

**“I WANT THIS PLAYER AND I WANT HIM NOW...
PLEASE MAKE IT HAPPEN!”
A SYNOPSIS OF THE ESSENTIAL RULES AND PRACTICES ON
THE TRANSFER OF FOOTBALLERS**

by *Ornella Desirée Bellia** and *Michele Colucci***

Introduction

The FIFA regulations have been and will be, time and again amended in order to address new and often delicate issues arising when negotiating and concluding the international transfer of a player.

Rules frequently change and yet the attitude and goals of the parties involved (clubs, players, intermediaries) remain the same: they try to maximize their economic and sporting benefits from the transfer while their legal counsels are tasked with translating their wishes in legal, valid and binding agreements.

From this perspective, the contractual parties will typically consider to have achieved a good transfer when they agree upon the contractual terms and conditions that represent the best possible balance of their respective economic and sporting expectations, whilst preventing disputes and/or claims from any party.

Every transfer gives rise to two parallel and simultaneous negotiations. The first one settles the economic aspects of the transaction while the other one aims at defining the legal term of the agreement, in order to prevent and solve any possible legal issues. Both negotiations are equally important and closely connected since, as mentioned above, the ultimate task for lawyers is to give legal form to the will and interests of the parties, completing the transfer finally in the best possible way.

* Head of Professional Football at FIFA. MBA in Sports Management, LL.M. in International Sports Law. E-mail: desireebellia@gmail.com.

** Official of the European Union, European Personnel Selection Office, Member of the *FIFA Dispute Resolution Chamber* and Member of the *FIFPro Dispute Committee*. Co-founder and honorary President of the Italian Association of Sports Lawyers, Editor of the *International Encyclopedia of Sports Law*. E-mail: info@colucci.eu.

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Furthermore, a transfer can be a complicated operation because of the different interests and parties involved.

First and foremost, stands the player, who has his/her economic and professional demands while clubs have to deal with their financial assets or constraints in trying hard to meet their sporting ambitions and targets.

Then there are the intermediaries, whose main aim is to maximize their clients' economic profits and benefits from the transfer ; incidentally, in doing so, they are also eager to earn a higher cut as percentage of the transfer value.

Of course, the parties involved have to give in to compromises on several elements of the negotiation. In fact, just like in any other business sector, labour relations in football are essentially defined by the parties' bargaining power.

On the player's side, this power is given by his/her past/current performances, the results achieved, his/her fame among supporters, not to mention his/her potential for commercial exploitation; for the club, leverage lies *inter alia* with its prestige, past and current sporting achievements, as well as its ambitious targets and more often than not, its financial, accounting and regulatory constraints. All these factors eventually have an ultimate impact on the contractual terms to be negotiated.

Finally, once they reach an economic agreement, all parties must prove they are able to maneuver through the legal, financial and fiscal provisions in view of building up the mutually satisfying contractual construction.

By considering those points and the in-depth analysis of the relevant international and national case-laws conducted by the Authors of this book, this essay shall focus on the essential issues that arise when parties negotiate and conclude both transfer and employment agreements, the practical considerations to make and the actions that parties have to take.

At the same time, due attention will be given to the challenges that lawyers have to face in identifying and flagging the legal issues, clarifying them to their clients, and providing them with the most effective solutions which enhance their legitimate economic interests in compliance with the relevant legal framework where relevant best practices and the main specific regulations of some of the most important federations¹ around the world will be addressed.

1. *Preliminary to any negotiations*

In a footballer's transfer, the interests at stake may often be huge: as a consequence, parties need to take all possible precautions and leave nothing to chance.

A successful transfer starts even before the parties begin negotiations.

¹ These include England, France, Germany, Italy, Portugal, Spain and, outside Europe, Argentina, Brazil, China and the USA.

1.1 *The Status of the Player and the nature of the Transfer*

The engaging club should ascertain the *status* (i.e. amateur or professional) of the relevant player.

In principle, if the player is an amateur there will be no transfer fee to pay.² On the contrary, if the player is a professional, the club should verify whether he is under contract or a free agent in view of a possible request for compensation.

The status of the player is also relevant in connection with the *nature of the transfer* (definitive or temporary): both amateurs and professionals can be transferred on a definitive basis, while only professionals can be loaned from club to club.

1.2 *The footballer's age impacts on training compensation*

The engaging club should also consider the *age* of the player. Given that training compensation for international transfers must be paid until the age of 23, in order to budget possible costs related to *training compensation*.

In order to ascertain whether and to whom such compensations should be paid, it is highly advisable for the club to request a copy of the player's passport (Art. 7 RSTP) to the former Football Association, however, these passports are not always reliable and are easily made available. In order to overcome such a problem, FIFA has recently approved the so-called *e-registration system* to facilitate the tracking of clubs with whom a player has been registered.³

1.3 *Minors*

In a *transfer agreement*, the age of a player is important since FIFA explicitly forbids the international transfers of *minors* (i.e. under 18).

However, there are three exceptions detailed in Art. 19 para. 2 RSTP, in particular to facilitate the transfer of young players above the age of 16 between the EEA/EU countries. In compliance with EU Single Market rules, players whose parents move to the country in which the new club is located for reasons not linked to football, those who live no further than 50km from a national border and the club with which the player wishes to be registered in the neighboring association is also within 50km of that border.

² Nevertheless, there are some specific cases in which FIFA has recognized that a transfer fee is legitimate if it has been for amateur players. See J.F. VANDELLOS ALAMILLA, "*Transfer Agreements pursuant to the FIFA PSC decision and the CAS jurisprudence*", *Transfer of Players*, O.D. Bellia and M. Colucci eds, para. 2.2, SLPC, 2020.

³ V. PLAVJANIKOVA and A. N. RECK, "*Training Compensation and Solidarity Mechanism*", *Transfer of Players*, O.D. Bellia and M. Colucci eds, SLPC, 2020.

Clubs willing to benefit from such exceptions need to submit all relevant documentation and information to the FIFA Subcommittee of the Players Status Committee (Art. 19 para. 4 RSTP), which will eventually clear the transfer.

Furthermore, FIFA jurisprudence has foreseen two further exceptions, which are codified and implemented as of 1 March 2020 in the FIFA regulations with specific regard to refugees and exchange students.⁴

In any case, clubs can legally only offer a minor a contract with a maximum three-year length (Art. 18 para. 2 RSTP) and not five years as for any other professional football player.

There are, however, exceptions to those general rules: for instance, **Brazil**'s legislation is in conflict with the FIFA rules given that, according to Brazilian law, the minimum duration of an employment contract is three months and the maximum is five years for every player regardless of the player's age. On the basis of this specific rule, the Brazilian confederation (CBF) has inserted a provision in its domestic regulations, which warns its affiliated clubs that only the first three years of the contracts may be considered in case of international disputes.⁵

In **China**, there are some rules establishing that 16 years old players (but under 18) can sign contracts for a maximum duration of 3 years (Article 50 CFA RSTP) while players under 18 cannot sign employment contracts unless they are registered in the first team of a club competing in a professional league (i.e. CSL, CL1 or CL2) (Article 4 of a CFA Regulation called "Implementation Opinion regarding Transfer of Youth Players and Standard Regulation of Training Compensation").⁶

1.4 Nationality and work permit

Depending on the player's *nationality*, there are a series of legal formalities to be carried out with regard to immigration compliance rules that the clubs should be aware of before offering an employment agreement.

In **Brazil**, for instance, visas are valid for only two years under the relevant immigration rules. As a consequence, clubs are obliged to split the total length of the employment contract (up to five years) in two or more subsequent registration periods (for up to two years).⁷

In **England** until now players coming from EU Member States have not needed visas/work permits; however, this will likely change if/when Brexit finally occurs in the course of 2020 or in 2021 following the relevant negotiations with the

⁴ L. FERRER, "Understanding the FIFA rules on International Transfer and First Registrations of Minors", *Transfer of Players*, O.D. Bellia and M. Colucci eds, SLPC, 2020.

⁵ V. ELEUTERIO and A. GALDEANO, "National Transfers in Brazil", *Transfer of Players*, O.D. Bellia and M. Colucci eds, SLPC, 2020.

⁶ D. WU, G. MARINO, T. PEREDA RUEDA and R. CHU, "National Transfers in China", *Transfer of Players*, O.D. Bellia and M. Colucci eds, SLPC, 2020.

⁷ V. ELEUTERIO and A. GALDEANO, "National Transfers in Brazil", *Transfer of Players*, O.D. Bellia and M. Colucci eds, SLPC, 2020.

European Union. Non-EU players presently require a governing body endorsement (GBE) from The FA in order to register with a club in England. The present GBE/work permit system broadly aims to permit only the most exceptional non-EU players to play in England, as it is based on EU players being able to freely move to England. If/when this changes due to Brexit, it is possible that the entire GBE/work permit system might also be overhauled or re-worked accordingly.

In **Portugal**, after the signature of a contract for the professional competitions, both the player and/or the club can request a work permit when he moves to Portugal. Furthermore, the national authorities and the League have established a Protocol granting special treatment to foreign professional players.

That said, in accordance with Art. 18 para. 4 of the FIFA RSTP, the validity of an employment contract between a player and a club cannot be made subject to the acquisition of a *work permit* from the local authorities. Such a condition, if included in a contract, is not admissible and shall be considered as null and void.

