

CHOOSING THE RIGHT PATH IN INTERNATIONAL FOOTBALL DISPUTE RESOLUTION

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Notwithstanding the turbulence in the world economy over the last decade which has affected industries worldwide, the rapid growth of football has continued and nowhere is this more evident than from the statistics in relation to its transfer market. The report produced by FIFA's Transfer Matching System ('TMS') in January 2017 confirmed that over 14,000 international transfers took place in 2016, with a total value of USD \$4.79b and no fewer than 879 transfers were completed between countries that had never before completed a transfer together since the introduction of the TMS in 2010.

The growth in the number of transfers between clubs from different countries operating within their own legal and regulatory frameworks and with differing levels of resources, knowledge and experience, has led to an increase in the number of international disputes between clubs, players and intermediaries.

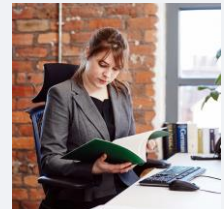
This Article explores the different forums which are available to clubs for the resolution of disputes, considers the mandatory provisions which clubs should be aware of and the tactical choices they can take to put themselves in the best possible position in the event of a dispute arising.

OBLIGATORY PROCEDURES

Some aspects of football's international dispute resolution framework prescribe exactly where certain types of disputes must be determined and it is not possible to depart from these provisions, otherwise jurisdiction will be declined and, at worst, FIFA may sanction parties that act contrary to such provisions.



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Knowledge of these provisions is key, as mistakes in the early stages of a dispute can be costly, waste time and potentially give the opposition the upper hand in the dispute.

Ousting of the Jurisdiction of National Courts

A notable feature of dispute resolution in football (both nationally and internationally) is that football clubs, leagues, players and intermediaries are prohibited from having recourse to the ordinary courts in all but a few limited cases.

The FIFA Statutes expressly provide that¹:

“Recourse to ordinary courts of law is prohibited unless specifically provided for in the FIFA regulations. Recourse to ordinary courts of law for all types of provisional measures is also prohibited.”

The Statutes even go as far as obliging national associations to exclude the jurisdiction of their own national courts².

Clubs must bear this rule in mind when contemplating dispute resolution, given that FIFA (and many national associations) will likely refuse to recognise and, where appropriate, challenge any decision rendered by a national court in a football-related dispute (that is if the court itself does not decline jurisdiction). Furthermore, FIFA has the right to impose sanctions on any club which seeks to bring a claim before its national court in contravention of its Statutes, should it wish to do so.

An infamous example of non-compliance with this prohibition involved the Swiss club, FC Sion, which challenged (with some initial success) a football registration ban imposed upon it through the Swiss courts, only to have the decisions of the lower regional Swiss courts overturned on the application of FIFA. This not only led to the wasted costs of the national court proceedings but also led to the club being sanctioned for actions taken by it in reliance on the order of the national court³.

It is notable, however, that the insistence of FIFA on mandatory arbitration within a football forum as opposed to recourse to the ordinary courts could still be challenged and, in such circumstances, FIFA would be required to prove that its arbitration procedures (and those of its national associations) are sufficiently neutral and independent to safeguard users' right to a fair hearing or risk the mandatory arbitration provisions it imposes on participants being deemed to be unlawful⁴.

¹ Article 59(2) of the FIFA Statutes

² Article 59(3) of the FIFA Statutes

³ http://www.espn.com/sports/soccer/news/_id/7403382/swiss-league-docks-fc-sion-36-points-avoid-fifa-ban

⁴ See Claudia Pechstien v The Ice Skating Union ('ISU') (http://www.tas-cas.org/fileadmin/user_upload/Pechstein_ISU_translation_ENG_final.pdf) in which Ms Pechstien's challenge to the mandatory arbitration agreement imposed by the ISU (pursuant to which all disputes under its anti-



There are two notable exceptions to the prohibition on having recourse to the ordinary courts, namely:

- i) Where a club is required to enter into insolvency proceedings, FIFA accepts that such proceedings are conducted by the relevant national courts; and
- ii) The right is reserved for players and clubs to enforce statutory employment rights in the applicable national court (rather than via FIFA or any national dispute resolution body) in appropriate cases⁵. This can potentially be of assistance to clubs where they have contractual or statutory rights in respect of a player which are recognised at domestic level, but perhaps not by FIFA.

