

31st May 2018

FIFA's regulatory reform, and the crack down on compliance with FIFA decisions

By Paolo Lombardi and James Mungavin, Lombardi Associates

The recently announced amendments to the FIFA Regulations on the Status and Transfer of Players (RSTP), and the change of approach under article 64 of the FIFA Disciplinary Code (FDC), as outlined in FIFA Circular letters 1625 and 1628, are significant changes that provide clarity in certain areas and also introduce new measures to the regulatory framework.

Codifying jurisprudence and enhancing enforcement

The amendments to the RSTP, which come into force from tomorrow, 1st June 2018, have been introduced as a result of dialogue between FIFA and two of its major stakeholders, FIFPro and the European Club Association (ECA). Players and clubs are of course the two main pillars of football, and FIFPro and ECA represented their interests during the discussions on the FIFA regulatory reform.

Although significant, the majority of the amendments to the RSTP simply represent a natural evolution, as they enshrine principles that had already been established through the consistent jurisprudence of the FIFA decision-making bodies for quite some time.

Having said this, the act of codifying principles arising from jurisprudence is not without its difficulties (especially for FIFA) and should not be underestimated.

The newly codified principles include those within the amended article 17 par. 1, which concern the calculation of compensation due for breach of contract, while taking into account mitigating and egregious circumstances.

The new provisions under Articles 14 (terminating a contract with just cause due to abusive conduct), article 14bis (a player terminating a contract with just cause due to outstanding salaries) and article 18 par. 6 (prohibiting contractual clauses granting clubs "grace periods" *i.e.* additional time to pay due amounts to players) have also been introduced as a reflection of existing jurisprudence. These provisions will not be analysed in depth in this article. Instead, we will mainly focus on article 17 and the new article 24bis, which introduces new measures to the regulatory framework aimed at enhancing enforcement of monetary decisions issued by FIFA's decision-making bodies.

Change of approach under article 17

In relation to the amendments to article 17 of the RSTP; by openly prescribing in detail the compensation due to a player in the event of breach of contract, FIFA has essentially defined a monetary value for each breach of contract. Clubs can therefore gauge in advance what it might cost to terminate a player's contract.

Article 17 par. 1 RSTP (New text in bold):

"In all cases, the party in breach shall pay compensation. Subject to the provisions of article 20 and Annexe 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 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 (amortised over the term of the contract) and whether the contractual breach falls within a protected period.

Bearing in mind the aforementioned principles, compensation due to a player shall be calculated as follows:

- i. in case the player did not sign any new contract following the termination of his previous contract, as a general rule, the compensation shall be equal to the residual value of the contract that was prematurely terminated;***
- ii. in case the player signed a new contract by the time of the decision, the value of the new contract for the period corresponding to the time remaining on the prematurely terminated contract shall be deducted from the residual value of the contract that was terminated early (the "Mitigated Compensation"). Furthermore, and subject to the early termination of the contract being due to overdue payables, in addition to the Mitigated Compensation, the player shall be entitled to an amount corresponding to three monthly salaries (the "Additional Compensation"). In case of egregious circumstances, the Additional Compensation may be increased up to a maximum of six monthly salaries. The overall compensation may never exceed the rest value of the prematurely terminated contract.***
- iii. Collective bargaining agreements validly negotiated by employers' and employees' representatives at domestic level in accordance with national law may deviate from the principles stipulated in the points i. and ii. above. The terms of such an agreement shall prevail."***

The amendments to article 17 represent confirmation of FIFA's change to its original stance towards the calculation of compensation due for breach of contract. When article 17 was first introduced, FIFA carefully avoided giving clear formulae and instead left calculations to the discretion of the Dispute Resolution Chamber, which would decide compensation strictly on a case-by-case basis.

However, the newly formulated article 17 now contains tools for calculations that had only previously been present in jurisprudence.

This change of stance could have an impact on the football transfer market too, given that clubs now have the elements to assess the financial impact of breaching a contract. However, sporting sanctions may still be imposed, in addition to the payment of compensation. This may act as a sufficient deterrent then, even if a club is comfortable with the amount of compensation that may be calculated according to article 17.

On a separate note, the issue of Mitigated Compensation is of particular interest. The concept of a creditor being required to mitigate the debtor's financial damage is of course not new, as it has already been reflected in FIFA's jurisprudence, as well as at CAS level. The relevant principle stems from Swiss law relating to damage mitigation.

