

FIFA TRANSFER RULES AND UNILATERAL TERMINATION WITHOUT “JUST CAUSE”

Paul A. Czarnota*

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* Sports Lawyer, Wisewould Mahony Lawyers, Melbourne, Australia; Candidate, New York State Bar (Passed February 2013 exam); Sessional Lecturer/Teaching Associate, Law Faculty, Monash University; BCom/LLB (Hons) (Monash University); LLM (sports law specialization) (University of Melbourne). This article is a revised version of a research paper prepared for the Master of Laws subject, ‘International Sports Employment Law’, at the University of Melbourne.

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1. INTRODUCTION

The FIFA Regulations for the Status and Transfer of Players¹ set out the rules governing international player transfers between clubs. The transfer rules aim to promote “Contractual Stability” between players and clubs while respecting each footballer’s right to free movement protected under Article 45 of the Treaty on the Functioning of the European Union.²

Article 17 of the transfer rules provides that, where a club or player unilaterally terminates their playing contract without “Just Cause” prior to the contract’s natural expiration date, compensation shall be payable by the breaching party to the non-breaching party, either as agreed upon in the contract or to be assessed (in default of agreement) in accordance with several non-exhaustive criteria which, in the author’s opinion, are ill-defined and oft-contradictory. This paper will focus primarily on the assessment of compensation payable by breaching players.

In accordance with the evolving jurisprudence of the Court of Arbitration for Sport³, compensation is determined by applying the *Matuzalem*-”Positive Interest” approach. This approach, however, leaves too much discretion to the judging authorities and the CAS to order the payment of excessive compensation amounts which, if the player’s new club (deemed jointly and severally liable under the transfer rules for any compensation payable) is unable to satisfy for financial distress reasons, effectively compels footballers to remain with their clubs, thereby prioritizing “Contractual Stability” to the absolute detriment of each player’s free movement rights. Such an outcome fails to consider the purpose and background circumstances of Article 17.

Furthermore, in light of the Swiss Federal Tribunal appeal in *Matuzalem* (which deemed it unlawful to impose a worldwide playing ban on breaching

1. FIFA Regulations for the Status and Transfer of Players shall hereinafter be referred to as the ‘transfer rules’.

2. Hereinafter referred to as the ‘TFEU’. The author notes that, although the transfer rules apply to any international transfer, the rules were originally a product of negotiations and ‘social dialogue’ between the European Commission, FIFA, UEFA, and FIFPro to ensure the compatibility of the rules with European Union Law, namely the predecessor to the TFEU, the European Community Treaty. Therefore, while ‘free movement of workers’ is a product of European Union law, it has become a central pillar underpinning the private international law regime existing under the transfer rules. Further, to highlight the indirect effect of EU law internationally, see TAS 2005/A/983 & 984 (transcript produced in French).

3. The Court of Arbitration for Sport will hereinafter be referred to as the CAS.

players as punishment for failing to satisfy an order to pay compensation to the non-breaching team), Article 17 should be amended to prevent the compensation system from being undermined by unrealistic compensation amounts that are incapable of being satisfied solely by breaching players.

For the reasons outlined herein, Article 17 should be amended to provide greater clarity and predictability as to the assessment of any compensation payable, which should be calculated according to the *Webster*-“Residual-Value” approach, with due regard to the “Specificity of Sport.”

2. BACKGROUND

Historically international football (or soccer) maintained a “Retain and Transfer” system where, upon expiration of a player’s contract, he could apply to transfer to another club. The existing club could, however, serve a notice of intention to retain and the player would result in the player remaining registered with the club.⁴

The legality of the “Retain and Transfer” system was considered by the High Court of England and Wales, Chancery Division, in *Eastham v Newcastle United Football Club Ltd.*⁵ Following the 1961 season, Newcastle United midfielder/inside forward George Eastham wanted to transfer to rival premier league club Arsenal F.C., but Newcastle served him with a retention notice.⁶ Justice Wilberforce held that the ‘retain system’ constituted an unreasonable restraint because it interfered with a player’s ability to seek alternative employment when they were no longer employees of a club.⁷ In obiter, Justice Wilberforce considered that, while the ‘transfer system’ imposed some restraints on players, it was not by itself unreasonable, because it enabled poorer clubs to obtain money to compete and stay in existence.⁸ Therefore, the transfer system remained a feature of international football until the landmark decision of the European Court of Justice in *Union Royale Belge de Sociétés de Football Association v Bosman*.⁹

Bosman, a Belgian footballer, received an offer to play with French club US Dunkerque after his contract with Belgian club RFC Liège had expired.¹⁰ However, he was unable to secure employment with US Dunkerque due to the high transfer fee demanded by RFC Liège.¹¹ The European Court of Justice¹² held that the transfer rules, which required payment of a transfer fee *after* the

4. Unless the relevant Association determined that the player’s remuneration was too low: Chris Davies ‘Post-Bosman and the Future of Soccer is Contract Law’ (2003) 19 *JCL* 190.

5. [1964] Ch 413 (*‘Eastham’*).

6. Davies, *supra* n4, 1-2.

7. Davies, *supra* n4, 1-2.

8. Davies, *supra* n4, 1-2.

9. Case C-415-93, 1995 E.C.R. I-4921 (*‘Bosman’*).

10. *Bosman*, *supra* n9, 28-29.

11. Braham Dabscheck ‘The Sporting Cartel in History’ (2008) 28 *Sport in History* 329, 336.

12. Hereinafter referred to as the ‘ECJ’.

playing contract had expired, contravened Bosman's free movement rights.¹³

As a consequence of the Court's ruling in *Bosman*, clubs could no longer demand transfer fees for 'free agent' players. However, because the Court in *Bosman* did not specifically address the legality of transfer fees demanded during a player's contracted period, doubts remained regarding the legality of all transfer regulations,¹⁴

The European Commission was concerned that such transfer fees had the potential to severely restrict player movement between European states.¹⁵ In a 2000 speech given at a Commission sports conference, Commissioner Monti stated:

'...international transfer systems based on arbitrarily calculated fees that bear no relation to training costs should be prohibited, regardless of...whether the transfer takes place during or at the end of the contract.'¹⁶

To assuage the Commission's concerns, FIFA,¹⁷ UEFA,¹⁸ and FIFPro¹⁹ negotiated revised transfer rules.²⁰ In March 2001, the Commission and FIFA agreed to a set of principles for the new transfer rules,²¹ which FIFA adopted on July 5 2001. These new rules imposed strict conditions on international

13. *Bosman*, supra n9, 99-104, and 129-137.

14. In *Bosman*, supra n9, 114, the ECJ stated that '...Article 48 of the Treaty [now 45 TFEU] precludes the application of rules laid down by sporting associations, under which a professional footballer who is a national of one Member State may not, on the expiry of his contract with a club, be employed by a club of another Member State unless the latter club has paid to the former club a transfer, training or development fee.' See also European Commission, 'Commission Staff Working Document – The EU and Sport: Background and Context, Accompanying document to the White Paper on Sport', 74-75, cited at <http://ec.europa.eu/sport/documents/dts935_en.pdf> (last visited October 24, 2013).

15. European Commission, supra n14, 75, cited at <http://ec.europa.eu/sport/documents/dts935_en.pdf> (last visited October 24, 2013).

16. Speech/00/152, 17/04/2000, Mario Monti, European Commissioner for Competition Policy, Sport and Competition, Excerpts of a speech given at a Commission-organised conference on sports, Brussels, 17 April 2000, cited at <<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/00/152&format=HTML&age d=0&language=EN&guiLanguage=en>> (last visited October 24, 2013).

17. Fédération Internationale de Football Association. FIFA is an international federation registered under Article 60ff of the Swiss Civil Code. It is headquartered in Zurich, Switzerland: FIFA Statutes (July 2012 Edition), Article 1.

18. Unions des Associations Européennes de Football ('UEFA'), the governing body for European football.

19. International Federation of Professional Footballers' Association ('FIFPro'), the world professional football players' association.

20. Dabscheck, supra n11, 337.

21. These principles included adopting measures to support the training of players (for example, allowing for training compensation to be paid to training clubs for all players under 23, and a solidarity mechanism to redistribute income to clubs involved in training), establishing a transfer period for each season, setting specifications for playing (for example, prescribing a minimum duration of 1 year and maximum duration of 5 years), setting out consequences of contractual breach, and ensuring arbitration is voluntary. See Braham Dabscheck 'The Globe At Their Feet: FIFA's New Employment Rules – II' (2006) 9 *Sport in Society* 1; European Commission, supra n14, 75, cited at <http://ec.europa.eu/sport/documents/dts935_en.pdf> (last visited October 24, 2013).

transfers of minors,²² provided a comprehensive training compensation system for players under 23,²³ and inserted articles designed to promote “Contractual Stability.”²⁴

The author will not address in great detail the calculation of training compensation upon transfer and of the landmark decision in *Olympique Lyonnais SASP v Olivier Bernard & Newcastle United Football Club Ltd*,²⁵ as it falls outside the scope of this paper.

The transfer rules are binding on all national Associations, Confederations and players. By virtue of recognition as a national Association²⁶ or Confederation²⁷ by FIFA, these bodies agree to comply with and enforce all FIFA regulations, including the transfer rules.²⁸ Failure to comply with FIFA regulations may result in suspension or expulsion.²⁹ Likewise, every footballer

22. FIFA Circular No.769, Revised FIFA Regulations for the Status and Transfer of Players, at pages 1-2/21, cited at <http://www.fifa.com/mm/document/affederation/administration/ps_769_en_68.pdf> (last visited October 24, 2013). Circular No.769 states that the imposition of strict conditions for the ‘international transfer of minors’ is designed to ‘provide a stable environment for the training and education of players’.

23. FIFA Circular No.769, supra n22, 2-10/21, cited at <http://www.fifa.com/mm/document/affederation/administration/ps_769_en_68.pdf> (last visited October 24, 2013). Circular No.769 states that this training compensation system pertaining to the transfer of players under 23 years is designed to ‘encourage more and better training of young football players, and to create solidarity among clubs, by awarding financial compensation to clubs which have invested in training young players’. See also Braham Dabscheck ‘Being Punitive: The Court of Arbitration for Sport Overturns Webster’ (2009) 3-4 *International Sports Law Journal* 20. Dabscheck noted that compensation would be paid to a player’s training club for players aged 18-23 who move to another club, whereas if an uncontracted player over 23 years moved to a new club, no training compensation would be payable to the former club.

24. FIFA Circular No.769, supra n22, 10-15/21, cited at <http://www.fifa.com/mm/document/affederation/administration/ps_769_en_68.pdf> (last visited October 24, 2013). Circular No.769 states that ‘Contractual stability is of paramount importance in football, from the perspective of clubs, players, and the public. 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.’

25. Case (C-325/08) [2008] ECR 2010.

26. FIFA Statutes, Articles 9 and 10. Examples of national Associations admitted to membership of FIFA are Football Federation Australia, the U.S. Soccer Federation and the Football Association Limited (England). Membership will only be admitted if an Association is currently a member of a Confederation (see footnote following), and it agrees to always comply with the Statutes, regulations and decisions of FIFA and of its Confederation, and to recognise the Court of Arbitration for Sport, as specified in the FIFA Statutes.

27. FIFA Statutes, Article 20. Examples of Confederations recognised by FIFA include the AFC (Asian Football Confederation), UEFA (Unions des Associations Européennes de Football) and the CONCACAF (Confederation of North, Central American and Caribbean Association Football).

28. FIFA Statutes, Articles 10, 13 and 20. Article 13 provides that Members have the following obligations: a) to comply fully with the Statutes, regulations, directives and decisions of FIFA bodies at any time as well as decisions of the Court of Arbitration for Sport (CAS); b) to take part in competitions organised by FIFA; and d) to ensure that their own members comply with the Statutes, regulations, directives and decisions of FIFA bodies.’

29. FIFA Statutes, Article 14 provides that the Congress is responsible for suspending a

agrees to be bound by FIFA regulations upon registering with a football club or national Association.³⁰

For the purposes of this paper, it is useful to briefly mention the key decision making bodies in international transfer disputes.

The transfer rules provide that all international transfer disputes are to be adjudicated by the FIFA Dispute Resolution Chamber (the ‘**DRC**’), which is comprised of an equal balance of player and club representatives, and an independent chairman.³¹

DRC decisions are subject to review by the CAS, an arbitral tribunal established to adjudicate Olympic and international sports-related disputes (including some FIFA disputes), and to then issue foreign arbitral awards recognized and enforceable under the New York Convention.³²

Given that the “seat” of all CAS arbitrations is Lausanne, Switzerland, a judicial appeal can be taken to the Swiss Federal Tribunal (the ‘**SFT**’) to set aside a CAS award.³³ Under Articles 190-192 of the Swiss Private International Law Act (PILA), the SFT has power to set aside a CAS award on extremely limited grounds. For example, the SFT can set aside a CAS award where the CAS was not properly constituted, where the CAS wrongly accepted or declined jurisdiction, or where the award rendered was incompatible with public policy.³⁴ As discussed and explored below, the CAS award rendered in *Matuzalem* was recently set aside by the SFT on public policy grounds.

Member, although where a member ‘seriously violates its obligations as a member’, the Executive Committee may suspend a member with immediate effect. Further, Article 15 provides that Congress may expel a member if it ‘seriously violates the Statutes, regulations, decisions or the Code of Ethics of FIFA’.

30. Transfer rules, Article 5 provides that ‘A player must be registered at an association to play for a club as either a professional or an amateur . . . By the act of registering, a player agrees to abide by the statutes and regulations of FIFA, the confederations and the associations.’ FIFA Statutes, Article 7.

31. See Transfer rules, Articles 22 and 24; Frans de Weger, *The Jurisprudence of the FIFA Dispute Resolution Chamber*, 1. For a further thorough description of the DRC, see <<http://www.fifa.com/aboutfifa/officialdocuments/doclists/disputeresolutionchamber.html>>.

32. See Matthew J. Mitten and Hayden Opie, “‘Sports Law’: Implications for the Development of International, Comparative, and National Law and Global Dispute Resolution” (2010-2011) 85 *Tul. L. Rev.* 269, 285. Professor Mitten stated that ‘Like other arbitral bodies, the CAS’ jurisdiction is dependent upon the parties’ written agreement to submit their dispute to the CAS for final determination’: Matthew Mitten, *Sport Law and Regulation*, (2009) Chapter 4, at pages 318. See Transfer rules, Article 24 (‘Decisions reached by the Dispute Resolution Chamber or the DRC judge may be appealed before the Court of Arbitration for Sport’); FIFA Statutes, Articles 66-68 (‘FIFA recognises the independent Court of Arbitration for Sport (CAS). CAS awards are foreign arbitral awards recognised and enforceable under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (‘The New York Convention’). See Matthew J. Mitten ‘Judicial Review of Olympic and International Sports Arbitration Awards: Trends and Observations’ (2009) 10 *Pepp. Disp. Resol. L.J.* 51, 62.

33. Mitten and Opie, *supra* n32, 300-301.

34. Antonio Rigozzi, ‘Challenging Awards of the Court of Arbitration for Sport’ (2010) 1 (1) *Oxford Journal of International Dispute Settlement*. 217, 218-219. The Swiss Private International Law Act is formally known as the Federal Statute on International Private Law of December 18, 1987, RS 291.

