. 43.

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being entitled to claim *sporting just cause* in accordance with the above conditions does not automatically mean that *sporting just cause* has been established. This must be done and established by the DRC.[183] Thirdly, it is a strict requirement that the unilateral termination on grounds of *sporting just cause* by the player is only valid if the player unilaterally terminates his employment contract in the 15 days following the last official match of the season of the club for which he is registered. These three cumulative conditions will be discussed in the following paragraphs.

#### 8.7.2.1 Established Professional

In the opinion of FIFA, an *established professional* is a player who has terminated and completed his training period. This *established professional* may have valid sporting reasons, also known as the aforementioned *sporting just cause*, for unilaterally terminating his employment contract. In this respect it must first be determined whether the player is actually an *established professional*. The RSTP, 2016 edition, does not provide for a definition of *established professional*. As a key element, however, the FIFA Commentary provides clarity and refers to the fact that an *established professional* is:

> a player with a certain level of footballing skill who does not have sufficient opportunities in a club and therefore wishes to leave in order to join a club where he has the opportunity to play on a regular basis.
>
> his level of footballing skill is at least equal to or even superior to those of his team mates who appear regularly. One possible reason for the player in question not playing (regularly) is because his position has already been taken by another player with similar characteristics.

Consequently, this means that the *established professional* cannot be a very young player because of his lack of football experience. Furthermore, it is quite remarkable that the *established professional* is at least equal, according to the FIFA Commentary, or even superior to those of his team mates. However, it is difficult to understand why a player who is even superior to his team mates would be held on the bench.

Following the FIFA Commentary, it now seems that the term *player's circumstances* (i.e. the player's position on the pitch, any injuries or suspensions sustained by a player that have prevented him from playing over a certain period of time, as well as any situation that may justify, from a sporting point of view, the fact that the player has not been fielded on a regular basis) is not an independent criterion, but must be seen in context of the first criterion, being the *established professional*, as well as in context of the second criterion, the *10 % prerequisite*, which will be discussed below.[184]

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[183]FIFA Commentary, explanation Article 15 under 2, p. 41.

[184]See also Gradev 2010, p. 111.

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#### 8.7.2.2 Appearance Professional

The second criterion is that the *established professional*, as defined in the previous paragraph, who has appeared in fewer than 10 % of the official matches in which his club has been involved in the course of the season, may terminate his contract prematurely on grounds of "*sporting just cause*". According to the FIFA Commentary, *appearance* must be understood as being fielded and thus actively taking part in a game. The championship and national and international cup matches must therefore be taken into account to establish the percentage of games played.[185]

#### 8.7.2.3 "15-Day Term"

The third and last criterion is that termination by the player on *sporting just cause* will only be valid if the player terminates his contract in the 15 days following the last official match of the season of the club for which he is registered. If the player fails to respect this requirement, this will automatically lead to disciplinary sanctions. According to the FIFA Commentary, the closer the termination is to the end of the main registration period, the harder the sanction may be, as the club suffers more in view of the difficulty of finding a replacement for the player who is leaving.[186]

### *8.7.3 CAS and DRC Jurisprudence*

Although the FIFA Commentary states that there had not been any DRC decisions on *sporting just cause* before the entry into force of FIFA Commentary published in December 2006, several decisions were published by FIFA in which claims by players for *sporting just cause* has been (albeit partially) discussed by the DRC.[187]

For example, in a decision of 1 June 2005, a player and a club signed a labour contract valid from 2 February 2004 until 30 June 2005.[188] At the same time, the parties concluded a special agreement which granted the player the right to terminate the employment contract after the last match of the 2003/04 season until 31 May 2004. According to this agreement, the player had the right to terminate the contract and the aforementioned employment contract would end on 30 June 2004. The DRC decided that the fact that a player signs an employment contract with a club does not automatically entitle the player to play. In other words, the DRC was of the opinion that as long as the player is paid his salary regularly and the club respects all other contractual obligations, a player must accept that he might not be

[185]FIFA Commentary, explanation Article 15, p. 42.

[186]FIFA Commentary, explanation Article 15, p. 44.

[187]FIFA Commentary, explanation Article 15, p. 43, footnote 68.

[188]DRC 1 June 2005, no. 65850.

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lined up. In this case, the club complied with its financial obligations towards the player. Therefore, the DRC decided that by not fielding the player, the club did not breach the relevant employment contract. Finally, the DRC decided and emphasized that the player concerned had chosen to unilaterally terminate the contractual relationship with the club according to the special agreement dated 2 February 2004. As a result thereof, the Chamber was of the opinion that it did not have to consider a contractual termination for *sporting just cause* by the player in line with Article 24 of the RSTP, 2001 edition.

In a decision of 23 March 2006, a player did not fulfil, among other things, the aforementioned requirement of the "*15-day term*". In this decision the player stressed that he had the right to breach the employment contract with his club for *sporting just cause* according to Article 15 of the RSTP, 2005 edition, without him being required to pay compensation or to have sporting sanctions applied against him.[189] In response to the player's claim, the club was of the opinion that the player had no basis to invoke the application of *sporting just cause* to terminate the employment contract. The club maintained that in the relevant league, a total of 34 competition matches are played each season and that the player participated in 15 official matches. Finally, the DRC recalled that an established professional may only terminate an employment contract for *sporting just cause* at the end of the season, more precisely, within 15 days following the last official match of the season of the club for which he is registered. The DRC stressed that the aforementioned conditions were not fulfilled and therefore the player could not invoke this reason for terminating his contract.

In a case before the DRC of 10 August 2007, published after the entry into force of the FIFA Commentary, the Chamber (finally) decided on the (context of) *sporting just cause*, as was noted by the Chamber itself. Although the issue of *sporting just cause* passed by in the two prior DRC cases as mentioned above, in which cases the DRC decided partially on this issue, it now actually had to decide on the validity of *sporting just cause* for the player. The DRC remarked that under the regulations and following a grammatical interpretation of the relevant provision, *sporting just cause* is established by mainly taking into consideration a floor of 10 % of the official matches in which the player participated and not the minutes. The Chamber finally deemed that there was no *sporting just cause* present for the player since five matches out of 34 was more than 10 % which was the limit required by Article 15 RSTP.[190]

Also, the CAS had decided previously on *sporting just cause*. In a case before the CAS of 6 March 2008, which contains the appeal procedure of the above DRC case of 10 August 2007 (no. 871322), the Single Arbitrator of the CAS decided that there are (even) four requirements to be complied with before a player can terminate his employment contract on the grounds of *sporting just cause*: (a) that the player is an established professional; (b) that he has played in less than 10 % of

[189]DRC 23 March 2006, no. 631290.

[190]DRC 10 August 2007, no. 871322.

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the official matches in which his club was involved in the sporting season in question; (c) the player's personal circumstances; and (d) that he terminates his employment contract during the 15 days following the final official match in the season of the club with which he was registered.[191] In this case the Single Arbitrator addresses all the criteria. According to the Single Judge of the CAS, the *established professional* concept needs to be elaborated not only on the basis of the player's age, but also on his sporting level as demonstrated during his career, in terms of an acceptable standard in view of the specificity of the sport, the players legitimate expectations, and what is expected of the player in terms of sporting performance. The relevant level for the definition of an *established player* is related to his development as a player, taking a common competitive standard into consideration, and not the reality or competitiveness of the club for which the player plays from time to time. On the second criterion, the appearance of a player in less than 10 % of the matches, the Single Arbitrator refers to the FIFA Commentary, in which it is stated that "*it is not the number of appearances in games but the minutes effectively played therein that is relevant*". According to the Single Judge, the aim of this article is to permit a player to terminate his employment contract unilaterally if he is in a situation in which he is prevented from exercising his professional activity with a reasonable frequency and, as such, is prevented for progressing professionally. If read literally, the limits imposed by this provision could easily be avoided by any club in relation to any player. For this it would suffice to put the player on the field in 10 % of its official games, while only allowing him to play for 1 min in each of these matches. The provision and specifically the question of the calculation of a 10 % participation in official matches must accordingly be considered in view of the *ratio* of Article 15, even if this leads to a consequence other than would have been obtained via a literal analysis of the said provision. According to the Single Judge, the meaning of the provision is thus that the actual time played rather than the number of games should be considered. In other words, the calculation must be based on the minutes. Another aspect that the CAS had to deal with regarding the 10 % criterion was what the total number of games of the team is which must be taken into account. In this regard, the Single Arbitrator emphasized that it is necessary to exclude matches played by second teams. The Single Arbitrator also noted that even when the player's personal circumstances justify his intention to leave the club, the player should, in some way, during the season, have manifested his discontent with the way he was being treated by the club, i.e. the fact that he was not fielded much in first team games. Silence can communicate a sense of resignation, acceptance or even accommodation to the situation and give the impression that he lacked motivation. The club was accordingly not alerted to the player's dissatisfaction and so it could not take corrective measures during the season in view of an improved equilibrium between the parties. On the fourth condition, the Single Arbitrator of the CAS considers that the player did not terminate his employment

[191]CAS 2007/A/1369 *O. v. FC Krylia Sovetov Samara*, award of 6 March 2008.

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contract with the club within the 15-day period following the club's final official game in the season and that the final requirement for the unilateral termination of the contract on grounds of *sporting just cause* provided in Article 15 RSTP had not been complied with.[192]

Also, in the previously mentioned *Bangoura* case of 2 July 2013, the case before the CAS between FC Nantes, Al Nasr and Ismäel Bangoura, the player also alleged that he had *sporting just cause* to terminate his contract with Al Nasr, thereby referring to Article 15 RSTP, 2010 edition.[193] The player alleged that he played only 3 matches out of 33 matches that were played by his team in the 2011/2012 season and that, he therefore had *just cause* to terminate his contract. The Panel does not need to consider this matter in depth in order to reject the player's argument in this respect, as the CAS jurisprudence particularly states that this provision is applicable only if the player in question has terminated "*his employment contract during the 15 days following the final official match in the season of the club with which he was registered*" (CAS 2007/A/1369), which is not the case in the present matter. As Article 15 RSTP is obviously not applicable in a case in which a player terminates his employment agreement in the course of a season, the player's argument was rejected.[194]

### *8.7.4 Final Remarks*

Following the jurisprudence there are several mandatory conditions for a player to be entitled to claim *sporting just cause*. Firstly, the player must be recognized as

[192]In another case before the CAS of 30 July 2009, it was decided by the CAS that Article 15 RSTP specifically governs termination by a professional player because the latter has, in the course of the season, appeared in fewer than ten per cent of the official matches in which his club has been involved. However, this *sporting just cause* is reserved for *established professionals*, according to the CAS Panel, and the very low threshold that is set in the regulations can obviously not be invoked by a player whose participation in the official matches of his team is close to 60 %. See CAS 2008/A/1696, award of 30 July 2009. See also CAS 2013/A/3107 *FC BATE Borisov v. Aleksandr Petrovich Gutor*, award of 31 January 2014. In the latter case, the player failed to comply with one of the 3 conditions, i.e. "the 15-day term".

[193]CAS 2013/A/3091 *FC Nantes v. FIFA & Al Nasr Sports Club*, CAS 2013/A/3092 *Ismaël Bangoura v. Al Nasr Sports Club & FIFA*, CAS 2013/A/3093 *Al Nasr Sports Club v. Ismaël Bangoura & FC Nantes*, award of 2 July 2013.

[194]In another case before the CAS of 31 January 2014, it was decided by the CAS that a player is entitled to unilaterally terminate his employment contract on the basis of *sporting just cause* if three cumulative prerequisites are met: (a) the player has professional status for three consecutive seasons, (b) the player appeared in less than 10 % of the official games on the club's main roster in all competitions the has participated in, and (c) the player files the appropriate request with the club within a 15-day period following the last official game of the season of the club. In this case the player failed to comply with the third prerequisite, i.e. the legal deadline. The player was thus not entitled to terminate the contract based on *sporting just cause*. See CAS 2013/A/1307, award of 31 January 2014.

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an *established professional*. Secondly, he has not played in more than 10 % of the official matches of his club. Thirdly, it is a strict requirement that the unilateral termination on grounds of *sporting just cause* by the player is only valid if the player unilaterally terminates his employment contract in the 15 days following the last official match of the season of the club for which he is registered. In the above CAS award of 6 March 2008, reference was also made by the Single Arbitrator to a fourth condition as the player's personal circumstances are also relevant to successfully claim *sporting just cause*. It is questioned whether one can speak of a fourth condition, since the player's circumstances can be established in the context of the first two criteria.[195] From the FIFA Commentary it can be derived that the player's circumstances must be related to situations that may justify, from a sporting point of view, the fact that the player has not been fielded on a regular basis. It can be questioned whether the player's circumstances also cover personal circumstances that justify the player's intention to leave the club and that the player should, in some way, during the season, have manifested his discontent with the way he was being treated by the club, as was stated by the Single Arbitrator. This extra (fourth) condition cannot be derived from Article 15 of the RSTP, edition 2016, itself. In other words, from a literal point of view and taking into account the three prerequisites as laid down in said Article it should be irrelevant whether or not the player has actually manifested his discontent with the way he was being treated by the club. In principle, meeting with the three conditions should suffice in order to establish the existense of a "*sporting just cause*". In other words, if the player meets all three criteria, but has not manifested his discontent with the way he was being treated by the club prior to his unilateral termination based on "*sporting just cause*" this is, in itself, no reason not to establish the validity of the "*sporting just cause*". However, it is justified that such specific circumstance could have an effect on the amount of compensation to be paid by the player to the club, in the light of Article 15 of the RSTP, edition 2016. After all, from this Article it follows that "compensation may be payable" which means that the DRC has a certain discretion in order to award compensation. In conclusion, it can benefit the player if he warned the club prior to his termination in order to avoid payment of any (higher) compensation, but from a strict literal point of view it is not a prerequisite for the validity. It cannot be compared with the warning which should be given by a player to a club prior to a termination based on a "*just cause*" since the party who terminates the contract on "*just cause*" is not obliged to pay any compensation to the other party. Therefore, the consequences of a termination of *just cause* are much more severe since no compensation has to be paid in these situations at any event.

[195]See also Gradev 2010, p. 111.

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## 8.8 Conclusion

In principle, an employment contract can only be terminated on expiry of the contract or by mutual agreement. With regard to the mutual agreement, parties may terminate their agreement by mutual consent. However, in order to prove such an agreement of termination, it is of the utmost importance that the arrangements in this respect are stipulated in an agreement. Following the DRC cases, it is also of crucial importance for clubs to take into account that reductions are only permitted insofar as they have been stipulated by the parties in the termination agreement.

As regards the relegation clause, the DRC is not quite clear. We must note the fact that the DRC is not very consistent with regard to the validity of the relegation clause, since there are decisions whereby the clause is valid and we note decisions whereby the clause is invalid, on the understanding that the CAS is of the opinion that the clause can be valid as long as such condition is not of a potestative nature, i.e. not depending on the will of one of the parties to the contract or a third party. However, we may generally conclude that as long as the clause is described as an automatic termination and not as a unilateral right of the club to terminate the contract, the DRC will find the relegation clause valid. In other words, in all the cases where the clause was not valid, there was a certain discretion for the club to decide to terminate the contract due to relegation. It is of utmost importance to note this difference and thus to draft the clause in an unambiguous way and not to leave any discretionary room for discussion with regard to its termination.

The DRC is of the opinion that a probation period is usually not allowed. With regard to the probation period, the Chamber recalled that such clauses are not acceptable as they do not respect the spirit of the regulations.

Following the decisions of the DRC, it is questionable whether parties may agree to a period of notice in the contract. For example, can a clause which gives the club the right to unilaterally cancel the employment contract within a specified period of time, be considered valid? And what if the other party is (not) provided with this same right and there is no reciprocity? The DRC, however, is not entirely clear at this point. On the one hand, the DRC is of the opinion that such clauses create a disequilibrium between the rights and obligations of the player and the club. Since the right to terminate the contract is left exclusively to the discretion and the subjective criteria of the club, i.e. the stronger party in the employment relationship, these clauses are not valid. On the other hand, we take note of decisions in which such clauses are permitted, the DRC thereby making reference to the principle of *pacta sunt servanda*.

Situations could occur that it is too much of a strain on the patience of one of the parties to respect the employment contract. The FIFA jurisprudence shows that in the case of a valid reason for one of the parties, the so-called *just cause*, the employment contract may be unilaterally terminated by either party with no consequences of any kind. In other words, no financial compensation needs to be paid and no sporting sanctions can be imposed upon a party by FIFA.

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In the daily practice of the international professional football world, there are clauses in an employment contract which state that the club may terminate the contract when the player does not perform well. According to the DRC decisions, we can note that the Chamber is of the opinion that a clause in a contract which states that the club may unilaterally terminate the employment contract when the player's sportive performance no longer meets the club's requirement, cannot be defined as *just cause* and is not valid. The DRC deems that, in view of its potestative nature, such contractual clauses cannot have legal effect. Therefore, a contract which states that the player's performance no longer complies with the club's requirements cannot be defined as *just cause* and will not be considered as valid.

According to the DRC decisions, it is questionable how the DRC would decide in future on the termination of a contract in relation to a number of played matches. The DRC once decided that such a clause can be valid if the clause is restricted to a single point in time after completion of each full playing season and cannot be invoked during the season at any arbitrary time. In the DRC's view, this could provide the player with some legal certainty and stability. In that respect an important factor in order to establish that such a clause is valid, is that such a clause is explicitly accepted by both parties when they signed the contract. However, we derive from a more recent case which meets more fairness, that a similar clause can be seen as arbitrary by the DRC, since it is up to the club to decide how many matches the player will play. In any event, we can conclude that termination clauses relating to a number of played matches bear a substantial risk to be seen as invalid.

With regard to the cases in which the club terminates the contract due to an injury of the player, the DRC is clear. According to the well-established and consistent jurisprudence of the DRC, the premature and unilateral termination of an employment contract by a club because of an injury must be considered as a termination of the contract without *just cause*. The DRC is of the firm opinion that if an employee is injured, in principle this does not constitute *just cause* for terminating the employment contract prematurely and unilaterally and therefore to cancel payment of the player's salary. Therefore, according to the well-established jurisprudence of the DRC, a player's injury does not constitute *just cause* in the sense of Article 14 of the RSTP for a club to terminate a contract.

The DRC is of the opinion that the absence of a player can generally constitute *just cause* for a club to unilaterally terminate the employment contract with the player. The period of two weeks in combination with regular misbehaviour or just one month of unauthorised absence can be considered as a valid *just cause* for the club.

*Just cause* can also exist if one can speak of misbehaviour of a player. However, the question whether or not *just cause* exists, will be subject to the specific circumstances of the case. We see that one-off misbehaviours, in principle will not automatically establish a valid reason for the unilateral termination. In the event that it is officially established that a player used drugs, *just cause* for the club will be accepted and the club will then be permitted to unilaterally terminate the employment contract and, as a result thereof, sue the player for financial compensation.

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With regard to the abuse of alcohol, the CAS and the DRC may decide in future that the abuse of alcohol can be constituted as *just cause* for the club to unilaterally terminate the employment contract with the player, however, only if it can be demonstrated that the player deliberately had the intention to play beneath his potential. In other words, the logical nexus between the level of playing and the abuse of alcohol must be present and must actually be demonstrated by the club.

On the side of the player, we also face the presence of several *just causes*, whereby the most important one is the *just cause* relating to outstanding salary. The jurisprudence of the DRC and the CAS is not always clear. The DRC and the CAS jurisprudence show that when the club has omitted and persisted in failing to pay salary to the player in time during a lengthy period, in the opinion of both committees the player is entitled to unilaterally terminate the contract and will consequently be free to leave the club. The DRC is of the explicit opinion that the persistent failure of a club to pay the salary of a player for at least 3 months can be considered as *just cause* for the player to unilaterally terminate his employment contract. In more recent cases we also note that, under special circumstances, a period of 2 months can be sufficient.

Another *just cause* for a player is related to his exclusion from first team activities or deregistrations. Based on the decisions of the DRC and the CAS, we derive that *just cause* exists for a player if the player is sent to training out of the permanent (first) team if, and insofar as the employment contract contains a clause that the player may only train with the first team. It must be noted that several elements are interesting to take into account in order to avoid an infringement of the player's rights. For example, whether or not the contract provides for a clause that the player is only entitled to perform in the first team, the exact reason for the relegation to a second team, and whether or not the decision for the relegation is of a temporary or definitive nature, as was also decided in the applicable jurisprudence. Important is also whether or not the player receives his salary during the exclusion. We also note the fact that the player cannot be forced to train alone under all circumstances and that the training facilities are also of relevance. In the event of a deregistration of a player, the competent authorities of the DRC will decide that there might be an infringement upon the player's personal rights as a result of which *just cause* exists for the player to unilaterally terminate the contract.

Aside from "*just cause*", we also note "*sporting just cause*", which is laid down in Article 15 of the RSTP. A *sporting just cause* exists if "*an established Professional who has, in the course of the season, appeared in fewer than ten per cent of the official matches in which his club has been involved may terminate his contract prematurely on the grounds of sporting just cause*". In principle, there are three mandatory conditions for a player to claim *sporting just cause*. Firstly, the player is recognized as an *established professional*, secondly, he has not played in more than 10 % of the official matches of his club and thirdly, it is a strict requirement that the termination on grounds of *sporting just cause* is only valid if the player terminates his contract in the 15 days following the last official match of the season of the club for which he is registered. As opposed to the *just cause*, the *sporting just cause* is exclusively a possibility for the *player* (not the club) to

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unilaterally terminate the employment contract and no sporting sanctions will be imposed on the player as with the just cause, but it is important to note that, contrary to the consequences of *just cause*, compensation *may* still be payable in case of a *sporting just cause*.

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# Chapter 9
# Compensation

**Abstract** This chapter focuses on the amount of compensation to be paid by a player or a club as a result of a unilateral breach of contract. In the event that the contract has been terminated by one of the parties without *just cause*, i.e. without a valid reason, the party in breach is obliged to pay compensation in accordance with Article 17 para 1 of the RSTP. The party who is in breach of the contract without *just cause* is obliged to pay compensation irrespective of whether the breach took place during or after the Protected Period. The situation will be discussed in which compensation must be paid by the club to the player due to a breach of contract without *just cause* by the club. The situation will also be discussed whereby compensation must be paid by the player to the club due to a breach of contract without *just cause* by the player.

**Keywords** Compensation · Termination with or without just cause · Specificity of sport · Ex aequo et bono · Protected Period · Positive interest · Replacement costs · Webster · Matuzalem · De Sanctis

## Contents

9.1 Introduction ..... 274
9.2 Calculation of the Compensation ..... 276
9.3 Compensation to Be Paid by the Club to the Player ..... 286
9.3.1 General ..... 286
9.3.2 DRC Approach ..... 287
9.3.2.1 General ..... 287
9.3.2.2 Adjustment Amount of Compensation ..... 288
9.3.2.3 Behaviour Parties ..... 289
9.3.2.4 Permanent Incapacity ..... 293
9.4 Compensation to Be Paid by the Player to the Club ..... 294
9.4.1 General ..... 294

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9.4.2 DRC Approach ..... 299
9.4.3 Breach of Contract and the Protected Period ..... 300
9.4.3.1 Introduction ..... 300
9.4.3.2 *Webster* Case ..... 302
9.4.3.3 *Matuzalem* Case ..... 304
9.4.3.4 *De Sanctis* Case ..... 305
9.5 Conclusion ..... 312
Reference ..... 314

## 9.1 Introduction

An employment contract may be unilaterally terminated by either party in the case of a valid reason, the so-called *just cause*, without any consequences of any kind. In other words, and to avoid any misunderstanding, a party who terminates a contract for *just cause* is not obliged to pay any compensation. However, in the event that the contract has been terminated by one of the parties without *just cause*, i.e. without a valid reason, the party in breach is obliged to pay compensation. This is laid down in Article 17 para 1 of the RSTP, 2016 edition. The party who is in breach without *just cause* is obliged to pay compensation irrespective of whether the breach is during or after the Protected Period.[1]

Claims for compensation based on Article 17 of the RSTP can be brought before the DRC, where financial compensation will be calculated with due consideration of the law of the country concerned, the specificity of sport, and any other objective criteria, as will be discussed later.[2] The DRC is of the opinion that awarding compensation in favour of a disadvantaged party (either the club or the player) has proven to be an efficient means and has found widespread acceptance since it guarantees that the fundamental principle of respect of contracts is taken care of.[3]

It is important to be aware that the CAS generally respects FIFA's autonomy regarding Article 17 of the RSTP. For example, in a case before the DRC of 30 November 2007 the DRC referred to a CAS award of 15 November 2006 (CAS 2006/A/1100) in which it was decided that Article 17 para 1 of the RSTP allows a considerable discretion in the calculation of the compensation for breach of contract. The CAS also provided the DRC with certain guidelines in this respect.[4]

Notwithstanding the above, the difference between the breach during or after the Protected Period is that sporting sanctions will *only* be imposed on the party that breached the contract within the Protected Period. Unilateral breach without

[1]FIFA Commentary, explanation Article 17 RSTP under 1 sub 1, p. 47.

[2]RSTP, edition 2005, Article 17 para 1.

[3]DRC 2 November 2007, no. 117623.

[4]DRC 30 November 2007, no. 117294. See also CAS 2006/A/1100, award of 15 November 2006. As a side-note, in the latter case the CAS also recalled that a person cannot be compelled to remain in a particular employment. A player who breaches an employment contract without *just cause* may be liable for damages or even have a sanction imposed based on Article 17 of the RSTP, but is not subject to an injunction to remain with his employer.

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*just cause* (or *sporting just cause*) after the Protected Period will not result in sporting sanctions. The issue relating to the sporting sanctions for players and clubs after a termination of the employment contract will be discussed in this chapter.

This chapter first discusses the relevant criteria regarding the amount of compensation in view of Article 17 of the RSTP. These rules provide for guidelines to determine the amount of compensation to be paid to the disadvantaged party. The compensation for breach of contract without *just cause* will be calculated with due consideration of the law of the country concerned, the specificity of sport and the mentioned "objective criteria" unless, as explicitly follows from Article 17, otherwise provided for in the contract. The compensation paid by the club as well as by the player will also be discussed in relation to the relevant jurisprudence.[5]

In order to analyse the DRC's approach in establishing the financial compensation for breach, it is important to be aware that several situations can occur that lead to the obligation to pay compensation. In the context of Article 17 para 1 of the RSTP, 2016 edition, we have to distinguish situations whereby the player breaches the contract and whereby the club breaches the contract, with and without *just cause* and whereby breaches take place within and after the Protected Period.

First the situation will be discussed where compensation must be paid by the club to the player due to a breach of contract without *just cause* by the club. For example, the situation in which the player terminates the contract based on *just cause* and claims compensation from the club due to breach of the contract without *just cause* of the club (a termination of the contract based on *just cause* by a party automatically means a breach of contract *without just cause* of the other party). Further, the situation will be discussed whereby the club breaches the contract without *just cause* inside or outside the Protected Period as a result of which the injured player is entitled to compensation.

Next and after the situation is discussed whereby the club breached the contract without *just cause* as a result of which the player is entitled to compensation from the club, we face several types of situations whereby the financial compensation is to be paid by the player to the club as a result of the breach of the contract by the player without *just cause*. For example, the compensation to be paid by the player to the club as a result of a termination by the player for *sporting just cause* in accordance with Article 15 of the RSTP, 2016 edition. But also, a unilateral termination by the club on the basis of *just cause* as a result of which the club can claim financial compensation from the player. Aside from this, the termination of an employment contract of the player without *just cause* can take place inside but also outside the Protected Period.

As a side-note it must be stressed that in all the "termination cases" before the *PSC*, just as with the DRC, the PSC Bureau deems it appropriate to underline that the termination of an employment contract between a club and a coach, as a general rule, has to be the "ultima ratio" in a labour relationship and that parties to a contract have to do their best to maintain their contractual relationship.[6] If an employment contract of a coach is terminated by the club without *just cause*, it is a common legal principle that any breach of contract entitles the injured party to

[5]Wild 2011, pp. 107–142.
[6]PSC 19 March 2013, no. 0313992.

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maintain a claim for compensation. However, in order to prevent misunderstanding, and as opposed to the DRC disputes between clubs and players, the PSC is of the opinion that the consequences of the termination of an employment contract without *just cause* with a coach, will not be based on Article 17 of the RSTP. In other words, said Article 17 of the RSTP is then not relevant in the calculation of the amount of compensation as this Article is specifically related to the disputes between *players* and their clubs.[7] Here Article 17 of the RSTP, among other things, is also not applicable to the amateur relationship between a player and a club.[8]

## 9.2 Calculation of the Compensation

According to Article 17 para 1 of the RSTP, 2016 edition, subject to the provisions of Article 20 and Annex 4 and unless otherwise provided for in the contract, compensation for breach of contract without *just cause* to be paid by the party in breach to the injured party, will be calculated with due consideration for:

- the law of the country concerned
- the specificity of sport; and
- other "objective criteria".

The other "objective criteria", shall include:

- remuneration and other benefits due to the player under the existing contract and/or the new contract;
- the time remaining in the existing contract up to a maximum of 5 years;

[7]PSC 30 January 2012, no. 01120974. Generally this means that claims for "damages relating to the specificity of sport" will be rejected by the PSC. See the PSC decision of 30 January 2012, no. 01120974. It was also decided by the CAS that Article 17 of the RSTP is only applicable to the relationship "player-club". See CAS 2004/A/741 *Mr. Jörg Berger v. Bursaspor Kulübü*, award of 4 August 2005, and CAS 2008/A/1464 and 1467 *Futebol Clube do Porto v. Jacobus Adriaanse*, award of 3 December 2008. In the latter case, the CAS Panel referred to Article 1 of the FIFA RSPT which states that the RSTP concerns "players", not "coaches". Moreover, the CAS Panel noted that the FIFA Statutes no longer contain the provision which appeared in Article 33.4 of their 2001 version which equated coaches with players. According to the Panel, Article 22 makes clear that FIFA has competence to hear disputes between coaches and clubs, which is precisely the competence exercised by the Single Judge, but that does not mean that substantive rules applicable to players, also apply to coaches. Article 17 para 4 of the RSTP even literally uses the term "Professional" (another indication that it can only concern "players"). In an unpublished PSC case of 30 January 2012, the PSC confirmed that Article 17 of the RSTP only applies to contractual disputes between players and clubs. In this respect, the PSC referred to the "nulla poena sine lege" principle, which provides that someone cannot be punished for doing something that is not prohibited by law. See also CAS 2010/A/2319 *Hans Dieter Schmidt v. Kumasi Asante Kotoko FC*, award of 11 January 2012.

[8]CAS 2004/A/691 *FC Barcelona SAD v. Manchester United FC*, award of 9 February 2005.

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- fees and expenses paid or incurred by the former club (amortised over the term of the contract); and
- whether the contractual breach falls within the Protected Period.[9]

With regard to the above criteria parties are entitled to provide for the consequences of terminating a contract without *just cause*, as follows from the words "unless otherwise provided for in the contract". In other words, the parties are entitled to provide for the amount of compensation in the contract itself in the event of a termination without *just cause*. Following the jurisprudence of the DRC, first the Chamber will check whether the parties provided for compensation in the contract if of a breach of contract on the understanding that the clause will not be taken into account if there is lack of reciprocity.[10] In this regard, the Chamber will check whether the contract included a clause pertaining to monies payable to either party in the event of premature termination of the employment contract, both parties having duly signed the contract and having agreed to such clause, and the relevant clause being reciprocal.[11] If this is the case, the amount of money stipulated in the employment contract will be taken into consideration by the Chamber when establishing the amount for compensation for the injured party.

As regards the amount of compensation as laid down in the contract itself, it is important that the clause is drafted precisely and carefully by the parties. In a case before the DRC of 20 May 2011, an employment contract contained a clause which referred to a certain amount of compensation, and more specifically referred to Article 17 para 2 of the "Regulations".[12] The Chamber deemed it important to highlight that the contract did not clearly stipulate to which regulations the said clause referred to, i.e. the regulations of the club, the association concerned, FIFA or even another entity. Therefore, the DRC concluded that said clause could not be applied. In other words, the calculation of the compensation due to the claimant could not be based on the said clause of the contract. Also according to the CAS, a so-called liquidated damages clause can be considered as "*a mutually agreed upon contractual clause that allows the parties to establish in advance in their contract the amount to be paid by either party in the event of unilateral, premature termination without just*

[9]Article 17 does not apply under all circumstances as follows from CAS 2014/A/3626, *Carmela Enrique Valencia Chaverra v. Ulsan Hyundai Football Club*, award of 23 April 2015. In this case, the Panel decided that the provisions set forth in the RSTP, and Article 17 in particular, are not directly applicable, as they provide for some criteria on the calculation of damages only in the event that a contract is terminated due to a breach by one of the parties.

[10]In general, the DRC will not take clauses into account where there is lack of reciprocity. See the DRC decision of 7 February 2014, no. 0214233, where the DRC pointed out that the clause in the contract on which the club's claim was founded, was not to be taken into consideration due to its lack of reciprocity. See also DRC 4 October 2013, no. 10131238.

[11]DRC 10 June 2004, no. 64133.

[12]DRC 15 May 2011, no. 5111860.

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*cause*".[13] A so-called buy-out clause, which specifically provides for the right for a party to unilaterally terminate the contract, must be distinguished from the aforementioned liquidated damages clause.[14] As mentioned in the introduction, the DRC generally only takes reciprocal clauses into account. For example, in its case of 17 February 2014, the DRC pointed out that the clause on which the club's claim was founded, could not be seen as valid due to its lack of reciprocity.[15] Also, in the unpublished case of 27 November 2014, the DRC reasoned that the contract did

[13]See CAS 2013/A/3411 *Al Gharafa S.C. & Mark Bresciano v. Al Nasr S.C. & FIFA*, award of 9 May 2014. In this case there was discussion whether or not the contract provided the player with the right to unilaterally terminate the contract. The CAS Panel decided that the clause was not a buy-out clause but constituted a liquidated damages clause. See also the DRC decision itself, DRC 4 October 2013, no. 10131238. In this case, the Chamber emphasized that the relevant provision did not establish a right for the player to terminate the contract for a specific, clearly predetermined amount but only seeks to determine the minimum amount of compensation due if of breach by the player. Furthermore, the amount in question remains open in respect of its maximum. The DRC had no other option than to consider that the player had no contractually stipulated right to prematurely terminate the contract. Therefore, he had terminated the contract without *just cause*. What's interesting to note is that it was also decided that the clause was not enforceable as it lacked reciprocal character since it only provided for the financial consequences of a contractual breach by the player and not by the club. See also CAS 2009/A/1909 *RCD Mallorca SAD v. FIFA UMM Salal SC*, award of 25 January 2010, from which award it follows that a liquidated damages clause does not entitle a party to terminate the contract, but refers to the damages to be paid if a party decides to unilaterally terminate the contract without *just cause*. With reference to Swiss law, liquidated damages clauses can be reduced if they are excessive. See for example, TAS 2006/A/1082-1104 *Real Valladolid CF SAD v. Diego Barreto Cáceres & Club Cerre Porteno*, award of 19 January 2007 and CAS 2005/A/902 & 903 *Mexès & AS Roma v. AJ Auxerre*, award of 5 December 2005. See also CAS 2010/A/2202 *Konyaspor Club Association v. J.*, award of 9 May 2011, which case dealt with a reduction of the liquidated damages clause. In case CAS 2013/A/3419 *Maritimo da Madeira v. Futebol SAD v. Clube Atlético Mineiro*, award of 14 November 2014, the CAS Panel considered that the clause concerned contained all the necessary elements required under Swiss law to establish a penalty clause. The CAS emphasized that a penalty clause can be defined as an accessory provision whereby the debtor promises an agreed penalty to the creditor if the debtor does not perform or improperly performs a defined obligation. See also CAS 2014/A/3640 *Vladimir Mukhanov v. FC Aktobe*, award of 28 January 2015.

[14]See also CAS 2009/A/1909 *RCD Mallorca SAD v. FIFA UMM Salal SC*, award of 25 January 2015 and CAS 2011/A/2356 *SS Lazio S.p.A. v. CA Vélez Sarsfield & FIFA*, award of 28 September 2011. See also CAS 2013/A/3417 *FC Metz v. NK Nafta Lendava*, award of 13 August 2014. From this case it follows that, according to jurisprudence of the CAS, a buy-out clause included in an employment agreement of a professional football player is a clause that determines in advance the amount to be paid by a party if of breach and/or unilateral premature termination of the employment relationship.

[15]DRC 7 February 2014, no. 0214233. See also DRC 15 March 2013, no. 03131032. In the latter case, the Chamber firstly focused on Article 9 of the contract, which stipulated that "if of breach of contract by the player, the latter shall pay the club the sum of USD 800,000". In this regard, the Chamber took into account that such clause appeared to be unilateral and to the benefit of the respondent only. In view of such a unilateral character of the pertinent contractual clause the members of the Chamber concluded that Article 9 of the employment contract could not be taken into consideration. The Chamber also concluded that clause 8 of the contract did not clearly indicate the value and, therefore, could not be taken into consideration.

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contain a clause for compensation if of breach of contract, but the DRC insisted that the calculations stipulated in the contract were not reciprocal.[16]

In addition to the abovementioned criteria and as laid down in Article 2 of the Procedural Rules, the DRC and the PSC shall apply the FIFA Statutes and regulations whilst taking into account all relevant agreements, laws and/or collective bargaining agreements that exist on a national level as well as the specificity of sport when establishing the compensation amount due. According to the FIFA Commentary, the laws of the country where the club is domiciled are relevant.[17] However, the jurisprudence of the DRC shows that national law will not be decisive. In fact, in the decision of 27 February 2014, the DRC stressed that FIFA's regulations prevail over national law chosen by the parties.

With regard to the "specificity of sport", the DRC is entitled to adjust the amount for compensation based on the "specificity of sport" factor as referred to in Article 17 para 1 of the RSTP. FIFA and CAS case law show that the "specificity of sport" criterion can justify an adjustment of compensation as a result of a breach of contract without *just cause* by a party. For example, in the CAS case of 26 May 2008, the CAS Panel considered the following on the concept of "specificity of sport": "*(…) The criterion of specificity of sport shall be used by a Panel to verify that the solution reached is just and fair not only under a strict civil (or common) law point of view, but also taking into due consideration the specific nature and needs of the football world (and of parties being stakeholders in such world) and reaching therefore a decision which can be recognised as being an appropriate evaluation of the interests at stake, and does so fit in the landscape of international football*".[18]

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[16]In an unpublished case of 21 May 2015, the DRC highlighted that compensation clauses may be freely entered into by the contractual parties and may be considered acceptable, in the event that the pertinent clause meets certain criteria such as proportionality, reasonableness and reciprocity. In the said case the DRC focused its attention on clause 7 of the first contract which read "the party terminating the contract with no *just cause* shall pay the other party a penalty equivalent to 50 % of the remainder of the contract" and came to the conclusion that the clause was reasonable and reciprocal as it granted both contractual parties the possibility to request for its application if of termination of the contract without *just cause* by the counterparty. The clause was proportional as it provided as compensation 50 % of the residual value of the contract at the time of termination.

[17]FIFA Commentary, explanation Article 17 RSTP under 1, sub 2, p. 47.

[18]See CAS 2007/A/1358 *FC Pyunik Yerevan v. L., AFC Rapid Bucaresti & FIFA*, award of 26 May 2008. Special reference can be made to the case CAS 2013/A/3089 *FK Senica, A.S. v. Vladimir Vukajlovic & FIFA*, award of 30 August 2013, in which case it was decided by the CAS that the compensation resulting from the termination of a contract without *just cause* was to be calculated keeping in mind the specificity of sport, i.e. the specific nature of sport and also the specific sporting circumstances of the case. In the said case the Sole Arbitrator concluded that a tacit agreement of termination between the parties had taken place, which released the player his obligations to train with the club's team to look for a new club and, in return, the club would no longer have to pay the player's salary. As a result it was decided that in these circumstances, where neither the player nor the club were interested any longer in maintaining their labour relationship and taking the principle of the specificity of sport into account, no compensation had to be awarded to the player. The purpose of Article 17 of the RSTP is basically nothing more than to reinforce contractual stability, i.e. to strengthen the principle of *pacta sunt servanda* in the world of international football, by acting as a deterrent against unilateral contractual breaches and terminations, whether

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In several CAS cases, CAS Panels emphasized that the principle of "specificity of sport" needs to strike a reasonable balance between the needs of the contractual stability, on the one hand, and the needs of the free movement of players, on the other hand. It needs to find solutions that foster the good of football by reconciling in a fair manner the various and sometimes contradictory interests of players and clubs. The deciding bodies had to take into consideration the specific nature and needs of sport when assessing the circumstances of the dispute at stake. CAS Panels explicitly stated that the specificity of sport is not an additional head of compensation nor a criterion allowing to decide in equity, but a correcting factor. In other words, the concept of specificity of sport is not a criterion that enables a transfer fee through the backdoor. Extra compensation based on the concept of specificity of sport will be awarded if the Panel is not convinced the costs until so far fully compensated the party that is entitled to compensation due to the breach of the other party.[19]

Regarding the other "objective criteria" as mentioned in Article 17 of the RSTP, we take note of the fact the DRC will take into account (a) the remuneration and other benefits due to the player under the existing contract and/or the new contract; (b) the time remaining on the existing contract up to a maximum of 5 years; (c) the fees and expenses paid or incurred by the former club (amortised over the term of the contract); and (d) whether the contractual breach falls within the Protected Period.

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Footnote 18 (continued)

they are breaches committed by a club or by a player (CAS 2008/A/1519-1520, para 80, with further references to: CAS 2005/A/876, p. 17*: "[…] it is plain from the text of the FIFA Regulations that they are designed to further 'contractual stability' […]"*; CAS 2007/A/1358, para 90; CAS 2007/A/1359, para 92: *"[…] the ultimate rationale of this provision of the FIFA Regulations is to support and foster contractual stability […]"*; confirmed in CAS 2008/A/1568, para 6.37).

[19]For example, in the event that a CAS Panel is not entirely convinced that the replacement costs have fully compensated a club for the loss it has suffered. See CAS 2007/A/1298 *Wigan Athletic FC v. Heart of Midlothian* and CAS 2007/A/1299 *Heart of Midlothian v. Webster & Wigan Athletic FC* and CAS 2007/A/1300 *Webster v. Heart of Midlothian*, award of 30 January 2008; CAS 2008/A/1519 *FC Shakthar Donetsk (Ukraine) v. Mr. Matuzalem Francelino da Silva (Brazil) & Real Zaragoza SAD (Spain) & FIFA* and CAS 2008/A/1520 *Mr. Matuzalem Francelino da Silva (Brazil & Real Zaragoza SAD (Spain) v. FC Shakthar Donetsk (Ukraine) & FIFA*, award of 19 May 2009; CAS 2010/A/2145 *Sevilla FC SAD v. Udinese Calcio S.p.A.*, CAS 2010/A/2146 *Morgan 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. See also CAS 2013/A/3089 *FK Senica, A.S. v. Vladimir Vukajlovic & FIFA*, award of 30 August 2013. This was also mentioned in the case before the CAS between Al Gharafa & Bresciano and Al Nasr of 9 May 2014. In the latter case, the CAS Panel agreed with the CAS case law that the "specificity of sport" must not be considered as an additional head of compensation, nor a criterion allowing to decide in *ex aequo et bono,* but a correcting factor which allows the CAS Panel to take into consideration other objective elements which are not envisaged under the other criteria as mentioned in Article 17 of the RSTP. See CAS 2013/A/3411 *Al Gharafa S.C. & Mark Bresciano v. Al Nasr S.C. & FIFA*, award of 9 May 2014. See also CAS 2014/A/3684 *Leandro da Silva v. Sport Lisboa e Benfica* and CAS 2014/A/369 *Sport Lisboa e Benvfica v. Leandro da Silva*, award of 16 September 2015. In the latter case, the CAS Panel assessed whether the objective amount of damages was just and fair or whether this amount should be reduced or increased in light of the "specificity of sport".

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With regard to "the remuneration and other benefits due to the player under the existing contract and/or the new contract", the DRC consistently takes the average remuneration under the old and new contract, whilst the CAS Panels also take into consideration the old and the new contract, but decided that the remuneration under the new contract would be less the savings under the old contract of the player.[20]

With regard to "the fees and expenses paid or incurred by the former club (amortised over the term of the contract)", fees in the meaning of this criterion can be "previously paid transfer fees". The DRC decision of 2 November 2007 states that a transfer compensation had been paid for the player's transfer, documentation of which has been presented.[21] According to Article 17 para 1 of the RSTP, this amount had to be amortized over the term of the relevant employment contract.[22] In the decision of 10 December 2009, the DRC also turned to the essential criterion relating to the fees and expenses possibly paid by the Italian club for the acquisition of the player's services insofar as these had not yet been amortized over the term of the relevant contract. The DRC noted that the Italian club requested an amount of EUR 2,519,632 as non-amortized fees or expenses. This figure apparently included the transfer compensation paid to the player's former club in order to acquire the player's services for the 1999/2000 season, i.e. at the time of concluding the first employment contract between the Italian club and the player. In that sense, the Chamber recognized the transfer compensation paid by

[20]See DRC 4 April 2007, no. 47936, DRC 2 November 2007, no. 117623 and DRC 10 December 2009, no. 129641. See also CAS 2008/A/1519 *FC Shakthar Donetsk (Ukraine) v. Mr. Matuzalem Francelino da Silva (Brazil) & Real Zaragoza SAD (Spain) & FIFA* and CAS 2008/A/1520 *Mr. Matuzalem Francelino da Silva (Brazil & Real Zaragoza SAD (Spain) v. FC Shakthar Donetsk (Ukraine) & FIFA*, award of 19 May 2009, and CAS 2010/A/2145 *Sevilla FC SAD v. Udinese Calcio S.p.A.*, CAS 2010/A/2146 *Morgan 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. Due to the fact that the former club Udinese had not been able to demonstrate the exact value of the player's services, the Panel in *De Sanctis* did not apply the same calculation as in Matuzalem and therefore applied a different calculation method in order to determine the appropriate amount of compensation. The CAS used "*the value of the replacement costs*" in the *De Sanctis* case and the CAS Panel in the *Matuzalem* case used "*the estimated value of the player*".

[21]DRC 2 November 2007, no. 117623.

[22]Also, the CAS decided in the *Matuzalem* case that pursuant to Article 17 of the RSTP the amount of fees and expenses paid or incurred by the former club, and in particular those expenses incurred to obtain the services of the player, is an additional objective element that must be taken in consideration. Article 17 para 1 requires those expenses to be amortized over the whole term of the contract. In the present matter, the DRC had recognized the fee paid by Shakhtar Donetsk to the club Brescia, i.e. EUR 8,000,000 as being such an expense. The CAS agreed and also shared the calculation made in the appealed decision according to which such fee had to be amortized in accordance with Article 17 over a period of 5 years, i.e. the entire contract period. Therefore, the non-amortized part of the transfer fee was equal to 2/5 of EUR 8,000,000 i.e. EUR 3,200,000. See CAS 2008/A/1519 *FC Shakthar Donetsk (Ukraine) v. Mr. Matuzalem Francelino da Silva (Brazil) & Real Zaragoza SAD (Spain) & FIFA* and CAS 2008/A/1520 *Mr. Matuzalem Francelino da Silva (Brazil & Real Zaragoza SAD (Spain) v. FC Shakthar Donetsk (Ukraine) & FIFA*, award of 19 May 2009.

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the Italian club to the former club as being such kind of expenses, but recalled that the player had remained with the Italian club for 8 years in total, whereas the first employment contract provided for an initial period of 5 years. Therefore, the DRC considered that all the fees and expenses paid in connection with the conclusion of the first employment contract, particularly the amount of EUR 5,422,797.25 paid to the former club, had been fully amortized over the period of 5 years. Consequently, and in line with the wording of Article 17 para 1 of the RSTP, this amount, or any part of it, could therefore not be claimed by a party as part of the financial compensation for the breach of contract without *just cause*.[23]

Another important aspect concerning the amount of compensation is whether the contractual breach takes place within or after the so-called Protected Period. The Protected Period is the period of 3 entire seasons or 3 years, whichever comes first, following its entry into force, if such contract was concluded prior to the 28th birthday of the professional. If the contract with the professional was concluded after his 28th birthday, the Protected Period is 2 seasons or 2 years, whichever comes first, following the entry into force of a contract. A breach within or outside the Protected Period is relevant with regard to the question whether sporting sanctions must be imposed. However, the question can be posed whether the concept of the Protected Period was only invented in order to determine whether or not sporting sanctions must be imposed? Or, does it also have direct consequences for the exact amount of compensation? Pursuant to Article 17 it should have, since it is mentioned in the list of criteria that need to be taken into account in order to calculate the amount of compensation, despite the fact it is consistent jurisprudence, that any such termination is clearly deemed a breach of contract. Especially since this criterion is mentioned in the "Article 17 list", it must be concluded that this criterion must (also) be taken into account in the calculation of the compensation.[24]

[23]In the appeal procedure before the CAS, the CAS stated that it was argued before the DRC that the initial fees paid to Juventus should have been amortized over the entire period that the player was under contract with it. In the DRC decision, it was decided that the fees paid to Juventus had been amortized over the first 5 years of the player's time with Udinese. However, Udinese did not appeal the DRC's decision with regard to the unamortized fees and expenses. See CAS 2010/A/2145 *Sevilla FC SAD v. Udinese Calcio S.p.A.*, CAS 2010/A/2146 *Morgan 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.

[24]Although the CAS Panel in *Matuzalem* answered this question by stating it was an open issue whether the breach within a Protected Period may also be taken into account when assessing the compensation due. In my opinion, we should take into account that a breach within the Protected Period can increase the amount of compensation. Vice versa, this would mean that if a breach takes place outside the Protected Period, not only will no sporting sanctions will be imposed, but the amount of compensation should also be reduced comparatively. If the facts and circumstances of two cases are completely the same, aside from the fact that in the one case the breach takes place within and in the other, outside the Protected Period, the outcome regarding the amount of compensation must be different. The CAS Panel in *Matuzalem* decided that the compensation should not be increased due to the fact the breach took place outside the Protected Period. See para 167 of the CAS award. See CAS 2008/A/1519 *FC Shakthar Donetsk (Ukraine) v. Mr. Matuzalem Francelino da Silva (Brazil) & Real Zaragoza SAD (Spain) & FIFA* and CAS 2008/A/1520 *Mr. Matuzalem Francelino da Silva (Brazil & Real Zaragoza SAD (Spain) v. FC Shakthar Donetsk (Ukraine) & FIFA*, award of 19 May 2009.

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Also, in the DRC decision of 7 September 2011, the Chamber stated that the termination by the club occurred shortly after the entry into force of the contract.[25] The DRC had to consider this fact in determining the compensation.

In view of the "objective criteria" it is important to underline with regard to Article 17 para 1 of the RSTP 2015 that the abovementioned list of Article 17 is not exhaustive, and that each request for termination has to be assessed on a case-by-case basis. For any misunderstanding, both deciding bodies, the DRC and the CAS, recall that the list of objective criteria is not exhaustive and that the broad scope of criteria indicated tends to ensure that a fair amount of compensation is awarded to the prejudiced party. It is explicitly stated in Article 17 para 1 of the RSTP 2016 that the "other objective criteria" will include …… "*in particular*". In other words, the particularities of each claim for compensation in future cases still need to be examined to establish the compensation amount. Each request for compensation on breach of contract has to be assessed on a case-by-case basis, leaving the deciding body the facility to decide *ex aequo et bono* where appropriate.

For example, in its DRC decision of 13 October 2010, with regard to Article 17 para 1 of the RSTP, the Chamber referred to the fact that the DRC has a certain degree of discretion when calculating the relevant compensation. The DRC even recalled that it regularly makes use of this margin of action.[26]

Other (not listed) elements can also be of relevance. For example, in a DRC decision of 22 June 2007, the Chamber decided that the fact that the player had shown bad faith regarding the conclusion of the termination agreement, had to be taken into consideration for the calculation of the compensation to be paid to the disadvantaged party.[27] The jurisprudence also refers to other criteria such as *agent fees*, *the replacement costs, the possible loss of a transfer fee, missing profit coming from stadium tickets revenues,* and *image damages towards the sponsors,* that were elements to establish the amount of compensation. In a DRC decision of 2 November 2007, the Chamber referred to the fact that agent fees can also be regarded as a factor to calculate the amount of financial compensation paid by a party in breach.[28] Furthermore, in

[25]DRC 7 September 2011, no. 9111901.

[26]DRC 13 October 2010, no. 10102536.

[27]DRC 22 June 2007, no. 67675. From CAS 2013/A/3374 *Al Ahli Club v. David Anthony O'Leary*, award of 4 July 2014, it can be derived that a request for reduction of the compensation must be rejected in the event of contributory negligence of an employee, if any, cannot lead to the reduction of the damages owed to that employee under Swiss law.

[28]DRC 2 November 2007, no. 117623. This was also decided in the *Mexès* case; see CAS 2005/A/902 and 903 *Mexès & AS Roma v. AJ Auxerre*, award of 5 December 2005, N. 118, where it was decided that payments to agents can be considered as being part of the costs incurred by a club in order to obtain the services of a player. However, in the DRC case of *De Sanctis*, the committee noted that Udinese had paid an amount of EUR 60,000 to an agent on signature of the contract at the basis of the present dispute and that this amount had not been fully amortized as a direct consequence of the breach of contract committed. Regarding the agent's fees paid in connection with the conclusion of the previous employment contracts, the DRC unanimously decided that these costs should not be taken into account when establishing the compensation.

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the above decision of 10 December 2009, the committee took note that the Italian club also requested compensation as *"missing profit coming from stadium tickets revenues",* and *"image damages towards the sponsors"*.[29] According to the DRC it was not clear whether those elements could be taken into account as "objective criteria" in the sense of Article 17 para 1 RSTP in order to calculate the compensation. However, the Chamber did not have to answer this question since the Italian club did not demonstrate the existence of such damages and, *a fortiori,* a link between the said damages and the breach of contract committed by the player. Thus, in the absence of any proof of a causal link, the DRC decided that these amounts did not have to be taken into consideration when establishing the compensation.[30] It is questionable whether the DRC will award compensation that relates to replacement costs. For example, in a DRC decision of 18 December 2012, this was rejected by the DRC.[31] In this case, with regard to the compensation for breach based on Article 17 of the RSTP, the Chamber noted that, in its calculation of the amount of compensation, the club had included costs relating to the acquisition of a player that allegedly replaced the player. The DRC deemed that it could not be established that these costs would either constitute an objective element or be linked to specificity of sport. Likewise, the DRC agreed that the amount of EUR 50,000, which was put forward by the club in its claim maintaining that it would have accepted to negotiate the player's transfer on the basis of such offered amount, could not be accepted, since it was considered to be speculative. In addition, the Chamber decided to reject the club's claim to receive the unspecified amount of EUR 100,000 for "*sports related damage*", since there appears to be no legal or contractual basis for such

[29]DRC 10 December 2009, no. 129641.

[30]In the appeal procedure these claims were not made to the CAS Panel by the Italian club. See CAS 2010/A/2145 *Sevilla FC SAD v. Udinese Calcio S.p.A.*, CAS 2010/A/2146 *Morgan 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. Although it will be difficult to demonstrate any entitlement to compensation as "missing profit coming from stadium ticket revenues" and/or "image damages towards the sponsors" and it is not clear whether these costs can be claimed, we must take into account that this might be possible if the claiming club demonstrates the existence of such damages and proves the existence of a link between the said damages and the breach of contract committed by the player. For example, and as indicated by the CAS Panel in *Matuzalem*, if the club has to pay a penalty to a sponsor due to the termination, the club might demonstrate the damage. Even the CAS Panel gave a slight opening in order to claim commercial losses. Although the CAS Panel in *Webster* was of the opinion that the claim of Hearts related to sporting and commercial losses had to be rejected, it might be that the aforementioned losses could be claimed if Hearts had demonstrated the causality of the termination and the existence of the damage.

[31]DRC 18 December 2012, no. 12121204.

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claim.[32] With regard to the costs related to the *possible loss of a transfer fee*, in the abovementioned DRC decision of 10 December 2009, the Chamber did not find a justification not to follow the jurisprudence related thereto and remarked that the Italian club concerned had not invoked the existence of any negotiations with a third party nor another "necessary logical nexus". The Italian club did not present any offer from a third party, which could have provided important information on the value of transfer of the player. In other words, the DRC considered that the player had not provided it with sufficient proof that it had lost an opportunity to realize a profit because of the premature termination of the contract.[33]

Notwithstanding the above, the DRC jurisprudence further states that the DRC will not award any claimed moral damages. In the DRC case of 16 April 2009, the

[32]The conclusion with regard to the replacement costs is that it might be possible to claim these costs as part of the compensation in the meaning of Article 17, for example, if parties agree to it contractually. However, if parties have not agreed to it contractually, we see that the club claiming replacement costs as part of the amount of compensation, can still be entitled to claim replacement costs if it can demonstrate this. Firstly, it must demonstrate that the new player was a substitution of the player to be replaced. In that respect the club must prove that the players play in more or less the same position on the pitch. Furthermore, the club also has to demonstrate that the new player had to join the team because of the unilateral termination by the replaced player. Secondly, the club must demonstrate that there is a necessary link between the amount of the transfer fee paid for the new player and the premature termination by the replaced player. In that respect, the club must prove and demonstrate that there is a logical nexus between the replacement costs and the breach of the employment contract.

[33]DRC 10 December 2009, no. 129641. In the appeal procedure before the CAS, the Panel referred to the *Matuzalem* and *El-Hadary* case, in which the Panels felt there was possibly a loss of a transfer fee, if the injured party could demonstrate that the club missed a transfer fee. However, none of the parties produced any evidence of any offers made or pending for the player De Sanctis. Udinese did produce the details of 3 other international goalkeepers that had transferred between clubs over the previous couple of years; however, this was not taken by the panel as evidence of any loss suffered by Udinese in relation to this player, more background information to be used in assessing the specificity of sport criterion below. As such, as no party advanced any submissions under this criterion, the Panel did not use it as part of assessing the compensation due to Udinese. The loss of a transfer fee was awarded in *El-Hadary*, where the new and the old club had been directly negotiating a fee at the time of the breach. It appeared to the Panel that, as a consequence of the premature termination of the player's employment contract, Al-Ahly was deprived of the opportunity to obtain a transfer fee of USD 600,000. See para 221 of the *El-Hadary* case. The CAS noted in the *El-Hadary* case that, differently from other CAS cases, the amount which FC Sion was willing to pay as a transfer fee, i.e. FC Sion being the club to which the player wanted to transfer to. Therefore, according to the CAS, Al-Ahly had an evident opportunity to obtain a certain fee by trading the services of the player to the Swiss club, but this opportunity was frustrated by the unjustified departure of the player. For the CAS, it may be concluded that in future cases the loss of a possible transfer fee can be considered as compensable damage head if the usual conditions are met, i.e. in particular if between the breach or the unjustified termination of the agreement and the lost opportunity to realize a certain profit there is a necessary logical nexus. It is of crucial importance that the transfer failed (i.e. the club eventually missed the transfer fee) because of the unjustified departure of the player to another club. In other words, this logical nexus must be demonstrated by the club. See CAS 2009/A/1881 *Essam El-Hadary v. FIFA & Al-Ahly Sporting Club*, award of 1 June 2010.

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Chamber decided that Article 17 of the RSTP did not provide for the possibility to grant an additional compensation in consequence to a possible moral prejudice. This part of the claim was thus rejected.[34] However, the CAS can award moral damages.[35] In this context, the DRC will neither award patrimonial and non-patrimonial damages. As to these requests for patrimonial damages and non-patrimonial damages, the DRC rejects such requests by any parties due to lack of legal basis.[36]

## 9.3 Compensation to Be Paid by the Club to the Player

### *9.3.1 General*

Firstly, we note the fact that according to Article 17 para 1 of the RSTP 2015 edition, the compensation for breach of contract without *just cause* will be calculated with due consideration of the law of the country concerned, the specificity of sport, and the abovementioned "other objective criteria" unless, as explicitly follows from said Article 17, otherwise provided for in the contract. In other words, first the Chamber will check whether the parties provided for compensation in the contract if of a breach of contract (on the understanding that the clause will not be taken into account where there is lack of reciprocity).[37] In the DRC decision of 10 June 2004, with regard to the award of financial compensation in favour of the player, the DRC took into account that the contract included a clause pertaining to monies payable to either party in the event of premature termination of the employment contract, both parties having duly signed the contract and having agreed on such clause, and the relevant clause being reciprocal.[38] The DRC therefore agreed that the amount of money stipulated in the employment contract should be taken into consideration when establishing the amount for compensation to be paid to the player by the club.

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[34]DRC 16 April 2009, no. 491101. See also DRC 7 November 2011, nos. 411438 and 411430, DRC 26 November 2004, no. 11475, and DRC 13 October 2010, no. 10101596. See also DRC 15 March 2013, no. 03132656, DRC 30 August 2013, no. 08132676, and DRC 29 November 2013, no. 1113766.

[35]See TAS 2008/O/1643 *Vladimir Gusev c. Olympus sarl*, award of 15 June 2009. See also TAS 2007/A/1267. See also TAS 2015/A/3871 *Sergio Sebastián Ariosa Moreira c. Club Olimpia* and TAS 2015/A/3882 *Club Olimpia c. Sergio Sebastián Ariosa Moreira*, award of 29 July 2015 and CAS 2013/A/3260 *Grêmio Foot-ball Porto Alegrense v. Maximiliano Gastón López*, award of 4 March 2014. In the latter case the claim for moral damages was not accepted.

[36]DRC 27 May 2014, no. 05142461. See also DRC 21 May 2015, no. 0515606.

[37]The DRC will not take into account clauses where there is lack of reciprocity. See the DRC decision of 7 February 2014, no. 0214233, in which case the DRC pointed out that the clause in the contract on which the club's claim was founded, was not to be taken into consideration due to its lack of reciprocity.

[38]DRC 10 June 2004, no. 64133.

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If a termination of the employment contract is based on *just cause* by a party, this automatically means a breach of contract *without just cause* of the other party. In other words, if the player has *just cause* to terminate the contract and claims compensation, the club is automatically in breach of contract without *just cause*. In line with the above determination of the amount of compensation, also if the club breaches the contract without *just cause*, the DRC will establish what the player would have received as remuneration had the contract been executed until its expiry. That amount will then serve as the basis for the final determination of the amount of compensation for breach of contract in the case at hand. The DRC will then verify whether the player had signed an employment contract with another club during the relevant period, by means of which he would have been enabled to reduce his loss of income.

## *9.3.2 DRC Approach*

### 9.3.2.1 General

The DRC jurisprudence points out that if a player claims outstanding amounts for breach of contract without *just cause* by the club due to the fact the latter does not comply with its contractual obligation to pay the salary in time, aside from the outstanding salary, the player can claim compensation based on the concept of *just cause*. The compensation that can be claimed by the player and will be awarded by the Chamber corresponds with the remuneration due until the expiry of his former contract less the remuneration due under the new contract for the same period.

For example, in the DRC decision of 23 January 2013, it follows that the Chamber will establish what the player would have received as remuneration had the contract been executed until its expiry.[39] That amount will serve as the basis for the final determination of the amount of compensation for breach of contract. The DRC also verified whether the player had signed an employment contract with another club during the relevant period, by means of which he would have been able to reduce his loss of income. According to the consistent practice of the DRC, such remuneration under a new employment contract shall be taken into account in the calculation of the amount of compensation for breach of contract in connection with the player's general obligation to mitigate his damages, which was confirmed in this case.[40] It is of relevance whether or not the player receives more or less money at his new club as compared to the remainder of his contract with this old club. In a DRC decision of 16 October 2014, the DRC observed that the player would have been entitled to receive the total amount of approximately

[39]DRC 23 January 2013, no. 0113797. See also DRC 12 January 2006, no. 16828.

[40]Reference can also be made to DRC 15 March 2013, no. 03131032, and DRC 28 August 2014, no. 0814677.

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USD 564,350 had he remained employed by the old club. This amount was lower than the one he was actually entitled to receive from the club he subsequently signed a contract with. Therefore, the DRC finally concluded, in accordance with its well-established jurisprudence, that for said period of time, the player was not entitled to receive any compensation, since he was not only able to mitigate his damages, but also to guarantee an even higher financial remuneration than the one he would have earned at the old club.[41]

As regards the remainder of the contract, for the sake of completeness, it must be noted that bonuses will not be taken into account if they have a variable and performance-related character. In its case of 28 June 2013, regarding the match bonuses included in the employment contract and in the player's claim for compensation, the DRC stressed that due to their variable and performance-related character it could not unreservedly establish that the claimant would have been paid such bonuses and, if any, in what proportion.[42] The DRC decided it could not take any such bonuses into account while assessing the residual value of the contract.

As a side-note, it must be stressed with regard to the compensation to be paid by a club, that from the well-established jurisprudence of the DRC it follows that the imposition of a fine, or any other available financial sanction will generally not be used by clubs as a means to set off outstanding financial obligations towards players. This is constant and long-standing jurisprudence of the DRC. For example, in its case of 25 April 2013, the DRC explicitly decided that this is not permitted.[43]

#### 9.3.2.2 Adjustment Amount of Compensation

In establishing the amount of compensation (remuneration due until expiry of the former contract minus the remuneration due under the new contract for the same period) deviation from the above principle can be justified. In other words,

[41]DRC 16 October 2014, no. 10143024.

[42]DRC 28 June 2013, no. 06131375. See also CAS 2014/A/3626, *Carmela Enrique Valencia Chaverra v. Ulsan Hyundai Football Club*, award of 23 April 2015.

[43]DRC 25 April 2013, no. 04132387. See also DRC 17 August 2012, no. 8122047, DRC 18 December 2012, no. 12122375, DRC 28 June 2013, no. 06132458 and DRC 28 March 2014, no. 03143127. This also follows from the DRC case of 17 May 2013, no. 05132419 and DRC 13 December 2013, no. 12131045. Relevant CAS cases are CAS 2010/O/2132 *Shakhtar Donetsk v. Ilson Pereira Dias Junior*, award of 28 September 2011 and CAS 2013/A/3109 *FC Steaua Bucuresti v. Rafal Grzelak*, award of 24 October 2013. In the latter case it was decided by CAS that the amount due by a player under a disciplinary sanction can be set-off against the amount due to this player under an employment contract if the following principles and conditions are met: (a) reciprocity of claims; (b) similarity of the performances; (c) due setting-off counterclaim; (d) opportunity to claim the setting-off counterclaim in court; (e) absence of reasons of prohibition; and (f) declaration or expression of set-off.

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circumstances can be present that have an effect on the compensation resulting in a higher or a lower compensation as compared to the above principle.[44]

#### 9.3.2.3 Behaviour Parties

In order to calculate the amount of compensation to be paid by the club, it is relevant to establish whether the breach took place within or outside the Protected Period. In a DRC decision of 7 September 2011, the DRC decided that since the breach of contract by the club occurred within the Protected Period, the club not only had to be sanctioned with a ban from registering any new players, either nationally or internationally, for the next 2 entire and consecutive registration periods, but this factor also had to be taken into account in determining the amount of compensation. In this case, the DRC also referred to its consistent practice and the general obligation of the claimant to mitigate his damages.[45] The DRC also established that bonus and other remuneration, which represents a variable and uncertain character from one season to another, will not be taken into account in the calculation of compensation.

In a case before the DRC of 12 January 2007, the Chamber had to deliberate whether or not the behaviour of the club had to be considered as a persistent failure in order to comply with its contractual obligations towards the player. In the present case, the club concerned had not paid the player's salary from November 2003 to May 2004, i.e. over 7 months. Therefore, it was decided that the behaviour of the club had to be considered as a persistent failure to comply with its financial obligations towards the player.[46] However, the DRC also decided that the relevant compensation to be paid by the club was also subject to the behaviour of the

[44]Reference can also be made to awards of the CAS as well, such as the case before CAS 2014/A/3573 *Damian Alejandro Manso v. Al Ittihad Club*, award of 29 January 2015, from which it follows that the CAS is entitled to adjust the amount due as a result of the behaviour of a player. Also, in the case before CAS 2005/A/893 *Bruno Metsu v. Al-Ain Sports Club*, award of 16 February 2006, the CAS did not award the player the maximum possible compensation, but adjusted it. According to these decisions, it is up to the court to determine the financial compensation due according to the circumstances, as well as the degree of fault of the parties concerned. Special reference can also be made to CAS 2013/A/3089 *FK Senica, A.S. v. Vladimir Vukajlovic & FIFA*, award of 30 August 2013, in which case it was decided by the CAS that compensation resulting from the termination of a contract without *just cause* was to be calculated keeping in mind the specificity of sport, i.e. the specific nature of sport and also the specific sporting circumstances. In the said case the Sole Arbitrator concluded that a tacit agreement of termination between the parties had taken place, by means of which the player was released of his obligations to train with the club's team in order to look for a new club and, in return, the club would no longer have to pay the player's salary. As a result, it was decided in these circumstances, that where neither the player nor the club were interested any longer in maintaining their labour relationship and taking the principle of the specificity of sport into account, no compensation had to be awarded to the player.

[45]DRC 7 September 2011, no. 9111901.

[46]DRC 12 January 2007, no. 17595.

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player concerned. In this context, the DRC concluded that both parties had a reason to terminate the employment contract. It was a situation of mutual fault. Therefore, the DRC decided that the player shall not receive any compensation for breach of contract without *just cause* by the club. The Chamber decided that the club only had to pay an amount of USD 35,000 to the player due to outstanding salary.

Reference to the behaviour of the player was also made in the case before the DRC of 23 February 2007.[47] As far as compensation for breach was concerned in this case, the DRC deemed it appropriate to highlight that the relevant compensation to be paid by the club concerned must be reduced slightly as the player's own misbehaviour (i.e. reassuming his duties with a delay of 2 days due to unspecified family reasons) must also be taken into account. Another relevant element in this case to reduce the compensation, was the fact that the player found a new club to play for and was not unemployed for a long period. Furthermore, it is important to note that the DRC underlined that it can be seen as an act of bad faith if a player claims more than he is entitled to.

Also, in its DRC decision of 9 January 2009, the player was entitled to receive financial compensation. For the assessment of the amount of compensation, the DRC referred to Article 17 para 1 of the RSTP, particularly to the non-exhaustive enumeration of the objective criteria which needed to be taken into account. Although the amount of compensation as a result of a termination without *just cause* was stated in the contract, the DRC was of the opinion that the contract was never executed and that the amount had to be reasonable given the circumstances of the case. The DRC further noted that the player also signed another contract with a club and that his footballing career had not been put in jeopardy by the non-execution of the contract. All these circumstances were taken into account in order to establish the amount of compensation to be paid by the club to the player.[48]

The behaviour of the player can be taken into account in order to establish the amount of compensation to be paid by the club to the player.[49] In its DRC decision of 22 June 2007, when calculating the compensation due, the Chamber did, however, take note of the fact that the player concerned had acted in bad faith.[50]

Even the fact that a player does not cooperate enough to find an amicable settlement can be relevant for the amount of compensation. In the previously

[47]DRC 23 February 2007, no. 27835.

[48]DRC 27 February 2013, no. 02131190. See also 13 October 2010, no. 10102536.

[49]DRC 12 January 2007, no. 17820, and DRC 18 March 2010, no. 310585. From the latter case it follows that while assessing the compensation to be awarded to the player, the DRC took into account that the player did not always fully comply with his obligations deriving from the employment contract. Also, from the DRC decision of 21 February 2006, no. 26332, it follows that the Chamber took into consideration the contributory negligence of the player which led to the termination of the employment contract. See also DRC 28 June 2013, no. 0613151a.

[50]DRC 22 June 2007, no. 67675. Aside from this, from CAS 2013/A/3374 *Al Ahli Club v. David Anthony O'Leary*, award of 4 July 2014, it can be derived that a request for reduction of the compensation must be rejected in the event of contributory negligence of an employee, if any, cannot lead to the reduction of damages owed to that employee under Swiss law.