Furthermore, the FIFA DRC jurisprudence has established that this rule also implies that the club is responsible for the renewal of the visa/work permit during the contract period, and thus not only at the moment they engage the player.

It falls thus within the responsibility and remit of a club to ensure that the necessary visa/work permit is requested and delivered to a player.⁸ Therefore, the club is not entitled to unilaterally terminate the employment contract because of the lack of a valid work permit.⁹

On the other hand, the player has to put himself at the club's full disposal and supply the prospective club with all necessary information and documentation in order to facilitate this task.¹⁰

In **China** there is no specific restraints to players in this regard. However, no visas nor working permits will be provided in case a person has an offense in his/her criminal record.¹¹

1.5 Quotas

The buying club should consider the relevant *quotas* for foreigners established by its sports association in order to avoid that once recruited, the foreign player cannot be named on the field of play.¹²

It however comes to reason that if the club engages a new foreign player, whilst other foreign players are still under contract, the club envisages that the

⁸ See FIFA PSC 5 June 2013, no. 613864.

⁹ See CAS 2007/A/1205 *S. v. Litex Lovech*, award of 6 June 2007.

¹⁰ S. CIVALE and L. PASTORE, "Employment Agreements of Football Players", *Transfer of Players*, O.D. Bellia and M. Colucci eds, SLPC, 2020.

¹¹ D. WU, G. MARINO, T. PEREDA RUEDA and R. CHU, "National Transfers in China", *Transfer of Players*, O.D. Bellia and M. Colucci eds, SLPC, 2020.

¹² For the latest figures and statistics see *FIFA Professional Football Report 2019* available at <https://img.fifa.com/image/upload/jlr5corccbsef4n4brde.pdf>.

newly engaged player will take the ‘foreigner-spot’ of one of the foreign players already at the club.

If over quota, the club *will de-register* another player *forcing* the latter to claim the termination of the employment contract for just cause. This is generally an unfavourable situation for the player; he or she would have to find new employment in a time in which most registration periods are closed and new clubs would often be reluctant to sign a player who has terminated his/her contract due to the joint liability deriving from art. 17 RSTP. Also, there is no financial gain for the player in this situation: at most he or she will receive the residual value of the employment contract (which he would have earned anyway if the club had not forced him to terminate) and if the player were to find new employment, the compensation to be paid by the club to the player for breach of contract would be mitigated by the new earnings. It can be considered a lose-lose situation for the players. As a result, many players in this kind of situation are increasingly accepting of settlement agreements in order to avoid jeopardising their career and obtaining an amount in a more expedited manner, rather than having to go through an often-lengthy procedure at FIFA and possibly CAS.

For **all EU countries** there is no limit to the registration of foreign players coming from other EU countries in compliance with the principle of freedom of movement of workers as enshrined in the Treaty of the Functioning of the European Union. This situation could change in **England** after Brexit; however, it is too early at this stage to predict whether there would be any specific quotas for foreigners (be it EU or non-EU players).

Nevertheless, each national sports association can set limits to the registration of players coming from third countries, i.e. outside the European Union.

In particular, in **France**, clubs of League 1 are allowed to employ a maximum of only four players from outside the EU/EEA or countries with an Association or Co-operation Agreement with the European Union. Furthermore, employment contracts with foreigners coming outside the European Union need to be validated by the League (LFP) upon verification of the relevant documents such as the resident permit, work authorization and visas. In any case, the player will be qualified for LFP’s competitions only for the duration of validity of the corresponding document (plus an additional period of 30 days for its renewal).

The validity period of the French immigration documents varies between 4 months and 10 years.

In **Italy**, clubs of serie A (first category) can register a maximum of four foreign players (two already registered plus two new players) subject to specific conditions established by the Italian Football Federation every year.

In **Spain**, clubs of the First Division can register a maximum of three foreign players and in the Second division can register a maximum of two foreign players.

Furthermore, legal rules on quotas can vary greatly across continents.

In **Argentina** for instance, clubs playing in the top division category (Superliga), are allowed to enter into and register contracts with a maximum of up to six foreign football players per club.

Nevertheless, only five of them will be able to participate in official matches.¹³

In **Brazil**, there is no limit for registrations, but only five foreigners may be simultaneously lined-up. Refugees however are not computed in this limit and are free to play.

In **China**, the CFA has recently amended its regulations increasing the number of foreign footballers. Chinese Super League clubs (first category) can register a maximum of seven foreign footballers per year and list four together, China League One clubs (second category) can register a maximum of four foreign players per season and field two together, while naturalized (nationalized?) players meeting certain specific conditions can be registered as domestic players.¹⁴

1.6 Verification of any TPO agreement

By introducing Arts. 18 bis and 18-ter RSTP, FIFA put into effect a complete *ban of third-party ownership* whose legitimacy has been upheld by CAS as well as by several national tribunals.¹⁵

Most recently, on 12 December 2019 the Court of Appeal of Brussels confirmed the validity of the disciplinary decisions rendered by the FIFA disciplinary committees which sanctioned the Belgian club FC Seraing for having violated the TPO and TPI rules.

The Court therefore acknowledged the full effect of *res judicata* of the CAS award on the same matter rendered on 9 March, 2017 and of the judgement of the Swiss Federal Tribunal rendered on 20 February 2018.¹⁶

As a consequence, clubs and players are forbidden from assigning to a third-party any rights or participation in the compensation payable for the future transfer of a player.

As such and always bearing in mind the recent amendment of the FIFA RSTP, according to which players are not considered third parties, they are entitled to hold a percentage over their own future transfer but are prohibited from further assigning it to any other third party.¹⁷

¹³ M. CLARIA and R. TREVISAN, “National Transfer in Argentina”, *Transfer of Players*, O.D. Bellia and M. Colucci eds, SLPC, 2020.

¹⁴ D. WU, G. MARINO, T. PEREDA RUEDA and R. CHU, “National Transfers in China”, *Transfer of Players*, O.D. Bellia and M. Colucci eds, SLPC, 2020.

¹⁵ See M. MOTTA and S. MALVESTIO, “Third Party Ownership”, *Transfer of Players*, O.D. Bellia and M. Colucci eds, SLPC, 2020.

¹⁶ Unpublished decision. See FIFA press release www.fifa.com/about-fifa/who-we-are/news/fifa-welcomes-brussels-court-of-appeal-ruling-on-fifa-s-tpo-and-tpi-rules.

¹⁷ M. MOTTA and S. MALVESTIO, “Third Party Ownership”, *Transfer of Players*, O.D. Bellia and M. Colucci eds, SLPC, 2020.

1.7 Approaching the player

Once the club has carried out the above investigation and made up the indispensable economic considerations, it should fulfill its legal obligations on ways and means of *approaching* the player.

Usually, the club interested in a player under contract makes contact with the other club to express its interest in the player, while the latter is discretely sounded out via his agent. However, practices sometimes differ, and the interested club may decide to enter into contact directly or indirectly with the player, luring him with much improved salary conditions. In most cases, the player then applies pressure on the club to favour his move. In most cases, clubs and players rely on the services of intermediaries and lawyers.

It is important to underline that Art. 18 para. 3 RSTP clearly states that: *“A club intending to conclude a contract with a professional must inform the player’s current club in writing before entering into negotiations with him. A professional shall only be free to conclude a contract with another club if his contract with his present club has expired or is due to expire within six months. Any breach of this provision shall be subject to appropriate sanctions”*.

In **China**, Article 51 CFA RSTP includes exactly the same provision.¹⁸ So does article 143 of the General Regulation of the RFEF in **Spain**.

In order to get in touch with the player, the club can either contact him directly and/or the releasing club can rely on the services of intermediaries and lawyers.

The above FIFA provision applies to international transfers whilst different rules govern domestic transfers.

In **England**, for instance, players on expiring contracts who intend to move domestically cannot approach or be approached (directly or indirectly) by other English clubs until the third Saturday of May in the year of their expiring contracts.

Similarly, in **Portugal** during the last six months prior to the expiration of the contract, the new club must notify the player’s previous club within five days of the date of signature of the new contract.

Clubs cannot even make any public statements expressing interest in an already employed player, as this can be considered as an indirect approach to the player and therefore leads to the imposition of disciplinary sanctions.

In **France**, the Federation’s regulations do not impose a specific date from which a club may approach a player.

However, and in any case (and therefore even in the case of a pre-registration procedure), the validation by LFP of any employment contract for a player already registered with a French club is subject to the submission of a

¹⁸ D. WU, G. MARINO, T. PEREDA RUEDA and R. CHU, “National Transfers in China”, *Transfer of Players*, O.D. Bellia and M. Colucci eds, SLPC, 2020.

prior information letter by the new club which notifies the player's current club about the beginning of negotiations.

In **Italy**, parties can sign a preliminary contract in the specific form provided by the relevant League which encompasses exactly the same content as the relevant definitive contract it refers to.

This form can be used to agree in advance on transfers, assignment of contracts, new employment contracts or renewal of existing employment contracts, with the juridical effects of the transaction entering into force at a later date.