3. CONTRACTUAL STABILITY VS. FREE MOVEMENT OF WORKERS

Part IV of the transfer rules was intended to strike a balance between “Contractual Stability” and worker’s rights to free movement protected under EU law.³⁵

The phrase “Contractual Stability” is one of trade custom used by FIFA simply to mean that playing contracts between players and clubs should be respected, honored and upheld, and premature termination of playing contracts (prior to their stated expiration date) ought to be discouraged.³⁶ The unique nature of international football (referred to by FIFA as the “Specificity of Sport”³⁷) and of sporting leagues generally dictate that, for the success of a sporting competition, restrictions should be placed on a footballer’s right to prematurely terminate existing employment relations and to seek employment with an alternative sporting club, thereby restricting the otherwise unfettered rights of free movement enjoyed by employees to move between employers in other fields of commerce.

The promotion of “Contractual Stability” is considered necessary to achieve “Competitive Balance” throughout sporting competitions (“Competitive Balance” refers to the degree of competitive evenness between competing teams³⁸). Without “Contractual Stability”, there is a fear that “Competitive Balance” will suffer. Applying this theory to a hypothetical scenario, assume that Manchester United FC (as one of the world’s most successful and wealthiest clubs) was allowed to purchase all of the world’s

35. Each association is required to implement Articles 13 to 18 into their national regulations to support, promote and foster ‘Contractual Stability’: Transfer Rules, Article 1. In *FC Pyunik Yerevan v L., AFC Rapid Bucuresti & FIFA CAS 2007/A/1358 (‘Pyunik’)*, 25-26, the CAS held that ‘[T]he ultimate rationale for [Article 17]. . . is to support and foster contractual stability.’

36. The importance of ‘Contractual Stability’ was noted by FIFA in Circular No. 769: ‘Contractual stability is of paramount importance in football, from the perspective of clubs, players and the public. 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.’ FIFA Circular No.769, supra n22, 13/21, cited at <http://www.fifa.com/mm/document/affederation/administration/ps_769_en_68.pdf> (last visited October 24, 2013).

37. White Paper on Sport, COM (2007) 391, at 4.1. The White Paper on Sport noted that ‘specificity of sport’ may encompass the unique characteristics of sporting activities and rules, for example, ‘separate competitions for men and women, limitations on the number of participants in competitions, or the need to ensure uncertainty concerning outcomes and to preserve a competitive balance between clubs taking part in the same competitions.’

38. Lenten LJA ‘Towards a New Dynamic Measure of Competitive Balance: A Study Applied to Australia’s Two Major Professional ‘Football’ Leagues’ (2009) 39 *Economic Analysis & Policy* 407; Paul Czarnota ‘The AFL, The Joint Venture Defence and Single Economic Entity Theory’ (2012) 20 *AJCL* 149, 150-151. The High Court of Australia in *Buckley v Tutty* noted the importance of ‘competitive balance’ in sporting leagues, considering it a ‘legitimate object of the League. . . to ensure that the teams fielded in the competitions are as strong and well matched as possible, for in that way the support of the public will be attracted and maintained.’ *Buckley v Tutty* (1971) 125 CLR 353 [at 17].

most talented footballers without any restrictions or liability to pay compensation for inducing or otherwise participating in a player's premature termination of employment with another club. This occurrence would invariably guarantee perennial on-and-off field success for Manchester United, and hinder the ability of financially weaker clubs to compete, thereby damaging competitive balance among competing clubs. In *Bosman*, the Court agreed by recognizing that "maintaining a balance between clubs by preserving a degree of equality and uncertainty as to results" was a legitimate objective of the transfer rules.³⁹

Post-*Bosman*, doubts surrounded the issue of whether clubs could lawfully demand transfer fees *during the contract*,⁴⁰ causing concern that smaller/poorer clubs would be unable to compete on- and off-field with larger, wealthier clubs. Further, there was a concern that, because clubs were no longer required to pay transfer fees for uncontracted players, players would demand higher salaries, thereby making it more difficult for smaller clubs to attract and retain the best players, and enabling international football to be dominated by a powerful few.⁴¹ By restricting the ability of smaller clubs to attract the world's best footballers, they would inevitably experience less on-field success, thereby leading to a decrease in supporter interest and thus leading to lower revenues from the sale of sponsorship and advertising, lower revenues from the sale of club memberships and lower ticket/game-attendance revenues.⁴² Additionally, even if smaller clubs invested time, energy and resources into developing players, the best players would move to larger, more successful clubs, thereby discouraging smaller clubs from investing in youth training.⁴³

Recent studies suggest that, while Europe's biggest clubs and leagues

39. *Bosman*, supra n9, 106. Notwithstanding the European Court of Justice recognizing that 'competitive balance' was a legitimate objective, it ultimately considered that the transfer rules 'neither preclude[d] the richest clubs from securing the services of the best players nor prevent[ed] the availability of financial resources from being a decisive factor in competitive sport, thus considerably altering the balance between clubs.' *Bosman*, supra n9, 107.

40. Although *Bosman* was concerned with the legality of the transfer system *following the expiry of player contracts*, it did not address the legality of transfer fees *during* a player's contracted period, and therefore doubts remained as to the legality of this system: European Commission, supra n14, 74-75, cited at <http://ec.europa.eu/sport/documents/dts935_en.pdf> (last visited October 24, 2013).

41. Blair Downey 'The Bosman Ruling: European Soccer – Above the Law?' (2001) 1 *Asper Rev. Int'l Bus. & Trade L.* 187, 192. In 2000, FIFPro president Gordon Taylor stated, without a transfer system and contractual stability, '[S]maller clubs [will be] cherry-picked by the big boys.' Gordon Taylor 'The Transfer System – A Need for Compromise', PFA website, 10 September 2000, cited in Braham Dabscheck 'The Globe At Their Feet – FIFA's New Employment Rules – I' (2004) 7(1) *Sport in Society* 69, 88.

42. Downey, supra n41, 192; Czarnota, supra n38, 150-151.

43. The transfer Rules set out a detailed system for ensuring the payment of training compensation for clubs which have 'invested in training younger players', thereby 'encouraging more and better training of young football players, and to create solidarity among clubs': FIFA Circular No.769, supra n22, 2/21, cited at <http://www.fifa.com/mm/document/affederation/administration/ps_769_en_68.pdf> (last visited October 24, 2013).

derive a substantial percentage of income from broadcasting, commercial and game attendance revenues, medium and smaller clubs rely on donations from their owners or transfer fees.⁴⁴ These clubs are, therefore, highly supportive of a system which fosters “Contractual stability.”⁴⁵

When considering the legality of the then-English Football transfer rules, Justice Wilberforce in *Eastham* stated in obiter that, by themselves, the transfer rules ‘do not appear. . . very objectionable’.⁴⁶

“ . . . [the transfer system] provides a means by which the poorer clubs can on occasions, obtain money, enabling them to stay in existence and improve their facilities; and . . . it provides a means by which clubs can part with a good player in a manner which will enable them to secure a replacement. One player cannot easily be obtained in exchange for another; the transferee club may not [and] . . . probably will not - have a player to offer in exchange: by giving cash, the transferor club is able to look all-round the league for a replacement. Given the need to circulate players, money is necessarily a more efficient medium of exchange than barter, and the system helps both money and players to circulate. Looked at in this way the system might be said to be in the interests of players themselves.”⁴⁷

On the other hand, European footballers (by virtue of their status as “workers”) enjoy a recognised right to free movement between European states pursuant to Article 45 of the Treaty on the Functioning of the European Union.⁴⁸

Following the devastation and divide precipitated by the Second World War, there was a European movement towards political, economic and monetary unity, cooperation, integration and harmony.⁴⁹ In an effort to “lay the foundations of an ever closer union among the peoples of Europe,”⁵⁰ various

44. Diego F. R. Compaire et al ‘Contractual Stability in Professional Football: Recommendations for Clubs in a Context of International Mobility’, Executive Summary (page ii), cited at <<http://www.lawinsport.com/pdf/ContStabinProfFoot.pdf>> (last visited October 24, 2013).

45. Compaire, supra n44, Executive Summary (page ii).

46. *Eastham*, supra n5, 437.

47. *Eastham*, supra n5, 437.

48. Article 45 TFEU provides that ‘1. Freedom of movement for workers shall be secured within the Union.

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment; 3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health: (a) to accept offers of employment actually made; (b) to move freely within the territory of Member States for this purpose; (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action; (d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission; 4. The provisions of this Article shall not apply to employment in the public service.’

49. Josephine Steiner et al ‘EU Law’, 3.

50. Steiner, supra n49, 3.

European nations signed a number of treaties. As part of European economic policy designed to create an “internal market,” EU law recognised “Four Freedoms” requiring protection: Free movement of goods, services, capital and workers.⁵¹

The right to free movement enjoyed by workers under EU law includes the right to accept offers of employment, to move freely between EU member states, and to remain in an EU member state for employment purposes.⁵² A worker’s rights to free movement may be restrained, however, where such a restriction is proportionate, narrowly drawn to pursue a legitimate aim, and justified on grounds of public policy.⁵³

While the Commission accepted after *Bosman* that “Contractual Stability” was essential for football, it believed that some flexibility for footballers to move during the contract period was essential for compliance with their free movement rights because:⁵⁴

“...[I]n almost all other walks of life, people can move jobs easily, and have the right to do so for many reasons: personal, professional, a dislike of a current job, a better offer elsewhere, and so on.”⁵⁵

Given the aforementioned background, the transfer rules were intended to strike a balance between promoting “Contractual Stability” and protecting each footballer’s free movement rights.

4. TRANSFER RULES

The object of this paper is to focus on the assessment of compensation payable to a club by a breaching player who unilaterally terminates his playing contract without “Just Cause” prior to its expiration date. The relevant provisions of the transfer rules appear in Articles 13 to 17.

Article 13 states that a contract between a professional footballer and a club may only be terminated by mutual agreement or upon its expiration:⁵⁶

“[I]n the event of a club and a player choosing to enter into a contractual relationship, this contract will be honored by both parties.”⁵⁷

Players may only be transferred and registered to another club during two

51. Steiner, *supra* n49, 309.

52. Steiner, *supra* n49, 408.

53. Steiner, *supra* n49, 420.

54. Nick Harris, *Stars will buy into ‘pay as you go’ system – An obscure Fifa rule could revolutionise the way the transfer market operates*, *The Independent* (online), 13 February 2007, <<http://www.independent.co.uk/sport/football/news-and-comment/stars-will-buy-into-pay-as-you-go-system-436166.html#>>. (last visited October 24, 2013).

55. Harris, *supra* n54.

56. Transfer Rules, Article 13.

57. FIFA Commentary on the Regulations for the Status and Transfer of Players (‘**FIFA Commentary**’), explanation Article 13, p38. See also *Wigan Athletic FC v Heart of Midlothian* CAS 2007/A/1298; *Heart of Midlothian FC v Webster* CAS 2007/A/1299; *Webster v Heart of Midlothian* CAS 2007/A/1300 (‘**Webster**’), at 50-52.

annual registration periods.⁵⁸ If a club wishes to secure a contracted player, it must inform the player's current club in writing before entering into negotiations with him.⁵⁹

Notwithstanding Article 13, Articles 14 and 15 allow either party to unilaterally terminate with "Just Cause" or "Sporting Just Cause."

"Just Cause" involves serious misconduct or prolonged violations of the terms of the contract.⁶⁰ Clubs have been held to have "Just Cause" where a player returns a positive doping result⁶¹ or uses illicit drugs,⁶² whereas no "Just Cause" exists when a player suffers injury,⁶³ or a player's performance, commitment or productivity declines.⁶⁴ Players have "Just Cause" if a club persistently fails to pay his salary.⁶⁵

"Sporting Just Cause" exists when the player appears in less than 10% of the club's official matches due to "injury, suspension, player's field or team position, age [or] reasonable expectations on the basis of past career."⁶⁶

If either a club or player unilaterally terminates their playing contract without "Just Cause", Article 17 provides various consequences for the terminating party and any person involved in the breach. Article 17.1 states as follows:

In all cases, the party in breach shall pay compensation. Subject to the provisions of Article 20 and Annex 4 in relation to training compensation, and unless otherwise provided for in the contract, compensation for the breach shall be calculated with due consideration for the law of the country concerned, the specificity of sport, and any other objective criteria. These criteria shall

58. Transfer Rules, Article 6.1

59. Transfer Rules, Article 18.3.

60. *Mutu v Chelsea Football Club*, CAS 2005/A/876 ('*Mutu*'), citing Weger, supra n31, 93; FIFA Commentary, supra n57, explanation Article 14, p39.

61. DRC 21 February 2006, no. 26439, cited in Weger, supra n31, 92. Copies of DRC decisions are found at <<http://www.fifa.com/aboutfifa/officialdocuments/doclists/decision.html>>.

62. *Mutu*, supra n60, citing Weger, supra n31, 93.

63. DRC 13 May 2005, no. 55230; DRC 12 January 2006, no. 16828, cited in Weger, supra n31, 88-89). Copies of DRC decisions are found at <<http://www.fifa.com/aboutfifa/officialdocuments/doclists/decision.html>>.

64. DRC 26 November 2004, no. 114534; DRC 28 July 2005, no. 75975; DRC 23 June 2005, no. 65657, cited in Weger, supra n31, 84-86). Copies of DRC decisions are found at <<http://www.fifa.com/aboutfifa/officialdocuments/doclists/decision.html>>.

65. DRC 23 March 2006, no. 36460; Weger, supra n31, 94-95; FIFA Commentary, supra n57, explanation Article 14. What constitutes a 'persistent failure' to pay a player's salary depends on the circumstances of each case. The FIFA Commentary, supra n57, explanation Article 14 states that a few weeks' delay in paying a player's salary does not constitute 'just cause' for the player to unilaterally terminate. In DRC 26 October 2006, no. 1061207, the DRC held that a player did not have 'just cause' to unilaterally terminate due to non-payment of his salary for one and a half months. On the other hand, in DRC 10 June 2004, no. 64133, the DRC held that a failure to pay a player's salary for four months, in addition to two 'sign-on fee' installments, constituted 'just cause' for the player to unilaterally terminate.

66. Transfer Rules, Article 15. FIFA Regulations governing the Application of the Regulations for the Status and Transfer of Players, Chapter V - Stability of contracts, Article 12, cited at <<http://www.diritto-sportivo.com/online-docs/ApplicationRegulations-Eng.pdf>> (last visited September 15, 2012).

include, in particular, the remuneration and other benefits due to the player under the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years, the fees and expenses paid or incurred by the former club (amortized over the term of the contract) and whether the contractual breach falls within a protected period.⁶⁷

Article 17 does not enable a player or club to unilaterally terminate the contract without “Just Cause” but rather, it declares each and every unjustified unilateral termination to be a contractual breach giving rise to a liability to pay compensation.⁶⁸ Where a player is ordered to pay compensation, his new club is deemed under the transfer rules to be jointly and severally liable for any compensation payable, regardless of whether or not that new club is at fault.⁶⁹ While this joint and several liability position tends to favor players, as highlighted by the *Matuzalem* award discussed below, a major issue arises where the new club is in financial distress, and liability for compensation falls solely on the player.

Article 17 also imposes sporting sanctions for breaches during the “Protected Period”. The “Protected Period” is defined as three entire seasons or years (whichever comes first) from the date the playing contract was entered into by a player under 28, or two seasons/years for players 28 and over.⁷⁰ A breaching player shall receive either a 4 or 6 month playing suspension⁷¹ and clubs in breach (or which induce breach) shall be banned from registering new

67. Transfer Rules, Article 17.1.

68. Transfer Rules, Article 17.1. The transfer rules also provide that the right to receive compensation cannot be assigned. Transfer Rules, Article 17.2. See also *Webster*, supra n57, 51-53; *FC Shakhtar Donetsk v Matuzalem Francelino da Silva & Real Zaragoza SAD & FIFA*, CAS 2008/A/1519 and 2008/A/1520 (“*Matuzalem*”), 64.