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mentioned case of 28 June 2013, the Chamber found that, in light of this specific circumstance and despite having had *just cause* to terminate the contract, the player could have shown more willingness to find an amicable solution to the dispute with the club, and concluded that this aspect must be taken into account as another mitigating factor in the assessment of compensation for breach of contract paid by the club to the player.[51]

In its case of 20 July 2012, when calculating the compensation, the DRC took into account, that although the contract was fully valid and enforceable, the execution of said agreement had never started.[52]

With regard to the behaviour of the player and his illegal absence, we note that an absence for a few days could not, per se, constitute a valid reason for the termination of a contract by the club. According to the DRC jurisprudence such a short period does not validate a unilateral termination. However, the DRC jurisprudence shows that a few days of unauthorized absence can affect the amount of compensation and can result in a reduction of it.[53]

In view of the compensation to be paid by the club to the player, the player has a general obligation to mitigate his damages.[54] For example, in a DRC decision of 13 October 2010, the DRC decided that, particularly in view of the original duration of the contract, the player's contractual entitlements, his financial claim, the general obligation of the player to mitigate his damages, as well as the behaviour

[51]DRC 28 June 2013, no. 0613151a. See also DRC 22 June 2007, no. 67675, in which decision an annex of a termination agreement which was signed by both the player and the club had the following clause: "*Upon confirmation by the claimant that he found a new club, the contract … will be terminated pursuant to terms agreed upon in the agreement*". On September 2006, the player informed the club that he had not found a new club and, therefore, wanted to keep playing for the club. The club now maintained that the player had been acting disloyally and that he had mislead the club by intentionally making them sign a termination agreement that differs from the draft that the club had presented to the player, even though the club did not know the agreement had been modified. The Chamber emphasized that a party signing a legal document, without knowing its contents, does so at its own risk. Therefore, the fact that the player had modified the agreement before presenting it to the club for signing, was to be considered as an act of bad faith, but could not constitute *just cause* for termination of the contract. The DRC maintained that the club had breached the contract without *just cause* and had to pay compensation. When calculating the compensation due, the Chamber did, however, note that the player had acted in bad faith.

[52]DRC 20 July 2012, no. 7121848.

[53]DRC 23 February 2007, no. 27835.

[54]See also CAS 2014/A/3684 *Leandro da Silva v. Sport Lisboa e Benfica* and CAS 2014/A/3693 *Sport Lisboa e Benvfica v. Leandro da Silva*, award of 16 September 2015. From this case it also follows that a player has a general obligation to duly mitigate his damages. The CAS Panel decided not to fully accept the claim of the player because the player took no positive steps to ask the club if and when he should return and merely relied on indirect information provided by his agent. Furthermore, the player purported to accept the termination of the contract without question and took no positive steps to the club. Special reference can also be made to footnote 75 of the FIFA Commentary, p. 47, from which it follows that: "*CAS 2004/A/587: with regard to the calculation of compensation for a breach of contract committed by a club, the panel applied Swiss law as the law of the country where the association taking the decision was domiciled (Article R58 of the Code of Sports-related Arbitration), since the parties involved had agreed to submit the dispute to the FIFA Regulations and to the Code of Sports-related Arbitration.*

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of the club, which, except from the fact that it had paid an amount of EUR 64,600 in February 2010, basically limited itself to contest the competence of the DRC and did not deem it appropriate to submit any kind of evidence to the DRC attesting its allegations regarding the substance, not only the entire remaining value of the contract, but the amount of EUR 385,000 was to be considered reasonable and justified as compensation. As a result, the DRC concluded that the club had to pay the amount of EUR 481,535 to the player, consisting of EUR 96,535 plus 5 % interest as from 29 January 2010 concerning outstanding salary and bonuses, and of EUR 385,000 as compensation for breach of contract.[55]

If the club breaches the contract without *just cause* and the player has *just cause* to terminate the contract and claims compensation, generally the DRC will establish an amount that corresponds to an amount which the player would have received as remuneration had the contract been executed until its expiry, which amount will be leading and serves as a basis. However, under special circumstances we note that the DRC can deviate from this general line due to the fact the player did not comply with its obligation to mitigate his damages. In a recent DRC decision of 24 April 2015, the DRC Judge noted that from the time of unilateral termination of the contract, the player would have had 6 registration periods to find a new employer in order to mitigate the damage caused due to the breach of contract without *just cause*.[56] Therefore, the DRC Judge considered it appropriate to reduce the amount of the compensation due to the player for breach of contract, by deducting the amount of 41,500, corresponding to half of his earnings for the season 2015/2016.[57] In other words, from this case we derive that if a player does not find a new club in a reasonable period of time, this will have an effect on the compensation amount. The question is whether this is reasonable since clubs are generally not particularly interested in signing a player that is involved in a contractual dispute with his former club. As a result of these circumstances, in its award of 28 November 2013, the CAS finally decided that a player is then prevented from mitigating his damages.[58]

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Footnote 54 (continued)

*The panel applied, in particular, Article 337c para 1 of the Swiss Code of Obligations (CO). Accordingly, the compensation due to the player corresponded to the salary for the remaining duration of the contract, taking into account the player's obligation to mitigate the damages. The damages caused by the breach of contract consisted of the loss of all benefits, provided they were stipulated in the employment contract. Furthermore, there was also the possibility of awarding additional compensation. This additional compensation may, however, not surpass the amount of six month's salary (cf. Article 337c para 3 CO). CAS 2005/A/902 & CAS 2005/A/903: with regard to the calculation of compensation for a breach of contract committed by a player, the panel applied Article 337d CO, according to which the player has to reimburse the club for damages suffered through the early termination of the contract. In order to quantify these damages, Article 99 para 3 CO makes direct reference to Article 42ff. CO*".

[55]DRC 13 October 2010, no. 10102536.

[56]DRC 24 April 2015, no. 04151124.

[57]The currency was not mentioned in the decision.

[58]CAS 2012/A/3033 *A v. FC OFI Crete*, award of 28 November 2013. See also CAS 2012-A-2874 *Grzegorz Rasiak v. AEL Limassol*, award of 31 May 2013.

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#### 9.3.2.4 Permanent Incapacity

Aside from the above exceptions, from the DRC jurisprudence it follows that effects inherent to permanent incapacity for a player to play professional football, will be taken into account by the DRC in determining the amount of financial compensation. The following 2 DRC decisions point this out.

In its case of 28 June 2013, the DRC also agreed that permanent incapacity, in itself, cannot be a valid reason to unilaterally terminate an employment contract.[59] However, this circumstance will have an effect on the amount of compensation, in light of the bilateral character of an employment contract and the circumstance that, in the event of permanent incapacity to play, a player is no longer in a position to render his services to the club. The Chamber decided that the respondent was liable to pay EUR 91,000 as outstanding remuneration. Taking into consideration Article 17 para 1 of the RSTP, the Chamber decided that the claimant is entitled to receive compensation for the termination of the contract of EUR 670,000, and the Chamber finally decided that the circumstance of permanent incapacity to play professional football is taken into consideration in the determination of said amount.

In the DRC decision of 7 February 2014, the player suffered a severe car accident on his way back from training with the club, which left him paralysed.[60] The DRC highlighted in this case that although permanent incapacity, in itself, cannot be considered as a valid reason to unilaterally terminate an employment contract, such specific circumstance will, however, have an effect on the amount of compensation in view of the bilateral character of an employment contract and the circumstance that, in the event of permanent incapacity to play, a player is no longer in the position to render his services to the club. The DRC concluded that the respondent had provided evidence of its defence and, therefore, it could be established that the respondent had paid the claimant all amounts which had fallen due at the time of the termination of the contract, as agreed upon between the parties in the contract. As a consequence, the respondent was not to be held liable to pay any outstanding remuneration to the claimant. Therefore, the DRC partially accepted the claimant's claim. Taking into consideration Article 17 para 1 of the RSTP, the Chamber decided that the claimant is entitled to receive compensation from the respondent for the termination of the contract without *just cause* on the basis of the contract. The circumstance of permanent incapacity to play professional football was taken into consideration by the DRC in determining the amount of financial compensation to be paid by the club to the player. In the event of permanent incapacity to play, the player is obviously prevented from fulfilling his main obligations arising from the employment contract, i.e. to render his services to the club. A permanent incapacity of a player thus creates a particular situation, in that the other party, a club, can no longer be expected to continue to fulfil its contractual

[59]DRC 28 June 2013, no. 06131988.

[60]DRC 7 February 2014, no. 02141221.

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obligations. In this specific case the Chamber deemed that effects inherent to permanent incapacity to play professional football for a player, have to be taken into account in determining the amount of financial compensation to be paid.

## 9.4 Compensation to Be Paid by the Player to the Club

### *9.4.1 General*

It is important to be aware that if a player is required to pay compensation, in accordance with Article 17 para 2 of the RSTP 2016 edition, the professional and his new club will be jointly and severally liable for its payment. To avoid any misunderstanding, the new club is responsible, according to the FIFA Commentary, for paying the former club of the player in breach, regardless of any involvement or inducement to breach the contract.[61] This is confirmed in a DRC decision of 2 November 2007, in which the DRC stressed that the joint liability of the player's new club is independent of whether the new club has committed an inducement to contractual breach. This conclusion is in line with well-established jurisprudence of the DRC and repeatedly confirmed by the CAS.[62]

As regards the above joint liability of the new club, the FIFA Commentary also confirms that whenever a player has to pay compensation to this former club, the new club, i.e. the first club for which the player registers after the contractual breach, shall be jointly and severally liable for its payment. For example and to avoid any misunderstanding, if a new club registers a player after the player was out of contract, the new club can still be held liable by the former club (in the event that any compensation must be paid by the player to the former club) if the new club can be considered as the first club for which the player registered after the breach. However, according to the CAS Panel in the latest *Mutu* case of 21 January 2015, the new club could not be held jointly and severally liable where it was the former club's decision to dismiss a player with immediate effect who, in turn, had no intention to leave the club in order to sign with another club and where the new club had not committed any fault and/or was not involved in the termination of the employment relationship between the old club and the player. These findings did not compromise contractual stability. In other words, only if the former club unilaterally terminates the employment contract, such as Chelsea did

[61]FIFA Commentary, explanation Article 17, p. 47.

[62]DRC 2 November 2007, no. 117623. See also CAS 2009/A/1840 *PFC Slavia 1913 AD v. Kayseri Erciyesspor Kulübü* and CAS 2009/A/1851 *Zdravko Ivanov Lazarov v. Kayseri Erciyesspor Kulübü*, award of 25 November 2009. In the latter case the Panel also underlined that the joint liability of the new club does not prevent it from claiming reimbursement from the player through a separate claim, if the new club was wrongfully induced by the player to sign.

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in the aforementioned *Mutu* case, we may assume, and it is to be expected, that the new club is not jointly and severally liable for any payment.[63]

In Article 17 para 2 of the RSTP 2016 edition, it is further stated that entitlement to compensation cannot be assigned to a third party. If a professional is required to pay compensation, the professional and his new club shall be jointly and severally liable for its payment. The amount may be stipulated in the contract or agreed between the parties. The parties are entitled to stipulate in the contract the amount that the player shall pay to the club as compensation in order to unilaterally terminate the contract.[64] This is called the so-called "buy-out clause".[65] In that respect, it is important to know that on the one hand, the sports legislation of certain countries such as Spain (*Real Decreto* 1006) made it compulsory for a buy-out clause to be included in contracts. On the other hand, there are countries that cannot include the buy-out clause in their contracts as it is not compatible with mandatory labour law. However, according to FIFA a buy-out clause in the contract is valid.[66]

In a case before the DRC of 2 November 2007, the Chamber decided partially on a "buy-out clause". However, the Chamber decided that the mentioned clause in the contract was not a "buy-out clause" since it was considered to be a clause with an "open end" and the essential prerequisites for the application of the relevant clause is the existence of an offer from a new club.[67] It is important to be aware that the buy-out clause is drafted in a correct manner. The clause should not be drafted by the parties in an unclear and ambiguous way. In order to avoid misunderstanding, a buy-out clause must be distinguished from a release clause since the first is a prerequisite for the player to terminate the contract. A release clause, however, is not referable to a termination of the contract, but is conditional upon an offer from a third party. In a DRC decision of 15 February 2008 the Chamber had to decide on a so-called release clause.[68] In this case, club X contacted FIFA and submitted its complaint about the illegitimate approach towards the player by club Z.[69] Club X requested that, on the basis of Article 18 para 3 of the Regulations appropriate sanctions should be imposed against club Z and also claimed compensation. The contract between club X and the player contained a clause which was stated that club X obliged itself to release the player if another club offers club X compensation for the transfer of the player in the amount of at least EUR 180,000. The DRC referred to club X's initial complaint that the approach by club Z in the

[63]CAS 2013/A/3365 *Juventus FC v. Chelsea FC*, award of 21 January 2015, and CAS 2013/A/1366 *A.S. Livorno Calcio S.p.A. v. Chelsea FC*, award of 21 January 2015.

[64]RSTP, edition 2005, Article 17 para 2.

[65]FIFA Commentary, explanation Article 17 para 1 Subpara 3, p. 47.

[66]FIFA Commentary, explanation Article 17, p. 47, footnote 76.

[67]DRC 2 November 2007, no. 117623. The clause concerned may in fact be closer to a release clause.

[68]See also DRC 2 November 2007, no. 117623.

[69]DRC 15 February 2008, no. 28533.

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course of the envisaged transfer of the player was illegitimate and in violation of Article 18 para 3 of the Regulations. In this respect, the DRC emphasized that club Z submitted its proposal for the transfer on 13 June 2007, whereas the employment contract that was eventually signed with the player was dated 27 June 2007. The DRC reiterated that due to the clause contained in the contract, club X was not in a position to further negotiate the transfer of the player to a third club, but could merely accept an offer of compensation for the transfer if this offer of at least EUR 180,000.[70]

As regards the compensation to be paid by a player to a club, we also face situations whereby parties establish a contractual penalty in the employment contract in the event of a unilateral termination of the employment contract. It is common practice in international football to recognize the enforceability of mutually and freely agreed upon penalty clauses since this reinforces the basic principle of *pacta sunt servanda*.[71] However, the jurisprudence of the DRC and the CAS show that the penalty clause can be disproportionate under circumstances. In this regard, CAS Panels have a different approach than the DRC.

[70]See also CAS 2010/A/2098 *Sevilla FC v. RC Lens*, award of 29 November 2011. In this case between the Spanish football club Sevilla FC and the French club RC Lens of 29 November 2010, also known as the *Keita* case, on 10 July 2007 Lens and Sevilla signed a transfer agreement. The parties agreed in the transfer agreement that in the case of a resale of the player by Sevilla to another club, Lens would be entitled to receive an additional portion of the price to be paid by Sevilla, expressed as a percentage of the capital gain made by Sevilla (the sell on clause). On 12 July 2007, Sevilla and the player concluded an employment contract. In a letter dated 26 May 2008, the player informed Sevilla of exercising his right to terminate the employment agreement to the Spanish "Real Decreto" 1006/1985. The amount of EUR 14,000,000 specified in the indemnification clause was later received by Sevilla through the offices of the Spanish Liga Nacional de Futbol Professional, which remitted a cheque to Sevilla drawn by the Spanish club FC Barcelona. Lens contacted Sevilla regarding the transfer and claimed the amount due based on the sell on clause. However, Sevilla refused to pay since, according to Sevilla, no agreement had been entered into with Barcelona. Lens lodged a claim before the FIFA PSC, which committee decided that an amount was due to Lens since the release clause should not be interpreted literally. Sevilla appealed before the CAS since it did not agree with the PSC. The CAS had to find out the "real and common intent of the parties" pursuant to the mentioned principles, beyond the literal meaning of the words used, in order to determine the implications of the sell on clause, as well as of any other contractual provision relevant in this arbitration. The CAS Panel decided that the transfer of the player from Sevilla to Barcelona could not be equated to a "sale" of the player as a result of which Sevilla was not obliged to pay any amount to Lens based on the sell on clause.

[71]See also CAS 2013/A/3419 *Maritimo da Madeira v. Futebol SAD v. Clube Atlético Mineiro*, award of 14 November 2014. In this case the CAS Panel considered that a clause contained all the necessary elements required under Swiss law to be established as a penalty clause. A penalty clause can be defined as an accessory provision whereby the debtor promises an agreed penalty to the creditor if the debtor does not perform or improperly performs a defined obligation. Also in this case the CAS Panel stated that a penalty can be excessive and must be reduced. Reference was made to CAS 2011/O/2397, TAS 2011/O/2427 and CAS 2013/A/3205.

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From the CAS jurisprudence it follows that if the penalty clause is excessive it can be reduced. The CAS has a more in-depth approach than the DRC.[72] According to the CAS, the clause will not be disregarded due to excessiveness, but will be reduced. If the DRC jurisprudence points out that the penalty clause is excessive, the clause will not be accepted.[73] If the DRC decides that the clause must be disregarded, as an alternative and in accordance with its longstanding practice, the party in breach will be obliged to pay 5 % default interest on the respective outstanding amounts to be paid by the player to the club.[74] Also in the DRC case of 28 September 2006, the player referred to the contract stipulating absurdly high compensation payments due to breach of contract.[75]

[72]See for example CAS 2012/A/2847 *Hammarby Fotball AB v. Besiktas Futbol Yatirimlari Sanayi ve Ticaret A.S.*, award of 22 March 2013. The CAS had another approach than the FIFA Single Judge of the Players' Status Committee and examined whether the penalty clause could be considered excessive (in accordance with Swiss law). The CAS Panel considered 4 criteria: (a) the creditor's interest, (b) the severity of the breach, (c) the debtor's fault and intentional failure to execute the main obligation and (d) the business experience of the parties. See also CAS 2010/A/2317. Reference was also made to Article 163 of the Swiss Civil Code according to which a penalty clause will be reduced if it is considered to be excessive.

[73]From an unpublished DRC decision it follows that "*a penalty clause exceeding the amount of 18 % p.a. has to be considered abusive*". See DRC 26 November 2015. This also follows from a decision of the PSC of 15 January 2014, no. 01142777. In the latter case, the Single Judge referred to the content of the penalty clause and, after analysing the relevant provision contained in the transfer agreement, noted that a penalty clause for late payment of 0.05 % per calendar day adds up to an amount of 18.25 % *p.a.* In this context, the Single Judge recalled the well-established jurisprudence of the PSC according to which a penalty clause exceeding the amount of 18 % *p.a.* has to be considered abusive. Moreover, the Single Judge determined in this case that the provision in question has to be considered as completely invalid and consequently came to the conclusion that the claimant's claim for interest in the amount of 0.05 % per calendar day has to be rejected.

[74]In a case before the PSC of 28 August 2013, no. 08133007, the Single Judge concluded that the penalty fee contractually agreed by the parties appeared to be disproportionate and should therefore be reduced. In light of the aforegoing and in view of the circumstances of the present matter, the Single Judge held that an amount of EUR 200 per day, which represented one-fifth of the daily penalty requested by the claimant, seemed to be an appropriate and justified penalty in order to compensate the claimant for late payment by the respondent. In this context, the Single Judge underlined that such an amount was also in line with the maximum rate of interest applicable under Swiss law.

[75]See DRC 28 September 2006, no. 96391. In this case, The DRC was of the opinion that, under such circumstances, the penalty clause appeared to be completely disproportionate and therefore, the deciding body could legitimately reduce the relevant amount, taking into account the particularities of the specific case. The DRC noted that for the claimant's failure to return in time from his holidays, according to the employment contract, he had to pay a fine of USD 10,000 per day. Moreover, the club pointed out the application of Article 10 para 5 and Article 17 of the employment contract if the player violated the obligation to resume duty in time. Therefore, the club was of the opinion that it had the right to terminate the contract and demanded compensation from the player in the amount of USD 100,000. In this context, the Chamber stressed that with regard to the monthly income of the claimant, i.e. USD 15,000 for the 2005 season and USD 20,000 for the 2006 season respectively, the penalty imposed by the club on the player was completely disproportionate and could not be accepted. In a case before the DRC of 22 June 2007, the Chamber deemed that the imposition of a fine corresponding to almost 80 % of the monthly salary of a player due to unsuccessful results of a match, cannot be endorsed; DRC 22 June 2007, no. 67736.

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In a case before the DRC of 16 April 2009, the DRC also had to decide on a penalty clause.[76] In this case the parties signed an annex to the employment contract agreeing on the one hand, that due to a unilateral termination of the contract a penalty fee amounting to EUR 450,000 would be payable. On the other hand, the club agreed to liberate the player to another club by payment of 30 % of the value of the negotiation. Later on parties agreed to increase the penalty fee as well as the compensation. The DRC unanimously decided that the penalty fee concerned as provided for in the contract contained such an exorbitant amount that this was excessive and is not acceptable. The DRC deemed appropriate to recall that also the CAS had confirmed the excessive and abusive nature of such a penalty clause.[77] DRC decisions are also published where penalty clauses are not excessive. For example, in the decision of 31 October 2013, the DRC deemed that the penalty fee of 10 % of the total outstanding amount, which the parties agreed upon in the context of terminating the employment relation, was proportionate and reasonable.[78]

[76]DRC 16 April 2009, no. 491241.

[77]In the case of the PSC of 30 January 2012, the claimant club claimed, among other things, an amount of EUR 202,500 as penalty under clause 5 of the agreement it concluded with another club, which corresponded to 15 % of the total outstanding amount. Furthermore, the claimant club claimed default interest over the claimed amounts. With regard to the claimant´s request in the amount of EUR 202,500 as penalty under clause 5 of the agreement, the Single Judge deemed that, as the wording of the said clause was clear and considering the elapsed time since the transfer of the player to club P in July 2008, a penalty corresponding to 15 % of the total outstanding amount was reasonable and proportionate. However, the Single Judge took note that the claimant also requested default interest over the claimed amounts. The Single Judge was keen to emphasize that according to the long-standing and well-established jurisprudence of the PSC in similar cases, a penalty for late payment cannot be requested together with default interest as both requests aim at compensating the creditor for late payment. The Single Judge added that in order to decide which of the 2 should apply, i.e. the penalty or the default interest, the will of the parties as expressed in the relevant agreement also needed to be taken into account. While reiterating that a penalty for late payment has to remain proportionate, the Single Judge held that the respondent should only be requested to pay the amount of penalty provided under clause 5 of the agreement and therefore the additional default interest of 5 % requested by the claimant cannot be granted. The Single Judge decided that the claim of the claimant had to be partially accepted and held that the respondent had to pay to the claimant an amount of EUR 1,350,000 as being the outstanding amount plus the amount of EUR 202,500 as penalty in accordance with the terms established in the agreement. See also CAS 2010/A/2317 *SC Fotbal Club Timisoara SA v. FC Slovan Liberec*, award of 9 September 2011. See also DRC 25 April 2013, no. 04132387, DRC 17 August 2012, no. 8122047, and DRC 22 June 2007, no. 67725.

[78]DRC 31 October 2013, no. 10132980. A disciplinary measure taken by the club can be unjustified if the disciplinary measure was imposed by the club unilaterally without inviting him to a hearing regarding the imposition of such measure and therefore, he could not defend himself. See DRC 28 March 2012, no. 3122945. See also DRC 10 May 2012, no. 5121852. In the latter case, the Chamber also emphasized that the claimant did not appear to have had the possibility to defend himself.

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### *9.4.2 DRC Approach*

Analysing the jurisprudence of the DRC on Article 17 of the RSTP with regard to compensation to be paid by the player to the club, the most common approach followed by the DRC if the player breaches his contract without *just cause*, is that the compensation should be calculated based on the average between the remuneration due until the expiry of the former contract and the remuneration due under the new contract for the same period. This can be derived from the jurisprudence of the DRC, such as the cases before the DRC of 16 April 2009 and 27 February 2013.[79] From this jurisprudence it can be inferred that the Chamber will first turn its attention to the remuneration and other benefits due to the player under the existing contract and/or the new contract, which value constitutes an essential criterion in the calculation of the amount of compensation in accordance with Article 17 para 1 of the RSTP. It also follows from the jurisprudence of the DRC, that the non-amortized transfer compensation can also be included by the Chamber in the calculation of the compensation due by the player to the club as a result of the breach, in accordance with Article 17 para 1 of the RSTP.

In cases where the club is entitled to compensation, attenuating circumstances can also be applicable in order to reduce the amount of compensation to be paid by the player to the club, such as that the club did not suffer any financial loss during the player's absence. For example, in the DRC decision of 7 February 2014, the DRC was of the opinion that attenuating circumstances were applicable in order to reduce the amount of compensation since the club did not suffer any financial loss during the player's absence, the player's innocence was confirmed and that the payment of the player's remuneration was suspended from January 2010, even though the decision of 16 February 2010 had not yet become final and binding.[80] Therefore, the Chamber finally decided to reduce the compensation for the breach to be paid by the club by one-third and that the player had to pay compensation of USD 60,000.

Several kinds of situations exist in which financial compensation is paid by the player to the club as a result of the player's breach of contract without *just cause*. For example, the compensation paid by the player to the club as a result of a termination by the player for *sporting just cause* in accordance with Article 15 of the RSTP. Contrary to the consequences in case of *just cause* (as a result of which no compensation is due), in the event of *sporting just* cause, compensation *may* still be payable. However, this is in no way definitive, it depends on the merits of the case. From FIFA Commentary it follows that the club may lose its entitlement to compensation if the player can prove that the club had completely neglected the

[79]See DRC 16 April 2009, no. 491241, and DRC 27 February 2013, no. 0213412. See also TAS 2007/A/1314 *Ali Bouabé & Sporting Lokeren Oost-Vlaanderen c. Association Sportive des Forces Armées Royales (ASFAR)*, award 31 January 2008.

[80]DRC 7 February 2014, no. 0214244.

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player from a sporting point of view, as it was not interested in his services.[81] From the DRC jurisprudence regarding *sporting just cause* a certain rule with regard to determining the amount of compensation cannot be derived simply because no jurisprudence of the DRC is present, whereby the player successfully claimed having *sporting just cause* as a result of which he had to pay compensation.[82] It is thus not clear how the compensation will be determined. It can be assumed that the amount will not exceed the amount of compensation due to breach of contract without *just cause* by the player on the understanding that no compensation has to paid if the player can demonstrate that the club has entirely neglected the player from a sporting point of view.

In the aforementioned case between Salkic and the Football Union of Russia and the professional football club Arsenal, the CAS Panel dealt with several questions. The CAS Panel also had to deal with the question whether or not the Russian club was entitled to compensation. The CAS Panel decided that although, in general, compensation is due in case of a breach of contract without *just cause*, the fact that the club placed no value on the player's services in this case questions the existence of any damage for the club. The club apparently considered it favourable to save the payments of salary in exchange of losing the player's services. According to the CAS, it cannot argue that there was a damage to be compensated when losing such services while saving the salary. Although, in general, compensation is due because of a breach of contract without *just cause*, the fact that the club placed no value on the player's services questions the existence of any damage for the club. The club apparently considered it favourable to save the payments of salary in exchange for losing the player's services. According to the CAS, it cannot argue that there was any damage to be compensated when losing such services while saving the salary.[83]

## *9.4.3 Breach of Contract and the Protected Period*

### 9.4.3.1 Introduction

As regards the amount of compensation to be paid by the player to the club due to a breach of contract without *just cause*, it is relevant to establish whether or not

[81]FIFA Commentary, explanation Article 15, p. 43.

[82]See DRC 1 June 2005, no. 65850, DRC 23 March 2006, no. 631290, and DRC 10 August 2007, no. 871322. CAS 2007/A/1369 *O. v. FC Krylia Sovetov Samara*, award of 6 March 2008; CAS 2008/A/1696, award of 30 July 2009; CAS 2013/A/3091 *FC Nantes v. FIFA & Al Nasr Sports Club*, CAS 2013/A/3092 *Ismaël Bangoura v. Al Nasr Sports Club & FIFA*, CAS 2013/A/3093 *Al Nasr Sports Club v. Ismaël Bangoura & FC Nantes*, award of 2 July 2013. CAS 2013/A/1307, award of 31 January 2014.

[83]CAS 2014/A/3642 *Erik Salkic v. Football Union of Russia & Professional Football Club Arsenal*, undated award.

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the player unilaterally terminated the contract without *just cause* during or after the Protected Period. For example, in the so-called *Mexès* cases, the DRC and the CAS had to establish the amount of compensation in which the player breached the contract within the Protected Period.[84] In establishing the amount of compensation, the DRC took into account the circumstances that the player received a

[84]The player Philippe Mexès was born on 30 March 1982 in Toulouse in France and started playing for the French football club Auxerre at the age of 15. One season later, on 13 May 1998, Mexès signed a youth player's contract with Auxerre for a period of 5 years. On 20 June 2000, the youth player's contract was replaced by a professional football player's contract for a period of 5 years ending at the end of the 2004/05 season. On 15 December 2002 Auxerre and Mexès agreed to prolong the contract by 1 season, thus, ending at the end of the 2005/06 season. On 24 May 2004, the Italian club AS Roma informed Auxerre that it was interested in the player Mexès and intended to make a transfer bid. On 4 June 2004, AS Roma offered Auxerre EUR 4,500,000 for Mexès by telephone. Auxerre told AS Roma that it did not agree to the transfer of Mexès to AS Roma and that Mexès was still under contract with Auxerre until 30 June 2006. On 11 June 2004, Mexès appealed to FIFA, basing the request on Article 42 of the RSTP, 2001 edition. On 12 June 2004, AS Roma and Philippe Mexès signed a contract for 4 seasons from the 2004/05 season until 2007/08. On 8 July 2004, Auxerre asked FIFA to decide on the dispute. By DRC decision of 13 May 2005, Mexès was ordered to pay Auxerre compensation of EUR 8,000,000 according to Article 22 of the RSTP, 2001 edition; DRC 31 August 2004 (not published). In this case, the DRC decided that Mexès unilaterally breached his contract with Auxerre without *just cause*. Mexès appealed to the CAS against the DRC decision of 31 August 2004; Decision of the CAS of 11 March 2005, no. CAS 2004 A/708/709/713. The CAS confirmed the DRC decision of 31 August 2004. See also DRC 13 May 2005, no. 55503. In this case, the DRC ordered Mexès to pay compensation to Auxerre in the amount of EUR 8,000,000. Mexès appealed to the CAS regarding the DRC decision of 13 May 2005; Award of the CAS of 5 December 2005, CAS 2005/A/902/903. In this case the CAS found the appeal partially admissible and ordered Mexès to pay Auxerre compensation to the amount of EUR 7,000,000. See also DRC 23 June 2005, no. 65503. The DRC decided that a ban should be imposed on AS Roma for 2 registration periods for the inducement of breach of contract. AS Roma appealed to the CAS against the DRC decision of 23 June 2005, no. 65503; Decision of the CAS of 5 December 2005; CAS 2005/A/916. In this latter case the CAS found the appeal partially admissible and ordered a ban on AS Roma for one entire registration period. However, in this case Auxerre had claimed compensation of EUR 18,000,000. Auxerre stated that Mexès received a much higher salary with AS Roma and the club also stated that it had invested a lot in the player Mexès. In its decision of 13 May 2005, the DRC had examined the objective criteria for calculating the compensation as laid down in Article 22 para 1 of the RSTP, 2001 edition. In the process, the DRC took into account the much higher salary that Mexès was earning at AS Roma, and that Auxerre was famous for training its young players. The DRC referred to the fact that Mexès had been trained by Auxerre for 7 years from the age of 15 until the age of 22. According to the DRC, the remaining value of the contract was EUR 2,403,614 and, based on the special circumstances and objective criteria, the DRC finally ordered Mexès to pay Auxerre a total compensation of EUR 8,000,000. In the appeal, the CAS considered as follows. In its decision of 13 May 2005, the CAS was of the opinion that the DRC had not explicitly motivated and calculated why AS Roma should pay compensation of EUR 8,000,000. Therefore, the CAS had to calculate the amount of compensation due. AS Roma offered to pay compensation of EUR 4,500,000. Auxerre refused this offer. At the basis of its calculation was the amount of EUR 2,289,644 for the loss of Auxerre for the period in which Mexès should have played with Auxerre during the 2005/06 season and compensation for not receiving a transfer sum for Mexès fixed at the minimum of EUR 4,500,000. According to the objective criteria, the CAS finally concluded that AS Roma should pay Auxerre a total financial compensation in the amount of EUR 7,000,000; CAS 2005/A/916 *AS Roma v. FIFA*, award of 5 December 2005.

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much higher salary from his new club. Furthermore, it was important that the player's former club was famous for training young players and that Mexès had been trained by Auxerre for 7 years. Regarding the exact amount of compensation, it must be noted that the amount explicitly depends on the merits of the case and its particularities. With regard to the Protected Period, it was stated that due to the prolongation of the employment contract the Protected Period started again, as is also stipulated in Article 17 para 3 of the RSPT. Therefore, the player unilaterally terminated his contract during the so-called Protected Period. As a consequence, the amount of compensation for the player to be paid to his former club was relatively high. However, it remains difficult to establish an exact calculation of the compensation. As mentioned before, it depends on the specific particularities of the case which must be adjudicated in view of Article 17 para 1 of the RSTP, 2016 edition.[85] In the CAS case of 28 November 2013, the CAS decided that a breach of contract occurring within the Protected Period is an aggravating factor taken into account in increasing the compensation to be awarded pursuant to the "specificity of sport".[86]

We also face situations in which players terminated their contracts outside the Protected Period, such as the famous *Webster*, *Matuzalem* and *De Sanctis* cases.

#### 9.4.3.2 *Webster* Case

In the *Webster* case, which started with a DRC decision of 4 April 2007, the Chamber had to adjudicate the amount of compensation to be paid by player Andrew Webster who left his club Heart of Midlothian after the Protected Period.[87] The Scottish international Andrew Webster was a professional player at Heart of Midlothian and after a conflict with the club owner Vladimir Romanov in 2006, he was degraded to the bench. That was the reason for Webster to terminate his contract. Webster terminated his contract after the Protected Period and therefore no sporting sanctions would be imposed on him. Following the termination, Webster signed a new contract with Wigan Athletic. However, Hearts did not agree with the termination and refused to cooperate with the transfer to Wigan Athletic. As a result, Webster appealed to FIFA and asked for a provisional registration, which was allowed by the Single Judge of the PSC. In the DRC procedure that followed, the Chamber stated that the player had terminated his contract outside the

[85]See also CAS 2006/A/1141 *M.P. v. FIFA & PFC Krilja Sovetov*, award of 29 June 2007; CAS 2007/A/1429 *Bayal Sall v. FIFA and IK Start* and CAS 2007/A/1442 *ASSE Loire v. FIFA and IK Start*, award of 25 June 2008; CAS 2008/A/1568 *M. & Football Club Wil 1900 v. FIFA & Club PFC Naftex AC Bourgas*, award of 24 December 2008; CAS 2008/A/1453 *Elkin Soto Jaramillo & FSV Mainz 05 v. CD Once Caldas & FIFA* and CAS/A/1469 *CD Once Caldas v. FSV Mainz 05 & Elkin Soto Jaramillo*, award of 10 July 2008. In the latter cases, a unilateral termination took place within the Protected Period.

[86]See CAS 2012/A/3033 *A. v. FC OFI Crete*, award of 28 November 2013.

[87]DRC 4 April 2007, no. 47936.

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Protected Period and that this was a very important element in order to establish the amount of compensation. The remaining value of the employment contract of the player concerned was EUR 199,976. However, the Chamber once again stressed that the player could not terminate his contract by simply paying his club the remaining value of his contract. Aside from his basic salary, the player received a number of appearance bonuses and the former transfer compensation of EUR 75,000 also had to be taken into consideration as well as the 5 seasons that the player had spent with his club, according to the DRC. The DRC further pointed out that another crucial factor to be taken into account was the way in which his club had contributed to the steady improvement of the player concerned. The aforementioned considerations led to the conclusion that Webster and Wigan were jointly and severally liable to pay an amount of GBP 625,000 to his former club Hearts. All parties appealed to the CAS.

In line with the DRC, the CAS also referred to Article 17 of the RSTP, for determining the level of compensation owed. Heart of Midlothian claimed the market value of the player as lost profit in the amount of GBP 4 million. The Panel was unequivocal. It decided there was no economic, moral or legal justification for a club to be able to claim the market value of a player as lost profit. In this case, the CAS believed it would be difficult to assume that a club could be deemed as being the source of appreciation in a player's market value, while never being deemed as being responsible for a depreciation in value. The CAS also considered that the remuneration and benefits due to the player under his new contract are not the most appropriate criterion on which to rely in cases involving unilateral termination by the player outside the Protected Period, because rather than focusing on the context of the employment contract which has been breached, it is linked to the player's future financial situation and is potentially punitive. The Panel found that Hearts' claim of GBP 330,524 based on the difference between the value of the old and new contract had to be rejected, and that the most appropriate criteria of Article 17 to apply in determining the level of compensation owed to Hearts by the player, is the remuneration remaining due to the player under the employment contract upon its date of termination, which the parties have referred to as the residual value of the contract. The CAS noted that the residual value represents GBP 150,000. The Panel thus considered this amount to be due to Hearts as compensation under Article 17, for the player's termination of his contract. The CAS Panel finally decided in this case, that the club Wigan Athletic was jointly and severally liable with player Webster to pay Hearts the amount of GBP 150,000.[88]

The *Webster* case gave rise to the suspicion that every player was free to terminate his contract after the Protected Period by only paying the remaining value as compensation. However, the CAS Panel in the *Matuzalem* case refused to follow this line.

[88]CAS 2007/A/1298 *Wigan Athletic FC v. Heart of Midlothian*, CAS 2007/A/1299 *Heart of Midlothian v. Webster & Wigan Athletic FC* and CAS 2007/A/1300 *Webster v. Heart of Midlothian*, award of 30 January 2008.

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#### 9.4.3.3 *Matuzalem* Case

The *Matuzalem* case started with the transfer of player Matuzalem from the Italian club Brescia to the Ukrainian club Shakhtar Donetsk in June 2004 for a fee of EUR 8,000,000. In the employment contract with Shakhtar it stated that Matuzalem could be transferred if Shakhtar Donetsk received an offer of EUR 25,000,000. During his stay with Shakhtar Donetsk, the player developed very well, being one of the most talented players as well as being the captain of the team. On 2 July 2007, after 3 years of his 5-year employment contract with Shakhtar Donetsk, Matuzalem unilaterally terminated his employment contract with the Ukrainian club. It's worth mentioning that termination took place during a very unpleasant moment since Shakhtar Donetsk was 2 weeks from the start of the UEFA Champion's League qualification rounds. Matuzalem then signed an employment contract with the Spanish club Real Zaragoza for the duration of 3 seasons on 19 July 2007. On 17 July 2008, Matuzalem was transferred on a loan basis to the Italian club SS Lazio Spa. In the loan agreement an option was included to purchase the player's registration rights. Finally, Matuzalem signed an employment contract for 3 years with Lazio. In the meanwhile, the Ukrainian club Shakhtar Donetsk started a procedure before the DRC, against Real Zaragoza and Matuzalem, and claimed financial compensation in the amount of EUR 25,000,000, as was included in the contract.

The DRC had to decide on the amount of compensation due to the unilateral termination outside the Protected Period. Firstly, the DRC decided that the clause regarding the EUR 25,000,000 could not be seen as a so-called buyout clause since the clause concerned was conditional upon an offer from a third club. The clause had an open end and, according to the DRC, this clause did not regulate compensation payable in the event of a breach of the employment contract by either of the parties, but merely attempted to secure transfer compensation. In other words, the clause concerned did not constitute a provision in the sense of Article 17 of the RSTP. Moreover, in this case the Chamber decided that the remaining value was not the only criterion and it referred to the objective criteria as listed in said Article 17.[89]

In order to calculate the amount of compensation, the DRC referred to the non-amortized expenses incurred by his former club when engaging the services of the player, the remuneration and other benefits due to the player under the previous and the new contract and the sports-related damage caused to the club by the player in light of the specificity of sport and the impact of the serious disrespect of good faith. With regard to the other objective criteria, the DRC decided that the player seriously offended the good faith of his former club since he accepted an increase in his financial entitlements shortly before the end of the season. Anyhow, the player did not indicate to his club that he might wish to look for other employment opportunities or that certain issues had arisen that did not meet his

[89]This decision was issued before the CAS decision of Webster.

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expectations. Finally, on 2 November 2007, the DRC decided that Matuzalem and Real Zaragoza were jointly and severally liable to pay compensation to Shakhtar Donetsk in the amount of EUR 6,800,000.[90] All parties appealed to the CAS.

Shakhtar Donetsk requested the payment of EUR 25,000,000 in compensation for the unilateral breach of contract, while Matuzalem and Real Zaragoza requested that the compensation had to be fixed at an amount of EUR 2,363,760. The CAS underlined that the termination of an employment contract without *just cause*, even if it occurs outside the Protected Period, remains a violation of contractual obligations and that Article 17 of the RSTP does not give a free pass, either to a club or to a player, to unilaterally breach an existing agreement. Contrary to the decision of the CAS in the *Webster* case, the CAS panel decided that the remaining value was not the only criterion in order to establish the amount of compensation after termination outside the protected period. In this case of player Matuzalem, the CAS decided that the award of damages had to be based on the principle of "*positive interest*", i.e. putting the injured party in the position it would have been in, had there been no breach. In order to calculate the compensation, the CAS applied the following criteria.

Firstly an important element according to the CAS, was the value of the lost services of player Matuzalem for Shakhtar Donetsk based on the amount of the transfer fee agreed between Real Zaragoza and Lazio, plus the average yearly salary paid by the 2 clubs. Furthermore, the amount of salary expenses that Shakhtar Donetsk did not have to pay to Matuzalem had to be deducted. With regard to the specificity of sport, the CAS decided that the status and behaviour of the player also had to be taken into account. The player left Shakhtar Donetsk just a few weeks before the start of the qualification rounds of the 2007/2008 UEFA Champions League, after the season in which he became captain of Shakhtar Donetsk. Therefore, the CAS Panel set an additional indemnity amount equal to 6 months of salary paid by Shakhtar Donetsk. Finally, the CAS decided on 19 May 2009 that the compensation for breach of contract to be paid by Matuzalem to Shakhtar Donetsk awarded in this case was EUR 11,858,934. In this respect, the CAS decided that the Spanish club Real Zaragoza was jointly and severally liable for this payment.[91]

#### 9.4.3.4 *De Sanctis* Case

On 5 July 1999, the Italian goalkeeper Morgan de Sanctis transferred from the Italian club Juventus to the Italian club Udinese. De Sanctis signed his first

[90]DRC 2 November 2007, no. 117623.

[91]CAS 2008/A/1519 *FC Shakthar Donetsk (Ukraine) v. Mr. Matuzalem Francelino da Silva (Brazil) & Real Zaragoza SAD (Spain) & FIFA* and CAS 2008/A/1520 *Mr. Matuzalem Francelino da Silva (Brazil & Real Zaragoza SAD (Spain) v. FC Shakthar Donetsk (Ukraine) & FIFA*, award of 19 May 2009. Matuzalem was not able to pay the amount as was established by the CAS and was finally subject to a ban on a worldwide scale. However, the award with regard to the prohibition of Matuzalem to play was annulled by the Swiss Federal Tribunal. See SFT 4A_558/2011 (27 March 2012, no).

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contract with Udinese for a period of 5 years, starting on 1 July 1999. It's worth mentioning that Udinese acquired 50 % of the economic rights of De Sanctis from Juventus for the amount of EUR 1,291,142. The other 50 % of the economic rights were acquired by Udinese from Juventus at a later date, i.e. on 30 May 2000, for the amount of EUR 4,131,655. Subsequently, on 10 November 2000, De Sanctis and Udinese signed a second contract, also for the duration of 5 years, starting on 1 July 2000. On 18 October 2003, another contract was signed, also for the duration of 5 years, effective from 1 July 2003, and on 20 September 2005, De Sanctis and Udinese finally signed a fourth (and final) contract, also for the duration of 5 year, starting on 1 July 1999.

On 7 July 2006, Udinese loaned out another of their goalkeepers, named Handanovic, to the Italian club FC Rimini Calcio. In the loan agreement between Udinese and Rimini an option was included for Rimini to acquire the economic rights of De Sanctis for EUR 1,200,000, but also a counter-option for Udinese to call the player back at a cost of EUR 250,000 to be paid to Rimini. On 7 June 2007, Udinese informed FIFA with regard to an alleged approach by Sevilla to De Sanctis. During that same time, Rimini exercised its option in relation to player Handanovic. Per letter of 8 June 2007, De Sanctis unilaterally terminated his employment contract with Udinese since he was of the opinion he was outside the Protected Period. In his letter he explicitly referred to Article 17 of the FIFA RSTP. On 21 June 2007, Udinese exercised its counter option with Rimini and Handanovic rejoined Udinese and at the end of June 2007, Udinese also signed a 37-year old goal keeper, named Chimenti.

On 10 July 2007, De Sanctis signed an employment contract for the duration of 4 years with Sevilla.[92] After the refusal of the Italian Association to issue the ITC for player De Sanctis, the matter had to be resolved by the Single Judge of the PSC, who finally issued the ITC on 13 August 2007. Per date of 18 April 2008, the Italian club Udinese filed its complaint with the Chamber claiming an amount of EUR 23,267,594 as compensation for the unilateral breach by the player De Sanctis.

The DRC recalled that the player was already 28 years old when the contract had been concluded in September 2005 and that the Protected Period therefore lasted 2 years or 2 entire seasons, whichever came first. The protected period started on 1 July 2005, finished at the end of the 2006/2007 season and thus it concerned a termination of the contract without *just cause* outside the protected period. The DRC had to decide on the basis of Article 17 para 1 of the RSTP what amount had to be paid as compensation. Firstly, the DRC stressed that Article 17 of the RSTP did not provide a legal basis for the right to unilaterally terminate an employment contract between a professional player and a club. The DRC focused its attention on the calculation of the amount of compensation for breach of contract. The DRC recapitulated that, in accordance with Article 17 para 1 of

[92]In addition, the contract with Sevilla contained a clause stating that if the player De Sanctis sought to terminate the contract with Sevilla before its expiry, then he would be obliged to pay compensation to Sevilla in the amount of EUR 15,000,000.

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the RSTP, the amount of compensation shall be calculated in particular and unless otherwise provided for in the contract at the basis of the dispute, with due consideration for the law of the country concerned, the specificity of sport and further objective criteria, including 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 5 years as well as the fees and expenses paid or incurred by the former club (amortized over the term of the contract) and whether the contractual breach falls within the protected period. The DRC recalled that the list of objective criteria was not exhaustive and that the broad scope of criteria aimed to ensure that a fair amount of compensation, was awarded to the prejudiced party.

The Chamber held that it first had to clarify whether the relevant employment contract between the player and Udinese contained a provision that the parties had agreed beforehand on an amount of compensation for breach of contract. The DRC assured itself that this was not the case. The DRC then re-emphasized that each request for compensation for breach of contract has to be assessed by the chamber on a case-by-case basis taking into account all specific circumstances of the respective dispute. The members explicitly stated in this case that it falls under their responsibility to estimate the prejudice suffered by Udinese in the case at hand, not only in accordance with the criteria contained in Article 17 para 1 of the RSTP and in due consideration of all specific circumstances of the present matter, but also with their specific knowledge of the world of football, as well as with the experience the DRC itself has gained throughout the years. The DRC took into consideration both the existing contract and the new contract, the agent fees, the missed transfer fee and also the specificity of sport. The DRC recalled that the specificity of sport allowed for it to take into account the circumstance that players can be considered as the main asset of a club in terms of their sporting value but also from an economic point of view. According to the DRC, one of the elements, that concretize the concept of specificity of sport was the remaining time of the contract that had been breached. The Chamber noted that the player De Sanctis had unilaterally terminated the employment contract after 2 seasons, with 3 more seasons remaining under the terms of the contract. The remaining time of the contract was therefore important, as 3 seasons out of 5 is a substantial period of time. The DRC outlined the exceptional and outstanding position that the player held within the organization of Udinese; De Sanctis was the first goalkeeper of the team, a member of the national team of Italy, one of the best goalkeepers in the Italian championship, and he played a fundamental role in Udinese's latest success. He was considered an example and a mentor for his colleagues. Although it might be questionable whether the player's position on the pitch had an impact on the damage caused, the Chamber stressed that he was the goalkeeper, i.e. a masterpiece of the organization of the team and, consequently a position which is, basically, not easy to replace.

Subsequently, the DRC concluded that the amount of compensation for breach of contract without *just cause* to be paid by De Sanctis to Udinese was firstly composed of the amount of EUR 3,547,134 being a reflection of the average

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remuneration and other benefits due to De Sanctis under the previous and the new contract and the value attributed to his services by both clubs, as well as EUR 36,000—being the non-amortized agent's fee over the term of the contract. Equally, the amount of compensation needed to include EUR 350,000 reflecting the sports-related damage caused to Udinese by De Sanctis in light of the specificity of sport, according to the DRC. Finally, the DRC considered that the total amount of EUR 3,933,134 had to be considered an appropriate and justified amount of compensation to be awarded. In accordance with the unambiguous contents of Article 17 para 2 of the RSTP, the Chamber finally established that Sevilla was jointly and severally liable for the payment of compensation.[93] Also in this case all parties appealed to the CAS.

The CAS Panel noted, and each of the parties submitted, that the compensation for the player's breach of contract with Udinese had to be determined in accordance with Article 17 of the RSTP. It was clear that the list was not intended to be definitive. Indeed, if the positive interest principle was to be applied in this case, then other objective criteria can and should be considered, such as loss of possible transfer and replacement costs, as were considered in the *Matuzalem* and the *El-Hadary* cases.[94] However, the Panel also noted that for compensation to be due in such instances there must be the logical nexus between the breach and the loss claimed. The loss of a transfer fee was awarded in the *El-Hadary* case, where the new club and the old club had directly been negotiating a fee at the time of the breach.[95] In the jurisprudence available and referred to by the parties, the Panel noted that previous panels did not feel bound to consider the Article 17 criteria in a strict order, but rather consider the most appropriate to the facts of their case first. Udinese, in both its submissions and at the hearing, provided the Panel with details of the replacement costs that it had incurred, which it alleged was a direct result of the player's breach. Whilst replacement costs are not referred to in Article 17 of the RSTP, these have been considered in previous CAS jurisprudence (such as the *Matuzalem*, *El-Hadary* and *Appiah* cases[96]) in order to establish the "*positive interest*", and it thus seemed a logical place to start, to see what loss the injured party had actually suffered as a result of the breach, before comparing this with the theoretical calculations that a judging authority is directed to make under Article 17 of the RSTP.[97]

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[93]DRC 10 December 2009, no. 129641.

[94]CAS 2009/A/1880 *FC Sion v. FIFA & Al-Ahly Sporting Club* and CAS 2009/A/1881 *Essam El-Hadary v. FIFA & Al-Ahly Sporting Club*, award of 1 June 2010.

[95]It appeared to the Panel that, as a consequence of the premature termination of the player's employment contract, Al-Ahly was deprived of the opportunity to obtain a transfer fee of USD 600,000. See para 221 of the *El-Hadary* case.

[96]CAS 2009/A/1856 *Fenerbahçe Spor Kulübü v. Stephen Appiah* and CAS 2009/A/1856 *Stephen Appiah v. Fenerbahçe Spor Kulübü*, award of 7 June 2010.

[97]The CAS Panel also noted that in these kinds of cases, which have different facts from others and will have been through the DRC, a panel has the benefit of hindsight or the benefit of seeing how the breach of contract has actually effected the injured party, as the CAS Panel may be looking at a breach that happened many years ago.

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Udinese submitted and provided evidence to support the claim that it had to bring back one of its squad who was on loan to Rimini as a replacement. The panel noted the comments of Sevilla during the hearing, stating that 3 other goalkeepers had left Udinese at the end of the 2006/2007 season, and, as such, queried whether these 2 goalkeepers were direct replacements for De Sanctis or whether Udinese would have brought these players back anyway. The Panel noted the submissions of the player that one player should not be replaced by 2 new ones. Replacing one player with 2 might seem odd, but the CAS in this matter considered the strategy of the club Udinese as reasonable to replace the player with both the young player, with eventual potential, and the old player, with immediate experience.

With regard to the possible loss of a transfer fee, the CAS Panels have different approaches—on the one hand, the *Webster* case where that Panel felt that transfer fees were not a possible factor in assessing compensation; whereas, in both the *Matuzalem* and *El-Hadary* cases, the Panels felt it was possible, if the injured party could provide sufficient evidence. In this case, none of the parties produced any evidence of any offers made or pending for the player De Sanctis.[98]

With regard to the remuneration and other benefits, the CAS Panel noted that this criterion had proven to be the most contentious to date. The Panels in the *Matuzalem* and *El-Hadary* cases both sought to calculate the value of the services of the player looking at the amount that the injured party, the old club, would have to pay to replace the player. Udinese did not produce concrete evidence of any offers for the player, just the details from a website of some other transfers of goalkeepers over the last few years, where the panel had no details of those players' salaries, unexpired terms, etc. Here, the panel was not put in a position by Udinese where it could safely value the services of the player. In the absence of any concrete evidence with regard to the value of the player De Sanctis, the CAS panel could not exactly apply the same calculation as in the *Matuzalem* case and was obliged to use a different calculation method to determine the appropriate compensation, the one which would be the closest to the amount that Udinese would have got or saved if there had been no breach.[99]

With regard to the fees and expenses amortized, the CAS noted that Udinese had argued before the DRC that the initial fees paid to Juventus should have been amortized over the entire period that the player was under contract with it.

[98]Udinese did produce the details of 3 other international goalkeepers that it had transferred between clubs over the previous couple of years; however, this was not taken by the panel as evidence of any loss suffered by Udinese in relation to this player. As such, as no party advanced any submissions under this criterion, the panel did not use it as part of assessing the compensation due to Udinese.

[99]Regarding the time remaining under the old contract, the CAS Panel noted that the time remaining under the old contract had to be taken into account when looking at the period for replacement costs, i.e. 3 years of replacement costs, less 3 years of savings made. However, the Panel also noted in that respect, that De Sanctis had concluded 2 out of his 5 years of his employment contract with Udinese. In certain previous cases, such as the *Matuzalem* case, this was dealt with in the specificity of sport.

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In addition, it claimed that the agent's fee paid in relation to the employment contract with Udinese should be amortized over the 5 year period of that contract on a pro rata basis, year by year. In the DRC decision, it was decided that the fee paid to Juventus had been amortized over the first 5 years of the player's time with Udinese, but EUR 36,000 was allowed as part of the compensation for the agent's fee. However, Udinese did not appeal the DRC's decision regarding the non-amortized fees and expenses. The player and Sevilla both submitted that there was no proof that the agent fee was actually paid. Therefore, Udinese confirmed at the hearing that it no longer made any claim in relation to the agent's fee. As such, the CAS Panel determined that since no party made any claim under this criterion in the appeal case before the CAS, it had no relevance in assessing the level of compensation due to Udinese.

With regard to the specificity of sport, the CAS Panel noted that it should aim at reaching a solution that is legally correct, and that was also appropriate to an analysis of the specific nature of the sporting interests at stake, the sporting circumstances and the sporting issues inherent to the single case. The panel agreed with the jurisprudence set out in previous cases mentioned herein, that the specificity of sport was not 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 which are not envisaged under the other criteria of Article 17. The CAS Panel was not convinced that the direct replacement costs had fully compensated Udinese for the loss it suffered as a result of breach by De Sanctis. The Panel determined that the specificity of sport had to be considered and used as a correcting factor, and not one that enables a transfer fee through the back door.

The Panel noted that Udinese quoted para 156 of Matuzalem in its submission, in which that Panel stated this head of compensation is limited, that it served to correct and should not be misused, yet then Udinese requested between EUR 5,000,000 and EUR 10,000,000 under this criterion. In addition, the panel did consider the parties' submission regarding the unexpired time left in the old contract, the special role of the player in the eyes of sponsors, fans and his colleagues at Udinese, the position he played in the field and the success he had brought to Udinese, etc..[100] The Panel noted that in the various previous cases, only the panels in *Bourgas*[101] and *Matuzalem* awarded any sum for the specificity of sport, where the breach was by the player. The FIFA RSTP offers no express guidance on how a judging authority should calculate compensation under this

[100]But also whether it was felt there was any evidence that the player and Sevilla had met before the player handed his notice in, the time he had given to the club, whether he was a "model professional" or not, the fact he was outside the protected period that he felt he followed a "process" set out in Article 17.3 of the RSTP and whether the player felt as Udinese had not offered him a new deal, after 2 years on the 4th contract.

[101]CAS 2008/A/1568 *M. & Football Club Wil 1900 v. FIFA & Club PFC Naftex AC Bourgas*, award of 24 December 2008.

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basis. However, the FIFA Commentary states, as a footnote on the specificity of sport: *"…Furthermore, there was also the possibility of awarding additional compensation. This additional compensation may, however, not surpass the amount of six month's salary …"*. In the decision on the appeal, the DRC awarded a sum of EUR 350,000, but did not offer any details on how it arrived at this sum.[102] The CAS Panel finally determined to follow the specificity of sport jurisprudence in the *Matuzalem* case. The CAS Panel therefore determined that the additional compensation for Udinese had to be an amount of EUR 690,789, being 6 months remuneration under the new contract of De Sanctis.

Finally, the total compensation due to Udinese was divided as follows. The replacement costs were EUR 4,510,000 less the savings of EUR 2,950,734 made was EUR 1,559,266 plus the specificity of sport EUR 690,789, in total EUR 2,250,055. The CAS decided on 28 February 2011 that De Sanctis and Sevilla were jointly and severally liable to pay Udinese EUR 2,250,055 as compensation.[103]

The *De Sanctis* case gave the international football world a more definitive answer on the amount of compensation to be paid in case of a termination by a player outside the Protected Period. After having analysed the above cases: only the remaining value of the contract is not the decisive element in any event. This was already clear after the *Webster* case, in my opinion. However, *Matuzalem* and *De Sanctis* made this absolutely clear. The CAS Panel in the *De Sanctis* case, even found it quite logical to establish what loss the disadvantaged party had actually suffered and devised a new calculation method. It did not feel bound to the *Webster doctrine* at all, in that only the remaining value was decisive in order to establish the amount of compensation as a result of a unilateral breach by the player of his employment contract outside the Protected Period. Also in the case before the CAS of 9 May 2014, between Al Gharafa & Bresciano v. Al Nasr, in which case the Panel had to calculate the amount of compensation after a player's termination within the Protected Period, the Panel explicitly noted that there is a growing consensus in the CAS jurisprudence on the application of the "positive interest" approach, followed in the *Matuzalem* case and also applied in the *El-Hadary* case.[104] In the latter case, the Panel agreed with such approach and underlined that the application of the criteria indicated by Article 17 para 1 RSTP should "*aim at determining an amount which shall basically put the injured party in the position that the same party would have had if the contract was performed properly*".

[102]In the *Bourgas* case, the CAS Panel rounded the compensation up—having worked from the remuneration due under the old contract, but then reviewing the increased remuneration the player received at his new clubs. In Matuzalem, the CAS Panel considered Swiss Law as guidance. In the *Matuzalem* case the CAS Panel awarded additional compensation in the form of an additional indemnity amount equal to six months of the salary under the new club's contract.

[103]CAS 2010/A/2145 *Sevilla FC SAD v. Udinese Calcio S.p.A.*, CAS 2010/A/2146 *Morgan 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.

[104]See CAS 2013/A/3411 *Al Gharafa S.C. & Mark Bresciano v. Al Nasr S.C. & FIFA*, award of 9 May 2014.

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In all above cases, it was emphasized by the deciding bodies that Article 17 does not provide a legal basis for the right to a unilateral termination of an employment contract. In other words, Article 17 cannot be interpreted as being a provision that *allows* a club or a player to unilaterally terminate an employment contract without *just cause*. Any such termination is clearly deemed a breach of contract. As clearly stated in the CAS award of *Matuzalem*: "*Article 17 FIFA Regulations does not give to a party, neither a club nor a player, a free pass to unilaterally breach an existing agreement at no price or at a given fix price*". As also referred to in the *Matuzalem* case, "*the purpose of Article 17 is basically nothing else than to reinforce the contractual stability, i.e. to strengthen the principle of pacta sunt servanda in the world of international football, by acting as a deterrent against unilateral contractual breaches and terminations, be it breaches committed by a club or by a player*".

## 9.5 Conclusion

In the event that the contract has been terminated by one of the parties without *just cause*, i.e. without a valid reason, the party in breach will pay compensation. This follows from Article 17 para 1 of the RSTP, 2016 edition. According to this provision, the compensation for breach of contract will be calculated with due consideration for (a) the law of the country concerned, (b) the specificity of sport and (c) other objective criteria, such as the remuneration and other benefits due to the player under the existing contract and/or the new contract, the time remaining in the existing contract up to a maximum of 5 years, the fees and expenses paid or incurred by the former club (amortized over the term of the contract) and whether the contractual breach falls within the Protected Period. This provides the basis for the DRC to determine and calculate the compensation to be paid by the party in breach. However, the DRC and the CAS are of the opinion that this list is not exhaustive.

The jurisprudence shows that other elements can also be of relevance, aside from the listed "objective criteria", in order to determine the compensation. For example, criteria such as *agent fees*, *the replacement costs, the possible loss of a transfer fee, missing profit coming from stadium ticket revenues,* and *image damages towards the sponsors,* are elements to establish the amount of compensation. From jurisprudence it can be derived that the DRC will always first establish whether the contract includes a clause pertaining to monies payable to either party in the event of premature termination, both parties having duly signed the contract and having agreed to such clause, and the relevant clause being reciprocal.

In general 2 different types of compensation can be distinguished. Following the well-established jurisprudence with regard to the compensation to be paid by the club, in principle, the player will be entitled to the contractual salary for the remainder of the contract on the understanding that the DRC will also take into account whether the player had signed an employment contract with a new

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club during the relevant period, by means of which he would have been able to reduce his loss of income. According to the consistent practice of the Chamber, such remuneration of the player under a new employment contract shall be taken into account in the calculation of the amount and deducted from the financial compensation to be paid by the club to the player for the unjustified breach of contract relating to the player's general obligation to mitigate his damages. Several other factors can also be taken into account as a result of which deviation from the above principle can be justified and the amount of compensation will increase or decrease. In fact, the DRC takes into account all specific particularities of each case, such as the behaviour of the club and the player, whether or not the player had a cooperative stance (for example, with regard to finding an amicable settlement) whether the execution of the said agreement has started, whether or not the breach took place within or outside the Protected Period and whether or not the player complied with its obligation to mitigate his damages, such as finding a new club in a reasonable period of time. We even take note of DRC decisions whereby effects inherent to permanent incapacity for a player to play professional football had to be taken into account in determining the amount of financial compensation to be paid by the club.

With regard to the compensation to be paid by the player to the club, the most common line followed by the DRC is that the compensation will be calculated based on the average between the remuneration due until the expiry of the former contract and the remuneration due under the new contract for the same period. This can be derived from the jurisprudence of the DRC. From this jurisprudence it can be inferred that the Chamber will first turn its attention to the remuneration and other benefits due to the player under the existing contract and/or the new contract, which value constitutes an essential criterion in the calculation of the amount of compensation in accordance with Article 17 para 1 of the RSTP. It also follows from the DRC jurisprudence, that the non-amortized transfer compensation can also be included by the Chamber in the calculation of the compensation due by the player to the club as a result of the breach, in accordance with Article 17 para 1 of the RSTP. In cases whereby the club is entitled to compensation, as with the situation whereby the player is entitled to compensation, attenuating circumstances can also be applicable to reduce the compensation to be paid by the player to the club, such as the club not suffering financial loss during the player's absence.

In respect to the amount of compensation to be paid by the player to the club due to a breach of contract without *just cause*, it is relevant to establish whether or not the player unilaterally terminated the contract without *just cause* within or outside the Protected Period. Special attention is given to the decisions of the DRC and the CAS whereby players unilaterally terminated their contracts outside the Protected Period. Finally, the *De Sanctis* case gave the international football world a more definitive answer with regard to the amount of compensation to be paid in the case of a termination by a player outside the Protected Period. The conclusion after having analysed the above cases: only the remaining value of the contract is not the decisive element in any event, which was already clear after the Webster case. However, the *Matuzalem* and *De Sanctis* cases make this absolutely clear.

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The CAS Panel in the *De Sanctis* case, in line with the Panel in the *Matuzalem* case, even found it quite logical to establish what loss the injured party had actually suffered (the positive interest principle). It did not feel bound to the *Webster doctrine* at all, in that only the remaining value was decisive in order to establish the amount of financial compensation as a result of the unilateral breach by the player of his employment contract outside the Protected Period.

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# Chapter 10
# Sporting Sanctions

**Abstract** This chapter considers the sporting sanctions that can be imposed on a player or a club as a result of a unilateral breach without *just cause*. For the sporting sanctions for players we note that this sanction is a restriction of 4 months on his eligibility to play in official matches. In the case of aggravating circumstances, the restriction for the player will last 6 months. In addition to an obligation to pay compensation, sporting sanctions may also be imposed on a club found to be in breach of contract or found to be inducing a breach during the Protected Period. It follows that FIFA will then ban the club from registering any new players, either nationally or internationally, for 2 entire and consecutive registration periods.

**Keywords** Sporting sanctions · Protected Period · 4-month rule · Aggravating circumstances · Transfer ban · Inducement

## Contents

10.1 Introduction ..... 315
10.2 Sporting Sanctions on Player ..... 316
10.2.1 Four-Month Rule ..... 318
10.2.2 Aggravating Circumstances ..... 321
10.3 Sporting Sanctions on Club ..... 323
10.3.1 Inducement ..... 325
10.4 Conclusion ..... 330
Reference ..... 330

## 10.1 Introduction

According to Article 17 paras 3 and 4 of the RSTP, 2016 edition, so-called sporting sanctions can be imposed on players (para 3) as well as on clubs (para 4) in the event that a breach of contract without *just cause* takes place within the Protected

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Period. Therefore, it is of crucial relevance to establish whether the breach falls within the Protected Period. Unilateral breach without *just cause* (or *sporting just cause*) after the Protected Period will not result in sporting sanctions.

It is of paramount importance to realize and note that the imposition of sporting sanctions is not mandatory at all, but rather appropriate aside from the obligation to pay compensation in cases of extraordinary circumstances. It is a well-accepted and consistent practice of the DRC not to automatically apply a sanction.[1] In other words, it must be understood that a certain scope of discretion exists regarding the imposition of sporting sanctions.[2] In this chapter the relevant related issues on sporting sanctions will be dealt with. First the sporting sanctions on the players will be discussed, followed by the sporting sanctions imposed on the clubs.

Before entering into the substance of this matter regarding the imposition of sporting sanctions, it is also important to be aware that not only players and clubs, but any persons subject to the FIFA Statutes and regulations, such as club officials, intermediaries, etc., who act in a manner designed to induce a breach of an employment contract between a professional football player and a club in order to facilitate the transfer of the player, can also be sanctioned by FIFA. This follows from Article 17 para 5 of the RSTP, 2016 edition (on the explicit understanding that "players' agents" must be replaced by intermediaries). The CAS jurisprudence also shows that parties are not allowed to exclude sporting sanctions and to modify the regime provided for in the RSTP by means of a contract.[3]

## 10.2 Sporting Sanctions on Player

Pursuant to Article 17 para 3 of the RSTP, 2016 edition, sporting sanctions will be imposed on a player who is found to be in breach of contract during the Protected Period. This sanction will be a restriction of 4 months on his eligibility to play in official matches. However, in the case of *aggravating circumstances*, the restriction for the player will last 6 months. The sporting sanctions shall take effect immediately once the player has been notified of the relevant decision. According to the aforementioned para 3, the sporting sanctions shall remain suspended in the

[1]DRC 2 November 2007, no. 1171309.

[2]DRC 2 November 2007, no. 1171309. See also CAS 2009/A/1880 *FC Sion v. Fédération Internationale de Football Association (FIFA) & Al-Ahly Sporting Club* and CAS 2009/A/1881 *E. v. Fédération Internationale de Football Association (FIFA) & Al-Ahly Sporting Club*, award of 10 June 2010. In this case the CAS Panel remarked that if it was the intention of the FIFA transfer regulations that it was to give the competent body the discretion to impose a sporting sanction, it would have employed the word "may" and not "shall". However, the CAS Panel ruled that rules and regulations have to be interpreted in accordance with the real meaning. See also CAS 2007/A/1358 & 1359 *FC Pyunik Yerevan v. L., AFC Rapid Bucaresti & FIFA*, award of 26 May 2008 and CAS 2014/A/3765 *Club X. v. D. & Fédération Internationale de Football Association (FIFA)*, award of 5 June 2015.

[3]See CAS 2009/A/1909 *RCD Mallorca SAD v. FIFA UMM Salal SC*, award of 25 January 2010.

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period between the last official match of the season and the first official match of the next season, in both cases including national cups and international championships for clubs, on the understanding that this suspension shall, however, not be applicable if the player is an established member of the representative team of the association he is eligible to represent, and the association concerned is participating in the final competition of an international tournament in the period between the last match and the first match of the next season.[4] Although unilateral breach without *just cause* or *sporting just cause* after the Protected Period will not result in sporting sanctions, disciplinary measures may be imposed on the player for failure to give due notice of termination within fifteen days of the last match of the season. In order to prevent any doubt, it must be stressed that while renewing the contract, the Protected Period starts again when the duration of the previous contract is extended.

The DRC jurisprudence shows that in the event that sporting sanctions have already been imposed on a player in the same dispute, new sporting sanctions will not be imposed again. In its decision of 28 September 2006, the DRC decided that with regard to sporting sanctions other than in exceptional circumstances, which should be applied if a player breaches a contract without *just cause* within the first 3 respectively 2 years of his employment contract according to Article 23 para 1 of the RSTP, the DRC renounced applying such sanctions because sports sanctions had already been imposed on the player in connection with the present dispute.[5]

If parties agree that a "buy-out clause" is inserted in the player's contract, they must be aware of the risk of sporting sanctions. The "buy-out clause" will also be discussed in relation to sporting sanctions for the club, but with regard to the imposition upon the player, a serious risk is also present. In the event that parties agree upon a "buy-out clause", the parties agree to give the player the opportunity to cancel the contract at any moment and without a valid reason, i.e. so too during the Protected Period, and as such, no sporting sanctions may be imposed on the player as a result of premature termination. However, absolutely no doubts must exist with regard to the validity and clear description of the "buy-out clause". For example, in the DRC decision of 4 October 2013, the Chamber took note that the player referred to a provision in the contract and to Article 17 of the FIFA Commentary to the RSTP which states that with the "buy-out clause" the player can also cancel the contract during the Protected Period and that no sporting sanctions may be imposed. However, in the case at hand, the DRC did not consider the provision to be a "buy-out clause" as a result of which sporting sanctions were imposed upon the player, resulting in a restriction of 4 months on the player's eligibility to participate in official matches.[6]

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[4]From the CAS case 2008/A/1448 *M. & Club X. v. Club Y. & FIFA*, award of 25 June 2008, it follows that when declared ineligible for playing in official matches as a result of a restriction to play for 4 months, the player was also prevented from taking part in a game with his national or representative team.

[5]DRC 28 September 2006, no. 96157. See also DRC 17 August 2006, no. 861307.

[6]DRC 4 October 2013, no. 10131238.