For its validity, a Preliminary Contract Form related to a transfer (i) can only be concluded during specific periods set forth every year by the Italian Football Federation, (ii) cannot involve clubs and players competing in the same championship when these are still ongoing and (iii) must be deposited with the relevant League within 20 (twenty) days of signing.¹⁹

1.8 *The background of the player and the financial means of the clubs*

From the perspective of the "buying" club, the latter should investigate the player and check his/her *background beyond his/her sporting performance*.²⁰

In fact, the club should be very well aware of his/her personal and social attitudes and past behaviour on and off the pitch and verify whether he was involved in any match fixing or doping practices. It should check the existence of a possible pending *disciplinary suspension* on the player whereas a sanction, not totally served under the previous club, will be taken on under the new employment relationship.²¹

The Club should also verify whether the player terminated his employment contract with or without just cause with his previous club and inform the latter accordingly before signing any contract in order to avoid any complaint of having induced the player to breach the employment agreement and thus, avoid the risk of being sanctioned.

From a player's perspective, he/she or his/her representative should adequately ascertain the *financial means* of the buying club and its actual capacity to honor the contract, its current sports standing, and its ambitions.

The lack of financial means – or the mere unwillingness to pay in order to force a player out of his contract – is by far the greatest cause for complaints before the FIFA DRC.

Furthermore, it would be good for the player to gain some information about the culture and living conditions in a country which could be very far from

¹⁹ L. TETTAMANTI and M. SPADINI, "National Transfers in Italy", *Transfer of Players*, O.D. Bellia and M. Colucci eds, SLPC, 2020.

²⁰ Some of the points hereby made – especially with regard to the preliminary stage of the negotiations of players' contracts have superbly been dealt with by G. MONTENERI and E. MAZZILLI at the occasion of the AIAS (*Associazione Italiana Avvocati dello Sport*) workshop on International Transfer of Players in Milan on 25 October 2019.

²¹ See Art. 12 FIFA RSTP on "Enforcement of Disciplinary Sanctions".

home with the implications regarding “adaptation”. In the past, too often, pending a valid employment agreement, players have abandoned their new foreign club without authorization because they could not stand the different social and cultural environment of the country, perceiving it as too hostile or even dangerous. By all means, the unauthorized leave has triggered disputes before the FIFA Dispute Resolution Chamber for *de facto* unilateral termination of the employment contract without just cause.

Finally, the releasing club should investigate the financial capacity of the “buying” club while his/her legal advisor applies all possible legal and contractual means to ensure that it will receive the money agreed in the transfer agreement.

In fact, as we will see hereafter, an experienced lawyer will insert all guarantees in the contract, such as penalty clauses, bank guarantee, advanced payment and any relevant evidence concerning financial obligations.

2. *Negotiations*

During the negotiations the parties should always *act in good faith* in order to avoid liability for *culpa in contrahendo*, meaning that they have a clear duty to negotiate with care, seriously and in a fair manner.

From a mere *economic or budgetary* point of view, it is important for the “buying” club to know the budget at its disposal in order to better negotiate the transfer fee with the other club. The latter is determined by the estimated player’s value, the player’s age, the remaining duration of the player’s current employment contract; his national team appearances; his/her position on the pitch; any trophies won and of course, the competitive and concurrent offers he might receive from other clubs. These are the main factors to keep an eye on.

Transfer fees, of course, may also be determined on the basis of the cost that the releasing club incurred in acquiring the service of the player, plus the additional funds invested in salaries, bonuses and training.

When dealing with a player, the club should be aware of the money it can spend in terms of remuneration (salary, bonus, and fringe benefits), keeping in mind the taxation, social security costs and the possible commission for intermediaries’ services.

Then, of course, the peculiarities of each country and federation should be taken into account.

In certain cases, the club shall also take into consideration the financial constraints arising from financial control regulations implemented at national (**Spain**) or confederational level (**UEFA**).

In **China**, for instance, there are certain specific issues to take into consideration prior to entering into negotiations: 1. the so-called “luxury tax” on the transfer fees; 2. the salary cap (introduced for the season 2020); 3. other limitations on expense imposed to Clubs by the CFA.²²

²² D. WU, G. MARINO, T. PEREDA RUEDA and R. CHU, “National Transfers in China”, *Transfer of Players*, O.D. Bellia and M. Colucci eds, SLPC, 2020.

3. *Drafting a transfer agreement*

3.1 *The form*

Ideally, in order to complete the transfer of a player, a transfer agreement between the two (buying and releasing) clubs should be signed first, and only then should the new club and the player enter into the relevant employment contract.²³

However, sometimes a club might prefer to immediately put a player under an employment contract and then negotiate the transfer agreement with the player's former club. In this case, the employment contract should be made conditional upon the conclusion of the relevant transfer agreement, otherwise the player could be accused of having terminated his/her employment relationship without just cause.

The releasing club ought to draft the transfer agreement since it is in most cases the one to be compensated: much care and attention must be paid in order to include all necessary guarantees which safeguard its own interests.

In general, agreements for the transfer of players within the same association do not tend to differ materially from the agreements used in international transfers.

In **Argentina, China, England, Germany, and Portugal** neither the federations nor the leagues prescribe that transfer agreements take a specific form, and unlike employment contracts, a standard/template transfer agreement is not used.

In **Spain**, the collective bargaining agreements existing in professional football for men and women, require that transfer agreements (both of temporary and permanent nature) are necessarily made in written form and include some essential terms such as the parties involved, the price of the transfer, the consent of the parties etc.

In **France**, like the employment contract, the Temporary or Permanent Transfer Agreement between 2 French Clubs are generated via the software Isyfoot, and therefore all the National Transfer Agreements have the same standard form (their contents however remaining freely negotiable by the two French Clubs).

By contrast, for International Transfer Agreement, there is no specific mandatory standard form.

3.2 *Payment of Transfer fee*

By far, the economic terms are dominant because often the amounts at stake are as significant as the expectations of the contractual parties. It is also crucial that the parties should clarify whether the relevant transfer fee is *net or gross* of any taxes.

²³ For a detailed and very critical analysis of transfer agreements, see J.F. VANDELLOS ALAMILLA, "Transfer Agreements", *Transfer of Players*, O.D. Bellia and M. Colucci eds, SLPC, 2020.

At the same time, they should clearly establish which party is going to bear the *training compensation and the solidarity mechanisms costs*, if they want to derogate from the general rules provided by the RSPT.

With particular regard to the solidarity compensation, it deserves a particular mention the local system established in **Germany** wherein all 36 clubs from Bundesliga 1 and Bundesliga 2 jointly fund the solidarity payments, irrespective of (i) any transfer fee paid in connection with the player's transfers, and (ii) the question of which club finally benefits from the players' training by fielding him in official matches.²⁴

Furthermore, in compliance with the principle *pacta sunt servanda*, the payment of a transfer fee can be delayed or denied in case of a force majeure, keeping in mind that this shall always be interpreted as an instance far beyond the control of the parties and one which could not be forecast and avoided by exercising reasonable due care.

Finally, it is worth recalling that clubs in breach of their financial obligations cannot invoke the fact that they did not receive the relevant invoice or tax certificate, or that they got the wrong bank account in order to justify their failure to comply with their financial obligations towards the other party.²⁵

3.3 Terms and conditions

As for the *contractual terms*, the parties must establish the conditions upon which the transfer agreement may be subject to.

These can be *the successful passing of the medical examination conducted by the new club; the delivery of the players' visa/working permits; the signing of an employment contract between the player and the new club; the timely delivery of the ITC by the former club; the release of bank guarantees.*

It is also interesting to note that following the latest CAS jurisprudence, a club could make the transfer of a player conditional upon an upfront payment of the transfer fee before the conclusion of the transfer.²⁶

The parties can even agree for the money to be transferred to an escrow account by a certain date, with failure to comply with such a condition resulting in the immediate termination of the contract.²⁷

Typically, negotiations will also revolve around the question of whether to include lawful preferential rights (*e.g. buy-back clause; option to transfer;*

²⁴ J. WILKENS, "National Transfers in Germany", *Transfer of Players*, O.D. Bellia and M. Colucci eds, SLPC, 2020.

²⁵ J.F. VANDELLOS ALAMILLA, "Transfer Agreements", *Transfer of Players*, O.D. Bellia and M. Colucci eds, SLPC, 2020.

²⁶ See CAS award 2018/5953 *FIFA Sport Lisboa e Benfica Futebol SAD, v. FIFA*, paras. 123-124 available <https://resources.fifa.com/image/upload/cas-2018-a-5953-sport-lisboa-e-benfica-futebol-sad-v-fifa.pdf?cloudid=c2woa5ehyixwqvs05hpl>.

²⁷ *Ibidem*.

rights of first refusal) bearing in mind not only the limitations pursuant to Arts 18 bis and 18 ter of the FIFA RSTP on Third Party Influence and Third Party Ownership, but also with the relevant national sports regulations.

In addition, the preference of the player needs to be considered, who may actually not agree with the buy-back clause agreed on between (stipulated by?) the transferring clubs.

As a matter of fact, the scope of Art. 18 bis RSTP is quite broad and open to interpretation: FIFA's current position as to what is lawful under Art. 18bis RSTP is very narrow. Finally, when only the two clubs are parties to the transfer agreement, it would be prudent to subject the validity of the transfer to the *consent of the player*, and thus, to the subsequent employment contract between the player and the new club. Likewise, it would be advisable to make the termination of the employment contract between the former club and the player conditional upon the receipt of the transfer fee or the successful passing of the medical examination.²⁸ This is, however, difficult to obtain in practice, given that transfer fees are normally paid in instalments and payment plans have durations that exceed the transfer date.