69. Transfer Rules, Article 17.2. Article 17.2 states that ‘Entitlement to compensation cannot be assigned to a third party. If a professional is required to pay compensation, the professional and his new club shall be jointly and severally liable for its payment. The amount may be stipulated in the contract or agreed between the parties.’ See also *Webster*, supra n57, 93-98.

70. Transfer Rules, Definitions.

71. Transfer Rules, Article 17.3. Article 17.3 states that ‘In addition to the obligation to pay compensation, sporting sanctions shall also be imposed on any player found to be in breach of contract during the protected period. This sanction shall be a four-month restriction on playing in official matches. In the case of aggravating circumstances, the restriction shall last six months. These sporting sanctions shall take effect immediately once the player has been notified of the relevant decision. The sporting sanctions shall remain suspended in the period between the last official match of the season and the first official match of the next season, in both cases including national cups and international championships for clubs. This suspension of the sporting sanctions shall, however, not be applicable if the player is an established member of the representative team of the association he is eligible to represent, and the association concerned is participating in the final competition of an international tournament in the period between the last match and the first match of the next season. Unilateral breach without just cause or sporting just cause after the protected period shall not result in sporting sanctions. Disciplinary measures may, however, be imposed outside the protected period for failure to give notice of termination within 15 days of the last official match of the season (including national cups) of the club with which the player is registered. The protected period starts again when, while renewing the contract, the duration of the previous contract is extended.’

players for two registration periods.⁷² Any club that signs a breaching player will be presumed to have induced the player's breach unless the club can satisfy the judging authority to the contrary.⁷³

When determining compensation payable by a breaching party for unilateral termination of the playing contract without "Just Cause," Article 17 provides as a starting point that the judging authority must look to whether the club and player have specified in their contract the compensation payable in the event of unilateral termination (otherwise known as a "Buy-Out" or "Penalty" clause).⁷⁴ The amount specified must be a genuine pre-estimate of the damages that would be suffered by the non-breaching party in the event of a unilateral termination.⁷⁵ Valid "Buy-Out" clauses must clearly reference Article 17 and state that the sum due is 'compensation in the event of a unilateral breach . . . by either of the parties.'⁷⁶

If no "Buy-Out" clause exists, the amount of compensation payable is assessed according to the criteria contained in Article 17 (stated above).⁷⁷ The CAS has applied Article 17 in several cases,⁷⁸ however each case tends to produce different and somewhat unpredictable outcomes due to the lack of definitional certainty and guidance on applying the non-exclusive and often contradictory criteria contained in Article 17.

Three CAS awards are discussed below to highlight the differing approaches to calculating compensation and the resulting unpredictability.⁷⁹

72. Transfer Rules, Article 17.4. Article 17.4 states that 'In addition to the obligation to pay compensation, sporting sanctions shall be imposed on any club found to be in breach of contract or found to be inducing a breach of contract during the protected period. It shall be presumed, unless established to the contrary, that any club signing a professional who has terminated his contract without just cause has induced that professional to commit a breach. The club shall be banned from registering any new players, either nationally or internationally, for two registration periods.'

73. Transfer Rules, Article 17.4.

74. *Pyunik*, supra n35, 23; *Webster*, supra n57, 50-56.

75. *Matuzalem*, supra n68, 65-68. The author considers that this is consistent with Article 163.3 of the Swiss Code of Obligations which provides a judge with discretion to reduce an excessively high penalty or liquidated damages sum. In determining whether the 'buy-out' clause is a genuine pre-estimate of damages, the CAS in *Matuzalem* stated that it in the 'general interest of both players and clubs to set the bar for admitting the existence of a penalty/buy-out clause fairly high.' *Matuzalem*, supra n68, 74.

76. Juan de Dios Crespo Pérez et al 'Contractual Stability: Breach of Contract', in Alexander Wild (Ed.) *CAS and Football: Landmark Cases*, at 88-89.

77. *Pyunik*, supra n35, 25; *Webster*, supra n57, 55-56.

78. The cases in which the CAS considered and applied Article 17 include *Philippe Mexès & AS Roma v FIFA & AJ Auxierre*, CAS 2004/A/708, 2004/A/709, 2004/A/713, 2005/A/902, 2005/A/903 and 2005/A/916; *Webster*, supra n57; *Pyunik*, supra n35; *Elkin Soto Jaramillo & FSV Mainz 05 v CD Once Caldas & FIFA*, CAS 2008/A/1453 and 2008/A/1469; *Matuzalem*, supra n68; *Fenerbahçe Spor Kutubu v Stephen Appiah*, *Stephen Appiah v Fenerbahçe Spor Kutubu*, CAS 2009/A/1856 and CAS 2009/A/1857 ('*Appiah*'); *FC Sion & El-Hadary v FIFA & Al-Ahly Sporting Club* CAS 2009/A/1880 and 2009/A/1881 ('*El-Hadary*'); *FC Shakhtar Donetsk v Ilyon Pereira Dias Junior*, CAS 2010/O/2132; *Sevilla FC SAD & Morgan De Sanctis v Udinese Calcio S.p.A.* CAS 2010/A/2145, 2010/A/2146 and 2010/A/2147 ('*Morgan De Sanctis*').

79. *Webster*, supra n57; *Matuzalem*, supra n68; *Morgan De Sanctis*, supra n78.

5. ARTICLE 17 ‘JURISPRUDENCE’

5.1 *Webster*5.1.1 *Facts and Circumstances*

Andy Webster was a professional footballer with Scottish club Heart of Midlothian F.C.⁸⁰ In securing the services of Webster in 2001, Hearts paid another club, Arbroath, a transfer fee of £75,000.00.⁸¹ Webster enjoyed great success with Hearts, winning 22 international caps by age 24.⁸² In 2003, Webster signed a new playing contract with Hearts, expiring on June 30, 2007.⁸³

Between April 2005 to April 2006, Hearts made several unsuccessful attempts to extend Webster’s contract.⁸⁴

Despite his on-field success, Webster was not selected for several games between January and April 2006. He believed this was due to his refusal of Hearts’ extension offers.⁸⁵ Hearts’ shareholder, Vladimir Romanov also made various public comments questioning Webster’s commitment to Hearts and discussed a possible transfer for him.⁸⁶

Citing a complete breakdown of trust, Webster sought to terminate his contract,⁸⁷ but because Hearts intended to challenge the termination (and such a challenge could have prevented him from playing in 2006/2007), he instead relied on Article 17.⁸⁸ Webster’s agent contacted approximately fifty clubs and advised them of Webster’s termination and the approximate “buy-out” figure of £200,000.00.⁸⁹

In August 2006, Webster signed with a new club, Wigan Athletic FC.⁹⁰

In November 2006, Hearts lodged a claim with the DRC, seeking £5,037,311.00 in compensation, a two-month suspension for Webster, and a one-year registration ban on Wigan.⁹¹ The DRC ordered Webster to pay £625,000.00 in compensation and imposed a two-week suspension on him.⁹²

80. *Webster*, supra n57, pages 4-5 of judgment. Heart of Midlothian will hereinafter be referred to as Hearts.

81. *Webster*, supra n57, page 5 of judgment.

82. *Webster*, supra n57, page 5 of judgment.

83. *Webster*, supra n57, page 5 of judgment.

84. *Webster*, supra n57, page 5 of judgment.

85. *Webster*, supra n57, page 5 of judgment.

86. *Webster*, supra n57, pages 5-6 of judgment.

87. *Webster*, supra n57, page 6 of judgment.

88. *Webster*, supra n57, page 6 of judgment.

89. *Webster*, supra n57, page 7 of judgment.

90. *Webster*, supra n57, page 7 of judgment. Wigan Athletic FC will hereinafter be referred to as Wigan.

91. *Webster*, supra n57, page 7 of judgment.

92. *Webster*, supra n57, pages 7-8 of judgment. The DRC also held Wigan to be jointly and severally liable for the compensation payable.

All parties appealed the decision to the CAS.⁹³

5.1.2 The Webster-CAS Award

The CAS noted from the outset that Webster and Hearts had not specified in their playing contract the amount of compensation payable in the event of premature termination by either party, therefore it turned to the criteria contained in Article 17.1. The CAS stated in particular that the “most appropriate criterion” was the remuneration remaining on the existing contract,⁹⁴ because it applied equally to club and player, and it correlated to the player’s value.⁹⁵ It also held that this ‘residual value’ approach allowed the level of compensation to be adjusted according to the player’s remuneration (higher remuneration equals higher compensation) and the time remaining on the contract (the earlier the termination, the higher the compensation payable).⁹⁶

In cases involving unilateral termination outside the “Protected Period”, the CAS considered it inappropriate to take into account the remuneration and benefits due under a player’s new contract, because:

“[R]ather than focusing on the content of the employment contract which has been breached, it is linked to the Player’s future financial situation and is potentially punitive.”⁹⁷

The CAS rejected Hearts’ claim for damages for lost profit of £4,000,000.00 based on Webster’s estimated transfer market value or replacement value, because this would punish Webster and unjustly enrich Hearts:⁹⁸

“[This claim] would in effect bring the system partially back to the pre-*Bosman* days when players’ freedom of movement was unduly hindered by transfer fees and their careers and well-being could be seriously affected by them becoming pawns in the hands of their clubs and a vector through which clubs could reap considerable benefits without sharing the profit or taking corresponding risks . . . such an effect would clearly be anachronistic and legally unsound.”⁹⁹

Overall, the CAS agreed with the DRC that Webster had unilaterally breached the contract without “Just Cause” and it reduced the compensation payable to £150,000.00 due primarily to the “residual-value” owing on the contract.¹⁰⁰

93. *Webster*, supra n57, pages 7-8 of judgment.

94. *Webster*, supra n57, 87-88.

95. *Webster*, supra n57, 86.

96. *Webster*, supra n57, 86.

97. *Webster*, supra n57, 85-88. The CAS further stated that “[T]here is no economic, moral or legal justification for a club to be able to claim the market value of a player as lost profit.”: *Webster*, supra n57, 76.

98. *Webster*, supra n57, 74.

99. *Webster*, supra n57, 81.

100. *Webster*, supra n57, 87-88.

5.2 Matuzalem

5.2.1 Facts and Circumstances

Matuzalem Frangelico da Silva is a professional footballer, who in June 2004 signed a five-year contract with Ukrainian club FC Shakhtar Donetsk for €1,200,000.00 per season.¹⁰¹ Article 3.3 of the contract between Matuzalem and Shakhtar provided that:

“...[I]n the case the Club receives a [€25,000,000.00 or more] transfer offer . . . the Club undertakes to arrange the transfer.”¹⁰²

In obtaining Matuzalem, Shakhtar paid his former club Brescia Calcio Spa an €8,000,000.00 transfer fee,¹⁰³ €221,092.00 solidarity mechanism payments and €3,200,000.00 agent’s fees.¹⁰⁴ In 2006 season, Matuzalem was named club captain.¹⁰⁵

On June 1 2007, Italian club U.S. Città di Palermo Spa offered €7,000,000.00 as a transfer fee for Matuzalem to Shakhtar, which it rejected.¹⁰⁶ The next day, Matuzalem terminated his contract pursuant to Article 17.¹⁰⁷ Shakhtar asserted that the playing contract was still be in force until Matuzalem paid €25,000,000.00.¹⁰⁸

Matuzalem signed a three-year contract with Real Zaragoza SAD¹⁰⁹ for €1,000,000.00 per season plus bonuses.¹¹⁰ The contract also provided that €6,000,000.00 compensation would be payable by Matuzalem if he prematurely terminated the contract without cause.¹¹¹ Thereafter, Shakhtar wrote to Real Zaragoza and demanded €25,000,000.00.¹¹²

In July 2008, Real Zaragoza loaned Matuzalem to another club, SS Lazio Spa, for the 2008 season,¹¹³ with the loan agreement containing an “option clause” for Lazio to permanently retain Matuzalem for €13,000,000.00 (or €15,000,000.00 in some circumstances).¹¹⁴ Thereafter, Matuzalem signed two new three-year playing contracts with Lazio and Real Zaragoza, the former club agreeing to pay Matuzalem €895,000.00 for 2008/2009, and

101. *Matuzalem*, supra n68, 8, 9 and 94. FC Shakhtar Donetsk shall hereinafter be referred to as ‘**Shakhtar**’.

102. *Matuzalem*, supra n68, 8.

103. *Matuzalem*, supra n68, 6.

104. *Matuzalem*, supra n68, 7.

105. *Matuzalem*, supra n68, 13.

106. *Matuzalem*, supra n68, 14.

107. *Matuzalem*, supra n68, 15.

108. *Matuzalem*, supra n68, 17.

109. *Matuzalem*, supra n68, 18.

110. *Matuzalem*, supra n68, 18 and 95.

111. *Matuzalem*, supra n68, 18.

112. *Matuzalem*, supra n68, 19. The demand was made pursuant to Article 17.2 transfer rules.

113. *Matuzalem*, supra n68, 20.

114. *Matuzalem*, supra n68, 20.

€3,220,900.00 for 2009/2010 and 2010/2011,¹¹⁵ and the latter club agreeing to pay Matuzalem €2,320,000.00 per season.¹¹⁶ The Real Zaragoza contract also contained a “Penalty Clause” which required Matuzalem to pay €22,500,000.00 for premature termination of the contract.¹¹⁷

5.2.2 The Matuzalem-CAS Award

In the initial decision by the DRC, it found in favor of Shakhtar and ordered Matuzalem to pay €6,800,000.00 in compensation. This amount comprised the contract’s ‘residual value’ (€2,400,000.00), the non-amortized portion of the transfer fee paid by Shakhtar (€3,200,000.00) and €1,200,000.00 for the “specificity of sport.”¹¹⁸ Shakhtar appealed to the CAS.¹¹⁹

Ultimately, the CAS agreed that Matuzalem was liable to pay compensation to Shakhtar under Article 17,¹²⁰ however it increased the compensation payable to €11,858,934.00, comprising €11,258,934.00¹²¹ and an additional amount of €600,000.00 owing to the “Specificity of sport”.¹²²

Noting that the wording of Article 17 requires that primacy be afforded to a validly agreed compensation clause (if any),¹²³ the CAS held that Article 3.3 of the playing contract between Matuzalem and Shakhtar was not a compensation clause because it did not address the compensation payable for unilateral terminations; it merely imposed an obligation on Shakhtar to transfer Matuzalem in the event that it received €25,000,000.00.¹²⁴

Following Article 17, the CAS considered it appropriate to apply the principle of “Positive interest” to place the injured party “in the position [it] would have had if the contract was performed properly”.¹²⁵

In considering the “Remuneration” element, the CAS stated that while remuneration under an existing contract “may provide a first indication” of the value of the player, the remuneration due under the new contract will generally provide a fuller indication of how the player is valued by his new club and the market, and could reveal the player’s motivation for terminating.¹²⁶

115. *Matuzalem*, supra n68, 21.

116. Matuzalem’s new annual salary of approximately €2.32m included fourteen payments of €10,000.00 per year (i.e. €140,000.00) plus an annual ‘sign-on’ fee of €2.18m. *Matuzalem*, supra n68, 22.