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### *10.2.1 Four-Month Rule*

In general, we note that if the DRC decides to impose a sanction on a player, the Chamber will sanction the player with a restriction of 4 months on his eligibility to participate in any official football matches. For example, in a DRC decision of 15 January 2004, a player and a club had a dispute with regard to their contract which, according to the club, was signed on 2 January 2002 and valid until the end of the 2005/06 sports season. The player stated that he had left the club legitimately, because, at the end of the year 2002, the club had not exercised its option right to extend his employment contract for another season. The player decided to terminate his employment contract with his club in December 2002, based on the aforementioned fact, namely that the club did not exercise its option right to extend its contractual link for another sports season. Unfortunately for the player, the DRC concluded that there was no *just cause* for the player to unilaterally terminate the employment contract with his club. To determine the sporting sanctions, the Chamber took into account that the player had reached the age of 25 years by the time the breach of the employment contract occurred and that it took place at the end of the first year of his contract. As a consequence, the Chamber decided to sanction the player with a restriction of 4 months on his eligibility to participate in any official football matches as from the beginning of the new season of the new club's national championships, as stipulated in Article 23 para 1 of the RSTP, 2001 edition.

The DRC will always establish whether the condition of proportionality requires that the gravity of a sanction corresponds with the gravity of the conduct. In a DRC decision of 10 June 2004, the case was initially considered by the Disciplinary Committee of a national football federation.[7] The Disciplinary Committee decided that the player concerned had breached his contract with his club, since he did not return for the remainder of the employment contract. As a consequence, the Committee banned him from playing in official football matches for 4 months, starting on the day of the national championships in the league of his new club. The player appealed to the Arbitration Body of the same football federation against this decision, but the appeal was rejected and the sanction was upheld. The player subsequently submitted a claim to FIFA against the disciplinary sanction imposed by his national federation, asking that the sanction preventing him to play for his new team be lifted. Although the player's conduct was considered by the DRC as a breach of contract, the Chamber did question the proportionality of the restriction imposed. According to the DRC, the condition of proportionality requires that the gravity of a sanction must correspond with the gravity of the conduct. The DRC noted that during the one month when the player stayed away from his employer club, no official matches were scheduled in the national league of his

[7]DRC 10 June 2004, no. 6400276.

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national football federation. Therefore, the absence of the player did not pose a serious problem to the club. As a result, the DRC concluded that the restriction imposed on the player concerned to participate in any official football matches for 4 months was not an appropriate sanction. The Chamber stated that it would have been more appropriate in this case if the player had been fined. Therefore, the restriction should be lifted.

From the jurisprudence of the DRC it can be inferred that the DRC takes into account the age of the player, as well as if the breach took place in the Protected Period in order to establish whether or not sporting sanctions must be imposed. In a DRC decision of 4 February 2005, the player unilaterally terminated his employment contract without *just cause* within one year of signing a 5 year contract.[8] Regarding the sporting sanctions, the DRC took into account the fact that the player was 19 years old at the time of the contractual breach and that it took place within the first year of the contract. The Chamber decided to sanction the player with a restriction of 4 months on his eligibility to participate in any official football matches, as stipulated in Article 23 para 1 of the RSTP, 2001 edition.

In the previously mentioned DRC decision of 13 May 2005, the Chamber considered that the player had never informed his new club that he was still under contract with the old club.[9] The player even signed the employment contract with his new club, despite the fact that he was still contractually bound to another club. The Chamber went on to analyse the sanctions to be imposed on the player for having caused the breach without *just cause*. According to Article 23 para 1 of the RSTP, 2001 edition, the Chamber finally decided that a football player will be sanctioned by means of a restriction of 4 months on his eligibility to participate in any official football matches.

Following the above case of 4 February 2005, and also in its decision of 21 February 2006, with regard to the sporting sanctions on the player, the Chamber took into account the fact that the player was 19 years old at the time of the contractual breach of the employment contract and that it took place within the first year of the contract.[10] Therefore, the Chamber decided to sanction the player with a restriction of 4 months on his eligibility to participate in any official football matches, as stipulated in Article 23 para 1 of the RSTP, 2001 edition.

In its decision of 23 March 2006, the DRC underlined that generally a lengthy absence of a player from his club without authorisation and without other *just cause* justifies the suspension of payment of the players' salaries and that this should be considered as an unjustified breach of the employment contract by the player.[11] The DRC concluded that the player had not presented any evidence that

[8]DRC 4 February 2005, no. 25820.

[9]DRC 13 May 2005, no. 55484.

[10]DRC 21 February 2006, no. 26267.

[11]DRC 23 March 2006, no. 36460.

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his absence had been authorised except for the vacation period. For that reason, the DRC declared that the player had undoubtedly breached the employment contract without *just cause* during the Protected Period. Therefore, the DRC was of the opinion that financial and sports sanctions must be imposed on the player. Regarding the sporting sanctions, the DRC referred to the basic sanction of 4 months on the player's eligibility to participate in any official football matches in the case of an unjustified breach of contract by a player. Finally, the Chamber decided that the player concerned should be sanctioned with a restriction of 4 months on his eligibility to participate in any official football matches as from the notification of this decision.

A sanction of 4 months for a player is a minimum and cannot be reduced as jurisprudence shows. This follows from the DRC decision of 10 August 2007. In this decision the Chamber emphasized that a suspension of 4 months on a player's eligibility to participate in official matches is the minimum sporting sanction that can be imposed for breach of contract during the Protected Period. This sanction, according to the explicit wording of the relevant provision, can be extended in case of aggravating circumstances. In other words, the regulations intend to guarantee a restriction on the player's eligibility of 4 months as the minimum sanction. The relevant provision does not provide a possibility for the deciding body to reduce the sanction under the fixed minimum duration in case of mitigating circumstances.[12]

In its DRC decision of 27 February 2013, the DRC took note that the player unilaterally terminated the contract without *just cause* on 4 June 2011. The Chamber concluded that the breach of the employment contract by the respondent player had occurred within the Protected Period.[13] The Chamber decided that, by virtue of Article 17 para 3 of the RSTP, the respondent player therefore had to be sanctioned with a restriction of 4 months on his eligibility to participate in official matches.

In general, if a player enters into more than one contract with different clubs covering the same period, sporting sanctions will be imposed upon the player. In a case of 27 November 2014 this was the case, and a player entered into more than one contract with different clubs covering the same period.[14] In this case the DRC ruled that the player had breached the employment contract with a club by not joining the team. With regard to the consequences of such actions, the Chamber referred to Article 18 para 5 of the RSTP, from which provision it follows that: "*If a professional enters into more than one contract covering the same period, the provisions set forth in Chapter IV (IV. Maintenance of contractual stability between professionals and clubs) shall apply*". After the DRC established that the contractual breach by the player in the present case had occurred within the

[12]DRC 10 August 2007, no. 871283. See also DRC 30 May 2006, no. 56653.

[13]DRC 27 February 2013, no. 0213412.

[14]DRC 27 November 2014, no. 1114239.

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Protected Period, in line with its established jurisprudence, it imposed a sanction on the player, consisting of a restriction of 4 months on his eligibility to participate in official matches.

According to the above decisions, the DRC generally applies the 4-month rule as a sporting sanction on the player. The DRC then concludes that if the player terminates his employment contract without *just cause*, the player must be sanctioned with a restriction of a minimum of 4 months on his eligibility to participate in any official football matches. However, following the DRC decisions, it is also very important that the gravity of the sporting sanction corresponds with the gravity of the conduct leading to the sporting sanction. The DRC refers to important elements in order to determine whether or not sporting sanctions should be imposed on the player. In all DRC decisions in which the Chamber decides that the 4-month rule is applicable, the Chamber explicitly refers to the age of the player and the Protected Period. If the player is relatively young and the contractual breach by the player took place within the first 2 years of the employment contract, the jurisprudence points out that the DRC is more inclined to apply a sporting sanction such as the standard 4-month rule. However, the DRC may take exceptional circumstances into consideration, based on which the sporting sanction could be extended. In the following paragraph, we note that the so-called "6-month rule" of Article 17 para 3 will be imposed by the DRC on a player as a sporting sanction in case aggravating circumstances exist.

### *10.2.2 Aggravating Circumstances*

From Article 17 para 3 of the RSTP, it follows that sporting sanctions can be imposed on any player found to be in breach of contract during the Protected Period. Generally the sporting sanction to be imposed upon the player shall be a 4-month restriction on playing in any official matches.[15] However, as follows from Article 17 para 3 of the RSTP, in case aggravating circumstances exist, the restriction shall last 6 months.

Neither the DRC nor the FIFA Commentary defines the term "aggravating circumstances". From the jurisprudence of the DRC it follows that the 4-month rule is the general rule for the DRC to fine a player if the player terminates his contract without *just cause*. In the so-called *Mexès* case, the DRC concluded that

[15]In accordance with Article 17 para 3, these sporting sanctions shall take effect immediately once the player has been notified of the relevant decision. The sporting sanctions shall remain suspended in the period between the last official match of the season and the first official match of the next season, in both cases including national cups and international championships for clubs. This suspension of the sporting sanctions shall, however, not be applicable if the player is an established member of the representative team of the association he is eligible to represent, and the association concerned is participating in the final competition of an international tournament in the period between the last match and the first match of the next season.

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aggravating circumstances were present. In this case the DRC decided on 31 August 2004, that Mexès had unilaterally breached the employment contract with Auxerre without *just cause* during the Protected Period. On the basis of Article 23 of the RSTP, 2001 edition, the Chamber imposed a 6-month suspension on Mexès from 12 September 2004 as a sporting sanction. AS Roma and Mexès appealed to the CAS and in the decision of the CAS of 11 March 2005, the Panel confirmed the sporting sanction of 6 months imposed on the player. The player Philippe Mexès was not allowed to play for AS Roma for a period of 6 months, because there were aggravating circumstances.[16]

Important pillars for applying the 4-month rule are the relatively young age of the player and the fact that the breach took place only one year after the signing of the contract and thus within the Protected Period. In the *Mexès* case, player Mexès was not only a relatively young player who had unilaterally terminated his employment contract within the Protected Period; an important element for determining the existence of aggravating circumstances could be the fact that Mexès was trained by Auxerre for seven years from the age of 15 until he was 22. According to the DRC, this had to be considered as "*a considerably long period of stay with his former club*". Unfortunately, the DRC decision *of 31 August 2004 is not published on the FIFA website, as it was in this case that the* DRC *decide*d that Mexès breached his contract with Auxerre without *just cause*. However, according to Article 23(c) of the RSTP, aggravating circumstances existed in the case of failure to give due notice or recurrent breach of contract. The considerable length of time spent by the player with his former club could have been a special circumstance to establish the existence of aggravating circumstances.

We also note the fact that if the player breaches his employment contract for a second time, the "six-month rule" will be applicable. For example, in its decision of 2 November 2007, the DRC decided that the player concerned had to be sanctioned for a period of 6 months since this was the second time that the player in question was recognized by the DRC as having unilaterally breached an employment contract during the Protected Period. Therefore, in this case the Chamber concluded that the fact that the player was a repeat offender, had to be taken into

[16]The Mexès case consists of several cases before the DRC as well as the CAS. For example, DRC 31 August 2004 (unpublished), in which case the DRC decided that Mexès unilaterally breached his contract with Auxerre without *just cause*. However, Mexès appealed to the CAS against the DRC decision of 31 August 2004. See the award of the CAS of 11 March 2005; CAS 2004 A/708/709/713, in which case the CAS confirmed the decision of the DRC of 31 August 2004. In its decision of 13 May 2005, no. 55503, the DRC ordered Mexès to pay compensation to Auxerre in the amount of EUR 8,000,000. Mexès also appealed against this decision to the CAS. This is the award of the CAS of 5 December 2005; CAS 2005/A/902/903. The CAS found the appeal partially admissible and ordered Mexès to pay Auxerre compensation in the amount of EUR 7,000,000. In its decision of 23 June 2005, no. 65503, the DRC decided that a ban should be imposed on AS Roma for 2 registration periods for the inducement for breach of contract. AS Roma, however, appealed to the CAS against the decision of the DRC of 23 June 2005, no. 65503. See the award of the CAS of 5 December 2005; CAS 2005/A/916. The CAS found the appeal partially admissible and ordered a ban on AS Roma for one entire registration period.

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account.[17] Also, in a case before the CAS of 25 June 2008, it was not disputed that the player terminated the contract during the Protected Period. The player submitted that the notion of "aggravating circumstances" did not contain and had to be differentiated from a repeated offence. However, the Panel noted that on 2 occasions and within a period of less than 18 months, a 21-year-old player had shown remarkable disrespect towards one of the main principles of professional football: contractual stability. The Panel therefore disagreed with the player's submission and was of the opinion that a repeated offence had to be regarded as an "aggravating circumstance".[18]

## 10.3 Sporting Sanctions on Club

According to Article 17 para 4 of the RSTP, 2016 edition, in addition to the obligation to pay compensation, sporting sanctions may also be imposed on a club who is found to be in breach of contract or found to be inducing a breach during the Protected Period. In this context, according to the second sentence of Article 17 para 4 of the RSTP, 2016 edition, this provision also provides for the following:

> it will be presumed, unless established to the contrary, that any club signing a professional who has terminated his contract without *just cause* has induced that professional to commit a breach.

From Article 17 para 4 of the RSTP, 2016 edition, it follows that the club will be banned from registering any new players, either nationally or internationally, for 2 entire and consecutive registration periods. The club shall be able to register new players, either nationally or internationally, only from the next registration period following the complete serving of the relevant sporting sanction. In particular, according Article 17 para 4 of the RSTP, 2016 edition, it may not make use of the exception and the provisional measures as mentioned in Article 6 para 1 of the RSTP in order to register players at an earlier stage. In Article 6 para 1 of the RSTP, 2016 edition, it states that where a contract has been terminated with *just cause*, FIFA may then take provisional measures in order to avoid any abuse.

As mentioned in the introduction, the imposition of sporting sanctions is not mandatory at all. A certain scope of discretion exists regarding the imposition of sporting sanctions. Therefore, the specific circumstances of a case are decisive. Several elements can be taken into account by the DRC to decide on imposing sporting sanctions on a club. For example, in a case before the DRC of 25 September 2014, in order to consider the imposition of sporting sanctions on the club concerned, the DRC deemed it fit to recall the circumstances in which the club proceeded to terminate the contract, i.e. due to the player's injury as well as

[17] DRC 2 November 2007, no. 117923.

[18] See CAS 2008/A/1448 *M. & Club X. v. Club Y. & FIFA*, award of 25 June 2008.

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the club's apparent disinterest in the player since it apparently never replied to the player's subsequent communications.[19] The Chamber decided that, by virtue of Article 17 para 4 of the RSTP, the club shall be banned from registering any new players, either nationally or internationally, for the next 2 entire and consecutive registration periods following the notification of the present decision. In accordance with the 4th sentence of said Article 17 para 4, the DRC decided that the club shall be able to register new players, either nationally or internationally, only from the next registration period following the complete serving of the relevant sporting sanction.

In the above case of 27 November 2014, in which case the Chamber referred to Article 18 RSTP, from which it follows that: "*If a professional enters into more than one contract covering the same period, the provisions set forth in Chapter IV (IV. Maintenance of contractual stability between professionals and clubs) shall apply*", the DRC established that the contractual breach in the present case had occurred within the Protected Period as a result of which it imposed a sanction on the player, consisting of a restriction of 4 months on his eligibility to participate in official matches.[20] However, as to possible sporting sanctions to be imposed on club, the DRC finally considered that the club did not induce the player to breach the contract as it had concluded a transfer agreement with the former club of the player and therefore was not aware of the contractual situation between the player and the club.

Referring to FIFA Circular no. 1327, it was stated that a further clarification was needed to bring the wording of Article 17 para 4 of the RSTP in line with the long-standing and well-established jurisprudence of the DRC with the aim to close any possible loopholes regarding the implementation of sporting sanctions. Therefore, as from the 2012 edition, Article 17 para 4 of the RSTP was amended in such a way that the club will be able to register new players, either nationally or internationally, only from the next registration period following the complete serving of the relevant sporting sanction. In particular, the club may also not make use of the exception and the provisional measures as laid down in Article 6 para 1 of the RSTP in order to register players at an earlier stage.

In the following paragraph an analysis will be made as to under what circumstances "an inducement" is present. In other words, when is a club found to be inducing a breach of contract during the Protected Period? In this context, the mentioned "presumption rule" as referred to in Article 17, will further be discussed and brought to the readers' attention. However, the following needs to be emphasized. Requests for sporting sanctions to be imposed upon a club, will only be imposed in cases regarding the premature termination of an employment contract. In a case before the DRC of 27 May 2014, the DRC considered the player's request for the imposition of sporting sanctions on the club and pointed out that

[19]DRC 25 September 2014, no. 0914107.

[20]DRC 27 November 2014, no. 1114239.

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sporting sanctions will only be imposed in cases regarding the premature termination of a contract, i.e. in cases involving Article 17 of the RSTP. Therefore, the player's request for sporting sanctions was finally rejected.[21]

### *10.3.1 Inducement*

As referred to in Article 17 para 4 of the RSTP, 2016 edition, it will be presumed, unless established to the contrary, that any club signing a professional who has terminated his contract without *just cause* has induced that professional to commit a breach. From said Article 17 it further follows that the club shall be able to register new players, either nationally or internationally, only from the next registration period following the complete serving of the relevant sporting sanction. In particular, it may not make use of the exception and the provisional measures as stipulated in Article 6 para 1 of these regulations in order to register players at an earlier stage. In Article 6 para 1 of the RSTP 2016 edition, it states that where a contract has been terminated with *just cause*, FIFA can take provisional measures to avoid any abuse.

As regards the above, in relation to Article 17 of the RSTP and also to avoid any misunderstanding, it is noteworthy to emphasize in relation to sporting sanction to be imposed upon clubs that only a new club of *a player* can be sanctioned. In other words, the new club of a *coach* cannot be sanctioned for inducing the breach of contract or found to be inducing a breach of contract during the Protected Period. Article 17 of the RSTP only applies to contractual disputes between players and clubs (and thus not coaches). With reference to the "*nulla poena sine lege*" principle, from which it follows that someone cannot be punished for doing something that is not prohibited by law, this means that the new club of a coach can thus not be sanctioned by FIFA for inducement of breach and cannot be considered jointly and severally liable to pay the compensation awarded.[22]

In any event and with regard to the "presumption rule", from the jurisprudence of the DRC it explicitly follows that a new club cannot reverse the presumption if this club does not respond to a claim by the former club in a procedure before the DRC. In the DRC case of 27 February 2013, it was highlighted that the club did not respond to the claimant's claim and, by doing so, it was not able to reverse the respective presumption contained in Article 17 para 4 of the RSTP, and was therefore to be considered as having induced the player to commit a breach of contract.[23] Consequently, the Chamber finally decided that, by virtue of said Article 17 para 4 of the RSTP, the respondent club had to be banned from registering any

[21]DRC 27 May 2014, no. 0512679.

[22]PSC 30 January 2012, no. 01120974.

[23]DRC 27 February 2013, no. 0213412.

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new players, either nationally or internationally, for the next 2 entire and consecutive registration periods following the notification of the present decision.

In several DRC decisions, the Chamber banned a club from registering any new players, either nationally or internationally, for the next 2 entire and consecutive registration periods. For example, on 9 November 2004, the DRC issued a decision on a claim represented by the Polish player Adam Majewski against the Greek club New Panionios, in which it ordered Panionios to pay an amount of EUR 70,500 to Majewski within 30 days and pronounced a ban on the registration of any new players, either nationally or internationally, until the expiry of the second transfer period following the date on which a breach of contract had been found.[24] It was not disputed that Panionios had not paid the due amounts within the time limit set by the DRC. Therefore, on 14 February 2005, the FIFA Disciplinary Committee issued a decision regarding the failure to comply with a decision passed by a FIFA body.

The Disciplinary Committee was of the opinion that Panionios was guilty of failing to comply with a DRC decision of 9 November 2004. It ordered Panionios to pay a fine of EUR 15,000 and granted a final period of grace of 30 days for the payment of the amount due to Majewski. In addition, in this decision the Disciplinary Committee ruled that if payment was not made within this deadline, the creditor club might demand in writing that 6 points be deducted from Panionios' first team in the domestic league championship. Finally, the Disciplinary Committee reminded the Hellenic Football Federation that, as a member of FIFA, it had a duty to implement the decision and that if it failed to do so despite being ordered by FIFA, it would be subject to sanctions. The Greek football club FC Aris Thessaloniki appealed to the CAS and the Panel finally decided that it did not have the jurisdiction to hear such a premature appeal and that it could not proceed with the appellant's appeal.[25]

It is the new club's responsibility to demonstrate that it should not be held responsible for having induced the breach of contract. In a DRC decision of 23 March 2006, the Chamber had to consider and pass a decision on the request made by a club against the new club of the player for sports sanctions for inducement to contractual breach.[26] In this decision the DRC first referred to Article 23 para 2(c) of the RSTP, 2001 edition, according to which a club seeking to register a player who has unilaterally breached a contract during the Protected Period will be presumed to have induced a breach of contract. The DRC pointed out that as a consequence, it is the new club's responsibility to demonstrate that it should not be held responsible for having induced the breach of contract.[27] When it signed the

[24]DRC 9 November 2004, no. 11417.

[25]CAS 2005/A/899 *FC Aris Thessaloniki v. FIFA & New Panionios N.F.C.*, award of 15 July 2005.

[26]DRC 23 March 2006, no. 36460.

[27]It is quite understandable that Mr. Janwillem Soek refers to the fact that it is not logical to impose a sanction on the player's new club if it cannot prove that it did not have a hand in the player's transfer; See Soek 2007.

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employment contract with the player, the new club relied solely on the player's statement that he had *just cause* to terminate the contract with his former club, instead of acting with caution and contacting the former club to clarify the situation before signing an employment contract with the player in question. Therefore, the new club had acted negligently. The DRC deemed that in view of the clear circumstances of the matter and failure of the new club to set aside the presumption contained in Article 23 para 2(c) of the RSTP, 2001 edition, it had to be presumed that the player was induced by the new club to terminate his contract. Finally, the DRC was left no other choice than to strictly apply the contents of Article 23 para 2 of the RSTP, 2001 edition. If a club induces a breach of contract occurring at the end of the first or second year of contract, the sanction will be a ban on registering any new player, either nationally or internationally, for 2 consecutive transfer periods. Therefore, the new club was banned from registering any new player, either nationally or internationally, until the end of the second transfer period following the notification of this decision.[28]

From the jurisprudence it also follows that in order to apply possible sanctions on the new club for inducement to breach of contract, as a *condition sine qua non*, a breach of contract must actually have occurred. For example, in a DRC decision of 21 November 2006, the Chamber had to decide on a dispute concerning the breach of contract and inducement to breach of contract arising between the parties involved.[29] The DRC had to pass a decision in this case on the request made by the former club against the player's new club, for inducement to breach of contract. The DRC pointed out that, in order to apply possible sanctions on the new club for inducement to breach of contract, as a *condition sine qua non*, a breach of contract must actually have occurred. However, in this case the DRC was of the opinion that no breach of contract had been committed by any of the parties.[30]

In the previously mentioned *Bangoura* case of 2 July 2013, the case before the CAS between FC Nantes, Al Nasr Sports Club and Ismäel Bangoura, the new club had not been able to reverse the "presumption rule".[31] According to the CAS, it was FC Nantes that bore the burden of proof to demonstrate that it should not be held liable for having induced the player to breach the employment contract. In this case, FC Nantes did not, in either its written submissions or during the hearing, address the crucial issue of its own role in the case at hand, more specifically the active role played by its President, Valdemar Kita, its General Director, Franck Kita and its Board Member and legal counsel, Mr. Klatovsky (specifically

[28]See also DRC 15 March 2013, no. 03131032.

[29]DRC 21 November 2006, no. 611727.

[30]See also DRC 28 September 2007, no. 9719, in which case it was decided that it is always recommended for a new club to check with the association of the former club what the contractual situation of the player actually is before signing him.

[31]CAS 2013/A/3091 *FC Nantes v. FIFA & Al Nasr Sports Club*, CAS 2013/A/3092 *Ismaël Bangoura v. Al Nasr Sports Club & FIFA*, CAS 2013/A/3093 *Al Nasr Sports Club v. Ismaël Bangoura & FC Nantes*, award of 2 July 2013.

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including the fact that Mr. Klatovsky initiated proceedings on the player's behalf before the DRC on 3 January 2012). The facts of the case demonstrated that there was no doubt that FC Nantes had, for quite a time, been well aware of the player's contractual situation with Al Nasr. Mr. F. Kita even sent a letter to Al Nasr on 26 January 2012, to enquire about the possibility of the player's transfer to FC Nantes, which demonstrates precisely that the latter club was aware, at the time, that there was still a valid employment agreement between the player and Al Nasr. In view of the above and given the fact that FC Nantes did not provide any specific or plausible explanation regarding its alleged non-involvement in the player's decision to unilaterally terminate the employment contract, the CAS concluded that FC Nantes was not able to reverse the presumption contained in Article 17 para 4 of the RSTP and that, accordingly, the latter induced the player to unilaterally terminate the employment contract.[32]

In its DRC decision of 30 July 2014, the DRC took into account the fact that the new club had, on a previous occasion, also been held liable by the Chamber for the premature termination of the employment contract.[33] In this case, by virtue of Article 17 para 4 of the RSTP and considering that club X had been found in breach of an employment contract without *just cause*, the Chamber decided that club X shall be banned from registering any new players, either nationally or internationally, for the next 2 entire and consecutive registration periods following the notification of the present decision. In this regard, the Chamber emphasized that aside from the new club having clearly acted in breach of the contract within the Protected Period in the present matter, the new club had also been held liable by the Chamber on a previous occasion for the early termination of the employment contract with the player concerned, which should therefore be considered as an aggravating circumstance.

As regards the inducement in view of Article 17 para 4, it comes down to the fact and must be taken into account, that the accused club must provide 'a plausible explanation for its possible non-involvement in the player's decision to unilaterally terminate his employment contract with his former club'.[34] For example, in its DRC decision of 4 October 2013, the DRC was of the opinion that the accused club did not provide a specific or plausible explanation for its possible non-involvement in the player's decision to unilaterally terminate his employment

[32]See also CAS 2007/A/1358 *FC Pyunik Yerevan v. L., AFC Rapid Bucaresti & FIFA*, award of 26 May 2008. In this case, the CAS noted that the inducement referred to in Article 17 para 4 RSTP is "an influence that causes and encourages a conduct". The CAS is only entitled to decide upon the imposition of any sporting sanctions if FIFA itself is party to the relevant procedure. See also CAS 2011/A/2656-2657 and TAS 2013/A/3167.

[33]DRC 30 July 2014, no. 0714643.

[34]It comes down to the question whether or not the accused club played an active role in the player's decisions that lead to a termination of contract without *just cause*. See CAS 2008/A/1448 *M. & Club X. v. Club Y. & FIFA*, award of 25 June 2008.

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contract with the former club. Therefore, the DRC had no option other than to conclude that the accused club had not been able to reverse the presumption contained in Article 17 para 4 of the RSTP and that, accordingly, the latter had induced the player to unilaterally terminate his employment contract with his former club. The Chamber decided that the accused club had to be banned from registering any new players, either nationally or internationally, for the next 2 entire and consecutive registration periods following the notification of the present decision. As was laid down in Article 17 para 4 of the RSTP, as from the 2012 edition, the DRC stressed that the club was able to register new players, either nationally or internationally, only from the next registration period following the complete serving of the relevant sporting sanction. In order to prevent any misunderstanding, the Chamber also emphasized that the club may not make use of the exception and the provisional measures as stipulated in Article 6 para 1 of the RSTP in order to register players at an earlier stage.[35]

Aside from the imposition of sporting sanctions upon a player in relation to a "buy-out clause", it is also interesting to find out the DRC's opinion on the so-called buy-out clause in relation to the whether an inducement took place or not. As said previously, with a buy-out clause the parties agree to give the player the opportunity to cancel the contract at any moment and without a valid reason, i.e. so too during the Protected Period, and as such, no sporting sanctions may be imposed on the player as a result of the premature termination.[36] However, this could still lead to the situation that sporting sanctions can be imposed *on the new club*.[37] If a player terminates his contract on grounds of the buy-out clause during the Protected Period, from a strictly legal point of view, with reference to Article 18 para 3 of the RSTP, 2016 edition, the new club still has to comply with the rule that it has to inform the current club in writing before entering into negotiations with the player.[38] If the new club omits to inform the current club of the player, despite the fact that the contract was provided with a buy-out clause, this new club could still risk having sporting sanctions imposed by the DRC. A parallel can be drawn to Article 18 para 3 of the RSTP, which may only be seen as a right for the player and may, by no means, be understood as an exoneration for a potential new club from its duty of care, consisting of contacting in writing a player's current club before entering into negotiations with a player, as decided in a case of the DRC of 27 November 2014.[39]

[35]DRC 4 October 2013, no. 10131238.

[36]The risk exists that the DRC does not establish that the clause is a buy-out clause; see DRC 4 October 2013, no. 10131238.

[37]FIFA Commentary, explanation under Article 17 RSTP under 1 sub 3, p. 47.

[38]RSTP, edition 2016, Article 18 para 4.

[39]DRC 27 November 2014, no. 1114239.

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## 10.4 Conclusion

In relation to the sporting sanctions with regard to a termination by one of the parties without *just cause*, it is of crucial relevance to establish whether the breach by one of the parties falls within the previously mentioned Protected Period. As explicitly stated, sporting sanctions will only be imposed on the party who breached the contract within the Protected Period. Unilateral breach without *just cause* after the Protected Period of the employment contract will not result in sporting sanctions.

According to Article 17 para 3, 2016 edition, in addition to the obligation to pay compensation, sporting sanctions will be imposed on any player found to be in breach of contract during the Protected Period. The sporting sanction will generally be a restriction of a period of four months on his eligibility to play in official matches. In the case of aggravating circumstances, as was the case in the *Mexès* case, this will be a period of six months. However, it is very important according to the DRC that the gravity of the sporting sanction corresponds with the gravity of the conduct leading to the said sanction. In all DRC decisions in which it was decided that the four-month rule was applicable, the Chamber refers to the age of the player and the Protected Period. If the player is relatively young and the contractual breach by the player took place within the first or first two years of the contract, the DRC seems to be more inclined to apply the four-month rule. To apply the six-month rule, an important factor could be that the player stayed a considerably long period with his former club.

Sporting sanctions may also be imposed on the club. In addition to the obligation to pay compensation, sanctions can be imposed on a club found to be in breach of contract or found to be inducing a breach of contract during the Protected Period. A club signing a professional who has terminated his contract without *just cause* may have induced that professional to commit a breach. As regards the inducement in view of Article 17 para 4, if follows from the DRC jurisprudence that it comes down to the fact that the accused club must provide a plausible explanation for its possible non-involvement in the player's decision to unilaterally terminate his employment contract with his former club. The club will be banned from registering new players, either nationally or internationally, for two registration periods.

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# Chapter 11
# Training Compensation

**Abstract** This chapter considers the concept of training compensation. In accordance with Article 20 of the RSTP, an amount for training compensation must be paid and is due by a new club to the player's former training clubs when a player signs his first contract as a professional and on each transfer of a professional until the end of the season of his 23rd birthday (subsequent transfer). In this chapter the main aspects related to training compensation and the applicable jurisprudence with regard to disputes relating to training compensation will be discussed. First, reference will be made to leading cases, such as the *Bosman*, *Bernard* and *Wilhelmshaven* cases. This chapter will also address under what conditions an amount for training compensation is not due. For example, pursuant to the RSTP, training compensation is not due if the former club terminates the player's contract without *just cause* (without the right of the previous clubs), if the player is transferred to a category 4 club and in the event that a professional reacquires amateur status on being transferred. We will also note that an amount for training compensation is not due if the claim is prescript. A former club that claims for training compensation is obliged to lodge its claim within 2 years with FIFA, in the absence of which, the club waives its right to receive training compensation. Special attention will be given to the fact that within the EU/EEA, there is an extra requirement on whether or not training compensation is due. If the former club does not offer the player a contract within the EU/EEA under certain strict conditions, no amount for training compensation is payable by the new club unless the former club can justify that it is entitled to such compensation (bona fide interest). Parties often try to exclude the right of the former club(s) to receive training compensation. However, the jurisprudence is quite clear. Only the club which is officially entitled to receive training compensation may waive its right to training compensation. Any possible financial settlements concluded between the former club or the new club and the player cannot establish that the former club(s) loses its right to receive training compensation. In conclusion to this chapter, the completion of the training period will be discussed extensively. If it is evident that the player has terminated his training

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period before the age of 21, the player may have completed his training period as a result of which no training compensation is due as from the age that the training is completed. However, the DRC (and the CAS) are quite reluctant to establish that the training period of a player is terminated before the age of 21. Finally, we will also note that parties are free to request the DRC to reduce or increase the amount of training compensation based on this "*clearly disproportionate rule*". All leading jurisprudence will be discussed extensively in relation to these subjects.

**Keywords** Training compensation · Bosman · Bernard · Wilhelmshaven · First professional contract · Subsequent transfer · Prescription · Circumvention · Offer of contract · Player Passport · Exceptions within EU/EEA · Bona fide interest · Loan · Waiver of rights · Completion of training period · Clearly disproportionate rule

## Contents

11.1 Introduction ..... 333
11.2 Developments After Bosman ..... 335
11.2.1 Bernard Case ..... 335
11.2.2 Wilhelmshaven Saga ..... 337
11.3 When Is Training Compensation Due? ..... 340
11.3.1 First Professional Contract ..... 340
11.3.2 Subsequent Transfer ..... 342
11.4 Difference Between Amateurs and Professionals ..... 344
11.4.1 Introduction ..... 344
11.4.2 DRC Jurisprudence ..... 345
11.4.3 CAS Jurisprudence ..... 353
11.4.4 Conclusion ..... 358
11.5 Responsibility of the New Club ..... 360
11.5.1 General ..... 360
11.5.2 Player Passport ..... 363
11.5.3 Entitlement of the National Association ..... 364
11.6 Loan of Professional ..... 365
11.7 When Is Training Compensation ***not*** Due? ..... 372
11.7.1 General ..... 372
11.7.1.1 Exceptions Worldwide ..... 372
11.7.1.1.1 Circumvention ..... 377
11.7.1.1.2 Prescription ..... 379
11.7.1.1.3 Women's Football ..... 382
11.7.1.2 Exceptions Within the EU/EEA ..... 382
11.7.1.2.1 General ..... 382
11.7.1.2.2 Free Movement of Players ..... 384
11.7.1.2.3 General Rule: Contract Offer to Professionals and Amateurs ..... 387
11.7.1.2.4 Prerequisites of Article 6 Para 3 Annex 4 ..... 392
11.7.1.2.4.1 "60-Day Obligation" and "Equivalent Value ..... 392
11.7.1.2.4.2 Registered Mail ..... 393

aruiz@isdemasters.com

11.7.1.2.5 Justification ..... 399
11.7.1.2.5.1 General ..... 399
11.7.1.2.5.2 DRC Jurisprudence ..... 400
11.7.1.2.5.2.1 Decisions Between 2004 and 2010 ..... 400
11.7.1.2.5.2.2 Decisions After 2010 ..... 403
11.7.1.2.5.3 CAS Jurisprudence ..... 406
11.8 Waiver of Rights ..... 410
11.8.1 General ..... 410
11.8.2 Decisions Between 2004 and 2010 ..... 411
11.8.3 Decisions After 2010 ..... 416
11.8.4 Conclusion ..... 422
11.9 Calculation of the Amount ..... 423
11.9.1 General ..... 423
11.9.2 Worldwide ..... 425
11.9.3 Within EU/EEA ..... 427
11.10 Completion of the Training ..... 428
11.10.1 General ..... 428
11.10.2 DRC Jurisprudence ..... 428
11.10.3 CAS Jurisprudence ..... 432
11.10.4 Conclusion ..... 435
11.11 Clearly Disproportionate Rule ..... 437
11.12 Conclusion ..... 443
References ..... 446

## 11.1 Introduction

The famous *Bosman* case finally led to the abolition of the actual transfer compensation between clubs at the end of the player's contract.[1] However, there were still some legal openings to protect clubs that were involved with the training and education of players in the past. FIFA introduced a training compensation system for clubs that were involved in the training and education of players. The RSTP 2001 edition were the first rules that contained provisions that regulated the compensation for the training and education of young players. According to FIFA Circular no. 769, the system of training and education was designed to encourage more and better training of young players and to create solidarity among clubs, by awarding compensation to clubs which had invested in the careers of its former players.[2]

[1]Case C-415/93 *Union Royale Belge des Sociétés de football association ASBL v. Jean-Marc Bosman Royal Club Liègois SA v. Jean-Marc Bosman. SA d'Economic Mixte Sportive de l'Union Sportive du Littoral de Dunkerque, Union Royale Belge des Sociétés de Football Association ASBL, Union des Associations Européennes de Football Union des Association Européennes de Football v. Jean-Marc Bosman* [1995] ECR I-4837.

[2]With reference to an order of the United States District Court dated 28 July 1997, U.S. Soccer if of the opinion that it cannot impose, implement or enforce, in any way, those rules, statutes, or regulations adopted by FIFA relating to the payment of training and development fees.

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In accordance with Article 20 of the RSTP, 2016 edition, training compensation must be paid to a player's training clubs when a player signs his first contract as a professional and on each transfer of a professional until the end of the season of his 23rd birthday. The obligation to pay training compensation exists whether the transfer takes place during or at the end of the player's contract.[3] Annex 4 of the RSTP, 2016 edition, provides for more explicit details regarding the system of training compensation. According to this Annex of the RSTP a player's training takes place between the ages of 12 and 23 for training incurred up to the age of 21, unless it is evident that a player has already terminated his training period before the age of 21. In that respect, it is important to distinguish the years relating to the obligation to pay training compensation and the years relating to the *calculation* of the amount. In other words and in order to avoid any misunderstanding, an amount for training compensation will be payable until the end of the season in which the player reaches the age of 23, but the *calculation* of the amount payable will be based on the years between 12 and the age when it is established that the player completed his training. This means that no training compensation is due if a player signs his first professional contract or changes clubs on an international level *after* the end of the season of his 23rd birthday.[4] Also other situations will be brought to the readers' attention whereby training compensation is not due. Further, a former club that is entitled to training compensation must take into account that a claim must be submitted to FIFA within 2 years, in the absence of which, that club waives its right.

Before discussing the main aspects relating to training compensation and the opinion of the DRC (and the CAS) with regard to disputes relating to training compensation, it must be noted that the obligation to pay training compensation is without prejudice to any obligation to pay compensation for breach of contract.[5] Furthermore, it must be noted that when a party asks for a certain amount of damages, the DRC will not adjudicate more than the amount of the claim of the club, also known as the principle of *non ultra petitum*. The DRC in these cases refers to the *non ultra petitum* rule, as a result of which the Chamber cannot adjudicate more than is claimed, as mentioned in the DRC case of 9 November 2004.[6]

Finally, the judgement of the Court of Justice of the European Union ("the CJEU") on 15 December 1995 in the *Bosman* case, had a huge impact on the international football world as it was decided that transfer compensation to be paid for a player who had ended his contractual relationship with his former club was not permitted and was

[3]The system of a solidarity mechanism only applies if the player is transferred before the expiry of his contract. In other words, the system of a solidarity mechanism will automatically be activated from the moment a transfer compensation needs to be paid.

[4]This is another difference with the solidarity mechanism system. The applicability of the solidarity mechanism is not limited to the age of the player.

[5]RSTP, 2016 edition, Annex 4, Article 2.

[6]DRC 9 November 2004, no. 114707.

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in violation with the free movement of people within the European Union.[7] However, after the *Bosman* case the question still remained unanswered whether or not FIFA's system of training compensation could be considered as "EU law-proof" since training compensation can also be due after expiry of a player's contract. In other words, the discussion was still whether FIFA's training compensation system was compatible with the principle of free movement of workers. In the *Bernard* case of 2010, the CJEU discussed and shed light on this issue again.[8] Another interesting development (and threat) for FIFA's training compensation system is the *Wilhelmshaven* case.[9] Also in the *Wilhelmshaven* case the compatibility of FIFA's training compensation system was evaluated again for the freedom of movement for workers. Therefore, after the *Bernard* case, the *Wilhelmshaven* saga will also be brought to the readers' attention. These cases cannot be left unmentioned since they show the substantial influence and impact of EU law on FIFA's training compensation system.

## 11.2 Developments After Bosman

### *11.2.1 Bernard Case*

In 1997, the player Olivier Bernard signed a so-called "*joueur espoir*"' contract with the French club Olympique Lyonnais for three seasons, which contract started on 1 July 1997. Before the contract was due to expire, Olympique offered the player an official professional contract for one year from 1 July 2000. However, the player refused to sign the proposed contract and later signed a professional contract with the English club Newcastle United FC. As a consequence, Olympique Lyonnais sued Bernard before the Employment Tribunal in Lyon and requested damages jointly against the player and Newcastle United FC. The amount claimed was EUR 53,357.16. This amount corresponded to the remuneration which Bernard would have received over one year if he had signed the contract offered by Olympique.[10]

The Employment Tribunal in Lyon decided that the player had unilaterally terminated his contract and ordered him and Newcastle United jointly to pay Olympique an amount of damages of EUR 22,867.35. On appeal, the Cour d'Appel in Lyon, had a different view and decided that the obligation on a player at the end of his training, to sign a professional contract with a club that had provided the training, and that also prohibited the player from signing such a contract

[7]Case C-415/93 *Union Royale Belge des Sociétés de football association ASBL v. Jean-Marc Bosman Royal Club Liègois SA v. Jean-Marc Bosman. SA d'Economic Mixte Sportive de l'Union Sportive du Littoral de Dunkerque, Union Royale Belge des Sociétés de Football Association ASBL, Union des Associations Européennes de Football Union des Association Européennes de Football v. Jean-Marc Bosman* [1995] ECR I-4837.

[8]Case C-325/08 *Olympique Lyonnais SASP v. Olivier Bernard and Newcastle United FC* [2010] ECR I-02177 ("Bernard Judgment").

[9]Oberlandesgericht (OLG) Bremen, 30 December 2014, 2U 67/14.

[10]See also Weatherill 2014, p. 485.

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with a club in another member state of the EU/EEA, was in violation of the current Article 45 of the Treaty on the Functioning of the European Union ("TFEU") (ex Article 39 EC Treaty).

The French club Olympique was not happy with the decision and appealed against it before the Cour de Cassation. The Cour de Cassation considered that although Article 23 of the French Charter did not formally prevent a young player from entering into a professional contract with a club in another member state, its effect was to hinder or discourage young players from signing such a contract in the event that the provision in question could give rise to an award of damages against them. The Cour de Cassation noted that the dispute raised a matter of interpretation of said Article 39 since it raised the question whether such a restriction could be justified by the objective of encouraging the recruitment and training of young professional footballers in accordance with the *Bosman* case. Therefore, the Cour de Cassation decided to ask the CJEU for a preliminary ruling and asked the Cour de Cassation whether the principle of the freedom of movement for workers, as laid down in Article 45 TFEU (ex Article 39 EC Treaty), precludes a provision of national law pursuant to which a "*joueur espoir*", who at the end of his training period signs a professional player's contract with a club of another member state of the European Union, may be ordered to pay damages and if so, whether the need to encourage the recruitment and training of young professional players constituted a legitimate objective or an overriding reason in the general interest of justifying such a restriction.

The CJEU considered that rules such as those in this specific matter, according to which a "*joueur espoir*", at the end of his training period, was obliged to sign a professional contract with the club which trained him, are likely to discourage such player from exercising his right of free movement, especially in the event that the player is liable to pay damages if he signs a professional contract with a club in another member state at the end of his training period. According to the CJEU, those rules can be considered as a restriction on the freedom of movement for workers (players).

However, according to the CJEU, a measure which constitutes an obstacle to freedom of movement for workers can be accepted if it pursues a legitimate aim compatible with the EC Treaty (now TFEU) and is justified by overriding reasons in the public interest.[11] The CJEU underlined that whether a system which restricts the freedom of movement of such players is suitable to ensure that the mentioned objective is attained and does not go beyond what is necessary to attain it, the specific characteristics of sport in general, and football in particular, and of their social and educational function, must be taken into account.[12] According to the CJEU, a scheme providing for the payment of compensation for training where a young player, at the end of his training, signs a professional contract with a club other than the one which trained him can, in principle, be justified by the objective of

[11]See para 38 of the Bernard Judgment. Application of that measure would still have to be such as to ensure achievement of the objective in question and not go beyond what is necessary for that purpose.

[12]See para 40 of the Bernard Judgment.

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encouraging the recruitment and training of young players. However, following the decisions it is of the utmost importance that such a scheme must actually be capable of attaining that objective and be proportionate to it, taking due account of the costs borne by the clubs in training both future professional players and those who will never play professionally.[13] In the matter at hand, the payment to the club which provided the training, did not contain compensation for training, but was related to damages, for which the player concerned would be liable for breach of his contractual obligations and the amount of which was unrelated to the real training costs incurred by the club.[14] In other words, according to the CJEU, the damages were not calculated in relation to the training costs incurred by the club that provided such training, but in relation to the total loss suffered by the club. Furthermore, the amount of that loss was established on the basis of criteria which were not determined in advance.[15]

Under those circumstances, the CJEU was of the opinion in this case that the possibility of obtaining such damages went beyond what was necessary to encourage recruitment and training of young players and to fund those activities. The CJEU finally decided and emphasized that a scheme such as this, under which a "*joueur espoir*" who signs a professional contract with a club in another member state, at the end of the training period of the player, is liable to pay damages calculated in a way which is not related to the actual costs of training the player concerned, was not necessary to achieve the mentioned objective.

### *11.2.2 Wilhelmshaven Saga*

After the *Bernard* case of 2010, the football world assumed, rightly or wrongly, and validly relied upon it that FIFA's training compensation system could be considered as "EU law-proof" and thus compatible with the principle of free movement of workers. However, it did not end with *Bernard*, as it was in the *Wilhelmshaven* case that the compatibility of FIFA's training compensation system was evaluated again.

In the *Wilhelmshaven* case, the player Sergio Sagarzazu, who had the Italian and Argentinian nationality, was registered as an amateur player with the Argentinian clubs Excursionistas and River Plate for a certain period of time. After his stay with these clubs, the player transferred to the German professional football club SV Wilhelmshaven where he signed his first professional contract from 8 February 2007 until 30 June 2007, which contract was prolonged for one more season. Both Argentinian football clubs claimed that they were entitled to receive training compensation, which was rejected by Wilhelmshaven. Therefore, both Argentinian clubs submitted a claim before the DRC. In its decisions of 5 December 2008, the DRC ordered the club Wilhelmshaven to pay the Argentinian

[13]See para 45 of the Bernard Judgment.

[14]See para 46 of the Bernard Judgment.

[15]See para 47 of the Bernard Judgment.

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clubs training compensation.[16] According to the Chamber, Excursionistas was entitled to EUR 100,000 and River Plate was entitled to an amount of EUR 57,500. Wilhelmshaven did not agree and on 23 March 2009 Wilhelmshaven filed two statements of appeal with the CAS. In its award of 5 October 2009, the Sole Arbitrator of the CAS confirmed the DRC decisions of 5 December 2008 and rejected the objections which were raised by Wilhelmshaven.[17]

As a result of the fact that Wilhelmshaven still refused to pay, on 13 September 2011 the FIFA Disciplinary Committee sanctioned Wilhelmshaven with additional fines. The FIFA Disciplinary Committee stated that if the club Wilhelmshaven had not paid within 30 days, a deduction of 6 points would be imposed. Wilhelmshaven did not comply and the 6 point deduction was imposed. However, Wilhelmshaven still did not comply with the ruling of the FIFA Disciplinary Committee. Therefore, another six points deduction was requested again by FIFA to be imposed by the German Football Association, the DFB, but again in vain. In the meantime, Wilhelmshaven had been relegated to a lower league. Instead of the DFB, the Norddeutscher Fussball Verband imposed the deduction sanction on Wilhelmshaven.

In May 2013, Wilhelmshaven decided to challenge the deduction sanction before the German courts. Aside from this, Wilhelmshaven also appealed a new decision of the FIFA Disciplinary Committee to the CAS in which a relegation sanction was ordered, which decision was confirmed on 24 October 2013.[18] The Norddeutscher Fussball Verband confirmed this decision and implemented the relegation sanction.

Although Wilhelmshaven did not appeal the CAS decisions before the Swiss Federal Tribunal, the court cases before the German court were still pending. Before the Landgericht Bremen, Wilhelmshaven was challenging the six-point deduction and the forced relegation. However, the court rejected the claims of Wilhelmshaven. This decision was also appealed before the Highest Regional Court who finally decided that the said CAS award was contradictory to EU law.

The main legal issue for Wilhelmshaven was that the CAS did not accept EU law.[19] According to Wilhelmshaven, the RSTP was contradictory to the EU's free movement of workers. More specifically, in the said CAS case the Sole Arbitrator questioned whether the DRC decisions of 5 December 2008 were in breach of EU law. With regard to Wilhelmshaven's argument on freedom of movement, the arbitrator was of the opinion that this argument was only available to the individual player and not to the club, thereby making reference to the consistent CAS jurisprudence in this respect.[20] The second issue related to the fact that the player concerned also had the Italian nationality as a result of which Wilhelmshaven was of the opinion that the Argentinian clubs were obliged to offer the player a contract in accordance with Article 6 para 3 of Annex 4 of the RSTP, as will be discussed later

[16]DRC 5 December 2008, nos. 128921a and 128921b.

[17]CAS 2009/A/1810 and 1811 *SV Wilhelmshaven v. Club Atlético Excursionistas & Club Atlético River Plate*, award of 5 October 2009.

[18]This CAS award of 24 October 2013 has not been published.

[19]Parrish and Miettinen 2008, p. 171.

[20]CAS 2004/A/794 and CAS 2006/A/1027 *Blackpool F.C. v. Club Topp Oss*, award of 13 July 2006.

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in this chapter. Since they failed to do so, they were not entitled to claim training compensation. The Sole Arbitrator decided that Article 6 of Annex 4 of the RSTP on the intra EU/EEA transfer of players was narrowly circumscribed within a limited geographic area, i.e. the EU/EEA territory. Prior to examining whether a contract had been offered to the player, the case had to fall within the scope of the above provision: in other words, the transfer had to take place from one national association to another within the EU/EEA.[21] The fact that the criterion of nationality is irrelevant has been confirmed by the CAS several times.[22] According to the Sole Arbitrator of the CAS, there was therefore no reason to depart from the unambiguous wording of Article 6 para 3 of Annex 4, which is obviously not applicable in the case of a player moving from a country outside the EU/EEA to a country within the EU/EEA, which is consistent with the CAS jurisprudence.[23]

With reference to well-established case law, the Highest Regional Court did not agree with the above reasoning of the CAS. The Court was not convinced between the intra-EU and the extra-EU transfers as referred to in Article 6 para 3. According to the Highest Regional Court the free movement principle should also apply to persons with EU nationality moving from a non-EU country to an EU country. In other words, the Highest Regional Court did not agree with the Sole Arbitrator's opinion that the free movement argument was only available to the individual player and not to the club. Article 6 of Annex 4 must also be applicable to persons with an EU nationality. As far as it concerns a person with an EU nationality from a non-EU country to an EU country, FIFA's system of training compensation was contradictory to EU law.[24] However, it is interesting to note in the football world, that from the award of the Highest Regional Court it can be concluded that the system of FIFA's training compensation is compatible with EU law as long as it concerns the so-called "intra EU-transfers". At this point in time, the case is at the highest German civil court, the German Bundesgerichtshof (BGH) in which the BGH is entitled to 'drop' a preliminary question to the CJEU in order to let the CJEU

[21]For the same reason, the benefit of the provision will automatically also be refused to a Turkish club.

[22]CAS 2006/A/1125 *Hertha BSC Berlin v. Stade Lavallois Mayenne FC*, award of 1 December 2006.

[23]CAS 2007/A/1338. See also CAS 2010/A/2075 *Marítimo da Madeira SAD v. Coritiba Football-Club*, award of 22 October 2010. In this case reference was also made to the *Wilhelmshaven* case (para 7.3.2). In this case, the Panel also emphasized that Article 6 para 3 of the RSTP depends on the location of the transferring clubs and not on the nationality of the players. This means that the difference made by the RSTP between a transfer within UE/EEA and outside this territory is therefore not based on the nationality of the player. Marítimo applied for the applicability of Article 45 TFEU (ex Article 39 EC Treaty), on the freedom of movement for workers within the EU. However, the Panel was clear and referred to the *Wilhelmshaven* case and stated that the arguments related to the freedom of movement of workers are only available to individual players and not to the club as an employer. Finally, the CAS rejected the request of Marítimo.

[24]See also CAS 2012/A/2862 *FC Girondins de Bordeaux v. FIFA* (Vada II), award of 11 January 2013. This case contains an exception to Article 19 RSTP. From this case it can be derived that the exception contained in Article 19 para 2 under b RSTP also applies to players having the nationality of a member country of the EU/EEA on the understanding that the club still needs to fulfil the criteria as follows from Article 19 para 2 under b RSTP.

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decide upon the compatibility of EU law with FIFA's training compensation. We have to await this outcome. It is important to have knowledge about the EU influences and the developments on training compensation, but for now we will leave it at this and will enter into FIFA's training compensation system.[25]

## 11.3 When Is Training Compensation Due?

### *11.3.1 First Professional Contract*

When a player signs his first contract as a professional, training compensation is due before the end of the season of his 23rd birthday. In that respect it is important to determine the status of the player. The difference between a professional and an amateur is that the professional has a written employment contract with his club and the amateur does not. Moreover, a professional is paid more than the expenses he effectively incurs in return for his footballing activity. The DRC and the CAS point out, and this deliberation comes up time and time again, that a football player will be regarded and considered as a professional if he receives remuneration in excess of the expenses he effectively incurs for his footballing activity. However, the DRC and the CAS are clear since the legal nature or the determination of the agreement is of no relevance with regard to determining whether the player is an amateur or a professional.[26] This means that if the player signs a written employment contract for the first time before the season of his 23rd birthday and gets paid more than merely the expenses that he effectively incurs in return for his footballing activity, training compensation is due. Contrarily, this means that if the player signs his first written employment contract and does not get paid more than the expenses he effectively incurs in return for his footballing activity, the player must be considered as an amateur player and as a consequence thereof, no training compensation is due.

The DRC is clear, as it states in accordance with its well-established jurisprudence, that the player's first registration as a professional is, in itself, sufficient to trigger the right of training clubs to claim training compensation. In other words,

[25]Another important case and legal crusade, such as the *Wilhelmshaven* saga, is the "*Pechstein* case", which was also pending before the German Bundesgerichtshof. See Oberlandesgericht (OLG) Munich, 15 January 2015, Az. U 1110/14 Kart. In the *Pechstein* case, the OLG based itself on German antitrust law to challenge the validity of arbitration clauses in favour of the CAS. However, in appeal the decision of the OLG was not confirmed by the German Bundesgerichtshof (GBG). See Bundesgerichtshof, 7 June 2016, KZR 6/15. The GBG decided that Claudia Pechstein voluntarily accepted the jurisdiction of CAS and that the monopolistic situation of the ISU, the acceptance by athletes of the ISU regulations and of the arbitration clause in favour of CAS does not constitute an abuse of a dominant position in the sense of German competition law; Pechstein continued her legal crusade by appealing to the German constitutional court (Bundesverfassungsgericht) and her case is still pending before the European Court of Human Rights. See also Duval and Van Rompuy 2015.

[26]DRC 17 August 2006, no. 86137, CAS 2005/A/383 and CAS 2004/A/691, no. 76 and no. 77.

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and as pointed out by an anonymous CAS case (*CAS XXXX/X/XXXX K v/T & Football Federation X*) the DRC referred to, the RSTP do not set out any minimum length of the contractual relationship between the player and the club where he signs his first professional contract when considering the amount of training compensation due.[27] However, it is possible that an amount with regard to training compensation will be reduced and mitigated by the DRC or the CAS due to the very short period of time spent by the player with the club. In a case before the CAS of 2010, the CAS Panel took different elements into consideration such as the very short period of time spent by the player concerned with the club and the fact that the club had not really benefited from the formation of the player.[28]

Also, in its case of 17 January 2014, the Chamber acknowledged that the respondent had, on a subsidiary note, requested the Chamber to consider a possible reduction of the amount of training compensation payable to the claimant.[29] The Chamber pointed out in this case that, according and with reference to Article 20 and Article 2 of Annex 4 of the RSTP, and as pointed out by the CAS in the case CAS 2006/A/1189 Club N v/Club T & country F Football Federation, the player's first registration as a professional before the end of the season of his 23rd birthday is, in itself, sufficient to trigger the right of training clubs to claim an amount of training compensation.

A club will be compensated for the entire time that it trained the player, so too if it trained the player as an amateur for a certain period of time and thereafter concluded the employment contract with the player. This can also be derived from the DRC decision of 20 May 2011.[30] Also in a case of 2004 before the CAS, the CAS Panel confirmed that a club that trained a player as an amateur for a certain period of time before concluding an employment contract with him, shall (also) be compensated for the entire time that it trained the player and not only for the period that it trained him as a professional.[31]

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[27]DRC 24 November 2010, no. 1110955; See also CAS 2009/A/1810 & 1811 *SV Wilhelmshaven v. Club Atlético Excursionistas & Club Atlético River Plate*, award of 5 October 2009.

[28]CAS 2010/A/2259. Furthermore, we face an unpublished DRC decision of 7 April 2011 in which the Chamber also stated that any possible dispute regarding the validity of the contractual relationship between the player and the respondent club (that was summoned to pay training compensation) could not be detrimental to the claimant's entitlement to claim training compensation from the respondent, since the RSTP clearly defines the triggering element for the entitlement to training compensation as being the registration of the player with the respondent, but not the conclusion of a valid employment contract. According to the DRC in this matter, this was irrelevant.

[29]DRC 17 January 2014, nos. 01141545a and 01141545b. See also DRC 17 January 2014, no. 01142929.

[30]DRC 20 May 2011, no. 5111952.

[31]CAS 2004/A/560. FIFA Commentary, explanation Article 3 para 1, p. 115, footnote 152.

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### *11.3.2 Subsequent Transfer*

Aside from the obligation to pay compensation, if the player signs his first contract as a professional before the end of the season of his 23rd birthday, training compensation is also due if the professional is transferred between clubs of two different associations before the end of the season of his 23rd birthday.[32] In that respect, it is irrelevant whether the transfer is during or at the end of his contract.[33] However, if the professional is transferred between clubs of two different associations before the end of the season of his 23rd birthday, the so-called "subsequent transfer", an amount for training compensation is only due to the former club. To avoid any misunderstanding and for the sake of clarity, the former club where the player played directly prior to his new club (who will be obliged to pay the training compensation, if applicable) can be the entitled club. In other words, in the case of a so-called subsequent transfer of the professional, training compensation will only be due to his former club for the time that he was effectively trained by that club.[34] This means that in the case of a subsequent transfer, the clubs where the player was registered and trained prior to the former club, are not entitled to receive training compensation. Contrary to the system of the solidarity mechanism, as we will note in Chap. 12, a club can only receive an amount for training compensation once.[35]

The fact of a subsequent transfer, where training compensation will only be owed to the former club of the player, is confirmed in several decisions of the DRC, for example in the decision of 14 September 2007. The DRC underlined that in the case of subsequent transfer of a professional, training compensation will only be owed to the former club of the player for the time that he was effectively trained there. Therefore, the DRC concluded in this case that the club concerned was not entitled to receive any training compensation from the new club since the transfer of the player to this club had to be considered as a subsequent transfer of a professional player and therefore, only the previous club of the player would be legally entitled to receive an amount of training compensation.[36]

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[32]If the transfer takes place within one association, the national regulations are applicable. In that respect it is important that according to Article 1 para 2 of the RSTP, 2016 edition, the national regulations should also provide a system to reward the clubs investing in the training and education of young players.

[33]RSTP, 2016 edition, Annex 4, Article 1 para 2.

[34]RSTP, 2016 edition, Annex 4, Article 3 para 1, last sentence. FIFA Circular no. 826 dated 31 October 2002.

[35]It must be noted that the CAS decided in its award of 13 August 2014, that in the event that a player is a free agent and signs with a foreign club, this will not be considered as a transfer in the meaning of Article 2 of Annex 4 of the RSTP. See CAS 2013/A/3417 *FC Metz v. NK Nafta Lendava*, award of 13 August 2014.

[36]DRC 14 September 2007, no. 971059.

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For the avoidance of any misunderstanding, if a player is transferred on a loan basis from club A to club B and, after the expiry of the loan, the professional returns to club A (club of origin) and, thereafter, transfers from club A to club C (belonging to another association) before the end of the season of the player's 23rd birthday, the DRC will acknowledge, as it did in the case of 1 March 2012, that although the claimant club, club B in the above example, was not the player's former club *stricto sensu*, however, within the framework of loans, the period of time that the player was registered with club A and the period of time that the player was registered with club B on loan, should be considered as one full timeframe. In other words, the transfer of a player from the club of origin to the club that accepts the player on loan as well as the return of the player from the club that accepted him on loan to the club of origin do not constitute a subsequent transfer in the sense of Article 3 para 1 sentence 3 of Annex 4 of the RSTP. According to the DRC, any other interpretation would lead to the situation in which clubs accepting a player on loan would never be entitled to receive training compensation, even if they contributed to the training of players.[37]

In its case of 17 August 2012, the DRC also deemed it essential to emphasize that, as to the liability to pay training compensation, the analogy established in Article 10 para 1 of the RSTP could not be extended to the case in which a player is loaned to a club and thus is not definitively being transferred to the latter club.[38] In other words, the transfer of a player from the club of origin to the club that accepts the player on loan, as well as the return of the player from the club that accepted him on loan to the club of origin, do not constitute a "*subsequent transfer*" in the sense of Article 3 para 1 sentence 3 of Annex 4 of the RSTP. The Chamber was eager to point out that it could not have been the intention of the legislator of the relevant regulatory provision (i.e. Article 10 para 1 of the RSTP) to trigger the consequences of Article 3 para 1 of Annex 4 of the RSTP on the occasion of a transfer on a loan basis and, thus, potentially deprive the loan of its essential flexibility and, in connection with the training and education of players, its purpose of providing young players with the opportunity to gain practical experience in official matches for another club to develop in a positive manner. The DRC also acknowledged in this case that the claimant club was not the player's former club *stricto sensu*, however, the Chamber pointed out that, within the framework of loans and for the purposes of the rules governing training compensation, the period of time that the player was registered with club X on loan and the period of time that the player was registered with the claimant club, should be considered as one full timeframe. This was also confirmed in several other decisions of the DRC, such as the DRC decisions of 7 June 2013 and 12 December 2012.[39]

[37]DRC 1 March 2012, no. 3121474.

[38]DRC 17 August 2012, no. 8122321.

[39]DRC 7 June 2013, no. 06131263, and DRC 12 December 2013, no. 12132748.

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Also in the *Feyenoord/Flamengo* case before the CAS, there was a legal discussion regarding the concept of "subsequent transfer". In this award of 26 November 2007 between the Dutch club Feyenoord and the Brazilian football club Flamengo, the CAS emphasized that each period between each professional transfer is a specific and independent segment of time.[40] With reference to FIFA Circular no. 826 it follows that for any subsequent transfer up to the age of 23, training compensation will only be owed to the previous club of the player for the time that he was effectively trained by that club. The CAS exclusively referred to the segment of time (a) during which the player was contractually bound to the "previous club" and (b) which immediately precedes the segment of time for which the player is registered with the new club.

## 11.4 Difference Between Amateurs and Professionals

### *11.4.1 Introduction*

Not only is the difference between an amateur and a professional relevant in relation to whether or not *transfer* compensation is due, it is also relevant with regard to whether or not an amount for *training* compensation is due, since training compensation is only due in the event that the player is a *professional*.

The answer on whether a player is a professional or an amateur is clearly laid down in Article 2 para 2 of the RSTP, 2016 edition. According to this provision, a professional can be considered as a player who has a written contract with his club and is paid more than the expenses he effectively incurs in return for his footballing activity. All other players can be considered as amateur players.

The first requirement to establish whether one can speak of a professional is that the professional must have a written contract with his club. This means that if there is no written contract, the player will be seen as an amateur. Following several decisions of the DRC and the CAS, this is a strict requirement. Also, according to the FIFA Commentary, it is compulsory to stipulate a written contract between a club and a player. With regard to oral agreements, irrespective of the fact that national law provides such possibilities, FIFA emphasizes that these are not in line with the mandatory nature of Article 2 para 2.[41]

[40]CAS 2007/A/1320-1321 *Feyenoord Rotterdam v. Clube de Regatas do Flamengo*, award of 26 November 2006.

[41]See FIFA Commentary, explanation Article 2, para 2, p. 11. Semi-professionals should also be considered as professionals if they comply with the requirements. See also CAS 2013/A/3207 *Tout Puissant Mazembe v. Alain Kaluyituka Dioko & Al Ahli SC*, award of 31 March 2014. In this award it was confirmed that oral arrangements between a club and a player, although possibly admissible by and in conformity with local labour law, are not in line with the mandatory nature of the conditions of Article 2 para 2 RSTP.

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The second requirement is that a professional is paid more than the expenses he effectively incurs in return for his footballing activity. However, an amateur is allowed to receive expenses, but these expenses may not exceed the real costs that he has to incur in connection with his football activities. Following the FIFA Commentary, the amateur is a player who pursues sport just for fun or as a hobby without any material gain and who has never received any remuneration other than for the actual expenses incurred. The social aspect of participating in the group life of the club as well as his own health and fitness play a predominant role for an amateur player. In the following paragraphs it will be considered when a player is formally a professional.[42]

### *11.4.2 DRC Jurisprudence*

Written contracts are unusual for amateur players, because amateurs are seen to pursue football as a leisure activity and not as a career. For example, in a DRC decision of 22 July 2004, the DRC considered that written contracts are unusual for amateur players. The DRC decided that all the parties involved in this case were in agreement about the fact that the "non-professional" contract could not be considered as an employment contract. The remuneration offered to the player did not exceed the actual expenses that the player incurred for football at the club. The DRC was furthermore of the opinion that the denomination non-professional shows that the parties did not consider this as an employment contract. As a result thereof, the Chamber concluded that the non-professional contract is a written record of the terms agreed to by the parties with regard to the player's participation at the new club in his capacity as an amateur player. The DRC underlined that written contracts are unusual for amateur players, simply because these players are seen to pursue football as a leisure activity and not as a career. In common practice, this means that the professional has an employment contract with his club and the amateur does not. The DRC further emphasized in this case that players who are not old enough to sign an employment contract are also considered amateurs.[43]

It follows that several criteria must be met in order to establish whether or not the player is a professional. In a DRC decision of 4 February 2005, the DRC addressed these criteria and had to decide in relation to a so-called "contrat aspirant". The player concerned was registered for a club, which acted as the claimant, from the 2000/01 season until the 2002/03 season. During the aforementioned period, the player was registered for the claimant as an amateur. On 17 March 2003, the player and a new club signed a "contrat aspirant" for two sporting seasons valid from August 2003 until July 2005 joining the training centre of the respondent, i.e. the new club of the player. In March 2004, his

[42]FIFA Commentary, explanation Article 2 para 2, p. 12.

[43]DRC 22 July 2004, no. 74557.

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former club contacted FIFA claiming training compensation from the respondent. The respondent was of the opinion that they were not obliged to pay any training compensation to the former club of the player, due to the fact that the player was transferred as an amateur player to their club with amateur status. Therefore, the respondent club was of the opinion that this contract should be considered as an amateur contract. The claimant did not accept these arguments and stated that the "contrat aspirant" was a form of scholarship and included the obligation of the new club to pay the player certain amounts of money, therefore it was a non-amateur contract. The Chamber made reference to the following 3 aspects in this decision:

1. "Players who have never received any remuneration other than reimbursement of their actual expenses incurred during the course of their participation in any activity connected with association football are regarded as amateur;
2. Travel and hotel expenses incurred through involvement in a match and the costs of a player's equipment, insurance and training may be reimbursed without jeopardising a player's amateur status; and
3. Any player who has ever received remuneration in excess of the expenses and costs described in para 2 of this Article … will be regarded as a non-amateur …".

In line with the above, the DRC finally concluded that some of the financial obligations assumed by the respondent in the contract with the player were, in principle, included in para 3 of the aforementioned Article 2 of the FIFA Regulations, 2001 edition, such as damage compensation for costs incurred by the parents' travel and living costs on the occasions when the player's parents visit him. Therefore, the relationship between the player and the club was regarded as non-amateur. Finally, the DRC was of the opinion that the claimant was indeed entitled to receive compensation for the training and education it provided to the player.[44]

The jurisprudence notes that a scholarship agreement can also be considered as an amateur contract. In a DRC decision of 28 July 2005, the DRC decided accordingly. In this case, the two clubs involved were arguing about the nature of the contract in question and actually whether this contract should be considered as a scholarship contract (amateur contract) or an employment contract (non-amateur contract). The player concerned signed a contract with a new club on 1 July 2004 and his former club lodged a claim for training compensation. The player was registered with his former club as an amateur player during the 2001/02 and 2002/03 seasons, at the age of 15 and 16. The new club insisted that although it had signed a contract with the player, the latter could keep his amateur status. The club based its statement on the fact that the contract signed was mainly an agreement to educate and train the player, entitling him to compensation for travel and housing expenses. Therefore, they were of the opinion that they were not liable to pay

[44]DRC 4 February 2005, nos. 25633a and 25633b.

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training compensation to his former club. The Chamber pointed out that in disputes concerning training compensation, the nature of a contract between a player and a club is determined by the relevant association. As a principle, the DRC therefore decided that it did not want to decide on the status of the player. In such case, the Chamber decided that the autonomy of the association must be respected by the DRC and therefore the status of the registration of such player at the association will be taken into consideration to determine whether the conditions stipulating the payment of training compensation had been fulfilled. Finally, the DRC decided that the player in question, as indicated by the football federation of the club, was registered as an amateur player for the new club.[45]

In a DRC decision of 2 November 2005, a player was trained by a German club as an amateur player and this club lodged a claim for training compensation. The German club maintained that the player had appeared for his new club, a Greek club, and was therefore no longer an amateur. In response to an enquiry from FIFA, the Greek club contested the fact that the player had non-amateur status as he was playing for the club's amateur youth team. However, the German club insisted on 11 April 2005 that the player was no longer an amateur, pointing out that although the player may only have been playing in youth and amateur teams, this issue depended exclusively on the status of the player and not on the team for which he appeared. The Greek club stated on 30 June 2005 that, given that the player had moved to Greece without any fee being paid and he had never appeared for a non-amateur team, there were no grounds for the payment of training compensation. Finally, the DRC unanimously concluded that the player had signed his first contract as a non-amateur and backed the opinion of the German club that this issue depended exclusively on the status of the player and not on the team for which he appeared. The DRC reached the conclusion that the former club was indisputably entitled to receive compensation from the new club for the training and education of the player regarding the timeframe that the latter spent with it, because the contract of the player with his new club had to be considered as a professional player's contract.[46]

Despite the above case from which it follows that scholarship agreements can be considered as amateur contracts, we also note a decision whereby a scholarship agreement had to be considered as a professional contract, for example in the DRC decision of 17 August 2006.[47] The DRC took into consideration the criteria set out in the stated Article 2 of the employment contract and the monies payable to the player on the basis of the scholarship agreement and decided unanimously that the player evidently received remuneration in excess of the expenses and costs described in para 2 of the said Article and was therefore a professional.[48]

[45]DRC 28 July 2005, no. 75142.

[46]DRC 2 November 2005, no. 115324.

[47]In the previously mentioned DRC decision of 28 July 2005, no. 75142, the Chamber decided that the "*scholarship agreement*" concerned had to be seen as an amateur contract.

[48]DRC 17 August 2006, no. 86137.

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The DRC considered it opportune to stress that a player's remuneration as per the criteria set out in the aforementioned Article 2 of the RSTP constitutes the decisive factor in determining the player's status. The Chamber was of the opinion that the legal nature or the determination of the agreement concerned was of no relevance in this respect.[49] From this decision it follows that the criteria are decisive in order to establish the status of the player.