Mandatory Jurisdiction of FIFA

Certain disputes can only be referred to FIFA in the first instance (albeit it is open to the parties to challenge any subsequent decision before the Court of Arbitration for Sport ('CAS')). Relevant disputes include:

- i) Training Compensation & Solidarity Disputes*

FIFA's Dispute Resolution Chamber ('DRC') is the exclusive forum for the resolution of disputes which arise under the provisions of the FIFA Regulations on the Status and Transfer of Players ('RSTP') in relation to the payment of Training Compensation⁶ and the Solidarity Mechanism⁷.

Clubs who are required to make (or defend) a claim of this nature must now do so by completing and submitting their claim (or defence) via FIFA's TMS in accordance with Annexe 6 of the RSTP. The DRC will not accept any claim for Training Compensation or Solidarity which is not submitted in this way and all documents served by the DRC in relation to the claim will be sent via TMS exclusively.

One notable point for clubs which has caused some teething problems since the introduction of the TMS claim system in September 2015 is that a club who has missed its opportunity to defend a claim is not entitled to rely on the fact that it did not check TMS and was thus not aware of the claim, to procure the annulment of any decision made in its absence. Clubs should therefore remain vigilant

doping regulations were required to be referred to the Court of Arbitration for Sport ('CAS')) was rejected, on the basis that although the arbitration agreement was restrictive, by referring matters to a neutral and independent body such as the CAS, the ISU was not interfering with its members' right to a fair hearing by imposing the mandatory provision.

⁵ See Article 22 of the RSTP

⁶ Article 20 of the RSTP

⁷ Article 21 RSTP



with regard to checking TMS, in order to ensure that any claims come to the attention of relevant individuals promptly and can be dealt with effectively and in compliance with deadlines set by the DRC.

ii) *Claims in relation to the release of an International Transfer Certificate ('ITC')*

Clubs may be faced by the need to make two types of claim in relation to the release of a player's ITC, both of which are required to be made to the FIFA Players' Status Committee ('PSC'):

- Clubs may need to make a request for provisional registration of player where the ITC has not been released by the Player's former national association in accordance with the provisions of Annexe 3 of the RSTP (often because there is an ongoing dispute between the player's new and former club)⁸; or
- Clubs may need to request a '*validation exemption*' where a player has been transferred but his old and/or new clubs have been unable to input details of the transfer on to TMS in accordance with the registration deadlines set out in Annexe 3 of the RSTP for reasons beyond their control⁹.

Article 22 RSTP provides that any "*interested party*" can make a claim in respect of an ITC request, so the above claims may potentially be brought by the relevant player, his old club and/or his new club. It is also common for national associations to bring ITC claims on behalf of their member clubs before the PSC.

Whilst it is inevitably helpful for clubs to have the support of their national association in applications of the above nature and this is always recommended, clubs should preserve their own standing in respect of the relevant matters, which will be important in the event of an appeal against the decision of the PSC to the CAS, for example where an ITC request has been refused.

Although there is jurisprudence of the CAS¹⁰ which supports the view that a player's new club would be entitled to appeal against any decision of the PSC not to release the ITC to CAS (irrespective of by whom the original claim to the PSC was made), on the basis that the new club has a sufficient legal interest in the dispute, clubs need to be prepared to argue that they have standing, as FIFA has shown a tendency to raise a challenge on the basis of lack of standing in some previous appeals¹¹.

⁸ See Article 8.2 (6) of Annex 3 of the RSTP

⁹ See Article 6 (1) of Annex 3 of the RSTP

¹⁰ See CAS 2014/A/3611

¹¹ CAS 2013/A/3140



- iii) *Disputes under Article 17 RSTP in relation to the maintenance of contractual stability between a player and a club belonging to different national associations and/or between two or more clubs belonging to two or more national associations*

Only the DRC has the power to adjudicate in cases of this nature and to impose the sporting sanctions set out in Article 17(3) and 17(4) RSTP. Claims of this nature (and indeed all claims before the DRC and PSC) are subject to new procedural regulations which came into force on 1 January 2018¹², pursuant to which FIFA now requires parties to submit all documents to FIFA's dispute resolution bodies by email or courier¹³. Fax is no longer a permissible method of service so clubs should be mindful not to miss deadlines / limitation periods due to a failure to lodge documents properly.