117. *Matuzalem*, supra n68, 22.

118. *Matuzalem*, supra n68, 24.

119. *Matuzalem*, supra n68, 28.

120. *Matuzalem*, supra n68, 64.

121. This figure represents the middle point between €10,693,334.00 and €11,824,534.00.

122. *Matuzalem*, supra n68, 178. The CAS also awarded 5% interest accruing from 5 July 2007, and held Real Zaragoza jointly and severally liable for the compensation due: *Matuzalem*, supra n68, 187-190.

123. *Matuzalem*, supra n68, 65-68. The author considers that this is consistent with Article 163.3 of the Swiss Code of Obligations which provides a judge with discretion to reduce an excessively high penalty or liquidated damages sum.

124. *Matuzalem*, supra n68, 71-72.

125. *Matuzalem*, supra n68, 86.

126. *Matuzalem*, supra n68, 92.

While the CAS noted that Matuzalem's salary remained at "basically the same level" post-termination,¹²⁷ it took into account Matuzalem's salary increases in the 2009/2010 and 2010/2011 seasons, as well as the "Option Clause" appearing in the loan agreement.¹²⁸ The CAS calculated the value of Matuzalem's services as follows:

The CAS included in the assessment €14,000,000.00¹²⁹ because Lazio had 'declared to be willing to pay,' and Real Zaragoza had shown a willingness to receive that amount, in order to effect a permanent transfer;¹³⁰

Real Zaragoza agreed to pay Matuzalem an average salary of €1,880,000.00;¹³¹

The average yearly value which Real Zaragoza attributed to Matuzalem was €6,546,667.00,¹³² and therefore the total value (over the two years remaining on Matuzalem's contract with Shakhtar) was €13,093,334.00;¹³³

The average yearly value which Lazio attributed to Matuzalem was €7,112,267.00,¹³⁴ and therefore the total value (over the two years remaining on Matuzalem's contract with Shakhtar) was €14,224,534.00;¹³⁵

The total value of Matuzalem's services over the remaining two years of his contract with Shakhtar was between €13,093,334.00 and €14,224,534.00.¹³⁶

In contrast to its findings in *Webster*, the CAS determined that it is more appropriate to deduct the "remaining value" from the aforementioned calculations, rather than using it as a proxy for compensation damages:

"[T]o simply equalize the amount of salaries to be paid by the former club to the damage suffered by the same club is not what [Article] 17 . . . asks the judging body to do and would deprive the compensation foreseen under [Article] 17 . . . of its meaning."¹³⁷

127. *Matuzalem*, supra n68, 98-99. The CAS noted that the fact of Matuzalem's new salary remaining at 'basically the same level' can, to some extent, support his argument that his motivation for leaving Shakhtar was personal, not economic, that is, his wife no longer wanted to live in Donetsk. See *Matuzalem*, supra n68, 36.

128. *Matuzalem*, supra n68, 99-101 and 107-109.

129. €14,000,000.00 was determined by the CAS to be the average of the amounts specified in the 'option clause', being €13,000,000.00 or €15,000,000.00.

130. *Matuzalem*, supra n68, 104-107.

131. The average was based on the agreed salary payments of €1,000,000.00 for 2007/2008 and €2,320,000.00 for 2009/2010 and 2010/2011. *Matuzalem*, supra n68, 107.

132. This figure was arrived at by adding €14m and €5,640,000.00 (being the supra mentioned average salary multiplied by three seasons), then dividing this sum by three seasons. *Matuzalem*, supra n68, 107.

133. This figure was arrived at by multiplying €6,546,667.00 by two seasons. *Matuzalem*, supra n68, 107-108.

134. This figure was arrived at by adding €14m and €7,336,800.00 (the total agreed salary payments for 2008/2009, 2009/2010 and 2010/2011), then dividing this amount by three seasons. *Matuzalem*, supra n68, 21 and 107.

135. This figure was arrived at by multiplying €7,112,267.00 by two seasons. *Matuzalem*, supra n68, 107-108.

136. *Matuzalem*, supra n68, 122.

137. *Matuzalem*, supra n68, 123.

The CAS subtracted Shakhtar's salary 'savings' over the remaining two-year period of Matuzalem's contract (€2,400,000.00), which left a valuation between €10,693,334.00 and €11,824,534.00.¹³⁸

In addition, the CAS awarded €600,000.00 as additional compensation, owing to the "Specificity of Sport".¹³⁹ Here, the CAS took into account two factors relevant to the facts of the case in awarding this additional head of compensation.

First, it took into account the time remaining on his contract with Shakhtar when he terminated the contract. Here, Matuzalem had two years remaining out of a five-year contract, which the CAS held was a "substantial period" remaining, particularly in the context of lengthy playing contracts where the club "had reason to believe and count on the continuation of the relationship".¹⁴⁰

Second, the CAS was highly critical of the timing of Matuzalem's decision to terminate the contract, particularly in light of his status and position within the club. The CAS noted that Matuzalem had decided to terminate his contract "just a few weeks" before the qualifying rounds of the UEFA Champions League (a competition which the CAS indicated was "obviously very important to Shakhtar"), a decision of which the CAS clearly disapproved particularly given Matuzalem's leadership position as Shakhtar's club captain and his standing as a player having been voted Shakhtar's best player the preceding year.¹⁴¹

5.3 *Morgan De Sanctis*

5.3.1 *Facts and Circumstances*

Morgan De Sanctis, a professional goalkeeper, signed a five-year contract with Italian club Udinese Calcio S.p.A.¹⁴² As part of the transfer from his former club Juventus Turin, Udinese purchased 50% of De Sanctis' economic rights upfront for €1,291,142.00, and the remaining 50% in 2000 for €4,131,655.00.¹⁴³

In 2005 De Sanctis executed a new five-year playing contract with Udinese for €630,000.00 per season plus annual rental contributions and performance-based bonuses.¹⁴⁴ Further, a "Loyalty Bonus" agreement was executed, under which De Sanctis would receive €350,878.00 for each year of the five-year contract period he remained with Udinese.¹⁴⁵

138. *Matuzalem*, supra n68, 123-124, and 177.

139. *Matuzalem*, supra n68, 168-174, and 178.

140. *Matuzalem*, supra n68, 158-162.

141. *Matuzalem*, supra n68, 168-174, and 178.

142. *Morgan De Sanctis*, supra n78, 3, 8.

143. *Morgan De Sanctis*, supra n78, 8-9.

144. *Morgan De Sanctis*, supra n78, 10-13. Udinese also agreed to pay De Sanctis' agent €60,000.00 for his part in the contract signing.

145. *Morgan De Sanctis*, supra n78, 13.

In May 2007,¹⁴⁶ the club wrote to FIFA alleging that Spanish club Sevilla FC SAD had unlawfully approached De Sanctis in violation of the transfer rules.¹⁴⁷ In June 2007, De Sanctis wrote to Udinese terminating his playing contract pursuant to Article 17,¹⁴⁸ and he signed a four-year contract with Sevilla for €331,578.00 per season and a gross payment of €1,050,000.00.¹⁴⁹ The contract also contained a €15,000,000.00 penalty clause if De Sanctis prematurely terminated.¹⁵⁰

5.3.2 *The Morgan De Santis-CAS Award*

Udinese sought an order from the DRC for €23,267,594.00 in compensation from De Sanctis for his unilateral termination prior to the contract's stated expiration date.¹⁵¹ The DRC ordered De Sanctis to pay €3,933,134.00 compensation to Udinese.¹⁵² Udinese, Sevilla and De Sanctis all appealed to the CAS.¹⁵³

The CAS ultimately reduced the amount of compensation payable by De Sanctis to €2,250,055.00. This sum comprised Udinese's consequential costs associated with obtaining replacement services for De Santis (€4,510,000.00) less the salary expenses Udinese saved which otherwise would have been paid to De Sanctis under the playing contract (€2,950,734.00), as well as including an additional sum of €690,789.00 as compensation owing to the "Specificity of Sport."¹⁵⁴

Noting that there was no "Buy-out" clause in the contract between Udinese and De Sanctis, the CAS looked at the Article 17 criteria. The CAS held that the criteria contained in Article 17 were non-exhaustive and other criteria could and should be considered, provided there was a "logical nexus between the breach and loss claimed."¹⁵⁵

The major factor used by the CAS to calculate the compensation payable was the replacement costs incurred by Udinese to replace the services of De Sanctis following his termination of the playing contract.

The CAS noted that, in July 2006, Udinese loaned out a reserve goalkeeper, Samir Handanovič, to FC Rimini, and the loan agreement contained an option for FC Rimini to acquire Handanovič's economic rights for €1,200,000.00 and a counter-option for Udinese to reclaim him for

146. *Morgan De Sanctis*, supra n78, 17.

147. *Morgan De Sanctis*, supra n78, 17.

148. *Morgan De Sanctis*, supra n78, 19.

149. *Morgan De Sanctis*, supra n78, 22.

150. *Morgan De Sanctis*, supra n78, 22.

151. *Morgan De Sanctis*, supra n78, 24.

152. *Morgan De Sanctis*, supra n78, 25. The DRC also awarded 5% interest accruing from 9 June 2007.

153. *Morgan De Sanctis*, supra n78, 26.

154. *Morgan De Sanctis*, supra n78, 103, 105-108. In addition to the compensation, the CAS awarded 5% interest per annum on the compensable sum from 9 June 2007.

155. *Morgan De Sanctis*, supra n78, 63-67.

€250,000.00.¹⁵⁶

In 2007, FC Rimini exercised its option to retain Handanovič's economic rights,¹⁵⁷ however following Udinese receiving notice of termination by De Sanctis, Udinese exercised its Handanovič counter-option.¹⁵⁸ It also signed an uncontracted veteran goalkeeper, Antonio Chimenti, to act as a reserve/backup goalkeeper to Handanovič.¹⁵⁹

The CAS considered it reasonable in the circumstances for Udinese to replace De Sanctis (a regular starting goalkeeper with international experience¹⁶⁰) with two goalkeepers, Handanovič as starting goalkeeper, and Chimenti as his reserve/backup. Udinese's replacement costs totaled €4,510,000.00.¹⁶¹

With respect to the "remuneration element," the CAS noted that, in *Matuzalem* and *El-Hadary*,¹⁶² the CAS had concluded that "the amount the new club was willing to pay the player in breach gave the best indication of what a theoretical replacement player would be paid."¹⁶³ However, the CAS held that:

"In the absence of any concrete evidence with respect to [a Player's] value . . . the Panel cannot apply exactly the same calculation as in *Matuzalem* and shall use a different calculation method to determine the appropriate compensation, the one which would be closest to the amount that Udinese would have got or saved if there had been no breach. . ."¹⁶⁴

As a result, the CAS considered it more appropriate under the circumstances to calculate the compensation payable by De Sanctis according to the "value of [his] replacement costs . . . rather than the estimated value' of De Sanctis."¹⁶⁵ However, it stressed that by employing such a calculation method:

"..[T]he Panel does not seek to depart from the *Matuzalem* jurisprudence but wishes to emphasize that there is not just one and only calculation method and that each case must be assessed in the light of the elements and evidence available to each CAS panel."¹⁶⁶

It did, however, agree with the CAS' determination—expressed in the *Matuzalem*, *El-Hadary* and *Appiah*¹⁶⁷ awards — that the "remuneration and other benefits" due under the existing contract should be deducted from the compensable sum. Udinese had saved annual salary payments to De Sanctis of

156. *Morgan De Sanctis*, supra n78, 16, 70.

157. *Morgan De Sanctis*, supra n78, 18.

158. *Morgan De Sanctis*, supra n78, 20.

159. *Morgan De Sanctis*, supra n78, 20-21.

160. *Morgan De Sanctis*, supra n78, 71.

161. *Morgan De Sanctis*, supra n78, 73.

162. *El-Hadary*, supra n78.

163. *Morgan De Sanctis*, supra n78, 79.

164. *Morgan De Sanctis*, supra n78, 86.

165. *Morgan De Sanctis*, supra n78, 86.

166. *Morgan De Sanctis*, supra n78, 86.

167. *Appiah*, supra n78.

€630,000.00, an annual rental contribution of €9,700.00, and annual loyalty bonus payments of €350,878.00, which over the remaining three-year period, totaled €2,950.734.00.¹⁶⁸

The CAS also awarded further compensation of €690,789.00 (the equivalent of six months remuneration under De Sanctis' new contract with Sevilla) as a "correcting factor" owing to the "Specificity of Sport."¹⁶⁹

In considering it appropriate to award additional compensation under this head, the CAS took into account various factors. The factors considered included:

The time remaining on the playing contract when De Sanctis terminated (which was three years out of a five-year contract);¹⁷⁰

His "special role . . . in the eyes of sponsors, fans and colleagues";¹⁷¹

His field position as goalkeeper and the "success he had brought to Udinese";¹⁷²

The lack of evidence establishing that De Sanctis and Sevilla had unlawfully engaged in contract discussions prior to De Sanctis' premature termination from Udinese;¹⁷³

The duration De Sanctis had spent with Udinese;¹⁷⁴

Whether De Sanctis' breach occurred outside the "Protected Period";¹⁷⁵

Whether De Sanctis had been a "model professional";¹⁷⁶

Whether De Sanctis had complied with the "process" laid out in Article 17.3;¹⁷⁷ and

Whether, as a result of Udinese failing to offer De Sanctis a contract extension, De Sanctis believed that he was no longer part of the club's future.¹⁷⁸

Notwithstanding the above factors, the CAS awarded additional compensation for the unquantifiable losses in revenue suffered by Udinese as a result of De Sanctis' breach owing to the time lost in allowing a replacement

168. *Morgan De Sanctis*, supra n78, 13 and 87.

169. *Morgan De Sanctis*, supra n78, 96 and 102.

170. *Morgan De Sanctis*, supra n78, 88-89, and 100.

171. *Morgan De Sanctis*, supra n78, 100.

172. *Morgan De Sanctis*, supra n78, 100.

173. *Morgan De Sanctis*, supra n78, 100.

174. *Morgan De Sanctis*, supra n78, 100.

175. *Morgan De Sanctis*, supra n78, 100. Here, the author notes that, while De Sanctis terminated his contract with Udinese two years into a five-year contract, he had been with Udinese for eight years since joining on 5 July 1999 as a 22 year old.

176. *Morgan De Sanctis*, supra n78, 100. Similar considerations were taken into account by the CAS in *Matuzalem*, supra n68, 168-174, and 178, when it paid regard to the 'Status and Behaviour' of Matuzalem, and in particular noting that Matuzalem had terminated his contract with Shakhtar 'just a few weeks before the start of the qualification rounds of the UEFA Champions League and was also elected best player of the team'.

177. *Morgan De Sanctis*, supra n78, 100.

178. *Morgan De Sanctis*, supra n78, 100.

“hero” to grow and materialise.¹⁷⁹ It considered it a “near impossible task” to quantify such losses, and therefore the “Specificity of Sport” criteria can and should be used in this circumstance.¹⁸⁰

6. ARTICLE 17 CRITERIA

It is important to understand the reasoning of the aforementioned key CAS awards to ascertain how the Article 17 criteria should be interpreted and applied.