The criteria as mentioned in Article 2 of the RSTP need to be cumulatively met. The Chamber decided in a case of 8 June 2007, that in accordance with the regulations, a player had to be regarded as a non-amateur if he had a written employment contract with the club employing him on the basis of which he receives remuneration in excess of the expenses effectively incurred in return for his footballing activity. Both elements need to be cumulatively met in this case, according to the Chamber. The Chamber deemed it appropriate to emphasize that, neither of the two clubs involved nor the associations concerned were able to demonstrate with documentary evidence that a written employment contract was effectively signed between the player and the club. Moreover, the DRC was eager to emphasize that the football league concerned had stated that it had registered the player as a "contract player", however, a relevant contract was not deposited with this association. The deciding body recalled that according to the regulations, a copy of the contracts concluded between players and clubs shall be deposited with the association concerned. The DRC concluded that not even the first element required by the regulations for a player to be regarded as non-amateur does not appear to have been met in the case at hand. Therefore, the DRC concluded that the player was an amateur player.[50]

It is of paramount importance to establish whether or not the player receives more than the expenses and costs effectively incurred for his footballing activity. In a DRC decision of 28 September 2007, the Chamber took due note that, on the basis of the said agreements, the player was entitled to receive monthly remuneration. In this case the payments exceeded the expenses and costs effectively incurred for his footballing activity. The DRC noted that in the contracts themselves reference was made to the "monthly salary" of the player. The above considerations led the Chamber to conclude that the federal contracts concluded between the player and the club had, notwithstanding their denomination, technically been professional contracts. In this respect, the Chamber also referred to the fact that the Football Federation of the club had confirmed the "non-amateur" status of the player, and to the relevant CAS jurisprudence in CAS 2004/A/794.[51]

In a DRC decision of 3 July 2008, the Chamber also decided on the status of the player.[52] In this case the Chamber also referred to Article 2 para 2 of the RSTP which stipulates that a professional is a player who has a written contract with a club and is paid more for his footballing activity than the expenses he effectively

[49]This was also confirmed by the CAS, see CAS 2005/A/383.

[50]DRC 8 June 2007, no. 67709.

[51]DRC 28 September 2007, no. 97782. See also DRC 30 November 2007, no. 117546.

[52]DRC 3 July 2008, no. 78228. See also DRC 3 July 2008, no. 78229.

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incurs. All other players are considered to be amateurs. Due to the fact a transfer compensation was paid as well as the fact that the player received salary payments which exceeded the expenses, the DRC decided the status of the player was professional. This can be considered as an extra element in order to establish the status and for that reason the Chamber decided the player was professional.[53]

In an important unpublished case of 16 July 2009, between the Dutch amateur football club Wilkracht Verkregen and the Belgian football club Royal White Star Woluwe FC regarding a training compensation dispute in connection with the player Moustafa Boussoufa, the Chamber had to decide whether or not the claimant club Wilkracht Verkregen was entitled to receive training compensation. The respondent, the Belgian club Royal White Star Woluwe FC, rejected the claim due to the fact that the player should not be considered as a professional upon his registration with them. The DRC took note that the player earned a fixed income of EUR 1845 per season, as well as some bonuses in the amount of EUR 147,50 per victory and EUR 55 per draw. According to the Chamber, the player evidently received remuneration in excess of the expenses he effectively incurred in return for his footballing activity. The DRC stressed that although the player's basic monthly remuneration of EUR 1845 might fall short of a living wage, he was also entitled to receive bonuses which, in fact, increased his monthly remuneration. The second element, the existence of a written contract, was also met. The DRC committee considered it opportune to stress that a player's remuneration as per the criteria set out in Article 2 of the RSTP constitutes the decisive factor in determining the status of the player and that the legal nature or the designation or classification of the contract is of no relevance in this regard, which has been confirmed by the CAS Panel in CAS 2006/A/1177, in which the Panel also emphasized that the definition contained in the mentioned provision is the only ground to establish a player's status. The classification of a player made by the association of his club is not decisive to determine the status of the player. And, finally, the remuneration in question may fall short of a living wage, but as long as it exceeds the expenses effectively incurred by the player, the criterion of said Article 2 of the RSTP is met.

The jurisprudence of the DRC also demonstrates that the designation given to an agreement between a club and a player is irrelevant. It must be established that the player received more than the actual expenses. In its DRC decision of 20 May 2011, a club contacted FIFA claiming its proportion of training compensation from another club, the respondent in this procedure.[54] In its reply, the respondent informed FIFA that it was of the opinion that it was not obliged to pay training

[53]See the DRC decision of 9 January 2009, the Chamber also had to determine the player's status. The DRC established that the sole relevant criteria to determine a player's status are, on the one hand, the fact that the player has a written contract and, on the other hand, the player's remuneration. In that respect, the DRC deemed it fundamental to emphasize that for the appreciation of a player's status, the legal nature or the designation of the agreement between a club and a player, is irrelevant. In addition, the Chamber strongly affirmed that the mention of a player's status on a Player Passport issued by the federation of the club for which he was registered neither constitutes a relevant criterion; DRC 9 January 2009, no. 191126.

[54]DRC 20 May 2011, no. 5111131c. See also nos. 5111131a and 5111131b.

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compensation since the player had already signed his first professional contract on 31 July 2006 with another club, A, and provided FIFA with a copy of a "sports labour agreement" signed between club A and the player. This labour agreement stipulated a monthly remuneration for the player of EUR 500 (which included vacation payment funds, as well as a vacation allowance and Christmas bonus) plus a special premium of EUR 750 if the player scored ten goals and EUR 250 for each successive series of five goals. Moreover, the respondent pointed out that club A and the player had mutually agreed upon a termination of the aforesaid labour agreement and also provided FIFA with a copy of this termination agreement. The DRC took note that the respondent provided FIFA with a copy of said labour contract signed between the player and club A and could verify that the player was receiving a minimum monthly remuneration in the amount of EUR 500 without bonuses and the mutual termination. The DRC recalled that the only relevant criteria to determine a player's status are stipulated in Article 2 para 2 of the RSTP. The DRC deemed it fundamental to emphasize that, for the appreciation of a player's status, the designation given to an agreement between a club and a player is irrelevant. In addition, the DRC affirmed that the mention of a player's status on a Player Passport issued by the federation of the club for which he was registered neither constitutes decisive criteria. Therefore, in consideration of the elements of Article 2 para 2 of the RSTP, the DRC held that the player's remuneration clearly exceeded the expenses and costs effectively incurred for his footballing activity. Finally, the DRC decided that the claimant was not entitled to training compensation for the training and education of the player from the respondent, since the player had already signed his first contract as a professional with club A.[55]

For the appreciation of a player's status, the legal nature or the designation of the agreement between a club and a player is irrelevant, which was decided in its DRC decision of 20 July 2012.[56] The DRC strongly affirmed that the mention of a player's status on a Player Passport issued by the association of the club for which he was registered neither constitutes a relevant criterion. The DRC held that the player's remuneration exceeded the expenses and costs effectively incurred for his footballing activity. The DRC referred to Article 10 of the RSTP, from which it can be derived that only professional players can be loaned. Thus, the DRC deemed that this additional element should be a further indication for the player's professional status. The DRC concluded that the contract signed between the player and the respondent was a professional contract and that training compensation was therefore due to the claimant.

According to the DRC, a player with a "contrat de stagiaire" can be considered as a professional player. In its case of 30 August 2013, the DRC referred to Article 2

[55]In its case of 10 August 2011, the DRC was of the firm opinion that it was beyond a doubt that the player was in fact paid more for his footballing activity. The Chamber decided that the player's remuneration as per the criteria set out in Article 2 para 2 of the RSTP constitute the decisive factor in determining the status of the player and that the legal nature or the designation of the contract is of no relevance in this respect. Also the second element, the written contract, was met; See DRC 10 August 2011, no. 8112849.

[56]DRC 20 July 2012, no. 7121208.

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para 2 of the RSTP and the longstanding and well-established jurisprudence on said provision, according to which players with a "*contrat de stagiaire*" are considered as being professional players.[57] The DRC recalled that the country P Football Federation confirmed that the player was registered as a "non-amateur" with the respondent club. Given that, according to Article 2 para 2 of the RSTP, players participating in organized football are either amateurs or professionals, the DRC finally held in the matter at hand that a "non-amateur" is to be considered a professional player.

Also the classification of a player made by the association of his club is not decisive in order to determine the status of a player. In its case of 17 January 2014, the DRC also took into consideration the criteria set out in Article 2 para 2 of the RSTP as well as the amounts payable to the player on the basis of the aforementioned contract, the members of the Chamber unanimously concluded that the player was in fact paid more for his footballing activity than the expenses he effectively incurred.[58] In this regard, the Chamber was eager to emphasize that a player's remuneration as per the criteria set out in Article 2 para 2 of the RSTP constitutes the decisive factor in determining the status of the player and that the legal nature or the designation of the contract is of no relevance in this respect. This approach has been confirmed by the CAS in its decision CAS 2006/A/1177, in which the CAS Panel also emphasized that the definition contained in the mentioned provision is the only ground to establish a player's status. For the sake of completeness, the DRC pointed out that the classification of a player made by the association of his club is not decisive to determine the status of a player. Finally, the DRC concurred that the player was registered as a professional with the respondent since the player was entitled to receive at least EUR 300 per month, plus EUR 90 or EUR 45 respectively, multiplied by the number of League and Cup matches, in which the player plays in the starting eleven or is included in the team, respectively.

From the following case we can infer that the specific circumstances of a case are decisive to establish whether or not a player is a professional. In the DRC decision of 27 February 2014, the Chamber turned its attention to Article 2 para 2 of the RSTP, which stipulates that "a professional is a player who has a written contract with a club and is paid more for his footballing activity than the expenses he effectively incurs.[59] All other players are considered to be amateurs". On this basis, the Chamber considered that an amount of EUR 400 per month could not be considered, from the outset, as insufficient to cover the expenses incurred by a player in country B. In fact, assessing the player's status solely on his remuneration for the 2011/2012 season, in the Chamber's view, would rather suggest that EUR 400 would be sufficient to cover all football related expenses. Nevertheless, considering the extensive argumentation of the respondent and, in particular, the diverging information from the country B Football Association, the DRC deemed it necessary to further analyse the circumstances. The Chamber recalled the contents of Article 528 of the regulations of the country B Football Association, according to which a

[57]DRC 30 August 2013, no. 08131673.

[58]DRC 17 January 2014, nos. 01141545a and 01141545b.

[59]DRC 27 February 2014, nos. 02142877a and 02142877b. See also DRC 27 February 2014, no. 02142877.

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player is to be regarded as "non-amateur" if he has a written contract according to the regulations of the country B Football Federation and if he receives a yearly salary of at least EUR 2047.60. Furthermore, the Chamber recalled the contents of the country B "*Royal decree of 19 June 2011*" and the "*Law of 24 February 1978*", according to which a player is to be regarded as a professional if he receives a yearly salary of at least EUR 8850. With this established, the Chamber asserted that by earning a yearly salary of EUR 4800, i.e. a salary higher than EUR 2047.60 and less than EUR 8850, the player had the status of "non-amateur", according to the regulations of the country B Football Association and the statutory laws of country B. The Chamber pointed to the undisputed fact that the player had already participated in 34 out of the 41 official matches for the first team of the respondent during the 2011/2012 season. Hence, the Chamber observed that the player had played a substantial number of matches with the respondent as well as that he was an important player for the respondent during the 2011/2012 season, a fact recognized by the respondent itself. In the Chamber's view, these sporting elements speak in favour of the claimant's argument that the player, in fact, was considered as a professional by the respondent since the conclusion of the contract dated 31 July 2011. The Chamber pointed to the undisputed fact that the player had already participated in 34 out of the 41 official matches for the first team of the respondent during the 2011/2012 season. Hence, the Chamber noted that the player had played a substantial number of matches for the respondent and that he was an important player during the 2011/2012 season, a fact recognized by the respondent itself. In the Chamber's view, these sporting elements speak in favour of the argument of the claimant that the player, in fact, was a professional. In this case, the Chamber also drew its attention to both the contents of the "scholarship contract" and the professional contract signed between the player and the respondent on 14 June 2011, and, in this regard, particularly focused on the monthly salary provided for in the "scholarship contract" and the financial details of the professional contract. In this context, the Chamber recalled that, for the duration of the "scholarship contract", the player received a monthly remuneration of EUR 400. Subsequently, the Chamber noted that the professional contract due to enter into force on the first day of the season of the player's 24th birthday provided for a gross salary of approximately EUR 24,000 per year plus a "sign-on fee" in the amount of EUR 45,000 for the 2012/2013 season. In this respect, the Chamber found it worthwhile to underline that not only was the player's monthly remuneration being multiplied by five as of 1 July 2012, but that a "sign-on fee" amounting to almost twice the amount of the yearly salary is rather unusual in player contracts. Again, bearing in mind that the player only received a salary of EUR 400 before signing the contract for the 2012/2013 and 2013/2014 seasons, the DRC believed that by suddenly being awarded such a raise in salary and a considerably high "sign-on fee" upon signature of the second contract, it could not be excluded that, the player was also compensated for accepting a lower salary in the "scholarship contract" for the 2011/2012 season as an attempt to circumvent the possible obligation of paying training compensation to the player's former club(s). The Chamber finally concurred in this case that the aforementioned provided a further indication that the player was already a professional during the 2011/2012 season.

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### *11.4.3 CAS Jurisprudence*

On several occasions the CAS dealt with the issue of whether or not the player is an amateur or a professional and how Article 2 para 2 must be interpreted.

The CAS jurisprudence demonstrates that in establishing the status of a player as an amateur, that he has never received any remuneration other than the reimbursement of actual expenses incurred. For example, in a case before the CAS in 2004, the CAS Panel decided that the mere existence of a written agreement between an amateur and a club for which he is registered does not suffice to trigger the application of the RSTP regarding contractual stability.[60] In other words, in this case the CAS decided that amateur status was not defined by reference to an "amateur contract" but by the fact that a player has never received any remuneration other than the reimbursement of actual expenses incurred. The interests of a club that has engaged an amateur player are protected by the provisions on training compensation when an amateur player turns professional. In this case the CAS was also of the explicit opinion that oral arrangements between a club and a player, even if they are admissible according to national labour law, will not be sufficient.

A player can still be considered as a non-amateur, even if he agrees to perform services for a meagre wage, since FIFA does not stipulate a minimum wage, which follows from a CAS award from 2005. The CAS decided in this award that even a very poor remuneration may suffice to qualify a player as a non-amateur even in cases where such remuneration falls short of a living wage and obliges the player to find other sources of income in order to subsist in the country.[61] In this case, the CAS also drew attention to Article 2 of the preamble of RSTP 2001, according to which the principles under Chapter I of the Regulations, including Article 2, are also binding on a national level. The Panel confirmed that the criteria set by FIFA governing the definition of a player as an amateur or non-amateur are also binding on a national level, and the national associations are required to apply those criteria.[62]

In the so-called *Blackpool* case of 13 July 2006, a case between the Dutch football club Top Oss against the English club Blackpool F.C., the CAS considered that in terms of the contract obligations, it was obvious that there was an employer-employee relationship between the club and the player.[63] From the

[60]CAS 2004/A/691 *FC Barcelona SAD v. Manchester United FC*, award of 9 February 2005. See also FIFA Commentary, explanation Article 2 para 2, p. 12.

[61]CAS 2005/A/838 *FC Girondins de Bordeaux v. Lyngby Boldklub & Lundtofte Boldklub*, award of 8 August 2005.

[62]In a case before the CAS between the club Guarani and the club FC St. Gallen AG of 2005, the CAS Panel had to deal with the status of a minor player, whose parents had signed an employment contract on his behalf. The CAS Panel found in this case that the club's payment of USD 16,500 to the player's parents did not produce a professional sports relationship, due to the fact that according to the agreement between the club and the player, this amount was paid to the player's parents in consideration of the registration of the player with the club and the economic rights related to any future transfer of the player. Therefore, the fact that the club did not pay this money to the player as "a salary" was the decisive criterion for the amateur status of the player; CAS 2005/A/878 *Club Guarani v. G. & Club FC St. Gallen AG*, award of 20 March 2006.

[63]CAS 2006/A/1027 *Blackpool F.C. v. Club Top Oss*, award of 13 July 2006.

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moment he signed the contract, the player agreed to perform services exclusively for the club. A situation of directional control on the part of the club and subordination on the part of the player was clearly present. In reward for his services, the player was entitled not only to a weekly salary and appearance bonuses in the events that he played, but he also enjoyed other rights such as holidays, disability benefits for a limited time and accommodation expenses. Subsequently, all these advantages clearly exceeded the category of cost reimbursements described in the RSTP. The CAS Panel finally came to the conclusion that the player concerned had to be established as a non-amateur.

The importance of remuneration as the only decisive criterion for deciding on the status of a player was highlighted in an award of the CAS of 2007. The CAS Panel stated that players can only be divided into two categories: professional and amateurs or, according to the older classification, amateurs and non-amateurs, and there is no space for another category.[64] Players who have another regular working activity or employment besides their remunerated football activity (so-called semi-professionals) will also be established as professionals if they comply with the requirements of the RSTP. It is important to note the fact that his case was dealt with by the CAS Panel under the application of the RSTP, 2001 edition. The CAS decided in this case that remuneration of a player therefore had to be the only criterion that should be taken into consideration when deciding on the status of the player, whereas the existence of an employment agreement was not a relevant criterion to determine the status of the player for the purposes of RSTP 2001, by arguing that remuneration, as the only element included in the definition of Article 2, could also be received outside an employment relationship, according to CAS. In this case, the CAS Panel detached the remuneration criterion from other conditions, such as the fact that the club benefited from the player's activity, since this condition could not be found in the relevant FIFA rules. In the *Blackpool* case, the CAS Panel repeated that the 2001 RSTP only provides for a single and clear remuneration-related test. In this case, the CAS Panel finally found that the classification of the agreement under national law had no impact on the classification of the status of the player according to the RSTP. Indeed, and although Article 3 of the RSTP, 2001 edition, provided that the status of the player shall be determined by the national association with which the player is registered, national legislation should comply with the RSTP.

Also in the case before the CAS of 21 August 2007, between the Italian club Parma and the English club Portsmouth, the CAS Panel decided that the only relevant test to determine the status of a player relates to remuneration of the player.[65] The receipt by the player of any remuneration "other than reimbursement of his

[64]CAS 2007/A/1177, award of 28 May 2007.

[65]CAS 2007/A/1207 *Parma F.C. v. Portsmouth City F.C.*, award of 21 August 2007. See also CAS 2007/A/1213 *U.S. Fiorenzuola 1922 v. Portsmouth City F.C.*, award of 21 August 2007.

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actual expenses incurred during the course of participation in any activity connected with association football" is what distinguishes an amateur from a non-amateur player. According to the CAS Panel, the existence of an employment agreement is not a relevant criterion. The CAS Panel decided that if the status of the player has to be determined in the context of a dispute concerning training compensation fees, the competent bodies, the DRC and the CAS, must also determine such status in accordance with the applicable RSTP and are therefore not bound by the classification made by the national federation. Also in this case, the Panel repeated that the 2001 RSTP only provided for a single and clear remuneration-related test, and that there is no need to have recourse to national legislation in order to interpret the nature of the specific contractual agreement between the player and his club. In other words, the Panel found that the classification of the agreement under national law had no impact on the classification of the status of the player according to the RSTP.

Awards of the CAS dealing with the RSTP as from 2005 show that the criteria of Article 2 of para 2 have to be cumulatively met in order to classify a player as a professional. In a 2009 case, the CAS Panel decided that the RSTP divides players participating in organized football into two categories, i.e. amateurs and professionals.[66] The definition includes two criteria (the written contract and the remuneration of the player). This means that, according to a literal interpretation, these criteria have to be cumulatively met to classify a player as a professional. Vice versa, this would mean that if one of those conditions is not met, the player is an amateur. As we see, the criterion of the written contract was made after the modification of the provision subsequent to the RSTP 2005 version. Since the two conditions have to be cumulatively met, the existence of a written employment contract does not suffice in order to qualify a player as "professional". With regard to the "burden of proof" principle, the CAS stressed that the club that contests that it has to pay training compensation to the former club on the basis that the player was already a professional when he was registered with his old club, has to prove this.[67]

Also in the previously mentioned *Wilhelmshaven* case of the CAS of 5 October 2009 between Wilhelmshaven and Club Atlético Excursionistas & Club Atlético River Plate, the Sole Arbitrator had to decide on the above issue, and decided that a professional is a player who is registered at an association and has a written contract with a club and is paid more for his footballing activity than the expenses that he effectively incurs.[68] All other players are considered to be amateurs. As long as those criteria are met, the amateur status of the player is sufficiently demonstrated by his registration and by the lack of any reliable counter-evidence. In this case,

[66]TAS 2009/A/1895.

[67]This was also established in CAS 2009/A/1810 and CAS 2009/A/1811 *SV Wilhelmshaven v. Club Atlético Excursionistas & Club Atlético River Plate*, award of 5 October 2009 (and later in TAS 2009/A/1895 *Le Mans Union Club 72 c. Club Olympique de Bamako*, award of 6 May 2010).

[68]CAS 2009/A/1810 and 1811 *SV Wilhelmshaven v. Club Atlético Excursionistas & Club Atlético River Plate*, award of 5 October 2009.

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the CAS also referred to para 2 of Article 2 RSTP and reiterated that a professional is a player who has a written contract with a club and is paid more for his footballing activity than the expenses that he effectively incurs. So, according to the Sole Arbitrator, there are two criteria for the recognition of a professional status: a) the player must have a written contract, and b) the player must earn more than the expenses that he effectively incurs for his footballing activity. It was emphasized that, as also recognized by numerous Panels of the CAS, that these criteria are cumulatively met.

The CAS jurisprudence notes that an amount of EUR 200 per month can be enough to establish that the player has the status of professional. For example, in the case before the CAS of 12 October 2009, it was decided that the decisive criterion for qualifying a player as a "professional" player is whether the amount he receives is more than the expenses he effectively incurred. In this respect, it is irrelevant whether it is much more or just a little more. In this case the player received an amount of EUR 200 per month as a result of which the player was professional. The CAS finally decided this was enough to establish the professional status of the player.[69]

According to the CAS, a written contract between a player and a club can give certain indications to the CAS Panel as to the status of the player. For example, in the case between Galatasaray and Alemannia of 16 August 2010, the Panel examined the contents of a contract and held that same can give certain indications to the CAS Panel as to the status of the player, especially in cases where there are no other documents, evidence or witnesses apart from the contract.[70] In this case, the CAS noted that the contract concerned contained terms such as "professional", "salary", "taxes", which indicates that the intention of the parties was to sign a professional contract. The CAS Panel concluded that both the "contents of the contract" and the player's salary are elements that indicate the professional status. The CAS decided that according to well-established CAS jurisprudence, the wording of a footballer's contract or its heading or even the status under which the player is registered within the federation are irrelevant in determining the status of a player as such. Nevertheless, the wording may give an indication or pointer as to the player's status especially if there are no other documents, evidence or witnesses apart from the contract itself to assist a judicial body in determining the real status of the player. The description of a contract as a professional football contract and the stipulation of the player's monthly salary as the minimum salary and being subject to taxes under national law are elements linking the player to a professional status, according to the CAS Panel.

In the event that a player is entitled to a monthly wage, more specifically of EUR 625, and appearance bonuses if he plays, but also enjoying other rights and benefits, the CAS will decide that the player is a professional. In a case before the

[69]CAS 2009/A/1781 *FC Siad Most v. Clube Esportivo Bento Gonçalves*, award of 12 October 2009.

[70]CAS 2010/A/2069 *Galatasaray A.S. v. Aachener TSV Alemannia F.C.*, award of 16 August 2010.

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CAS of 10 July 2012, 3 Dutch football clubs claimed training compensation from the Maltese club Hamrun Spartans FC due to the fact the three clubs claimed that the player signed his first professional contract with the Maltese club.[71] The three Dutch clubs won the case before the FIFA DRC. However, during the CAS procedure, it was brought by the (legal counsel of) the Maltese club and so noted by the CAS, that the player signed an employment contract with the previous Dutch football club, Quick Boys. Important to note is that the previous Dutch club whom the player played for, Quick Boys, was an amateur club and amateur clubs were not allowed to conclude employment contracts with their players during that period in the Netherlands. Despite this, it did conclude an employment contract with the player, although it was not registered with the national association. In this case the CAS stated that players are either amateur or professional. There is no space for a third, or hybrid category (CAS 2006/A/1177; Aston Villa F.C. v. B.93 Copenhagen, para 7.4.3; CAS 2009/A/1781 FC Siad Most v. Club Esportivo Bento Concalves, para 8.13; CAS 2008/A/1739 Club Atletico Boca Juniors v. T., Real Club Deportivo Mallorca SAD & FIFA para 92). The definition in the RSTP is clear. As stated supra, to be a professional, the player must meet two cumulative requirements: a) he must have written employment contract with a club and b) must be paid more than the expenses he effectively incurs in return for his football activity (TAS 2009/A/1895 Le Mans Union Club 72 c. Club Olympique de Bamako). In this case the CAS Panel confirmed that the player had a written contract with the Dutch club Quick Boys and that he was paid more than the expenses that he incurred. The CAS Panel stated that nothing in the relevant FIFA rules indicates that the classification as a professional is subject to a third condition, i.e. the effective registration as such at the relevant association. The mere fact that a national federation registered a player in a way inconsistent with the requirements of the RSTP (e.g. because a club did not inform the national federation that it concluded an employment contract with a player) should not affect the decision as to the true status of the player and should not remove the player from the scope of the RSTP and the criteria as established in Article 2 (CAS 2007/A/1370 & 1376, CAS 2008/A/1781 FK Siad Most v. Club Esportivo Bento Goncalves, 8.25). As a result, the RSTP, and in particular its Article 2, override possible conflicting national rules. From the moment he signed the contract, the player agreed to perform services for the club. A situation of directional control on the part of the club, and subordination on the part of the player, is clearly present. In consideration for his services, the player was entitled not only to a monthly wage, more specifically EUR 625 and appearance bonuses in the event that he played, but also enjoyed other rights and benefits. All these advantages clearly exceeded the category of costs reimbursements as described in Article 2 para 2.

The 3 Dutch clubs stated that the first registration of a professional should be decisive in order to determine whether or not training compensation is due.

[71]CAS 2012/A/2711/2712/2713 *Hamrun Spartans v. AFC/Quick Boys/Almere City*, award of 10 July 2012.

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However, the CAS Panel did not agree and decided that the first signing of the contract was decisive. In this respect, the CAS Panel referred to the case of CAS 2008/A/1781 (FC Siad Most v. Club Esportivo Bento Goncalves), in which the Panel decided that there is an undeniable inconsistency in the wording used in the RSTP. While Article 20 refers to the signing of the first professional agreement as the trigger element for paying of training compensation, Article 2 para 1 and Article 3 para 1 of Annex 4 refers to the first registration as a professional as the trigger element for payment. Nevertheless, it's the CAS's view that the Articles of Annex 4 of the RSTP are mainly focused on the procedure for payment and therefore refer to registration, being an easily identifiable element. However, the principle can be found by reading Article 20 together with Article 5 of the 2005 RSTP. Said Article 5 requires that the registration will reflect the true status of the player, and thus states clearly that the registration should adhere to the criteria of Article 2. The assumption of the regulations is that a player must indeed be registered in a manner that complies with the criteria contained in Article 2 and therefore, under this assumption, that there is no distinction between the signing of the first contract and the registration for the first time as a professional. Finally, the CAS Panel decided in this procedure that the player signed his first professional contract with the Dutch club Quick Boys as a result of which no amount for training compensation was eventually due by Hamrun to the 3 claiming Dutch clubs.

### *11.4.4 Conclusion*

It can be concluded that the difference between a professional and an amateur is, firstly, that the professional has a written employment contract with his club and the amateur has not. Secondly, the difference between a professional and an amateur is that the professional is paid more than the expenses he effectively incurs in return for his footballing activity. The amateur player can only be considered an amateur if he is paid at most the expenses that he effectively incurs in return for his footballing activity.

The well-established jurisprudence of the DRC and the CAS undoubtedly confirms that both mentioned conditions are cumulatively met since the modification of the provision subsequent to the RSTP 2005 version. Since the two conditions must be cumulatively met, this means that the existence of only a written employment contract does not suffice anymore to be qualified as a "professional".

With regard to the first difference between an amateur and a professional, i.e. that a professional must have a written contract, we notice that the DRC is very strict. Only professionals have written agreements. The DRC is of the opinion that written contracts are unusual for amateur players, simply because these players are seen to pursue football as a leisure activity and not as a career. On this point the DRC deviates from the opinion of most national courts, because normally an oral agreement can suffice according to legislation in several countries where the employee status is concerned. In that respect, one must be aware that the FIFA

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RSTP requires that the employment contract between the player and the club is registered with its national association. The application to register a professional must be submitted by the new club and will be accompanied by a copy of the contract between the new club and the professional. As long as the association has not received the employment contract, it will not issue the ITC and as a consequence thereof, the player will not be eligible to play for his new club. In practice in the international football world and for the best organization of football, it is highly defensible that the Chamber differs at this point from most national legislation and follows its own line.

With regard to the second requirement, the fact that an amateur may not get paid more than the expenses that he effectively incurs in return for his footballing activity, one can say that although the amateur is allowed to receive expenses, these expenses may explicitly not exceed the real costs that he has to make in connection with his football activities. Accordingly, the Chamber emphasizes that in this respect a football player will be regarded as a professional if he receives remuneration in excess of the expenses he effectively incurs for his footballing activity. With regard to this "remuneration criterion", we can infer from the CAS jurisprudence that there is no requirement with regard to the minimum wage of a professional player's contract. In other words, FIFA does not stipulate a minimum wage. The DRC jurisprudence shows that an amount of EUR 300,- per month can also be enough (see DRC 17 January 2014, no. 01141545a and b). Also, the CAS decided that even very poor remuneration may suffice in order to qualify a player as a non-amateur even in cases where such remuneration falls short of a living wage and obliges the player to find other sources of income in order to subsist in the country. An amount of EUR 200 per month can be sufficient, according to the CAS (CAS 2009/A/1781), but it must be taken into consideration in which the country the salary is earned by the player.[72]

According to the second requirement, it must be noted that the DRC is not as consistent as it might initially seem. In a DRC case of 22 July 2004, the Chamber concluded that the denomination "non-professional" shows that the parties did not consider this as an employment contract. Therefore, the DRC decided that the player should be considered as an amateur.[73] In its decision of 28 July 2005, the DRC decided accordingly, and that the status of the registration of a player with the association was the decisive factor to determine whether the player in question should be considered as an amateur or as a professional.[74] In that case, the DRC stressed that the nature of a contract between a player and a club is determined by the relevant association and the Chamber therefore decided that the player in question, as indicated by the football federation of the club, was registered as an amateur player for the new club. However, as from the year 2006, we note that the

[72]See CAS 2010/A/2069 *Galatasaray A.S. v. Aachener TSV Alemannia F.C.*, award of 16 August 2010.

[73]DRC 22 July 2004, no. 74557.

[74]DRC 28 July 2005, no. 75142.

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DRC has a differentiated view in this respect. In its decision of 21 February 2006, the DRC concluded that although in strictly formal terms the player was registered as a non-amateur and that he had signed a contract, in fact he should be considered as an amateur as he never received any remuneration for his services and it was therefore clear that he did not receive more than the expenses he effectively incurred in return for his footballing activity.[75] The DRC confirms this in its decisions of 17 August 2007 and 9 January 2009, in which it states that the legal nature or the determination of the agreement concerned is of no relevance in order to establish the status of the player, which was confirmed by the CAS cases.[76] These more recent decisions seem to be detrimental to the autonomy of the associations. This more recent view is also confirmed by the CAS, since it decided that if the status of the player has to be determined in the context of a dispute regarding training compensation fees, the DRC and the CAS, are not bound by the classification made by the national federation.

Bearing the above in mind and according to the current opinion of the DRC, one can say that a player's amateur status is not defined by reference to an amateur contract, but is exclusively established by the fact that a player has never received any remuneration other than the actual expenses incurred. The DRC is clear in its recent cases; the legal nature or the determination of the agreement is of no relevance with regard to determining whether the player is an amateur or a professional. This is also confirmed by the CAS in several decisions. According to the CAS, neither does the mention of a player's status in a Player Passport issued by a federation of the club for which the player was registered constitute a relevant criterion.

## 11.5 Responsibility of the New Club

### *11.5.1 General*

Article 3 of Annex 4 of the RSPT, 2016 edition, stipulates that when a player is registered as a professional for the first time, the club for which the player is being registered is responsible for paying training compensation within 30 days of registration to every club for which the player was registered (in accordance with the player's career history as provided for in the Player Passport) and which has contributed to his training, starting from the season in which he had his 12th birthday.[77] Although it is not mentioned in the aforementioned paragraph whether

[75]DRC 21 February 2006, no. 26135.

[76]DRC 17 August 2006, no. 86137; CAS 2005/A/383 and CAS 2004/A/691 *FC Barcelona SAD v. Manchester United FC*, award of 9 February 2005; See also DRC 9 January 2009, no. 191126.

[77]RSTP, 2016 edition, Annex 4, Article 3 para 1.

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the "30-day term" also applies to a subsequent transfer, the second paragraph of this Article states that in both cases, the deadline for payment of training compensation is 30 days following the registration of the professional with the new association.[78] It must be noted that, it is the responsibility of the new club to calculate the training compensation and the way in which it should be distributed to the clubs where the player previously played. In that respect, the Player Passport plays a key role in establishing the entitlement of the clubs to training compensation.

In a case before the DRC of 15 March 2013, the members of the Chamber found it essential to emphasize that the obligation of the new club towards the previous club(s) to pay training compensation cannot be transferred to a third party by means of a private agreement which disposes of a claimant's right established in the FIFA RSTP.[79] In other words, any obligation transferred to a third party in virtue of an agreement, which in any case shall have effect *inter partes*, i.e. between the parties to this agreement, cannot discharge the new club of its obligation to distribute training compensation to the training club(s). The DRC considered that the agreement which the respondent had concluded with Mr. H in the present matter, could not be held against the claimant, nor set aside the relevant provisions regarding training compensation contained in the RSTP, which, amongst other things, establish that on registering a professional for the first time, the club with which the player is registered is responsible for paying training compensation. Thus, the DRC concluded that the argument of the respondent could not be sustained and had to be rejected.

Sometimes there is discussion with regard to the amount of training compensation due to overlapping seasons. For example, in the event that a potential new club wants to sign a player, but the latter comes from a competition that follows a different sporting season, discussions sometimes follow. The jurisprudence demonstrates that the sporting season to be taken into account for training compensation is the season of the old club. Any other interpretation, according to the DRC, would be contrary to the *ratio legis* of training compensation, namely to compensate clubs for training and educating players. It is important to be aware of this as the potential new club when signing a player that comes from a competition that follows a different sporting season. For example, from the DRC decision of 20 May 2011, it follows that in the case of overlapping seasons, the sporting season that will be taken into account by the DRC for the calculation of training compensation is the season of the old club.[80]

For the sake of any misunderstanding, it must also be taken into account that the "sporting successor" of a former, no longer existing club can in principle be

[78]RSTP, 2016 edition, Annex 4, Article 3 para 1.

[79]DRC 15 March 2013, no. 03132589.

[80]DRC 20 May 2011, no. 5111952. See also CAS 2013/A/3303 *Bradford City Football Club v. Falkirk Football Club*, award of 14 March 2014.

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held liable to pay training compensation. In a case before the DRC of 10 April 2015, the Chamber had to confine itself to assess whether "*Club C*", under the management and operation of the new club, had standing to be sued in the present proceedings and if it was therefore liable to pay the amount and interest awarded under point 4 of a CAS award to club A.[81] The DRC was of the unanimous opinion that the new club's argument that it had not acquired any rights or assets of the old club cannot be upheld. The DRC did not find it coherent that the new club would be responsible for respecting the old club's obligations towards its players but not towards any other *bona fide* third party. Along these lines, the DRC did not consider it valid for the new club to acquire only the assets that are directly linked with "*Club C*", i.e. the logo, the name, the stadium, its players, but not its liabilities. The DRC decided that "*Club C*" *therefore* had standing to be sued in the proceedings and it was liable to pay to club A the amount specified in the arbitral award concerned (CAS 2012/A/2019).[82]

Paragraph 1 of Article 3 Annex 4 RSTP 2016, states that the new club shall pay the training compensation within 30 days of registration to every club with which the player has previously been registered. According to Article 7 Annex 4 of the RSTP 2016, the Disciplinary Committee may impose disciplinary measures on clubs that do not observe the obligations set out in said Annex 4. Following

[81]DRC 10 April 2015, no. 04152285. The DRC referred to previous decisions by FIFA's decision-making bodies relating to this particular issue as well as to the CAS Award 2013/A/3425. The CAS established that a club is an acknowledged sporting entity, which is formed by a combined set of elements that constitute its image. In particular, the DRC fully adopted the reasoning of the Sole Arbitrator in the aforementioned award that reads as follows*: "The Sole Arbitrator highlights that the decisions that had dealt with the question of the succession of a sporting club in front of the CAS (CAS 2007/A/1355; TAS 2011/A/2614; TAS 2011/A/2646; TAS 2012/A/2778) and in front of FIFA's decision making bodies (…), have established that, on the one side, a club is a sporting entity identifiable by itself that, as a general rule, transcends the legal entities which operate it. Thus, the obligations acquired by any of the entities in charge of its administration in relation with its activity must be respected; and on the other side, that the identity of a club is constituted by elements such as its name, colours, fans, history, sporting achievements, shield, trophies, stadium, roster of players, historic figures,* etc. *that allow it to distinguish from all the other clubs. Hence, the prevalence of the continuity and permanence in time of the sporting institution in front of the entity that manages it has been recognised, even when dealing with the change of management companies completely different from themselves."* The DRC is of the opinion that the new club's argument that it had not acquired any rights or assets of the old club cannot be upheld because the old and the new club competed in the A league under the name of club C, the logo of club C did not change after the change of license, the old and the new club held their local matches in the same stadium and sixteen players of the old club continued to play for club C after the relevant change of licence. The DRC concluded that there are sufficient elements to establish that club C has been the same club throughout its history, despite the change of the management company behind the operation of the team and by using the same name, logo, stadium and players, it is evident that the new club had the intention to maintain the identity and image of club C in order to be considered as the same club.

[82]See also CAS 2012/A/2919 *FC Seoul v. Newcastle Jets FC*, award of 24 September 2013.

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numerous DRC decisions, one of the disciplinary measures is that a party is condemned by the DRC to pay a default (Swiss) interest payment of 5 % per year if the payment has not been made within a period of 30 days.[83]

### *11.5.2 Player Passport*

The Player Passport is a document which contains all the relevant details of the player and contains a survey of his sports career; more specifically, it lists the clubs for which the player has been registered since the season of his 12th birthday until the former club. In that respect it is important to mention that it is always the registering association which is obliged to provide the club for which the player is registered with this so-called Player Passport of the player concerned.[84] The Player Passport is therefore of primal importance in international football because, as an official document, clubs rely on it when they track the history of a particular player and when they calculate a player's total transfer costs, allowing the clubs to make a final decision with all relevant data and information at their disposal.

From certain DRC cases it can be derived that there are sometimes discussions between the parties on the existence of different Player Passports. For example, in its decision of 15 February 2008, the DRC emphasized that any amendment to an official document such as the Player Passport, shall be justified, and not operated only on the basis of a clubs' assertions.[85] Furthermore, in its DRC decision of 20 May 2011, with regard to legal certainty, the Chamber was of the opinion that a club, which takes a player under contract based on the confirmation of its association and trusting that it would not have to pay training compensation, should be able to rely on it and cannot be obliged to pay training compensation.[86] The DRC was clear and stressed that when signing a player, the club must be able to rely on the Player Passport issued at that point in time. Allowing the second Player Passport to be enforceable against the new club would be contrary to the club's legitimate interest and the club's expectations, according to the Chamber.

Also in the case before the DRC of 30 August 2013, the Chamber stressed that the dispute primarily circled around the question whether or not the respondent was obliged to pay an additional amount of training compensation to the claimant based

[83]In the case before the CAS between Schalke and FC Twente, the Panel stated with reference to the deadline of 30 days in the aforementioned Article, that Article 102 para 2 of the Swiss Code of Obligations applied, and that interest is due by the debtor even in the absence of the creditor's specific warning (reference was also made to CAS 2003/O469, CAS 2003/O/500 and CAS 2003/O/506). See CAS 2004/A/696 *Schalke 04 v. FC Twente*, award of 2 March 2005.

[84]RSTP, 2016 edition, Article 7. It is furthermore stipulated that if a birthday falls between seasons, the player will be listed in the Player Passport for the club for which he was registered in the season following his birthday.

[85]DRC 15 February 2008, no. 28428.

[86]DRC 20 May 2011, no. 511126.

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on the second Player Passport issued by the country B Football Confederation.[87] The Chamber noted that the claimant itself, after registration of the player with the respondent, had contacted the respondent providing the latter with a copy of a Player Passport and a corresponding invoice. The Chamber acknowledged that on the basis of said Player Passport and invoice, the respondent paid the amount of EUR 61,000 to the claimant club. The DRC decided that the respondent was in good faith to believe that the relevant data was accurate and that it had, therefore, fully complied with its obligations deriving from the pertinent provisions contained in the RSTP, when making payment on 31 May 2011. The DRC unanimously concluded that it had no alternative but to follow its previous decisions, from which it follows that a new club can rely on a first Player Passport issued by a football federation. In this case, the DRC decided that the new club fully complied with its contractual obligations deriving from the provisions of Annex 4 of the RSTP.

### *11.5.3 Entitlement of the National Association*

As with a solidarity mechanism, in Article 3 para 3 of Annex 4 of the RSTP, as from the 2012 edition, it is stated that an association is entitled to receive the proportion of solidarity contribution which, in principle, would be due to one of its affiliated clubs, if it can provide evidence that the club in question—which was involved in the professional's training and education—has ceased in the meantime to participate in organized football and/or no longer exists due to bankruptcy, liquidation, dissolution or loss of affiliation. According to this paragraph, the compensation shall be reserved for youth football development programmes in the association(s) in question. In former editions of the RSTP before year 2012, it stated that if a link between the professional and any of the clubs that trained him could not be established within 18 months of his transfer, the compensation had to be paid to the association(s) of the country (or countries) where the player was trained and the compensation also had to be reserved for youth football development programmes in the association(s) in question.[88]

[87]DRC 30 August 2013, no. 08121946.

[88]As with the system of a solidarity mechanism, under the former editions before 2012, it must be noted that the "18-month term" was not equal to the prescription term of two years. For example, if a club made itself known in the 19th month after the registration of its former player, it was not too late and did not forfeit its claim for training compensation. Following the FIFA Commentary, if an association claims training compensation and a former club entitled to training compensation then appears, the claim of the association will (obviously) lose all effect. However, in the previous 2001 edition of the RSTP, this 18-month term was equal to the prescribed term of 24 months. FIFA modified this Article to prevent a situation where the association had to wait for 24 months, whereupon its claim would be prescript. Associations therefore have six months to make themselves known and if a club makes itself known after the 18th month after the registration of its former player, the claim of the club will then get priority above the right of the association after all. See also FIFA Commentary, Annex 4, explanation Article 3, p. 116.

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In reality it was already the case under the former editions of the RSTP (before the 2012 edition), that if the association has irrefutable evidence that one of its affiliated clubs which is entitled to training compensation no longer exists (for example due to bankruptcy), then the new club should pay training compensation immediately to the association and not only after the 18th month.[89] In that respect the DRC decision of 2 November 2007 was interesting, since the DRC stressed in this case that in accordance with Article 1 of the RSTP in connection with Article 6 of the Procedural Rules, training compensation relating to transfers of players cannot be claimed by clubs which are not properly affiliated to the member association of the country to which they belong and regularly participate in the competition and championships organized by the relevant association and that no other entities can be entitled to receive the compensation.[90] In other words, if the club no longer exists (due to bankruptcy), the club is not affiliated any longer to the member association of the country to which it belonged and does not participate any longer in the competition and championships organized by the association.

## 11.6 Loan of Professional

If a player is loaned to another club, only the 'new' hiring club can be entitled to receive training compensation. The decisive element for the entitlement is where the player actually played, as confirmed in several decisions by the DRC and the CAS.

The RSTP is quite clear on the question whether or not the loan of a professional is subject to the system of training compensation. Article 10 para 1 of the RSTP, 2016 edition, provides the answer. If a player is loaned to another club such loan is subject to the same rules that apply to the transfer of players, including the provisions on training compensation and a solidarity mechanism.[91] The DRC is also quite clear since it is of the opinion that the nature of a player's registration, i.e. on a definite or on a temporary basis, with a club claiming training compensation is irrelevant on whether such a claimant club would be entitled to receive training compensation for the period of time that the player was effectively trained by that club. In other words, it comes down to the point where the player actually played, as confirmed in several DRC and CAS decisions.

In a DRC decision of 24 March 2004, the DRC decided that no training compensation will be due to the club for the period of time that the player was

[89]FIFA Commentary, Annex 4, explanation Article 3 para 3, p. 116, footnote 155.

[90]DRC 2 November 2007, no. 117526.

[91]According to some national regulations, such as the regulations of the Royal Netherlands Football Association, it does not follow that a loan on a national level is subject to a national system of training compensation.

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transferred on a loan basis to another club. In fact, only the club where the player played on a loan basis was entitled to receive training compensation.[92] In the present DRC case, the Chamber outlined that the training period to take into consideration started in the 1992/93 sports season when the player was 12, until the 2000/01 sports season, at the age of 21. According to the DRC, it was therefore undisputed that the Brazilian club was entitled to receive an amount of compensation for the training and education of the player for the sports seasons that the player spent with the Brazilian club. The Chamber concluded in this case that the Italian club had to pay the Brazilian club the total amount of EUR 570,000, corresponding to EUR 10,000 per season, for the 3 seasons that the player spent with the Brazilian club, plus EUR 90,000 per year of training for the remaining six seasons.[93]

It is constant jurisprudence that a club is not entitled to receive training compensation for the period that he was loaned to another club, since he was then not effectively trained by that club for that period of time. However, in the case before the CAS between Grasshopper and Allianza of 18 June 2009, in which the CAS also decided that a club is not entitled to receive training compensation during the period that the player is at another club on a loan arrangement, the Panel also emphasized that this rule does not apply if the club that loaned the player to another club, can demonstrate that it bore the costs for the player's training during the loan period.[94]

In another DRC decision of 23 March 2006, the DRC decided that also the club for which the player played on a loan basis is entitled to receive training compensation.[95] In this case a player who was born on 14 March 1982 was registered with an Italian club during the 2002/03 season. During the 2003/04 season, the player was registered with a Belgian club. On 6 December 2004, the Italian club turned to FIFA and claimed an amount of EUR 60,000 plus interest as compensation for the training of the player concerned. The player had been registered from 1 July 2002 until 30 June 2003 at the age of 20 and 21 for the Italian club on a loan basis after having been transferred from A.C. Milan. The DRC noted that the player went on loan for the duration of the 2002/03 season to the Italian club, while he was under contract with another club. After the end of the relevant loan period, the player in question duly returned to this club, from which he was transferred to the Belgian club. The Italian club now claimed that it was entitled to receive compensation for the training and education of the player in question for the period of time that he was registered with the club, being from 1 July 2002 until 30 June 2003, for an

[92]DRC 24 March 2004, no. 34368.

[93]DRC 24 March 2004, no. 34432.

[94]CAS 2008/A/1705 *Grasshopper v. Alianza Lima*, award of 18 June 2009. This was also confirmed in CAS 2013/A/3119 *Dundee United FC v. Club Atletico Vélez Sarsfield*, award of 20 November 2013.

[95]DRC 23 March 2006, no. 36928.

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amount of EUR 60,000 plus interest. The DRC first had to answer the preliminary question of whether clubs that accept a player on loan basis are entitled to receive compensation for the training and education of young players in accordance with Chapter VII of the Regulations and Chapter III of the Regulations governing the Application of the RSTP as well as FIFA Circular no. 826 dated 31 October 2002. The DRC decided that, according to the jurisprudence established by the Chamber, a club is only entitled to receive training compensation for the period of time during which a player was actually trained by the club claiming payment of such compensation. Therefore, the claim for training compensation put forward by the club that had transferred the player on a loan basis to another club was dismissed in relation to the period of time that the player in question was registered on a loan basis with another club. However, the claim for training compensation dealt with in the present matter was put forward by a club that accepted the player on a loan basis. The DRC finally concluded that the nature of a player's registration, i.e. on a definite or on a temporary basis, with a club claiming training compensation is in fact irrelevant with regard to the question of whether such a claimant club would be entitled to receive training compensation for the period of time that the player was effectively trained by that club. The DRC concluded that the Italian club was entitled to receive training compensation in the amount of EUR 60,000 within 30 days.

A club cannot claim training compensation for such a short period of 21 days (and) if it only has the intention to transfer him to another club. In a DRC case of 16 July 2009, a player, born on 15 July 1985, was registered with club U as of July 2000, first as an amateur, and since the 2004/2005 season as a professional with 2 loans to J clubs during the 2004/2005 and 2005/2006 seasons.[96] The player was loaned from club U to club A and registered with it from 1 August 2006 until the end of June 2007 as a professional player. The player was transferred from club U to club Z on 2 August 2007, where he was registered as a professional player. On 21 November 2007, club A lodged a complaint against club Z before FIFA, by means of which it claimed payment of training compensation in the amount of EUR 75,000 for the player for the full 2006/2007 season. Club A pointed out that after the expiry of the loan period with it, the player was registered with club U for only 21 days, i.e. from 1 July 2007 until 21 July, and stated that a sport activity cannot be started in such a short period of time. In conclusion, club A considered itself to be the previous and the last team effectively involved in the player's training, and thus the only one entitled to receive training compensation. The DRC decided that club A had contributed considerably to the player's training, as the player played in the J Serie B on numerous occasions. The DRC emphasized that a serious training could not be established during one month only, i.e. during the period when the player was with club U. In particular, the DRC took into account

[96]DRC 16 July 2009, no. 79612.

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that club U had the player back with the intention to transfer him to another club. Therefore, the DRC determined that the main focus of club U was not on the player's training and education, but on his transfer to club Z. In that respect, the DRC concurred that club A had to be considered as the last club, in which the player had de facto been trained. The DRC clarifies things in this case by stating that club A is entitled to claim training compensation since club U only had the player back with the intention to transfer him to another club. Therefore, the DRC determined that the main focus of club U was not on the player's training and education but on his transfer to club Z. Club A was entitled to compensation.

In the case before the DRC of 29 September 2010, the Chamber reiterates its point of view by referring to its established jurisprudence pertaining to the entitlement to training compensation in relation to loans of players.[97] The DRC pointed out that, in principle, in accordance with Article 10 para 1 of the RSTP, a training club is equally entitled to training compensation for the relevant period of time of training during which the player was registered for it as a consequence of a loan from another club. Moreover, the DRC emphasized, referring to its well-established jurisprudence which was also confirmed by the CAS (CAS; cf. CAS 2004/X/XXX, consideration nos. 7.4.13 et sq.), that all clubs which in actual fact have contributed to the training of a player as from the age of 12, in principle, are entitled to training compensation for the timeframe that the player was effectively registered with them. In summary, the deciding authority clarified that a club which contributed to the training of a player for a certain period of time between the seasons of the player's 12th and 21st birthday, notwithstanding the fact that it temporarily transferred the player to another club on a loan basis, is entitled to training compensation for the pertinent period, i.e. for the entire period of time if effectively trained the player (prior to and after the respective loan).

The DRC was eager to stress in the above case that it could not have been the intention of the legislator of the relevant regulatory provision (Article 10 para 1 of the RSTP) to trigger the consequences of Article 3 para 1 of Annex 4 of the RSTP on the occasion of a loan and thus potentially depriving the loan of its essential flexibility and function of providing young players with the opportunity to gain practical experience in another club in order to develop in a positive way, personally and, eventually, so too for the benefit of the player's new club. The DRC concluded that the assertions presented by the respondent in this case with regard to the loan of the player were thus not valid reasons aiming to reject the claimant's request for payment of training compensation and that, as a result thereof, the reasoning presented by the respondent in this respect had to be rejected. The DRC further referred to the wording of Article 5 of the RSTP as well as to its well-established jurisprudence and recalled that only a club can register a player and that, as a result thereof, a transfer of a player can only take place between two clubs. In other words, the Chamber considered that a player cannot be transferred to a company, and therefore an amount paid by a company cannot be considered

[97]DRC 29 September 2010, no. 10101596.

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as a payment consisting of or including training compensation. The DRC considered that the respondent's assertions, and supporting documentation, in accordance with which the player had already finished his training at the age of 18 was not corroborated by any substantial evidence establishing the reality of its assertion. In these circumstances, the DRC concluded that the respondent's assertions in this respect were to be rejected. The DRC concluded that the claimant was fulfilling the required conditions to claim for training compensation and that the assertions put forward by the respondent to justify its refusal to pay compensation were not valid.

The DRC also explicitly noted in its decision of 7 September 2011 that the relevant entitlement can only be claimed from a new club that requires the services of a player on a *definitive and permanent* basis subject to the prerequisites established in Article 20 and Annex 4 of the RSTP. In other words, if the player is transferred on a loan basis, the club that has the player on loan is not obliged to pay training compensation to the club that hired out the player. In this case, the DRC reiterates its point of view by referring to its established jurisprudence pertaining to the entitlement to training compensation in relation to loans of players.[98] The Chamber pointed out that, in accordance with Article 10 para 1 of the RSTP, a training club is equally entitled to training compensation for the relevant period of time of training during which the player was registered for it as a consequence of a loan from another club.

Also in the case of 1 March 2012, it was decided that if a player is transferred on a loan basis from club A to club B and that after the expiry of the loan, the professional returns to the club A (club of origin) and, thereafter, transfers from club A to a club C (belonging to another association) before the end of the season of the player's 23rd birthday, the DRC will acknowledge, as it did in this case of 1 March 2012, that although the claimant club, club B in the above example, was not the player's former club *stricto* sensu, however, within the framework of loans, the period of time that the player was registered with the club A and the period of time that the player was registered with club B on loan, should be considered as one entire timeframe. In other words, the transfer of a player from the club of origin to the club that accepts the player on loan, as well as the return of the player from the club that accepted him on loan to the club of origin, do not constitute a subsequent transfer in the sense of Article 3 para 1 sentence 3 of Annex 4 of the RSTP. According to the DRC, any other interpretation would lead to the situation in which clubs accepting a player on loan would never be entitled to receive training compensation, even if they contributed to the training and education of players.[99]

Also in its case of 17 August 2012, the DRC deemed it essential to emphasize that, as to the liability to pay training compensation, the analogy established in

[98]See DRC 7 September 2011, no. 911668.

[99]DRC 1 March 2012, no. 3121474.

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Article 10 para 1 of the RSTP could not be extended to the case in which a player is loaned to a club and thus is not definitively being transferred to the latter club.[100] In other words, the transfer of a player from the club of origin to the club that accepts the player on loan, as well as the return of the player from the club that accepted him on loan to the club of origin, do not constitute a "subsequent transfer" in the sense of Article 3 para 1 sentence 3 of Annex 4 of the RSTP. The Chamber was eager to point out that it could not have been the intention of the legislator of the relevant regulatory provision (i.e. Article 10 para 1 of the RSTP) to trigger the consequences of Article 3 para 1 of Annex 4 of the RSTP on the occasion of a transfer on a loan basis and, thus, potentially deprive the loan of its essential flexibility and, in connection with the training and education of players, its purpose of providing young players with the opportunity to gain practical experience in official matches for another club in order to develop in a positive manner. The DRC also acknowledged in this case that the claimant was not the player's former club *stricto* sensu. However, within the framework of loans and for the purposes of the rules governing training compensation, the period of time that the player was registered with club X on loan and the period of time that the player was registered with the claimant club, should be considered as one entire timeframe.[101]

In line with the above, the obligation to pay training compensation arises if a player is definitely transferred from one club to another club belonging to a different association, but not when he is temporarily transferred to another club while still being contractually bound to his club of origin (yet, with the effects of the relevant contract being temporarily suspended), such as a loan, as was decided in the case of the DRC of March 2012.[102] Hence, the relevant entitlement can only be claimed from a new club that acquires the services of a player on a definitive and permanent basis subject to the fulfilment of the prerequisites established in Article 20 and Annex 4 of the RSTP. As to the argument in the present case that the claimant was not the player's former club in the sense of Article 3 para 1 of Annex 4 of the RSTP, the DRC acknowledged that the claimant was not the player's former club *stricto sensu*. However, the DRC pointed out that, within the framework of loans, the period of time that the player was registered with club A and the period of time that the player was registered with the claimant on loan, should be considered as one entire timeframe. According to the DRC, any other interpretation would lead to the situation in which clubs accepting a player on loan would never be entitled to receive training compensation, even if they contributed to the training of players. The DRC decided this would contravene the intention of the legislator of the RSTP.[103]

[100]DRC 17 August 2012, no. 8122321.

[101]See also DRC 7 June 2013, no. 06131263, and DRC 12 December 2013, no. 12132748.

[102]DRC 1 March 2012, no. 3121474.

[103]See also DRC 17 August 2012, no. 8122321, and DRC 7 June 2013, no. 06131263.

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Also in the case of 27 February 2014, the Chamber came to the firm conclusion that for the purposes of the provisions of the RSTP governing training compensation in connection with the player of origin to other clubs, the loan of a young player from his club does not interrupt the ongoing training period of the player. According to the DRC, the obligation to pay training compensation arises only if a player is transferred on a definitive basis, with the effect that the club which transferred the player on a loan basis to another club is entitled to training compensation for the entire period of time during which it effectively trained the player, however, excluding the period of time of the loan.[104]

Recent cases of the CAS created some doubts with regard to loan transfers and the entitlement of training compensation. In these cases there was a discussion regarding the concept of "subsequent transfers" and the so-called "segmentation principle". On the one hand, the *Panionios/Paraná* case of 2013 before the CAS shows that in the event that a player is loaned by a training club to another club, the training club does not have the right to claim training compensation for training and education which was provided before the loan took place.[105] This case suggests that a loan breaks the chain with regard to a training club's entitlement to training compensation. In this case the segmentation principle was not upheld. Reference was also made to the previously mentioned *Feyenoord/Flamengo* case before the CAS of 2007 (although this case did not concern a loan issue).[106] It can be questioned what the value of this outcome is, since on the other hand, in a later case of that same year, which is actually in line with the well-established jurisprudence of the DRC, the *Dundee-Vélez* case, it was decided by the CAS Panel that in the event a player is loaned by a training club to another club, the training club *does* have the right to claim training compensation for the entire period of training and education which was provided before the loan took place.[107] In this case the segmentation principle was upheld. In my opinion the *Dundee-Vélez* case should be leading since this is fairer and also in line with the well-established jurisprudence of the DRC.[108] In a more recent CAS case of 22 April 2015, the *Dundee-Vélez* case was actually confirmed.[109] The CAS Panel emphasized that it saw no precedential value in the *Panionios* case and found the approach by the Panel in the *Panionios* case misconceived. This could also be derived from another CAS case of 22 April 2015, in which the Panel stressed that it fully endorsed the view

[104]DRC 27 February 2014, no. 02141750. See also DRC 10 February 2015, no. 0215699.

[105]CAS 2012/A/2908 *Panionios GSS FC v. Parná Clube*, award of 9 April 2013.

[106]CAS 2007/A/1320-1321 *Feyenoord Rotterdam v. Clube de Regatas do Flamengo*, award of 26 November 2006.

[107]CAS 2013/A/3119 *Dundee United FC v. Club Atletico Vélez Sarsfield*, award of 20 November 2013.

[108]DRC 1 March 2012, no. 3121474. DRC 17 August 2012, no. 8122321.

[109]CAS 2014/A/3620 *Us Città di Palermo v. Club Atlético Talleres de Córdoba*, award of 19 January 2015.

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of the CAS Panel in *Dundee*.[110] In other words, the future CAS Panels will most likely follow the view of the *Dundee-Vélez* case: In the event that a player is loaned by a training club to another club, the training club will have the right to claim training compensation for the entire period of training and education which was provided before the loan took place.[111]

## 11.7 When Is Training Compensation *not* Due?

### *11.7.1 General*

#### 11.7.1.1 Exceptions Worldwide

Aside from the fact that training compensation is not due if the transfer takes place in one national association, as a result of which the national regulations of the association concerned are applicable. Article 2 para 2 of Annex 4 of the RSTP, 2016 edition, provides for several specific situations when it will not be applicable.

Firstly, training compensation is not due if the former club terminates the player's contract without *just cause* (without the right of the previous clubs).[112] According to the FIFA Commentary, this club should not be rewarded for this behaviour. For example, in a decision of 30 November 2007, the DRC took note of the club's argument that in view of the RSTP, according to which training compensation is not due if the former club terminates the player's contract without *just cause*, no training compensation at all was payable in the present case by this club since the player was not responsible for the termination of the employment contract between him and his former club. The DRC referred to its former conclusions, in which it had stated that the player was responsible for the termination of the employment contract in question, and consequently rejected this argument.[113] The DRC finally concluded in the present case, that the conditions for training compensation to be payable were fulfilled, and that the club was therefore entitled

[110]CAS 2014/A/3710 *Bologna FC 1909 S.p.A. v. FC Barcelona*, award of 22 April 2015.

[111]Monbaliu 2014.

[112]If the player breaches his employment contract without *just cause*, the new club obviously has to pay compensation. FIFA Commentary, explanation Article 1 para 1, p. 112.

[113]Moreover, the DRC stressed that, as a general rule, on the occasion of a player's first transfer as a professional, the player's new club has to pay training compensation to the player's former club not only for the period of time during which the player was registered with the former club as a professional, but also for the seasons, if any, during which the player was trained by the former club as an amateur player, if the player is not registered with a third club in between. In this respect, the DRC referred to the constant and continuous jurisprudence of the DRC and of the CAS (e.g. CAS 20051A/891, CAS 20051A/894).

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to receive training compensation.[114] Previous clubs are still entitled to claim if they did not receive it at an earlier stage. For example, if the player played on a loan basis with a "previous club" (in the sense of the abovementioned Article 2 para 2), this "previous club" can still claim training compensation even if the "former club" terminates the player's contract without *just cause*. As we will see later in this chapter, clubs where the player played on a loan basis can also claim for compensation under the condition that the player was effectively trained at the said club on loan.

There is a termination of a player's contract without *just cause* (in the sense of the abovementioned Article 2 para 2) in the event that the relevant employment contract was by no means imputable to the player and the player at no time showed any behaviour which would have constituted a violation of the terms of the employment contract justifying the premature termination of such contract, which follows from a DRC decision of 17 January 2014.[115] In this decision the Chamber highlighted that the central issue in the matter was to determine whether Article 2 para 2 of Annex 4 of the RSTP was applicable. In this respect, the Chamber recalled the contents of Article 2 para 2 of Annex 4 of the RSTP which stipulates that training compensation is not due if the former club terminates the player's contract without *just cause*. *A contrario*, only if the club had *just cause* to terminate the relevant employment contract, would it still be entitled to training compensation. With regard to the particularities of the case, the Chamber recalled that it was undisputed between the parties that the player at no time showed any behaviour which would have constituted a violation of the terms of the employment contract justifying the premature termination of such contract. On the contrary, it was undisputed that the only reason for the unilateral termination of the employment contract with the player were the financial difficulties of the claimant and the related liquidation of the SASP pursuant to the abovementioned decision of the Tribunal de Commerce on 12 July 2011. The Chamber believed that the termination of the relevant employment contract was by no means imputable to the player and concluded that in fact the claimant was solely responsible for the liquidation of the SASP and the consequent termination of the contract. Against such a background, the Chamber decided that there was no valid reason or *just cause* for the unilateral termination of the employment contract. Thus, the Chamber thought to emphasize that a club that has terminated an employment contract with a player without having a *just cause* to do so shall not be able to retain any rights which depend on such a rightful termination. Therefore, in accordance with Article 2 para 2 of Annex 4 of the RSTP, the claimant was not entitled to receive training compensation in connection with the transfer of the player to the respondent.[116]

[114]DRC 30 November 2007, no. 117698.

[115]DRC 17 January 2014, no. 01143151.

[116]See also DRC 17 January 2014, no. 01143038 and no. 01143151.

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Another DRC decision that concerned the question whether or not the contract was terminated without *just cause* and the potential entitlement of training compensation, was the case before the DRC of 13 December 2013, in which case the DRC Judge considered that the player was registered with both the claimant and the respondent as a professional and that the player was being re-registered as a professional with the respondent within 30 months of being reinstated as an amateur with club K.[117] The DRC Judge decided that the claimant would, in principle, be entitled to receive training compensation, in accordance with Article 2, Article 20 and Annex 4 of the RSTP. The DRC Judge made reference to Article 2 para 2 under i. of Annex 4 of the RSTP, which provides that training compensation is not due if the former club terminated the player's contract without *just cause*. As a result, the DRC Judge decided to reject the claim for training compensation of the claimant.

Secondly, training compensation is not due if the player is transferred to a category 4 club. In a DRC decision of 30 November 2007, the DRC had to decide on this issue. In this case the club concerned denied that training compensation had to be paid to a club due to the fact that the player was transferred to a category 4 club. The DRC considered the 2 documents sent to FIFA from the club that was being obliged to pay training compensation, indicating that all of its affiliated clubs were allocated in category 3. The Chamber deemed that the argument put forward by the club concerning the refusal for the payment of the training compensation due to a transfer to a club pertaining to a fourth category must be rejected, considering that this club should be allocated in a category 3 club.[118]

In the third place, training compensation is also not due in the event that a professional reacquires amateur status on being transferred.[119] In this respect it is important to be aware of the pitfall in Article 3 para 2 of the RSTP, 2016 edition, which states that if an amateur player reregisters as a professional within 30 months of being reinstated as an amateur, then training compensation will be due after all.[120] In the abovementioned case before the DRC of 13 December 2013, the DRC Judge considered that the player was registered with both the claimant and the respondent as a professional and that the player was being reregistered as a professional with the respondent within a period of 30 months of being reinstated as an amateur.[121]

Fourthly, purely based on jurisprudence, training compensation is also not due if the club claiming the training compensation does not exist anymore, i.e. is

[117]DRC 13 December 2013, no. 121311102.

[118]DRC 30 November 2007, no. 117921. See also DRC 23 February 2007, no. 27395.

[119]See SRC 10 August 2007, no. 87908. See also DRC 30 November 2007, no. 117921.

[120]According to Article 3 para 2 of the RSTP, 2016 edition, a new club will pay training compensation in accordance with Article 20 of the RSTP, 2016 edition. See for example DRC 24 October 2011, no. 1011707, and 13 December 2013, no. 12131102.

[121]DRC 13 December 2013, no. 121311102.

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bankrupt. In the previously mentioned DRC decision of 2 November 2007, the Chamber remarked that in accordance with Article 1 of the RSTP in connection with Article 6 of the Procedural Rules, training compensation relating to transfers of players may only be claimed by clubs, which are properly affiliated to the member association of the country to which they belong and regularly participate in the competition and championships organized by the relevant association. According to the DRC, no other entities can be entitled to receive training compensation.[122]

In the fifth place, we also take note of the fact that if 2 clubs conclude a transfer agreement providing for the respective financial obligations, i.e. transfer compensation, training compensation is considered as being included in the transfer compensation. The claiming club will then not be entitled to training compensation. If the parties wish to stipulate the contrary to the aforementioned, i.e. training compensation being due in addition to the agreed transfer compensation, they need to explicitly mention it in the transfer agreement. In the decision of 21 February 2006, the DRC referred to its constant jurisprudence and stated that if 2 parties conclude a transfer agreement providing for the respective financial obligations, i.e. transfer compensation, training compensation is considered as being included in the transfer compensation. If the parties wish to stipulate that training compensation is due in addition to the agreed transfer compensation, they need to explicitly mention it in the transfer agreement.[123]

If one of the situations as mentioned above is not applicable and all the other elements point out that training compensation is due, the new club will generally not have any legal reasons not to pay training compensation. In a case before the DRC of 8 June 2007, also known as the *Tsunami* case, a football federation informed that its member club is one of the clubs had been damaged by the Tsunami. As a result thereof, its member club lost several players due to the disaster. Therefore, it requested that the FIFA considered this a force majeure situation

[122]DRC 2 November 2007, no. 117526.

[123]DRC 21 February 2006, no. 26595. See also DRC 9 November 2004, no. 114363 and no. 114312, DRC 13 June 2008, no. 3830, DRC 31 July 2008, no. 78026, DRC 9 January 2009, no. 19512, DRC 21 February 2006, no. 26595, DRC 9 November 2004, no. 114312 and no. 114363. See DRC 12 March 2009, no. 39328. See also CAS 2004/A/785 *T. v. L.*, award of 30 August 2005. In the latter case, the CAS decided, that when negotiating the transfer agreement, there was a clear understanding between the parties that all financial aspects of the transfer were validly and fully agreed upon. If the appellant had wanted to reserve its right to claim a compensation, it would have had to address such issue with the respondent. Instead, the appellant agreed to a "free transfer", reserving only the right to an additional fee of 25 % to be paid in case of another transfer to a third club. Against this background, the panel's interpretation of the transfer agreement concluded by the parties in November 2002 was that the appellant was content to transfer the player G. to the respondent on the stated terms: through such transfer the appellant was indeed released from its obligation to pay a considerable sum of money, i.e. the second sign-on fee and the salary due to the player up to the end of his contract, as well as the applicable social charges. By agreeing to a free transfer without making any reservation for an additional compensation for training, the appellant effectively, at least towards the respondent, waived any right to claim an additional payment.

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as a result of which the club would not be entitled to pay training compensation. In addition, the Chamber deemed it important to particularly emphasize that, without intending to underestimate the circumstances that occurred in the relevant flood-affected areas, the obligation of the new club to pay training compensation to the claimant club became due in this case at the latest within 30 days following the signature of the contract between the player in question and the new club, thus prior to the disastrous events that occurred and other areas concerned. Therefore, the DRC was of the opinion that the terrible catastrophe which happened in the relevant region where the new club was located should not lead to disadvantages and a loss of the pertinent rights of the claimant club. Finally, the Chamber ordered the new club to compensate the other club and went on to deliberate on the proper calculation of this compensation, affirming that the amount had to be calculated in accordance with the parameters provided by the regulations.[124]

#### 11.7.1.1.1 Circumvention

Situations exist in which a club tries to circumvent its payment for training compensation. Also known as "bridge transfers", these can be characterized as a transfer of a player to a lower category in order to avoid or limit the amount of training compensation. In these cases a player is often immediately transferred to a third club which, had it signed the player directly, would have to pay a higher amount of training compensation. For example, given the circumstances in its case of 27 February 2013, the DRC had to establish whether or not the respondent tried to circumvent the application of the provisions on training compensation.[125] The Chamber underlined that the player was registered as a professional with the involved club for only 4 days, that the employment contract between the club and the player had been terminated after 4 days and that on the day following the termination of the contract with the club, i.e. 6 February 2012, the respondent had already concluded an employment contract with the player. Secondly, the Chamber observed the documents enclosed with the claimant's claim, respectively dated 9 and 14 January 2012, this is, before the registration of the player with the respondent. The DRC further noted that these documents were extracts from the respondent's website and considered that the respondent, in its reply, had not provided any clarifications in relation to the contents of such documentation. Hence,

[124]DRC 8 June 2007, no. 67499.

[125]DRC 27 February 2013, no. 0213936. See also DRC 22 July 2010, no. 7101140. In the latter case, the Chamber considered that respondents 1 and 2 tried to circumvent the application of the provisions regarding the payment of training compensation by first registering the player as a professional with the first respondent, which is a category 4 club—thus with the aim to avoid payment of any training compensation—before concluding one, or several, loan agreements in favour of the second respondent, which is a category 3 club. In the CAS 2014/A/3536 *Racing Club Asociación Civil v. FIFA*, award of 5 May 2015, the CAS Panel had to deal with the question whether sanctions had to be imposed in relation to the use of TMS for a bridge transfer.