- iv) *Employment related disputes between clubs and players or coaches of an international dimension where there is no National Dispute Resolution Chamber ('NDRC') and/or there is no valid agreement between the parties to submit disputes to the relevant NDRC*

Many national associations and leagues prefer to have disputes involving their member clubs determined at a national level, in order that they are determined in accordance with national regulations, collective bargaining agreements and national law and therefore many national associations now operate recognised NDRCs and have mechanisms in place to contractually oblige clubs and players to resolve disputes before the NDRC in this way, such that the relevant FIFA bodies do not have competence.

Mandatory Jurisdiction of National Dispute Resolution Chambers

This month marks the tenth anniversary of the implementation of FIFA's "National Dispute Resolution Chamber ('NDRC') Standard Regulations" (the 'NDRC Regulations') which were created by FIFA "in order to shift responsibilities from FIFA to its member associations"¹⁴ in connection with the resolution of disputes.

¹² See the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber (http://resources.fifa.com/mm/document/affederation/administration/02/92/54/28/rulesgoverningtheproceduresoftheplayersstatuscommitteeandthedisputeresolutionchamberdezember2017_neutral.pdf)

¹³ http://resources.fifa.com/mm/document/affederation/administration/02/92/15/75/circularno.1603-amendmentstotheulesgoverningtheproceduresoftheplayersstatuscommitteeandthedisputeresolutionchamberandtotheregulationsonthestatusandtrans_neutral.pdf

¹⁴

http://resources.fifa.com/mm/document/affederation/administration/67/18/19/national_dispute_resolution_efsd_47338.pdf



The NDRC Regulations include certain minimum requirements which must be fulfilled for a body to be recognised by FIFA as an NDRC including in particular, the need for the body to be equivalent to the DRC by being comprised of members who provide equal representation of clubs and players.

The NDRC Regulations provide that the NDRC:

“is competent to handle disputes between clubs and players regarding employment and contractual stability, as well as those concerning training compensation and solidarity contributions between clubs belonging to the same association.”

Players

In most countries, leagues and national associations maintain control of disputes involving member clubs and their players by obliging them to agree to submit disputes to the relevant NDRC as part of the regulatory regime of the relevant national association, as a term of a standard playing contract imposed by the relevant league or association or as a term of a collective bargaining agreement which is negotiated and agreed on behalf clubs and players by the national players' association and relevant leagues.

In such cases, FIFA's dispute resolution bodies should refuse to accept jurisdiction and this should instead be determined by the NDRC in accordance with the rules and national laws of the relevant NDRC.

Many clubs prefer to have disputes determined under the rules of their own national association and national law where possible, given that clubs are familiar with such rules and how they are applied practice. There is also a concern that the DRC and PSC may apply additional provisions to the resolution of the dispute which are derived under the RSTP and/or Swiss law.

However, there are limitations on the powers of NDRCs compared to FIFA's bodies in the context of an international dispute, as a NDRC will have no jurisdiction to impose a sanction on any club¹⁵ which belongs to another association for its role in any breach of contract by the player registered with its member club. In such circumstances, it will be necessary for the former club to enforce the decision of the NDRC against the foreign club before the DRC, in order to obtain the full range of remedies available to it in the event of a breach of contract by one of its players (i.e. securing a right to claim compensation against the new club (under Article 17(2) RSTP and the imposition of worldwide sporting

¹⁵ See Articles 17(2) and 17(4) of the RSTP



sanctions against the player (under Article 17(3)) and sporting sanctions against the new club (under Article 17(4)).

Coaches

Article 22(c) RSTP provides that disputes between clubs and coaches with a so-called ‘international dimension’, should be resolved by an NDRC in preference to FIFA even without agreement between the parties to this effect:

“employment-related disputes between a club or an association and a coach of an international dimension, unless an independent arbitration tribunal guaranteeing fair proceedings exists at national level”; (our emphasis).

Any club which receives a claim from a member of its coaching staff via the PSC would, therefore, be well-advised to consider challenging the jurisdiction of the same, to ensure the matter is determined in accordance with the rules of its own national association and national law.