6.1 “Law of the country concerned”

Consideration of the “law of the country concerned” requires the judging authority to consider “all relevant arrangements, law and/or collective bargaining agreements existing at the national level.”¹⁸¹

In *Webster*, the CAS held that it was not required to give priority to one country’s national laws relating to contractual breach damages over the Article 17 criteria. Rather, the CAS held that it was merely a factor to consider while retaining discretion to determine what weight (if any) to afford it.¹⁸² There, the “law of the country concerned” was Scottish law because it had the “closest connection with the contractual dispute.”¹⁸³ However, the CAS considered it inappropriate to apply Scottish law, because its principle of calculating damages for contractual breach related to general commercial contracts and not the assessment of damages for breach of football employment contracts.¹⁸⁴ The CAS ruled that:

“... [I]t is in the interests of football that solutions to compensation be based on uniform criteria rather than on provisions of national law that may vary considerably from country to country.”¹⁸⁵

Similarly, in *Pyunik*, *Matuzalem*, *El-Hadary* and *Morgan De Sanctis*, the CAS determined that there were no “compelling arguments” that any relevant national law could impact the compensation payable,¹⁸⁶ so the burden should be placed on the party seeking to invoke relevant national law principles to “make sufficient assertions in this regard.”¹⁸⁷

179. *Morgan De Sanctis*, supra n78, 100-101.

180. *Morgan De Sanctis*, supra n78, 100-101.

181. FIFA Circular No.769, supra n22, 13/21, cited at <http://www.fifa.com/mm/document/affederation/administration/ps_769_en_68.pdf> (last visited October 24, 2013).

182. *Webster*, supra n57, 17-23.

183. The contract was signed and performed in Scotland, and both Hearts and Webster were domiciled in Scotland at the time of execution and termination of the contract: *Webster*, supra n57, 24.

184. *Webster*, supra n57, 61-65.

185. *Webster*, supra n57, 61-65.

186. *Pyunik*, supra n35, 39; *Matuzalem*, supra n68, 144-148; *El-Hadary*, supra n78, 81-85; *Morgan De Sanctis*, supra n78, 94-95.

187. *El-Hadary*, supra n78, 84.

Taking into account the CAS' reluctance to calculate compensation based on varying principles of national law and its desire to apply uniform criteria, it is difficult to envisage circumstances where the CAS will place any weight on the "law of the country concerned" in determining the compensation due.

6.2 "Specificity of Sport"

The "Specificity of Sport" is an ill-defined and highly subjective consideration in calculating the appropriate compensation payable, despite being referred to as an "objective" criterion.¹⁸⁸ However, various European courts and the Commission use the phrase to describe the unique characteristics of sport that may justify restrictive trade or employment practices provided they are proportionate to the objectives pursued.¹⁸⁹

The CAS held in *Pyunik* that the "Specificity of Sport" criterion shall be used to:

"...[V]erify that the solution reached is just and fair... and reaching therefore a decision which can be regarded as being an appropriate evaluation of the interests at stake, and does so fit in the landscape of international football."¹⁹⁰

Under this criterion, the judging authority may vary the compensation payable if the nature and needs of football dictate that such a result would be just and fair.¹⁹¹

In *Pyunik*, the CAS held that the "Specificity of Sport" allowed it to take into account the independent nature of the sport, footballers' rights to free movement, and the market for football,¹⁹² as well as the "specific nature of damages" that a player's breach may cause.¹⁹³ Further, the CAS recognized the special role of footballers as follows:

"...[I]n the world of football, players are the main assets of a club, both in terms of their sporting value in the service for the teams for which they play, but also from a rather economic view, like for instance in relation to their valuation in the balance sheet of a certain club, if any, their value for merchandising activities or the possible gain which can be made in the event of

188. Juan de Dios Crespo Pérez observed that the words "any *other* objective criteria" contained in Article 17 implied that both the "[national] law of the country concerned" and "Specificity of Sport" were also objective criteria. He stated that "We can see from case law and the fantastic amount of academic commentary about the "specificity of sport" that it is not a well defined category and cannot be seen as objective criterion": Pérez (in Wild), *supra* n76, 78.

189. White Paper on Sport, *supra* n37, 4.1. The White Paper on Sport noted that 'specificity of sport' can encompass the specificity of sporting activities and rules, for example, 'separate competitions for men and women, limitations on the number of participants in competitions, or the need to ensure uncertainty concerning outcomes and to preserve a competitive balance between clubs taking part in the same competitions', as well as the specificity of sporting structures and governance.

190. *Pyunik*, *supra* n35, 41.

191. *Matuzalem*, *supra* n68, 152-156.

192. *Pyunik*, *supra* n35, 40.

193. *Pyunik*, *supra* n35, 41.

their transfer to another club.”¹⁹⁴

In *Matuzalem*, the CAS considered it appropriate to award €600,000.00 as additional compensation owing to the “Specificity of Sport”. The judgment indicates that the CAS placed great emphasis on the sporting value of Matuzalem to Shakhtar as its club captain and best player in the weeks prior to the commencement of the UEFA Champions League tournament.¹⁹⁵

As justification in awarding this additional compensation, the CAS noted that, at the time Matuzalem terminated his contract with Shakhtar, there were two years remaining out of a five-year contract, which the CAS stated was a “substantial period” remaining.¹⁹⁶ The CAS commented that the circumstances “would have been different if the Player had just a few months of a valid contract to serve.”¹⁹⁷

The CAS was critical of Matuzalem for terminating his contract with Shakhtar “had reason to believe and count on the continuation of the relationship”.¹⁹⁸ Implicit in its reasoning here, the CAS appears to have placed great emphasis on the upholding of “Contractual Stability” between clubs and players, particularly where clubs signing playing talent on longer-term contracts are concerned. “Contractual stability” should be encouraged to enable clubs to groom, train, develop, and mould their teams over time for on-field success without fear that its players will walk out of clubs before these developmental plans yield results.¹⁹⁹

The CAS was also critical of the timing of Matuzalem’s termination, given his status and position within the club.²⁰⁰ Here, the CAS paid due regard to the importance of the UEFA Champions League as an internationally recognized tournament, and the fact that Matuzalem had terminated his contract “just a few weeks” before the qualifying rounds of the UEFA Champions League.²⁰¹ The UEFA Champions League is a prestigious annual tournament in which Europe’s most successful clubs play off against each other (when they would otherwise play only those teams within their national competitions).²⁰² Jürg Stadelmann, the maker of the UEFA Champions League trophy, once noted:

“[The Trophy] may not be an artistic masterpiece . . . but everybody in football is keen to get their hands on it.”²⁰³

Given the importance and prestige associated with competing in and

194. *Pyunik*, supra n35, 154.

195. *Matuzalem*, supra n68, 168-174, and 178.

196. *Matuzalem*, supra n68, 161.

197. *Matuzalem*, supra n68, 161.

198. *Matuzalem*, supra n68, 158-162.

199. *Matuzalem*, supra n68, 158-162.

200. *Matuzalem*, supra n68, 168-174, and 178.

201. *Matuzalem*, supra n68, 172 and 178.

202. For information on the UEFA Champions League tournament, see <http://www.uefa.com/uefachampionsleague/history/index.html>.

203. See <http://www.uefa.com/uefachampionsleague/thetrophy/index.html>.

succeeding at the UEFA Champions League level, the CAS appeared to be highly judgmental of Matuzalem's decision to terminate in light of his leadership position as club captain of Shakhtar and the player voted its best on-field player in the preceding season.²⁰⁴

Finally, the CAS noted that Matuzalem had terminated the contract outside the "Protected Period," the implication being that it may have ordered greater additional compensation if he had terminated during the "Protected Period" which the CAS stated is a "particular serious form of unlawful behavior."²⁰⁵

In *Morgan De Sanctis*, the CAS awarded €690,789.00 to "correct" the amount of compensation payable by De Sanctis to Udinese,²⁰⁶ and in doing so, it took into account the following factors:

The fact that there were three years remaining on a five-year contract;²⁰⁷

The "special role" held by De Sanctis "in the eyes of sponsors, fans and colleagues";²⁰⁸

De Sanctis' position as goalkeeper and the "success he had brought to Udinese";²⁰⁹

The lack of evidence produced showing that De Sanctis and Sevilla engaged in unlawful contract discussions prior to termination of the Udinese contract;²¹⁰

The duration De Sanctis had spent with Udinese;²¹¹

The fact that the breach had occurred outside the "Protected Period";²¹²

The fact that De Sanctis had been a "model professional";²¹³

The fact that De Sanctis had complied with the "process" laid out in Article 17.3;²¹⁴ and

De Sanctis' belief that he was no longer part of the club's future..²¹⁵

Notwithstanding the CAS in *De Sanctis* expressly stating that it took into

204. *Matuzalem*, supra n68, 168-174, and 178.

205. *Matuzalem*, supra n68, 163-167.

206. *Morgan De Sanctis*, supra n78, 102.

207. *Morgan De Sanctis*, supra n78, 88-89, and 100. The time remaining was three years out of a five-year contract.

208. *Morgan De Sanctis*, supra n78, 100.

209. *Morgan De Sanctis*, supra n78, 100.

210. *Morgan De Sanctis*, supra n78, 100.

211. *Morgan De Sanctis*, supra n78, 100.

212. *Morgan De Sanctis*, supra n78, 100. Here, the author notes that, while De Sanctis terminated his contract with Udinese two years into a five-year contract, he had been with Udinese for eight years since joining on 5 July 1999 as a 22 year old.

213. *Morgan De Sanctis*, supra n78, 100. Similar considerations were taken into account by the CAS in *Matuzalem*, supra n68, 168-174, and 178, when it paid regard to the 'Status and Behaviour' of Matuzalem, and in particular noting that Matuzalem had terminated his contract with Shakhtar 'just a few weeks before the start of the qualification rounds of the UEFA Champions League and was also elected best player of the team'.

214. *Morgan De Sanctis*, supra n78, 100.

215. *Morgan De Sanctis*, supra n78, 100.

account the foregoing factors, the CAS did not disclose which factor weighed most heavily in its decision to “correct” the compensation sum by €690,789.00. Further, the CAS failed to explain the impact certain factors above had (or ought to have in future cases) on the assessment of compensation. While it is clear that breaches occurring during the “Protected Period” are considered serious violations favoring an upwards revision of any compensation payable,²¹⁶ it is unclear what relevance a Player’s field position or success brought to his team would have on the amount of compensation payable by a breaching player. Moreover, it is unclear if a player’s behavior as a “model professional” ought to increase or decrease the compensation payable by a breaching player.

Ultimately, the CAS appeared to base its award of additional compensation on the unquantifiable (and, in the author’s opinion, speculative) damages suffered by Udinese as a result of De Sanctis’ breach. The CAS stated that:

“... [De Sanctis] was a senior professional, with whom the club had enjoyed some of their greatest successes. The fans and sponsors of all clubs demand immediate success and results. The Panel believes that at any club, when a key player is sold or goes and time is required for a new “hero” to materialize, revenues will be affected, the injured party will suffer losses which it may not be able to prove in Euros. This, in the opinion of the Panel, is where the specificity of sport can be used and should be used [emphasis added].”²¹⁷

Given the ambiguity surrounding the “Specificity of Sport” criterion and its application, Article 17 should be amended to provide greater clarity to the judging authority regarding when, under what circumstances, and how to justly and fairly “correct” the compensation amount payable by a breaching party.

6.3 Remuneration under the existing and/or new contract

Use of the “remuneration” criterion in the assessment of compensation payable by a breaching party has proved “the most contentious to date”²¹⁸ with the CAS having adopted two distinct approaches: the *Webster*-“Residual-Value” approach and the *Matuzalem*-“Positive Interest” approach.

In *Webster*, the CAS ordered Webster to pay £150,000.00 compensation to Hearts,²¹⁹ holding that the “residual-value” owing on his old playing contract with Hearts to be “the most appropriate criterion” for determining the amount of compensation payable by him to Hearts under Article 17.²²⁰ The CAS considered it inappropriate to pay regard to Webster’s remuneration and benefits under the new contract because:

216. *Matuzalem*, supra n68, 163-167.

217. *Morgan De Sanctis*, supra n78, 79.

218. *Morgan De Sanctis*, supra n78, 79.

219. *Webster*, supra n57, 88.

220. *Webster*, supra n57, 86.

“[R]ather than focusing on the content of the employment contract . . . breached, it is linked to the Player’s future financial situation and is potentially punitive.”²²¹

Overall, the CAS considered that:

“[T]here is no economic, moral or legal justification for a club to be able to claim the market value of a player as lost profit.”²²²

By contrast, the CAS in *Matuzalem* considered it more appropriate to calculate the value of Matuzalem’s services based on the remuneration and other benefits due under the new contracts with Real Zaragoza and Lazio, and to deduct the “remaining value” owed as salary savings.²²³ The CAS reasoned that while a player’s remuneration under the existing contract “may provide a first indication on the value of the services of the player for that employing club,” the player’s remuneration under the new contract may provide a fuller indication of the player’s market value and motivation for terminating.²²⁴

Juan de Dios Crespo Pérez proffered one explanation for the discrepancy in reasoning between *Webster* and *Matuzalem* that, although not expressly stated by the *Webster* panel:

“It is clear that the [CAS] were hesitant to grant a big award in favor of [Hearts] who had so badly mistreated [Webster].”²²⁵

As the law currently stands, based on *Matuzalem* and subsequent cases,²²⁶ in determining the compensation due, the “positive interest” approach will be applied by future CAS panels as the preferred approach over the “residual-value” method. However, as discussed below, the “positive interest” approach demonstrates an erroneous interpretation of Article 17 which can result in irrelevant considerations being taken into account and lead to excessive and punitive compensation awards.

6.4 Time remaining on the existing contract

This criterion encourages “Contractual Stability” for club and player alike, for:

“ . . . the club in terms of technical continuity of the team’s roster and the player in terms of steadiness and serenity of his football career and personal life.”²²⁷

In *Matuzalem* and *Morgan De Sanctis*, the CAS dealt with this criterion as part of its assessment of the “Specificity of Sport.”²²⁸ In awarding €600,000.00

221. *Webster*, supra n57, 85-88.

222. *Webster*, supra n57, 76.

223. *Matuzalem*, supra n68, 123.

224. *Matuzalem*, supra n68, 92.

225. Pérez (in Wild), supra n76, 76. Pérez acted for Webster (in *Webster*) and Shakhtar (in *Matuzalem*).

226. *El-Hadary*, supra n78, *Morgan De Sanctis*, supra n78.

227. *El-Hadary*, supra n78, 104.

228. *Matuzalem*, supra n68, 158-162; *Morgan De Sanctis*, supra n78, 88-89.

in additional compensation, the *Matuzalem* panel appeared to place particular weight on the fact that Matuzalem terminated with two years remaining on a five-year contract, declaring this to be a “substantial period” and stating that:

“The situation would have been different if the Player had just a few months of a valid contract to serve.”²²⁹

In *Morgan De Sanctis*, the CAS also took into account the time remaining in awarding €690,789.00 as additional compensation under the “Specificity of Sport”.²³⁰ However, it is unclear what weight the CAS afforded this criterion in “correcting” the compensation payable.

The *Matuzalem* and *Morgan De Sanctis* awards demonstrate that the time remaining on the existing contract, at the time of breach, is a key criterion to be applied in considering whether the compensation awarded is fair and just. Where the time remaining is “substantial”, the CAS is more likely to award additional compensation owing to the “Specificity of Sport.”²³¹ That being said, aside from determining that two years out of a five-year contract is “substantial,” and a few months remaining would not be “substantial,” the CAS has to date failed to clarify where to draw the line on what is a “substantial” period of time remaining on a contract.