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considering that the contents of the relevant documentation remained uncontested by the respondent, the Chamber deemed that it was clear that in fact the player had already joined the respondent in January 2012, i.e. prior to the player's registration with club F in February 2012. In continuation, the Chamber turned its attention to the argument provided by the respondent, which merely indicated that club F had stated that the player was a "free agent" and therefore no training compensation is due. In this respect, the Chamber outlined that the respondent neither provided any comments in relation to the allegation of the claimant regarding the alleged circumvention, nor did the respondent provide an explanation why the player had moved from a club (in country R) playing in the 1st league in country R to a club in country X participating in the 3rd league for only 4 days, before transferring to a club participating in the 1st league in country M. The Chamber came to the conclusion in the matter at hand, that the respondent tried to avoid the payment of training compensation to the claimant. The DRC considered that the respondent club tried to circumvent the application of the provisions regarding the payment of training compensation. The Chamber finally determined that the respondent shall be liable for the payment of training compensation to the claimant.

Numerous elements can speak in favour of a situation of circumvention of the RSTP regarding the payment of training compensation. For example, in another case before the DRC of 31 October 2013, the DRC took note of the claimant's statements that the player participated in a training camp with the respondent in January 2012, and that the respondent informed the claimant that it would pay training compensation for the transfer of the player.[126] Furthermore, the DRC took note of the claimant's reference to a decision of the CAS (2009/A/1757 *MTK Club B v Club I*) and its statement in said case that the parties had used a similar construction to circumvent the payment of training compensation. Equally, the DRC noted that the respondent argued that the abovementioned decision of the CAS is not applicable to the present case, since the respondent did not enter into negotiations with the claimant regarding the transfer of the player, the player in the present case was already a professional and he was only transferred on loan, in contrast to the referred CAS case. In view of all the above, taking into consideration all the surrounding circumstances of this specific matter, as well as the documentation presented during the present proceedings, the DRC concluded that there were numerous elements speaking in favour of a situation of circumvention of the RSTP regarding the payment of training compensation by the respondent. Indeed, the Chamber emphasized the fact that the respondent, according to its own website, had already signed a contract with the player in August 2011, the fact that the player went on a training camp with the respondent in January 2012, that there was only a very short period of time between the moment that the player was transferred to club K and when he was loaned from club K to the respondent for a very low amount, can lead to no other conclusion than that the respondent was the

[126]DRC 31 October 2013, no. 10131359.

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new club of the player in the sense of the RSTP.[127] Therefore, the Chamber held that the respondent should be considered the player's new club. The Chamber reiterated all the specific circumstances of the present matter as well as all the evidence produced by the parties. The Chamber considered that it could not be established that the player was a regular first team player during the 2007/2008 season with the claimant. The Chamber also held that the fact that the player was voted as best player of country G in the 2010/2011 season does not imply that his training period had been completed. The Chamber concurred that, taking all the abovementioned elements and circumstances into account, it could not be established that the player had indeed completed his training period before his 21st birthday. Consistently with the above, the Chamber finally concluded that training compensation was due.

In a case before the CAS of 10 February 2010, club FC Stefan cel Mare lodged a claim against FC Tranzits and FK Ventspils before the DRC, claiming that the player had been registered for the first time as a professional with FC Tranzits and that the two Latvian clubs in fact tried to circumvent the application of the provisions on training compensation by first registering the player with a category 4 club, thus avoiding to pay any training compensation, before registering the player three months later with a category 3 club.[128] The DRC partially accepted the claim and decided that FK Ventspils has to pay to FC Stefan cel Mare the amount of EUR 100,000 for training compensation. On 22 August 2011, FK Ventspils appealed against this DRC decision before the CAS. According to the CAS, it was not the understanding of the Panel that when a player who signed his first professional contract with a category 4 club is subsequently loaned to a club which would have had to pay a training compensation had the player signed his first professional contract with the latter, the latter club should automatically have had to pay training compensation. However, based on the circumstances of the case and on the evidence submitted by the parties, the Panel considered that FK Ventspils, for which the player played exclusively subsequently to the signing of his first professional contract and which effectively benefited from the efforts of training the player invested by FC Stefan cel Mare, tried to circumvent the application of the provisions regarding training compensation. Therefore, lacking any convincing counterevidence, the CAS was only able to confirm the decision by the DRC and finally decided in the case at hand that FK Ventspils was liable for payment of training compensation.[129]

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[127]See also DRC 20 August 2014, no. 08142533. In this case the player was registered as a professional with the involved club for only 4 days.

[128]CAS 2011/A/2544 *FK Ventspils v. FIFA & FC Stefan cel Mare*, award of 10 February 2012.

[129]See DRC 20 August 2014, no. 08142533. See also CAS 2011/A/2477 *Spartak Moscow v. RFU & FC Rostov*, award of 29 October 2012. In the latter case, the CAS Panel emphasized that Articles 15 and 22 of the RSTP do not provide for any rules in case of such circumvention by transferring a player through a club in a lower division. See also CAS 2012/A/2733, *Stichting Heracles Almelo v. FC Flora Tallinn*, award of 27 November 2012.

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In its case of 27 February 2014, the Chamber referred to the fact that an attempt to circumvent payment of training compensation was present. In this regard, the Chamber noted that the player only received a salary of EUR 400 before signing the contract for the 2012/2013 and 2013/2014 seasons. As a result thereof, the DRC believed that by suddenly being awarded such a raise in salary and a considerably high "sign-on-fee" upon signature of the second contract, it could not be excluded that the player was also compensated for accepting a lower salary in the "scholarship contract" for the 2011/2012 season as an attempt to circumvent the possible obligation of paying training compensation to the player's former club(s). The Chamber finally concurred that the aforementioned indicated that the player was already a professional during the 2011/2012 season.[130]

In view of the above jurisprudence, we note that very short stays with lower category clubs and the fact that the player did not play any matches for the bridge club are relevant indications that a situation of circumvention took place. An unusual pattern of transfers can be indications for the competent authorities to establish a situation of circumvention. For example, in another case before the CAS of 30 July 2009, a situation of circumvention was present.[131] In this case, a very talented player from the Hungarian club MTK Budapest, transferred to the Maltese club Pieta Hotspurs FC, where he was registered for only 9 days, and was then transferred to the Italian club Inter Milan. The CAS observed that it was difficult to understand why highly-rated player who has captained the Hungarian under 19 team and who has attracted the attention of Inter Milan, should elect to move to a club in Malta and stay there for little more than a week before moving on to Italy. This unusual pattern was also what the DRC kept in mind in its decision. From this case it follows that certain guidelines can lead to the conclusion that a circumvention took place. From this case and the above case law clubs are not powerless in situations of circumvention if it can prove the circumvention. Also the relationship between the new club and the bridge club and the fact whether or not the contract between the new club and the player was signed before the transfer to the bridge club, can be relevant elements to establish that a situation of circumvention is present and must therefore be taken into account.

#### 11.7.1.1.2 Prescription

A club can also not claim training compensation before FIFA if the claim is prescript. From Article 25 para 5 of the RSTP it can be derived that the DRC will not hear any case subject to these regulations if more than 2 years have lapsed since the event giving rise to the dispute. In other words, a former club that claims for training compensation, which concept is laid down in Annex 4 of the RSTP, is

[130]DRC 27 February 2014, nos. 02142877a and 02142877b. See also DRC 27 February 2014, no. 02142877.

[131]CAS 2009/A/1757 *MTK Budapest v. FC Internazionale Milano S.p.A.*, award of 30 July 2009. See DRC 31 October 2008, no. 108806.

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strictly bound to the prerequisite to lodge its claim within 2 years, in absence of which the club waives its right to training compensation. It must be taken into consideration that the 2-year term for the event giving rise to the dispute will lapse, despite the fact that it is the new club that is responsible for the payment *ex officio* pursuant to Article 3 of Annex 4 of the RSPT, 2016 edition. Therefore, it is of importance that clubs follow the career of their players since they cannot claim that the prescription term should not be applicable due to the fact that the new club did not comply with its obligation to make the payment within 30 days of registration as laid down in the aforementioned Article 3. As a side-note, one questions what the relevance of said provision in relation to the prescription term is, since the common practice in international football shows that clubs that have to pay training compensation are sometimes quite reluctant to do so without any notice from claimant clubs.

In view of the above, the further question is posed: when does the event give rise to the dispute? In that respect, it is important to note that training compensation is applicable from the moment the player is *registered*. This is not only an obligation that follows from the RSTP, but is also confirmed in several DRC cases. For example, in a case before the DRC of 16 April 2009, the Chamber was eager to emphasize that training compensation could only be due if the player was effectively registered at the new association.[132] In this specific case, the DRC considered that it was patent that the parties had never been registered, neither for the new club nor for any club belonging to the latter and affiliated to the USF. As a consequence, the DRC concluded that the new club could not be held liable for paying training compensation to the former club, since the necessary condition to be held responsible in that respect, i.e. the registration of the player, was not fulfilled. In accordance with Article 3 of Annex 4 of the RSPT, this means that the "prescription term" will start as from 30 days after the player's registration since the new club is obliged to pay the training compensation within 30 days after the player's registration. Therefore, it can be inferred that the event giving rise to the dispute is the 31st day after the registration as a result of which the time limitation starts as from that day.

As mentioned in the introduction of this chapter, former clubs that are entitled to receive an amount of training compensation need to be aware of the fact that a former club that is entitled to training compensation is obliged to lodge a claim within 2 years *with FIFA*, in absence of which the former club waives its rights to receive training compensation from the new club. In order to avoid any misunderstanding in this respect, the time limit, in principle, will not be suspended by a letter in which the club is summoned to pay. The prescription term will then not be postponed and it will not be established as an act of interruption. This can also be derived from a DRC decision of 26 October 2006.[133] When calculating the statute of limitations of 2 years, one needs to consider the event giving rise to the dispute

[132]DRC 16 April 2009, no. 49055. See also DRC 16 April 2009, no. 49444.

[133]DRC 26 October 2006, no. 106421.

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and the day on which the claim was formally submitted. Mentioning the fact that a claim should be formally submitted, rules out the fact that a letter would be seen as an action which would make a club or player meet the statute of limitations. From this case it can be concluded that a claim must be lodged within the time limit of 2 years *with FIFA*.

As a final remark and in addition to the above general strict time limit of 2 years, reference must be made to the CAS award of 24 September 2013 as referred to previously.[134] From this case regarding training compensation it can be derived that the limitation period of Article 25 para 5 of the RSTP can be interrupted under certain circumstances. Although there is no provision providing for the consequences of a possible amicable agreement between parties to postpone the due date for payment of certain amounts also no provision providing for the possible interruption of the prescription period or a provision specifically determining that the limitation period of 2 years can under no circumstances be interrupted, the CAS held that, where the FIFA regulations contain a *lacuna*, or at least an ambiguity, in the spirit of good relationships that should be encouraged in the world of sport, it must be possible for a limitation period to be interrupted. According to the CAS, if the parties have mutually agreed on a new payment schedule, especially if the debtor requested it and the *bona fide* creditor relies on this, a limitation period should be interrupted.

In view of the above, it can be concluded that the jurisprudence of the DRC is quite clear on the "*prescription term*". The DRC jurisprudence leaves no room for any exceptions. However, from the abovementioned CAS case of 24 September 2013 relating to training compensation, it can be inferred that the limitation period of Article 25 para 5 of the RSTP can be interrupted under certain circumstances, according to the CAS.[135] With regard to the limitation period of 2 years set out in Article 25 para 5 of the RSTP, the CAS stressed in this case that there is no provision for the consequences of a possible amicable agreement between parties to postpone the due date for payment of certain amounts. According to the CAS, there is also no provision for the possible interruption of the prescription period or a provision specifically determining that the limitation period of 2 years can under no circumstances be interrupted. The CAS held that, where the RSTP contains a *lacuna*, or at least an ambiguity, in the spirit of good relationships that should be encouraged in the world of sport. According to the CAS in this specific case, it must be possible for a limitation period to be interrupted if the parties have mutually agreed on a new payment schedule, especially if the debtor requested it and the bona fide creditor relies on such new payment schedule. Therefore, it must be taken into consideration that DRC committees in future cases may decide that the prescription term can be interrupted in the event that the parties concerned have mutually agreed on a new payment schedule, especially in the event that the debtor requests it and the bona fide creditor relies on such new payment schedule.

[134]CAS 2012/A/2919 *FC Seoul v. Newcastle Jets FC*, award of 24 September 2013.

[135]CAS 2012/A/2919 *FC Seoul v. Newcastle Jets FC*, award of 24 September 2013.

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#### 11.7.1.1.3 Women's Football

Clubs claiming training compensation also need to be aware that the training compensation system is only applicable to men's football. The system of training compensation is thus not applicable to women's football. In its decision of 7 April 2011, the DRC explicitly decided that the training compensation system, as such, at least for the time being, could not be applied to women's football since it shows a scenario completely different to men's football. The DRC committee concluded that the system of training compensation is thus only applicable to men's football.[136]

It is quite remarkable that the training compensation system is not applicable to women's football since in the "*Definitions Section*" of the FIFA RSTP it states that "*Terms referring to natural persons are applicable to both genders. Any term in the singular applies to the plural and vice,versa*". However, based on the aforementioned decision we must take into account that the DRC committees in any future cases will decide that the training compensation system only applies to men's football since the DRC in the above decision of 7 April 2011 concurred and was of the explicit opinion that the reality of women's football differs significantly from that of the men's game.

### 11.7.1.2 Exceptions Within the EU/EEA

#### 11.7.1.2.1 General

It is important to underline that the abovementioned exceptions, as laid down in the RSTP and as derived in the applicable jurisprudence, only apply to matters which concern and are related to international transfers of players (worldwide). However, with regard to international transfers *within the EU/EEA* there is an extra exception as a result of which training compensation is also *not* due.

If the former club does not offer the player a contract, no training compensation is payable unless the former club can justify that it is entitled to such compensation.[137] This is laid down in the first sentence of Article 6 para 3 of Annex 4 of the RSTP, 2016 edition.[138] Moreover, according to the second sentence of the aforementioned article, it is also a prerequisite that the former club then offers the

[136]DRC 7 April 2011, no. 411375.

[137]According to FIFA Circular no. 769 dated 24 August 2001. See also DRC 19 February 2009, no. 29540 and DRC 31 October 2008, no. 108806. FIFA Commentary, explanation Article 6, p. 125, footnote 176.

[138]Vice versa, this means, following the RSTP, that if a player transfers from or to a club that is situated outside the EU/EEA, this exception is not applicable and the club is not obliged to offer a contract in order to maintain its right for training compensation.

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player a contract in writing via registered mail at least 60 days before the expiry of his current contract.[139] Further, in the third sentence of this article, it is obliged that this offer is at least of an equivalent value to the current contract. In the event that the former club does not offer the player a contract and it does not comply with the prerequisites as mentioned in Article 6 para 3 of Annex 4 of the RSTP, 2016 edition, the club with which the player was registered must take into account that this leads to the situation that it loses its entitlement to training compensation.[140]

It is only an obligation for the former club to offer a contract and thus not for any other previous claiming clubs. In Article 6 para 3 of Annex 4 of the RSTP, 2016 edition, it is stated that this provision is without prejudice to the right to training compensation of the player's previous club(s). This is also constant jurisprudence of the DRC, which is confirmed in its decision of 7 April 2011 (no. 4111875), in which case the DRC decided that the claiming club was not obliged to fulfil the prerequisites of Article 6 para 3 of Annex 4 of the RSTP (i.e. the obligation with regard to the contract offer) since this is an obligation only for the former club and is without prejudice to the right of previous clubs. As a result, the claiming club was entitled to receive training compensation and had nothing to do with the contract offer. This was also decided in its case of 17 January 2014, in which the Chamber pointed out that, *in casu*, a possible obligation to offer the player a contract in compliance with Article 6 para 3 of Annex 4 of the RSTP would, in principle, lie with the former club of the player and not with the claimant.[141] In this respect, the Chamber recalled that the claimant club was not the player's former club, since the player was registered with 2 other clubs after he had left the claimant. As stated in Article 6 para 3 of Annex 4 of the RSTP, and as confirmed by the DRC, said provision is without prejudice to the right of training compensation of the player's previous club(s).

This section focuses on this exception within the EU/EEA. Further, it is important to note that if the former club does not offer the player a contract, it can still be entitled to training compensation, if the former club can justify that it is entitled to such compensation. With regard to Article 6 para 3 of Annex 4 of the RSTP, 2016 edition, several questions can be posed; Does the obligation to offer a contract cover both amateur as well as professional players? In other words, should a contract also be offered to an amateur player in order for the club to maintain its right for training compensation? In many DRC cases clubs were of the opinion that the contract offer was not applicable to amateurs since the second sentence of Article 6 para 3 of Annex 4 of the RSTP speaks of "*before the expiry of his current contract*". Therefore, they were of the opinion that the contract offer can only be applicable to their professional players. Moreover, one can question whether the "*registered mail*" is the only possibility to fulfil the requirement with regard to the contract

[139]RSTP, 2016 edition, Annex 4, Article 6 para 3.

[140]RSTP, 2016 edition, Annex 4, Article 6 para 3.

[141]DRC 17 January 2014, nos. 01141545a and 01141545b.

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offer? Or, are there other options that suffice? And for example, under what specific circumstances can a former club validly justify that it is entitled to receive training compensation in the event that it did not offer a contract to one of its players?

Article 6 para 3 of Annex 4 of the RSTP, 2016 edition, is not clear with regard to the above questions and does not provide for the answers. Therefore, it is necessary to consult the relevant decisions of the DRC as well as the CAS. These committees have decided on multiple occasions with regard to this subject. We note that the DRC seems to take a more consistent line and provides the football world with more clarity on certain points. The outcome of the various CAS cases indicates that the CAS Panels are more ambiguous. The above questions will be discussed in the following paragraphs. At the end of this chapter, more awareness of the legal risks will be present in order to anticipate more adequately on this issue. However, first note the fact that Article 6 para 3 of Annex 4 of the RSTP, 2016 edition, is subject to the location of the transferring clubs.

#### 11.7.1.2.2 Free Movement of Players

The CAS and the DRC decided several times that the obligation of a club to offer the player a contract when claiming training compensation is a requirement which only needs to be met within the EU/EEA, as also follows from the RSTP. This means that if the training club is not located within the EU/EEA, the abovementioned provision does not apply. In several DRC cases it was decided that the obligation of a club having offered the player a contract when claiming training compensation is a requirement that only needs to be met within the EU/EEA. If a training club is not located within the EU/EEA, the DRC is of the opinion that Article 6 para 3 Annex 4 of the RSTP does not apply.[142] Also according to the well-established CAS jurisprudence, the application of Article 6 para 3 of Annex 4 of the RSTP depends on the *location* of the transferring clubs and not on the nationality of the players. Arguments for the freedom of movement of football players across the EU are raised by clubs. However, according to the DRC and the CAS in several decisions, these arguments can only be raised by the player himself and not by the football clubs, although this is questionable. In light of the previously mentioned *Wilhelmshaven* case, it can be questioned whether parties can rely on this argument since the Highest Regional Court emphasized that the "free movement argument" was also available to the club, which means that said Article 6 is applicable when it concerns persons with EU nationality.[143] In the *Wilhelmshaven* case of the CAS of 5 October 2009, the Sole Arbitrator of the CAS decided that Article 6 of Annex 4 of the RSTP on the intra EU/EEA transfer of players is narrowly circumscribed within a limited geographical area, i.e. the EU/EEA territory. Prior to examining if a

[142]DRC 27 April 2007, no. 4732. See also DRC 12 January 2007, no. 17897.

[143]CAS 2009/A/1810 and 1811 *SV Wilhelmshaven v. Club Atlético Excursionistas & Club Atlético River Plate*, award of 5 October 2009.

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contract had been offered by the club to the player, the case must fall within the scope of the above provision: in other words, the transfer must take place from one national association to another one within the EU/EEA.[144]

For the same reason, the benefit of the provision will also automatically be refused to a Turkish club, as follows from the CAS jurisprudence. In a case before the CAS between the Turkish club Galatasaray and the German club Alemannia of 16 August 2010, the CAS Panel had to deal with the above issue and referred to the fact that as Turkey is not a member country of the EU/EAA (although Turkey is a member country of UEFA), a club from the Turkish Football Federation (TFF) cannot benefit from the special provision as mentioned in Article 6 para 3 Annex 4 of the RSTP that specifically relates to training compensation for players who transfer from one association to another inside the territory of the EU/EAA.[145]

In a case before the CAS of 2010 between the Brazilian club Coritiba Football-Club and the Portuguese club Marítimo da Madeira SAD a dispute arose regarding the training compensation due by the latter after the signing of the Brazilian football player Anderson Gomes de Lima.[146] In this case it had not been proven that Coritiba offered a new professional contract to the player. At the end of his contract with Coritiba, the player went to Europe as a *free agent*. He signed a contract with the Portuguese club mentioned and was then registered at the Portuguese Football Federation on 30 January 2008. As Marítimo did not pay the requested amount of training compensation to Coritiba, Coritiba lodged a claim on 25 June 2008 with FIFA and requested the payment of EUR 110,000. At first the DRC condemned Marítimo to pay the entire sum requested by Coritiba. However, Marítimo did not agree and referred to Annex 4, Article 6 RSTP. Marítimo stated that training compensation is not payable by the new club to the former club if the former club did not offer the player a contract in writing, via registered post, at least 60 days before the expiry of his current employment contract, as was mentioned in Article 6 para 3 of the RSTP.[147] The Panel emphasized that Article 6 para 3 of the

[144]CAS 2009/A/1810 and 1811 *SV Wilhelmshaven v. Club Atlético Excursionistas & Club Atlético River Plate*, award of 5 October 2009.

[145]CAS 2010/A/2069 *Galatasaray and Alemannia*, award of 16 August 2010.

[146]CAS 2010/A/2075 *Marítimo da Madeira SAD and Coritiba Footballclub*, award of 2010.

[147]Despite the fact that the abovementioned exception is only applicable to players moving from one association to another within the territory of the EU/EEA, Marítimo referred to the "Treaty of Friendship, Cooperation and Consultation between the Federative Republic of Brazil and the Portuguese Republic", and specifically to Article 12, in which it was stated that Brazilian nationals in Portugal and Portuguese nationals in Brazil enjoy the same rights. Therefore, Brazilian players, as workers, had to benefit from Article 6 para 3 of the RSTP. Coritiba was of the opinion that in the *Midtjylland* case (CAS 2008/A/1485 *FC Midtjylland A/S v. FIFA*, award of 6 March 2009), the Panel refused to directly apply the provision of an international treaty signed between several African countries and the European Community, the so-called Cotonou Agreement, over the RSTP. The Panel considered, as opposed by Coritiba, that in the present case there was neither evidence that the player had submitted an application to obtain the equal status referred to in the Treaty nor that the player was provided with an equal status.

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RSTP depends on the location of the transferring clubs and not on the nationality of the players. This means that the difference made by the RSTP between a transfer within the EU/EEA and outside this territory, is thus not based on the nationality of the player. Marítimo applied for the applicability of Article 45 TFEU (ex Article 39 EC Treaty), on the freedom of movement for workers within the EU. However, the Panel referred to the *Wilhelmshaven* case and stated that the arguments relating to the freedom of movement of workers are only available to individual players and not to the club as an employer. Therefore, the CAS rejected the request of Marítimo.[148]

Also in a more recent case of the CAS of 2013, the previously discussed *Dundee-Vélez* case, it was decided that in the event a player is transferred from a club outside the territory of the EU/EEA to a club within the territory of the EU/EEA, Article 6 para 3 is not applicable to the case at hand, as was decided in (and also in this award reference was made to) the abovementioned CAS jurisprudence.[149]

In view of the above, we must note from the DRC and the CAS jurisprudence that it can be inferred that if a training club is not located within the EU/EEA, Article 6 para 3 of the RSTP does not apply. According to the well-established DRC and CAS case law, the application of such provision depends on the *location* of the transferring clubs and not on the nationality of the players. However, and with reference to the previously mentioned *Marítimo* case, in future it might be possible that Article 6 para 3 of the RSTP will be applied in a broader scope; Not only because of the developments in the previously discussed "Wilhelmshaven saga", but also if evidence can be provided that the player did submit an application to obtain the equal status referred to in the EC Treaty (now TFEU) or that the player was provided with an equal status. For example, if a player is transferred from a country situated outside the EU/EEA, which has a bilateral agreement with the EU on equal working conditions. Especially if it can be demonstrated that the salary offered by the club has been reduced as a result of the fact that the new club had to pay training compensation to his previous club which had not offered him a new contract. It is questionable whether FIFA and the CAS will decide in line with well-established jurisprudence from which it follows that if a training club is not located within the EU/EEA, Article 6 para 3 of the RSTP does not apply.

[148]The applicability of Article 6 para 3 of Annex 4 of the RSTP was also refused to a Brazilian player being transferred from a Brazilian club in the case CAS 2010/A/2075 *Marítimo da Madeira SAD and Coritiba Footballclub*, award of 2010, although the new club in which the player was being transferred was Portuguese and despite the provisions of the Treaty of Friendship, Cooperation and Consultation between the Federative Republic of Brazil and the Portuguese Republic granting equal treatment between workers of both nationalities.

[149]CAS 2013/A/3119 *Dundee United FC v. Club Atletico Vélez Sarsfield*, award of 20 November 2013. See also CAS 2009/A/1810 and 1811 *SV Wilhelmshaven v. Club Atlético Excursionistas & Club Atlético River Plate*, award of 5 October 2009, CAS 2010/A/2069 and CAS 2010/A/2075 *Marítimo da Madeira SAD and Coritiba Footballclub*, award of 2010.

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#### 11.7.1.2.3 General Rule: Contract Offer to Professionals and Amateurs

From the DRC jurisprudence it follows that it is the spirit and purpose of Article 6 para 3 of Annex 4 of the RSTP, 2016 edition, to penalise clubs which are obviously not interested in the player's services as a professional, no matter if the club would have to offer the player an employment contract for the first time or a renewal due to the expiry of an already existing contract.[150] In other words, the DRC is of the opinion that the requirements of said Article, are applicable also to cases in which the player was registered as an amateur with his former club. Also from the FIFA Commentary it follows that in order to safeguard its entitlement to training compensation and demonstrate its real intention to continue its relationship with the player concerned, the former club must offer the player a contract in writing via registered mail at least 60 days before the expiry of his current contract.[151] For example, in a case before the DRC of 27 April 2006, the Chamber was quite clear with regard to its interpretation of Article 6 para 3 of Annex 4 of the RSTP.[152] The Chamber explicitly decided that the first sentence of the cited provision clearly stipulates that no training compensation must be paid to the player's former club if the said club did not offer the player a contract unless it can justify its entitlement to compensation. No reference to a new contract was made in the general introduction to the relevant provision. The DRC emphasized that it is the spirit and purpose of the provision to penalise clubs which are obviously not interested in the player's services as a professional, no matter if the club would have to offer the player an employment contract for the first time or a renewal due to the expiry of an already existing contract. The Chamber finally decided that the requirements of Article 6 para 3 of the RSTP, are applicable, also in cases like the one at hand, in which the player was registered as an amateur player with his former club.[153]

It is a common argument (but also a misunderstanding) that Article 6 para 3 of Annex 4 of the RSTP does not apply if there was no existing current contract which would have obligated it to offer the player a new one. In a DRC decision of 8 June 2007, the DRC also had to decide on the entitlement of training compensation and decided in line with the abovementioned case of 27 April 2006.[154] In this case the club stated that the mentioned provision did not apply in this case, since there was no existing current contract which would have obligated it to offer the player a new one. The club was of the opinion that Article 6 para 3 of Annex 4 of the RSTP applies only to the renewal of a contract. In this case the DRC referred to a decision of CAS 2006/A/1152 taken by the CAS on 7 February 2007. According to the DRC,

[150]A club will not forfeit its entitlement to claim training compensation and is not obliged to make a contract offer due to its sanctioning with demotion for its financial situation. See DRC 20 August 2014, no. 0814388.

[151]FIFA Commentary, Annex 4, explanation Article 6 para 3, p. 125.

[152]DRC 27 April 2006, no. 461185.

[153]As said earlier and to avoid any misunderstanding, it is only an obligation for the former club to offer a contract and thus not for claiming clubs where the player had played before.

[154]DRC 8 June 2007, no. 6754.

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in this case the CAS confirmed the existing jurisprudence of the DRC as far as the applicability of Article 6 para 3 of Annex 4 of the RSTP was concerned. The CAS corroborated that the first sentence of Article 6 para 3 of Annex 4 of the RSTP covers both amateur and professional players. According to the DRC's jurisprudence and as confirmed by the CAS Panel in its relevant award, the second and third sentence of the provision in question, however, only apply "*to situations when a professional contract is already in existence, setting out certain requirements which the training club must meet in order to retain a right to compensation if a player moves to another club*". If the former club does not offer the player a contract, it can still be entitled to receive training compensation, if the former club can justify that it is entitled to such compensation. However, according to the Chamber, this justification may be very difficult to prove and limited to extraordinary circumstances.[155]

In a case of the DRC of 16 April 2009, the Chamber also had to decide whether the club had complied with the prerequisites of Article 6 para 3 of Annex 4 of the RSTP in order to be entitled to training compensation.[156] In this case the DRC committee also had to decide whether or not Article 6 para 3 sentence 1 of Annex 4 of the RSTP was applicable to both amateur and professional players. In this decision the DRC again confirmed that in accordance with its well-established jurisprudence, which was previously confirmed by the CAS, Article 6 para 3 sentence 1 of Annex 4 of the RSTP is applicable to both amateur and professional players. In this case, the DRC refers (in a concrete way by making reference to the number of the case) to its DRC decision of 27 April 2006, no. 461185, consideration no. II./10 et sq. and CAS 2006/A/1152 Av/N FC, consideration nos. 8.6, 8.8 and 8.9 et seq.). In line with its prior jurisprudence, the DRC is clear as it confirms again that a training club has to offer a contract to a player in order to maintain its right for training compensation, notwithstanding the fact whether or not the player is registered as an amateur or a professional for the respective club. In the second sentence of the aforementioned article, it states that the former club must offer the player a contract in writing via registered post at least 60 days before the expiry of his current contract[157] and in the third sentence it mentions that the required offer

[155]This also follows from the FIFA Commentary, Annex 4, explanation Article 6 para 3, p. 125.

[156]DRC 16 April 2009, no. 49444.

[157]In a DRC decision of 30 November 2007, no. 117221, the DRC deemed it appropriate to clarify that the written offer made via registered mail is not the only possible evidence for a club to document the relevant offer and thus its entitlement to training compensation. If the club is in a position to prove by other means that an offer of at least equivalent value to the current contract was actually made to the player in due time, this must be accepted and cannot just be dismissed by the fact that it was not a registered letter. In another DRC decision of 18 June 2009, no. 69816, the DRC emphasized that—in exceptional circumstances like the present case—the written offer made via registered mail is not the only option for clubs to make an offer in accordance with Article 6 para 3 of Annex 4 of the RSTP. If the training club can prove unambiguously by other means that an offer equivalent to the current contract was made to the player in due time, the training club's arguments cannot be dismissed on the grounds of said article.

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of the club shall furthermore be at least of an equivalent value to the current contract. The DRC also explicitly decided that the obligation to offer a professional contract to one of its players, does not apply to *purely amateur clubs*.[158] The DRC decided that amateur clubs per se are not in a position to offer professional contracts to their players. The obligation thus only applies to clubs with amateurs and professionals.[159]

In line with the above DRC decision of 8 June 2007, in its unpublished DRC case of 16 July 2009, between the Dutch amateur club Wilkracht Verkregen and the Belgian club Royal White Star Woluwe FC regarding a training compensation dispute in connection with the player Moustafa Boussoufa, the Chamber confirmed that if a contract is not offered by an amateur club to its amateur player, this club will then not forfeit its entitlement since the club is not able to offer a contract. Purely amateur clubs are not obliged to offer contracts to their players. Also, in the unpublished case of the DRC of 7 April 2011, the Chamber was of the opinion that the obligation for the former club to offer a player's contract does not exist if this former club only has "purely amateur status" according to the national association concerned and that, according to the internal regulations of that same national association, it is forbidden for the amateur club to offer any kind of contract to the player.

In its decision of 1 February 2012, the DRC clarified that according to its well-established jurisprudence, the first part of Article 6 para 3 sent. 1 of Annex 4 of the RSTP, i.e. the obligation of the former club to offer a contract to the player, does not apply to purely amateur clubs, which are not in a position per se to offer a contract to their players.[160] The DRC wished to emphasize in this respect that, contrary to purely amateur clubs, the aforementioned principle does apply to clubs which have both amateur and professional players. The Chamber recalled that Football Association X had confirmed that the claimant was a purely amateur club and concluded that the claimant was thus not in the position to offer professional contracts to its players. Therefore, the DRC decided that the club was liable to pay training compensation to the claimant. *A contrario*, one can conclude that in the event it does *not* concern a *purely* amateur club, the amateur club is obliged to offer a contract pursuant to Article 6 para 3 sentence 1 of Annex 4 of the RSTP.

In a few cases before the CAS, for example in 2005 between FC Girondins de Bordeaux and Lyngby Boldklub & Lundtofte Boldklub[161] and in 2006 between

[158]Nowadays we note that more and more amateur clubs do conclude contracts with their players. A purely amateur club is not in the position to offer a contract to its player.

[159]DRC 8 June 2007, no. 6754.

[160]DRC 1 February 2012, no. 2122003.

[161]CAS 2005/A/838 *FC Girondins de Bordeaux v. Lyngby Boldklub & Lundtofte Boldklub*, award of 8 August 2005.

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Aston Villa and Copenhagen,[162] the CAS decided that the obligation to offer a contract to a player will only exist if the player is already under contract. In these cases it was decided that only a club which already had a contract with a player is obliged to offer a new contract if it intends to secure its entitlement to training compensation.

In light of the aforegoing, it must be noted that the former FIFA rules of 2001, the FIFA Regulations governing the Application of the Regulations for the Status and Transfer of Players, the "*Application Regulations*", were applicable to the cases at hand. Article 5 para 5 of the Application Regulations stated:

> In the EU/EEA, if the training club does not offer the player a contract, this shall be taken into account in determining the training compensation payable by the new club, without prejudice to the right to compensation of the previous clubs.

FIFA Circular no. 769 further added:

> Furthermore, within the EU/EEA, in case a player younger than 23 years does not receive a contract from the club where he has trained, and this player moves to another non-amateur club, this factor must be taken into account when deciding whether any training compensation shall be due, and what the amount of this compensation should be. As a matter of principle, the player's training club will not be entitled to receive training compensation unless this training club can demonstrate to the DRC that it is entitled to training compensation in derogation of this.

The CAS decided in its case of 2005 between FC Girondins de Bordeaux and Lyngby Boldklub & Lundtofte Boldklub that the wording of Article 5 para 5 of the Application Regulations did not address the question, whether this provision also applied to transfers of amateur players who sign their first non-amateur contract with a new club. In its case of 2006 between Aston Villa and Copenhagen, the CAS emphasized that the FIFA rules were ambiguous on whether Article 5 para 5 of the Application Regulations also applies to transfers of amateur players who signed their first non-amateur contract with a new club. In both cases the CAS was clear: the obligation to offer a contract only exists for a player that is already under contract.

In the abovementioned case before the CAS in 2006 between Aston Villa and Copenhagen, the CAS also referred to another important case before the CAS, the case of 7 February 2007 between ADO Den Haag and Newcastle United.[163] This latter case dealt with a more recent version of the similar principle contained in Article 6 para 3 of Annex 4 of the RSTP, 2005 edition. In that matter, the CAS considered that, under the RSTP 2005, if the training club does not offer a professional contract to its amateur players and the amateur player signs his first professional contract with another club, the training club is not entitled to training compensation, unless the former club can justify that it is entitled to such compensation. CAS decided that the first sentence of Article 6 para 3 of Annex 4 of the RSTP, 2005

[162]CAS 2006/A/1177 *Aston Villa FC and B.93 Copenhagen*, award of 28 May 2007. See also CAS 2004/A/785 *T. v. L.*, award of 30 August 2005, to which case the DRC referred in its decision of 12 March 2009, no. 39328.

[163]CAS 2006/A/1152 *ADO Den Haag and Newcastle United FC*, award of 7 February 2007.

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edition, did cover both amateur and professional players. The CAS further stated that if FIFA had wished to limit the application of the first sentence of the mentioned article to professional players it should have explicitly provided so.

In a case before the CAS in 2008, between Admira Wacker Modling and A.C. Pistoiese,[164] the CAS also referred to the CAS case of 7 February 2007 between ADO Den Haag and Newcastle United. In this case the Austrian football club Admira Wacker Modling claimed training compensation from the Italian club A.C. Pistoiese. The CAS noted that the language itself of Article 6 para 3 RSTP, makes clear that the first sentence covers both players with and players without a contract (i.e. both professionals and amateurs), whereas the second and third sentences cover only players who are already under contract, i.e. professional players. From this case we note that the CAS follows the line as stated in the *ADO Den Haag* case, the case of 2007 between ADO and Newcastle United.[165]

In view of all the above, there can be no doubt about the view of the DRC with regard to this subject: Article 6 para 3 of Annex 4 of the RSTP applies to both professional and amateur players. It can therefore be concluded that if a similar case is brought before the DRC, the committee will adjudicate in line with its consistent jurisprudence. If the case is brought before the CAS, we have seen that there was uncertainty and differing outcomes. However, despite the fact that CAS was not as consistent as the DRC on the interpretation of the said Article, in future the CAS will most likely decide that contracts must also be offered to amateurs as well as professionals, since the CAS not only decided in the above case between Admira Wacker Modling and Pistoiese of 2008 (CAS 2008/A/1521), but also in the above case in 2007 between ADO Den Haag and Newcastle United (2006/A/1152), that the first sentence of Article 6 para 3 of Annex 4 of the RSTP, 2005 edition, covers both amateur and professionals. Since the 2016 edition has not been amended at this point, this will most likely be decided in future.[166]

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[164]CAS 2008/A/1521 *VfB Admira Wacker Modling v. A.C. Pistoiese S.p.A.*, award of 12 December 2008.

[165]CAS 2006/A/1152 *ADO Den Haag and Newcastle United FC*, award of 7 February 2007. It is also interesting to emphasize the fact that according to the CAS it is far from being evident and certain that the exercising of an option of unilateral renewal of a contract could be seen as an offer in writing. In its case of 30 July 2009, the CAS decided that even if the exercising of an option of unilateral renewal of a contract could be seen as an offer in writing, the club would have had to deliver the statement of unilateral renewal to the player via registered mail at least 60 days before the expiry of the current contract. This was not done in the specific matter at hand; See CAS 2008/A/1533, award of 30 July 2009. See also CAS 2014/A/3486 *MFK Dubnica v. FC Parma*, award of 2 February 2015.

[166]Despite the fact that it is not absolutely sure what the CAS would decide, also due to the "Stare Decisis-principle", it would be highly recommended that claiming training clubs do not take any risk on this point. In order to secure their rights for training compensation in future and in order to avoid any misunderstanding in this respect, these clubs should, insofar as they are financially able to do so, offer contracts to their high level amateur players whose stars they expect to rise in future. In that respect, small contracts can be offered since there are no prerequisites laid down in the RSTP, 2016 edition, regarding any minimum salary amounts.

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In view of the above, one can refer to the jurisprudence's definition of "Professional"; A professional has a written employment contract with his club and is paid more than the expenses he effectively incurs in return for his footballing activity. In conclusion and with reference to the above DRC decision of 8 June 2007, 'purely amateur clubs' will face no problems with regard to this issue, due to the fact they are not obliged to offer their players professional contracts to validly claim training compensation and since the DRC in the mentioned case that purely amateur clubs are not in a position per se to offer contracts to their players.

#### 11.7.1.2.4 Prerequisites of Article 6 Para 3 Annex 4

##### *11.7.1.2.4.1 "60-Day Obligation" and "Equivalent Value"*

Now that the interpretation of the DRC and the CAS regarding the first sentence of Article 6 para 3 is clear (in order to maintain its right for training compensation, the contract offer by the club must be made to its amateur and to professional players), we can further analyse the said provision and its additional prerequisites in this respect. In the second sentence of Article 6 para 3 of the RSTP, 2016 edition, it is stated that "*the former club must offer the player a contract in writing* via *registered post at least 60 days before the expiry of his current contract*". In the third sentence of Article 6 para 3 of the RSTP, 2016 edition it states that "*Such an offer shall furthermore be at least of an equivalent value to the current contract*".

The jurisprudence notes that it is sufficient to prove that an equivalent offer has been made in order to fulfil this requirement. In the DRC case of 10 August 2007, the DRC stressed that the FIFA RSTP does not oblige a training club to offer the player better contractual conditions than those possibly put forward by another club.[167] This means that the club cannot offer lesser conditions, which also explicitly follows from a DRC decision of 12 March 2015. In the latter case, the club concerned forfeited its right to claim for training compensation since the employment contract offer could not be considered as having a better value than the previous agreement.

In the above DRC case of 8 June 2007, the Chamber referred to the CAS case between ADO Den Haag and Newcastle United (2006/A/1152). In this case the CAS not only confirmed the existing jurisprudence of the DRC as far as the applicability of the first sentence of Article 6 para 3 of Annex 4 of the RSTP covers both amateur and professional players, but it also decided that the second and third sentence of the provision in question, however, only apply "*to situations when a professional contract is already in existence, setting out certain requirements which the training club must meet in order to retain a right to compensation if a player moves to another club*". This is also quite logical because these sentences

[167]DRC 10 August 2007, no. 87277.

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do not make any sense and can obviously not apply to amateur players, due to the "*60-day obligation*" and "*equivalent value*" requirements as mentioned in the second and third sentence. They can only refer to a contract that already exists. The words "….e*quivalent to the current contract*" in the second sentence as well as the words "…..*60 days before the expiry of his current contract*" in the third sentence of the said provision explicitly refer to situations and are thus requirements with regard to players that are already under contract with a club, the so-called "professionals".

#### *11.7.1.2.4.2 Registered Mail*

Aside from the abovementioned obligations with regard to the "60 days" and the "equivalent value" requirements, another obligation exists with regard to Article 6 para 3 of the RSTP, 2016 edition. According to the second sentence of the said Article, which is only applicable to professional players and not to amateurs, the contract offer must be made in writing via "registered post". However, does this mean that if a club meets the "60 days" and the "equivalent value" requirements, but did not make the contract offer in writing via registered post to the player who is already under contract, the club automatically forfeits its entitlement to receive training compensation? In a strictly legal sense the answer is 'yes' since the (3) formal conditions to maintain a right for training compensation, following the first sentence of the said provision, are then not met. The question can also be posed whether this is also a prerequisite for clubs towards their amateurs in order to receive and maintain their right for training compensation in future. The first sentence, which is applicable to amateur players, does not clarify things on to how the contract offer must be made. Therefore, in this paragraph the relevant jurisprudence of the DRC and the CAS will be discussed.

The DRC jurisprudence shows that the written offer made via registered mail is not the only possible evidence for a club to document the relevant offer and thus its entitlement to training compensation. In the case before the DRC of 30 November 2007, the DRC had to decide on the situation in which a contract offer was not made via registered post by a club to one of their professionals.[168] The DRC emphasized that the implemented conditions, integrated as from RSTP, 2005 edition, are not formal requirements *stricto sensu*, but a requirement to evidence the fact of having made such offer to a particular player. According to the DRC, this eases the burden of proof-laying on training clubs. The Chamber deemed it appropriate to clarify that the written offer made via registered mail is not the only possible evidence for a club to document the relevant offer and thus its entitlement to training compensation. If the club is in a position to prove by other means that an offer of at least equivalent value to the current contract was actually made to the player in due time, this must be accepted and cannot just be dismissed by the fact it was not a registered letter. However, in this case the claiming club could not demonstrate this.

[168]DRC 30 November 2007, no. 117221.

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In another DRC decision of 18 June 2009, the DRC also had to decide on the question whether the club forfeited its right to training compensation due to the fact that the said club did not offer a professional a contract in writing via registered mail.[169] The DRC emphasized that—in the exceptional circumstances like the present case—the written offer made via registered mail is not the only option for clubs to make an offer in accordance with Article 6 para 3 of Annex 4 of the RSTP. The DRC emphasized in this case that if the training club can prove unambiguously by other means that an offer equivalent to the current contract of the player concerned was made to the player in due time, the training club's arguments cannot be dismissed on the grounds of said provision. Also in this case the claiming club had not been able to demonstrate this, since the club had only been able to declare that it had handed over in person a written offer for a new contract to the player.

Based on the above cases in which contracts were not offered via registered post to professionals, we can conclude that if a club did make the offer in accordance with the prerequisites of Article 6 para 3 of Annex 4 of the RSTP, it can still be entitled to receive training compensation if the club can prove and demonstrate by other means that an offer of at least an equivalent value to the current contract was actually made to the player in due time instead of the obligation to offer it via registered post. According to the DRC in the above cases, this must be accepted and cannot just be dismissed by the fact it was not a registered letter. However, a contract which is not offered per registered post by a club to a player, still needs to be of an equivalent value to the current contract and further, needs to be in due time.

Notwithstanding the above, only under very exceptional circumstances can a club demonstrate by other means that an offer of at least an equivalent value to the current contract was made to the player in due time. For example, in its case of 10 August 2011, the DRC also had to analyse whether the claimant in this procedure had complied with the prerequisites of Article 6 para 3 of Annex 4 of the RSTP.[170] The DRC noted equally that the claimant indicated that it was unable to find a copy of the written contract offer in its archives and that, therefore, it had submitted a written statement from the player in which he confirmed that he "had received from the club, before the last 60 days of the contract that binds him to the club and which ends on 30 June 2010, in writing and via registered post, a proposal for a new contract with a higher value than the contract mentioned". However, this was not established to the satisfaction of the DRC. The DRC found it hard to believe that there was not a single other piece of evidence available confirming that the said offers were indeed sent by registered post. Due to the specific circumstances of the case, the said statement lacked credibility. Since the claimant in this matter had not complied with the prerequisites of the said provision, the

[169]DRC 18 June 2009, no. 69816.

[170]DRC 10 August 2011, no. 8112849.

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respondent party was not liable to pay an amount of training compensation. The question whether the contract offer has not been done to an amateur player or a professional will be of relevance in respect of the circumstances of this case. In this case the player was already a professional as a result of which the prerequisites of Article 6 para 3 Annex 4 of the RSTP are even more decisive.

In line with the decision above, it can be concluded that if the player is an amateur and a dispute arises on the question whether the prerequisites of Article 6 para 3 of Annex 4 of the RSTP have been met, following a similar case, a club can be entitled to receive training compensation. A player, born on 27 July 1992, was registered with club B, the claimant, as from 13 August 2008 until 30 June 2009 as an amateur.[171] The Football Federation W also submitted a copy of the Player Passport of the player which indicated that the player was registered with "*Academy-Junior club*", from August 2004 until June 2008. The player was registered with its affiliated club S, the respondent, on 29 January 2010, as an amateur and as of 5 August 2010 as a professional. On 27 January 2011, the claimant lodged a claim before FIFA claiming the payment of training compensation from the respondent, asserting that on 5 August 2010, the player had signed his first professional contract with the respondent. Although the claimant club had offered the player a contract in order to maintain its right for training compensation, the claimant acknowledged that the contact was not made in writing. The respondent rejected the claim since the claimant did not meet all the prerequisites of Article 6 para 3 of Annex 4 of the RSTP. The respondent also submitted a declaration from the player and his father that there was an offer, but that the offer was not in writing. The claimant stated that the player did not have a contract with them as a result of which the second and third sentence of Article 6 para 3 of Annex 4 of the RSTP was not applicable. The DRC Judge pointed out that it had to examine whether the claimant had complied with the prerequisite of Article 6 para 3 of Annex 4 of the RSTP. The DRC Judge noted that the witness statement by the player and the player's father, which were submitted by the respondent itself, further confirmed that the claimant had offered the player a contract, albeit orally. The DRC Judge emphasized that the requirement that a contract offer shall be made "in writing via registered post", as stipulated in the second sentence of Article 6 para 3 of Annex 4 of the RSTP, was established with the aim of facilitating the burden of proof of a club to demonstrate that it had, indeed, made a contract offer to a player and that it was therefore entitled to training compensation. *E contrario*, the DRC Judge concluded that a club, which does not meet said prerequisite, is not automatically prevented from receiving training compensation, insofar as it can demonstrate beyond doubt that an offer was indeed made to the player. The DRC Judge found that it was evident that the claimant, in the specific matter at hand, was not in a position to offer the player a contract at least 60 days before the expiry of his current contract, since no such "current contract" existed. The player had at all times been registered as an amateur player. In view of all the

[171]DRC 24 October 2011, no. 1011322.

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aforementioned, taking into consideration all the surrounding circumstances of this specific matter, as well as the documentation presented during the present proceedings, particularly the witness statements from the player and his father, which were provided by the respondent, and taking into consideration that the respondent had explicitly recognized that the player had been offered a contract by the claimant, the DRC Judge concluded that it was proven that the claimant had complied with Article 6 para 3 of Annex 4 of the RSTP. The DRC Judge finally decided that the claimant was entitled to receive training compensation. In this case it was decisive (and thus different from the aforementioned case of DRC 10 August 2011, 8112849) in order to establish that training compensation was due, that the player was an amateur player, and that it was submitted by the respondent club and not the claimant club (such as was the case in DRC 10 August 2011, 8112849).

In the case between Udinese and Helsingborgs before the CAS of 25 July 2012, Helsingborgs claimed training compensation for their former professional player, Landgren, from Udinese.[172] In this case Article 6 para 3 of Annex 4 of the RSTP was applicable to the matter at hand. The CAS referred to the fact that the contract or the offer had to be made in writing by the training club to the player. In the CAS case 2008/A/1521, the Panel mentioned that there was no definition in the FIFA Regulations of the meaning "*in writing*". According to Swiss Law, a contract—or an offer—is deemed to be made "in writing", when it is signed with the original signature of the party or the parties that are contractually bound by the document. The Panel noted that no offer in writing was made by the respondent, as there was no document in the file which the respondent signed. The first of the cumulative conditions of Article 6 para 3 of Annex 4 of the RSTP had not been met. The CAS decided that having failed to comply with at least one of the formal requirements of said article, the respondent, Udinese, should in principle not be entitled to training compensation. However, due to the "*exception to the exception*" Udinese was entitled to receive training compensation, which will further be discussed in the following paragraphs.

With regard to the second question, whether or not the contract offer *per registered post* is also a prerequisite for clubs towards their amateur players in order to receive and maintain their right for training compensation in future, neither the DRC nor the CAS are clear. Since the first sentence of Article 6 para 3 of Annex 4 of the RSTP, which is applicable to amateur players, does not clarify things on how the contract offer must be made and thus does not require that it is made via registered post, we may conclude that a club is not obliged to offer a contract via registered post to one of its amateurs in order to maintain its right for training compensation, although it is strongly advisable to do so in light of the burden of proof and matters of evidence and since it is also not absolutely sure that the DRC or the CAS conclude accordingly in future. To avoid any misunderstanding and unnecessary risks in this respect, it would be advisable not to send the offer by

[172]CAS 2011/A/2682 *Udinese Calcio S.p.A. v. Helsingborgs IF*, award of 25 July 2012.

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email. A registered letter eases the burden of proof which it lays on the training club since the evidence of the existence of a contract offer could be difficult to bring otherwise.[173]

In its DRC decision of 23 January 2013, the Chamber noted that, according to the wording of Article 6 para 3 of Annex 4 of the RSTP, the former club must offer the player a contract in writing via registered post at least 60 days before the expiry of his current contract and that such an offer shall be at least of an equivalent value to the current contract.[174] The Chamber then noted that the claimant argued that it offered a contract extension to the player via the player's agent via email, which would allegedly have been of greater value than the current contract of the player, nine months before the expiry of the player's latest employment contract. The Chamber was eager to recall that the validity of the emails sent to the agent was not disputed by the respondent. The Chamber remarked that the first email of the claimant containing an offer of a contract, sent to the player, was dated 27 October 2010. In other words, such offer was made more than 60 days before the expiry of the player's former contract (which was valid until the 2010/2011 season, i.e. 30 June 2011). The Chamber concluded that 3 of the conditions, as stipulated in Article 6 para 3 of Annex 4 of the RSTP, i.e. that there had to be an offer of a contract, that such a contract offer had to be made at least 60 days before the expiry of the previous contract and that the respective offer had to be at least of an equivalent value as the current contract of the player, were fulfilled. The Chamber turned its attention to the main argument of the respondent, that the claimant's contract offer to the player was not made via registered post as stipulated in Article 6 para 3 of Annex 4 of the RSTP. The Chamber deemed it to be undisputed between the parties that this formal prerequisite, was not fulfilled per se, since the aforementioned contract offers were transmitted by means of email correspondence. The Chamber went on to establish the legal consequences of the fact that there was a contract offer which was made more than 60 days before the expiry of the player's current contract and which was of greater value than the current contract, but which did not meet the formal prerequisites of Article 6 para 3 of Annex 4 of the RSTP, since it was not made via registered mail. The Chamber considered that a strict adherence to the wording of said article may, at first glance, indicate that a club shall not be entitled to training compensation if it does not strictly fulfil the stipulated formal requirements. However, the Chamber was of the opinion that it is rather the *ratio legis* of the formal prerequisite which provides for a comprehensive answer to the question at hand. The Chamber considered that the requirement that a contract offer shall be made "*in writing* via *registered post*" was established with the aim of facilitating the proof of a club to demonstrate that it had, indeed, made a contract offer to a player and that it was, therefore, entitled to

[173]In an unpublished case of 8 August 2011, the PSC decided that information contained in emails are generally not considered as legally binding.

[174]DRC 23 January 2013, no. 01132516.

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training compensation. *E contrario*, the Chamber concluded that a club, which does not meet said prerequisite, is not automatically prevented from claiming training compensation. The Chamber equally based this appreciation on the first sentence of Article 6 para 3 of Annex 4 of the RSTP which provides for the possibility that a club, even if it does not offer a contract to a player, is generally granted the possibility to "*justify that it is entitled to [training compensation]*". The Chamber decided that the fact that the claimant did not offer a contract in writing and via registered mail did not exclude the claimant per se from claiming training compensation. The Chamber was, however, eager to highlight that the claimant, therefore, had to justify that it was entitled to such compensation. The Chamber went on to examine whether the claimant had provided sufficient proof as regards the latter's justification to claim training compensation. The Chamber considered that such justification can, in general, be manifested by a club by displaying a bona fide interest in keeping the player in question in its team and by showing a proactive attitude *vis-à-vis* the respective player, so as to clearly manifest that the club intends to count on the player in the future. To establish whether the claimant had demonstrated such an interest and attitude, the Chamber carefully studied the documentation on file. First of all, it turned its attention to the extensive exchange of email on file. The Chamber was convinced that the claimant had in fact displayed a bona fide and genuine interest in keeping the player, by making, in the course of evident contractual negotiations, several offers with constantly increasing financial conditions. The Chamber decided that the claimant could justify its entitlement to training compensation, in accordance with the first sentence of Article 6 para 3 of Annex 4 of the RSTP. Therefore, the Chamber concluded that the claimant was entitled to training compensation, based on the international transfer of the player from the claimant to the respondent.

The above case of 23 January 2013 is very interesting. From previous DRC cases it can be derived that the DRC is strict with regard to the requirements as laid down in Article 6 para 3 of Annex 4 of the RSTP (see DRC 24 November 2011, no. 1011322, DRC 10 August 2011, no. 8112849). In this case the Chamber concluded that three of the conditions, as stipulated in Article 6 para 3 of Annex 4 of the RSTP, i.e. that there had to be an offer of a contract, that such a contract offer had to be made at least 60 days before the expiry of the previous contract and that the respective offer had to be at least of an equivalent value as the current contract of the player, were fulfilled. However, the claimant's contract offer to the player was not made via registered post as stipulated in Article 6 para 3 of Annex 4 of the RSTP. The DRC decided that the claimant was entitled to receive training compensation due to several reasons. For example, the DRC was of the opinion that the statements made in the email which was sent by the claimant to the agent constituted typical contract negotiations of a club and a player, with the former being interested in concluding a new employment contract and the latter seeking to achieve the most favourable financial conditions possible. The DRC also took note of the fact that, between 9 October 2010 and 15 December 2010, the claimant transmitted numerous contract offers and contract proposals to the player's agent, each time with augmented salary and possible bonus payments for the player.

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In particular, the DRC noted that in an email to the player's agent on 9 November 2010, the claimant offered a bonus payment of EUR 20,000 to the player, should he participate in at least 20 league matches in the country F Ligue 1, payable on 30 September of the following season. The Chamber also took note that the player's agent, by means of an email dated 17 January 2012, acknowledged that he had taken note of the club's offers, stating that he and the player "have agreed on a certain number of points and stipulations", and that "there are still some details to be dealt with in order to find agreement". Furthermore, the Chamber referred to an email exchange between the claimant and the player's agent, dated 12 and 13 December 2010, in which the claimant and the player's agent agreed upon a meeting in the player's agent's office in country F to continue the contractual negotiations. In other words, there was enough evidence in this case, among other things due to the fact that the agent confirmed the contract offer per email as a result of which the claimant had been able to demonstrate that it was entitled to receive training compensation.

In its case of 27 February 2013, the Chamber concluded that the claimant failed to provide sufficient documentary evidence regarding the alleged contract offer.[175] The Chamber particularly emphasized that, from the undated "receipt of letter notice" as provided by the claimant as evidence, it could not be established what the contents was of said letter to the player's agent, when it had been sent and whether the player's agent was indeed the agent of the player. Equally, the Chamber noted that the claimant had neither presented a copy of the relevant employment contract nor a copy of the contract offer allegedly made. Therefore, the Chamber concluded that it could not be established that the claimant actually offered a contract to the player in accordance with the prerequisites as stipulated in Article 6 para 3 of Annex 4 of the RSTP. In view of the aforegoing, the DRC therefore decided that the claimant was not entitled to receive an amount of training compensation from the respondent.[176]

#### 11.7.1.2.5 Justification

##### *11.7.1.2.5.1 General*

It needs to be emphasized that Article 6 para 3 of Annex 4 of the RSTP still provides claimant training clubs with a possibility to secure their rights for training compensation even if the club did not offer one of its players a contract in

[175]DRC 27 February 2013, no. 02132668.

[176]See also CAS 2010/A/2316 *Stoke City FC v. Brescia Calcio S.p.A.*, award of 6 December 2011. In this case it was decided by the CAS that a registered letter was not a strict prerequisite (however, the 60-day condition was a prerequisite). See also CAS 2014/A/3486 *MFK Dubnica v. FC Parma*, award of 2 February 2015.

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conformity with the said provision. As we have seen before, this will be the case if the former club can justify that it is entitled to such compensation. This means that even if a club did not offer a contract, or did not meet with one of the requirements of the said provision, it can still prove it is entitled to receive training compensation. In the aforementioned case of the DRC of 18 June 2009, the chamber explicitly stated that the club not only did not prove that an offer had been made by other means, but it also did not try to justify that it would be entitled to receive training compensation.

'The justification' may be very difficult to prove and limited to extraordinary circumstances, as follows from the jurisprudence of the DRC (and the CAS) and as also laid down in the FIFA Commentary. In the abovementioned case of the DRC of 18 June 2009, the Chamber also recalled that, according to its well-established jurisprudence, this justification is indeed limited to very exceptional circumstances. For example, following the FIFA Commentary, if a club descends to a lower division in which it is not entitled to register players as professionals, this club will not be in a position to offer an employment contract to young players.[177] As a consequence of this "*exception to the exception*", this club will, under these circumstances, not forfeit its right to training compensation from the player's new club.

#### *11.7.1.2.5.2 DRC Jurisprudence*

##### *11.7.1.2.5.2.1 Decisions Between 2004 and 2010*

The jurisprudence of FIFA shows that the player's training club will not be entitled to receive training compensation unless the training club can demonstrate to the DRC that it was entitled to compensation. In a DRC decision of 11 November 2004, a Norwegian club was of the opinion that it did not owe any training compensation to a Swedish club as the player was allegedly not offered any new contract by the Swedish club, either verbally or in writing, before expiry of his contract.[178] With regard to the Swedish club's claim, the DRC referred to the principle for transfers which take place within the EU/EEA, the fact that the training club does not offer a player a contract will be taken into account when determining the training compensation payable by the new club. The DRC took into consideration the contents of FIFA Circular no. 769 dated 24 August 2001, which, under point 2a, specified that the former club of a player younger than 23, whose contract has expired and who has not received a new contract from his club, which is equivalent in remuneration to his previous contract, will be deemed not to have offered a contract to the latter for purposes of calculating training compensation. The FIFO Circular no. 769 further stated that, as a matter of principle, the

[177] As mentioned previously, a club will also not forfeit its entitlement to claim training compensation and is not obliged to make a contract offer due to it having been sanctioned with demotion for its financial situation. See DRC 20 August 2014, no. 0814388.

[178] DRC 9 November 2004, no. 114549.

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player's training club will not be entitled to receive training compensation unless the training club can demonstrate to the DRC that it was entitled to compensation. The DRC decided that despite its claim for training compensation, the Swedish club had not offered any documentary evidence that would prove an offer to the player, which needed to correspond with the remuneration of his previous contract with the club. Therefore, the claim of the Swedish club could thus not be accepted, according to the Chamber.

The DRC is of the opinion that Article 6 para 3 of Annex 4 of the RSTP is also applicable if the player is an amateur. In order to maintain its right for training compensation, the club must show enough interest in the player's services as a professional. In a DRC decision of 27 April 2006, the DRC was of the opinion that it could not back the claimant's argument that Article 6 para 3 of Annex 4 of the RSTP, 2005 edition, was exclusively applicable if the player was already a professional.[179] In fact, according to the DRC, the first sentence of the cited provision clearly stipulated that no training compensation must be paid to the player's former club if the said club does not offer the player a contract, unless the former club can justify its entitlement to such compensation. No reference to a new contract was thus made in this general introduction to the relevant provision. The DRC emphasized and concluded that it is the spirit and purpose of the said provision to penalise clubs which are obviously not interested in the player's services as a professional, no matter whether the club would have to offer the player an employment contract for the first time or a renewal due to the normal expiry of an already existing contract. The former club that was of the opinion that it was entitled to receive training compensation had to make a suitable offer to the player in a written form prior to the beginning of the summer holidays. The DRC finally concluded that the real reason why the player did not sign an employment contract with his training club, but with the other club, must be seen in the fact that the club did not show enough interest in the player's services as a professional player. With such behaviour, according to the Chamber, the claimant party forfeited its entitlement to claim compensation.

In line with the above, the jurisprudence demonstrates that a club must show a bona fide and genuine interest in retaining a player for the future in order to maintain its right for training compensation. In a case before the Chamber of 27 April 2007, the DRC took note that the club contested the fact that it did not offer the player an employment contract. According to Article 6 para 3 of Annex 4 RSTP, within the territory of the EU/EEA, if the former club does not offer the player a contract, no training compensation is payable unless the former club can justify that it is entitled to such compensation. The former club must offer the player a contract in writing via registered mail at least 60 days before expiry of his current contract. In view of this construction, the DRC referred to a decision of the CAS. In this decision of the CAS the Panel concluded that if a training club does not offer a professional contract to one of its amateur players and the player signs his

[179]DRC 27 April 2006, no. 461185.

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first professional contract with another club, the training club is not entitled to training compensation "… *unless the Former Club can justify that it is entitled to such compensation*" (last part of the first sentence of Article 6 para 3 of Annex 4 RSTP). This, according to the Panel, must be considered as an "*exception to the exception*". In view thereof, the Panel of the CAS had to analyse what would be considered as a justification for entitlement to receive training compensation in such a case. In this respect, the Panel concluded that the training club must either offer the concerned player a professional contract or, short of that, show a bona fide and genuine interest in retaining him for the future. The DRC took note that the club alleged that during March 2004, it offered the player a professional contract and that on 6 May 2004, the legal representative of the player refused to sign the offered professional contract. The club forwarded this letter to FIFA and therefore the DRC considered that the offer had been made to the player. Considering the interpretation of the CAS of Article 6 para 3 of Annex 4 RSTP, the DRC concluded that in the present case, a fortiori the training club showed its interest in retaining the player and offering him a professional contract. The DRC concluded that club was entitled to claim training compensation.[180]

What can a club do if the player does not want to play for the club anymore? Does the club still have to make him an offer in order to secure its entitlement for training compensation? In a DRC decision 28 September 2007, the DRC pointed out that the club did not claim to have offered the player a contract, but alleges to be able to justify that it was entitled to such compensation. The club pointed out that the only reason for the termination agreement to revoke the contract between it and the player, was the player's willingness to leave the club. It purports that it could not be penalized for the player's wish to leave the club and added that it would have had the obligation to offer the player a contract if it was its own will to let the player go. The DRC stressed that, irrespective of the question as to whether the argument put forward by the club to justify its alleged entitlement to training compensation must be considered as valid, the club had failed to present documentary evidence that the player left the club of his own will. The DRC concluded that the condition of offering the player a contract, which is set in the RSTP, was not fulfilled. Moreover, the DRC concurred that the club had failed to justify its entitlement to training compensation.[181] In other words, from this case it can be inferred that if a player wishes to leave the club, the club must demonstrate that it

[180]DRC 27 April 2007, no. 4732. See also DRC 12 January 2007, no. 17897. In this case the DRC considered that the obligation of a club having offered the player a contract when claiming training compensation is a requirement that only needs to be met within the EU/EEA. Since the training club is not located within the EU/EEA, the DRC concluded that the aforementioned provision does not apply in the case at hand.

[181]DRC 28 September 2007, no. 97349. In a DRC decision of 10 August 2007, the DRC stressed that the regulations do not oblige a training club to offer the player better contractual conditions than those possibly put forward by another club; DRC 10 August 2007, no. 87277.

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is the player's will to leave and the club must (still) justify that it is justified to receive training compensation.[182]

The DRC confirms in its decisions that Article 6 para 3 of Annex 4 of the RSTP is applicable to both amateur and professional players. In its case of 16 April 2009, the DRC also had to decide whether club F had complied with the prerequisites of Article 6 para 3 of Annex 4 RSTP in order to be entitled to training compensation.[183] More specifically, the DRC had to decide on whether or not the said Article was applicable to both amateur and professional players. In this decision the DRC confirms that the Article is applicable to both amateur and professional players. The Chamber in this case also referred (in a concrete way by making reference to the number of the case, which is quite rare) to the DRC decision of 27 April 2006, no. 461185, consideration no. II./10 et seq. and CAS 2006/A/1152 Av/N FC, consideration nos. 8.6, 8.8 and 8.9 et seq.).

#### *11.7.1.2.5.2.2 Decisions After 2010*

The bona fide and genuine interest can be demonstrated with the existence of a trainee contract. In its decision of 21 May 2010, the DRC had to decide whether or not the former club, claiming the training compensation, offered the player a contract in writing via registered mail at least 60 days before expiry of the aforementioned player's contract. This decision indicates the importance of the existence of a trainee contract since the DRC concluded in this specific matter, amongst others things, that due to the existence of a trainee contract the claimant showed bona fide and genuine interest in the player's services. The DRC committee decided that, in that way, the club justified its entitlement to receive any amount of training compensation.[184]

Even if a contract is not offered to an amateur player this does not automatically mean that a club can justify its entitlement to receive training compensation. In a case of 22 July 2010, the DRC noted that the claimant had not offered the player a contract to one of its amateur players. The DRC pointed out that the claimant asserted that it intended to keep the player in its youth academy for

[182]In a DRC decision of 28 September 2007, the Chamber had to decide on whether an official offer had been done by the club as a result of which training compensation was due. The DRC emphasized that in accordance with Article 6 para 3 of Annex 4 RSTP, if the former club does not offer the player a contract, no training compensation is payable unless the former club can justify that it is entitled to such compensation. The Chamber deemed that such provision, in general, applies to circumstances under which a club is in the position to offer a professional contract to a player. The DRC acknowledged that it is uncontested by both the clubs that no contract was offered to the player by the claimant prior to the expiry of the player's contract relating to the 2004/2005 season. Finally, the DRC pointed out once more that the club had, prior to the expiry of the relevant federal contract for the 2004/2005 season, not offered a further contract to the player although it had thus been in a position to do so. Therefore, no training compensation was due; See DRC 28 September 2007, no. 97782. See also DRC 8 June 2007, no. 6754.

[183]DRC 16 April 2009, no. 49444.

[184]DRC 21 May 2010, no. 510425.

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the following season and "*showed this by offering the player (in writing) a place in its youth academy*" and that the aforementioned was, in the claimant's point of view, fulfilling the prerequisites provided for in Article 6 para 3 of Annex 4 of the RSTP. The DRC concluded that, by failing to provide any evidence of having presented an offer to the player in writing to keep the latter in the youth academy, in combination with the fact that the claimant did not propose a written contract 60 days before the expiry of his current contract, whereas it acknowledged the actual possibility of such a proposal, the claimant was not entitled to receive any training compensation.[185]

It is of relevance whether or not the contract has not been made towards a professional or an amateur. In its decision of 15 June 2011, the DRC also had to decide on whether or not the claimant had complied with the prerequisites of Article 6 para 3 of Annex 4 of the RSTP in order to be entitled to training compensation.[186] In this case, the DRC recalled that the player was already contractually bound and registered as a professional with the claimant prior to his move to the respondent. The DRC emphasized that, in accordance with Article 6 para 3 of Annex 4 of the RSTP, if the former club does not offer the player a contract, no training compensation is payable unless the former club can justify that it is entitled to such compensation. The former club must offer the player a contract in writing via registered mail at least 60 days before expiry of his current contract. The DRC, and hereby underlining that the claimant had not offered a new contract to the player, who was already a professional player when registered with the claimant, decided that the aforementioned considerations could lead to no other conclusion than that the claimant had not complied with the prerequisites of Article 6 para 3 of Annex 4 of the RSTP. Furthermore, the DRC pointed out that the claimant had not made any efforts to justify that it would be entitled to training compensation in accordance with Article 6 para 3 of Annex 4 of the RSTP, which, according to the well-established jurisprudence of the DRC, is limited to very exceptional circumstances. The DRC reiterated that the only statement of the claimant with regard to Article 6 para 3 of Annex 4 of the RSTP was that, despite various alleged discussions on the prolongation of the player's contract, it was the player himself that had decided to leave the club on 30 June 2010. This did not suffice, as we had also seen in the above DRC decision of 28 September 2007.[187] In the event that a player wishes to leave the club, the club not only has to demonstrate that it is the player's will to leave, but the club must also justify and demonstrate that it is justified to receive an amount for training compensation.

[185]DRC 22 July 2010, no. 710567.

[186]DRC 15 June 2011, no. 6113041.

[187]DRC 28 September 2007, no. 97349. In a DRC decision of 10 August 2007, the DRC stressed that the regulations do not oblige a training club to offer the player better contractual conditions than those possibly put forward by another club; DRC 10 August 2007, no. 87277.

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A bona fide and genuine interest in keeping the player can be demonstrated if the DRC establishes the existence of evident contractual negotiations and offers with constantly increasing financial conditions. In the abovementioned case of 23 January 2013, the Chamber went on to examine whether the claimant had provided sufficient proof regarding the latter's justification to claim training compensation.[188] The Chamber considered that such justification, can be manifested by a club by displaying a bona fide interest in keeping the player in its team and by showing a proactive attitude *vis-à-vis* the respective player, so as to clearly manifest that the club intends to count on the player in future. In order to establish whether the claimant club had actually demonstrated such an interest and attitude, the Chamber carefully studied the documentation on file. First of all, it turned its attention on the extensive email exchange on file. The Chamber was convinced that the claimant had in fact displayed a bona fide and genuine interest in keeping the player, by making several offers in the course of evident contractual negotiations, with constantly increasing financial conditions. The Chamber decided that the claimant could justify its entitlement to training compensation, in accordance with the first sentence of Article 6 para 3 of Annex 4 of the RSTP. Therefore, the Chamber finally concluded that the claimant was entitled to training compensation.