NON-MANDATORY PROCEDURES

Clubs have a greater degree of control over other types of dispute, provided that consideration is given to the disputes which are likely to arise and such disputes are properly addressed at the time the relevant agreement is drawn up. Examples of the types of arrangement in which arbitration provisions should be considered include:

i) General disputes between clubs of different associations

These arise most commonly in the context of transfer agreements which are bespoke documents, freely negotiated by the parties and in respect of which the parties are free to determine the dispute resolution provisions.

Clubs can choose from a number of options in this regard including:

(a) Dispute Resolution before the FIFA PSC

Benefits to FIFA’s dispute resolution procedures, include the ability of FIFA to impose sporting sanctions (and disciplinary sanctions in the event of non-compliance with a decision), relatively low costs, confidentiality of proceedings and the ability of FIFA to take into account relevant national regulations, laws and collective bargaining agreements.



However, FIFA proceedings can be restrictive in other ways, for example oral hearings are rarely held (even where witness evidence is introduced), no provision is made for a successful party to recover its legal costs and the process can be very slow and cannot be expedited.

(b) Dispute Resolution before FIFA in accordance with Article 12 bis RSTP;

The 'Article 12bis' procedure was introduced by FIFA in April 2015 to provide clubs and players with an expedited process through which to request the imposition of disciplinary sanctions on clubs which fail to make due payment of contractually agreed sums.

Decisions in accordance with Article 12bis published up to July 2017 suggest that transfer bans were imposed in no fewer than 137 cases (suspended pending full payment of the overdue payables within 30 days of the relevant decision) with fines, warnings and reprimands being issued in many other cases.

(c) Dispute resolution before the Ordinary Division of the CAS

The parties can agree to bypass FIFA and proceed straight to the CAS to have a dispute definitively resolved which can have a number of advantages:

- Proceedings are conducted quickly and matters can, with the agreement of the parties, be conducted on an expedited basis (even in a matter of weeks in appropriate cases);
- Oral hearings are available;
- Parties select their own arbitrator with specialist knowledge of the football industry;
- Parties select the applicable law;
- Awards are internationally recognised and can be enforced by the national courts of any member states who are signatories to The Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('The New York Convention'¹⁶), which includes most major jurisdictions; and
- The parties are entitled to apply for costs awards which often enable a successful party to recover a contribution towards its costs of running the case.

ii) Agreements with Intermediaries

FIFA ceased to intervene upon the implementation of the FIFA Regulations on Working with Intermediaries in April 2015¹⁷ and such disputes are therefore now determined in accordance with the

¹⁶ <http://www.newyorkconvention.org/>

¹⁷ Prior to April 2015 disputes involving intermediaries would have been resolved by the PSC in accordance with Article 30 of the FIFA Agents Regulations 2008



provisions of the representation contract under which they arise and/or the regulations of the national association in whose jurisdiction the Intermediary performs services.

Clubs should be mindful when entering into disputes with intermediaries to include appropriate dispute resolution provisions which provide for a governing law and forum for resolution of disputes which is as favourable as possible to the club, particularly when entering into agreements with foreign intermediaries.

ARBITRATION CLAUSES

Where it is possible to control of the forum in which disputes are heard, it is necessary to include a definitive an arbitration clause in the relevant agreement which clearly states:

- (a) The nature of the dispute(s) to which it relates (for example the parties may elect that simple payment disputes should be resolved in accordance with Article 12 bis RSTP but more substantial disputes are to be resolved by the PSC, DRC or the CAS);
- (b) The forum (or forums) to which the disputes identified should be referred; and
- (c) Procedural considerations including whether the proceedings should be expedited, the number of arbitrators, the language of the proceedings and ultimately, the applicable governing law.

Finally, it is important to remember that the arbitration clause should be compatible with the mandatory dispute resolution pathways to which the club is bound as a member of its league, national association and, ultimately, FIFA.

The various forums that exist for the resolution of international football disputes may appear a labyrinth to clubs which do not have experience of such matters - clubs are therefore advised to consider and take advice on the various options available to them when seeking to enforce rights under the RSTP and also prior to entering into agreements with players, coaches, clubs and intermediaries in order to ensure they are best placed to deal with any dispute which may arise.