6.5 Fees and expenses paid by the former club

Article 17 requires consideration of the “fees and expenses paid or incurred by the former club (amortized over the term of the contract).”²³² The “term of the contract” was interpreted by the CAS in *Webster* to mean the term of the “original” contract when it held that Hearts was not entitled to recoup €75,000.00 for the original transfer fee paid, because this amount was deemed under the rules to have been amortized over the original contract period.²³³

Under this criterion, a club may claim transfer fees,²³⁴ agent fees,²³⁵ and player economic rights,²³⁶ and until clarified by the CAS in future cases, doubt

229. *Matuzalem*, supra n68, 158-162, and 178.

230. *Morgan De Sanctis*, supra n78, 88-89, and 100.

231. Aside from considering two-years out of a five-year contract to be substantial, and noting that ‘The situation would have been different if the Player had just a few months of a valid contract to serve’, the CAS provided little guidance in determining what constitutes a ‘substantial period.’

232. Transfer Rules, Article 17.1.

233. *Webster*, supra n57, 83. See also *Morgan De Sanctis*, supra n78, 90-91, where Udinese did not appeal the aspect of the DRC decision that its purchased economic rights were deemed to have been amortized over the original 5 year contract period.

234. *Matuzalem*, supra n68, 127.

235. Such ‘fees and expenses’ can be claim, provided they were ‘linked to the transfer of the Player’ and the financial burden for such payments fell on the club: There, Shakhtar had failed to satisfy the CAS that the agent’s fees were linked to securing Matuzalem. *Matuzalem*, supra n68, 129-130.

236. *Morgan De Sanctis*, supra n78, 8-9, and 90-91. In *Morgan De Sanctis*, Udinese, as part of the transfer, agreed to purchase 50% of De Sanctis’ ‘economic rights’ from Juventus for €1,291,142.00 on 5 July 1999, and the remaining 50% on 30 May 2000 for €4,131,655.00. The DRC determined that such ‘fees and expenses’ were deemed to have been amortised over the

surrounds whether injured clubs can claim reimbursement of any solidarity mechanism payments paid to former clubs involved in training the player.²³⁷

Further, it is unclear whether “fees and expenses” include any “training compensation” paid pursuant to Article 20 and Annex 4 of the transfer rules, or any expenses incurred in training and developing a player. In *Webster*, the CAS considered the club’s training and development expenses irrelevant for assessing compensation under Article 17, because such expenses are expressly dealt with under other provisions of the transfer rules.²³⁸ In *Matuzalem*, Shakhtar failed to prove it had invested any amount in training Matuzalem²³⁹ and therefore the CAS refrained from determining whether such amounts could be considered under Article 17 (albeit noting that Article 20 and Annex 4 expressly deal with training compensation).²⁴⁰ The author considers that the CAS will likely disregard any claims based on expenses incurred for “training compensation”, training, or development of a breaching player, because compensation for these expenses is expressly dealt with under Article 20 and Annex 4. To allow a claim for reimbursement of these expenses under Article 17 would constitute a form of double-counting.

Uncertainty surrounds the appropriate amortization method to be employed by the judging authority in applying this criterion.

In *Matuzalem*, the CAS adopted a linear approach to amortizing the €8,000,000.00 transfer fee paid by Shakhtar to Matuzalem’s former club Brescia. The CAS held that, with two years remaining on a five-year contract, the non-amortized portion of the transfer fee was €3,200,000.00.²⁴¹

Conversely, the CAS in *Webster* doubted whether a club could reclaim a portion of a transfer fee incurred beyond the “Protected Period” absent a “meeting of the minds on the subject.”²⁴²

“... [C]ontractual fairness would tend to require that upon accepting his

original 5 year contract period, and therefore no compensation was payable. The DRC, therefore, considered that such expenses could, if non-amortised, have been claimed as compensation.

237. In *Matuzalem*, the CAS rejected Shakhtar’s claimed compensation to reimburse it for solidarity payments made to Brescia on acquiring Matuzalem, because ‘Shakhtar had the right to reduce such payments from the transfer fee .. [and] If it did not do so, it was because of its own decision’: *Matuzalem*, supra n68, 128.

238. *Webster*, supra n57, 54-55.

239. *Matuzalem*, supra n68, 140-143.

240. *Matuzalem*, supra n68, 141-142. With regard to whether training compensation could have been considered, Dabscheck correctly highlighted that this was an inappropriate criteria to be considered, given that Matuzalem was 27 when he unilaterally terminated his contract, and Annex 4 expressly provides that ‘Training Compensation shall be payable, as a general rule, up to the age of 23 for training incurred up to the age of 21.’: See also Dabscheck, supra n23, 23. Further, the author considers that, given the express provision of training compensation in Article 20 and Annex 4, and the notable absence of reference to the investment in training as a criteria requiring consideration pursuant to Article 17, the drafters and parties (FIFA, UEFA, FIFPro and the EC) did not intend for a club’s investment in training to be considered under Article 17 calculations. On this point, the CAS’ inability to make a determination is unsatisfactory.

241. The non-amortized sum was 2/5 of €8,000,000.00: *Matuzalem*, supra n68, 126-132.

242. *Webster*, supra n57, 84.

employment a player be fully aware of the financial engagements he has undertaken and the way in which they can affect his future movements.”²⁴³

Therefore, at least insofar as the *Webster* panel was concerned, the transfer fee ought to be deemed amortized during the “Protected Period”, and not amortized in equal weights over the entire contract period (as was considered appropriate by the *Matuzalem* panel).

Braham Dabscheck suggested an alternative method:

“Rather than attaching an equal weight to each year it may be more appropriate to bias the weighting to the early years on the assumption that as players get older they lose their competitive ability; their bodies wear out, are more prone to injury, loose that extra yard of pace and so on. It may be more appropriate to adopt a five year depreciation based on 35, 25, 20, 15 and 5.”²⁴⁴

Finally, when considering whether to increase compensation due based on the non-amortized portion of any paid fees and expenses, the CAS in *Matuzalem* considered it inappropriate to award compensation for any non-amortized fees if the value of Matuzalem’s services lost could be calculated as at the time of breach.²⁴⁵

Overall, the author considers that Article 17.1 should be amended to consider this criterion as part of the “Specificity of Sport.” Further, absent contrary language contained in the playing contract between club and player any fee or expense should be deemed amortized during the “Protected Period”. The club is in the best position to protect itself and mitigate its own financial losses by selecting an appropriate amortization method for any fees and expenses incurred in securing the player’s services. To allow an injured club to reclaim such expenses as compensation from a player beyond the contract’s “Protected Period” would ignore the risks and realities of a player’s diminishing value to a club over time, and reward the club for its poor financial management by selecting an inappropriate amortization method.

6.6 Contractual breach within/outside the “Protected Period”

FIFA adopts a strict stance of disapproval against any breaches occurring during the “Protected Period” of a playing contract:

“Unilateral termination . . . especially during the so-called protected period, is to be vehemently discouraged.”²⁴⁶

This position is supported by the fact that, in addition to liability to pay compensation for breach, sporting sanctions are imposed on players who terminate during the “Protected Period.”²⁴⁷

In *El-Hadary*, the CAS held that unilateral terminations during the

243. *Webster*, supra n57, 84.

244. Dabscheck, supra n23, 28.

245. *Matuzalem*, supra n68, 131.

246. FIFA Commentary, supra n57, Article 13.

247. Transfer Rules, Article 17.3.

“Protected Period” constitute an aggravating factor to be considered in assessing compensation because:

“It would otherwise be difficult to understand why this element has expressly been listed as a criterion to take into consideration when assessing such compensation.”²⁴⁸

El-Hadary terminated his playing contract only one year into a three-and-a-half-year contract²⁴⁹ However, the CAS noted El-Hadary’s “advanced sporting age” and “inevitably declining career,” and under the circumstances, declared the sporting sanctions to be sufficient punishment.²⁵⁰

In *Matuzalem*, the CAS decided not to increase the compensation due because Matuzalem terminated outside the “Protected Period”.²⁵¹ Additionally, in *Morgan De Sanctis* the CAS approved of the approach adopted by the CAS in *Matuzalem*, which considered this criterion as part of the “Specificity of Sport.”²⁵²

In light of the above, it seems that this criterion will be considered under the “Specificity of Sport”. However, the CAS retains ultimate discretion to determine whether additional compensation should be awarded in the circumstances of each case. Where a breach occurs outside the “Protected Period,” the CAS has indicated an unwillingness to alter the compensation payable, whereas any terminations occurring during the contract’s “Protected Period” may result in the CAS increasing the compensation payable on account of what it considers to be an “aggravating factor.”

6.7 Other “Objective” criteria

6.7.1 Compensation for the loss of a transfer fee?

There are conflicting CAS authorities regarding whether the loss of a transfer fee can be considered when assessing compensation.

In *Webster*, the CAS ruled that Hearts was not entitled to a £4,000,000.00 compensation for lost profit based on Webster’s estimated transfer value, because it would punish Webster and unjustly enrich Hearts.²⁵³ The CAS held that allowing clubs to obtain compensation and lost profits based on a player’s market value would be “anachronistic and legally unsound.”²⁵⁴ As highlighted above, the CAS stated that:

“[This approach] would in effect bring the system partially back to the pre-*Bosman* days when players’ freedom of movement was unduly hindered by transfer fees and their careers and well-being could be seriously affected by

248. *El-Hadary*, supra n78, 106-107.

249. *El-Hadary*, supra n78, 105.

250. *El-Hadary*, supra n78, 108.

251. *Matuzalem*, supra n68, 163-167.

252. *Morgan De Sanctis*, supra n78, 92-93, and 100

253. *Webster*, supra n57, 74.

254. *Webster*, supra n57, 81.

them becoming pawns in the hands of their clubs and a vector through which clubs could reap considerable benefits without sharing the profit or taking corresponding risks.”²⁵⁵

Conversely, in *Pyunik*, the CAS considered that the club had a “legitimate expectation of gain in respect of a possible transfer of [Carl Lombe].” Ultimately, however, the club failed to produce evidence of any transfer offers by any clubs and the CAS did not award compensation under this head.²⁵⁶

In *Matuzalem*, the CAS held that the loss of a transfer fee could be considered as part of the assessment of compensation payable, provided there is a “necessary logical nexus” between a player’s termination and the lost transfer opportunity.²⁵⁷ It also held that evidence of transfer offers made by third parties may provide an indication as to the market value of a player’s services.²⁵⁸ However, the CAS indicated that a club could not claim compensation for lost transfer fees in addition to the value of a player’s lost services because this would constitute over-compensation.²⁵⁹ Ultimately, the CAS noted that the €7,000,000.00 transfer offer made by Palermo was rejected by Shakhtar before Matuzalem terminated, and therefore it held that Shakhtar had suffered no direct damage from Matuzalem’s breach in the form of a lost transfer fee.²⁶⁰

In *El-Hadary*,²⁶¹ the CAS did award compensation on account of the loss of a transfer fee. El-Hadary was a goalkeeper playing with Egyptian club Al-Ahly, who signed a three-and-a-half-year contract commencing in July 2007.²⁶²

In February 2008, El-Hadary, his club Al-Alhy and Swiss club FC Sion attended a meeting to discuss a potential transfer for El-Hadary.²⁶³ FC Sion made a \$400,000.00 transfer offer to Al-Alhy; Al-Alhy requested \$800,000.00.²⁶⁴ The CAS accepted evidence submitted that FC Sion was “ready and willing” to offer \$600,000.00 to Al-Ahly, but that El-Hadary had terminated his contract with Al-Ahly prior to any such offer being made by FC Sion.²⁶⁵ The CAS also noted in its award that El-Hadary was subsequently transferred to another club, FC Ismaily, for \$600,000.00.²⁶⁶

The CAS determined that Al-Ahly would have had to spend \$600,000.00 in transfer fees to obtain a comparable replacement player, and that Al-Ahly was deprived of the opportunity to obtain the \$600,000.00 transfer fee because

255. *Webster*, supra n57, 81.

256. *Pyunik*, supra n35, 42.

257. *Matuzalem*, supra n68, 116-117.

258. *Matuzalem*, supra n68, 120.

259. *Matuzalem*, supra n68, 119.

260. *Matuzalem*, supra n68, 121.

261. *El-Hadary*, supra n78.

262. *El-Hadary*, supra n78.

263. *El-Hadary*, supra n78, 95.

264. *El-Hadary*, supra n78, 95-96.

265. *El-Hadary*, supra n78, 96-97.

266. *El-Hadary*, supra n78, 98.

of El-Hadary's breach.²⁶⁷ As such, the CAS ordered El-Hadary to pay \$796,500.00 in compensation to Al-Ahly. The compensation comprised \$600,000.00 for the loss of a transfer fee from FC Sion and \$488,500.00 for remuneration due under the new contract, minus \$292,000.00 salary savings.²⁶⁸

In summary, compensation for lost transfer fees may be awarded if there is a "necessary logical nexus" between a player's termination and a lost opportunity,²⁶⁹ but lost transfer fees will not be awarded in addition to the lost value of a player's services.²⁷⁰ Further, the CAS has accepted that evidence of transfer offers may be tender to provide an indication of the market value of a player's services.²⁷¹ However, this holding has received some criticism, because this may encourage clubs keen on acquiring the services of a player to make lowball, unrealistic transfer offers, because evidence of such offers may be submitted and considered by the CAS as part of any assessment of compensation payable (particularly given that acquiring clubs are held jointly and severally liable with the breaching players for any compensation payable to the player's former club).²⁷²

In the author's opinion, a club's possible loss of a transfer fee should be considered as a factor under the "Specificity of Sport" criterion, because there will be some occasions (such as *El-Hadary*) where the timing of a player's breach directly and proximately causes financial harm to his former club such that it is deprived of an anticipated or expected transfer fee. Further, allowing such a factor to be considered will serve to discourage larger/financially stronger clubs from "cherry-picking" the best talent from medium and smaller-sized clubs without paying suitable compensation in the form of a transfer fee.²⁷³ Therefore, allowing the CAS to have regard to this criterion will encourage and foster the development of "competitive balance" throughout international football.

6.7.2 "Replacement Costs"

"Replacement Costs" simply refer to the consequential and incidental costs incurred by an injured club, as a direct and proximate cause of a player's breach, in acquiring the services of a suitable replacement player.

In *Matuzalem*, the CAS disregarded Shakhtar's claim for €20,000,000.00 of "Replacement Costs" in securing the services of Nery Alberto Castillo,²⁷⁴ because it noted that clubs will ordinarily incur these costs upon expiration of a

267. *El-Hadary*, supra n78, 97-100.

268. *El-Hadary*, supra n78, 99-103, and 127.

269. *Matuzalem*, supra n68, 116-117.

270. *Matuzalem*, supra n68, 119.

271. *Matuzalem*, supra n68, 120.

272. *Compaire*, supra n44, 35.

273. Gordon Taylor 'The Transfer System – A Need for Compromise', PFA website, 10 September 2000, cited in *Dabscheck*, supra n23, 88.