As a peculiarity of the North American legal system, it is interesting to note that, in *Major League Soccer (MLS)*, a player may be required – even without his/her consent – to relocate to any team in the same league; with the simple agreement between the two clubs coupled with the approval from the League Office being enough to complete the transfer of the player.²⁹

3.4 *Jurisdiction and applicable law*

Clubs and players should identify the *competent forum* to hear any disputes relating to the transfer agreement (FIFA Players' Status Committee, the CAS or other arbitral tribunals) and the *applicable law* to the agreement.³⁰

In this regard, Art. R58 CAS Code refers to the regulations and law chosen by the parties. If no choice is made, the law of the country where the football association issued the challenged decision shall apply.

The parties to international transfer agreements usually opt for the subsidiary application of Swiss law, by expressly or implicitly referring to the application of the FIFA regulations in relation with Art. 57(2) FIFA Statutes: "*CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law.*"; this is to fill gaps in the RSTP or FIFA Statutes.

²⁸ J.F. VANDELLOS ALAMILLA, "*Transfer Agreements*", *Transfer of Players*, O.D. Bellia and M. Colucci eds, SLPC, 2020.

²⁹ N.A. SANTIAGO, "*National Transfers in the United States: Focus on Major League Soccer*", *Transfer of Players*, O.D. Bellia and M. Colucci eds, SLPC, 2020.

³⁰ J.F. VANDELLOS ALAMILLA, "*Transfer Agreements*", *Transfer of Players*, O.D. Bellia and M. Colucci eds, SLPC, 2020.

4. Drafting an employment agreement

Parties in an employment contract shall comply not only with the regulations implemented by FIFA but also with the obligations and administrative formalities requested by the relevant domestic regulations in order to make the employment contract valid.

They should be aware that, unlike transfer agreements, the validity of an employment agreement cannot be made subject to the passing of medical examinations or to the issuance of a working permit (Art. 18.4 RSTP), nor can it be conditioned on the delivery of the International Transfer Certificate (hereafter “ITC”).

The responsibility for duly registering a player and requesting the ITC relies on the new club. The latter applies for the ITC through the national association using the Transfer Matching System (TMS), while the releasing club and its national association have to insert specific information and documentation into the system.³¹

The **MLS** constitutes a peculiarity in the football industry, given that it completely disregards the FIFA Regulations. Employment contracts literally state that “FIFA Regulations do not apply” and players renounce all their rights under the FIFA RSTP. Furthermore, all employment contracts are not entered into by the clubs but rather by the MLS, which holds the players’ registration rights.³²

This means that while the player’s employment contract terms must fit into the recipient club’s *salary cap* (admitted in the US and, from January 2020 on, also in **China**),³³ there is no obligation to renegotiate the player’s compensation with the club upon executing the player’s transfer (loan or “trade”³⁴) because he remains under the same employment contract concluded with the MLS itself.

4.1 Knowledge of the Legal Framework

The conclusion of an employment contract requires the parties to take into account the following array of regulations: (a) national legislation and, in particular, any mandatory provisions thereof; (b) collective bargaining agreements, if applicable;³⁵ (c) the FIFA regulations, including the Code of Ethics; for the Confederations,

³¹ S. CIVALE and L. PASTORE, “*Employments Agreements of Football Players*”, *Transfer of Players*, O.D. Bellia and M. Colucci eds, SLPC, 2020.

³² N.A. SANTIAGO, “*National Transfers in the United States: Focus on Major League Soccer*”, *Transfer of Players*, O.D. Bellia and M. Colucci eds, SLPC, 2020.

³³ D. WU, G. MARINO, T. PEREDA RUEDA and R. CHU, “*National Transfers in China*”, *Transfer of Players*, O.D. Bellia and M. Colucci eds, SLPC, 2020.

³⁴ “Trade” must be intended as the reassignment of a player from one team to another in exchange for another player or some other tradeable asset, such as *inter alia* a draft pick or a preferential right to sign a prospective player.

³⁵ For the detailed statistics on the countries which have collective bargaining agreements see FIFA “*Professional Football Report 2019*” available at <https://img.fifa.com/image/upload/jlr5corccbsef4n4brde.pdf>.

Member Associations and Professional Leagues (if applicable), the Statutes, Regulations and Decisions of these bodies.³⁶

Despite such a comprehensive listing, from a practical point of view the FIFA RSTP, together with the domestic football regulations and the collective bargaining agreements (if applicable), have the greatest impact on football employment contracts.

It is always imperative for any legal advisor involved in the negotiation of an employment contract, to identify the applicable rules and take them into account at all times during both the negotiations phase and the performance of the contractual obligations.

Of course, a good knowledge of the FIFA regulations and of the relevant CAS/FIFA jurisprudence is essential to avoid onerous mistakes, which may eventually lead to disputes as well as both economic and sporting damages for the parties.

4.2 *FIFA regulations v. national laws*

As per Art. 2 of the FIFA Rules Governing the Procedures of the Players' Status Committee and the DRC reads:

"In their application and adjudication of law, the Players' Status Committee and the DRC shall apply the FIFA Statutes and 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".

Thus, when deciding an employment-related dispute before the DRC, the FIFA Statutes and regulations are the primary sources of applicable law. However, the adjudicatory body shall also take into account the laws and regulations of the country concerned.

Pursuant to the FIFA Commentary, the deciding body has a discretionary margin to interpret and accordingly apply the guidelines provided by Art. 2.³⁷ In any case, by the wording of Art. 2 of the FIFA Rules Governing the Procedures of the Players' Status Committee and the DRC, it is clear that, for disputes having an international dimension, FIFA's regulations prevail over any national law that may be applicable to a particular case.

Furthermore, the DRC traditionally sustains that FIFA's regulations prevail over any national law even when the latter has been specifically chosen by the parties.

In particular, the DRC emphasises 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

³⁶ FIFA Circular Letter 1171, 2008.

³⁷ FIFA Commentary on the Regulations for the Status and Transfer of Players, comment under Art. 25.

achievable if the DRC had to apply the national law chosen by specific parties to every dispute brought to it.³⁸

The supremacy of FIFA regulations over domestic laws appears to clash with Art. 22 of the FIFA RSTP, which explicitly allows players and clubs to refer employment-related disputes to domestic independent arbitration bodies or civil courts: as a matter of fact, such courts would be most likely to primarily apply domestic employment laws.

The new provision of art. 14 bis FIFA RSTP is particularly significant, specifically regarding outstanding salaries, giving preference to the terms of a collective bargaining agreement validly negotiated by clubs and players' representatives at national level.

Nonetheless, until now decisions issued by the FIFA DRC have systematically mirrored the supremacy of FIFA regulations.

It may be said in general terms that clubs who wish to terminate a contract with a player, do so when they are no longer interested in the player's services and generally wish to apply national law over FIFA Regulations, whereas if a player wants to move on the basis of national law, clubs prefer the application of the FIFA Regulations. The same can be said for players who – if they would like to prematurely leave the club – prefer the application of national law, whereas in the situation the club would terminate the contract and try to get rid of the player, they would prefer the application of the FIFA Regulations. This is an interesting debate, also keeping in mind that different dispute resolution fora and the fact that a club seems to always have the possibility to seek redress at FIFA under art. 22 a) of the FIFA RSTP, should the player move abroad without just cause, whereas a player can find himself bound to a NDRC, the latter being more likely to apply national law.

This happens because the dynamic and continuous evolution of the FIFA Regulations is increasingly reflective of the analysis of the football market, the jurisprudence of FIFA judicial and disciplinary bodies, and above all, the consultation and involvement of all football stakeholders.³⁹

Nevertheless, it should be highlighted that in some countries such as **France**, the FIFA RSTP is not a principal regulation but is rather only applied in a supplementary manner and does not bind the French legislative, executive and judicial powers.⁴⁰ As mentioned above, the **USA**, do not apply the FIFA RSTP, nor does **Spain**, that has a specific and mandatory law governing the employment relationships of professional athletes.

In **China**, the disputes resolved by the CFA judicial bodies (regardless between domestic or foreign parties) are primarily subject to the CFA Regulations and subsidiarily Chinese law.

³⁸ DRC 9 February 2017, no. 02171603, DRC 15 October 2015, no. 1015863.

³⁹ O. ONGARO, "FIFA Regulations on the Status and Transfer of Players – the latest developments", *Transfer of Players*, O.D. Bellia and M. Colucci eds, SLPC, 2020.

⁴⁰ A. MIALHE, A. ANTONINI and B. ARNAUD, "National Transfers in France", *Transfer of Players*, O.D. Bellia and M. Colucci eds, SLPC, 2020.

In very limited and exceptional circumstances FIFA or CAS jurisprudence is taken into consideration by the CFA judicial bodies.

However, it has to be said that the CFA RSTP for example is practically a copy-paste of the FIFA RSTP, with some minor changes in order to comply with Chinese law.⁴¹

4.3 *The form*

Employment agreements must be in writing.

Many associations provide a standard employment contract which could be anything between a very short (**France and Italy**) and quite detailed and long document (**England, Germany**). These contract forms pick up the established rules of valid collective agreements (**Argentina, France, Germany, Italy, MLS, Portugal**) or they can be private, civil law agreements.

In other countries, there is a standard employment contract, however it is not mandatory to use (**Slovakia**) or mandatory standard contract which have not been agreed with the national stakeholders and are therefore imposed by Federations (**Malta, Serbia**). Finally, in some countries they predominantly use self-employed contracts with players being considered as independent contractors (**Czech Republic, Poland, Romania, and Croatia**).