What if a club only offered a contract to a player after having been informed of the intention of another club to offer a contract to the player? In a case before the DRC of 27 February 2014, the respondent club held that the claimant club only offered the contract to the player after having been informed of the intention of the respondent club to offer a contract to the player. Therefore, the respondent club was of the opinion that the claimant acted in bad faith since it was not genuinely interested in the player.[189] In this case the DRC had to answer the question whether a club should lose its entitlement to training compensation if this club, after being informed of the intention of another club to hire the player, offers a contract to the player in accordance with Article 6 para 3 of Annex 4 of the RSTP. With reference to Article 12 para 3 of the Procedural Rules, the Chamber emphasized that the respondent was of the opinion that the claimant club was not genuinely interested in the player when offering the contract, but failed to provide evidence in that respect. The DRC finally decided that the claimant club fulfilled all the requirements of Article 6 para 3 of Annex 4 of the RSTP and that, therefore, training compensation was due. In other words, from this case it follows that in the event the respondent club had been able to provide evidence that the claimant club was not genuinely interested in the player when offering the contract, a claim for training compensation can be rejected if a club only offered a contract to a player after having been informed of the intention of another club to offer a contract to the player.

[188]DRC 23 January 2013, no. 01132516.

[189]DRC 27 February 2014, no. 02141750.

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*11.7.1.2.5.3 CAS Jurisprudence*

The respondent club in the above DRC case of 27 February 2014 appealed against the decision before the CAS.[190] The CAS questioned whether the offer of the renewed contract was made in bad faith. Although the Panel was willing to accept that the claimant club was aware of the interest of the respondent club in acquiring the services of the player, and even if the Panel were to determine that the claimant club should have known that the respondent club had concluded an employment contract with the player, this in itself did not prevent the claimant club from exercising its right pursuant to Article 6 para 3 of Annex 4 of the RSTP to offer a renewed employment contract to the player 60 days before expiry of the current contract in order to preserve its entitlement to training compensation. However, the CAS stressed that this could be different if a training club's act or conduct would misrepresent its true intention vis-à-vis the player concerned and a third club in order to later claim in bad faith the training compensation. The CAS Panel stressed in this case that the "genuine interest requirement", which is derived from the CAS jurisprudence (reference was made to CAS 2006/A/1152), is only relevant when no contract is offered and therefore did not apply in the case at hand. It also follows from CAS case between Admira Wacker Modling and A.C. Pistoiese (2008/A/1521) that the principle of "*bona fides and genuine interest*", as developed in CAS 2006/A/1152 (ADO Den Haag and Newcastle United), was not applicable due to the fact that the player was already a professional at the time of the transfer.[191]

From the above DRC and CAS case we can infer that if 'bad faith' can be demonstrated, training compensation may not be due. In other words, a club must provide evidence that a claimant club was not genuinely interested in the player if a club only offered a contract to a player after having been informed of the intention of another club to offer a contract to the player. It can be assumed that a club to which a player has been transferred for only one day and with which he has never trained or played any exhibition or competitive matches can also not be considered as having reaped the benefit of the player's training. According to the CAS, it must be the club for which the player actually played following his transfer that reaped the benefit of the player's education and training.[192]

As mentioned earlier, in the CAS case between ADO Den Haag and Newcastle United FC (2006/A/1152), the CAS concretized the concept of the "justification" and defined under what circumstances training compensation could still be claimed. In this case, the CAS decided that the claimant training clubs must have taken a proactive attitude vis-à-vis the player so as to show clearly and without

[190]CAS 2014/A/3710 *Bologna FC 1909 S.p.A. v. FC Barcelona*, award of 22 April 2015.

[191]CAS 2008/A/1521 *VfB Admira Wacker Modling v. A.C. Pistoiese S.p.A.*, award of 12 December 2008.

[192]CAS 2012/A/2968 *Konyaspor Kulübü Dernegi v. Ituano Futebol Clube*, award of 23 July 2013.

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any doubts that the club still counted on him for future seasons. This is also confirmed by the DRC and in the previously mentioned CAS case in 2008, between Admira Wacker Modling and A.C. Pistoiese (2008/A/1521), in which the CAS Panel also referred to the *ADO Den Haag* case. In this case the Austrian football club Admira Wacker Modling claimed training compensation from the Italian club A.C. Pistoiese, whilst the Austrian football club did not offer a contract to the player who was under contract.

We can derive from the cases before the CAS that we should distinguish two situations. The situation in which a contract is not offered to a player who is already under contract, i.e. the professional, and the situation in which a contract is not offered to an amateur player. In the CAS case between Admira Wacker Modling and A.C. Pistoiese (2008/A/1521), the CAS decided that one cannot expect a club, particularly an amateur club, to focus on all its amateur players for whom training compensation might be paid by a third football club and consequently to make formal offers to all those players. In this respect, the CAS decided in this case that the standards are higher for professionals than for amateurs. According to the CAS, there is no reason that if a training club does not offer a new contract in writing to one of its professional players whose contract is expiring, and such player signs a new professional contract with another club, the training club should be entitled to training compensation. The CAS finally decided in this case that the principle of "*bona fide and genuine interest*" developed in CAS 2006/A/1152 (ADO Den Haag and Newcastle United) was not applicable due to the fact that the player was already a professional at the time of the transfer. In that respect, the CAS further decided in CAS 2006/A/1152 (ADO Den Haag and Newcastle United) that an obligation to offer contracts to amateurs, would also be too costly for the clubs. According to the CAS in the matter at hand, it would have contravened "*the spirit and purpose of the FIFA transfer rules, which are set out in order to grant to clubs the necessary financial and sportive incentives to invest in training and education of young players*".

In another case before the CAS between Budapest and Inter Milan of 30 July 2009,[193] the CAS also had to decide on a similar issue. In this case, the Hungarian club MTK Budapest had not offered a contract to an amateur player. The CAS Panel reiterated that a training club may be entitled to training compensation even if it has not offered the player a contract provided it "can justify that it is entitled to such compensation". The CAS emphasized, in line with the CAS case between Admira Wacker Modling and A.C. Pistoiese (2008/A/1521) that the standards in terms of formal requirements are higher in the case of professionals than they are for amateurs. Since in this case the player was an amateur and the training efforts of Budapest were not questioned by either side in this case (the player was selected to captain under 19 Hungarian team, was called up for the national team

[193]CAS 2009/A/1757 *MTK Budapest v. FC Internazionale Milano S.p.A.*, award of 30 July 2009.

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and had attracted the interest of Inter, one of the top clubs in Europe), the CAS emphasized it would be contrary to common sense to suppose that Budapest would not have been interested in keeping the player, had it been able to do so. Budapest had validly justified it was entitled to receive training compensation.

In the case before the CAS of 14 May 2006 between FC Metz and Ferencvarosi, the CAS Panel decided that the failure to offer a contract is only a factor to be taken into account when calculating the compensation payable for training and education.[194] Article 5(5) RSTP of the 2001 edition does not explain how that factor is to be taken into account, or what weight it should be given. The regulator has apparently opted for this question to be left for discussion by the DRC or the CAS, as the case may be. The burden of proof of the existence of an offer is on the club claiming for training compensation. The CAS emphasized that an element justifying the reduction of the training compensation is the failure to provide evidence that a firm and binding offer has been made to the player. This consideration might be counterbalanced by other elements in favour of the allocation of the training compensation: the undisputed successful training of the player during several years and the existence of negotiations between the player and a club. In this case the respondent relied on a letter written by the player to establish that an offer had been made. In this letter, the player expressed his intention to thank the club "*for offering me the extension of our contract*". According to the respondent, this declaration from the player should be taken as absolute evidence as regards the existence of an offer. However, the CAS did not share the respondent's opinion since one cannot deduce from these words the existence of what could be legally be construed as an offer.[195]

In the case between Udinese and Helsingborgs before the CAS of 25 July 2012, Helsingborgs claimed training compensation for its former professional player, Landgren, from Udinese.[196] In this case Udinese did not make the offer to one of its professional players. The CAS Panel referred to the "exception of the exception"; unless the former club can justify that it is entitled to such compensation. The CAS Panel referred to the CAS case 2006/A/1152. The Panel decided that the conditions listed in the said case (2006/A/1152) are also applicable to professional players. In this regard, the CAS Panel disagreed with the CAS in the case 2010/A/2316 in which it was stated that "*if the training club does not offer a new professional contract in writing to one of its professional players whose contract is expiring, and such player signs a new professional contract with another club, the*

[194]CAS 2006/A/1181 *FC Metz v. FC Ferencvarosi*, award of 14 May 2007.

[195]In the case of CAS 2010/A/2316, it was decided in an obiter dictum that if the training club does not offer a new professional contract in writing to one of its professional players whose contract is expiring, and such player signs a new professional contract with another club, the training club should not be entitled to training compensation. In the CAS case between FC Nitra and FC Banik, the CAS decided that training compensation must be granted whenever it appears contrary to common sense to conclude that the training club was not interested in keeping the services of the player. See CAS 2012/A/2990 *FC Nitra v. FC Banik Ostrava*, award of 26 April 2013.

[196]CAS 2011/A/2682 *Udinese Calcio S.p.A. v. Helsingborgs IF*, award of 25 July 2012.

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*training club should not be entitled to training compensation*". Following this obiter dictum would render the first sentence of Article 6 para 3 of Annex 4 of the RSTP meaningless for professional players whereas it is noted that this rule is applicable to professional players. The CAS Panel decided that "*the exception to the exception*" and the conditions of its application listed previously have to be applied more strictly to professional players as clubs have to pay attention to those players with a contract. In the case at hand, Udinese had been able to demonstrate that it started to negotiate with the player one year before the end of his contract, that several offers were made either via email or during meetings, and that these offers were substantially of a greater value than the player's existing contract. The Panel was of the opinion that the respondent showed a bona fide and genuine interest to keep the player. Furthermore, it was an important element in this case that Helsingborgs was aware that the club would have to pay training compensation.[197]

In the CAS case between FC Nitra and FC Banik, the CAS decided in its award of 26 April 2013 that training compensation must be granted whenever it appears contrary to common sense to conclude that the training club was not interested in keeping the services of the player. The Panel considered that the circumstances lead to the reasonable conclusion that FC Nitra desired to keep the player on its roster with a view to keeping alive the option of granting him a professional contract at a later stage. In fact it was beyond doubt that the player was a talented player, who, already in 2009, had many chances to pursue a successful career. Indeed, according to the CAS Panel, at the time of his transfer to Banik, the player had already been fielded with the first team of FC Nitra, and was involved in the training session for the following season. In such context, it seemed unreasonable to assume that Nitra intended to write-off its investment in the training of the player and to forfeit any claim to training compensation. It was also noted that Banik previously (and specifically) stated that: "*we naturally do agree that the Claimant is entitled to receive the training compensation for the professional football player and the matter of dispute between the parties is just the high costs of this compensation*". Finally, it was also not disputed that the player has been with Nitra since he was 6 years old and the club has therefore invested considerable time and expense in his formative training and education. This is a further relevant factor that the Panel took into account.[198] It also must be noted in the case at hand that the player concerned was an amateur player.

In view of the above, we can conclude that if a club did not offer a contract in accordance with the prerequisites of Article 6 para 3 of Annex 4 RSTP, 2016 edition, it can still be entitled to receive training compensation if it validly demonstrates it is entitled thereto. As we have seen, the relevant criterion is that the club must have shown a bona fide and genuine interest in retaining the player for the

[197]See also in this regard CAS 2010/A/2316 *Stoke City FC v. Brescia Calcio S.p.A.*, award of 6 December 2011. From this case it can be derived that a registered letter was not a strict prerequisite.

[198]CAS 2012/A/2890 *FC Nitra v. FC Banik Ostrava*, award of 26 April 2013.

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future. Besides training the player, the club needs to have a proactive stance towards the player in order to show him that his services are appreciated and a further relationship welcomed, despite no contract being offered (yet). Clubs need to take into account for future cases that if the club does not offer a contract to one of its *professionals*, the club will generally forfeit its right to training compensation (unless the club complied with all three prerequisites, on the understanding that the DRC and the CAS will be more flexible with regard to the "registered post condition" as long as the offer can be proven). At least, a heavier burden of proof will exist for the club and it will have a higher hurdle to overcome to demonstrate it is still entitled to training compensation on the understanding that at least a contract offer must have been made. If the offer has not been made to an *amateur*, the club's chances will increase substantially in order to successfully demonstrate it is justified to receive training compensation. In that regard, the club needs to demonstrate that it had a bona fide and genuine interest in the player's services to receive training compensation, which interest does not have to be proven if all three prerequisites are met. It is advisable for clubs to file relevant (positive) documents with regard to the development of the player concerned. In this regard, documents must be submitted by a party that can be helpful to prove it is justified to receive an amount for training compensation and that it had always showed a bona fide and genuine interest in retaining the player for the future. For example, in the Netherlands the so-called "*poolbrief*" exists, i.e. a letter in which the club states it wishes to retain a minor player for the following season. This is an obligation that follows from the rules of the Dutch Federation in order to secure a compensation in case of a transfer of a youth player to another Dutch professional football club, the so-called "*poolvergoeding*". Although ADO Den Haag did not offer the player a contract in the said CAS case, the club had been able to prove successfully with this "*poolbrief*" that it had shown sufficient evidence of its good faith and genuine interest in keeping the player and as a result of which it received training compensation. In that respect, and as derived from the DRC jurisprudence, a trainee contract will also help to validly demonstrate that the club had a bona fide and genuine interest in the player's services in order to receive training compensation.[199]

## 11.8 Waiver of Rights

### *11.8.1 General*

Parties are entitled to exclude their entitlement for training compensation by stipulating this in an agreement. However, for the new club it is of utmost importance that provisions in that respect will be drafted in a legally correct manner and in

[199]DRC 21 May 2010, no. 510425. See also DRC 22 July 2010, no. 710567.

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accordance with the basic principles of well-established jurisprudence. For example, the entitlement for training compensation cannot be excluded by an agreement between the new club and a player, an intermediary or any other third party, not being the club that is entitled to receive training compensation in accordance with the RSTP. The jurisprudence of the DRC and the CAS makes absolutely clear that only the former club that is officially entitled to receive training compensation can waive its right to receive any training compensation. Be aware in that respect, that the club that it entitled to receive training compensation needs to *explicitly* waive its right for training compensation. In that respect, it is of the utmost relevance to draft specific provisions in a transfer agreement or in the so-called "waiver" (if the parties do not conclude a transfer agreement and in which document the club formally waives its right), precisely and legally correct to avoid any misunderstanding. In this paragraph, the most important DRC and CAS cases in this respect will be discussed.

### *11.8.2 Decisions Between 2004 and 2010*

We are confronted with many cases in which a party is of the opinion that it did not waive its right for training compensation for the player concerned, but that it only confirmed that no transfer sum had to be paid in respect to the expiry of the employment contract. For example, in a DRC decision of 9 November 2004, the DRC decided that, despite the existence of a document in which parties agreed that no transfer fee would be due in case of a future acquisition of the player's federative rights after 30 June 2002, and in which no reference is made to the right of the former club to claim the relevant training compensation, the former club is still entitled to receive training compensation.[200] The player was born in 1982 and registered for a club during three sports seasons, from the 1999/2000 season until the 2001/02 season, between the age of 17 and 20. On 13 August 2002, he signed a non-amateur contract with another club. His former club claimed training compensation. The latter stated in this case that it did not have to pay any amount for training compensation for the player to the former club as the latter signed a confirmation on 21 June 2002 addressed to the attention of the representative of the player with the following wording:

> We hereby confirm that the contract of … (the player) expires on 30 June 2002 and that no more transfer fees exist.

The former club was of the opinion that because of this confirmation, it did not waive its right for training compensation for the player concerned in accordance to the FIFA Regulations, but that it only confirmed that no transfer sum had to be paid in respect of the expiry of the employment contract. The DRC finally

[200]DRC 9 November 2004, no. 114461.

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concluded that that such document only mentioned that no transfer fee would be due in the case of a future acquisition of the player's federative rights and therefore underlined that no reference was made to the right of the former club to claim training compensation.

The above DRC case of 9 November 2004 was appealed against before the CAS.[201] In the case before the CAS of 19 December 2005 between these clubs, Galatasaray and Duisburg, the Panel had to decide whether the right to training compensation was validly waived. The CAS Panel decided on appeal that according to Swiss law, once the addressee of a declaration does not understand the statement contained in the declaration in the sense wished by its sender, one has to rely on an interpretation based on the principle of trust.[202] According to this principle, a declaration thus has to be interpreted in the sense that the addressee could and should have given to it, taking into account all circumstances of the case and the rules of good faith. The CAS decided to dismiss the appeal filed by Galatasaray against the decision issued by the FIFA DRC on 9 November 2004 according to which Galatasaray had to pay the amount of EUR 210,000 to MSV Duisburg as training compensation. The CAS decided that "all circumstances surrounding the transfer of the player led to the findings that a training compensation was due". According to the applicable principle of trust and taking due consideration of all the evidence produced by the parties during the proceedings with the CAS, Galatasaray should have understood the statement in the sense that no *transfer* fees were due, but a *training* compensation could still be claimed. Or at least, Galatasaray should have checked this latter point with MSV Duisburg. For these reasons, the CAS did not consider the document dated June 21, 2002 as a valid waiver. Duisburg could validly claim training compensation for the 3 seasons spent by the player in its squad.

Parties are entitled to exclude their entitlement for training compensation by stipulating this in an agreement. In the following DRC decision of 4 February 2005, the DRC had to decide on this issue.[203] The player concerned was born on 22 September 1984 and was registered as an amateur player with a German club for three seasons from 19 July 2000 until 29 June 2003. The German club claimed payment of an amount of money relating to training compensation. The new Turkish club was of the opinion that it only had to pay training compensation to the relevant clubs and submitted a document signed by the German club on 3 January 2004. The DRC finally concluded that although it is undisputed that the player had been trained and educated at the German club, the document dated 3 January 2004 that had been presented by the Turkish club in its defence, must be seen as a waiver. By having signed such document, which refers to the player in

[201]DRC 9 November 2004, no. 114461.

[202]CAS 2005/A/811 *Galatasaray SK v. MSV Duisburg GmbH & Co. KgaA*, award of 19 December 2005.

[203]DRC 4 February 2005, no. 25528a.

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question and states, *inter alia*, that the German club will have no claims against the Turkish club, the German club has waived its right to claim an amount of money relating to training compensation. However, it must be explicitly noted that in this DRC decision of 4 February 2005, FIFA invited the German club to give its opinion on the relevant document, but the German club did not present comments on the said documents.

Only the club which is officially entitled to receive training compensation can waive its right to training compensation. This cannot be excluded by an agreement between the player and the new club, which follows from a DRC decision of 2 November 2005.[204] In this case, the player, who was born on 12 May 1985, was registered with a club as a non-amateur for the 2003/04 season between the ages of 18 and 19. In August 2004, the player was registered with another club. His former club now claimed training compensation, but the new club informed FIFA that the player and his agent had given notice to the former club, following which the two parties, the player and the new club had agreed that the player would give up his financial demands against the former club and in return the latter would not ask for any transfer or training compensation. In this respect, the new club provided a player's statement dated 1 February 2005, according to which he affirmed that he had given notice to the former club that he would give up his financial demands and in return the former club would neither ask for any transfer or training compensation nor raise financial demands against him. As a result, the new club was of the opinion that it did not owe any training compensation to the former club. The DRC concluded that the argument by the new club could not be upheld since any possible financial settlement concluded between the former club and the player cannot in any sense abolish the former club's entitlement to receive training compensation. As a consequence thereof, the DRC concluded in this case that the former club was still entitled to receive training compensation for the training and education of the player.

It must be taken into consideration that an agreement between a new club and a player does not have legal effect on the entitlement of the former club(s) to claim training compensation, which was decided in a DRC decision of 18 August 2006.[205] In this case, the player concerned was born on 14 January 1983 and was registered for his club from 22 October 1999 until 16 August 2001, the seasons of his 17th to his 18th birthday. In July/August 2005 the player signed his first professional contract with a club from another country, for which he was registered on 30 August 2005. The player also concluded a covenant with his new club by which he completely accepted responsibility for possible claims related to transfer

[204]DRC 2 November 2005, no. 115377. For the sake of good order, the DRC emphasized in this decision that Article 5 para 5 of the FIFA Regulations governing the Application of the FIFA Regulations should not be taken into consideration in the present matter, since the case did not involve two clubs in the EU/EEA area.

[205]DRC 18 August 2006, no. 86130B. It must be noted that the player did not sign the covenant. However, irrespective of this, the DRC decided that the former club had not waived its right.

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payments or training compensation. The relevant covenant contained a clause which stipulated that neither the player nor the training clubs were entitled to demand payment from the new club. Furthermore, it was agreed by the two parties concerned that no legal action would be taken against the new club. However, on 5 December 2005 his former club lodged a claim with FIFA requesting the payment of training compensation. During this procedure, the new club stated that it was not responsible for paying the requested training compensation on the basis of the aforementioned covenant. The DRC unanimously concluded that the argumentation of the new club could not be supported since the covenant had been concluded between the new club and the player concerned and thus, according to the DRC, it could not in any sense deprive the former club of its entitlement to receive training compensation.

From a DRC decision of 26 October 2006 it follows that terms such as "financial compensation" in waivers could not be understood to only include transfer compensation.[206] In this case, the DRC had to decide whether the term "financial compensation" contained in the waiver of the club X also referred to its possible right to receive training compensation. The DRC stressed that the notion "*financial compensation*" was a general and unspecified term which, in principle, could not be understood to only include transfer compensation. The DRC considered that the term rather encompassed any kind of monetary compensation which club X could possibly have requested from club Y in connection with the player, including training compensation. The DRC had to examine a written confirmation, dated 30 January 2004 and signed by the president of the former club at that time, according to which this club waived its right to receive any "financial compensation" from the new club for the player concerned. The DRC took note of the statement of the former club, according to which the waiver only referred to its alleged right to receive transfer compensation for the player in question, whereas the new club was of the opinion that the former club had also renounced any right to receive training compensation. The DRC proceeded to deliberate whether the term financial compensation contained in the waiver of the former club also referred to its possible right to receive training compensation. The Chamber stressed that the notion financial compensation was a general and unspecified term which, in principle, could not be understood to include only transfer compensation. The DRC committee considered, amongst other things that the term rather encompassed any kind of monetary compensation which, in the specific case at hand, the former club might have requested from the new club in connection with the player, including training compensation. The DRC had to assume that the former club's waiver also referred to its right to training compensation.

In a case of 8 June 2007, the Chamber again confirmed that an agreement between two clubs can have legal effect with regard to the entitlement by one of those clubs to claim training compensation. In this case the Chamber acknowledged that, without prejudice to the rights of any other club that contributed to the

[206]DRC 26 October 2006, no. 106574.

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player's training, in the event of the registration of the player as a professional for the first time, two clubs could indeed not apply the provisions governing training compensation in a specific case. However, as training compensation is a right stipulated in the regulations, the DRC was of the unanimous opinion that the existence of a waiver of this right could only be assumed if it was unmistakable that the renouncing club had indeed intended to waive its right to training compensation under the applicable regulations. In the matter at hand, the DRC deemed that it had no alternative but to doubt that this club had in fact intended to renounce its right to payment of training compensation from the other club. In this respect, the panel emphasized that the document did not constitute an agreement between the two clubs. Further, the DRC deemed that the document's para 8 a) concerning the compensation for the player was drafted in very general terms. In this document no mention was made with regard to the FIFA RSTP on training compensation. It could not be understood as a valid waiver.[207]

As discussed earlier, it is well-established jurisprudence of the DRC that if two parties conclude a transfer agreement providing, inter alia, for the respective financial obligations, i.e. the transfer compensation, training compensation is considered as being included in the transfer compensation. For example, in the DRC decision of 13 June 2008, two clubs argued on the entitlement of training compensation. In this case a player, born on 11 February 1987, had been registered with club T as a professional during the 2003-2005 seasons, with club N as an amateur on 9 August 2005 and with club B as an amateur as from 7 June 2006 until 1 February 2007. The Turkish Football Federation had confirmed that the player was registered with club M on 1 February 2007. On 14 December 2007 club N lodged a claim for training compensation against club M maintaining that the player signed his first professional contract with club M and that it therefore was entitled to receive training compensation. Club M pointed out that the player had declared to the club that no training compensation would be payable. The DRC decided that any declaration made by the player cannot and does not affect any entitlement of club N to training compensation.[208] This also follows from the DRC decision of 9 January 2009, in which decision the Chamber also stated and confirmed that according to its well-established jurisprudence, if two parties conclude a transfer agreement providing, inter alia, for the respective financial obligations, i.e. the transfer compensation, training compensation is considered as being included in

[207]DRC 8 June 2007, no. 67516. In a DRC decision of 29 September 2008, no. 9101245, the respondent also denied the claimant's entitlement to receive any training compensation, because the claimant decided not to receive any refund for expenses invested in the player's development since it encircled the answer *"No"* to the question on whether the club wanted to receive a refund, on a form entitled *"Clearance"*. The DRC, however, decided that in accordance with the freedom of contract and the clear wording of the *"Clearance"* document, i.e. the expression *"Refund of expenses invested in the player's development"*, it was to be considered that the claimant had renounced its right to receive training compensation.

[208]DRC 13 June 2008, no. 68836a.

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the transfer compensation. If the parties wish to stipulate the contrary to the aforementioned, i.e. training compensation being due in addition to the agreed transfer compensation, according to the Chamber, they need to explicitly mention this in the transfer agreement.[209]

### *11.8.3 Decisions After 2010*

In a decision of 21 May 2010, the DRC had to decide on 2 important subjects. In the first place, the DRC confirms that it is only the former club that can waive its rights to training compensation under the applicable regulations. The DRC explicitly underlined that the document, according to which the agent was responsible to pay the training compensation to any third clubs, does not have any legal effect and does not discharge the new club to pay the training compensation to the former club.[210] In line with prior jurisprudence, the DRC decided that the entitlement for training compensation cannot be excluded by an agreement between the new club and an agent. It can be concluded from this decision that it is only the former club that is officially entitled to receive training compensation, and thus not an agent, who can waive its right to training compensation.

Despite the fact that a valid "waiver" is absolutely necessary, under exceptional circumstances we note that the DRC can decide that "defective" waivers can be sufficient to waive its right for training compensation in a legally valid way, as it was in the aforementioned case of 26 October 2006 (in which the DRC decided that the term "financial compensation" contained in the waiver of the club also referred to its possible right to training compensation).[211] In its DRC decision of

[209]DRC 9 January 2009, no. 19512. DRC 21 February 2006, no. 26595, DRC 9 November 2004, nos. 114363 and 114312, DRC 13 June 2008, no. 3830, DRC 31 July 2008, no. 78026, DRC 21 February 2006, no. 26595, DRC 9 November 2004, nos. 114312 and 114363. See also DRC 12 March 2009, no. 39328. See also CAS 2004/A/785 *T. v. L.*, award of 30 August 2005. In the latter case, the CAS decided that when negotiating the transfer agreement, there was a clear understanding between the parties that all financial aspects of the transfer were validly and fully agreed upon. If the appellant had wanted to reserve its right to claim a compensation, it would have had to address such issue with the respondent. Instead, the appellant agreed to a "free transfer", reserving only the right to an additional fee of 25 % to be paid in case of another transfer to a third club. Against this background, the panel's interpretation of the transfer agreement concluded by the parties in November 2002 was that the appellant was content to transfer player G. to the respondent on the stated terms: through such transfer the appellant was indeed released from its obligation to pay a considerable sum of money, i.e. the second sign-on fee and the salary due to the player up to the end of his contract, as well as the applicable social charges. By agreeing to a free transfer without making any reservation for an additional compensation for training, the appellant effectively waived, at least towards the respondent, any right to claim an additional payment. See also DRC 8 June 2007, no. 67499.

[210]DRC 21 May 2010, no. 510425.

[211]DRC 26 October 2006, no. 106574.

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29 September 2010, the Chamber noted that the claimant decided not to receive any refund for expenses invested in the player's development since it encircled the answer "no" to the question on whether the club wanted to receive a refund, on a form entitled "Clearance".[212] The DRC turned its attention to this point to determine whether the said "Clearance" document was to be considered as a waiver by the claimant to receive training compensation. In analysing the relevant "Clearance" document, the DRC duly noted that in para 9 referring to "Data concerning refund of expenses invested in the players development" the claimant did answer the question, i.e. "Does the club request a refund" by encircling the answer "No". The DRC finally decided that the claimant club had renounced its right to receive any amount of training compensation. The Chamber explicitly wished to outline that, as the dispute at hand involved an amateur player, the question of the payment of a transfer compensation, or a waiver to receive an amount corresponding to a transfer compensation, was irrelevant.

In its unpublished decision of 7 April 2011, the DRC confirmed and reiterated that it is the responsibility of the club with which a player is registered to pay training compensation and also to establish the player's previous career, in order to evaluate the clubs which are entitled to training compensation. The DRC deemed in this case that any statements that the player and/or his agent may have made towards the respondent (that was summoned to pay training compensation to the claimant club) are absolutely irrelevant for the latter's obligation to pay training compensation.

Although the previously mentioned DRC decision of 20 May 2011 did not specifically concern an issue relating to training compensation, but dealt with the validity of a buy-out clause, the said compensation clause could not be seen as a valid buy-out clause since the said clause referred to compensation according to Article 17 para 2 of "the Regulations".[213] The DRC deemed it important that the contract did thus not clearly stipulate to which Regulations the said clause referred, i.e. the Regulations of the club, the FFH, FIFA or even another entity. The DRC concluded that the said clause could therefore not be applied, i.e. the calculation of the compensation due to the claimant could not be based on the said clause of the contract. From this case we note indirectly and must at least take into account that in order for the new club to be assured of a valid waiver of the former club, exact reference must be made in the waiver to waive training compensation as mentioned in "the Regulations on the Status and Transfer of Players" and thus not only "the Regulations", "FIFA Rules" or other vague terms.

In its decision of 7 September 2011, it was again made clear that statements made by persons who are not authorized to act on behalf of the club that is entitled to receive training compensation, do not suffice.[214] In this case, the Football

[212]DRC 29 September 2010, no. 910245.

[213]DRC 20 May 2011, no. 5111860.

[214]DRC 7 September 2011, no. 9112744.

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Association A (FAA) confirmed that player M, born on 18 April 1990, was registered with its affiliated club B from 9 March 2001 until 29 June 2009, always as an amateur football player. The Football Association N (FAN) confirmed that said player was registered as a professional football player on 6 August 2009 with its affiliated club Z. On 17 May 2010, club B, the claimant, contacted FIFA claiming training compensation relating to the international transfer of the player from club B to club Z, the respondent. Club B was requesting to receive an amount of EUR 250,000. In its reply, club Z rejected club B's claim and asserted that during the transfer negotiations, club B orally waived its right to receive training compensation in the presence of the player, the player's father and the player's agent. Club Z submitted two documents, one statement and one letter, in order to establish that club B had renounced its right to claim training compensation. In the statement made by the aforementioned persons, it was stated that club B had renounced its right to claim training compensation and it granted the player "*a free transfer*". The second document contained a letter sent by the club to the player in which the player was given a "free transfer". Club Z asserted that since the player was an amateur player, the expression "free transfer" cannot refer to any transfer compensation but can only refer to training compensation. Club B stated that this could not be interpreted as a waiver, otherwise it would lose its right to claim training compensation in relation to each amateur player it releases, which would be absurd. The respondent also stated that the amount of training compensation was disproportionate. The DRC found that it could not be considered that the statement was conclusive evidence of the fact that the claimant would indeed have waived its right to claim training compensation since the mentioned persons were not authorized to act on behalf of club B. The second document, the letter, which was only addressed to the player, could also not be considered as a valid renouncement of right. The DRC considered that the "free transfer" could not be interpreted as a waiver encompassing training compensation and which could afterwards be usable by the player's future club. The DRC further considered that no particular fact of the case should lead to review the amount payable in the sense of a reduction, in accordance with Article 5 para 4 Annex 4. Finally, the claim of the claimant, club B, was accepted and the respondent club Z, had to pay an amount of EUR 250,000.

In the event that a player and/or the player's agent or even the association of the former club of the player assure upon request of the club wishing to engage the player, that there is no contractual link between the player and another club, and provided no indications to the contrary appear, as a general rule the new club is allowed to trust on the information received, which follows from a DRC decision of 30 November 2007.[215] This was also decided by the DRC in its decision of

[215]DRC 2 November 2007, no. 1171309.

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28 September 2007 in which it was deemed by the Chamber that in cases where a player and/or the players' agent assure that no contractual link to another club exists, even apparently corroborating this by means of documentary evidence, provided that no indications to the contrary appear, as a general rule the new club, in good faith, has to be protected in trusting on the information received. However, in this decision it was also emphasized by the DRC that it is always recommended that a player's new club should check with the association of the former club what the contractual situation of the player actually is before signing him.[216]

In its DRC decision of 24 November 2011, a club requested training compensation in the amount of EUR 60,000.[217] In its response to the claim, the respondent held that the player signed a professional contract with it after having received a "*Confirmation*" from the claimant, dated 9 June 2010 and signed by its technical secretary, Mr. X, by means of which it confirmed that club M will not ask for training compensation. The DRC had to decide on whether the said "*Confirmation*" established that the claimant had renounced its right to receive training compensation on the basis of the contents of said document. In this respect, the DRC carefully examined the contents of the aforementioned document dated 9 June 2010 and signed by Mr. X "*Technical Secretary*", and addressed to the player's agent Mr. Z, in which the claimant stated *inter alia* that "*(…) will not ask for any training compensation (…)*". The Chamber took note that the club stamp of the claimant contained in the "*Confirmation*" dated 9 June 2010 was indeed different from the one used by the claimant in its power of attorney issued in favour of the Football Federation of M authorizing it to act on behalf of the claimant in the present affair. In addition, the DRC took into account that the "*Confirmation*" was printed on blank paper and did not contain the club's letterhead. The Chamber further recalled that with regard to the claimant's allegations that Mr. X, who had signed the alleged "*Confirmation*", was not employed by the claimant, or the fact that the original version of said document was not provided by the respondent, the latter never provided FIFA with its position. Therefore, the DRC deemed that, by doing so, the respondent renounced to its right to defence and accepted the allegations of the claimant made in the latter's last submission (cf. Article 9 para 3 of the Procedural Rules), that said "*Confirmation*" cannot be taken into account as a waiver to receive training compensation. The Chamber decided that the respondent was liable to pay the amount of EUR 45,000 for the training and education of the player.

A player cannot be held responsible for the payment of training compensation, which was decided in the DRC decision of 12 June 2012.[218] In this case, the respondent rejected the claimant's claim for training compensation, arguing that

[216]DRC 28 September 2007, no. 9719.

[217]DRC 24 November 2011, no. 11113518.

[218]DRC 12 June 2012, no. 6122546.

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the player was responsible for the payment of training compensation. In this respect the respondent referred to an agreement between the player and the club. The DRC Judge explicitly stated that only the new club is responsible to pay training compensation. The DRC found it essential that the obligation of the new club towards the previous clubs in relation to the payment of training compensation cannot be transferred to a player by means of a private agreement. In other words, the DRC Judge considered that the agreement that the respondent had concluded with the player could not set aside the relevant provisions regarding training compensation contained in the RSTP. The DRC Judge finally decided in this case that the respondent was liable to pay an amount of training compensation to the claimant.[219]

A club can be assumed to be in good faith that, based on such wording, no payment whatsoever would have to be made for the transfer of the respective player, i.e. neither a payment of a transfer sum, nor of any other compensation, such as training compensation. In its case of 26 April 2012, the Chamber carefully examined a letter dated 15 June 2007. In this respect, the Chamber noted that this document bore the letterhead of the claimant, that the person who signed the letter declared himself to be "responsible" for the team of the player and, in particular, that the letter explicitly stated that the player was "authorised (…) to sign (…) at the club of his choice, free of payment".[220] According to the Chamber, the wording of the aforementioned letter was clear and unambiguous, and it expressed that a third club who would sign the player would not have to make any kind of monetary compensation which, in the case at hand, the claimant could possibly have requested from the respondent in connection with the player, thus also training compensation. The DRC considered that, from the perspective of a third club, it can be assumed in good faith that, based on such wording, no payment whatsoever would have to be made for the transfer of the respective player, i.e. neither a payment of a transfer sum, nor of any other compensation, such as training compensation. The DRC also laid particular emphasis on the fact that the person who signed the letter dated 15 June 2007, which bore the claimant's letterhead, was employed by the claimant and that the claimant could be held accountable for actions taken by the employee.

There must be conclusive evidence that a party actually waived its right for training compensation. In the case before the DRC of 21 September 2012, the Chamber noted that the claimant denied having ever waived its right in any way to claim training compensation in relation to the player.[221] The DRC noted in this regard that the documents (cf. points I.6. and I.7.) presented by the respondent party, had the sole and exclusive purpose of declaring that the player did not have any contract with the claimant. The members of the DRC found that it could not

[219]See also DRC 23 July 2015, no. 07150005.

[220]DRC 26 April 2012, no. 412107.

[221]DRC 21 September 2012, no. 9122324.

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be considered that said statement was conclusive evidence of the fact that the claimant would indeed have waived its right to claim training compensation. The members of the DRC hence considered that the letter dated 10 February 2010 could not be interpreted as a waiver for training compensation. In light of the above, the members considered that the respondent had not provided sufficient evidence to support its allegation that the claimant had waived its right to claim training compensation.

Aside from the abovementioned CAS case of 19 December 2005 between the clubs Galatasaray and Duisburg, the CAS had to deal with similar issues several times.[222] In a case before the CAS of 7 May 2010, the Panel had to decide on the concept of "*free agent*" which was granted to a player by his former club.[223] The CAS Panel had to decide whether a club could validly waive its entitlement to training compensation. The CAS decided that according to CAS case law, "*free agents*" are "*players who are free from contractual engagements*" and referred to the CAS 2004/A/635. The Panel came to the conclusion that there was no reference in the FIFA RSTP or the CAS jurisprudence that this concept could also refer to training compensation. Therefore, the letter by which the club granted the player the status of "free agent" did not amount to a waiver of the club's right to training compensation. The same was decided in its case of 7 May 2010, in which case the CAS had to decide whether the words "Free Agent Status" in a letter meant that no training compensation was due. The CAS Panel was of the opinion that the letter did not evidence a possible waiver of the club's right to receive training compensation.[224]

Also, in a more recent case of the CAS of 20 November 2013, the *Dundee-Vélez* case, the CAS had to decide on the validity of a "waiver".[225] In this case the CAS decided that Dundee United could not have reasonably understood from a termination agreement that Vélez Sarsfield waived its right to training compensation. In this regard, the CAS Panel decided, as the CAS Panel had in the abovementioned case of the CAS of 19 December 2005, that, as a matter of common sense, Dundee United could at least have checked the position with Vélez Sarsfield.

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[222]CAS 2005/A/811 *Galatasaray SK v. MSV Duisburg GmbH & Co. KgaA*, award of 19 December 2005.

[223]CAS 2009/A/1919 *Club Salernitana Calcio 1919 S.p.A. v. Club Atlético River Plate & Brian Cesar Costa*, award of 7 May 2010.

[224]CAS 2009 *Club Salernitana Calcio 1919, S.p.A. v. Club Atlético River Plate & Brian Cesar Costa*, award of 7 May 2010.

[225]CAS 2013/A/3119 *Dundee United FC v. Club Atletico Vélez Sarsfield*, award of 20 November 2013; See also CAS 2009/A/1810 and 1811 *SV Wilhelmshaven v. Club Atlético Excursionistas & Club Atlético River Plate*, award of 5 October 2009; CAS 2010/A/2069 *Galatasaray A.S. v. Aachener TSV Alemannia F.C.*, award of 16 August 2010; CAS 2010/A/2075 *Marítimo da Madeira SAD and Coritiba Footballclub*, award of 2010.

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### *11.8.4 Conclusion*

Following the above decisions of the DRC and the CAS, we can conclude that parties are entitled to exclude their entitlement for training compensation by stipulating this in an agreement. For example, the decisions of the DRC show that the entitlement for any amounts of training compensation cannot be excluded by an agreement between the new club and a player, an agent or any other third party, who is not the club that is officially entitled to receive an amount for training compensation. This is constant jurisprudence of the DRC. It is only the former club that is entitled to receive training compensation, which can validly waive its right for training compensation. In other words, any possible financial settlements concluded with any other parties cannot, in any sense, abolish the former club's entitlement to receive training compensation.

In order not to take any unnecessary risks, it is recommended to be in line with the view of the DRC (in its decision of 7 September 2011, no. 9112744) as well as the CAS (in its awards of 20 November 2013; CAS 2013/A/3119 and 19 December 2005; CAS 2005/A/811), to contact the former club of the player directly in order to ask for information, or a confirmation, regarding its position with regard to training compensation in relation to the player. Furthermore, it is of utmost importance for the new club that provisions relating to the renouncement of training compensation are drafted in a legally correct manner in accordance with the basic principles of the well-established jurisprudence of the DRC. One should consider the DRC's different view in cases of rather vague and unclear words that leave room for misinterpretation since the Chamber decided in its case of 9 November 2004 (no. 114461) and DRC 7 September 2011 (no. 9112744) that the words "transfer fees" in these cases did not include training compensation, whereas the committee decided in its decision of 26 October 2006 (no. 106574) that "*financial compensation*" did contain training compensation. Also words such as "*free agent*" do not refer to training compensation, according to the CAS Panel in the above case of 7 May 2010.

If two clubs intend to agree that one of those clubs will waive its right for training compensation, the former club of the player must explicitly waive its right for training compensation before the new club concludes a player's contract. Only this club is bound to this waiver and not any other former clubs. The next provision will suffice and is "DRC-proof": "*[The former club] herewith explicitly confirms that it renounces and waives any possible right to training compensation as mentioned in Article 20 and Annex 4 of the FIFA Regulations on the Status and Transfer of Player. Therefore, [the former club] will not, neither now nor in the future, claim any amount of training compensation from [the new club] for the player concerned in case the player signs a professional contract with [the new club]*". As decided in the DRC case of 24 November 2011 (no. 11113518), and to avoid any misunderstanding, it can further be relevant and it is advisable to print the waiver on the club's letterhead (with a correct club stamp). Obviously, the waiver must be signed by an authorized person.

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## 11.9 Calculation of the Amount

### *11.9.1 General*

Pursuant to Article 1 para 1 of Annex 4 of the RSTP, 2016 edition, training compensation shall be payable until the end of the season in which the player reaches the age of 23, but the calculation of the amount payable shall be based on the years between the age of 12 and the age when it is established that the player actually completed his training period. In the event that the player is registered for the first time after the age of 12 years, the date of this first registration is obviously crucial and decisive in order to establish the exact period of training of the player concerned.[226]

In order to calculate the compensation due by new clubs for training and education costs to former clubs, all associations of FIFA are instructed by FIFA to divide their clubs into a maximum of 4 categories in accordance with the clubs' financial investment in training players. The training costs are set for each category and correspond to the amount needed to train one player for one year multiplied by an average so-called "player factor", which is the ratio between the number of players who need to be trained to produce one professional player. The training costs, which are established on a confederation basis for each category, as well as the categorization of clubs for each association, are published on the FIFA website.[227]

Through Circular no. 1537, FIFA provided its member associations with a list of the exact training costs determined on a confederation basis for each category:[228]

| Confederation | Category I | Category II | Category III | Category IV |
|---|---|---|---|---|
| AFC | | USD 40,000 | USD 10,000 | USD 2000 |
| CAF | | USD 30,000 | USD 10,000 | USD 2000 |
| CONCACAF | | USD 40,000 | USD 10,000 | USD 2000 |
| CONMEBOL | USD 50,000 | USD 30,000 | USD 10,000 | USD 2000 |
| OFC | | USD 30,000 | USD 10,000 | USD 2000 |
| UEFA | EUR 90,000 | EUR 60,000 | EUR 30,000 | EUR 10,000 |

With regard to the calculation of the amount, firstly it is important to determine which edition of the RSTP is applicable to the matter at hand, since former editions change in contents with regard to the calculation of the amount of training compensation. For example, as from the 2005 edition, FIFA amended the

[226]See also FIFA Commentary, explanation Article 1, p. 112, footnote 150.

[227]RSTP, 2016 edition, Annex 4, Article 4 para 2. The training costs and the categorization of clubs are updated at the end of every calendar year.

[228]FIFA Circulars no. 1537 dated 3 May 2016.

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calculation method with regard to players for the seasons between their 12th and 15th birthday (in total four seasons). In order to prevent the situation where training compensation for very young players was set at unreasonably high levels, the training costs for players for the seasons between their 12th and 15th birthday (in total four seasons) was to be based, according to Article 5 para 3 of Annex 4 of the RSTP, 2005 edition, on the training and education costs for category 4 clubs. FIFA tried to avoid compensation for very young players being set at an unfairly high level, according to the FIFA Commentary. As from the 2009 edition, which came into force on 1 October 2009, FIFA added to the afore-mentioned provision that "*this exception shall, however, not be applicable where the event giving rise to the right to training compensation (cf. Annex 4 Article 2 para 1) occurs before the end of the season of the player's 18th birthday*".[229] As of 1 August 2014, the afore-mentioned "*exception rule*" was deleted again by FIFA for unknown reasons.[230] Therefore, before the DRC can adjudicate on the calculation of the training compensation concerned, it must first establish which version of the RSTP is applicable to the specific matter at hand. In this context, it is important to be aware, with regard to the amendment in the 2009 edition of the RSTP, which came into force on 1 October 2009, that the DRC decided that it could not apply said amendment retroactively, which indirectly follows from CAS 2014/A/3500.[231] This was also confirmed in FIFA Circular no. 1437 of 23 July 2014 as FIFA referred to the general principle under which a provision could not be applied retroactively.[232] However, at this moment it is not clear whether or not said amendment has to be applied retroactively since from a more recent CAS case of 5 June 2015 it can be indirectly derived that said amendment might be applied with retroactive effect.[233]

Also from FIFA Circular no. 1249 it follows that the clubs are divided into four categories. This Circular provides a further explanation. For example, category I contains the top-level clubs (all first division clubs). It is also vital to mention that FIFA Circular no. 1249 shows that in case of a manifest discrepancy, the DRC normally applies the training categories in accordance with the guidelines, despite the fact that the member association concerned had indicated a different categorization. This also follows from the DRC decision of 1 March 2012.[234] In this regard, it

[229]See also FIFA Circular no. 1190 dated 20 May 2009.

[230]See also FIFA Circular no. 1437 dated 23 July 2014.

[231]DRC 30 August 2013, no. 08131673, DRC 30 August 2013, no. 08121946, and DRC 1 February 2012, no. 2122003. See CAS 2014/A/3500 *FC Hradec Kralove v. Genoa Cricket and Football Club*, award of 23 September 2014.

[232]FIFA Circular no. 1437 dated 23 July 2014.

[233]CAS 2014/A/3652 *KRC Genk c. LOSC Lille Métropole*, award of 5 June 2015. See also CAS 2006/A/1181 *FC Metz v. FC Ferencvarosi*, award of 14 May 2007, from which award the prohibition of issuing rules having retrospective effect follows.

[234]DRC 1 March 2012, no. 3121501. See also DRC 2 September 2015, no. 0915471 from which it also follows that it must be proven that the association had committed a manifest error of assessment when categorising the club.

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must be taken into consideration that requests for an allocation or amendment of the category will not be easily accepted. However, in a case of the DRC of 30 August 2013, the Chamber had the view that there were good and valid reasons to deem that the allocation of the respondent club in category IV was not justified in view of the specific circumstances of the case at hand. The DRC decided that category III had to apply to the club and training compensation was due.[235]

With regard to the calculation it is also worth taking into account that, as was also decided in the *Wilhelmshaven* case of the CAS of 5 October 2009, the categorization of the club at the time of the transfer of a player will be decisive. According to the Sole Arbitrator in the Wilhelmshaven case, clubs and third parties must be able to rely on the categorization of a club at the time of transfer. Otherwise, according to this Arbitrator, it would deny the possibility of the training clubs and the transferee clubs to assess precisely the amount of the payable compensation and would open the door to arbitrary results and great uncertainty.[236]

### *11.9.2 Worldwide*

According to Article 13 of the RSTP, 2001 edition, the calculation of the amount of training compensation was based on the years between the age of 12 and the age when it was established that the player actually completed his training. When a player signed his first contract as a non-amateur, or when a player moved during the course of a contract before reaching the age of 23, the amount of compensation was limited to compensation for training and education, calculated in accordance with the parameters set out in the Application Regulations and FIFA Circular no. 769. According to these regulations and the mentioned circular, compensation for training was thus based on the training and education costs in the country of the new club, but taking into account the category of the football club which has effectively trained him.

As from the 2005 edition of the RSTP, FIFA decided that, as a general rule, to calculate the training compensation due to a player's former club(s), it is necessary to take the costs that would have been incurred by the *new* club if it had trained the player itself. Accordingly, the first time a player registers as a professional, the training compensation payable is calculated by taking the training costs at the new club multiplied by the number of years of training in principle from the season of the player's 12th birthday to the season of his 21st birthday. In that respect, it is important to know that the amount payable is calculated on a pro rata basis

[235]DRC 30 August 2013, no. 08131149.

[236]CAS 2009/A/1810 and 1811 *SV Wilhelmshaven v. Club Atlético Excursionistas & Club Atlético River Plate*, award of 5 October 2009. See also the decision of the DRC of 26 November 2015, no. 1115310 from which it follows that the relevant club category is the one at the moment that the player was registered with the new club.

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according to the period of training that the player spent with each club (on the understanding that the CAS jurisprudence teaches that a part of a month has to be calculated as a full month insofar as the club has provided training to a player for more than half of the month[237]).[238] In the case of a subsequent transfer, training compensation is calculated based on the training costs at the new club multiplied by the number of years of training with the former club.[239] Also on this point, the amount payable is calculated on a pro rata basis according to the period of training that the player spent with each club. In conclusion, compensation for training as from the 2005 edition of the RSTP, and as laid down in the 2016 edition, is based on the training and education costs and on the category of the country of the *new* club.

As said before, a club shall be compensated for the entire time that it trained the player and not only for the time it trained him as a professional. This is not only derived from a DRC decision of 20 May 2011, but also in a case of 2004 before the CAS, when the Panel confirmed that a club that trained a player as an amateur for a certain period of time before concluding an employment contract with him shall be compensated for the entire time that it trained the player and not only for the time that it trained him as a professional.[240] The CAS Panel decided that as a general rule, to calculate the training compensation due to a player's former club(s), it is necessary to take the costs that would have been incurred by the new club if it had trained the player itself. Accordingly, the first time a player registers as a professional, the training compensation payable is calculated by taking the training costs at the new club multiplied by the number of years of training in principle from the season of the player's 12th birthday to the season of his 21st birthday. In that respect, it is important to know that the amount payable has to be calculated on a pro rata basis according to the period of training that the player spent with each club.

A situation can take place whereby a club disputes its obligation to pay training compensation for the entire period due to a player's injury. For example, in a DRC decision of 13 June 2008, the DRC decided that injuries are part of football and that, irrespective of the fact that the player in question was injured, the player stayed and was registered with his club (i.e. the claiming club) and was undertaking his rehabilitation. In this sense, the DRC concluded that, even though the player was injured, this particular period has to be considered as part of the training period. From this DRC case it can be derived that if a player is injured for a certain period of time, then training compensation can still be claimed for the

[237]See CAS 2008/A/1705 and CAS 2013/A/3119 *Dundee United FC v. Club Atletico Vélez Sarsfield*, award of 20 November 2013.

[238]RSTP, 2016 edition, Annex 4, Article 3 para 1; CAS 2004/A/560; FIFA Commentary, explanation Article 3 para 1, p. 115, footnote 152.

[239]RSTP, 2016 edition, Annex 4, Article 5 para 2.

[240]DRC 20 May 2011, no. 5111952, and CAS 2004/A/560. See also FIFA Commentary, explanation Article 3 para 1, p. 115, footnote 152.

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period that the player is injured. However, knowing that the CAS does not always follow the line of the DRC, the CAS might have a different view taking into consideration the previously mentioned *Blackpool* case of 13 July 2006.[241] In this case between the Dutch football club Top Oss against the English club Blackpool F.C., the CAS also had to decide whether or not training compensation was due for the period that the player was injured. The appellant in that case, Blackpool, was of the opinion that training compensation was not due for the period that the player was injured. According to the CAS Panel, Top Oss had not substantiated, much less proven, when the player was injured and to what degree he actually and effectively trained until then, if at all. Due to the lack of evidence, the Panel concluded that the Dutch club Top Oss had not borne its burden of proof regarding the degree of the player's training in the relevant 2003–2004 season. The CAS held that the player could have trained properly and effectively at Top Oss only during the other seasons. From this case it can be derived that if a player is seriously injured, the CAS can decide that the player is not effectively trained and training compensation may not be claimed for that period.

### *11.9.3 Within EU/EEA*

Within the EU/EEA there are special provisions relating to training compensation. Not only is there an extra prerequisite in relation to the fact when training compensation is not due to the former club (namely when the former club does not offer the player a written contract), but also with regard to the amount of compensation, the rules within the EU/EEA are different from the aforementioned rules on a worldwide scale.

According to Article 6 of Annex 4 of the RSTP, 2016 edition, for players moving from one association to another inside the territory of the EU/EEA, the amount of training compensation payable will be established based on the following. If the player moves from a lower to a higher category club, the calculation will be based on the average of the training costs at the two clubs. For example, if a player moves from a Spanish category 3 club (EUR 30,000 training costs per year) to an English category 1 club (EUR 90,000 training costs per year), the average cost of training per year will then come down to EUR 60,000. However, it is also important to know that in the RSTP it is stated that if the player moves from a higher to a lower category, the calculation is based on the training costs at the lower category club.

[241]CAS 2006/A/1027 *Blackpool F.C. v. Club Top Oss*, award of 13 July 2006.

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## 11.10 Completion of the Training

### *11.10.1 General*

According to the first Article of Annex 4 of the RSTP, 2016 edition, a player's training takes place between the ages of 12 and 23 for training undertaken up to the age of 21, unless it is evident that a player has already terminated his training period before the age of 21. In other words and as discussed in the introduction of this chapter, training compensation will be payable until the end of the season in which the player reaches the age of 23, although the calculation of the amount will be based on the years between 12 and the age when it is established that the player actually completed his training.[242] The CAS as well as the DRC decided in several cases on the question under what circumstances a player has actually completed his training.[243]

In the following paragraphs all the relevant decisions of the DRC will be discussed in a chronological order of time in order to note the developments over the years. Since the developments in the CAS jurisprudence are also relevant to note developments at and the approach of the DRC over the years, the relevant CAS awards will also be discussed. In the conclusion an analysis will be made after the decisions are discussed about the completion of the training period.

### *11.10.2 DRC Jurisprudence*

One of the first published decisions of the DRC in which an amount for training compensation was reduced due to the fact the training period was completed earlier, was the DRC decision of 22 July 2004, in which the Chamber considered, as established in Article 13 and FIFA Circular no. 826 dated 31 October 2002, that up to the age of 23 training compensation is payable for a player's training undertaken between the ages of 12 and 21.[244] In this case, due note was taken of the new club's defence according to which the player finished his actual training period by the time he had started the 2001/02 season with his former club. Therefore, the new club was of the opinion that a shorter education period took place as a result of which the training period of the player was completed in a

[242]Also following the FIFA Commentary, explanation Article 1 para 1, p. 112, footnote 149, the CAS decided in several cases on this issue. CAS 2003/O/527. See also CAS 2004/A/560; FIFA Commentary, explanation Article 3 para 1, p. 115, footnote 153. See also CAS 2004/A/594.

[243]For the provisions regarding solidarity contribution it is irrelevant whether a particular player already ended his training period, because it is a concept different from training compensation. See DRC 17 March 2015, no. 03151545.

[244]DRC 22 July 2004, no. 74353, DRC 2 July 2004, no. 74323, DRC 22 July 2004, no. 7472 B.

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sporting season before his 21st birthday. The new club submitted that in the playing 2000/01 season, the player was fielded on a regular basis (15 times) in the club's "A" team, scoring 3 goals. At that time he had already spent many years as a non-amateur player from an early age and could thus be considered to have been a particularly successful player. The new club's arguments in this respect were accepted by the Chamber. Based on this, the DRC concluded its deliberations by deciding that the 2001/02 training period would not be taken into consideration for calculation purposes. This was translated by the Chamber into a reduction of EUR 90,000 over the total amount of EUR 550,000 resulting in a final sum of EUR 460,000 due.

In the past, many clubs and players have erroneously invoked the provision regarding premature termination, in cases where it cannot be said that a player had completed his training before the age of 21. In a DRC decision of 9 November 2004, the Chamber decided with regard to the provision that training compensation was owed to the former club of the player unless it was evident that the player had terminated his training period before the age of 21.[245] The DRC wished to reiterate that it was the understanding of the legislator that such an exemption would only apply in cases of unusually talented young players, which are rarely encountered. This tends to be the case with young players, who, at the age of 17 or 18 are globally known for their exceptional talents, who are regulars on both the club and national level, and who are frequently the focus of transfer arrangements to the world's top clubs. In such cases, according to the DRC, it would seem rather misplaced to discuss training compensation for these players, who at the age of 17 or 18 are considered absolute world class. The DRC was of the opinion that there were only very few players with such an exceptional status that they had completed their training and would have gained all the relevant experience before reaching the age of 21. The DRC decided in this case, that although the player could display considerable experience on a first team level, the chamber underlined that it is unquestionable that the player was still benefiting from instruction being offered and experience gained in performing for the club. The player only spent one year at the club, i.e. from the age of 18 to 19, and therefore the members of the Chamber were of the unanimous opinion that the club was entitled to receive compensation for the instruction received during this year. The club was entitled to receive training compensation in the amount of EUR 60,000.

It is very important to realize in any case, that more than just one indication to the possible premature termination of the training period must exist in order to justify the application of the relevant exception. This was confirmed in a DRC decision of 21 February 2006, in which case the Chamber also had to decide on the completion of training of a player.[246] This case concerned the question of whether the player concerned had already completed his training with the former club prior

[245]DRC 9 November 2004, no. 114556.

[246]DRC 21 February 2006, no. 26562.

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to his 21st birthday. The DRC pointed out that the period of training to be taken into account would only be reduced if it was evident that the player had terminated his training period before the age of 21. In this case the main argument of the new club was that the player had played in numerous matches for the senior team of his former club during the last season. The DRC underlined that more than just one indication to the possible premature termination of the training period must exist in order to justify the application of the relevant exception. The DRC finally decided that it was not evident that the player terminated his training before the age of 21.

The club that tries to prove that the training period of the player is terminated before the age of 21, needs to provide the competent authorities with evidence that the player is a most talented player, who played at all ages at the highest level and in the national teams at all different ages or that the transfer involved significant amounts of money. This follows from a DRC decision of 12 January 2007, in which case the Chamber also decided on the completion of the training of a player before the age of 21. In this context, the DRC reiterated that, in any case, more than just one indication to the possible earlier termination of the training period needs to exist in order to justify the application of the relevant exception, so as for example the evidence that the player is the most talented player who played at all ages at the highest level and in the national teams at all different ages or that the transfer involved imported significant amounts of money. The DRC decided that it was not evident that the player terminated his training before reaching the age of 21. Therefore, the Chamber rejected the allegation in that regard. As a result thereof, the Chamber finally concluded that the claimant club was entitled to receive an amount for training compensation for the training and education of the player.[247]

Some indications of the player being a talented "key player" are not enough to prove an early termination of the training period of the player, as was the case in the DRC decision of 13 June 2008.[248] In fact, the DRC noted that in order to consider the training period of a player to be terminated early, several factors have to be taken into account and the requirements for a player's training period to be considered terminated early are very high. The mere fact that the player took part in several matches of the league as well as in the Confederation Cup do not indicate as such that the training period terminated before the player turned 21.

The club must devise substantial evidence. For example, in the case before the DRC of 29 September 2010, the DRC considered and decided that the respondent's assertions and supporting documentation, in accordance with which the player had already finished his training at the age of 18, was not corroborated by any substantial evidence establishing the reality of the respondent's assertions.[249]

[247]DRC 12 January 2007, no. 17266.

[248]DRC 13 June 2008, no. 681123.

[249]DRC 29 September 2010, no. 10101596.

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In these circumstances, the Chamber concluded that the respondent's assertions thus had to be rejected.

The requests for early termination will be decided on a case-by-case basis, in which all the specific circumstances and all the evidence produced will be taken into consideration, which was also decided in the case before the DRC of 17 August 2012.[250] Hence, several factors and indications have to be considered in order to assess and establish whether a particular player's training has indeed been completed before the season of his 21st birthday. For the sake of completeness, the Chamber pointed out that both the Chamber and the CAS have adopted a strict approach in establishing that a player's training had indeed been completed before the season of a player's 21st birthday, so as to not jeopardize the right of training clubs, in principle, to receive an amount for training compensation. The Chamber concurred that, in the specific matter at hand and taking all the abovementioned elements combined, it could not be established that the player had indeed already completed his training. The DRC deemed that the training period of the player had therefore not been completed before the season of his 21st birthday.[251]

In the case before the DRC of 12 December 2013, the Chamber also had to examine whether or not the player's training period had already been completed before the season of his 21st birthday.[252] The Chamber emphasized that cases involving a possible early completion of a player's training period have to be assessed on a case-by-case basis, in which all the specific circumstances and all the evidence produced has to be taken into consideration. Hence, several factors and indications have to be considered in order to assess and establish whether a particular player's training has indeed been completed before the season of his 21st birthday. For the sake of completeness, the Chamber pointed out that both the Chamber and the CAS have adopted a strict approach in establishing that a player's training had indeed been completed before the season of a player's 21st birthday, so as to not jeopardize the right of training clubs, in principle, to receive training compensation. The Chamber acknowledged that the main arguments put forward by the respondent are the fact that the player in question was fielded by club Y, the club in which the player was on loan, in 30 matches of country A first division competition scoring a total of 18 goals and that the respondent had not presented any "*official*" documentary evidence in that regard but only a printout from a website. In addition, the Chamber took note that the respondent club did

[250]DRC 17 August 2012, no. 8122321.

[251]In its case of the DRC of 31 October 2013, the Chamber decided on the completion of the training of the player and considered that it could not be established that he was a regular first team player during the 2007/2008 season with the claimant. The Chamber also held that the fact that the player was voted 'best player' of country G in the 2010/2011 season does not imply that his training period had been completed. The Chamber concurred that, taking into account all the relevant elements and circumstances, it could not be established that the player had indeed completed his training period before his 21st birthday; DRC 31 October 2013, no. 10131359.

[252]DRC 12 December 2013, no. 12132748.

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not present any evidence on the alleged completion of the player's training during the period that the player was registered with the claimant. The Chamber concluded that, in the specific matter at hand and taking into account all the relevant elements combined and referring to the principle of the burden of proof, it could not be established that the player had indeed already completed his training before joining the respondent club. Hence, the Chamber deemed that the training period of the player had not been completed before the season of his 21st birthday.

### *11.10.3 CAS Jurisprudence*

In the case before the CAS between Hamburger Sport-Verein against Odense Boldklub of 21 April 2004, a player signed his first professional contract at the age of 17.[253] In his first season as a professional, he played 15 times with the first team. The question was whether the player had terminated his training period. According to the CAS panel, the completion of the training period of an athlete has to be considered in view of FIFA Circular no. 801 which states the scale, the characteristics and the level of games of clubs. The date of signature of a first non-amateur contract between a player and a club, and the number of games played by the player in the "A" team of the club during a season, as well as the technical skills and speed, are to be taken into consideration to determine the duration of the training period. FIFA Circular no. 826 states the criteria to calculate a training compensation and indicates this compensation amount depending on the age of the player, on the division as well as on the categories of the clubs for whom the player is playing. An average of the indicative amounts per season has to be calculated. If the effective costs incurred by a club for the formation and the education of a player are allegedly lower than the ones calculated on the basis of the indicative amounts mentioned in the FIFA Circular no. 826 but are not proven, then the indicative amounts of the Circular applies. The CAS Panel finally decided in this case that the player concerned had terminated his training period before his second season as a professional player at the age of 18.

In another case before the CAS, the Panel also decided that the player's training period had finished earlier. In this case before the CAS of 2004, the player concerned was described by his training club as "*the most talented player who played at all ages at the highest level in the country of the training club and in the national teams at all ages*".[254] The player was loaned to another club. With regard to this

[253]CAS 2003/O/527 *Hamburger Sport-Verein e.V. v. Odense Boldklub*, award of 21 April 2004; See also FIFA Commentary, explanation Article 1, p. 112, footnote 149.

[254]CAS 2004/A/594. See also FIFA Commentary, explanation Article 1, p. 112, footnote 149. See also CAS 2004/A/785 *T. v. L.*, award of 30 August 2005.

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four-year loan of the player at the age of 18, a six-figure USD sum was paid for each year. Therefore, it was considered by the CAS that the player's training was terminated at 17, when he, in fact, signed a five-year contract with his training club.

In a case before the CAS of 2 March 2005, a player was registered with the Dutch football club FC Twente from the 1995/1996 season through to the 2002/2003 season, more specifically for seven sports seasons, between the age of 14 and 21.[255] As from the of 1998/1999 season up to and including the 2002/2003 season the player was under contract with FC Twente. On 1 July 2003 an employment contract was concluded between the player and the German club Schalke 04. In the same year, before the player's 23rd birthday, FC Twente raised its claim for training compensation. On 22 July 2004, the DRC ordered Schalke 04 to pay FC Twente the amount of EUR 460,000. Schalke 04 challenged the DRC and stated before the CAS that the player finished his training period at the end of the of 2000/2001 season. The CAS noted that Schalke 04 primarily had based its arguments on an interpretation of the FIFA RSTP, limiting the obligation to pay training compensation, with regard to a subsequent transfer, only for training times received after the last change of the player's status. The CAS Panel did not subscribe to this interpretation.

In a case before the CAS of 2 October 2006 between Maccabi Haifa and Racing Club Santander, the Panel decided that according to the CAS jurisprudence, a player that regularly plays in the "A" team of a club can be deemed as having completed his training.[256] According to FIFA Circular no. 801, the element which triggers the end of a player's training and/or education is a question of proof. The burden of proof is on the club that is claiming this fact. The decision must be taken on a case-by-case basis. Several factors can be considered to determine the completion of the player's training: the reference to the player as "*a regular player for the club*" and the loan of a player for significant sums of money tend to lend credence to the argument that the player is "effectively trained" and hence will be (is) a regular player. The contribution for the further development of a player after he has terminated his training period according to FIFA Regulations, is not considered as a factor in the calculation of training compensation and does not entitle the club to such compensation. In this case the CAS Panel made a distinction between the training period and the development. The training period is subject to rules and limited by FIFA with specific regulations and Circulars while the development of a player is not. The aim and spirit of the FIFA Regulations was to regulate the training and not the development of the player. Therefore, the CAS Panel finally decided that what needs to be established is the point of termination of the training period of the player and not the extent of the subsequent development of the player concerned as a professional football player.

[255]CAS 2004/A/696 *Schalke 04 v. FC Twente*, award of 2 March 2005.

[256]CAS 2006/A/1029 *Maccabi Haifa FC v. Real Racing Club Santander*, award of 2 October 2006.

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In a case before the CAS between Feyenoord and Flamengo of 26 November 2007, the CAS emphasized that the club that wishes to state that the training period of the player has been completed, bears the onus of proof that a player was fully trained before the age of 21.[257] The decision on whether and when the formation of a player has been completed has to be taken on a case-by-case basis, taking due consideration of all the circumstances and evidence produced. In this regard, the number of matches played is not necessarily decisive, according to the CAS Panel. Finally, the CAS Panel held that Feyenoord had not demonstrated that the player's formation had to be considered as completed before his transfer to Feyenoord.

In a case before the CAS between Grasshopper and Allianza of 18 June 2009, the CAS Panel referred to the case law of CAS (cf. CAS 20004/A/560, no 7.4.13; CAS 2004/A/594, no 7.2 *et seq.*) in which it was decided that the period to be considered when establishing training compensation owed, is the time during which a player was effectively trained by a club.[258] This rules out any time spent by a player at another club on a loan arrangement unless the loaning club can demonstrate that it bore the costs for the player's training for the duration of the loan. According to the FIFA RSTP, training compensation is due for training incurred up to the age of 21, unless it is evident that the player already terminated his training period before the age of 21. The burden of proof to demonstrate that the training was indeed concluded before the player reached the age of 21, lies with the new club. Even though regular performance for a club's "A" team can trigger the end of a player's training and constitutes the major indicator of the completion of a player's training, this does not necessarily constitute the only and decisive factor for the completion of a player's training. According to the CAS, there are other factors that are generally taken into consideration such as the player's value to a club, reflected in the salary that a player is paid, in the loan fee that is achieved for his services or in the value of the player's transfer, the player's public notoriety on a national and international level, his position at the club if established as a regular or even holding the captaincy, his regular inclusion in the national team and so forth (cf. CAS 2006/A/1029, p. 20 *et seq.*).

In the previously mentioned case between Udinese and Helsingborgs before the CAS of 25 July 2012, Helsingborgs claimed training compensation for its former professional player, Landgren, from Udinese.[259] With regard to the exact amount of training compensation, the appellant, Udinese, stated that the player terminated his training before the age of 21. According to the Panel, it is Udinese that has the burden of proof to show that the player terminated his training before the age of 21. Udinese contended that the player was fielded ten times in the A team of the respondent, that he took part in four UEFA Cup games and that he was a member of the national youth team. The CAS Panel referred to the CAS jurisprudence (CAS 2003/A/527 and 2006/A/1029) in which it was stated that a player that

[257]CAS 2007/A/1320-1321 *Feyenoord Rotterdam v. Clube de Regatas do Flamengo*, award of 26 November 2006.

[258]CAS 2008/A/1705 *Grasshopper v. Alianza Lima*, award of 18 June 2009.

[259]CAS 2011/A/2682 *Udinese Calcio S.p.A. v. Helsingborgs IF*, award of 25 July 2012.

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regularly plays in the A team of a club is to be deemed as having completed his training. The CAS Panel decided that the 2007 season, in which he played ten games in the A team, was not enough to state that the training period was terminated. The 2008 season, on the contrary, can be considered as a turning point in the career of the player. In that season the player played in nineteen games (out of a possible thirty) for the A team. In the 2009 season, the player's figures are similar although he played two more games for Udinese's A team in the Swedish national league. The Panel was aware that the number of games played is only one factor to be taken into consideration when assessing if a player has completed his training period, but deems that this is an important and objective criterion which might be sufficient in the absence of other elements. The Panel is of the opinion that once this objective criterion is demonstrated, the burden of proof shifts to the training club to prove that a player was not actually fully trained even though he was playing most of the games with the A team. The training club failed to prove this. The CAS emphasized that there is a difference between the training and the development of a player, as decided in CAS 2006/A/1029. The training period was completed after the 2007 season.[260]

In the case before the CAS between Bradford City and Falkirk of 14 March 2014, which case concerns the appeal of the DRC case of 23 January 2013, the player made three appearances for the club in the 2007/2008 season, 27 appearances during the 2008/2009 season and in the 2009/2010 season he made 20 appearances for the first team of the club, but again suffered a number of injuries. As opposed to the DRC, which decided that the training period was not completed before the age of 21, the CAS finally decided that Bradford City had discharged its burden of proof and that the player had terminated his training at the end of the 2008/2009 season.[261]

### *11.10.4 Conclusion*

Following consistent jurisprudence of the DRC and the CAS it can be derived that both institutes are generally reluctant to decide that the training period of a player is terminated. As also often confirmed in the 'older' jurisprudence of the DRC, such as the DRC decision of 9 November 2004 (no. 114556), that many clubs and

[260]See also CAS 2014/A/3486 *MFK Dubnica v. FC Parma*, award of 2 February 2015. In this case the player's training was also completed before the age of 21. See also CAS 2014/A/3518 *Zamalek Sporting Club v. Accra Hearts of Oak Sporting Club*, award of 31 October 2014. In CAS 2012/A/2968 *Konyaspor Kulübü Dernegi v. Ituano Futebol Clube*, award of 23 July 2013, the club failed to provide any data concerning the number of times the player was actually fielded in the first team. The CAS stressed that only under exceptional circumstances can a player be considered as having completed his training before the age of 21.

