

## **CONTRACTUAL STABILITY IN PROFESSIONAL FOOTBALL: QUO VADIS?**

*Pacta sunt servanda* is the bedrock of all contract law. This legal maxim, which dates back to ancient Roman law, simply means that “agreements must be kept”: when two parties have freely signed a contract, they must perform the terms and conditions therein stated. However, as always in the law, this principle is not absolute. Terms will not be enforceable if they are unconscionable, contradict good faith, or establish conditions that are grossly unfair for one of the parties. Professional football establishes another exception to the principle: the idea of “freedom of movement”. Since football players have a limited professional lifespan, and may be subject to a foreign country and culture to which they cannot adapt to, the original stability of the parties’ agreement may be limited by the possibility of the players to transfer to another club, in another country. Hence, an inherent tension between both ideas: on the one hand, respect and stability to what has been agreed between the club and the player; on the other hand, freedom of the player to move on and transfer to another club. FIFA and other relevant authorities must strike a fine balance between both. Initially, the balance favored stability of the contract; later developments balanced the equation towards freedom of movement. The question is: where will contractual stability go in the future?

### **CHALLENGING THE TRANSFER SYSTEM: THE BOSMAN DECISION AND ITS AFTERMATH**

Originally, the system for transfer of players was rigid; it struck the balance in favor of the clubs and to the detriment of players. The system was so abusive, that a transfer fee was due even if the contract of the player’s former club had already run out. This changed with the landmark decision “Bosman”. Jean-Marc Bosman, a Belgian player, challenged this rigid transfer system before the European Court of Justice (ECJ); the Court judged in favor of Bosman, and thus the transfer system underwent an important change: no transfer fee was due if the player’s contract with the club had concluded.

The ECJ ruling in favor of Bosman introduced the concept of freedom of movement to the world of football. FIFA was now compelled to revise its Regulations regarding to the transfer system, in order to maintain a balance between freedom of movement and Contractual Stability.

FIFA and the European Commission agreed on this matter in the year 2001. The spirit was steadfastly announced in FIFA Circular letter 769: “... *The relations between players and clubs must therefore be governed by a regulatory system which responds to the specific needs of football and which strikes the right balance between the respective interests of players and clubs and preserves the regularity and proper functioning of sporting competition*”. This paved the way for the introduction of article 17 of FIFA’s Regulations on the Status and Transfer of Players (articles 21 and 22 of the 2001 version). The new text introduced the right of freedom of movement for players; it effectively provided players with the right to terminate unilaterally and without just cause an existing contractual relationship with a club. It also establishes the criteria to

be used in order to calculate the amount of compensation that should be paid in case a professional football player unilaterally terminates a contract without just cause, invoking this article. However, the language of this article opened the door to future troubles, since it established that if parties had not agreed expressly for the compensation in the contract, other “objective criteria” would apply (with no definition of this idea), including a vague reference to the “specificity of sport”.

#### THE TIDE TURNS AGAIN: FROM WEBSTER TO MATUZALEM

The troubles became apparent 5 years later, when a Scottish football player, Andrew Webster, became the first player to expressly invoke article 17 to terminate a contract. The decision in his case sent shockwaves in the football scene, since it understood the criterion of “specificity of sport” blatantly in favor of the players.

The Court of Arbitration for Sport (CAS) Panel in the Webster case stated that the: *“specificity of sport is a reference to the goal of finding particular solutions for the football world which enable those applying the provision to strike a reasonable balance between the needs of contractual stability, on the one hand, and the needs of free movement of players, on the other hand...”*, and concluded that in this case, all the compensation needed to be paid was the residual value of the player’s contract, which on the facts was not a considerable sum. It thus favored freedom of movement greatly, to the detriment of stability, since players (and other clubs) had the incentive to terminate a contract by paying a small amount.

The Webster case caused major controversy and concern in football: many thought that the transfer system could collapse and clubs feared that transfer fees would greatly decrease due to the fact that CAS considered only the “residual value of the contract” as the amount to be paid as compensation according to article 17. After this award, why would a club pay a transfer fee if they could just sign the player, and eventually pay the residual value of the contract which was far less? If this practice became common, many argued, the system would become unstable and could directly crumble.

However, the tide turned a year later, due to another case which shifted the interpretation of article 17 once again: the Matuzalem case.

The decision, involving a Brazilian player, was that the amount of compensation was not just the residual amount of the contract; other factors must be taken into account besides this one, and understood the malleable concept of specificity in sports in a whole new meaning with regards to the Webster decision. Thus, the compensation amount fixed by CAS on the facts of the case was substantial, and once again threw the balance in favor of stability.

#### AFTER MATUZALEM: UNCERTAINTY ON THE HORIZON

Yet, it is important to put Matuzalem in due perspective: the law is not settled in this matter. As has been said above, the issue here is precisely that the concept of

“specificity of sport” is a vague concept, with no precise boundaries. The Panel that decided Matuzalem put its finger on this idea. Every situation, it argued, has different elements and courts must proceed on a case by case basis: the criteria to be used in order to fix the amount of compensation in case of breach of contract will be *“establish(ed) on a case-by-case basis the prejudice suffered by a party in case of an unjustified breach or termination of contract, with due consideration of all elements of the case including all the non-exclusive criteria mentioned in art. 17 para. 1 of the FIFA Regulations...”*; and also, that *“As every case is composed of so many different elements, article 17 does not provide us the concept of specificity of sport in order to give the judging bodies a wide scope of discretion, thus promoting contractual stability”*.

Thus, it is important to take into account that this decision does not mean that in the future, when another player employs article 17, FIFA and CAS will rely on the Matuzalem award or some other part of the *lex sportiva*. Every case must be analyzed with “due consideration of all its elements”, and a minor change in the facts may lead to another decision.

The question today is then: What will be the result of the next case regarding article 17?

Obviously, this is not an ideal state of affairs. A minimum of certainty and foreseeability is required for any human activity, and professional football is no exception to this rule.

#### QUO VADIS CONTRACTUAL STABILITY?

So, where should the issue of contractual stability go in the future? This is, no doubt, a most difficult matter. The spirit of Article 17 is not a sort of “blank check” for players, allowing for a free system of termination of contractual relationships. The principle, once again, is that the agreement must be respected. However, this must not be maintained at all costs or *percat mundis*; freedom of movement is a key concept in the football legal arena, and is a conquest that must be respected: sound policy and principle lie behind it.

A fine balance must be thus struck between both principles. This is not easy. And yet it is clear that extremes are not the right answer: neither the pre-Bosman days of abuse against players, nor a Webster style regime allowing for a free-for-all transfer, without payment of fair sums for compensation are to be preferred. As Aristotle asserted more than 2,000 years ago, the right answer must surely lie in the middle.

And yet, perhaps even more important than this solution, or the amount fixed, is that the system be foreseeable: that all stakeholders involved –players, managers, agents, owners, etc.—have some clear view of what to expect. This is not the state of affairs today. Where is contractual stability going? Does the uncertainty proposed by article 17 motivate contractual stability? One has to hope that we have a fair answer soon, for the benefit of the whole sport.