In **Brazil** the standard CBF employment contract, which is mandatory for registration purposes is quite simple, but clubs can add “extra clauses”. It is common that clubs also conclude private law employment contracts alongside the CBF standard one. A similar situation occurs in **Spain**.

In **Germany** the current standard employment agreement is composed of around 40 pages and there are translated versions in the remaining three official FIFA languages, i.e. English, French and Spanish.

In **China** the federation only provides a template for clubs’ reference and holds no binding value. It is quite interesting to observe that players (even foreign ones) must put their fingerprints on each page to give validity to the contract.

Parties can decide whether to conclude an employment contract or a pre-contract. If they wish to conclude a pre-contract, it is advisable to specify it clearly in the relevant agreement because a pre-contract might/may be considered as a valid and binding employment contract if all the essential elements of the latter are duly compiled in written form.

In particular, they should also check the age of the player and, accordingly, verify (a) whether or not he/she is entitled to enter into an employment contract according to the laws of the country of the relevant club, and (b) the requirements for the player to sign a valid employment contract.⁴²

⁴¹ D. WU, G. MARINO, T. PEREDA RUEDA and R. CHU, “National Transfers in China”, *Transfer of Players*, O.D. Bellia and M. Colucci eds, SLPC, 2020.

⁴² *Ibidem*.

4.4 *The essentialia negotii*

Important case laws have developed over the years as to the presence of *essentialia negotii* in any document to constitute a sufficiently binding obligation between a club and a player.⁴³

In particular, the parties and their legal advisors should then focus on the basic elements of the employment contracts, i.e. the *essentialia negotii*, namely:

- the names of the parties: the player and the club shall be correctly identified;
- the financial terms: the employment contract shall at least state the fix salary due to the player in each football season.
- the duration: the employment contract to be valid shall clearly indicate the starting date and the expiry date of the employment relationship;
- a signature date;
- the signatures of the parties: the representative of the club shall be duly empowered to sign the contract; the signature of the player's legal guardians may be required if the player is an underage.

4.5 *Remuneration*

Employment contracts of players have specific provisions on remuneration, which might be fixed and/or variable in nature.

4.5.1 *Fixed Remuneration*

The contract may provide for the salary figure to remain the same for the duration of the contract, or to increase each football season (in which case it will likely include such increase to be conditional upon the club not being relegated), and/or to increase in the event of promotion to a higher league or decrease in the event of relegation to a lower league. Depending on the club's prospected performance it may be advisable to clearly determine the fixed remuneration to be paid during each and any season.

A player may receive a *signing on fee*, which under the English *FA* rules may be paid in equal instalments over the term of his/her playing contract.

In China, the CFA has introduced caps on the salary of players, which are different for domestic and foreign players. Moreover, such caps also include image right fees, signing-on fees, house allowance, transportation, remuneration in kind, stocks, bonds, etc.

⁴³ See for instance Arbitrations CAS 2015/A/3953 & 3954 *Stade Brestois 29 & John Jairo Culma v. Hapoel Kiryat Shmona FC & Fédération Internationale de Football Association (FIFA)*, award of 30 November 2015.

In addition, there are additional limitations imposed by the CFA. For example, CSL clubs can invest a maximum of 1.1 billion RMB per season, whereas salaries cannot surpass 60% of that amount.⁴⁴

4.5.2 Bonuses

Besides a fixed remuneration, it is common practice to incorporate bonuses for the players in order to encourage them to achieve the best possible results in terms of individual and team performance.

When drafting such clauses, it is important to foresee and detail the specific circumstances triggering the payment of bonuses.

For example, in the event of a bonus for the player's participation in a match at his/her club, it will be necessary to (i) exclude or include friendly games, (ii) specify whether only games as a "starting eleven" will be taken into account, (iii) indicate whether a minimum playing time is required and, in this case, establish that the only authoritative document to determine playing time is the official game sheet. As regards the bonuses for qualifying for international/regional competitions, it will be useful to distinguish the group stages from the qualifying rounds.

Following the recently amended definition of TPO, the player is not considered as a third party.⁴⁵ Such a definition has a practical impact on employment agreements because now parties are clearly allowed to stipulate provisions that, in case of future transfer of the player, the club would pay him either a percentage of the transfer price or a lump sum, always proportional to the transfer compensation paid by the new club to the player's previous club.

Where not specifically forbidden, such as in **France**, players may also receive *loyalty bonuses* depending on the duration of their employment.

Bonus provisions in players' employment contracts typically include *appearance bonuses*, *positional bonuses* (linked to the club's final league position at the end of the season), *promotional bonuses* (if the club is promoted to a higher league at the end of a season), and *qualification bonuses* linked to the club's achievements in both domestic and European cup competitions, in terms of qualification and reaching certain stages of the competition, *match bonuses* linked to games played and bonuses for a win/draw/goals scored are also applicable to players. There are, of course, also collective bonuses that in **China** for instance have been established by the CFA for the period 2019-2021 in which the whole team are excluded from the salary cap (win-draw) bonuses.

Quite enlightening and innovative is the so-called *ethics bonus*, used in **France**. The French employment contract provides this special bonus for a player for his/her exemplary behaviour, drawing positive media coverage on the athlete

⁴⁴ D. WU, G. MARINO, T. PEREDA RUEDA and R. CHU, "National Transfers in China", *Transfer of Players*, O.D. Bellia and M. Colucci eds, SLPC, 2020.

⁴⁵ See S. MALVESTIO and M. MOTTA, "Third Party Ownership", 2020.

and the club. This was implemented in order for clubs to optimize the co-operative attitude of their players so that their behavior in their professional lives, as in their personal lives, is likely to improve the club's image.⁴⁶

4.5.3 *Fringe benefits*

The parties can also agree specific fringe benefits – such as car/accommodation, flight tickets, and, more importantly health and medical insurances – for the players and their families.

4.5.4 *Gross/Net*

It is market practice to negotiate football employment contracts by using net amounts as a benchmark, and this is a pretty unique feature of the football industry.

During the negotiations of an employment agreement, it is of utmost importance to identify the player's selected country of tax residence⁴⁷ for the entire duration of the contract and check the Conventions for the avoidance of Double Taxation and Bilateral Tax Treaties between the two countries (namely the country where the employer has its seat and the country where the employee has his/her fiscal residence).

Furthermore, it is also prudent to verify whether the destination country has any preferential tax regimes for foreigners.

In **France** for instance, any individual of any nationality, even French, may benefit for eight years from the so-called "*repatriates scheme*" on the condition that they have not been a French tax resident during the past five years. Thanks to this scheme, 30% of a foreign player's regular pay is exempt from income tax. The express reference to this scheme in the employment contract's clauses is indispensable so that the player is able to enjoy its benefits.

In **Italy** a similar regime has been recently adopted in favour of Italian workers (included footballers) abroad willing to return back to Italy. Under certain circumstances they can benefit from substantial tax reductions.⁴⁸

When these regimes exist, it is important they be adequately reported in the employment contract so that the player can receive the expected net remuneration.

⁴⁶ See. A. MIALHE, A. ANTONINI and B. ARNAUD, "*National Transfers in France*", *Transfer of Players*, O.D. Bellia and M. Colucci eds, SLPC, 2020.

This ethical bonus is generally paid to the player on a monthly basis subject to the absence of any public comment, or any negative attitude toward the club and its members or supporters during matches or training sessions but also outside the game and/or during the player's working time, and when he is on international duty.

⁴⁷ See M. TENORE, "*International Tax Issues Related to Transfers of Football Players*", *Transfer of Players*, O.D. Bellia and M. Colucci eds, SLPC, 2020.

⁴⁸ *Ibidem*.

A further practical suggestion is to verify and possibly indicate in the employment contract the exact tax rate applicable in the club's country seat and thus, where it pays the taxes.

Moreover, in order to protect the interest of the player, the regular and timely delivery of tax certificates should be added, among the contractual obligations of the employer.⁴⁹

A tax certificate is a document issued by the Tax Authority which shows the exact percentages and amounts paid by the club as taxes on the amounts paid to the player. Such document allows the employee to check whether the club has paid the taxes due and also to check if it did so at the "agreed/official" tax rate, looking at specific contractual provisions (if any). Additionally, by means of tax certificates the player can calculate the balance of the amount to be paid to the Tax Authority of his/her country of residence.⁵⁰

Another issue related to taxation is linked to the compensation to be paid in case of the early termination of the employment contract. The question again is whether the compensation shall be paid net or gross, and the amount of taxes to be paid in each relevant country. Therefore, the contract should contain a settling clause for this issue.

As for the *salary*, in **France** and in **Italy** it must be indicated as a gross amount and in case of a multiannual agreement, for each sporting season, preferably for each championship in case of promotion/relegation of the club.

As players usually demand to receive a net salary, clubs make use of a practical table prepared by the AIC (the Italian Players' Union) to approximately calculate the corresponding gross amount to be inserted in the employment agreement (the so-called "Tabella Lordo/Netto").⁵¹ In any case, parties are free to produce and register an additional agreement specifying the NET amount with the League.

Finally, in some countries, such as **Poland** and **Croatia**, cases have emerged of players under a self-employed contract who are paid a net salary plus VAT by the club, but only upon receipt of a VAT invoice from the player.