[261]See DRC 23 January 2013, no. 01132988, and CAS 2013/A/3303 *Bradford City Football Club v. Falkirk Football Club*, award of 14 March 2014.

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players have often erroneously invoked this provision, in cases where it cannot be said that a player had finally completed his training before being 21 years old.

Analysing the jurisprudence it follows that the DRC is even stricter than the CAS. According to the DRC jurisprudence, it must be evident that the player has terminated his training period before the age of 21. The DRC is of the opinion that in any case, more than just one indication to the possible earlier termination of the training period must exist in order to justify the application of the exception. The Chamber wished to reiterate that it was the understanding of the legislator that the exemption of the said Article 1 of Annex 4 of the RSTP would only apply in cases of unusually talented young players, which are rarely encountered. This tends to be the case with young players, who, at the age of 17 or 18 are known globally for their exceptional talents, who are regulars on a club and national level and who are frequently the focus of transfer agreements to the world's top clubs. In such cases, according to the DRC, it would seem rather misplaced to discuss training compensation for these players, who at the age of 17 or 18 are considered absolute world class. However, according to the DRC committee there are very few players with such an exceptional status that they have completed their training period and would have gained all the relevant experience before reaching the age of 21.

According to the CAS case law, the CAS seems to be more inclined to decide that the training period is terminated before the age of 21. The CAS Panels constantly stress that the decision must be taken on a case-by-case basis in order to establish that the training period is completed. Several factors are important, such as the player's value at a club, reflected in the salary that a player is paid, in the loan fee that is achieved for his services or in the value of the player's transfer (a loan of a player for significant sums of money tends to lend credence to the argument that the player is "*effectively trained*"), the player's public notoriety on a national and international level, his position at the club is established as a regular or even holding the captaincy, his regular inclusion in the national team, the date of signature of a first non-amateur contract between a player and a club and the number of games played by the player in the "A" team of the club during a season, as well as the technical skills and speed are to be taken into consideration to determine the duration of the training period, the reference to the player as "a regular player for the club" and so forth. We note that the regular performance for a club's "A" team can indeed trigger the end of a player's training and constitutes an important indicator of the completion of a player's training, however, this does not necessarily constitute the only and decisive factor for the completion of a player's training before the age of 21. Finally, it needs to be noted that the burden of proof in order to demonstrate that the training period was indeed concluded before the player reached the age of 21, always lies with the new club. In the mentioned case between Udinese and Helsingborgs before the CAS of 25 July 2012, the Panel even decided that once the objective criteria are demonstrated, the burden of proof shifts to the training club to prove that the player was not fully trained even though he was playing most of the games with the club's A team.[262]

[262]CAS 2011/A/2682 *Udinese Calcio S.p.A. v. Helsingborgs IF*, award of 25 July 2012.

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Over the years we also see a development in which the DRC does not refer to prior considerations, such as "an early termination only applies in cases of unusually talented young players, which are rarely encountered". According to the DRC in this 'older' jurisprudence, this tended to be the case with young players, who, at the age of 17 or 18 were known globally for their exceptional talents, who were regulars on both a club and national level and who were frequently the focus of transfer agreements to the world's top clubs. In the past, it concerned players who, at the age of 17 or 18 were considered as absolute world class. The DRC was of the opinion that there were very few players with such an exceptional status that they had completed their training and would have gained all the relevant experience before being 21 year old. In the last few years, especially the CAS Panels seem to provide more possibilities for clubs to establish that the training period of a player is terminated before the age of 21, although the CAS and especially the DRC still hold on to their strict approach in this respect. However, and although several elements still have to be taken into account, the CAS Panels tend to give more weight to the number of matches that the player has played. In the event that the player has played a substantial number of matches, the CAS seems to be more inclined to decide that the training period is terminated before the age of 21 at the end of the season that he played a substantial number of matches.

## 11.11 Clearly Disproportionate Rule

Pursuant to Article 5 para 4 of Annex 4 of the RSTP, 2016 edition, the DRC may review disputes concerning the amount of training compensation payable and shall have discretion to adjust this amount if it is clearly disproportionate to the case under review. In other words, parties are free to request the DRC to reduce or increase the amount of training compensation based on this "clearly disproportionate rule". According to the FIFA Commentary, "disproportionate" means that the amount is clearly either too low or too high with regard to the effective training costs incurred in the specific case. The club alleging the disproportion in the amount of training compensation shall submit all necessary evidence substantiating the demand or review. From the jurisprudence regarding this subject, we can conclude that the requesting party needs to provide FIFA with substantial documentary evidence that the amount that is clearly disproportionate.

From the DRC jurisprudence it follows that the circumstances of the player in question must be exceptional and the outcome of the calculation must clearly be disproportionate. In a decision of 12 January 2007, the Chamber emphasized that in accordance with its well-established jurisprudence when deciding on cases of training compensation, the calculation mechanism set out in the RSTP along with the explanations contained in FIFA Circular 826 dated 31 October 2002, is to be applied rigorously. In that respect, the DRC explicitly stated that the amount calculated according to these rules will only be altered, if the circumstances of the

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player in question are exceptional and the outcome of the calculation is clearly disproportionate (also following the aforementioned FIFA Circular no. 826).[263]

In order to avoid any legal uncertainty, the Chamber will be reluctant to establish that the amounts for training compensation are disproportionate. In a DRC decision of 12 March 2009, the DRC decided that it can adjust the amounts for training compensation to reflect the specific situation of a case according to circular 826. However, the Chamber outlined that this is not an obligation and must only be seen as an exception, since this would otherwise lead to worldwide legal uncertainty.[264]

It is of vital importance to substantiate a claim based on the clearly disproportionate rule. In the DRC decision of 19 August 2010, the respondent rejected the claim lodged by the claimant and stated that the amount was disproportionate. However, the DRC decided that the respondent had not provided FIFA with any substantial documentary evidence that the amount claimed by the claimant was clearly disproportionate.[265] As a result thereof, the DRC finally decided that it had no reason to deviate from the indicative training compensation amounts.

In its case of 24 November 2010, the DRC Judge reverted to the respondent's statement in accordance with which it considered that the amount claimed by the claimant was "*tremendously high*".[266] In this regard, the DRC Judge recalled, in accordance with the contents of Article 5 para 4 of Annex 4 of the RSTP, that the DRC Judge may review disputes concerning the amount of training compensation payable and shall have discretion to adjust this amount if it is clearly disproportionate in the case under review. However, the DRC Judge was eager to emphasize that such possibility allowed by the RSTP would, in any case, have to be analysed on a case-by-case basis. In this context, the DRC Judge pointed out that, according to Article 20 of the RSTP and Article 2 of Annex 4 of the same RSTP, the player's first registration as a professional, in itself, is sufficient to trigger the right of training clubs to claim training compensation. Moreover, as pointed out by the CAS in the case *CAS XXXX/X/XXXX K v/T & Football Federation X*, as well as by the well-established jurisprudence,[267] the RSTP do not set out any minimum length of the contractual relationship between the player and the club where he signs his first professional contract, when considering the amount of training compensation due in a particular case. The DRC Judge finally considered that no particular fact of the case should lead him to review the amount payable in the sense of a reduction compared to the strict application of the provisions regarding the calculation of training compensation. Consequently, the DRC Judge concluded that the provisions of Article 5 para 4 of Annex 4 of the RSTP shall not be applied in the present

[263]DRC 12 January 2007, no. 17897. See also DRC 12 January 2007, no. 17266.

[264]DRC 12 March 2009, no. 39234.

[265]DRC 19 August 2010, no. 8101159.

[266]DRC 24 November 2010, no. 1110955.

[267]DRC 12 March 2009, no. 39234.

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case and, therefore, finally decided that the amount of training compensation payable by the respondent to the claimant shall not be reviewed.

As referred to before, the amount calculated will only be altered, if the circumstances of the player in question are exceptional and the outcome of the calculation is clearly disproportionate. This also follows from a DRC decision of 26 January 2011, in which case the Chamber had to decide on whether or not the amount payable for training compensation had to be adjusted.[268] Taking into account the abovementioned jurisprudence and the legal principle of the burden of proof, the Chamber concluded that the respondent in this case neither substantiated, nor provided any documentary evidence in order to corroborate exceptional circumstances or a disproportionate outcome of the calculation in the present matter. Consequently, the Chamber considered the allegation of the respondent to be ungrounded and therefore the Chamber decided that it had to be rejected due to the lack of probative force. The DRC Committee finally decided to take into account the indicative amount of EUR 60,000.[269]

The jurisprudence notes that the DRC may review disputes concerning the amount of training compensation payable, and has discretion to adjust this amount if it is clearly disproportionate, which will be analysed on a case-by-case basis and it must be substantiated with any pertinent documentary evidence by the club that is addressed to pay training compensation. In its case of the DRC of 17 August 2012, the Chamber referred to all these elements and took into account that the respondent, in an alternative motion, contested the amount claimed by the claimant, and deemed that the DRC should adjust the relevant amount since it is clearly disproportionate.[270] The DRC concluded in this case that the respondent actually does not deny the claimant's entitlement to training compensation, but rather expresses the view that such compensation should be reduced in view of certain particular circumstances. The Chamber recalled that, according to Article 5 para 4 of Annex 4 of the RSTP, the DRC may review disputes concerning the amount of training compensation payable and shall have discretion to adjust this amount if it is clearly disproportionate to the matter under review. In this regard, the DRC was, however, eager to emphasize that such possibility allowed by the RSTP would, in any case, have to be analysed on a case-by-case basis. In this context, the DRC underlined that the respondent had not substantiated its request with any pertinent documentary evidence. The DRC unanimously concluded that the respondent attempted to overturn said principle in trying to allege that it was the claimant that

[268]DRC 26 January 2011, no. 1111959.

[269]In an unpublished DRC decision of 7 April 2011, the Chamber was eager to emphasize that the "*clearly disproportionate rule*" does not stipulate the obligation of the Chamber to reduce amounts which are, allegedly, disproportionate but only the possibility to do so on a case-by-case basis. Equally, the DRC underlined that this possibility exists only in cases of *clear disproportionality* and that, in any case, the party invoking such disproportionality had to carry the burden of proof in this respect.

[270]DRC 17 August 2012, no. 8122742.

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had to prove said proportionality, while it is up to the respondent to prove the disproportionality of the indicative amount fixed in the relevant FIFA Circulars. For the sake of good order, the Chamber was also eager to emphasize that as a general rule, the classification of a club as established and confirmed by the relevant association to which the club is affiliated, is the only one which can be taken into account by the deciding body, that is, the national associations are responsible for the categorization of their member clubs.

In a case before the DRC of 17 January 2014, the Chamber acknowledged that the respondent had, as a side-note, requested the Chamber to consider a possible reduction of the amount of training compensation payable to the claimant.[271] The Chamber pointed out that, according to Article 20 and Article 2 of Annex 4 of the RSTP, and as pointed out by the CAS in the case CAS 2006/A/1189 *Club N v/ Club T & country F Football Federation*, the player's first registration as a professional before the end of the season of his 23rd birthday is, in itself, sufficient to trigger the right of training clubs to claim training compensation. Moreover, in the aforementioned case, in which the CAS also dealt with a request to reduce the amount of training compensation, the CAS highlighted that the RSTP does not set any minimum length of the contractual relationship between the player and the club where he signs his first professional contract. Regardless of the aforementioned consideration, the DRC deemed that the fact that the player never played in the 1st team could not be taken into account as a strong argument in favour of reducing the amount of training compensation. The Chamber had no alternative but to decide that training compensation payable by the respondent to the claimant could not be adjusted.

The DRC underlines that the possibility for a reduction only exists in cases of a clear lack of proportionality and that, in any case, the party invoking such disproportionality has to carry the respective burden of proof. In its case of 27 February 2014, the DRC reverted to the respondent's argument according to which the indicative amounts for training compensation were disproportionate and should be adjusted by the DRC in accordance with Article 5 para 4 of Annex 4 of the RSTP.[272] The Chamber was eager to emphasize that said provision does not stipulate the obligation of the Chamber to reduce amounts which are allegedly disproportionate, but only the possibility to do so on a case-by-case basis. Equally, the Chamber deemed it fit to underline that the burden for a party to prove the lack of proportionality of the relevant amounts and/or the respective categorization had to be set at a high level, in order to provide and safeguard legal certainty for all the clubs involved in the world of football. The Chamber considered that it is of major interest for all the stakeholders in the world of football to be able to rely on indicative amounts and the relevant categorizations in order to calculate the relevant shares of training compensation in a specific case. Therefore, the Chamber

[271]DRC 17 January 2014, nos. 01141545a and 01141545b. See also DRC 17 January 2014, no. 01142929.

[272]DRC 27 February 2014, no. 0214390.

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decided that only if there are strong indications pointing towards a clear lack of proportionality, that the Chamber could possibly review and/or reduce the amounts of training compensation payable. The Chamber came to the conclusion that the respondent failed to submit sufficient proof in order to corroborate the clear disproportionality either of the indicative amounts or of the categorization according to the country G Football Federation, as it would have been necessary, according to Article 5 para 4 of Annex 4 of the RSTP, for the DRC to be in a position to use its discretion to reduce the amount due.

The CAS is also of the opinion, in line with DRC jurisprudence, that the club claiming that the amounts are disproportionate, bears the burden of proof. For example, in its award of 2004, the CAS decided that a club claiming that training compensation calculated on the basis of the indicative amounts is disproportionate, bears the burden of proof.[273] This club has to present concrete evidence in the form of documents such as invoices, costs of a training centre, budgets, etc. Only economic aspects are relevant in that respect. According to the CAS, a club is allowed to demonstrate that the strict application of the system leads to an amount that is clearly disproportionate and to ask for a reduction or an increase of the amount. Time factors, such as a short contractual period (see CAS 2009/A/1810-1811, para. 87), or qualitative factors, such as the player's lack of skills (see CAS 2009/A/1810-1811, para. 89) or, to the contrary, the fact that the player is highly talented (see CAS 2009-A-1908, para. 143), cannot be taken into account.[274]

In the previously mentioned case before the CAS of 2 March 2005, Schalke 04 was of the opinion that training compensation should be proportional to the benefit that each party received from the training of the player as an amateur. In accordance with the CAS jurisprudence (CAS 2003/0/506), the CAS Panel decided that the "clear disproportion" rule set out by FIFA Circular no. 826, is an exception to the general rule dictating the use of the indicative amounts.[275] According to the CAS, this exception is to be raised by "any party that objects to the result". The objecting party has the burden of proof not only that the amount is disproportionate, but that it is also clearly so.[276]

In the previously mentioned *Wilhelmshaven* case of the CAS of 5 October 2009, the Sole Arbitrator referred to the FIFA rules regarding training

[273]CAS 2004/A/560. See also FIFA Commentary, p. 120, footnote 160.

[274]CAS 2004/A/594 *Hapoel Beer-Sheva v. Real Racing Club de Santander S.A.D.*, award of 1 March 2005. The CAS also decided that the FIFA DRC is given the discretion to vary the training compensation fee based on the tariff in the rules, is limited to circumstances where such amount is "clearly disproportionate". Such clear lack of proportion has to be proven by the clubs that stated that the amount is disproportionate.

[275]CAS 2004/A/696 *Schalke 04 v. FC Twente*, award of 2 March 2005.

[276]Also in CAS 2009/A/1908 *Parma FC S.p.A. v. Manchester United F.C.*, award of 9 July 2010, the CAS Panel decided that the guidelines as referred to in FIFA Circular no. 799 can be used to determine whether training compensation calculated on the basis of the indicative amounts is clearly disproportionate to the specific circumstances of this case.

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compensation and the possibility to a club objecting to a training compensation calculated on the basis of the indicative amounts mentioned in the FIFA regulations. In that case the club has to prove that such compensation is disproportionate on the basis of concrete evidentiary documents, such as invoices, costs of training centres, budgets, and suchlike.[277] However, such clubs have to provide clear and convincing evidence to establish, to the satisfaction of the Arbitrator, that such compensation is disproportionate, failing which the indicative, general amount shall apply. Arguments like the very short period of the contract do not constitute a suitable parameter to evaluate the real and effective training costs incurred by a club for the formation and the education of a player, because only economic factors—and thus not time factors—may be taken into account by the Arbitrator. The applicable FIFA RSTP do not provide any basis for a reduction of the training compensation due to the short period of time spent by the player at the new club that he has been transferred to. It is not reasonable to assert that the amount of compensation due to the training clubs could be influenced by the terms of the contract (such as the length of the labour contract) negotiated by two distinct parties. According to the Sole Arbitrator, a club cannot be held responsible nor suffer from the consequences of a club's failure to carefully verify the actual value of an amateur football player who is less than 23 years old before hiring him. Also the club's argument that the player was not as good and skilful as expected, were not accepted. The claimant clubs could not be held responsible nor suffer from the consequences of Wilhelmshaven's failure to carefully verify the actual value of an amateur who is less than 23 years old before hiring him.[278]

In a case before the CAS in 2010, after establishing the status of the player, the CAS decided to reduce the amount of the training compensation due by the club, based in equity.[279] The CAS took different elements into consideration such as the very short period of time spent by the player at the club and the fact that the club had not really benefited from the formation of the player (see CAS 2010/A/2259). Also in the previously mentioned case of the CAS of 2013, the *Dundee-Vélez* case, the CAS Panel had to decide whether or not the amount of training compensation had to be adjusted.[280] In this case, the CAS Panel referred to other leading CAS cases.[281] The CAS found no reason to adjust the amount due for training compen-

[277]CAS 2009/A/1810 and 1811 *SV Wilhelmshaven v. Club Atlético Excursionistas & Club Atlético River Plate*, award of 5 October 2009.

[278]CAS 2006/A/1027 *Blackpool F.C. v. Club Topp Oss*, award of 13 July 200 and CAS 2007/A/1218.

[279]CAS 2010/A/2259.

[280]CAS 2013/A/3119 *Dundee United FC v. Club Atletico Vélez Sarsfield*, award of 20 November 2013. See also CAS 2009/A/1810 and 1811 *SV Wilhelmshaven v. Club Atlético Excursionistas & Club Atlético River Plate*, award of 5 October 2009; CAS 2010/A/2069 and CAS 2010/A/2075 *Marítimo da Madeira SAD and Coritiba Footballclub*, award of 2010.

[281]CAS 2011/A/2681, CAS 2003/O/500, CAS 2009/A/1908, CAS 2009/A/1810 and 1811 *SV Wilhelmshaven v. Club Atlético Excursionistas & Club Atlético River Plate*, award of 5 October 2009 and CAS 2003/A/506.

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sation and finally decided that insofar as Dundee United argues that the indicative amount of training compensation had to be reduced because of the bad faith of the Vélez Sarsfield club towards it, this argument had to be dismissed.[282]

The DRC may review disputes concerning the amount of training compensation payable and shall have discretion to adjust this amount if it is clearly disproportionate to the case under review. Based on DRC jurisprudence, we note that if the circumstances of the player in question are exceptional and the outcome of the calculation is clearly disproportionate, which is also confirmed in FIFA Circular no. 826, the amount of training compensation can be reduced. However, this is not an obligation and must be seen as an exception since this would otherwise lead to worldwide legal uncertainty. In that respect, it is of vital importance to substantiate a claim based on the clearly disproportionate rule, as the CAS also emphasized several times. A club claiming a reduction needs to provide FIFA with concrete documentary evidence that the amount claimed by the claimant is clearly disproportionate. In other words, the objecting party has the burden of proof not only that the amount is disproportionate but that it is also clearly so. The club has to present concrete evidence in the form of documents such as invoices, costs of a training centre, budgets, etc. Economic aspects are relevant in that respect. We must take into account that time factors, such as a short contractual period, or qualitative factors, such as the player's lack of skills or, to the contrary, the fact that the player is highly talented, will generally not be taken into account by the CAS in future cases. However, the CAS is not very consistent in this respect, since it did once consider that the short period of time spent by the player with the club in combination with the fact that the club had not really benefited from the formation of the player, as being relevant. Therefore, it seems worthwhile for a club to bring up this argument in future cases in any event. Arguments such as the player never played in the 1st team, will not be taken into account as an argument in favour of reducing the amount of training compensation.

## 11.12 Conclusion

According to Article 20 of the RSTP and Annex 4, 2016 edition, we have noted that training compensation must be paid to a player's training clubs if the player signs his first employment contract as a professional, but also on each transfer of a professional. With regard to both situations, however, the player must sign his employment contract or be transferred to another foreign club before the season's end of his 23rd birthday. Contrary to the system of a solidarity mechanism, where

[282]CAS 2014/A/3518 *Zamalek Sporting Club v. Accra Hearts of Oak Sporting Club*, award of 31 October 2014. See also CAS 2013/A/3082 *Budapest Honvéd FC v. América FC*, award of 3 September 2013.

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compensation is only required if the professional football player is transferred before the end of his contract, training compensation must be paid irrespective of whether the transfer takes place during or at the end of the player's contract.

In order to be entitled to receive training compensation, the player must be established as a professional. According to Article 2 para 2 of the RSTP, 2016 edition, a professional is a player who has a written contract with his club and is paid more than the expenses that he effectively incurs in return for his footballing activity. As from the amendment of this provision of the RSTP in 2005, the well-established jurisprudence of the DRC and the CAS confirms that both conditions, (a) the written contract and (b) the payments exceed the expenses, must be cumulatively met.

Pursuant to Article 3 of Annex 4 of the RSPT, 2016 edition, it is stipulated that when a player is registered as a professional for the first time and when he signs a second contract with regard to a "subsequent transfer", the club for which the player is being registered is responsible for paying training compensation within 30 days of registration to every club for which the player was registered. An association is entitled to receive training compensation which, in principle, would be due to one of its affiliated clubs if it can provide evidence that the club in question—with which the professional was registered and trained—has in the meantime ceased to participate in organized football and/or no longer exists in particular, due to bankruptcy, liquidation, dissolution or loss of affiliation, whereby this financial compensation is earmarked for youth football development programmes in the association in question.

Following numerous decisions of the DRC (and as confirmed by the CAS), it is decided that a club where the player plays on a loan basis is entitled to receive training compensation. Following the well-established jurisprudence of the DRC and the CAS, the nature of a players' registration, whether on a definite or on a temporary basis with a club claiming training compensation, is not relevant with regard to the question whether or not such claimant club is entitled to receive training compensation for the period of time that the player was effectively trained by it.

Pursuant to Article 1 of Annex 4 of the RSTP, 2016 edition, training compensation is not due (a) if the former club terminates the player's contract without *just cause* (without the right of the previous clubs), (b) if the player is transferred to a category four club and (c) in the event that a professional reacquires amateur status on being transferred. If one of the situations as mentioned is not applicable and all the other elements point towards training compensation being due, the jurisprudence shows that the new club will not have any legal defence not to pay training compensation. Furthermore, we note that a former club that claims for training compensation is obliged to lodge its claim within 2 years with FIFA, in absence of which the club waives its rights to receive training compensation. The "*prescription term*" will start as from 30 days after the player's registration, which can be entitled as "*the event giving rise to the dispute*", since the new club is obliged to pay the training compensation within 30 days after the player's registration. Aside from these situations, to avoid any misunderstanding, training compensation is not applicable to women's football.

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Within the EU/EEA, there is an extra requirement on whether or not training compensation is due. If the former club does not offer the player a contract within the EU/EEA, no training compensation is payable by the new club unless the former club can justify that it is entitled to such compensation. The CAS and the DRC decided in several cases that the obligation of a club having offered the player a contract when claiming training compensation is a requirement which only needs to be met within the EU/EEA. This means that if the training club is not located within the EU/EEA, the abovementioned provision does not apply. According to the DRC and the CAS, it is also difficult to prove that this "justification" exists. This means that if parties mutually agree to terminate the player's contract within the EU/EER, the former club cannot prove its entitlement to receive training compensation since that club is not sincerely interested in the player.

According to several DRC decisions, we have noted that parties often try to exclude the right of the former club(s) to receive training compensation. However, the DRC and the CAS are very clear on this point. Only the club which is officially entitled to receive training compensation may waive its right to training compensation. Any possible financial settlements concluded between the former club or the new club and the player cannot, in any sense, establish that the former club(s) loses and therefore forfeits its right to receive training compensation from the new club.

With regard to the completion of the training and education period, the DRC and the CAS are of the opinion that if it is evident that the player has terminated his training period before the age of 21, the player may have completed his training. However, following the well-established jurisprudence of DRC and the CAS, we can conclude that both institutes are quite reluctant to establish that the training period of a player is terminated before the age of 21. The decision must be taken on a case-by-case basis in order to establish that the training period is completed. Several factors are important, includes the player's value to a club, which is reflected in the salary, his regular inclusion in the national team, the number of games played by the player in the "A" team of the club, as well as the technical skills, are to be taken into consideration to determine the duration of the training period. The burden of proof to demonstrate that the training was indeed concluded before the player reached the age of 21, always lies with the new club. It must prove that there must be more than one indication regarding the possible termination of the training period to justify the application of the exception.

Finally, we may conclude that parties are always free to request the DRC to reduce or increase the amount of training compensation based on this "clearly disproportionate rule". This can be inferred from Article 5 para 4 of Annex 4 of the RSTP since the DRC may review disputes concerning the amount of training compensation payable and shall have discretion to adjust this amount if it is clearly disproportionate in the case under review. If the circumstances of the player in question are exceptional and the outcome of the calculation is clearly disproportionate, the amount of training compensation can be reduced. However, this is not an obligation and has to be seen as an exception, according to the Chamber.

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# Chapter 12
# Solidarity Mechanism

**Abstract** The solidarity mechanism entails that each time a professional is transferred before the end of his contract, a solidarity contribution is due by the new club to all the clubs for which the player played between the age of 12 and 23. The solidarity mechanism is only due if the player moves *during* the course of his contract. In this chapter all relevant issues relating to the solidarity mechanism will be discussed. It is the responsibility of the new club to calculate the amount of the solidarity contribution and to distribute it in accordance with the player's career history as provided in the Player Passport. The DRC refers to its well-established jurisprudence, in accordance with which the player's new club is ordered to remit the relevant proportion of the 5 % solidarity contribution to the clubs involved in the player's training. In other words, following numerous DRC decisions, it is a general rule that it is only the new club which is entitled to distribute the amount of solidarity compensation to the relevant former clubs of the player. Even if this obligation is transferred to another club, the new club will still remain liable in any event. The provisions of loan are also subject to the same rules that apply to the transfer of players, including the provisions on the solidarity mechanism. If the player is on loan, the loaning club is entitled to receive a solidarity contribution. Under certain circumstances a solidarity contribution must be paid despite the fact that a transfer compensation is not due. If parties agree upon a mutual exchange of obligations, without providing for payment of any compensation, for example to exchange 2 players, the DRC is of the opinion that the exchange of players can indirectly imply a financial agreement, in view of the fact that the sports qualities of the players have an economic value in the football employment market.

**Keywords** Solidarity mechanism · Solidarity contribution · Domestic transfers · Prescription · Player Passport · Loan · Contingent payments · Exchange of players · Buy-out clause · Default interest

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## Contents

12.1 Introduction ..... 448
12.2 Domestic Transfers ..... 450
12.3 Responsibility of the New Club ..... 452
12.3.1 Calculation ..... 452
12.3.2 Distribution ..... 454
12.3.3 Player Passport ..... 465
12.4 Entitlement of the National Association ..... 466
12.5 Prescription ..... 470
12.6 Contingent Payments ..... 471
12.7 Loan ..... 472
12.8 Exchange of Players ..... 473
12.9 Buy-Out Clause ..... 477
12.10 Default Interest ..... 480
12.11 Conclusion ..... 481
Reference ..... 482

## 12.1 Introduction

FIFA also introduced the system of a so-called solidarity mechanism. The RSTP, 2001 edition, contained provisions that regulated the compensation for the training and education of young players.[1] Following Article 21 of the RSTP, 2016 edition, the solidarity mechanism entails that each time a professional is transferred before the end of his contract, a so-called solidarity contribution is due by the new club to all the clubs for which the player played between the age of 12 and 23. As with the training compensation, the solidarity mechanism stipulates that the former club that provided the education and training of the player is entitled to receive an amount of solidarity contribution in the event that an international transfer of its former player took place in the course of his employment contract. However, there are some significant differences with the training compensation.[2] Training compensation is only applicable when a player moves during his contract as well as after the end of his contract (i.e. if he is transfer free). The solidarity mechanism is

[1]See DRC 8 June 2007, no. 671050. In this case the DRC drew attention to the transfer agreement concluded between 2 clubs and noted that the parties had, instead of agreeing on a transfer compensation by means of a lump sum payment, agreed upon on a payment of a share of 40 % if the player would be transferred internationally to another club. The DRC stated that the agreement had been concluded on 18 December 1998 whereas the mechanism of solidarity contribution had not been introduced until the entry into force of the 2001 edition of the regulations. The DRC concluded that the parties could not have made any provision regarding the solidarity contribution, as this mechanism did not exist at the date of the conclusion of the agreement.

[2]For example and as referred to earlier, for the provisions regarding solidarity contribution it is irrelevant whether a particular player already ended his training period, because it is a different concept from training compensation. See DRC 17 March 2015, no. 03151545.

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only due if the player moves *during* the course of his contract.[3] In other words, a solidarity contribution is not due after the end of a player's contract. Another important difference is that training compensation is due when the transfer or signing of the contract of the player takes place before the age of 23.[4] The applicability of the solidarity mechanism, however, does not depend on a certain age of the player.[5] This is confirmed in several decisions of the DRC, such as its decision of 1 April 2011.[6] Annex 5 of the RSTP, 2016 edition, shows more details regarding the system of a solidarity mechanism.[7]

An important issue in relation to the solidarity mechanism, and regarding the system of training compensation, is that any former clubs claiming the solidarity contribution must also deal with the prescription term of 2 years. As with the training compensation system, a former club forfeits its right to claim solidarity contribution if more than 2 years have elapsed since the event which gave rise to the dispute.

As explicitly decided in the CAS case between Real Madrid and the Brazilian Football Association of 25 July 2012, and as will be discussed later in this chapter, only affiliated clubs are entitled to claim an amount for solidarity contribution. According to the CAS, within the framework of Annex 5 of the RSTP, the term "club" can only designate a club affiliated to a national association, who in turn is a member of FIFA. In other words, *non-affiliated* clubs are not within the FIFA system. In fact, Article 2 and Article 3 of the RSTP clearly show that the regulations only concern "Organized Football" (i.e. "*association football organized under the auspices of FIFA, the confederations and the Associations, or authorized by them*"), as determined in the Definitions section of the RSTP, according to the CAS Panel. In this case the CAS decided that the claim of the national association to request payment of the share of solidarity contribution if no successful link can be established, is of a subsidiary nature. According to the CAS, the claim only exists if a valid primary request exists.[8]

[3]See for example DRC 22 June 2007, no. 67986. In this case the DRC confirmed that the provisions of the solidarity contribution apply only in the event of a player transferring between 2 clubs affiliated to different associations and if a transfer compensation is paid by the player's new club to the player's former club, from where the player is being transferred during the course of the contract.

[4]FIFA Circular no. 769 dated 24 August 2001.

[5]From a more linguistic point of view, the "solidarity contribution" is the contribution itself to be paid by the new club. The overarching system is called "solidarity mechanism".

[6]DRC 1 April 2011, no. 4112858. See also DRC 10 July 2013, nos. 07132717a, 07132717b and 07132717c.

[7]For the rationale of the solidarity mechanism, see CAS 2012/A/2944 *Genoa Cricket and Football Club S.p.A. v. Club Bella Vista*, award of 3 April 2013.

[8]See CAS 2011/A/2635 *Real Madrid Club de Futbol v. Confederacao Brasileira de Futbol (BF) and Sao Paulo FC*, award of 25 July 2012.

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## 12.2 Domestic Transfers

Another parallel between both systems is that both the solidarity mechanism and the system of training compensation is (obviously) only applicable in the case of an *international* transfer. The DRC and the RSTP are quite explicit as it is a basic principle regarding the solidarity mechanism, that it does not apply to *national* transfers (i.e. domestic transfers), not even in cases where the club claiming the payment of the relevant contribution is affiliated to another association.[9] The main criterion and key element is, and the DRC confirms this and refers in this respect to its own well-established jurisprudence regarding this matter, that the solidarity mechanism applies in cases in which the basis of the claim for solidarity contribution is a transfer of a player between 2 clubs affiliated to another association.[10] There is, however, an exception to the aforementioned rule that FIFA's solidarity mechanism does not apply to national transfers: where the association concerned has included a clear clause in its own regulations, thereby acknowledging the obligation to pay an amount of solidarity contribution as a consequence of domestic transfers.[11]

It must be noted that the member associations of FIFA do not necessarily have to implement a solidarity contribution mechanism identical or similar to the solidarity contribution mechanism contained in the RSTP. In the DRC decision of 1 February 2012, the claimant club contacted FIFA claiming its proportion of the solidarity contribution in connection with a national transfer of the player concerned from club H to the respondent, on the basis of an alleged transfer compensation of EUR 16,250,000.[12] In particular, the claimant requested the payment of EUR 465,058.15 plus interest at a rate of 5 % per year. The claimant stated that its request for solidarity contribution was primarily based on Articles 4, 14 and 15 of the Football Associations A's 2008/2009 "*Regulations on General Transfer Provisions, training compensation and solidarity contribution*" (hereinafter: *FAA Regulations*). The claimant outlined that the Football Association A had implemented in its regulations a solidarity mechanism system similar to the solidarity mechanism system contained in the RSTP. The claimant further argued that, in accordance with the constant jurisprudence of the DRC, the pertinent solidarity mechanism system implemented in the Football Association Regulations should therefore also be applied to clubs belonging to different associations. In its reply,

[9]See DRC 22 July 2010, no. 710264. In this case the DRC was of the opinion that despite the fact that the claiming club and the new club played in the same domestic pyramid, and even in the same competition—i.e. the Football League Championship—the transfer of the player was undoubtedly a transfer between clubs belonging to different associations, also commonly called "international transfer".

[10]DRC 21 November 2006, no. 116132. See DRC 9 November 2004, nos. 114679, 114678c, 114678b, 114678a, 114677b, 114677a, 114663b, 114663a, 114662, and nos. 15, 114407, 114342 and 114465.

[11]FIFA Commentary, explanation Article 1, p. 128.

[12]DRC 1 February 2012, no. 2121218.

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the respondent rejected the claim of the claimant stating that the Football Association A is an association and that the regulations of the Football Association A only apply and refer to the members of Football Association A. As far as the applicability of the RSTP was concerned, the respondent argued that the RSTP only applied to international transfers. The respondent argued that the Football Association A had not included a "clear clause" in its regulations stating that a solidarity contribution also applied to non-members of the Football Association A. In light of the arguments put forward by the claimant, the DRC found it vital to emphasize that, in accordance with Article 1 para 2 of the RSTP, the member associations of FIFA are not obliged to implement a solidarity mechanism system in their national regulations identical or similar to the solidarity mechanism system contained in the FIFA RSTP. The member associations are merely directed to provide for a system that rewards clubs investing in the training and education of young players. In other words, the member associations do not necessarily have to implement a solidarity contribution mechanism identical or similar to the solidarity contribution mechanism contained in the RSTP. The DRC wished to emphasize, in particular, that the solidarity contribution mechanism is not included in the list of obligatory provisions to be put in place on a national level. In accordance with the clear wording of Article 1 para 2 of the RSTP as well as in accordance with the well-established jurisprudence of the DRC, which was confirmed by the CAS, the Chamber concurred that the solidarity mechanism system contained in the RSTP only applied to international transfers of players and not to national transfers of players. Consequently, the Chamber decided to reject the claimant's claim for a solidarity contribution based on the RSTP. It was evident that the Football Association A had excluded non-affiliated clubs from its solidarity mechanism system. Contrary to the claimant's opinion, this does not constitute a discriminatory treatment, but simply derives from the freedom of association. As to the arguments put forward by the claimant in connection with principles of European law, the DRC highlighted that the claimant is a club from country P, i.e. a country that is not a member of the European Union. Finally, the claimant's claim, club P in this case, was rejected.[13]

In the so-called *Carini* case of the CAS of 28 November 2007 between Danubio FC and FIFA & Internazionale Milano S.p.A. the CAS Panel had to decide on this same issue. In this case the Uruguayan club Danubio FC claimed that Inter Milan had to pay to Danubio an amount of EUR 350,000 as a solidarity contribution pursuant to the FIFA RSTP, as a result of the national transfer of player Carini from the Italian club Juventus to the fellow Italian club Inter Milan.[14] In this case the Italian Football association implemented national rules not yet approved by FIFA, which did not provide for solidarity contributions and were only applicable to national clubs. Danubio, as a foreign club, had no ability

[13]See also DRC 26 April 2012, no. 4121300.

[14]CAS 2007/A/1287 *Danubio FC v. FIFA & Internazionale Milano S.p.A.* award of 28 November 2007.

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to obtain any solidarity contribution, whether on the basis of the FIFA RSTP, or on the basis of the Italian rules. Danubio thus considered this situation as discriminatory. The Panel stated that since the transfer of the player took place between 2 clubs, Juventus and Inter, belonging to the same association, the Italian association, the CAS Panel did not see any reason why the FIFA RSTP providing for the payment of solidarity contribution should be applied, and the fee paid to Juventus by Inter be should subject to solidarity contribution provided under the RSTP. According to the CAS Panel, the clear wording of the FIFA RSTP left no room for a different solution. The Panel considered that there was no impact on the competition within the EC market by the current system, even to the extent that it was applicable to international and not to domestic transfers. In fact, according to the CAS, even if rules on solidarity were regarded as a decision of an association of undertakings limiting the appellants' freedom of action, they did not necessarily constitute a restriction of competition incompatible with the common market, within the meaning of Article 81, or an abuse pursuant to Article 82, since they were justified by a legitimate objective. According to the CAS Panel, the legitimate objective concerned was the redistribution of a proportion of income to clubs involved in the training and education of a player, including amateur clubs, in the safeguarding of competitive sport and its promotion.

## 12.3 Responsibility of the New Club

### *12.3.1 Calculation*

In the following paragraphs, we will note that the DRC explicitly indicates that it is the responsibility of the new club to calculate the amount of the solidarity contribution and to retain and distribute it in accordance with the player's career history as provided in the Player Passport, as also follows from Article 2 para 1 of Annex 5 of the RSTP, 2016 edition. In that respect, it is important to mention that if the new club, as stipulated in Article 2 para 1 of Annex 5 of the RSPT, does not fulfil its duty to pay the solidarity contribution to the training club(s) within 30 days after the player's registration or, in case of contingent payments, after the date of such payment, it will be held liable by the DRC to pay an interest rate of 5 % to the former clubs.

If the parties agree upon a payment in instalments whereby the first instalment must be paid *before* the date of registration, the "*30-day*" term, as mentioned in Article 2 of Annex 5 of the RSPT, 2016 edition, will be activated and must be paid as from the date the first instalment, according to the DRC decision of 8 June 2007. In this case the registration date was 22 July 2005 whilst the first instalment payment was agreed upon as 15 July 2005. The DRC decided that the payment had to be made before 16 August 2005. In other words, the DRC stated that the amount had to be paid 30 days after the date of the first contingent payment.[15]

[15]DRC 8 June 2007, no. 67579.

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It is not only the responsibility of the new club to spontaneously pay, retain and distribute the amount, it is firstly the responsibility of the new club to calculate the precise amount of the solidarity contribution. The solidarity contribution will generally reflect and indicate the number of years the player was registered with the relevant former clubs between the seasons of his 12th and 23rd birthday.

The calculation schedule with regard to the payment of a solidarity contribution, as mentioned in Article 1 of Annex 5 of the RSTP, 2016 edition, is as follows:

– season of 12th birthday 5 % (i.e. 0.25 % of total compensation);
– season of 13th birthday 5 % (i.e. 0.25 % of total compensation);
– season of 14th birthday 5 % (i.e. 0.25 % of total compensation);
– season of 15th birthday 5 % (i.e. 0.25 % of total compensation);
– season of 16th birthday 10 % (i.e. 0.5 % of total compensation);
– season of 17th birthday 10 % (i.e. 0.5 % of total compensation);
– season of 18th birthday 10 % (i.e. 0.5 % of total compensation);
– season of 19th birthday 10 % (i.e. 0.5 % of total compensation);
– season of 20th birthday 10 % (i.e. 0.5 % of total compensation);
– season of 21st birthday 10 % (i.e. 0.5 % of total compensation);
– season of 22nd birthday 10 % (i.e. 0.5 % of total compensation);
– season of 23rd birthday 10 % (i.e. 0.5 % of total compensation).[16]

In line with the above, it must be stressed that the amount will be calculated pro rata by the new club if the player played for less than one year with that former club.[17]

Also, the jurisprudence shows that the amount of solidarity contribution will always be calculated on a pro rata basis. For example, in a DRC decision of 28 September 2006, the Chamber had to decide on the amount of solidarity contribution to be paid by the new club to the former club where the player played for less than one year.[18] The Chamber referred to Article 1 of Annex 5 of the RSTP, 2005 edition, which took into consideration the number of years, calculated pro rata if less than one year, that the player was registered with the club(s) involved in his training and education between the seasons of his 12th and 23rd birthdays. The Chamber concluded that the calculation of the solidarity contribution should be made on a pro rata basis of the season of the player's 23rd birthday taking into consideration the registration period as from 22 April 1996 until 6 August 1996. The DRC finally concluded that 2.5 % of the 5 % solidarity contribution would be apportioned to the former club. The amount agreed by and between the 2 clubs for the transfer of the player was EUR 3,500,000. Therefore, 2.5 % of the 5 % solidarity contribution was the amount of EUR 4375. The DRC decided in this case that the new club was liable to pay an amount of EUR 4375 as a solidarity contribution.

In addition, from the RSTP it explicitly follows that 5 % of *any* compensation, not including training compensation paid to his former club, shall be deducted

[16]RSTP, 2016 edition, Annex 5, Article 1.

[17]RSTP, 2016 edition, Annex 5, Article 1.

[18]DRC 28 September 2006, no. 961202B.

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from the total amount of this compensation and distributed by the new club as a solidarity contribution to the club(s) involved in his training and education over the years if a professional moves during the course of a contract. However, in a DRC decision of 24 April 2015, the DRC Judge noted the argument of the claimant according to which the amount of EUR 1,680,000 was paid solely in order to purchase 30 % of the rights pertaining to the player, whereas according to a financial statement published by the respondent for the third quarter of 2011, a further amount of EUR 4,225,400 was stipulated for 70 % of the rights pertaining to the player.[19] The DRC Judge therefore noted that the claimant hence concluded that the actual amount which was paid in connection with the transfer of the player and which had to be taken into account when calculating solidarity contribution, was EUR 6,036,285.71, calculated as follows: EUR $4{,}225{,}400/70 * 100$.[20] In other words, from this decision it can be concluded that the solidarity contribution was not only based on the transfer sum itself, but also on the amount paid to a third party for economic rights. In this context, in line with the exchange of players, as we will see later in this chapter, it can be pleaded that agreements between clubs with regard to friendly matches, take-over of wage payments in case of loan constructions, payments in case of future transfer compensation (sell-on clauses) indirectly imply a financial agreement, due to the fact that these elements have a financial value in the football employment market. These elements can fall under "any" compensation as mentioned in Article 1 of Annex 5 of the RSTP, 2016 edition. Also from the DRC decision of 24 April 2015 it can be derived and it was stressed that training clubs are entitled to "any" compensation. Reference was also made in this decision to the spirit and the ratio of the RSTP.[21]

## *12.3.2 Distribution*

### 12.3.2.1 General

It is not only the responsibility of the new club to calculate the amount of the solidarity contribution, but also to retain and distribute it in accordance with the player's career history as provided in his Player Passport (the Player Passport plays an important role for the club in the allocation of compensation to former clubs). In that respect, it is a general rule that the new club, following the FIFA Commentary, must contact the player's former clubs to acquire the bank details required to pay the solidarity contribution to which the former clubs are entitled.[22]

[19]DRC 24 April 2015, no. 0415977.

[20]The DRC Judge believed that it was the amount of EUR 6,036,285.71 on the basis of which a solidarity contribution had to be calculated, given that said amount was adequately substantiated by the claimant and was subsequently not disputed by the respondent.

[21]DRC 24 April 2015, no. 04151496.

[22]FIFA Commentary, Annex 5, explanation Article 2, p. 130.

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According to Article 1 of Annex 5 of the RSTP, 2016 edition, 5 % of any compensation paid to the former club should be deducted from the total amount of the transfer compensation and distributed by the new club as a solidarity contribution to the clubs involved in his training and education over the years. The "5 %" will finally be deducted from the total amount of compensation with the exception of training compensation.[23] If the player is younger than 23 and transfers during the term of his contract and a solidarity contribution is payable to his former clubs, the total deduction from the transfer compensation will be less than 5 %. In this regard, for every year that the player is younger than 23, 0.5 % will be deducted from 5 %.[24]

According to Article 2 of Annex 5 of the RSPT, 2016 edition, the new club is obliged to pay the solidarity contribution to the training club(s) no later than 30 days after the player's after the date of registration. Prior to the expiry of this 30-day time limit, training clubs have no legal interest in starting legal action. In other words, the DRC underlines that training clubs may not start legal proceedings relating to the amount due as solidarity contribution in connection with the training and education of a player earlier than 31 days after the player's registration for the new club.[25]

If a party has made a "double payment" with regard to the payment of a solidarity contribution, a claim for recovering the solidarity contribution can be submitted to the PSC since the payment can be seen as an unjustified payment.[26]

#### 12.3.2.2 Decisions

It is a golden rule following numerous decisions of the DRC that it is only the new club that is entitled to distribute the amount of solidarity compensation to the relevant former clubs of the player. In other words, even if the new club and the

[23]RSTP, 2016 edition, Annex 5, Article 1.

[24]FIFA Commentary, explanation Article 10 para 1, p. 129.

[25]DRC 17 August 2006, no. 861152. See also DRC 28 September 2007, no. 97280, and DRC 8 June 2007, no. 67579.

[26]If the new club paid the entire amount of compensation to the former club without having deducted the 5 % solidarity contribution, the claim for recovering the amount paid in excess has to be lodged with the PSC, which can be based on Article 22 under f RSTP, 2016 edition. See also FIFA Commentary, explanation Article 24, p. 73, Footnote 108. In the PSC decision of 14 January 2015, no. 0115486, the Single Judge decided that "the event giving rise to the dispute" in the context of Article 25 para 5 of the RSTP, arose on the 31st day following the due date of the respective instalments of the transfer compensation. As from that moment the two-year deadline started with regard to the request for reimbursement of the solidarity contribution. However, this decision was appealed and in the award of the CAS 2015/A/4105 *PFC CSKA Moscow v. FIFA & Football Club Midtjylland A/S*, award of 21 December 2015, it was decided by the Sole Arbitrator that the "event giving rise to a claim", in light of the "prescription term" of Article 25 para 5 Annex 4 RSTP, shall be the moment when the club is obliged to pay a solidarity contribution to another club. Therefore, the statute of limitation started in this matter as from the date of the DRC decision.

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selling club agree that the transfer compensation will include solidarity contribution and the selling club is obliged to distribute it to the other former clubs of the player, the new club still bears the risk that a former club can validly claim its proportion of solidarity contribution from the new club if the selling club omits to pay this former club, despite its arrangement with the new club that it was not obliged to pay according to the arrangement with it. In the following paragraphs we will discuss several decisions by the DRC and the CAS and also the consequences of different arrangements.

In a DRC decision of 22 July 2004, a player played for club Z during the period from 1993 until 2000, from the age of 10 until the age of 17.[27] In the year 2000, the player left to go to club A and in July 2003 the player transferred from club A to club B. The latter club had to pay a transfer compensation of EUR 6,000,000.

Clause 4 of the transfer agreement between club A and club B stipulated:

> As to the obligation to pay amounts based on the FIFA Regulations for the Status and Transfer of Players in relation to transfer only, it has been agreed between the parties that such amounts will be for the account of club A.

The DRC finally had to decide on the validity of this clause and whether it was possible to transfer the obligation to pay solidarity contribution to another club, such as the selling party. The Chamber underlined that the new club frequently fails to retain the 5 % solidarity contribution payable to the clubs involved in the player's training and education. In such cases, the club that mistakenly paid 100 % of the transfer fee agreed with the player's former club will consider itself in the clear regarding the solidarity contribution and will ask the clubs entitled to the solidarity contribution to revert to the former club of the player instead. The Chamber emphasized that it is the task of the new club to calculate the amount owed as a solidarity contribution to the clubs involved in the player's training and to distribute this amount in accordance with the player's career history. The DRC finally concluded that club B should pay the solidarity contribution to the former clubs and was of the opinion that Article 4 of the agreement was not relevant in this respect.

In a DRC decision of 26 November 2004, the Chamber concluded that the new club was responsible for paying the solidarity contribution to the clubs involved in the player's training, even if it had mistakenly omitted to retain this contribution amount when it paid the federative rights of the player to his previous club.[28] In light of the above, the Chamber concluded that the new club was responsible for paying the solidarity contribution to the clubs involved in the player's training, even if it had mistakenly omitted to retain this contribution amount when it paid the federative rights of the player to his previous club. The fact that the new club paid the entire amount agreed on to the selling club had no influence on the claim of a former club, given that the latter was not a party to the transfer agreement signed between both clubs. The DRC finally decided that the new club should

[27] DRC 22 July 2004, no. 74038.

[28] DRC 26 November 2004, no. 114130.

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therefore pay the amount of EUR 314,372.50 to the former club within 30 days of notification of the present decision.

In a DRC decision of 21 February 2006, the Chamber had to decide on the calculation of the amount.[29] A player who was born on 17 September 1977 was registered with a club from 10 July 1997 until 16 December 1998. The DRC underlined that the new club to which a player is transferred during the course of an employment contract with his previous club, is responsible for the distribution of 5 % of the compensation payable to the player's former club(s) involved in the training and education of the player between the ages of 12 and 23. In the case at hand, the transfer compensation was in the amount of USD 1,800,000. The DRC outlined that the period to be taken into consideration is related to the player's age from 19 to 20, i.e. the 1997–1998 season, until the player's age of 20–21, i.e. the 1998–1999 season, during which the player was registered until 16 December 1998. The DRC concluded that 15 % of the 5 % solidarity contribution should be apportioned to the former club acting in this procedure as claimant. Now that the DRC had ascertained that the amount agreed upon by and between the 2 clubs for the transfer of the player was USD 1,800,000, 15 % of the 5 % solidarity contribution was USD 13,500. The DRC concluded that the new club was liable to pay this amount.

The obligation to pay solidarity contribution can only be an obligation for the new club and not to any other former clubs. This was confirmed in a DRC decision of 27 April 2006.[30] The DRC duly noted that the new club had paid the entire amount agreed as transfer compensation to the former, selling club of the player. Furthermore, the selling club agreed with the new club that the selling club would pass on the relevant amount and would be responsible for the payment of any possible third club related to the solidarity contribution. In other words, the new club failed to deduct 5 % of the relevant transfer compensation relating to the solidarity mechanism, while contractually establishing that the selling club would make the relevant payments. The DRC referred to its well-established jurisprudence applied in similar cases, in accordance with which the player's new club is ordered to remit the relevant proportion of the 5 % solidarity contribution to the clubs involved in the player's training. At the same time, the player's former club was ordered to reimburse the same proportion of 5 % of the compensation that it received from the player's new club. The said jurisprudence was based on the fact that there is no contractual link between the training club claiming solidarity contribution and the player's former club. Therefore, the DRC was of the opinion that the relevant claim does not have a contractual basis. The regulations of FIFA clearly establish that the distribution of the solidarity contribution is incumbent on the new club. As a result, the DRC underlined that the regulations only provide a legal basis for the claim of the training club against the new club, but not for a claim against the player's former club.

[29]DRC 21 February 2006, no. 26866b.

[30]DRC 27 April 2006, no. 4618.

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In line with the above rule that it is only the new club and not any other entity that is entitled to pay the solidarity contribution, reference is also made to the DRC decision of 10 August 2007. In this case the DRC deemed it important to make it clear that the said jurisprudence of the DRC applies independently of the fact that a third party, in this case a company, assumed the obligation to pay the 5 % solidarity contribution to the player's training club(s). The Chamber recalled that in accordance with Article 22 to 24 of the RSTP in connection with Article 6 of the Procedural Rules, FIFA is not competent to decide claims derived from contracts concluded between a club and a company. The Chamber decided to refer the club to the competent national authorities in order to obtain a binding decision regarding potential claims derived from the said contract against a company. In this case the Chamber again emphasised that since 1 September 2001, the date of entry into force of the completely renewed version of the FIFA regulations, the concept of the so-called "federative rights" to players does not exist anymore. The DRC finally stated that it was replaced by the principle of maintenance of contractual stability between the contracting parties. The Chamber also explicitly emphasized in this case that a player and a club may only be contractually bound by a valid employment contract.[31]

Only the former club that is actually entitled to receive solidarity contribution is entitled to waive its right. For example, in a decision of the Chamber of 14 September 2007, the Chamber emphasized the fact that a former club which renounced to eventually receive a solidarity contribution from the new club in connection with the transfer of the player does not affect or interfere in any way with the right of another club to receive its relevant portion of the solidarity contribution as a training club.[32]

Clubs must be aware and take account that agreements in which parties agree on "vague net amounts" can have serious legal consequences. For example, in a DRC decision of 2 November 2007, 2 clubs provided the transfer agreement with the following provision: "*The NET price of the present transfer is agreed in FOUR MILLION SIX HUNDRED FIFTY THOUSAND USA DOLLARS (4,650,000) that it will be paid*". The DRC analysed this Article and considered that the clause is question was rather vague. The DRC decided that the term "*NET*" is not sufficient to conclude that the 5 % solidarity contribution should not be deducted from the transfer compensation, particularly in view of the unambiguous wording of the applicable FIFA Regulations which clearly provides for the deduction of the applicable amount of solidarity contribution from any transfer compensation.[33]

It is consistent jurisprudence that the new club must deduct 5 % of the transfer compensation as solidarity contribution. In a DRC case of 22 July 2010, the Chamber duly noted that the new club asserted having paid the entire amount of EUR 120,000 agreed upon as transfer compensation. In other words, the new club

[31]DRC 10 August 2007, no. 87505. See also DRC 22 June 2007, no. 67525.

[32]DRC 14 September 2007, no. 97527.

[33]DRC 2 November 2007, no. 117568.

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omitted to deduct 5 % of the relevant transfer compensation relating to the solidarity mechanism. The Chamber referred to its well-established jurisprudence applied in similar cases, following which the player's new club is ordered to remit the relevant proportion(s) of the 5 % solidarity contribution to the club(s) involved in the player's training, in strict application of Article 21 and Annex 5 of the RSTP. At the same time, the player's former club was ordered to reimburse the same portion of 5 % of the compensation that the club received from the player's new club.[34]

Although it is a general rule following numerous DRC decisions that it is only the new club that is entitled to distribute the amount of solidarity compensation to the relevant former clubs of the player and that this obligation cannot be transferred to another club, from a DRC decision of 23 February 2007 it follows, that there are exceptions. In this case, also known as the *Fred* case, the DRC deemed it appropriate to explain that, differently from the majority of cases pertaining to solidarity contribution which are submitted to it for consideration and a formal decision, in this case one of the clubs did not deny being liable to take over the responsibility for the distribution of the solidarity contribution to the club(s) involved in the training and education of the player concerned. In fact, this club accepted, as agreed with the club which, according to the RSTP was responsible in the transfer agreement pertaining to the transfer of the player Fred, to be responsible for the payment of the solidarity contribution towards the club(s) that trained and educated the player. Moreover, the stance of this club was supported by the fact that it had already started with the relevant payments of the solidarity contribution. The fact that the club had already started paying would obviously have played a decisive role to deviate from the RSTP which states that only the new club is responsible.[35]

In the DRC case of 26 January 2011, a claimant club, TFC, contacted FIFA on 22 January and 10 March 2009, claiming its portion of the solidarity contribution in connection with the definitive transfer of a player from it to the respondent club, FCR.[36] Clause 3 of the relevant transfer agreement stipulated that the amount of EUR 6,000,000 was a *net* amount, without any deduction or participation, which does not include any right that could be claimed by another club and that the respondent committed to distribute the solidarity contribution and training compensation. Clause 10 recalled that the transfer compensation did not include the solidarity contribution. The claimant requested the payment of 45 % of the 5 % portion of the total compensation, however the respondent rejected the claim lodged by the claimant. The respondent stated to the claimant that the amount of EUR 6,000,000 paid to the claimant included all kind of payments as well as the training of the player. The DRC emphasized in accordance with Article 1 of Annex 5 of the RSTP, and so too in line with the goals and the spirit of the provisions governing the solidarity contribution, that the deduction of a 5 % portion of the total transfer compensation paid to the player's former club is absolutely mandatory. The DRC confirmed that the clubs could not derogate from the aforementioned provision and

[34]DRC 22 July 2010, no. 710106.

[35]DRC 23 February 2007, no. 27377.

[36]DRC 26 January 2011, no. 111492.

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could not provide in a private agreement for another system of calculation and distribution of the solidarity mechanism. In other words, the DRC decided that the parties were not permitted to determine that the amount of transfer compensation amounted to a net sum without the deduction of the relevant solidarity contribution. The claimant also received 100 % of the 5 % of the transfer compensation earmarked for the solidarity contribution that was to be distributed to clubs involved in the player's training and education. Finally, the DRC decided that the claim of the claimant was rejected. It is constant jurisprudence of the DRC that an agreement by means of which 2 parties establish that a solidarity contribution will be paid (not by the new club in accordance with the RSTP, but) by the player's former club, is in contradiction of Article 21 of the RSTP. In other words, the said article cannot be set aside by means of a contract concluded between clubs involved in a player's transfer. However, it can be derived from this case, in the event the parties establish that a transfer compensation is a net amount (and thus parties agree that the transfer compensation does not include any amount of solidarity contribution), the DRC is of the opinion that the transfer compensation also includes any amount of solidarity contribution. Parties to a transfer agreement are not allowed to derogate from the mandatory provisions regarding solidarity contribution and parties are thus not allowed to determine that the amount of transfer compensation amounts to a net sum without deduction of the relevant solidarity contribution.

It was decided that the obligation to distribute solidarity contribution cannot be set aside by means of a contract concluded between the clubs involved in a player's transfer. In the case before the DRC of 11 March 2011, the DRC Judge noted that club T asserted that, in accordance with Article 4 of the loan agreement, any and all solidarity contributions were due by club W, since the said article stipulated that "*The Temporary and Definitive Transfer Fees stated in this Agreement are not inclusive of the Solidarity Contribution and of the Training Compensation (if due) entitlement under the FIFA Regulations. These, as well as any other levies as required by the PL, shall be borne by W alone*".[37] The DRC Judge noted that the main issue in the current matter was that club T was of the opinion that the total amount of EUR 600,000 was due to it and that, in accordance with Article 4 of the loan agreement, club W had to pay, over and above the total loan compensation of EUR 600,000, the relevant amounts concerning solidarity contribution to the club(s) involved in the training and education of the player. The DRC Judge was eager to emphasize that the solidarity mechanism is a well-established principle in the RSTP, from which the parties signing a transfer or loan contract cannot derogate through the contents of a contract. In other words, the DRC Judge also decided in this matter that the obligation to distribute solidarity contribution cannot be set aside by means of a contract concluded between the clubs involved in a player's transfer. So, as for the distribution of the solidarity contribution, the amount to be taken into account when calculating the solidarity contribution payments due to the club(s) involved in the player's education and training, was the amount actually

[37]DRC 11 March 2011, no. 3112691.

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agreed upon as the total compensation payable by the new club to the former club, regardless of any provision to the contrary stipulated in the transfer or loan contract. According to the DRC Judge, a strict application of the rules on solidarity contribution should be followed and, hence, 5 % should have been deducted from the EUR 600,000 and distributed to the club(s) involved in the player's training and education. It is consistent jurisprudence of the DRC that an agreement by means of which 2 parties establish that a solidarity contribution will be paid (not by the new club in accordance with the RSTP, but) by the player's former club, is in contradiction of Article 21 of the RSTP. The said article cannot be set aside by means of a contract concluded between clubs involved in a player's transfer. It can be derived from this case that in the event the parties establish that an amount of solidarity contribution has to be paid over and above the total loan compensation, the DRC (Judge) will decide (at least in this matter) that the loan compensation also includes the amount of solidarity contribution. Parties are not allowed to derogate from the mandatory provisions regarding solidarity contribution and parties are thus not allowed to determine that the amount of a loan compensation amounts to a net sum without deduction of the relevant solidarity contribution.

The PSC decided in line with the DRC. For example, in a PSC case of 21 November 2011, the central point of the present dispute concerned the question whether or not the respondent was entitled to deduct the sum of EUR 450,000 or 5 % of the total amount agreed upon between the clubs involved for the relevant transfer.[38] The Single Judge of the PSC decided in this case that even if the parties involved had agreed on a net transfer amount, i.e. without deducting the 5 % solidarity contribution, said provision would be contrary to the clear wording and interpretation of the rules regarding solidarity contribution. The Single Judge of the PSC referred to a CAS award (CAS 2006/A/1018), which will be dealt with later in this chapter. With reference to the said award, the Single Judge of the PSC decided that not only the facts at the basis of the referred decision were totally different, but also, that the RSTP edition applicable to the case decided by the CAS was different to the one applicable in this matter.

Also in its case of 18 March 2014, the DRC Judge was eager to emphasize that the solidarity mechanism is a well-established principle in the RSTP, from which the parties signing a transfer agreement cannot derogate through the contents of a contract.[39] In other words, the obligation to distribute solidarity contribution cannot be set aside by means of a contract concluded between the clubs involved in a player's transfer. So, as for the distribution of the solidarity contribution, the amount to be taken into account when calculating the solidarity contribution payments due to the club(s) involved in the player's education and training, is the amount actually agreed upon as the financial compensation payable by the new club to the former club.[40]

[38]PSC 21 November 2011, no. 1111159.

[39]DRC 18 March 2014, no. 03142763a.

[40]See also DRC 13 March 2013, nos. 12131365a and 12131365b, and DRC 18 March 2014, no. 03142763.

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Also, the CAS has decided on several occasions with regard to the question whether the amount of solidarity contribution must be deducted from the transfer compensation. In line with the DRC jurisprudence, also the CAS emphasizes in its awards that the obligation to apportion the solidarity contribution amongst the training clubs is on the new club. However, CAS Panels seem to give the parties more freedom. It is the general view of the CAS that the RSTP does not prevent clubs from agreeing otherwise and to ensure that the transfer fee shall be paid without any deduction.

In the case before CAS of 10 November 2006, between River Plate and Hamburger SV, the CAS Panel emphasized that the obligation to apportion the solidarity contribution amongst the former training clubs is on the new club.[41] From the FIFA RSTP it follows that it is for the new club to calculate and to pay a solidarity contribution to the former clubs. The *ratio legis* is that it is easier for the receiving club to determine the former clubs of the player. The player being at the disposal of the receiving club, can assist his new employer in this task, which is also an obligation according to the RSTP.[42] As it is up to the receiving club to calculate and distribute the solidarity contribution, the system provides that an amount of 5 % can be retained by the receiving club. If it has not retained part of the transfer sum in order to pay the solidarity contribution, the receiving club has a claim against the transferring club for repayment of the amounts paid in application of the solidarity mechanism. A transfer agreement that insists on the fact that the party receiving the transfer fee shall get an amount "*without any deduction*" complies with the RSTP.[43]

In a case before the CAS of 13 February 2009, the CAS Panel had to decide on provisions of a transfer agreement in which a club from Qatar acquired a player from a Spanish club "*free of any burden or tax*".[44] The agreement provided for a "*net price*" with regard to the transfer fee. According to the CAS, both expressions were not clear enough to conclude that the solidarity contribution was not to be deducted from the transfer fee. The CAS decided that after having the draft of the transfer agreement reviewed, the Qatari club had requested the inclusion of an express clause saying that the Spanish club would have to carry the financial

[41]CAS 2006/A/1018 *C.A. River Plate v. Hamburger S.V.*, award of 10 November 2006. See also CAS 2004/A/797 *Confederação Brasileira de Futbol (CBF) v. Bayer 04 Leverkusen Fussbal*, award of 25 January 2006. In a case before the CAS between *Confederação Brasileira de Futbol (CBF) v. Bayer 04 Leverkusen Fussball* of 25 January 2006, the CAS Panel confirmed in this case in a compelling manner that one cannot possibly accept that the 5 % figure was intended as an absolute requirement rather than a ceiling.

[42]See also RSTP, 2016 edition, Article 2 para 2, last sentence.

[43]This means that "any" means not even a deduction of the 5 % solidarity contribution. The CAS decided in its case between Feyenoord and Cruzeiro of 19 December 2006, that when a contractual clause states that a club is entitled to a certain percentage of a "*full transfer sum*", an amount of solidarity contribution cannot be deducted from the transfer fee since this deduction would not be justified. See CAS 2005/O/985 *Feyenoord Rotterdam N.V. v. Cruzeiro Esporte Club*, award of 19 December 2006.

[44]CAS 2008/A/1544 *RCD Mallorca v. Al Arabi*, award of 13 February 2009.

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burden of the solidarity contribution. This request had been denied by the Spanish club, which had refused to bear the final financial burden of the solidarity contribution and insisted on receiving a net amount. Therefore, the Qatari club had signed the transfer agreement without any clause for evaluating the burden of the solidarity contribution to the Spanish club. For the CAS Panel it was clear that the Qatari club had agreed that in this particular case, the payment(s) to be made to the training club(s) in application of the solidarity contribution were not to be reimbursed by the former club.

In a case before the CAS of 3 November 2009, the CAS Panel referred to the principle set forth in Article 21 of the RSTP, according to which it is up to the new club to retain and distribute the 5 % contribution to all clubs involved over the years in the player's training and education.[45] However, if it has deducted this sum beforehand from the transfer compensation due to the former club, the financial burden in fact lies with the former club, according to the Panel. There are no provisions in the RSTP or in Swiss legislation, suggesting that a different "internal arrangement" between the clubs involved in a transfer would be prohibited, as long as the new club remains responsible vis-à-vis the former clubs that trained the player in the past.[46]

In the CAS case of 12 October 2012 between AS Nancy-Lorraine and FC Dynamo Kiev, reference was made to the FIFA RSTP, according to which the amount corresponding to the solidarity mechanism mandatorily had to be deducted by the new club from the transfer compensation.[47] Therefore, the parties were not permitted to determine that the amount of transfer compensation amounted to a net sum without deduction of the solidarity contribution, which made the FIFA DRC decide that Nancy already received from Dynamo the solidarity contribution relating to the relevant transfer of the player. On the occasion of a player's transfer, the former club and the new club certainly cannot deviate from the RSTP provisions on solidarity contribution in issues affecting third parties, like the amount to be received by the training clubs as solidarity contribution (5 % of the transfer compensation), or the party which shall make the relevant payments to the beneficiaries of such contribution (the new club). However, there is no legal obstacle which prevents the clubs from agreeing that the new club, aside from paying the transfer price, additionally bears burden of the solidarity contribution. In fact, some CAS precedents confirm this position, according to the CAS. In this award the CAS also referred to the awards in the cases CAS 2009/A/1773 & 1774 Borussia Mönchengladbach v. Asociación Atlética Argentinos Juniors and CAS 2008/A/1544 RCD Mallorca v. Al Arabi which state, according to the CAS Panel, in the pertinent part the RSTP provides the following principles on solidarity

[45]CAS 2009/A/1773 and 1774 *Borussia Vfl 1900 Monchengladbach v. Club de Futbol America de C.V. (Asociacion Atletica Argentinos Juniors)*, award of 3 November 2009.

[46]This long-standing CAS jurisprudence has also been confirmed in CAS 2008/A/1544 *RCD Mallorca (Spain) v. Al Arabi (Qatar)*, award of 13 February 2009, and CAS 2006/A/1018 *C.A. River Plate v. Hamburger S.V.*, award of 10 November 2006.

[47]CAS 2012/A/2707 *AS Nancy-Lorraine v. FC Dynamo Kyiv*, award of 12 October 2012.

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contribution: (a) It is the new club that has the obligation to pay the solidarity contribution to the club(s) entitled to it. (b) Towards third parties, i.e. the clubs entitled to the solidarity contribution, the obligation to pay the contribution remains with the new club, even if there are internal arrangements between the new club and the transferring club. (c) The transferring and the new club are free to agree on a shift of the final, financial burden of the solidarity contribution and, in particular, to agree on a rule regarding any reimbursement due or not.[48]

#### 12.3.2.3 Conclusion

Following the DRC decisions, it is the player's new club that is ordered to remit the relevant proportions of the 5 % solidarity contribution to the clubs involved in the player's training. Therefore, it is a golden rule following numerous DRC decisions that it is only the new club that is obliged to distribute the amount of solidarity compensation to the relevant former clubs of the player. Although the obligation can be transferred to another club, the new club will remain liable in any event. According to CAS case law, there are no provisions in the FIFA RSTP or in Swiss legislation, suggesting that a different "internal arrangement" between the clubs involved in a transfer would be prohibited, as long as the new club remains responsible towards the former clubs that trained the player. The CAS jurisprudence shows that there is no legal obstacle which prevents the clubs from agreeing that the new club, aside from paying the transfer price, additionally bears the burden of the solidarity contribution. In fact, some CAS precedents confirm this position, according to the CAS. However, if the new club and the selling club agreed that the transfer compensation included solidarity contribution and transferred the amount including the solidarity contribution, generally the DRC orders the player's former club to reimburse the same 5 % portion of the compensation that it received from the player's new club. In this context, a claim for recovering the solidarity contribution can be submitted to the PSC since it concerns an unjustified payment.[49]

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[48]In addition, the CAS Panel also referred to the case CAS 2008/A/1544 *RCD Mallorca v. Al Arabi*, award of 13 February 2009, in which it was expressly mentioned that: "*Furthermore, neither the 2005 FIFA Regulations nor other FIFA rules do prohibit the parties on such an internal arrangement […] Therefore, upon analysis of the aforementioned provisions, the Panel concludes that neither the relevant provisions of the FIFA Regulations nor those of Swiss Law forbid the parties to stipulate who will carry the financial burden of the solidarity contribution*".

[49]If the new club paid the entire amount of compensation to the former club without having deducted the 5 % solidarity contribution, the claim for recovering the amount paid in excess has to be lodged with the PSC, which can be based on Article 22 under f RSTP, 2016 edition. See also FIFA Commentary, explanation Article 24, p. 73, footnote 108. In CAS 2015/A/4105 *PFC CSKA Moscow v. FIFA & Football Club Midtjylland A/S*, award of 21 December 2015, it was decided by the Sole Arbitrator that the "event giving rise to a claim", in light of the "prescription term" of Article 25 para 5 Annex 4 RSTP, shall be the moment when the club is obliged to pay a solidarity contribution to another club. Therefore, the statute of limitation started in this matter from the date of the DRC decision.

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### *12.3.3 Player Passport*

The Player Passport is the document which contains all the relevant details of the player and contains a survey of his sports career; more specifically, it lists the clubs for which the player has been registered since the season of his 12th birthday. In that respect it is important to know that it is always the registering association which is obliged to provide the club for which the player is registered with this so-called Player Passport.[50] This document is of primal importance in international football because, as an official document, clubs rely on it when they track the history of a particular player and when they calculate a player's transfer total costs allowing, the clubs to make a final decision with all relevant data and information at their disposal.