274. *Matuzalem*, supra n68, 133-139.

player's contract.²⁷⁵ Notwithstanding this, the CAS ruled that to support a claim for "Replacement Costs", the club must prove that the new player was obtained as a substitute, that there is a link between the new player's transfer fee and the old player's termination, and that the costs incurred have been "somehow increased" by the player's breach.²⁷⁶ The club must demonstrate that the players play roughly the same position, and that the club's decision to secure a replacement was triggered by the player's termination.²⁷⁷ Overall, the CAS was not satisfied that the transfer of Castillo was linked to Matuzalem's termination, because while Castillo plays in the midfield position (similar to Matuzalem), it was not convinced that the transfer of Castillo and the transfer fee paid was either "linked to the gap left by [Matuzalem] or that the costs of hiring [Castillo] have been somehow increased by [Matuzalem's] termination."²⁷⁸

In *Morgan De Sanctis*, the CAS considered that "Replacement Costs" can and should be considered, provided there is a "logical nexus between the breach and loss claimed".²⁷⁹ The CAS stated that:

"While replacement costs are not referred to in Art[icle] 17 . . . it seems a logical place to start – to see what loss the injured party has actually suffered as a result of the breach."²⁸⁰

The CAS accepted that, as a result of De Sanctis' breach, Udinese incurred €4,510,000.00 in "Replacement Costs" in securing the services of Samir Handanovič and Antonio Chimenti, and awarded this sum as compensation.²⁸¹ In reclaiming Handanovič from FC Rimini, Udinese paid €250,000.00 to FC Rimini, waived a €1,200,000.00 transfer fee from FC Rimini, and paid €1,179,000.00 for Handanovič's salary over the remaining three-year period of the De Sanctis contract.²⁸² Further, the CAS considered it reasonable for Udinese to acquire Chimenti, a veteran to act as an immediate replacement (given Handanovič's inexperience), his three-year salary payments totaled €1,881,000.00.²⁸³

Overall, the CAS awarded Udinese compensation in the amount of €2,250,055.00. The majority of the compensation calculation thus related to Udinese's consequential costs incurred in replacing De Sanctis' services.²⁸⁴

The CAS treated Udinese's "Replacement Costs" as an alternative approach to valuing the services of De Sanctis, rather than relying on his

275. *Matuzalem*, supra n68, 135.
276. *Matuzalem*, supra n68, 136-138.
277. *Matuzalem*, supra n68, 136.
278. *Matuzalem*, supra n68, 138-139.
279. *Morgan De Sanctis*, supra n78, 66-67.
280. *Morgan De Sanctis*, supra n78, 67.
281. *Morgan De Sanctis*, supra n78, 73.
282. *Morgan De Sanctis*, supra n78, 70-73.
283. *Morgan De Sanctis*, supra n78, 71-73.
284. *Morgan De Sanctis*, supra n78, 103.

remuneration under his new playing contract as a determining factor.²⁸⁵ Therefore, it seems that this criterion can be adopted as an alternative means of assessing the market value of a player's services, and not in addition to a value calculation based on a player's remuneration under a new playing contract.

6.7.3 Aggravating factors

In *Webster*, each party raised the argument that the other's conduct constituted an aggravating factor which ought to affect compensation.²⁸⁶ Hearts argued that Webster had unfairly refused to accept a contract extension, thereby deliberately attempting to disentitle Hearts from capturing a transfer fee.²⁸⁷ Webster submitted that Hearts' conduct caused a breakdown in trust and confidence that led him to terminate, and therefore any compensation payable should be reduced.²⁸⁸

Ultimately, the CAS did not accept either argument and considered it inappropriate to determine whether such aggravating factors are relevant in assessing the compensation due.²⁸⁹ Therefore, depending on the circumstances of a particular case, it seems open to the judging authority to take into account any aggravating factors or contributory negligence on the part of either party in assessing the amount of compensation due, however the CAS has yet to provide any guidance on what conduct would constitute an aggravating factor or contributory negligence. This will depend on a case-by-case basis.

7. CRITIQUE

7.1 Interpreting Article 17

The transfer rules constitute an internationally recognized and accepted commercial contract which sets out the rules governing the international transfer of footballers between clubs. Therefore, interpreters of the transfer rules should pay heed to recognized principles of contractual construction under the common, civil, and EU bodies of law.

The UNIDROIT principles of international commercial contracts provide that a contract shall be interpreted in accordance with the actual common intentions of the parties, or if this cannot be determined, objectively, according to the meaning a reasonable person in the same circumstances would assign.²⁹⁰

285. The CAS stated that 'In the absence of any concrete evidence with respect to the value of [De Sanctis], the Panel cannot apply exactly the same calculation as in Matuzalem and shall use a different calculation method to determine the appropriate compensation, the one which would be closest to the amount that Udinese would have got or saved if there had been no breach by [De Sanctis]': *Morgan De Sanctis*, supra n78, 86.

286. *Webster*, supra n57, 40-49.

287. *Webster*, supra n57, 40.

288. *Webster*, supra n57, 41-44.

289. *Webster*, supra n57, 45 and 49.

290. UNIDROIT Principles of International Commercial Contracts (2010) ('**UNIDROIT Principles**'), Chapter 4, Article 4.1.

The nature and purpose of the contract, preliminary negotiations, subsequent conduct of the parties, and trade usages shall all be considered in the interpretation of an international commercial contract.²⁹¹ Similar tests exist under Swiss civil law²⁹² and the common law.²⁹³

Articles 13 to 17 of the transfer rules are designed to establish, encourage, foster and reinforce “Contractual Stability” among contracting clubs and players, by affording a broad discretion to the judging authority to determine the appropriate compensation payable for unilateral terminations of the playing contract prior to its expiration period without “Just Cause.” In *Matuzalem*, the CAS recognized that:

“The purpose [of Article 17] is basically nothing else than to reinforce contractual stability, i.e. to strengthen the principles of *pacta sunt servanda* in the world of international football, by acting as a deterrent against unilateral contractual breaches and terminations [emphasis added]. . . .”²⁹⁴

However, an objective reading of Part IV and Article 17, in light of the background circumstances, prior negotiations and “factual matrix”²⁹⁵ reveals that “Contractual Stability” must be balanced against each footballer’s right to free movement.

As highlighted earlier, the Commission’s concern in the post-*Bosman* era was to create a transfer system which protected each footballer’s rights to free

291. UNIDROIT Principles, supra n290, Chapter 4, Article 4.3.

292. In *Webster*, supra n57, 50, the CAS stated that ‘In keeping with the practice under Swiss law relating to the interpretation of the bylaws of an association, the Panel shall have regard first for the wording of article 17, i.e. its literal meaning, and if this is unclear shall have regard to the provision’s internal logic, its relationship with other provisions of the FIFA Status Regulations as well as its purpose revealed by the history of its adoption’.

293. In *Investors Compensation Scheme Ltd v West Bromwich Building Society* (“*The ICS case*”) [1998] 1 W.L.R 896, 912, Lord Hoffmann stated that ‘Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract’. The “background knowledge” is often referred to as the “matrix of facts”. See *Prenn v Simmonds* 1971 1 W.L.R 1381 (per Lord Wilberforce): “The time has long passed when agreements, even those under seal, were isolated from the matrix of facts in which they were set and interpreted purely on internal linguistic considerations.” Id. at 1383-84. “Evidence of negotiations, or of the parties’ intentions . . . ought not be received, and evidence should be restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the “genesis’ and objectively the “aim’ of the transaction.” Id. at 1385. In *Bank of Credit and Commerce International SA v Ali* [2002] 1 A.C. 251, 39, Lord Hoffmann stated that, as an aid to interpretation, the Court can consider ‘absolutely anything’ which a reasonable person would have regarded as relevant and which would have affected the way the contract would have been understood by a reasonable person. One key difference between the *ICS* principles and the UNIDROIT principles, however, is that ‘the law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent.’ *The ICS case*, supra n294, 912-913 per Lord Hoffmann. See also *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337, 352 [per Mason JJ]. Evidence of ‘subsequent conduct’ is also inadmissible under the common law: *Agricultural and Rural Finance Pty Ltd v Gardiner* [2008] HCA 57 per Gummow, Hayne, Kiefel and Heydon JJ; *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235.

294. *Matuzalem*, supra n68, 80.

295. See infra n293, otherwise referred to as the “matrix of facts”.

movement, while recognizing the importance of “Contractual Stability” as part of the “Specificity of Sport”. The interpretation of Article 17 by the CAS in *Matuzalem*, however, fails to accord with the parties’ intentions to strike such a balance, with the CAS determining that promotion of “Contractual Stability” was a paramount consideration to affording “some degree of flexibility for players to move, even when they had voluntarily entered into a contract.”²⁹⁶

The *Matuzalem*-“Positive Interest” approach can result in the imposition of liabilities on breaching footballers to pay excessive and punitive compensation which disproportionately outweigh their earnings and market value.²⁹⁷ Such an approach not only restricts a footballer’s rights of free movement, but effectively compels footballers to remain with their club. This is inconsistent with Swiss law and CAS jurisprudence, which provides:

“... [A] player cannot be compelled to remain in the employment of a particular employer. If a player terminates his employment contract without valid reason, then the latter is—notwithstanding the possibility of sporting sanctions – obliged to compensate for damages, if any, but is not obliged to remain with the employer or to render his services against his will.”²⁹⁸

As Valloni and Pachmann stated:

“Even though there is of course the principle of *pacta sunt servanda*, there is no (sporting) reason why a football player should become factually a slave to his former football club for the rest of his life if [he] decides to terminate his contract earlier. There is no prevailing interest of the football world which could justify such a lifelong limitation of personal and economic freedom.”²⁹⁹

For the above reasons, the CAS’ interpretation of Article 17 in *Matuzalem* fails sufficiently consider the background circumstances of Article 17, and instead develops a line of jurisprudence prioritizing “Contractual Stability” to the detriment of each footballer’s right to free movement.

7.2 Irrelevant Considerations

Article 17 was drafted broadly to provide considerable discretion to the judging authority to determine the appropriate compensation based on the facts of each case.³⁰⁰ In doing so, however, Article 17 enables the judging authority to take into account irrelevant considerations. Such was highlighted in *Matuzalem*.

The CAS ordered that Matuzalem pay compensation of €11,858,934.00,³⁰¹

296. Harris, *supra* n54.

297. Cf *Appiah*, *supra* n78.

298. *Tareq Eltaib v Club Gaziantepspor*, CAS/2006/A/1100, 30.

299. Lucien Valloni et al, *The Landmark Matuzalem Case and Its Consequences On The FIFA Regulations*, 25 July 2012, at <<http://www.mondaq.com/x/184712/Sport/The+Landmark+Matuzalem+Case+And+Its+Consequences+On+The+FIFA>> (last visited October 24, 2013).

300. *Matuzalem*, *supra* n68, 89.

301. *Matuzalem*, *supra* n68, 178.

but three main problems appear in the calculation considerations.

First, the CAS' calculation was largely based on the "Option Clause" contained in the loan agreement between Lazio and Real Zaragoza which entitled Lazio to permanently retain Matuzalem for €13,000,000.00.³⁰² This clause should not have been factored into the CAS' calculations because the clause was never exercised by Lazio. Earlier in the judgment, the CAS examined Article 3.3 of the contract between Shakhtar and Matuzalem, and determined that it was not a "Buy-out" clause, but rather it conferred an obligation on Shakhtar to transfer Matuzalem in the event it received €25,000,000.00.³⁰³ The "Option Clause" contained in the loan agreement should have been treated in a similar fashion, because it did no more than impose an obligation on Real Zaragoza to complete a permanent transfer of Matuzalem to Lazio, in the event the option was exercised by Lazio. Because it was not exercised by Lazio, the figure contained in the "Option Clause" was not an accurate reflection or representation of Matuzalem's fair market value.³⁰⁴

Second, in determining the value of Matuzalem's services *at the time of breach* the CAS improperly examined what Lazio and Real Zaragoza agreed to pay Matuzalem in periods *after the contract between Matuzalem and Shakhtar would have expired*. The CAS failed to acknowledge that at this time, Matuzalem would have been a free agent,³⁰⁵ and could have moved to any club without any liability to pay compensation.

Third, in assessing his value *at the time of breach*, the CAS took into account Matuzalem's salary rises that occurred *more than a year after breach*, which did not reflect the injury suffered by Shakhtar at the time of Matuzalem's breach.³⁰⁶

Article 17 allows consideration of a player's remuneration and other benefits under the new contract, which affords the judging authority considerable discretion to look at irrelevant considerations. For example, the judging authority may look well into the future at the then-market value of a player's services (which may bear no resemblance to his market value *as at the time of breach*), in addition to any unexercised penalty clauses contained in future playing contracts or loan agreements between clubs which, as Matuzalem submitted (rightly, in the author's opinion), "are always set at a level far higher than the effective value of the player concerned."³⁰⁷

302. *Matuzalem*, supra n68, 20.

303. *Matuzalem*, supra n68, 71-72.

304. Similar criticisms of the CAS' reasoning were noted by Dabscheck. See Dabscheck, supra n23, 25.

305. Similar criticisms of the CAS' reasoning were noted by Dabscheck. See Dabscheck, supra n23, 25.

306. Similar criticisms of the CAS' reasoning were noted by Dabscheck. See Dabscheck, supra n23, 25.

307. *Matuzalem*, supra n68, 36.

7.3 *Matuzalem in the Swiss Federal Tribunal*

The recent decision of the SFT in *Matuzalem* demonstrates that the “Positive Interest” approach to assessing compensation is unsustainable and unworkable, and that Article 17 requires amendment to bring future compensation awards in line with *Webster*.

Following the handing down of the CAS award, Matuzalem and Real Zaragoza appealed to the SFT, seeking to annul the award, but the appeal was rejected.³⁰⁸ Subsequently, Matuzalem was unable to pay €11,858,934.00 in compensation (well over his salary ‘peak’ of €3,220,900.00 for 2009/2010 and 2010/2011 with Lazio).³⁰⁹

FIFA disciplinary proceedings were commenced against Matuzalem and Real Zaragoza for failing to comply with the CAS award. Real Zaragoza (which had not paid the compensation) submitted that it was experiencing serious financial difficulties which could lead to insolvency.³¹⁰

The FIFA Disciplinary Committee held that Matuzalem and Real Zaragoza had breached the CAS award, and imposed a fine of CHF30,000.00 (in addition to the original compensation) payable within 90 days.

Matuzalem failed to pay the ordered compensation to Shakhtar, and FIFA imposed a worldwide playing ban on him.³¹¹ Matuzalem appealed against the decision to impose a worldwide ban to the CAS, however he was unsuccessful.³¹² Thereafter, he sought to annul this CAS award before the SFT pursuant to Articles 190-192 PILA,³¹³ on grounds that the CAS violated his right to be heard, or alternatively, that the award is incompatible with public policy.³¹⁴

The SFT annulled the award, determining that the worldwide ban is contrary to public policy.³¹⁵ The SFT stated that:

“The infringement of [Matuzalem’s] economic freedom would be suitable to promote the willingness to pay and to find the funds for the amount due; however if [Matuzalem] rightly says that he cannot pay the whole amount anyway, the adequacy of the sanction to achieve its direct purpose – namely the payment of the damages – is questionable. Indeed the prohibition to continue his previous economic and other activities will deprive [Matuzalem] from the possibility to achieve an income in his traditional activity which would enable him to pay his debt.”³¹⁶

308. *Francelino da Silva Matuzalem v Fédération Internationale de Football Association (FIFA)*, 4A_558/2011 (*Matuzalem v FIFA*), at page 2 of judgment.

309. *Matuzalem*, supra n68, 21; Valloni, supra n299.

310. *Matuzalem v FIFA*, supra n308, at page 3 of judgment.

311. *Matuzalem v FIFA*, supra n308, at pages 3-4 of judgment.

312. *Matuzalem v FIFA*, supra n308, at pages 3-4 of judgment.

313. *Matuzalem v FIFA*, supra n308, at page 4 of judgment, translator’s footnote 10.

314. Article 190(2)(d)-(e) Swiss Private International Law Act; See *Matuzalem v FIFA*, supra n308, at page 5 of judgment.