5. *Length of the agreement*

The parties have to agree on a fundamental point, the length of a contract. As indicated by Art. 18, para. 2 RSTP, the minimum length of a contract shall be from the date of its entry into force to the end of the relevant sporting season, while the maximum length of a contract shall be five years (three years for players aged below 18). Contracts of any other length shall only be permitted if consistent with

⁴⁹ S. CIVALE and L. PASTORE, "Employment Agreements of Football Players", *Transfer of Players*, O.D. Bellia and M. Colucci eds, SLPC, 2020.

⁵⁰ *Ibidem*.

⁵¹ L. TETTAMANTI and M. SPADINI, "National Transfers in Italy", *Transfer of Players*, O.D. Bellia and M. Colucci eds, SLPC, 2020.

national laws, as it happens in **Spain**, where there are cases of players in the first division with eight year contracts. Furthermore, the validity of unilateral extension clause shall be assessed on a case by case basis. In general, the DRC's approach⁵² considers the unilateral extension options reserved to the clubs as invalid. Such power excessively restricts the employees' freedom and gives the right to the club to terminate the contract or extend its duration. On the contrary, if the clause provides a mutual right for both parties to extend the contract, such clause might be deemed valid.

6. *Language*

International transfers of players will typically involve parties with at least two different nationalities, which often speak different languages.

It is important that the employment contract is drafted in a *language* that the player understands.

It is therefore quite common to draft international transfer agreements in two languages (the club's language and English) for ease of use.

In these cases, a specific contractual clause containing the clear indication of which language prevails in case of conflict between the two versions is fundamental in order to prevent problems during the contract execution, let alone in case of disputes.

However, if the contract does not specify which language prevails, or in case there are two identical contracts signed on the same day between the same parties but in different languages, it will be necessary to identify the real intention of the parties in order to resolve the conflict, taking into consideration, as usual, the specific circumstances of the case.⁵³

7. *Liquidated damage clauses/Indemnity clauses, buy out and release clauses*

When entering into a contract, parties should also anticipate the possible consequences of the termination of a contract, especially with regard to the economic compensation and sporting sanctions they may face.

They should also agree on terms of the termination of the employment agreement, taking into account the principle of contractual stability as enshrined in the FIFA regulations. In particular, Art. 17 RSTP allows clubs and players to stipulate in their contract the amount of compensation due in case of unilateral breach of

⁵² See DRC decision n. 310607 of 18 March 2010 available at <http://resources.fifa.com/mm/document/affederation/administration/drclabour/310607.pdf> and DRC decision n. 06132616 of 13 June 2013 available at http://resources.fifa.com/mm/document/affederation/administration/02/25/89/13/06132616_english.pdf.

⁵³ S. CIVALE and L. PASTORE, "*Employment Agreements in Football*", *Transfer of Players*, O.D. Bellia and M. Colucci eds, SLPC, 2020.

contract without just cause by the counterparty and include such a clause in their contract (so called liquidated damages clause).

Liquidated damages or indemnity clauses are quite practical because they stipulate the amount to be paid and save a party having to sue for general damages, which are quantified by the competent judge by reference to a number of variables and are, therefore, speculative in nature. The amount must represent a genuine pre-estimate of the loss generated by the breach.

Nevertheless, as rightly pointed out,⁵⁴ when drafting this kind of clause, legal counsels must be very careful because, in case of a dispute, a clause may be declared invalid when lacking reciprocity, proportionality and/or containing unbalanced terms.

Parties can also foresee a so-called *buyout clause*, which does not provide for damages but it gives the player the right to terminate the employment relationship at any moment by paying a pre-determined amount – although in practice, the amount is paid by the new club via the player. This, in turn, can lead to tax consequences for the player if the amount paid by the new club to the player is considered as taxable income.

In general the club is not obliged to transfer the player, and if an agreement on a suitable fee cannot be reached between clubs, a buyout clause can be triggered by the player. In such a case, the club cannot oppose or refuse the offer by any means. Usually this is a higher amount than the player's expected market value, although on occasion a player at a smaller club will sign a contract and insist on a low buyout fee to attract bigger clubs if ensuing performances generate interest from other clubs.

The aim of this clause for clubs is twofold: firstly, with its high amount, competing teams are discouraged from attempting to acquire the player if the current club shows no signs of wishing to sell him/her; and secondly it raises high stakes for the players in case they would think to disregard their contractual commitments.

In **Spain**, buyout clauses are common because Art. 16 of the RD 1006/1985 allows players to freely walk out of employment contracts by pre-establishing an amount to be paid to the club in such cases. However, such clauses are not compulsory. When the amount is not pre-established by the parties, players can still terminate their contracts but it will be for the judge to determine compensation in light of the relevant circumstances.⁵⁵ If wishing to terminate their contract, players are required to personally pay the buyout fee to their current club (via la Liga), with that fee being normally advanced to them by the new club. Since October 2016, the buyout fee advances to the players are no longer taxable, meaning only the fee itself has to be paid.

⁵⁴ O. ONGARO, "FIFA Regulations on the Status and Transfer of Players – The Latest developments", *Transfer of Players*, O.D. Bellia and M. Colucci eds, SLPC, 2020.

⁵⁵ Royal Decree 1006/1985 of 26 June 1985 on the special employment relationship of professional athletes.

While in buy-out clauses the amount established corresponds to the ‘consideration’ (price) for the player to exercise his right to terminate the contract, in the *indemnity clauses*, the amount corresponds to a pre-determination of the damages that the club would suffer.

Release clauses oblige a club to accept an offer for the player if the underlying fee is over a certain amount.⁵⁶

If the minimum amount set out in the contract is offered by a potential purchasing club, the player is entitled to negotiate with that club and in the event that the player agrees to his/her transfer to the new club, the former club is due to transfer the player against the pre-determined transfer compensation. Thus, no unilateral termination of the employment contract occurs.

It is interesting to observe that in **France**, release clauses are prohibited yet penalties clauses are permitted.

Penalty clauses protect the creditor’s interest in the fulfilment of the footballer’s contractual obligations. Such a clause is not expressly regulated in the RSTP. Therefore, Swiss law applies in the majority of the international contracts that are subject to the FIFA RSTP in order to define and interpret the modalities and content of such penalty clauses.

The penalty clause is a strong deterrent that encourages the debtor to fulfil its financial obligations towards the creditor. Nevertheless, the creditor needs to prove that the debtor actually failed to fulfil his/her obligations under the employment contract. But even if a breach of contract can be established, a penalty clause must be proportionate in order to be valid.

According to the established FIFA jurisprudence, the amount of the penalty should be proportionate in relation to the player’s salary. The higher the salary of a player, the higher a penalty may be. This also means that a club cannot use an outstanding penalty as an excuse to disregard the employment contract itself.

Furthermore, under Swiss law, contractual penalties are valid, but CAS has the authority to reduce them if they are excessive.⁵⁷

In **Brazil**, every employment contract must contain two types of penalty clauses, one in favour of the player and one in favour of the club.

The so-called “cláusula compensatória desportiva” is due by the club to the player in the event of unfair dismissal (or dismissal without a motive) or termination with just cause by the player. Its minimum threshold is the time remaining of the employment contract, with the maximum corresponding to 400 (four hundred) times the player’s monthly salary at the moment of termination.⁵⁸

⁵⁶ CAS 2008/A/1519 *FC Shakhtar Donetsk v Mr. Matuzalem Francelino da Silva & Real Zaragoza SAD & FIFA*.

⁵⁷ S. CIVALE and L. PASTORE, “*Employment Agreements of Football Players*”, *Transfer of Players*, O.D. Bellia and M. Colucci eds, SLPC, 2020.

⁵⁸ As before 2011 the rule was that the club should always pay half of the residual value of the player’s contract, it is very uncommon, if not impossible, to see parties deviating from the minimum threshold currently stipulated.

The so-called “*cláusula indenizatória desportiva*”, in turn, is a type of buy-out clause due to the club by the player in the event he terminates his/her contract without just cause or if he/she resumes his/her professional activities with another club within 30 (thirty) months after. For instance, abandoning the club or retiring while a contract is still pending and valid.

The amount of the “*cláusula indenizatória desportiva*” may vary according to the national or international transfer of the player after the termination of his/her contract. For domestic transfers, the maximum amount shall not exceed 2,000 (two thousand) times the player’s average monthly salary, while for international transfers no limit is established. In any case, be it in accordance with the Pelé Law or the FIFA RSTP (the latter, in case of international transfers), the new club is jointly and fully liable for paying the buy-out clause.

8. *Image Rights agreements*

In general, the more prestigious the clubs and players, the more important it becomes to deal with the subject of *image rights*.

Personal image rights are dealt with by specific agreements whereby players grant either directly or through image rights companies that belong to them or are controlled by them, all or some of the right to use their image, i.e. they authorise the club to make use of such rights for commercial exploitation.

Interestingly, in recent times some of the top tier clubs in Europe are making the signing of football employment contracts conditional upon the parallel signing of contracts for the exploitation of the footballer’s image rights (either in full or in part).

Such agreements are beneficial for both parties. For football clubs, the benefits are obvious. By paying the agreed remuneration, they are entitled to use the name, image and other personal rights of football stars (as defined by the agreement) for commercial purposes, such as advertising, promotion, merchandising, social media activities, etc.

On the other hand, players earn a considerable remuneration (depending on their popularity and value) and at the same time the value of their image rights grows as a result of (i) the association with big clubs or big brands and (ii) the penetration and popularity in new markets, enabling them to receive higher remunerations for the same rights in the future and attract more brands.