If the Player Passport is incomplete, it is very important that the player helps the new club to fulfil its obligation by providing his new club with all the relevant documentation.[51] Despite the fact that the Player Passport plays an important role in identifying the former clubs for the new club, it is good to be aware of the fact that the risk of incompleteness of such a Player Passport, may be borne by the former club who claims its portion of the solidarity contribution. In the aforementioned DRC decision of 28 September 2006, the Player Passport was incomplete.[52] According to the Player Passport provided by the football federation concerned, the player in question was formerly registered with the club, who claimed for solidarity contribution, on loan from 22 April 1996 until 6 August 1996. The DRC noted that with regard to the player's registration period with the former club, there was a discrepancy between the statement by this former club and the Player Passport presented. The former club had failed to present documentary evidence in support of its allegation that the player had remained registered with the former club until 31 December 1996. Therefore, the Chamber concurred that the relevant registration period must be established on the basis of the documentary evidence presented by the football federation, in other words the Player Passport. The DRC finally pointed out that such Player Passport commonly constitutes the main documentary evidence pertaining to the period of a player's registration with a club.

In line with the cases related to training compensation from which it follows that when signing a player, the club must be able to rely on the Player Passport issued at that point in time, we may assume that the same will apply to cases related to solidarity contribution. The new club must rely on the fact that the

[50]RSTP, 2016 edition, Article 7. It is stipulated that if a birthday falls between seasons, the player will be listed in the Player Passport for the club for which he was registered in the season following his birthday.

[51]RSPT, 2016 edition, Annex 5, Article 2 para 2. This was also confirmed by the CAS Panel in CAS 2006/A/1018 *C.A. River Plate v. Hamburger S.V.*, award of 10 November 2006.

[52]DRC 28 September 2006, no. 961202B. See also DRC 23 February 2007, no 27837, in which case the DRC considered that the claimant, with his claim for solidarity contribution, should have known how long it provided the player in question with training and education.

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relevant data is accurate.[53] In its decision of the DRC of 19 February 2015, the Chamber decided that the respondent party could rely in good faith on the first player passport.[54]

The solidarity contribution must always benefit the clubs that have actually contributed and invested in the training of a player. In its DRC decision of 6 May 2010 in which the DRC emphasized that the solidarity mechanism should benefit the clubs that have actually contributed and invested in the training of a player, the DRC was eager to point out that, notwithstanding the fact that the claimant club appears to be the club which effectively trained the player during the 1996/1997 and 1997/1998 seasons, by the time club D, being the new club of the player and responsible for the payment, distributed the solidarity contribution to another club, club B, it had not been informed of the erroneous information contained in the Player Passport issued by the FFP. Therefore, the DRC underlined that club D relied on the official Player Passport issued by the FFP, as established in the RSTP, and had no reason to doubt its accuracy. The DRC concluded that club D paid the amount to club B corresponding to the solidarity contribution regarding the 1996/1997 and 1997/1998 seasons, in good faith according to the information provided by the FFP in the Player Passport and thus in accordance with the Regulations. Club D, relying on an official source, the FFP, paid club B as it was convinced that it was the club entitled to receive the relevant solidarity contribution.[55] It must be taken into consideration that it is the claiming club that bears the burden of proof if clubs argue on the amount of transfer compensation. In its decision of 22 July 2010, the DRC unanimously concluded that any club claiming its right to receive its alleged proportion of the solidarity contribution from a club that contests the alleged amount of transfer compensation, will be obliged to carry the burden of proof that such a transfer compensation was indeed higher as stated by the new club of the player.[56]

## 12.4 Entitlement of the National Association

In respect of training compensation, in Article 2 para 3 of Annex 5 of the RSTP, as from edition 2012 it is stated in the RSTP that an association is entitled to receive a proportion of solidarity contribution which, in principle, would be due to one of its affiliated clubs, if it can provide evidence that the club in question—which was involved in the professional's training and education—has in the meanwhile ceased to participate in organized football and/or no longer exists due to bankruptcy, liquidation, dissolution or loss of affiliation. This solidarity contribution

[53]See DRC 20 May 2011, no. 511126, and DRC 30 August 2013, no. 08121946.

[54]DRC 19 February 2015, no. 0215163.

[55]DRC 6 May 2010, no. 510435.

[56]DRC 22 July 2010, no. 310149.

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shall then be reserved for youth football development programmes in the association(s) in question. In the editions of the RSTP before 2012 it was stated that if a link between the professional and any of the clubs that trained him could not be established within 18 months of his transfer, the solidarity contribution had to be paid to the association(s) of the country (or countries) where the professional was trained, whereby the solidarity contribution would have to be reserved for any youth football development programmes at the association(s) in question.[57]

It is a clear and strict requirement that it is a football association's responsibility not only to demonstrate that no link could be established between a professional and a club, but also to give evidence for the player to have actually been trained in football by a club during the relevant period, if it intends to claim part of the solidarity contribution. This is consistent and well-established jurisprudence of the DRC.

In a DRC decision of 19 February 2009, the Chamber emphasized that, as established in Article 21 of the RSTP in connection with Annex 5 of the RSTP, the new club of the player has to distribute as a solidarity contribution 5 % of any compensation paid to the previous club to the club(s) involved in the training and education of the player in proportion to the number of years that the player was registered with the relevant club(s) between the seasons of his 12th and 23rd birthdays.[58] In this case the DRC underlined that it was the B Football Federation, i.e. an association, and not a club, which claimed the payment of the relevant solidarity contribution. The DRC pointed out that if a link between a professional and any of the clubs that trained him cannot be established within 18 months of his transfer, the solidarity contribution shall be paid to the association of the country where the professional was trained. The DRC took note that the B Football Federation argued that the player had certainly been trained and educated by a club, however, it was by a club or a kind of "football school" which is not affiliated to the B Football Federation and which was therefore not entitled to claim training compensation. According to the DRC it is a clear requirement that evidence of the player's football training in the country of the association concerned had to be proven by the B Football Federation. Without such evidence, one of the essential prerequisites listed in Article 2 para 3 of Annex 5 of the RSTP, which, according to the DRC, must undoubtedly result in the dismissal of any claim of an association for solidarity contribution. The DRC concluded that it is an association's responsibility not only to demonstrate that no link could be established between a professional and a club, but also to give evidence for the player to have

[57]As we noted with the system of training compensation, under the former editions before 2012, the association used to have 6 months to make themselves known, and if a club makes itself known after the 18th month after the registration of its former player, the claim of the club will then get priority above the right of the association after all. However, if the association has irrefutable evidence that one of its affiliated clubs that is entitled to a solidarity contribution no longer exists (for example, due to bankruptcy), then the solidarity contribution should immediately be paid by the new club to the association, and not only after the 18th month. See also FIFA Commentary, Annex 5, explanation Article 2, p. 130.

[58]DRC 19 February 2009, no. 29108.

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actually been trained in football by a club during the relevant period, if it intends to claim part of the solidarity contribution. In this case the claim of the federation was rejected.

In its DRC decision of 10 August 2011, the football federation B, the claimant in this procedure, confirmed that a player was not registered ("no record found") with any of its affiliated clubs since the season of his 12th birthday until 23 June 1996.[59] According to the football federation E, the player was registered with club E, the respondent in this procedure. On 19 July 2007, the claimant contacted FIFA requesting its proportion of the solidarity contribution. The claimant referred to a decision of the CAS, according to which an association does not have to prove that the player was trained during the period, where "no record" was found concerning the player. The DRC recapitulated that if a link between a professional player and any of the clubs that trained him cannot be established within 18 months of his transfer, the solidarity contribution shall be paid to the association(s) of the country where the professional player was trained. Since the time frame of 18 months had elapsed, which is a prerequisite for the football federation to claim solidarity contribution, the football federation, in principle, was entitled to claim solidarity contribution. The DRC acknowledged that, as asserted by the claimant, no link could be established between the player and any of the clubs affiliated to the federation B that allegedly trained him during the relevant period. The DRC took note of the claimant's referral to the CAS decision, according to which an association does not have to prove that the player was trained during the "*no record found*" period. With reference to Article 2 para 3 of Annex 5 of the RSTP, the DRC emphasized that the RSTP clearly and unambiguously requests for the player to have been trained in football during the period of time in which no link between the professional player and any of the clubs that trained him can be established. In other words, if prior to entering into football a player practiced no sport at all or another sport, training cannot be compensated within the football structures. In line with its earlier jurisprudence on this issue, the DRC decided and reiterated that it is an association's responsibility not only to demonstrate that no link could be established between the professional and a club, but also to give evidence that the player actually trained in football during the relevant period of time, if it intends to claim part of the solidarity contribution.

The CAS decided in its case of 5 August 2009 between the Brazilian Football Association and the Portuguese clubs Club Sport Lisboa & Benfica Futebol S.A.D. regarding the player Anderson Cleber Beraldo that the question of whether or not the national association claiming the solidarity contribution needs to prove the existence of a youth promotion programme, could remain open.[60] In the above DRC case of 10 August 2011, the claimant referred to this award and interpreted it

[59]DRC 10 August 2011, no. 811829.

[60]CAS 2008/A/1751 *Brazilian Football Federation v. Sport Lisboa e Benfica-Futebol S.A.D.,* award of 5 August 2009.

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that a national association is not obliged to provide proof of the training of an internationally transferred player during the missing years. This was not correct, since in this CAS case the Panel decided that the proof with regard to the existence of a youth promotion programme could remain open. In accordance with the constant jurisprudence of DRC, it must be taken into consideration that it is an association's responsibility not only to demonstrate that no link could be established between a professional and a club, but also to give evidence for the player to have actually been trained in football by a club during the relevant period. In the said CAS case, it was decided that only clubs that are linked to a national football association, which is a member of FIFA, are entitled to claim solidarity contribution.

In the previously mentioned CAS case between Real Madrid and the Brazilian Football Association of 25 July 2012, it was decided by the CAS that a national association is not entitled to claim solidarity contribution on behalf of a football school since the "*non registered*" football school was not an affiliated club to the national association.[61] In other words, national associations can only claim solidarity contribution if the club concerned is an affiliated club. The CAS decided that the wording of Article 2 para 3 of Annex 5 of the RSTP was not clear in this respect. The only reasonable interpretation, which can be given to the term "*link*" used in the said Article, is the one of a "*successful link*". A link is deemed successful if it allows for reaching an existing club, affiliated to a national association. In this respect reference can be made to the DRC case of 2 November 2007, in which case the DRC stressed that, in accordance with Article 1 of the RSTP in connection with Article 6 of the Procedural Rules, training compensation related to transfers of players cannot be claimed by clubs which are not properly affiliated to the member association of the country they belong to and regularly participate to the competition and championships organized by the relevant association and that no other entities can be entitled to receive the compensation.[62] In other words, if the club no longer exists (due to bankruptcy), the club is not affiliated any longer to the member association of the country it belongs to and does not participate any longer in the competition and championships organized by the relevant association. In this respect, the CAS emphasized that it would otherwise mean (if no "*successful link*" was meant) that the provision could be applied in a situation whereby the training club went bankrupt (as suggested in the FIFA Commentary), the literal meaning of the term "*link*" would not be respected. Indeed, in such a case, the link between the player and the club that trained him could be made since it is only the club that does not exist anymore. Therefore, according to the CAS, the only reasonable interpretation which can be given to the term "*link*", is one of a "*successful link*".

[61]CAS 2011/A/2635 *Real Madrid Club de Futbol v. Confederacao Brasileira de Futbol (BF) and Sao Paulo FC*, award of 25 July 2012.

[62]DRC 2 November 2007, no. 117526.

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## 12.5 Prescription

Parallel to the system of training compensation, any claims with regard to the solidarity contribution will be prescript 2 years after the event that gives rise to the dispute. Reference in this regard is made to Article 25 para 5 of the RSTP, 2016 edition, which states that the DRC shall not hear any case subject to the RSTP if more than 2 years have elapsed since the event giving rise to the dispute. The FIFA Commentary confirms that Article 25 para 5 of the RSTP should thus be interpreted, that a party forfeits its right to lodge a claim with FIFA deciding bodies if more than 2 years have elapsed from the event giving rise to the dispute.[63] In accordance with Article 2 of Annex 5 of the RSPT, 2016 edition, the "*prescription term*" will start as from 30 days after the player's registration since the new club is obliged to pay the applicable amount of solidarity contribution within 30 days after registration of the player. Therefore, the event giving rise to the dispute is the 31st day after the player's registration as a consequence of which the time limitation starts as from that day.

In a case before the DRC of 24 November 2011, the DRC duly noted that the respondent party in this procedure was of the opinion that the present claim had to be viewed as time-barred, since the player was registered in August 2007 with the respondent, whereas the claim was received by the respondent on 10 May 2010.[64] The Chamber deemed it fundamental to underline that in order to determine whether it could hear the present case, it should, first and foremost, establish what was "*the event giving rise to the dispute*", i.e. what is the starting point of the time period of 2 years set out under Article 25 para 5 of the RSTP. The DRC referred to Article 2 para 1 of Annex 5 of the RSTP, which stipulates that "*the New Club shall pay the solidarity contribution to the training club(s)* […] *no later than 30 days after the player's registration or, in case of contingent payments, 30 days after the date of such payments*". On account of the aforegoing, and bearing in mind that the documents at hand did not contain any indication that the transfer compensation was paid in contingent payments, the Chamber unanimously decided that the event giving rise to the dispute, regarding the payment of solidarity contribution occurred 30 days after the *player's registration* with the respondent. As a consequence, the Chamber concluded that less than 2 years had elapsed between the event giving rise to the dispute, i.e. the due date of payment of the solidarity contribution, which was on 30 September 2007, and the submission of the present claim to FIFA by the claimant on 4 October 2007, and therefore, that the claimant's claim for the solidarity contribution can be heard by the DRC. The Chamber

[63]In CAS 2015/A/4105 *PFC CSKA Moscow v. FIFA & Football Club Midtjylland A/S*, award of 21 December 2015, it was decided by the Sole Arbitrator that the "event giving rise to a claim", in light of the "prescription-term" of Article 25 para 5 Annex 4 RSTP, shall be the moment when the club is obliged to pay a solidarity contribution to another club. Therefore, the statute of limitation started in this matter as from the date of the DRC decision.

[64]DRC 24 November 2011, no. 1111460.

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finally decided that the respondent had to pay the amount of EUR 222,420 as a solidarity contribution.

In line with the previously mentioned case before the CAS of 24 September 2013 relating to the concept of training compensation, also with regard to the solidarity contribution, parties should take into consideration that the limitation period of Article 25 para 5 of the RSTP can be interrupted under certain circumstances.[65] In this case of 24 September 2013, the CAS held that, where the RSTP contains a *lacuna*, or at least an ambiguity, in the spirit of good relations that should be encouraged in the world of sport, it must be possible for a limitation period to be interrupted if the parties have mutually agreed on a new payment schedule, especially if the debtor requested it and the bona fide creditor relies on such new payment schedule.

## 12.6 Contingent Payments

As stated in Article 2 of Annex 4 RSTP, 2016 edition, the new club will pay the solidarity contribution to the former clubs also in case of a contingent payment, 30 days after receipt. According to the FIFA Commentary, if the entire solidarity contribution is payable when the clubs involved in the transfer have agreed on a contingent payment, it would represent an undue enrichment of the clubs receiving this contribution, with regard to those instalments that have not yet matured.[66]

In a DRC decision of 17 August 2006, the Chamber was of the opinion and confirmed in this case that in the event of any contingent payments, the relevant solidarity contribution should be payable 30 days after the date of such payments.[67] In a DRC decision of 10 January 2008 the Chamber also underlined that in the case of contingent payments, the new club shall pay the solidarity contribution to the training clubs no later than a period of 30 days after the date of such payments.[68]

If the parties agree upon a payment in instalments whereby the first instalment must be paid *before* the date of registration, the "*30-day*" term, as mentioned in Article 2 of Annex 5 of the RSTP, will be activated and start as from the date that the first instalment needs to be paid. In the case of the DRC of 8 June 2007, the registration date was 22 July 2005 whilst the first instalment payment was agreed as 15 July 2005. The DRC decided that the payment had to be made before 16 August 2005. In this case the DRC finally decided that the amount had to be paid 30 days after the date of the first instalment payment.[69]

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[65]CAS 2012/A/2919 *FC Seoul v. Newcastle Jets FC*, award of 24 September 2013.

[66]FIFA Commentary, Annex 5, explanation Article 2, p. 180, Footnote 180.

[67]DRC 17 August 2006, no. 86558.

[68]DRC 10 January 2008, no. 18337; See CAS 2012/A/2817, from which case it follows that a solidarity contribution is only due if the related transfer compensation is actually paid.

[69]DRC 8 June 2007, no. 67579.

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A club cannot be forced to accept payment in instalments. In a DRC decision of 27 April 2006, the Chamber noted that the former club which acted as claimant for the solidarity contribution did not accept the payment plan offered by the new club and required the new club to pay the claimed amount in full at once.[70] The DRC considered that in view of the above, the members had reached the conclusion that the new club would be required to pay to the claimant the relevant amount pertaining to the solidarity contribution. The DRC decided and underlined that the former club was and is not obliged, according to the regulations, to accept payment of its relevant share of solidarity contribution in instalments and thus the former club may request payment to be made in one single payment.[71]

## 12.7 Loan

According to Article 10 of the RSTP, 2016 edition, a loan is subject to the same rules that apply to the transfer of players, including the provisions on solidarity mechanism.[72] This means that if the player is on loan, the loaning club is entitled to receive a solidarity contribution for the period that the player was on loan.[73] The DRC is of the explicit opinion that every contrary interpretation of the regulations would violate the *ratio legis* of the aforementioned regulations. Furthermore, it is also important to be aware of the fact that the club receiving the player on the basis of a loan is obliged to retain 5 % of the loan fee and to distribute the amount due to all the clubs that have actually contributed to the training of the player between the ages of 12 and 23.

In a DRC decision of 26 October 2006, the Chamber decided in a dispute concerning solidarity contribution between 2 clubs in connection with the transfer of a player.[74] The DRC decided that, contrary to the training compensation, the solidarity mechanism is not restricted to the period that the player actually played with that club. Every time a professional is transferred before the end of his contract, the solidarity contribution must be paid by the new club to all the clubs for which the player played between his 12th and 23rd birthday. The DRC decided to reject the club's claim that solidarity contribution was not due since the player concerned had been registered on a loan basis with the claimant. According to the

[70]DRC 27 April 2006, no. 46557.

[71]DRC 27 April 2006, no. 46557.

[72]RSTP, 2016 edition, Article 10 para 1. See also DRC 2 November, no. 117420. For the sake of clarity and in order to avoid any misunderstanding, it needs to be emphasized that as from the RTSP 2005 and further new editions, a loan is subject to the same rules that apply to the transfer of players, including the provisions on the solidarity mechanism. However, following the RSTP 2001 edition, a loan was *not* subject to the same rules that apply to the transfer of players, including the provisions on the solidarity mechanism. See for example DRC 23 February 2007, no. 2753.

[73]FIFA Commentary, explanation Article 10 para 1, p. 32.

[74]DRC 26 October 2006, no. 106419.

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jurisprudence of the DRC, the solidarity contribution is payable to the clubs which effectively trained and educated a player independent of the basis on which the player was registered with a training club, i.e. on a loan or a definitive basis.

In a DRC decision of 28 September 2006, the Chamber took into consideration the circumstance that the player was registered with the former club on a loan basis.[75] The DRC referred to Article 10 of the RSTP, edition 2005, in accordance with which the loan of a professional is subject to the same rules that apply to the transfer of players, including the provisions on the solidarity mechanism. Taking into account the aforementioned elements, the DRC finally concluded in this case that the former club was entitled to receive a solidarity contribution following the regulations.[76]

Also in a DRC decision of 28 September 2007, the DRC pointed out that in accordance with Article 21 and Annex 5 of the RSTP, any club that has contributed to the education and training of the professional shall receive a proportion of the compensation paid to his previous club. The DRC referred to Article 10 para 1 which clearly establishes that a loan is subject to the same rules that apply to the transfer of players, including the provisions on training compensation and solidarity mechanism. The DRC concurred that the club concerned was entitled to receive solidarity contribution proportional to the period of registration of the player.[77]

In line with the above, we establish that a solidarity contribution is due to a club where the player played on a loan basis. However, contrary to the system of training compensation, a solidarity contribution can *also* be claimed from a new club that requires the services of a player on a temporary basis (loan basis). The DRC explicitly noted in its decision of 29 September 2010 on training compensation, that the relevant entitlement can only be claimed from clubs that require the services of a player on a definitive and permanent basis.[78]

## 12.8 Exchange of Players

As opposed to the system of training compensation, the solidarity mechanism is only due if the player moves *during* the course of his contract. In other words, the existence of a transfer sum activates the concept of a solidarity mechanism.

[75]DRC 28 September 2006, no. 961202B.

[76]In a case before the Chamber of 22 June 2007, the DRC established and confirmed, for the sake of clarity, that according to Article 10 para 1 of the RSTP a loan is subject to the same rules that apply to the transfer of players, including the provisions on training compensation and the solidarity mechanism. The DRC again pointed out in this case that according to Article 1 of Annex 5 of the RSTP, the new club is obliged to deduct the 5 % solidarity contribution from the compensation agreed upon with the player's former club. DRC 22 June 2007, no. 471240.

[77]DRC 28 September 2007, no. 97276.

[78]DRC 29 September 2010, no. 10101596.

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However, there are DRC cases in which a solidarity contribution had to be paid despite the fact that a transfer compensation was not due.

From DRC jurisprudence it follows that the exchange of players indirectly implies a financial agreement due to the fact that, in practice, the relevant qualities of the players have a financial value in the football employment market. For example, in a DRC case of 12 January 2007, a solidarity contribution had to be paid despite the fact that a transfer compensation did not have to be paid. In this case an exchange of players took place between 2 clubs. The Chamber outlined that, as a general principle, a transfer contract constitutes a bilateral agreement, which implies a mutually agreed exchange of obligations between the parties involved. However, in the present case, by means of the transfer contract the parties concerned mutually agreed to an exchange of obligations, whereby no transfer compensation payment was stipulated but in which 2 players were exchanged between the clubs. The DRC concluded that the present exchange of players implies indirectly a financial agreement due to the fact that, in practice, the relevant qualities of the players have a financial value in the football employment market. The parties explicitly recognised this fact in the relevant transfer agreement by stating that the 2 clubs would grant the same values to each of the players concerned. Consequently, the Chamber finally decided that the provisions regarding the solidarity mechanism cannot be circumvented by means of an exchange of players.[79] In other words, according to the Chamber, despite the fact that a transfer sum was not paid in this case, the solidarity mechanism was due.

Also, in the DRC case of 9 January 2009, the Chamber outlined that any transfer contract represents a bilateral agreement, which implies a mutual exchange of obligations between the parties involved. In this matter the parties also agreed to a mutual exchange of obligations, without providing the payment of any compensation, yet providing the exchange of 2 players. The DRC concluded that the present exchange of players indirectly implied a financial agreement, in view of the fact that the sports qualities of the players have an economic value in the football employment market. The DRC concluded that club L had to pay a solidarity contribution of EUR 108,000 for the transfer of the player.[80]

Also, in its case of 17 August 2012, the DRC outlined that any transfer agreement, including a loan agreement, represents a bilateral agreement, which implies a mutual exchange of obligations between the parties involved. In the matter at hand, by means of the signing of the loan agreement, the parties agreed upon a mutual exchange of obligations, whereby no loan compensation payment was specified, but in which 2 players were exchanged.[81] Yet, the DRC concluded that the present exchange of players indirectly implied a financial agreement, i.e. an agreement with a monetary component, due to the fact that the relevant qualities of the players have an economic value in the football employment market. The Chamber was of the

[79]DRC 12 January 2007, no. 17630.

[80]DRC 9 January 2009, no. 19442b. See also DRC 9 January 2009, no. 19442a.

[81]DRC 17 August 2012, no. 812019.

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unanimous opinion that the provisions regarding the solidarity mechanism also apply whenever there is an exchange of players, regardless of whether such exchange is on a temporary or permanent basis, and that, thus, the provisions regarding the solidarity mechanism cannot be circumvented by means of an exchange of players. In other words, the Chamber was of the opinion that in order to obtain player J, the respondent "*paid*" club A with the player B. In view of the above, the Chamber decided that the claimant was entitled to receive a solidarity contribution in connection with the exchange of the players on a loan basis.

In the above case of 17 August 2012, the DRC had to establish the value indirectly agreed upon between the parties for the exchange of players, in the current matter, for the loan of the player R. Thus, the Chamber had to establish the most appropriate value in order to calculate the relevant solidarity contribution. The DRC reiterated that in exchange for the loan of player J from club A to the respondent, the latter had "paid" club A with player B. The DRC stressed that it had to determine the market value of player B, since player B has to be considered as the "compensation paid" for the loan of player J from club A to the respondent. In this respect and in order to determine the market value of player B, the DRC considered all the relevant elements in the present matter. The Chamber noted that player J had previously been transferred from the claimant to club A for a transfer compensation amounting to EUR 22,500,000, whereas player B had previously been transferred from the claimant to the respondent for a transfer compensation amounting to EUR 24,500,000, including contingent payments. Consequently, the Chamber determined that, to establish the basis for the assessed transfer value of player B, it should take into account the transfer compensation paid by the respondent to the claimant for the transfer of player B, i.e. EUR 24,500,000. The Chamber further took note that upon signing player B, the respondent and the player had concluded an employment contract for the duration of 5 years. In establishing the compensation on a pro rata basis, the Chamber concluded that the amount of EUR 24,500,000 should be divided by 5 years and that, thus, the starting point to determine the most appropriate value in order to calculate the relevant solidarity contribution, shall be calculated on the basis of the assessed transfer compensation of EUR 4,900,000 (EUR 24,500,000/5 = EUR 4,900,000). The DRC deemed that the amount of EUR 4,900,000 should further be reduced, considering that the present matter concerns a transfer on a loan basis and not a transfer on a permanent basis and that the player returned to his club of origin after expiry of the loan period. Therefore, the Chamber deemed it appropriate to further reduce the assessed transfer compensation by 40 %, which resulted in the amount of EUR 2,940,000 (EUR 4,900,000 − 40 % = EUR 2,940,000). Furthermore, the Chamber also considered that the additional amount paid by the respondent party to club A should be taken into account when calculating the amount due as a solidarity contribution. The Chamber decided that the amount of EUR 1,090,400 had to be added to the amount of EUR 2,940,000 which finally cumulated to the total amount of EUR 4,240,000.

In line with the above, also in its case of 17 August 2012, the Chamber outlined and referred to the general rule that, any transfer agreement, including a loan

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agreement, represents a bilateral agreement, which implies a mutual exchange of obligations between the parties involved.[82] In this case, by means of signing the loan agreement, the parties agreed on a mutual exchange of obligations, whereby no loan compensation payment was specified, but in which 2 players were exchanged. Yet, the DRC concluded that the present exchange of players indirectly implied a financial agreement, i.e. an agreement with a monetary component, due to the fact that the relevant qualities of the players have an economic value in the football employment market. The DRC was of the opinion that the provisions regarding the solidarity mechanism also apply whenever there is an exchange of players, regardless of whether such exchange is on a temporary or permanent basis, and therefore, the provisions regarding the solidarity mechanism cannot be circumvented by means of an exchange of players. The Chamber did not share the opinion of the claimant that, in order to determine the amount of solidarity contribution due to the claimant in connection with the loan of player J to the respondent, it had to evaluate the market value of player J. In fact, the Chamber stressed that it had to determine the market value of player R, since the player R has to be considered as the "compensation paid" for the loan of player J from club C to the respondent. The Chamber finally concurred that the amount of EUR 3,000,000 had to be deemed as the most appropriate value of the transfer amount in order to calculate the relevant amount regarding the solidarity contribution in the present matter.

As regards the above jurisprudence, it can be concluded that if it is established that an exchange of two players took place, the DRC might be of the opinion that an exchange of players indirectly implies a financial agreement, i.e. an agreement with a monetary component, due to the fact that the relevant qualities of the players have an economic value in the football employment market. The DRC might then decide that the provisions regarding the solidarity mechanism also apply whenever there is an exchange of players, regardless of whether such exchange is on a temporary or permanent basis, and therefore, the provisions regarding the solidarity mechanism cannot be circumvented by means of an exchange of players. However, it must be noted that in the above DRC cases, parties explicitly stipulated in the agreement itself that two players were exchanged as a result of which it was entirely clear for the DRC that an exchange between these two players had actually taken place. In other words, if the parties do not stipulate in a specific transfer or loan agreement that an exchange took place (but the two clubs, for example, transferred three players between both clubs on one day whereby the contractual obligations between them were stipulated in three separate agreements), it will be much more difficult to prove that an exchange actually took place and that the values of the players were incorporated in the exchange itself. The DRC will most likely be more reluctant to accept such claims.[83] In such event

[82]DRC 17 August 2012, no. 812020.

[83]See an unpublished PSC decision of 22 May 2015 regarding a situation in which an exchange of three players took place and the claimant club was of the opinion that it was entitled to receive compensation based on a sell-on clause.

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it is more likely that the party claiming the solidarity contribution must demonstrate to the DRC that there are elements speaking in favour of a situation of circumvention.[84]

## 12.9 Buy-Out Clause

Although it is not a DRC case, there is an important CAS case with regard to the aforementioned buy-out clause. From this case it follows that a new club is also obliged to pay a solidarity contribution if the employment contract of a player is provided with a buy-out clause. This can be inferred from the CAS case between the Italian football club Lazio and the Argentinian football club Vélez of 28 September 2011, in which case the CAS had to decide whether or not a solidarity contribution was also due if the employment contract of a player, in this case the player Zárate with the Qatari club Al Saad, was provided with a buy-out clause.[85] Lazio stated in this case, that it was not obliged to pay a solidarity contribution to the Argentinian club Vélez since there was, from a strictly legal point of view, no transfer.[86] Vélez, however, stated that a restrictive interpretation of Article 21 of FIFA RSTP would allow clubs to circumvent the obligation of paying the solidarity contribution, and this would be contrary to the *ratio* of the referred provisions.[87] In the Panel's view, the elements identifying a transfer of a player between clubs for the purposes of the solidarity contribution mechanism were (a) the consent of the club of origin to the premature termination of its contract with the player, (b) the willingness and consent of the destination club to acquire the player's rights, (c) the consent of the player to move from one club to the other, and

[84]In CAS 20111/A/2449 *K.F.C. Germinal Beerschot Antwerpen NV v. FIFA & Club Atlético Chacarita Juniors*, award of 23 December 2011, reference was made to the concept of "*simulation*". According to the CAS Panel, a simulation exists if both parties agree to the fact that the reciprocal declarations shall produce a legal effect which does not correspond to their will, as they want to feign an agreement or to hide, by means of the apparent contract, the contract really wanted by the parties. See also CAS 2014/A/3508 *FC Lokomotiv v. Football Union of Russia & FC Nika*, award of 23 March 2015.

[85]Chemor 2013.

[86]CAS 2011/A/2356 *SS Lazio S.p.A. v. CA Vélez Sarsfield & FIFA*, award of 28 September 2011. Lazio stated that the key issues that arose in this case were the same as those which were considered in the so-called *Keita* case, CAS 2010/A/2098 *Sevilla FC v. RC Lens*, award of 29 November 2010. In both cases the players terminated their contracts in advance and were hired by a new club, which paid the amounts corresponding to the indemnification to be received by the club of origin. In both cases, the lack of consent of the club of origin impedes any consideration that a "sale" (*Keita* case) or a "transfer" (this case) was effected. In addition, no bad faith by the destination club existed in either of these cases.

[87]The abovementioned position was reinforced by the broad wording of Article 1 of Annex 5 FIFA RSTP, which (a) recognized the right to the solidarity contribution when the player "moves" (not restricted to "transfer") and (b) stipulates that 5 % of contribution is to be calculated on "any compensation" (not restricted to "transfer fee").

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(d) the price or value of the transaction. The Panel was therefore convinced that the aforementioned transaction had to be considered as a proper transfer in the sense of Article 21 and Article 1 Annex 5 of the FIFA RSTP. From this case it can be concluded that a transaction that is not identical to the typical or common pattern of transfers can be established as a "move" or a "transfer" within the meaning of Article 21 and Article 1 of Annex 5 of the RSTP.[88]

In a case before the DRC of 24 April 2015, the Chamber took note of the legal arguments of the respondent party and in particular of the fact that the latter club argued that the move of the player should not be considered as a transfer, in view of the particularities and the characteristics of indemnification or buy-out clauses based on the decree from country B. The DRC took note that the respondent had argued that the claimant's consideration, which amount of EUR 20,000,000 was a net amount, was neither negotiated nor stipulated in any agreement between the parties, which is why the claimant's reasoning should be deemed unsustainable. In view of the particularities of the specific case and the characteristics of buy-outs in connection with the decree from country B and the indemnification clause included in the employment contract between the player and the claimant, the Chamber believed that by accepting the inclusion of EUR 20,000,000 in the employment contract with the player, the claimant indirectly implied having accepted that such amount was a net amount in the sense that solidarity contribution should also already be included in such amount. The DRC concluded that the claimant is not entitled to claim solidarity contribution payments over and above the amount of EUR 20,000,000 that it already received from the respondent. Consequently, the DRC decided that the claimant's request for the payment of the solidarity contribution from the respondent party had to be rejected.[89]

In another DRC decision of 15 April 2015, reference was made to the above CAS case.[90] Club A argued that the circumstances of the case had to be considered as being an international transfer of a professional player, and, in this regard, stressed that a transfer typically requires four elements, namely (a) the consent of the club of origin to the premature termination of its contract with the player, (b) the willingness and consent of the destination club to acquire the player's rights,

[88]The fact that this transaction was not identical to the typical or common pattern of transfer does not at all mean that it should not be considered a transfer if the basic elements constituting a transfer concur. The Panel wanted to stress that the circumstances of the *Keita* case were not comparable to the situation that gave rise to the present dispute, so it was not in any respect anomalous or incoherent that the pronouncements made and grounds followed in the one case, were different from the other. Although both cases may present certain similarities, there were major differences which impact in their respective outcomes. In the *Keita* case, RC Lens claimed against Sevilla CF for an amount arising out of a contractual commitment (additional payment in case of "resale" of Keita) which both parties freely agreed, defined and drafted. However, in the present case, club Vélez requested the payment of an amount to Lazio not based on a contractual stipulation but on certain FIFA regulations (solidarity contribution) which tend to foster the training of young players and which shall be respected by operators in the world of football.

[89]See DRC 24 April 2015, no. 04151496b.

[90]See DRC 24 April 2015, no. 04151496.

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(c) the consent of the player to move from one club to the other and (d) the price or the value of the transaction. In view of the opposing views of the parties, the Chamber deemed that it had to decide on the following two questions at the crux of the dispute:—Was the payment of the amount of EUR 20,000,000 in the above circumstances equivalent to the payment of transfer compensation which would thus trigger club C's obligation to pay solidarity contribution to club A?—If club C has to pay solidarity contribution to club A, does club D have the obligation to reimburse the relevant amount to club C? The Chamber firstly analysed the relevant indemnification clause of the employment contract between the player and club D. In this regard, the deciding authority underlined that this release clause, the contents of which had been approved by the above two parties, should not be interpreted literally, i.e. by adhering only to the letter of the clause in question, but in accordance with the theory of the parties' recognisable intent, i.e. by ascertaining the meaning that the parties could reasonably have wished to give to the contractual clause in question. The Chamber highlighted the fact that according to this interpretation, pursuant to the principle of good faith and in view of the considerable sum of EUR 20,000,000 set forth in the clause in question, it appears likely that club D and the player were providing for the possibility of a third club indirectly intervening in the payment of the release clause on a subsidiary basis with a view to contracting the services of the player in question. The DRC compared the contents of the relevant indemnification clause of the employment contract signed between the player and club D as well as the facts of this case, to a transfer agreement signed by two clubs for the transfer of a player. The Chamber underlined that a typical transfer agreement signed by two clubs and a player, generally stipulates a sum of money freely agreed to between the player's former and new club in exchange for the premature termination of the contractual relationship between the player and his former club, which is thus tantamount to the premature termination of the employment contract in question by means of the payment of a sum commonly described as the "*transfer amount*". Furthermore, the Chamber underlined that the professional services that a player renders to a club is a factor that is liable to be evaluated by the employer from a financial standpoint. Consequently, when a club shows an interest in the professional services of a player who has a valid employment contract with another club, the interested club must reach an agreement with the former club with regard to the value of this transfer, with a view to compensating the former club for agreeing to dispense with the professional services of the player in question before expiry of the employment contract. Bearing in mind the established jurisprudence of the DRC in this regard, the Chamber decided that in the present case, the activation of the relevant contractual clause by the player, that the sum in question, EUR 20,000,000 was voluntarily borne by club C, has to be considered as a transfer in the sense of the RSTP and in particular with regard to Article 21 and Article 1 of Annexe 5 of the RSTP. According to the DRC, this is also in line with the spirit and the ratio of the RSTP which basically provide that training clubs are entitled to a share of the solidarity contribution for any compensation paid by the new club to the former club. Therefore, the Chamber finally concluded in this case, that club C did have to pay solidarity

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contribution to club A. The DRC recalled that club C requested to be reimbursed by club D for that amount. In this regard, the DRC first referred to the general rule that the player's new club has to remit the relevant proportion(s) of the 5 % solidarity contribution to the club(s) involved in the player's training and education in strict application of Article 1 and Article 2 of Annexe 5 of the RSTP whereas, at the same time, according to well-established jurisprudence, the player's former club is ordered to reimburse the same 5 % portion of the compensation that it received from the player's new club. However, in view of the particularities of the specific case and the characteristics of buy-outs in connection with the decree and the indemnification clause included in the employment contract between the player and club D, the Chamber held, in this specific case, that no reimbursement can take place. The indemnification clause amounted to EUR 20,000,000 and cannot be reduced by the Chamber by now ordering club D to return part of the paid amount to club C. Consequently, club C's request for reimbursement therefore has to be rejected.

## 12.10 Default Interest

In Article 2 para 1 Annex 5 of the RSTP 2016, it is stated that the new club shall pay the solidarity contribution no later than 30 days after the player's registration, or in case of contingent payments, 30 days after the date of such payments. According to Article 2 para 4 Annex 5 of the RSTP 2010, the Disciplinary Committee may impose disciplinary measures on clubs that do not duly observe the obligations set out in Annex 5. Following numerous DRC decisions, one of the disciplinary measures is that a party is condemned by the DRC to pay a default (Swiss) interest payment of 5 % per year if the payment has not been done within 30 days until the day of the payment is applied.[91] However, in a DRC decision of 27 April 2007, the Chamber acknowledged that the regulations do not provide for any provision stipulating the right for a party to receive default interest for a possible late payment of the solidarity contribution. Indeed, the regulations stipulate explicitly that the DRC may impose disciplinary measures on clubs that do not observe the obligation relating to the payment procedure of the solidarity contribution. The Chamber concluded that the entitlement to receive default interest in connection with the solidarity mechanism cannot be derived from the regulations, but that the regulations left the decision whether to award default interest relating to the payment of the solidarity contribution, to the competent body's discretion.[92]

[91]See for example DRC 27 April 2007, no. 47774.

[92]DRC 27 April 2007, no. 47407. See also DRC 28 March 2008, no. 38289(1). In the previously mentioned CAS case between Real Madrid and the Brazilian Football Association of 25 July 2012 (CAS 2011/A/2635 *Real Madrid Club de Futbol v. Confederacao Brasileira de Futbol (BF) and Sao Paulo FC*, award of 25 July 2012), it was decided that there are 3 types of interest.

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## 12.11 Conclusion

In the case of an international transfer of a player which takes place during the course of his employment contract, all his former clubs that have provided the education and training of the player for which the player played between the age of 12 and 23, are entitled to a proportion of the 5 % solidarity contribution. In other words, as long as a transfer compensation is paid by the new club, a solidarity contribution must be paid to all the former clubs where the player has played between the age of 12 and 23. It is the responsibility of the new club to calculate the amount of the solidarity contribution and to distribute it in accordance with the player's career history as provided in the Player Passport. The DRC refers to its well-established jurisprudence, in accordance with which the player's new club is ordered to remit the relevant proportion of the 5 % solidarity contribution to the clubs involved in the player's training. In other words, the general rule following numerous DRC decisions is that it is only the new club that is entitled to distribute the amount of solidarity compensation to the relevant former clubs of the player. Even if this obligation is transferred to another club, the new club will still remain liable in any event.

The amount will be calculated pro rata by the new club if the player played less than one year with that former club. If the Player Passport is incomplete, the player will assist the new club in fulfilling its obligation by providing his new club with all the relevant documentation. Despite the fact that the Player Passport plays an important role in the allocation of compensation to the former clubs by the new club, the risk of incompleteness of a Player Passport may be borne by the former club claiming its part of the solidarity contribution from the new club. In this regard, new clubs should also be able to rely on the Player Passport. In other words, in principle, the risk of incompleteness can thus not be shifted to the new club.

As stated in Article 2 of Annex 4 RSTP, 2016 edition, the new club will pay the solidarity contribution to the former clubs, so too in the case of a contingent payment, 30 days after receipt of this payment. Although the new club may pay the transfer compensation in instalments, the DRC is of the opinion and explicitly emphasizes that, according to the regulations, the former club is not obliged to accept payment in instalments by the new club of its relevant share of solidarity contribution. As a result, the former club may request the payment to be made in a single payment. As with training compensation, in Article 2 para 3 of Annex 5 of the RSTP it is stated that if no link between the professional and any of the clubs that trained him can be established within 18 months, the solidarity contribution will then be paid to the association of the country where the professional was formerly trained. Parallel to the system of training compensation, any claims with regard to a solidarity contribution will be prescript 2 years after the event that gave rise to the dispute.

According to Article 10 of the RSTP, 2016 edition, the provisions of the loan of players are subject to the same rules that apply to the transfer of players, including

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the provisions on a solidarity mechanism. If the player is on loan, the loaning club is entitled to receive solidarity contribution. In that respect it is also important to know that the club receiving the player on the basis of a loan, will retain 5 % of the loan fee and distribute it to all the clubs that contributed to the player's training between the ages of 12 and 23.

As opposed to the system of training compensation, the solidarity mechanism is only due if the player moves *during* the course of his contract. If a transfer sum needs to be paid, the system of a solidarity mechanism is applicable. However, there are DRC cases in which a solidarity contribution had to be paid despite the fact that a transfer compensation was not due. If parties agree to a mutual exchange of obligations, without providing for the payment of any compensation, for example, by providing the exchange of 2 players. The DRC is of the opinion that the exchange of players indirectly implies a financial agreement, in view of the fact that the sports qualities of the players have an economic value in the football employment market. As a result thereof, a solidarity contribution needs to be paid.

With reference to the jurisprudence, we may further expect that the Chamber will decide that a new club is also obliged to pay a solidarity contribution in the event that the employment contract of a player is provided with a so-called buy-out clause.

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# Chapter 13
# Final Conclusions

After having analysed and discussed the most relevant DRC decisions since 2002, following a classification of the most relevant subjects, over the last few years, the DRC decisions contain better and more extensive and consistent deliberations. Divergent case law of the DRC is quite rare nowadays. In recent years the DRC Judge is also more involved. Due to the development in and existence of well-established jurisprudence by the DRC, national laws seem to be less relevant. The DRC regularly makes reference to its well-established jurisprudence, sometimes to leading CAS awards and sometimes to Swiss law. There is a more consistent line with regard to the most important issues that the DRC has to deal with. Obviously, the creation and existence of a well-established international football jurisprudence is a highly time-related process, since the DRC has been in existence since 2001.

The DRC has an important and leading position within the international professional football world. As mentioned in the introduction, the DRC decisions have a huge impact in the international world of football. Therefore, it is worth reiterating that not all the DRC decisions are published on the official FIFA website (on the understanding that, as mentioned in the Author's Note, cases were even removed from the published list for unknown reasons). Sometimes this is quite unfortunate. For example, on 17 January 2007, the DRC issued a decision relating to the validity of a unilateral extension option in favour of the club. This decision is, without exaggeration, far too important to be omitted from the list of published decisions. To establish global uniformity, equality, certainty and transparency in the professional football world on a worldwide scale, insofar as is possible, FIFA should provide us with all the decisions, not just the selection as published on its FIFA website.

The DRC decisions are based on general principles of labour law, as laid down in the various national laws and treaties. However, we have noted that the DRC sometimes creates its own sort of law, the so-called "specificity of sport", as mentioned in Article 25 of the RSTP, 2016 edition, which can also be characterised

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as *Lex Sportiva* (or even better, *Lex Futbol*). For example, in the famous *Webster* case, the DRC underlined that it not only had to deal with the regulations and national laws, it also had to deal with "*specific knowledge of the world of football*". It will always be difficult, not to say impossible, to define the *Lex Sportiva*. However, it is possible, by analysing the DRC decisions, to derive a general line with regard to the *Lex Sportiva* in relation to the most important subjects that the DRC has to deal with.

Regarding several issues that the DRC had and has to deal with, the DRC sometimes deviates from national laws. For example, according to most national laws, an oral agreement may suffice to determine that an employment agreement exists. However, the DRC's general line is quite clear as it is of the opinion that a professional football player must have a written agreement (since this is a strict prerequisite).

At some points, it seems defensible that the DRC creates its own line. *Lex Sportiva* finds its justification in the fact that the football world is different and has its own particularities (although I am aware that this point of view also meets a lot of resistance (within and) outside the international sports law field and cannot apply in an absolute manner). The probation period is an example which is not valid, contrary to certain national laws, according to the DRC, because of the uncertainty that it creates for the player with regard to his employment contract. Furthermore, according to the national labour law of various countries, it is sometimes possible to make the validity of the employment contract conditional upon the positive result of a medical examination of an employee. However, although certain national laws do permit an employer to unilaterally terminate the contract with his employee in the case of a negative result of a medical test, on this point the DRC rightly differs. The same point of view applies to the visa, the work permit, the non-registration or non-approval of the employment contract under national rules. The Chamber is of the opinion that a player's contract cannot be made subject to these circumstances. A football player must be protected with regard to these matters in the best possible way.

The protection of minors is another extremely important pillar for FIFA. With regard to this subject, the DRC is of the opinion that the RSTP should have priority above certain national laws. It is defensible that insofar as these rules pursue a legitimate objective, for example, the protection of players under the age of 18 from being excluded from making an international transfer as well as the restriction with regard to the maximum length of 3 years of their employment contracts, the rules of FIFA prevail above national laws. Under certain circumstances, in the context of uniformity, equality and certainty and to enable the system to function, it should be justified to overrule national law. However, in my point of view the DRC must define the conditions better under which a deviation can be justified. In my point of view, it is justified that the RSTP rules can overrule national law, but this should not be justified under all circumstances. The DRC can take several elements into account, for example, whether (a) the parties have explicitly stipulated in the employment contract that a certain national law must be applicable for their case, and whether (b) the national law concerned is mandatory which must

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be demonstrated and invoked by the party claiming that national law is applicable. Aside from this, (c) the deviation from national law should, in principle, pursue a legitimate objective and should be considered as a vital issue, such as the protection of minors; and (d) the deviation should not be in conflict with the well-established jurisprudence of the DRC. From a legal point of view it should not be correct that the DRC deviates from national law under all circumstances. It is not only Article 17 that refers to the fact that compensation for breach shall be calculated with due consideration for the law of the country concerned, but also Article 2 of the Procedural Rules that states, that in their application and adjudication of law, the PSC and the DRC shall, among other things, apply the laws that exist on a national level. If FIFA's regulations prevail under all circumstances, this would make the contents of the aforementioned provisions completely superfluous. The DRC should therefore create more clarity in this respect.

With regard to certain issues, the *Lex Sportiva* is subject to further discussion. For example, the unilateral extension option. From the jurisprudence it can be inferred that that certain conditions have to be met and present in order to establish validity. From the point of view of the DRC (and the recent CAS) jurisprudence, it is to be recommended that (at least) 7 criteria are met. The potential maximal duration of the employment contract may not be excessive thereby taking into account that the maximum period will not exceed the '*5-year term*' of Article 18 para 2 of the RSTP, 2016 edition. The unilateral extension option must be exercised by the club within an acceptable deadline before expiry of the current employment contract. The salary reward deriving from the option right must be defined in the original contract. One party will not be at the mercy of the other party with regard to the contents of the employment contract. In this respect, the salary reward deriving from the option right must correspond with a 'substantial salary increase'. The option must be clearly established and emphasized in the original contract so that the player is aware of it at the moment of signing the contract. The extension period is proportional to the main contract, whereby the extension period may not exceed the duration of the original contract. The number of unilateral extension options must be limited to one. Aside from these 7 conditions, it must be noted that the relevant circumstances of a specific case shall always be decisive, which means that these 7 conditions must not be seen as being cast in concrete.

The majority of the cases are related to the unilateral termination of a player's contract. This is more or less the backbone of this book. According to Article 14 of the RSTP, situations could occur that are too much of a strain on the patience of one of the parties to respect the employment contract. FIFA therefore devised the possibility that in the case of a valid reason for one of the parties, the so-called *just cause*, the employment contract may be unilaterally terminated by either party with no consequences of any kind. On the one hand, the jurisprudence shows that no *just cause* exists for a club in the event that a player is injured or is not performing well on the field. However, on the other hand and also following well-established jurisprudence of the DRC (and the CAS), it is to be expected that the DRC will rule in future that serious misbehaviour including

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not only a lengthy unauthorised absence of the player, but also the positive result of a doping test and the use of alcohol or drugs, such as cocaine, can be constituted as *just cause* for the club to unilaterally terminate the employment contract with the player. Obviously, the player is obliged to do whatever is necessary on his part to maintain his working capacity. Not under all circumstances does the abuse of alcohol lead to a justified termination. Only if it can be demonstrated that the player deliberately had the intention to play beneath his potential. The logical nexus between the level of playing and the abuse of alcohol must be demonstrated by the club claiming due to termination. Situations also exist in which players do not receive their salary for a substantial period of time, which can be considered as valid *just causes*. Furthermore, we can assume that *just cause* for a player exists if the player is sent to training out of the permanent (first) team, in any event if the employment contract contains a clause that the player may only train with the first team. From the jurisprudence it follows, that several elements should be taken into account on whether or not the exclusion is legally permitted and to avoid an infringement of the player's rights. For example, whether or not the contract provides for a clause that the player is only entitled to perform in the first team, the reason for relegation to a second team, and whether or not the decision for relegation is of a temporary or definitive nature. Important is also whether or not the player receives his salary during the exclusion, that the player cannot be forced to train alone under all circumstances, and that the training facilities are also of relevance. Also in the event of a deregistration of a player, we note that the DRC is of the opinion that in future there might be an infringement of the player's personal rights. From the DRC (and the CAS) jurisprudence it explicitly follows that among a player's fundamental rights under an employment contract, it is not only his right to a timely payment of his remuneration, but also 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 that by de-registering a player, even for a limited period, a club is effectively barring, in an absolute manner, the potential access of a player to competition and, as such, is violating one of his fundamental rights as a football player and that the de-registration of a player, therefore, could constitute *just cause* for a player.

A party which terminates a contract for *just cause* is not obliged to pay any compensation. However, in the event that the contract has been terminated by either of the parties without *just cause*, the party in breach is obliged to pay compensation in accordance with Article 17 para 1 of the RSTP, 2016 edition. The party which is in breach without *just cause* is obliged to pay compensation irrespective of whether the breach is during or after the Protected Period. According to this Article, and unless otherwise provided for in the contract, the compensation for breach of contract without *just cause* to be paid by the party in breach to the injured party, will be calculated with due consideration for the law of the country concerned, the specificity of sport and other non-exhaustive "objective criteria", such as 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

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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 the Protected Period.

Following the well-established jurisprudence, with regard to the compensation to be paid by the club, the player will be entitled to the salary for the remainder of the contract on the understanding that the DRC will also take into account whether the player had signed an employment contract with a new club during the relevant period of time, by means of which he would have been enabled to reduce his loss of income. According to the constant practice of the Chamber, such remuneration of the player under a new employment contract shall be deducted from the financial compensation to be paid by the club to the player for the unjustified breach of contract relating to the player's general obligation to mitigate his damages. Several other factors can also be taken into account as a result of which deviation from the above principle can be justified. In fact, the DRC takes into account all specific particularities of each case, such as the behaviour of the club and the player, whether or not the player had a cooperative stance (for example, with regard to finding an amicable settlement), whether the execution of the said agreement has started, whether or not the breach took place within or outside the Protected Period, and whether or not the player complied with his obligation to mitigate his damages, such as finding a new club within a reasonable period of time. With regard to the compensation to be paid by the player to the club, the most common line followed by the DRC is that the compensation will be calculated based on the average between the remuneration due until the expiry of the former contract, and the remuneration due under the new contract for the same period of time. From jurisprudence it can be inferred that the DRC will first turn its attention to the remuneration and other benefits due to the player under the existing contract and/or the new contract, which value constitutes an essential criterion in the calculation of the amount of compensation in accordance with Article 17 para 1 of the RSTP. It also follows from the DRC jurisprudence that the non-amortized transfer compensation can also be included in the calculation of the compensation due by the player to the club as a result of a breach of contract without *just cause*, following Article 17 para 1 of the RSTP. In cases where the club is entitled to compensation, as with the situation in which the player is entitled to compensation, attenuating circumstances can also be applicable to reduce the amount of financial compensation paid by the player to the club, due to the club not suffering any financial loss during the player's absence.

According to Article 17 paras 3 and 4 of the RSTP, 2016 edition, so-called sporting sanctions can be imposed on players (para 3) as well as on clubs (para 4) if a breach of contract without *just cause* takes place within the Protected Period. Therefore, it is of paramount importance to establish whether the breach falls within the Protected Period. Unilateral breach without *just cause* (or *sporting just cause*) after the Protected Period will not result in sporting sanctions. According to Article 17 para 3, 2016 edition, in addition to the obligation to pay compensation, sporting sanctions will be imposed on any player found to be in breach of

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contract within the Protected Period. This sanction will generally be a restriction of a period of 4 months on his eligibility to play in official matches. In the case of aggravating circumstances, as was the case in the *Mexès* case, this will be a period of 6 months. However, according to the jurisprudence of the DRC, it is very important that the gravity of the sporting sanction corresponds with the gravity of the conduct leading to the said sanction. In all decisions in which it was decided that the 4–month rule was applicable, the Chamber refers to the age of the player and the Protected Period. If the player is relatively young and the contractual breach of the player took place within the first or first 2 (or 3) years of the contract, the DRC seems to be more inclined to apply the 4–month rule. In order to apply the 6–month rule, an important factor could be that the player stayed a considerably long period with his former club. Sporting sanctions may also be imposed on the club. In addition to the obligation to pay compensation, sporting sanctions will be imposed on any club found to be in breach of contract or found to be inducing a breach of contract within the Protected Period. Any club signing a professional who has terminated his contract without *just cause* may have induced that professional to commit a breach. The club will be banned from registering any new players, either nationally or internationally, for 2 registration periods. Obviously, it is therefore advisable that clubs contact former clubs or associations to clarify the situation before signing contracts with new players in order to avoid the risk of being accused of a potential inducement.

Following several DRC decisions with regard to the system of training compensation and the solidarity contribution, it is worth recalling that the DRC deals with many cases relating to training compensation and a solidarity mechanism. For example, whether or not a contract offer has been made in conformity with Article 6 para 3 of Annex 4 of the RSTP, whether or not the player can be considered as a professional (or an amateur), whether or not the completion of the training period of the player is ended before the age of 21. We also note the fact that parties often try to exclude the right of the former clubs to receive training compensation. The DRC is very clear on this point, as it is of the opinion that only the club which is officially entitled to receive training compensation may waive its right to an amount for training compensation. The DRC is clear, as the possible financial settlements concluded between the former club or the new club and the player cannot establish that the former clubs renounce their right to receive training compensation from the new club. In relation to the solidarity mechanism, it is important to emphasize that the DRC explicitly underlines that it is only the new club which is entitled to distribute the amount of solidarity compensation which has to be paid to the relevant former clubs.

Having discussed the most relevant DRC decisions, we still note that in FIFA's quest for further uniformity, equality and certainty, this process is sometimes hindered because of the fact that some decisions by national arbitration tribunals are not always in line with the DRC decisions. It cannot be denied that it is rather unpleasant that certain clauses in the contracts of players are considered to be valid on a national level, while the DRC is of the opinion that this same clause must be considered as invalid (or vice versa). For example, despite the fact that

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according to the DRC a unilateral extension option in favour of the club is generally invalid, the Dutch KNVB Arbitration Tribunal decided twice to the contrary of this well-established DRC jurisprudence, as it was of the opinion that the extension option was valid. The same applies to the relegation clause. Eventually, this creates an imbalance between the line of FIFA and the view of some national arbitration tribunals. The national arbitration tribunals should at least be aware of the DRC jurisprudence. Therefore, more attention should be paid to the decisions. Better insights into the thoughts of the Chamber will ultimately contribute and assist FIFA in its quest for more conformity, equality and certainty in professional football.

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# Index


**A**

Agreement(s), 5, 10, 16, 37, 44, 59, 67, 107, 120, 132, 142, 176, 184, 208, 234, 243, 245, 263, 285, 296, 313, 344, 375, 381, 399, 413, 454, 461, 479, 484. *See also* Breach of contract
- amateur contract, 346, 347, 360
- aspirant contract (contrat aspirant), 345
- cancellation –, 197, 233
- collective bargaining –, 5, 40, 43, 46, 50–52, 59–61, 179, 180, 185, 279
- employment –, 114, 132, 133, 142, 143, 151, 169, 183, 185, 190, 203, 206, 208, 266, 328, 354, 484
- image right related –, 43
- non-amateur –
  - of termination, 195, 199, 268
- oral –, 117, 144, 344, 358, 484
- payment –, 120
- performance related –, 185, 190
- principle of respect of –, 195, 274
- private –, 142, 154, 361, 420, 460
- professional –, 358
- scholarship –, 346, 347
- termination of –, 148, 193, 196–199, 268, 283, 350, 402, 421
- termination with/without (sporting) just cause of –, 277, 290
- training –, 44
- unilaterally cancellation of –, 62, 120, 122, 124, 135, 195, 203, 204, 206, 208–10, 214, 215, 218, 221, 222, 227, 233, 240, 244, 248, 251, 270, 278, 295, 484
- unilateral renewal of –, 180
- unilateral termination of –, 119, 135, 138, 194, 196, 203, 206, 208, 214, 215, 219, 220, 228, 232, 239, 242, 245, 266, 269, 292, 296, 298, 312, 373, 485
- validity of –, 21, 78, 119–121, 123, 124, 127, 128, 132, 139, 175, 222
- written –, 7, 52, 143, 353, 358, 484

Amateur, 37, 344, 348. *See also* Agreement(s) and Player(s)
- amateur clubs, 68, 357, 389, 392, 452

Arbitration, *see* Settlement

Arbitration Tribunal for Football (TAF), 106

Arbitration tribunals, 52, 54, 60, 488, 489. *See also* Settlement
- independent –, 33, 36, 40, 42, 50, 53, 54, 58–60
- national –, 40, 43, 50, 59, 488

Association(s)
- autonomy of –, 13, 48, 102, 347, 360

**B**

*Bernard* case, 335, 337

Bonuses
- appearance –, 83, 303, 354, 356, 357

Breach of contract, 33, 40, 41, 45, 58, 79, 83, 89, 119, 207, 235, 242, 249, 274–276, 286, 287, 290–292, 305–307, 312, 334, 486. *See also* Compensation
- inducement to –, 294, 326


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unconditional –, 124, 176
unilateral –, 241, 273, 305
unjustified –, 127–130, 224, 226, 241, 242, 253, 313, 320, 487

**C**
CAS Code of Sports-related Arbitration (CAS Code), 105
Circumstances
aggravating –, 315, 316, 320–322, 328, 330, 488
Clause(s)
arbitrary –, 154, 219, 269
buy out –, 278, 295, 304, 317, 329, 417, 477, 478, 482
disproportionate –, 213, 296, 439, 442, 443
disproportionate penalty –, 296
extension –
null and void, 184, 203
liquidated damages –, 277
penalty –, 296, 298
potestative nature of –, 201, 211, 216, 268
probation –, 203
release –, 295, 479
sell on –, 296
termination –, 197, 205, 218, 219, 222, 269
unacceptable –, 206, 214, 218
validity of –, 115, 222
Commentary on the Regulations of the Status and Transfer of Players (FIFA Commentary), 5, 6, 12–16, 30, 31, 34, 38, 41, 47, 49, 50, 55–57, 60, 61, 65, 66, 82, 91, 94–96, 99, 102, 118, 124, 130, 134–136, 145, 167, 195, 227, 228, 230, 250, 261–265, 274, 279, 291, 294, 295, 299, 300, 311, 317, 321, 329, 341, 344, 353, 364, 382, 387, 388, 423, 424, 428, 432, 437, 450, 454, 455, 469–472
Comparison of the FIFA regulations version July 2001 and following Circulars with the new FIFA regulations version December 2004 (FIFA Comparison), 13, 14
Compensation, 4. *See also* Solidarity
amount of –, 207, 221, 223, 224, 229, 235, 237, 275–277, 282–284, 287, 288, 290, 291, 293, 299, 300, 302, 304–306, 308, 311, 313, 455, 487
procedural –, 93, 109
solidarity –, 455, 459, 464, 481, 488
supplementary –, 199
training –, 4, 10, 14, 18, 20, 23, 29, 55, 57–60, 65, 74, 86, 92, 97, 115, 180, 332, 334, 335, 339, 340, 342, 344, 347, 350, 357, 361, 365, 367–369, 371, 373–378, 380, 382, 384, 389, 392, 395, 396, 398, 400, 402, 404, 407, 409–417, 419–422, 426, 428, 433, 437, 439, 441, 444, 445, 449, 472, 488
Confidentiality
breach of confidence, 16
Contractual stability
maintenance of –, 9, 14, 17, 22, 29, 40, 41, 58, 90, 122, 133, 134, 180, 194, 204, 205, 221, 320, 324, 353, 458
Counterclaim, 76, 88, 89, 92, 109, 223
Court of Arbitration for Sport (CAS)
appeal(s) to –, 8, 27, 28, 33, 36, 100, 104, 105, 107, 108, 110, 166, 177, 182, 236, 237, 239, 308, 322, 326, 338, 412
Court of Justice of the European Union (CJEU), 7, 334, 336, 337
Courts of law
compulsory jurisdiction of –, 31
recourse to –, 31
Criminal offence, 148

**D**
*De Sanctis* case, 302, 305
Deportation order, 126
Disproportionality, 440, 441
Dispute Resolution Chamber (DRC), 4, 11, 18, 19, 23, 25, 26, 28, 32, 33, 51, 53, 54, 103, 179
Dispute(s), *see* Settlement9
Doping, 233, 234
Drug abuse, 114, 233

**E**
E-filing, 110
Employment agreement, *see* Agreement(s) and Labour law
Employment relationship
factual –, 45
maximal duration of –, 188, 190, 485
Enforcement, 5, 25, 27, 34, 69, 102, 103, 184
European Commission (EC), 7, 9, 10, 35
European Economic Area (EEA), 37
European Union (EU), 37
European competition law

aruiz@isdemasters.com

free movement of persons, 8, 164, 335
Evidence, *see* Proof

**F**
Faith
bad –, 137, 151, 175, 176, 197, 242, 253, 283, 290, 405, 406, 443
good –, 466, 479
Federation International de Football Associations (FIFA)
Circular letters, 11, 19, 72, 73
Circular no. 769, 333, 390, 400
Circular no. 801, 432, 433
Circular no. 826, 344, 367, 428, 432, 438, 441, 443
Circular no. 827, 106
Circular no. 959, 12
Circular no. 995, 65
Circular no. 1010, 52–54
Circular no. 1130, 16
Circular no. 1171, 165
Circular no. 1206, 17
Circular no. 1233, 18
Circular no. 1249, 424
Circular no. 1270, 103
Circular no. 1327, 19, 324
Circular no. 1356, 20, 21
Circular no. 1437, 20, 424
Circular no. 1464, 21, 22
Circular no. 1468, 22, 23, 29, 66, 87
Circular no. 1500, 23, 40, 55, 56, 58
Disciplinary Committee, 14, 16, 19, 69, 103, 233, 326, 338

**G**
German Bundesgerichtshof (BGH), 339

**I**
Impartiality, 71, 73, 78, 79
Intermediary(-ies), 23, 29, 66, 146, 147, 191, 202, 316
International Council of Arbitration for Sport (ICAS), 106
International private law
applicable law, 25, 26, 60, 178
forum shopping, 31, 42
International Registration Transfer Certificate (IRTC), 13
International Transfer Certificate (ITC), 13
Intervention, 145

**J**
Jurisdiction, 12, 14, 23, 25, 26, 31, 34, 36, 41, 46, 52, 56, 106, 150, 326

**L**
Labour law
basic principle of –, 128–130
general principles of –, 62, 63, 114, 165, 166, 242, 483
mandatory –, 295
national –, 124, 353, 484
Lex Sportiva, 64, 106, 113, 114, 115, 124, 484, 485
Liability
*culpa in contrahendo*, 136
Litispendency, 31

**M**
*Matuzalem* case, 302
Measure(s)
disciplinary –, 16, 317, 362, 480
provisional –, 19, 93, 95, 108, 195, 323, 324, 329
Minors, 11. *See also* Young players
international transfer of –, 10, 17
protection of –, 14, 21, 37, 60, 64, 484, 485
Monti, Mario
Monti-rules, 10

**N**
National Dispute Resolution Chamber (NDRC), 23, 32, 33, 51–54, 60
National Dispute Resolution Chamber Standard Regulations (NDRC Regulations), 52, 53
National law
mandatory –, 63, 484
Nationality
double –, 48, 49
European –, 10
New York Convention, 102
Notice period, 200, 205, 247, 252

**O**
Option right
irrevocable –, 104
null and void –, 184
nullity of –, 145
Option(s)

aruiz@isdemasters.com

extension –, 9, 42, 114, 115, 163–169, 171, 173, 174, 177, 178, 180, 181, 183, 185–190, 485
invalid –, 115
period of –, 177
reciprocal extension –, 184
unilateral –, 9, 42, 114, 115

**P**
*Pechstein* case, 340
Petitions, 71, 73, 74, 92
Player(s)
absence of –, 209, 215, 224, 227, 229, 486
amateur –, 67, 337, 340, 344–346, 353, 358, 374, 387, 390, 393, 395, 401, 403, 407, 418, 488
established professional –, 264
injury of –, 269
lack of appearance of –, 217
medical examination of –, 484
medical treatment of –, 220, 227
non-amateur –, 347, 348, 353, 425
non-professional –, 345
performance of –, 153, 156, 193, 209, 214, 215, 254
physical health of –, 183
player factor, 423
player passport, 77, 363, 465, 481
professional –, 19, 22, 126, 180, 257, 306, 336, 342, 347, 350, 367, 383, 388, 391, 392, 401, 404, 408, 423, 468, 478
release of –, 6, 12, 38, 60
semi-professional –, 354
Player's agent(s)
licensed –, 30, 67, 146
Players' Agents Regulations (PAR), 147
unlicensed –, 66
Players' Status Committee (PSC), 4, 11, 18, 25, 26, 99, 179
Power of Attorney, 70, 71, 74, 419
Principle(s)
*electa una via non datur recursus ad alteram*–, 236
*in venire contra factium proprium* –, 78
*non ultra petitum* –, 86, 334
*pacta sunt servanda* –, 62, 110, 134, 158, 180, 194, 312
Private International Law Act (PILA), 110
Probation period
not allowed, 268
Procedural costs, 25, 91
Proof
burden of proof –, 45, 78, 79, 82, 83, 86, 327, 395, 397, 410, 432, 434–436, 440, 441, 445, 466
documentary evidence –, 77, 78, 83, 85, 156, 231, 348, 402, 437, 439, 465
lack of evidence –, 86, 427
Proportionality, 208, 318, 440
Protected Period, 19, 133–135, 195, 274, 275, 282, 301, 303, 305, 306, 311, 316, 319–323, 326, 330, 487, 488
Public policy, 178

**R**
Registration, 10, 17, 19, 22, 23, 29, 48, 49, 60, 77, 81, 91, 94, 95, 136, 140, 160, 241, 256, 289, 304, 323, 324, 326, 329, 340, 349, 357, 361, 365, 376, 380, 423, 444, 452, 455, 470
Regulations on the Status and Transfer of Players (RSTP), 5, 6, 16, 417
Regulations on Working with Intermediaries, 23, 29, 66
Representation, 30, 34, 40, 46, 50, 52–55, 59, 70, 74
*Res iudicata*, 34, 35
Right(s)
of appeal, 101
renouncement of –, 84
waiver of –, 410
Royal Netherlands Football Association (KNVB), 115
Rule(s)
club-internal proxy, 147
four months rule, 318
six months rule, 311
Rules governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber (Procedural Rules), 11, 22, 25–28, 38, 39, 53, 64, 66–80, 82–84, 86–93, 99–101, 113, 144, 236, 279, 365, 375, 405, 419, 458, 469, 485

**S**
Salary (Loan)
outstanding –, 83, 119, 171, 218, 240
Sanction(s)
disciplinary –, 19, 103, 153, 263, 318
sporting –, 18, 19, 22, 40, 41, 58, 114, 115, 137, 195, 261, 271, 275, 316, 318

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Settlement, 33. *See also* Arbitration Tribunals
amicable –, 210, 290, 313, 487
dispute resolution –, 199
disputes, 199
Dutch Arbitration Tribunal, 64
employment-related disputes, 14, 46
International football related disputes, 106
Single Judge of the PSC, 56, 129, 461
sports arbitration, 31, 34
sports-related dispute, 106
Signature
false, 148
Signing-on fee, 137, 205, 241, 247
Single Judge of the DRC (DRC Judge), 56, 60
Solidarity
compensation, 4
contribution, 38, 56, 57, 60, 90, 448, 450–453, 455–457, 459–464, 466, 467, 469, 471, 473, 475, 478
mechanism, 14, 23
Sport
economic activity, 7, 8
specific of –, 61
Swiss Civil Code (SCC), 297
Swiss Code of Obligations (SCO), 249, 292, 363
Swiss Federal Tribunal (SFT), 110, 338

**T**
Team(s)
non-amateur –, 429, 436
Terms
15-days term, 94, 209, 261
18 months term, 323, 467, 468
30 days term, 19, 22, 99, 363, 380
60 days term, 387, 388, 392, 393, 395, 397, 401, 404, 406
Third Party Ownership (TPO), 21
Transfer, 4. *See also* Compensation
agreement, 123
arrangements, 429
bid, 301
contract, 41, 89, 474
domestic –, 450, 452
fee, 456
free, 464
free – certificate, 464
international –, 10
international – minors, 10
International Registration Transfer Certificate (IRTC), 13
International Transfer Certificate (ITC), 13
list, 13
of an amateur, 442
outside the EU/EEA, 339
payments, 414
provisional – certificate, 182
registration period, 182
regulations, 182
request for – certificate, 19
rules on international –, 9
status, 9
subsequent –, 331, 342, 344, 361, 370, 426, 444
sum, 411, 420
system, 7, 179
within the EU/EEA, 331, 339, 382, 386
Transfer Matching System (TMS), 18, 23
Treaty on the Functioning of the European Union (TFEU), 336

**U**
Union Européenne de Football Association (UEFA), 6, 9, 86, 126, 158, 304, 305, 385, 434

**V**
Visa, 48, 49, 114, 123, 125–129, 132, 484

**W**
*Webster* case, 302
*Wilhelmshaven* case, 384

**Y**
Young players, 11, 18, 20, 145, 302, 333, 336, 337, 367, 370, 407, 424, 429, 436, 437, 451

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