315. *Matuzalem v FIFA*, supra n308, at page 8 of judgment.

316. *Matuzalem v FIFA*, supra n308, at page 8 of judgment.

Therefore, although the SFT originally upheld the determination of compensation due by Matuzalem, it seems implicit in the SFT judgment that, in light of Matuzalem's inability to pay the compensation ordered, the SFT considered the sum to be excessive.

In addition, the SFT will likely pay closer attention in future cases to the ability of a player to satisfy an order to pay compensation.³¹⁷

In light of the SFT decision, Article 17 should be amended. By continuing to enable the judging authority to award overly excessive compensation, Article 17 as currently constituted will undermine FIFA's objective of promoting "contractual stability." FIFA can no longer use the threat of a worldwide ban to ensure that breaching players pay compensation as ordered.

Further, although CAS awards can be enforced under the New York Convention, as the saying goes "you can't get blood out of a stone." While the facts in *Matuzalem* largely turn on the fact that Real Zaragoza was in financial distress and unable to satisfy the compensation award (notwithstanding it being jointly and severally liable for the debt), the occurrence of future similar circumstances are certainly foreseeable in the current climate. Recent financial reports prepared on behalf of UEFA indicate that many football clubs are suffering with financial hardship, with data dating to 2008 indicating that the aggregate losses suffered by Europe's major clubs were approximately €578,000,000.00, and up to 47% of all clubs were reportedly suffering losses.³¹⁸ Measures are being taken by UEFA through its "Financial Fair Play" model to "protect European football's long-term health and viability,"³¹⁹ so it is apparent that, notwithstanding the imposition of joint and several liability on a player's new club, many players may be held solely responsible to pay excessively punitive compensation amounts which far exceed their level of earnings, depending on the financial health of a player's new club. Such a situation is unsatisfactory and unworkable long-term.

Amending Article 17 to limit the criteria for assessing compensation to the "Residual-Value" approach and, if necessary, the "Specificity of Sport," will ensure that the compensation awarded is proportionate to the player's earnings, and therefore act as a greater deterrent against players unilaterally terminating.

7.4 Clarity and Predictability?

In *Matuzalem*, the CAS considered that the drafters of Article 17 intended

317. Valloni, *supra* n299.

318. See <http://www.uefa.com/uefa/footballfirst/protectingthegame/financialfairplay/news/newsid=1494481.html#financial+fair+play+explained>.

319. See <http://www.uefa.com/uefa/footballfirst/protectingthegame/financialfairplay/news/newsid=1494481.html#financial+fair+play+explained>.

to promote “Contractual Stability” by fostering and encouraging uncertainty and unpredictability of determinations regarding the assessment and awarding of compensation. The CAS stated that:

“By asking the judging authorities . . . to duly consider a whole series of elements . . . [the] judging body has . . . a considerable scope of discretion, so that any party should be well advised to respect an existing contract as the financial consequences of a breach or termination without just cause would be, in their size and amount, rather unpredictable.”³²⁰

However, as Braham Dabscheck observed, such an approach is inconsistent with the common law doctrine of precedent, designed to ensure consistency of outcomes, to assist in resolving disputes without litigation, and to prevent outcomes from being a “lucky dip.”³²¹

Moreover, it is an established principle of sports law that sporting rules, which affect the careers of athletes, should be drafted in a clear, predictable manner. In *Quigley*³²² (a landmark doping decision), the CAS stated that:

“The fight against doping is arduous, and it may require strict rules. But the rule-makers and the rule-apppliers must begin by being strict with themselves. Regulations which affect the careers of dedicated athletes must be predictable. They must emanate from duly authorized bodies. They must be adopted in constitutionally proper ways. They should not be the product of an obscure process of accretion. Athletes and officials should not be confronted with a thicket of mutually qualifying or even contradictory rules that can be understood only on the basis of the de facto practice over the course of many years of a small group of insiders.”³²³

Like with anti-doping law, Article 17 should be amended to afford a degree of clarity and predictability to players and teams, particularly given that it jeopardizes each professional footballer’s right to pursue their chosen

320. *Matuzalem*, supra n68, 89.

321. Dabscheck stated that ‘The role of courts is to develop principles in resolving the disputes that are presented to them for adjudication. Courts pride themselves on the consistency of their decision making and the principles they develop (*stare decisis*). Adherence to following precedents is designed to ensure that the decisions of courts are consistent over time and that individual judges keep their personal biases and preferences under control. Particularly in cases which involve the awarding of compensation/damages, to not follow such an approach would amount to a ‘lucky dip’. Consistency also provides guidance to the parties and helps them to resolve disputes without the need for litigation.’ Dabscheck, supra n23, 24.

322. *USA Shooting & Q v UIT* (*‘Quigley’*), CAS 94/129. Quigley competed as a member of a skeet shooting event in Cairo, organised by the UIT. On day 1, he was in 2nd place. He had felt ill for a number of days but his condition worsened sharply that night, his complaints including suffering a high temperature, fits, hallucinations and sleep deprivation. His coach was called at 3:00am, and the hotel doctor was called. The hotel doctor diagnosed bronchitis and chest infection, and returned with antibiotics in a box with Arabic writing on it. A list of prohibited substances was shown to the doctor, who considered that no prohibited substances were in the medication. Testing thereafter showed he had taken a prohibited substance, and issues surrounded the imposition of a strict liability standard for doping offences. It is in this context that CAS made various remarks.

323. *Quigley*, supra n322, 34.

profession and livelihood.

8. AMENDMENT PROPOSAL

The “Positive Interest” approach requires the judging authority to award compensation that puts the injured party “in the position that [it] would have had if the contract was properly performed.”³²⁴ However, the CAS appears to have overlooked the fact that when a contract is properly performed, the contract will continue to impose rights and obligations on both contracting parties until the contract expires, a contracting player will continue to play for his contracted club, and as consideration, the club will pay the player the “remaining value” of the salary agreed upon under the contract. In the post-*Bosman* era, upon a contract’s expiration, a contracting player’s status becomes that of a “free agent,” capable of moving to any club without his former club lawfully demanding a transfer fee. An inconsistency necessarily follows from the logic of justifying any assessment of compensation (designed to put the parties in a position they would have been had the contract been fully performed) on account of a player’s remuneration under his new contract (particularly given his status would have been that of a “free agent,” had the contract been fully performed).

The “Residual-Value” remaining on a playing contract is commensurate with how the former club valued a player’s services for the existing contract period. But taking into account the player’s remuneration under a new contract simply provides an indication of another club’s valuation of the player’s services, rather than the former club’s valuation, which is already factored into the existing contract’s “remaining value.”

By applying the “Residual-Value” approach, the compensation awarded should be sufficient to pay any transfer fee to acquire a replacement. If the “Residual-Value” was insufficient to acquire a replacement, the proper inquiry should be whether the former club was paying the player a fair and reasonable salary which accurately reflected the player’s value. Further, the salary payments saved would be available to spend on a comparable replacement player’s salary who (assuming they are a suitable replacement) should command a comparable salary.

A player’s worth may increase during the contract period, and therefore his initial salary may not reflect his market value as at the termination date. However, this reasoning ignores the reality that clubs often re-negotiate player salaries during the contract period.

By adopting a “Residual-Value” approach, clubs will be encouraged to draft appropriate “Buy-out” clauses in their playing contracts with footballers to avoid any determination of the amount of compensation payable based on the Article 17 criteria. In addition, the “Residual-Value” approach will encourage clubs to offer extensions on the original contract, thereby resetting

324. *Morgan De Sanctis*, supra n78, 61.

the “Protected Period” and subjecting players to potential sporting sanctions and a liability to pay greater compensation.³²⁵ However, as demonstrated in *Webster*, players who are keen to exercise free agency will be disinclined to agree to contract extensions.

Alternatively, clubs will be encouraged to include salary review clauses in their playing contracts to enable player salaries to be reviewed and re-negotiated during the contract period. This will benefit both parties: the player will be entitled to receive an increased salary if his performance improves during the contract period, and the club will be entitled to greater compensation in the event of player breach. Moreover, a player would be more inclined to remain with a club long-term if he believed he was being adequately compensated. Either way, it seems that “Contractual Stability” will be promoted.

Take the following hypothetical example. Player A, aged 23, agrees to a five-year contract with a salary of €100,000.00. Over the first two years, he develops into the club’s best player and, upon reaching free agency; he could command an annual salary of €1,000,000.00. If the club were to continue paying him €100,000.00 annually, this would not accurately reflect the player’s elevated standing, his open market value, and the club’s contribution through training and development. Thereafter, the club would obtain a substantial windfall benefit in utilizing the services of a highly-underpaid player.

If the player were to unilaterally terminate his contract at the end of the third year (outside the “Protected Period”), a “Residual-Value” approach would require him to pay to the club €200,000.00. This would be in addition to the salary savings of €200,000.00. The club would likely claim to be under-compensated and incapable of procuring a comparable replacement player. However, this argument ignores the fact that the club has either failed to negotiate and insert an appropriate “Buy-out” clause, or alternatively failed to re-negotiate the player’s salary upwards to accurately reflect his market value.

But if the club were to re-negotiate the player’s salary under the “Residual-Value” approach to €1,000,000.00 per year for the contract’s remaining three years, it would be entitled to greater (and more accurate) compensation when the player terminated after three years (In other words, €2,000,000.00 for the remaining two years in addition to €2,000,000.00 salary savings).

However applying the “Residual-Value” approach may result in insufficient compensation where a player terminates shortly prior to the contract’s expiration as occurred in *Pyunik*.³²⁶ In that case, Carl Lombe terminated his contract with Pyunik with six months remaining, and then owing

325. Transfer Rules, Article 17.3, states that ‘. . . The protected period starts again when, while renewing the contract, the duration of the previous contract is extended.’

326. *Pyunik*, supra n35.

\$7,200.00 in “Residual-Value.”³²⁷ Applying the criteria listed in Article 17, the CAS ordered Lombe to pay compensation of \$25,000.00,³²⁸ noting that he earned \$25,000.00 during the first six months of his new contract with AFC Rapid.³²⁹ There, the CAS ruled:

“When the salary criterion is taken into account, the one to be received from the new club must prevail on the one received from the former club, as it is a better reflection of the real value of the services of [Lombe] at the time of breach.”³³⁰

While the “Residual-Value” approach would have assessed compensation at USD\$7,200.00, by affording discretion to the judging authority to consider the “Specificity of Sport,” which enables the judging authority to vary the compensable sum in a manner it thinks is fair and just in the circumstances.

The FIFA Commentary states that any additional compensation payable resulting from the “Specificity of Sport” is limited to six months of salary.³³¹ This is consistent with Article 337c of the Swiss Code of Obligations.³³²

Therefore, given that Article 17 allows the judging authority to vary the compensation award owing to the “Specificity of Sport” for up to six months of salary, applying a “Residual-Value” approach would help to prevent an injustice occurring in circumstances similar to *Pyunik*, while preventing the judging authority from being empowered to order the breaching party to pay exorbitant and disproportionately punitive compensation.

In light of the discussion herein, Article 17.1 should be amended as follows:

In all cases, the party in breach shall pay compensation. Subject to the provisions of Article 20 and Annex 4 in relation to training compensation, and unless otherwise provided for in the contract, compensation for the breach shall be calculated based on the “Residual-Value” owing under the player’s existing contract (including guaranteed remuneration and other benefits, but excluding bonuses and loyalty payments). In addition, the judging authority has discretion to award further compensation of up to six months’ salary under the existing or new contract, having due regard to the law of the country concerned and the “Specificity of Sport”. In considering the “Specificity of Sport”, the judging authority shall consider the time remaining on the existing contract up to a maximum of five years, the fees and expenses paid or incurred by the former club (amortized over the “Protected Period” of the original contract term), whether the contractual breach falls within the “Protected Period”, the status and behavior of the parties, the special role of the player in the eyes of

327. The CAS noted that the remuneration that the Player would have earned under the old contract with *Pyunik* was USD\$1,200.00 per month. *Pyunik*, supra n35, 46.

328. *Pyunik*, supra n35, 47.

329. *Pyunik*, supra n35, 46.

330. *Pyunik*, supra n35, 46.

331. FIFA Commentary, supra n57, Article 17, footnote 75.

332. FIFA Commentary, supra n57, Article 17, footnote 75.

sponsors, fans and colleagues, the player's playing position, the time the player had played with the club, the loss of a possible transfer, the player's sporting age, and any damages suffered by an injured party resulting from a breaching party's breach which are otherwise difficult to quantify. Compensation shall not be assessed with consideration to the amounts invested in training and development of the player.

Applying the above criteria to the discussed cases (and compensation is varied by the maximum six months' salary):

Matuzalem's liability would have been €3,000,000.00 (*i.e.* €2,400,000.00 "residual-value" plus €600,000.00 owing to six months' salary with Shakhtar);

De Sanctis' liability would have been €2,609,889.00 (€1,919,100.00 'residual value' plus €690,789.00 owing to six months' salary with Sevilla); and

Lombe's liability would have been USD\$32,200.00 (USD\$7,200.00 "residual-value" plus USD\$25,000.00 for six months' salary with AFC Rapid).

To highlight the adequacy of the proposed compensation method, it is useful to note that in *Morgan De Sanctis*, Udinese paid €250,000.00 total transfer fees to acquire Samir Handanovič and Antonio Chimenti (the latter being an uncontracted free agent), and their salary expenses were €3,060,000.00. This amount would have been covered by an award of €2,609,889.00, in addition to Udinese's salary savings of €2,950,734.00 (which total €5,560,623.00). The amount would have also been sufficient to cover the lost transfer monies which would have been received from FC Rimini (€1,200,000.00), assuming this is classified as an "expense." Given the aforementioned examples, the proposed amendments to Article 17 are sufficient to adequately protect the financial interests of a former club, in the event of a premature termination by a player, while promoting "Contractual Stability" and balancing this factor against each footballer's fundamental right to free movement recognized under EU law.

9. CONCLUSION

The FIFA transfer rules were the product of negotiations and social dialogue between FIFA, UEFA, FIFPro and the European Commission, designed as a balancing exercise between "Contractual Stability" (to protect and promote "Competitive Balance" and the "Specificity of Sport") and each footballer's rights to free movement protected under Article 45 TFEU. However, amendments to the transfer rules are required to adequately strike this balance.

The developing "Lex Sportiva" of the CAS post-*Matuzalem* demonstrates that, where a player unilaterally terminates his contract without "Just Cause", the means by which compensation is calculated under Article 17 fails to sufficiently consider the background circumstances behind its creation. The "Positive Interest" approach of interpreting and applying Article 17 may, as demonstrative by *Matuzalem*, result in players paying overly excessive

compensation amounts which effectively compel them to abide by their contractual arrangements with their club, thereby ignoring their fundamental rights to free movement. Moreover, the wording of Article 17, and the criteria to be considered in assessing the level of compensation payable, is ambiguous, unclear, unpredictable, and allows the judging authority to employ irrelevant considerations in its decisions. Such a state of affairs flagrantly disregards the nature of sporting rules, which ought to be clear and easily understood by athletes.

Article 17.1 should be amended to ensure that compensation is calculated based on the “Residual-Value” owing on the contract, and at the time the player terminates, as well as to provide discretion to the judging authority to vary the compensation payable according to the “Specificity of Sport.” Further, greater clarity ought to be provided in defining objective factors for consideration as part of the “Specificity of Sport,” an ambiguous, highly subjective phrase purporting to be objective.