That said, the practice of signing image rights agreements in parallel with employment contracts entails some negative aspects too.⁵⁹

It is also not uncommon, especially in the lower level leagues, that image rights agreements are merely agreed on to reduce the payment of taxes, with cases having emerged in Cyprus where the payments received under the image

⁵⁹ For a detailed analysis of the Image rights agreements, see K. ZEMBERIS, “*Image Rights*”, *Transfer of Players*, O.D. Bellia and M. Colucci eds, SLPC, 2020.

rights agreement would even be higher than the salaries received under the employment contract.⁶⁰

A footballer might find himself in a difficult and problematic situation if the club does not respect its obligations arising either from the employment contract or from the image rights agreement, or both.

Thus, if the club is not fulfilling its financial obligations pursuant to the image rights contract, the player, as a principle, will not be able to simultaneously terminate all the contracts with the club, especially if his salary is properly paid. This means that the multiplicity of contracts may place the player in the awkward position of maintaining an employment bond with a club while pursuing a harsh litigation with it at the image rights level.

Likewise, should a club fail to comply with its (employment) contractual obligations and the employment contract is terminated due to a breach on behalf of the club, the player would be entitled to claim before sporting judicial bodies only due compensations from his/her employment contract.

Indeed, the sporting judicial bodies are not competent to decide on a genuine image rights agreement.

In light of the above considerations, it is essential to identify beyond any doubt the holders of the rights at stake (the player and/or a third party), the *commercial* (limitation of media interviews and marketing activities) and *territorial* (national or worldwide) *scope* of the agreement, the warranties granted to each party, the exclusivity or non-exclusivity of the image rights arrangement.

Equally important is to anticipate the *kind of exploitation* permitted, the *duration* and finally, the *consequences in case of violation*.

For several reasons, very often players entrust the exploitation of their image to specialised image rights companies. First, there is obviously a tax benefit since highly paid individuals are taxed in all countries higher than legal entities (it should be reminded that while tax evasion is illegal, tax planning is not) and second, big football stars can focus on their game while somebody else (in many case experienced managers) is taking care of their businesses on the commercial side.

Such matters ought to be assessed, defined and regulated in a separate contract, keeping in mind that the tax rate applicable to this kind of contract is different from the one applicable to employment agreements.

In that regard, in **Brazil** in order to reduce taxes and ancillary labour obligations, almost every club would try to pay most of its players' remuneration (including the least popular players) as image rights, reserving just a small part for salaries. Albeit image rights agreements have always been lawful, the use of such rights by Brazilian clubs was somewhat limited, making it easy for labour judges and the Federal Tax Service to detect fraud. In this regard, after decades of legal battles, in 2015 an amendment to the *Pelé Law* finally established that the maximum

⁶⁰ See in that regard See also: www.devereuxchambers.co.uk/resources/news/view/first-tier-tax-tribunal-determines-that-payments-under-a-premier-league-footballers-image-rights-agreement-taxable-as-earnings.

ratio between a player's image rights payment in relation to his/her global remuneration is 40% (forty percent).⁶¹

An image rights agreement is, in this sense, independent from the employment contract of a player in Brazil, having to be explicit in relation to the rights and obligations of the parties and even if concluded through a licensing company, shall be registered before the CBF.⁶² However, it is worth noting that mandatory registration is not a condition for the validity of the agreement, but a duty recently introduced in the CBF RSTP to enhance transparency and facilitate the resolution of disputes – as matters involving image rights agreements can also be submitted to the CBF's national dispute resolution chamber (the so-called "CNRD").

In **England**, unless a player has assigned his/her image rights to a specialized company (in which case payments in respect of the club's use of such image will be dealt with in a separate image rights agreement), under the employment contract, players grant the right to their club for the term of the employment contract to exploit their image rights in a "club context". Such rights can be used in relation to the club's products and services, the League's licensed products, services and sponsors. This is subject to the use of the player's image (either individually or with up to two players) being no greater than the average usage of all regular first team players. The player's image should not be used to imply any brand or product endorsement by the player.

In **France**, the exploitation of image rights and the associated royalty must give rise to a separate contract between the club and the player. The basis for determining the amount of the fee must correspond to the revenue from the actual exploitation of the individual image in the areas of sponsorship, advertising and marketing of derivatives (revenues from TV rights and ticketing for club games are excluded from the scheme).

The collective bargaining agreement sets the limit on the fees liable to be paid to the player and the minimum remuneration under the employment contract above which the "Image Contract" may be concluded by the sportsman or professional coach.⁶³

In **Spain** art. 7.3 of RD 1006/1985 cross refers to the rights set out in the relevant collective agreement or individual contract. The Footballers' collective agreement classified as salary if they are not ceded but instead exploited by the player in his or her own name (art. 28).

⁶¹ This provision shall not be confused with the so-called "*direito de arena*" stipulated in the Pelé Law, according to which 5% (five percent) of all broadcasting revenue obtained by clubs shall be distributed to the players taking part in the relevant match.

⁶² Image rights agreements shall also be registered through CBF's electronic system, but differently from employment contracts and Training Contracts are not published in the BID.

⁶³ See MIALHE, ANTONINI and ARNAUD, "*National Transfers in France*", *Transfer of Players*, O.D. Bellia and M. Colucci eds, SLPC, 2020. The Authors underline that individual image entitlement limit may not exceed 50% of a certain wage remuneration insofar that the image rights compensation does not exceed 33.33% of the individual overall compensation. Furthermore, the royalties are not subject to VAT.

In **Germany**, the standard employment contract requires that each player grants the club the rights and permits to use and exploit the player's "commercialisation rights" which encompasses all his personality rights insofar as they relate to his/her capacity as player for the club. In contrast to other provision of the standard contract where the clubs enjoy a large freedom of legal drafting, the detailed regulations on the player's personality rights are thoroughly controlled by the DFL. Although contested by the national players' union association because the relevant rules of the above-mentioned provision have been considered too favourable to the clubs, national courts have considered the contractual duties regarding the player's commercialisation rights as appropriate to the parties' respective interests as long as they do not deprive the players of their right to use their names, data or image for their own personal purposes.⁶⁴

In the **MLS** with the signature of the standard player agreement, each player grants and assigns the MLS the use or further assignment or licensing, the exclusive rights to his/her likeness (players, name, nickname, image, photograph, signature, specific attributes that identify him, etc.) for – within certain limits – promotional material for MLS, the player's team, and local and national sponsors. The MLS may even enter into sub-licensing agreements for these rights without needing further approval or consent from the player.⁶⁵

9. *Representation agreements with Intermediaries*

Players and clubs may only appoint registered intermediaries, i.e. those individuals/companies that are listed in the registers of national football associations.⁶⁶

The representation contract must be enclosed to the player's contract and sent to the relevant football association. The contract should mention the absence of any intermediary in the transfer deal.

Furthermore, the relevant information, namely the names of the club and player's intermediary(ies), together with the amounts of the commissions, must be registered in the TMS.

FIFA requires that the representation agreement is concluded before the intermediary participates in the relevant transaction. The relevant legal text specifies the relationship between the parties, and contains the following essential elements: *"the names of the parties, the scope of services, the duration of the legal relationship, the remuneration due to the intermediary, the general terms of payment, the date of conclusion, the termination provisions and the signatures of the parties. If the player is a minor, the player's legal guardian(s) signs*

⁶⁴ J. WILKENS, "National Transfers in Germany", *Transfer of Players*, O.D. Bellia and M. Colucci eds, SLPC, 2020.

⁶⁵ N.A. SANTIAGO, "National Transfers in the Unites States: Focus on Major League Soccer", O.D. Bellia and M. Colucci eds, SLPC, 2020.

⁶⁶ For a critical and exhaustive analysis of the FIFA regulations on Working with the Intermediaries see A. BOZZA and P. CAPELLO, "Intermediaries", *Transfer of Players*, O.D. Bellia and M. Colucci eds, SLPC, 2020.

the representation contract in compliance with the law of the country of the player's domicile".

In general, concluding a written representation agreement prior to the relevant transaction is of crucial importance in terms of legal certainty. In the context of international transfers, it is also imperative that the representation agreement abides by the relevant intermediaries' regulations of the National Association of the country to which the player moves to. Various National Associations may have specific rules (e.g. in **England**, the maximum permissible duration of a representation agreement is 2 years) which can easily be overlooked in the rush to complete a transfer before the deadline.

In fact, an intermediary involved in a deal should always bear in mind that an issue of burden of proof (i.e. concerning the commission at stake) could arise at any time in a possible dispute with a club and/or a player. This means that a written representation agreement would be the only instrument to prove entitlement to a commission payment and/or involvement in a given transaction.

Finally, it is always advisable to include the scope of the services as a detailed description of the activities and services that an intermediary undertakes to provide for a client. In drafting this clause, the wording should be as precise and complete as possible in order to leave no room for ambiguity.⁶⁷

10. Processing the relevant transfer and employment agreements

All relevant documentation and information concerning the international transfer of a player must be duly uploaded in the FIFA Transfer Matching System pursuant to Art. 1 para. 5 of Annex 3 RSTP. Any registration of a player without the use of ITMS will be deemed invalid.

Art. 31 para. 1 of Annex 3 of the RSTP lists the obligations of clubs. It states that clubs are responsible for entering and confirming transfer information in ITMS and where applicable, for ensuring that the recorded information matches with the legal requirements.

As a result of more recent introductions, such information includes the player's passport, proof of the last contract end date and the employment contract as well as the TPO declaration from the former club of the player. Especially in the lower end of the football market, the requirement for the new club to upload the TPO declaration from the former club can lead to problems when the former club leverages the issuance of said document against a final clearance or a waiver from the player to his outstanding salaries.

Strict regulatory time limits apply to avoid undue delay in the player's transfer. For instance, the association of the new club must request the ITC when its affiliated club has completed the transfer process in the system. The new association may at the very latest request the ITC up until the last day of the registration period.

⁶⁷ M. COLUCCI, *The FIFA Regulations on Working with the Intermediaries*, II edition, SLPC, 2016.

The agreements need to be registered with the relevant sports association in order to be recognized and/or enforced under the national jurisdiction of each country.⁶⁸

Moreover, some key domestic law rules apply to a footballer transfer.

In **England**, for instance, The FA's prior consent is required when a club proposes to acquire a player owned by a foreign club or a third party. Furthermore, the payment of any sum must be done via The FA's designated account and prior to the expiry of the player's initial employment contract.

All transfer documentation must be lodged with the relevant league and The FA within five days of execution.⁶⁹

Furthermore, The FA provides the possibility to submit a "deal sheet" two hours before the deadline of the transfer window allowing the parties to confirm to the Premier League that a deal has been reached in order to give additional time (up to two hours after the deadline) in order to submit the remaining documentation.

It is very interesting to know that when FIFA has announced the establishment of a *clearing house* for the processing of all payments related to the transfers of players, The FA already had its own clearing house, which has seemingly been working quite well. In fact, all transfer fees, loan fees and contingent payments payable to a Premier League or EFL club must be paid by a buying club into a Compensation Fee Account of the Premier League or EFL Board. Once the payments are received in that account, the relevant Board pays the amounts due to the selling club. If the buying club is an international club, the amounts are paid into a clearing house run by the FA.⁷⁰

In **Italy**, all contracts (transfer and employment) must be registered with the leagues otherwise they can be declared as null and void. Furthermore, the Leagues operate with a "clearing house" method, setting off credit-debt positions derived from the transfer transactions of their affiliated clubs. Every yearly instalment is divided into sub-monthly quotes and must be guaranteed by the respective clubs with bank sureties issued by Italian banks or insurance warranties issued by certified insurance companies with a minimum rating of A3 – Moody's / Fitch or A – by Standards & Poors.⁷¹

In **Spain**, all contracts (transfer and employment) must be registered in the Spanish FA ("Fenix System") and in LaLiga.

Pursuant to the CBF RSTP, the registration of both professional and amateur players in **Brazil** (including those coming from abroad) is entirely conducted

⁶⁸ K. MORRIS, "The Transfer Matching System", *Transfer of Players*, O.D. Bellia and M. Colucci eds, SLPC, 2020.

⁶⁹ C. COUSE and T. GUNAWARDENA, "National Transfers in England", *Transfer of Players*, O.D. Bellia and M. Colucci eds, SLPC, 2020.

⁷⁰ *Ibidem*.

⁷¹ L. TETTAMANTI and M. SPADINI, "National Transfers in Italy", *Transfer of Players*, O.D. Bellia and M. Colucci eds, SLPC, 2020.

by electronic means, through a system developed and administered by CBF. To start the process, clubs have to submit copy of any contract to be registered, some personal and medical documents of the player concerned, as well as proof of payment of all applicable taxes and fees. All the documentation is then reviewed by the relevant State football federation and eventually handed over to the CBF for final approval.

If approved, the registration is concluded upon the publication of the player's name and contractual details in the "Boletim Informativo Diário" (the so-called "BID"), which is a bulletin published on a daily basis in CBF's website, open for public consultation.

In **China**, all the contracts signed between clubs, coaches and players are submitted to the CFA, including image rights agreements.

Furthermore, clubs are not allowed to enter into contracts without any substantial commercial value (so called "fake contracts"), such as image rights agreements without any real exploitation of the player's image but for the mere purpose of paying additional remuneration to the player with a lower tax rate.

In addition to that, the CFA issued an additional circular letter⁷² at the end of 2018 and further policies by the end of 2019,⁷³ aimed to tackle *inter alia* the use of "yin and yang"⁷⁴ contracts by Chinese professional clubs. For this purpose, the CFA obliged the clubs to execute payments exclusively from bank accounts registered before the CFA and prohibited clubs from entering into the following contracts: a) commercial contracts with players or coaches without any or low commercial consideration; b) contracts establishing payments in cash or value in kind to players or coaches or establishing payments via third parties; c) contracts not approved by the CFA;⁷⁵ and d) contracts deemed as "yin and yang" contracts⁷⁶ by the CFA inspection group.

In **France**, in order to exercise control over the legality of all definitive and temporary transfers as well as employment contracts, the League has developed a software programme called *IsyFoot*, made available to professional clubs. This tool centralizes and standardizes a set of procedures and formalities to follow.

In **Germany**, all transfers of players to Bundesliga or a Bundesliga 2 club is processed via an online-based registration system called *TOR* (*Transfer Online Registration system*), where the club willing to register a new player shall

⁷² Circular Letter "FA [2018] No. 891".

⁷³ "Notice of the Chinese Football Association on the policy adjustment of the 2020 professional league", issued by the CFA on 31 December 2019.

⁷⁴ This is a Chinese expression referring to contractual schemes in which one contract is drafted for submission to authorities – mainly tax authorities – and the other contract includes the real financial terms.

⁷⁵ All contracts entered between clubs, coaches and players must be sealed by the CFA prior their filing.

⁷⁶ This is a Chinese expression referring to contractual schemes in which one contract is drafted for submission to authorities – mainly tax authorities – and the other contract includes the real financial terms.

enter the data necessary to identify the player and to allow the league to register the player for the new club.⁷⁷

In **Portugal**, clubs can process the domestic and international transfers of players through the online platform called *SCORE*, whose operation is similar to that of FIFA TMS: clubs register the players in the electronic system of the league called *TRANSFER* by inserting the relevant information which is subsequently transferred in *SCORE*.

A club's use of this interface is a necessary prerequisite for the approval of the different agreements and therefore, the registration of its players.

Conclusion

The last two decades have seen a deep and wide evolution of the FIFA Regulations on the Status and Transfer of Players (the "Regulations").

The dynamic factors of this consistent though fragmented transformation have been on one hand the reception of the case law of the Dispute Resolution Chamber and the Players' Status Committee and, on the other hand, the integration of the positive results of the negotiations between FIFA and the football stakeholders, which have led to the latest edition of these Regulations.

Among the issues arising from, and integrated into, the various editions of the Regulations, the protection of contractual stability has been at the core of many of the amendments. Considering the vast amount of funds involved in transfers, both clubs and players, together with their legal representatives, were rightly entitled to expect more detailed and strengthened rules and disciplinary sanctions to govern the issues that provide a just cause to terminate their employment relationship. The collection of new rules on contractual stability has certainly upgraded the protection of players, as the weaker party, and provide clear consequences related to economic compensation and sporting sanctions due to unjust cause.

Of course, the rules relating to training compensation and solidarity mechanism have also been substantially upgraded in the context of international transfers. They were initially established with the aim of compensating clubs which train players, particularly after the changes to the transfer system following the intervention of the EU Court of Justice in the *Bosman* case.

In that regard, FIFA has recently established a Clearing House in order to effectively ensure the payment of solidarity contributions and training compensation to training clubs, with the potential to increase the amount of money distributed to these teams by up to four times. Furthermore, the new rules on the recording of the training clubs in footballer's certificates and registration processes aim to ensure that clubs receive their due compensation.

⁷⁷ J. WILKENS, "National Transfers in Germany", *Transfer of Players*, O.D. Bellia and M. Colucci eds, SLPC, 2020.

Maybe the existence of disputable phenomena such as TPI and TPO, which finally have been completely banned, have introduced a serendipitous bonus for players who may now benefit from extra compensation from their own future transfers. This is due to the remodeling of the definition of “third party” under the Regulations, which has been narrowed to exclude players, and therefore allows them to exploit their economic rights.

Yet the FIFA regulatory evolution has not been exclusively focused on financial rules. The successive editions of the Regulations have seen an increasing trend of specific detailed provisions to enhance the protection of minors, which has become a priority for football as well as the entire sports world.

In 2001, the Regulations provided only a simple, unbinding code of conduct for clubs. Nearly 20 years later, the effective and constant protection of minors from financial exploitation and human trafficking, as well as their education and training for alternative working activities, are social requirements for clubs and associations. To these ends, FIFA has developed a detailed regulatory framework and expanded its scope, and recently added specific provisions regarding humanitarian and academic cases.

Furthermore, procedural provisions, establishing administrative clauses concerning the transfer of minors, allow FIFA to monitor the clubs’ and associations’ compliance with substantive requirements and to take the appropriate measures to correct irregularities and impose effective sanctions.

The above-mentioned matters represent only the main measures that have been adopted, and surely many others will emerge to upgrade the overall efficiency, transparency and ethics of the international transfer system.

Probably, it is still not perfect, but as with other human constructions, it can be improved upon, and FIFA as well as all stakeholders will strive to make the system ever more effective and just for both clubs and players.