Pursuant to the newly formulated article 17, if a player did not sign a new contract following the termination of his previous contract, the former club would have to pay compensation equal to the residual value of the contract that was prematurely terminated. Furthermore, according to the same provision, if the player did find new employment, then the value of the new contract would be taken into account for the purposes of reducing the amount of compensation due by the former club

Bearing this in mind, one might have expected there to be a requirement in article 17 for the player to actively seek new employment, and therefore reduce the financial damage caused by the club's breach of contract. However, no such requirement was included in the RSTP amendments, and on this point, the input of FIFPro appears to have prevailed over that of ECA. Although having said this, in practice it would be problematic to check if a player was actively looking for employment, and it would need to be established what exactly the requirements were and who was responsible for checking if such requirements were met.

Article 24bis

The most significant change to the RSTP is the addition of article 24bis, as it introduces a new concept to the regulatory framework.

One of the main concerns of football stakeholders, players and clubs alike, has been the enforcement of decisions issued by the competent decision-making bodies. As a matter of fact, both players and clubs regularly face issues of non-compliance with decisions of FIFA and CAS, and parties can encounter major difficulties in ensuring decisions are respected. Of course, a monetary decision without enforcement is worthless to a creditor.

A possible solution to the enforcement issue has now been provided by the introduction of the new article 24bis, according to which the FIFA body issuing a decision will also issue the sanction that will apply in the event of non-compliance by the debtor.

Article 24bis RSTP:

"1. When instructing a party (a club or a player) to pay another party (a club or a player) a sum of money (outstanding amounts or compensation), the Players' Status Committee, the DRC, the Single Judge or the DRC judge (as the case may be) shall also decide on the consequences of the failure to pay the relevant amounts in due time.

2. Such consequences shall be included in the findings of the decision and will be the following: Against a club, a ban from registering any new players, either nationally or internationally, up until the due amounts are paid. The overall maximum duration of the registration ban, including possible sporting sanctions, shall be of three entire and consecutive registration periods; Against a player, a restriction on playing in official matches up until the due amounts are paid. The overall maximum duration of the restriction, including possible sporting sanctions, shall be of six months on playing in official matches.

3. The ban or the restriction will be lifted prior to its complete serving, once the due amounts are paid.

4. The ban or the restriction shall be applicable if the due amounts are not paid within a period of 45 days as of the creditor having provided the debtor with the required bank details for the payment while the relevant decision having become final and binding."

Prior to the amendments of the RSTP coming into force on 1st June 2018, if a monetary decision was not complied with, the next step was for the creditor to request the FIFA Disciplinary Committee to open disciplinary proceedings and potentially impose sanctions under article 64 of the FDC in order to enforce payment.

Instead, monetary decisions involving a club or player having to pay a club or player will now include a sanction that applies if the decision is not respected by the debtor.

The origins of this solution can be traced back to over 20 years ago, when football's legal framework was in its infancy. A similar concept could be found in the obsolete FIFA Circular Letter 616, dated 4th June 1997, which had introduced a procedure for dealing with clubs that failed to comply with financial obligations. The FIFA Players' Status Department (not the FIFA body issuing a decision) was vested with the power to pronounce a ban on all international transfers against a club that failed to respect a FIFA order to comply with a financial obligation. The contents of Circular Letter 616 were never included in the actual FIFA regulations. However, they were referred to in a number of FIFA decisions for several years thereafter, but hardly ever applied in practice.

The introduction of article 24bis may now act as an effective deterrent for debtors, given that it empowers FIFA's decision-making bodies to include strong sanctions in the event that the debtor fails to comply with a decision within the 45-day grace period.

Sanctions will include a ban from registering new players for up to three consecutive registration periods (if the debtor is a club) and a prohibition to play in official matches for up to six months (if the debtor is a player).

It is interesting that in relation to clubs, it has been decided that the specific type of sanction will be a transfer ban (rather than other types of sanctions, such as warnings, fines, point deductions and relegations, which are all noted in article 64 of the FDC).

Pursuant to article 24bis, no matter what the amount of money is, a monetary decision involving a club paying a player or another club will include a transfer ban as a temporary enforcement sanction under article 24bis. There is no discretion involved in relation to the type of sanction imposed. For example, if the amount due was relatively small, a fine could not be imposed instead of a transfer ban. It would only be the length of the transfer ban that would be at the discretion of the decision-making body.

In practice, a transfer ban is actually a very suitable sanction to use for this purpose because it is one that not only can be easily enforced when an amount has not been paid, but it can also be easily lifted when the due amount has eventually been paid. It can be temporarily enforced and then lifted without any permanent effects. Whereas, a point-deduction or relegation are permanent measures that would be far more problematic to use in a temporary manner and could not easily be revoked after the relevant amount has been paid.

What practitioners may expect – Interaction with article 12bis and article 17

The introduction of article 24bis should, in principle, result in less delays for creditors, and also less cases for the FIFA Disciplinary Committee to deal with.

Nevertheless, it is worth noting that if an article 24bis sanction does not have the desired effect (*i.e.* the debtor still fails to pay) then the next step for the creditor would still be to revert to the usual procedure of requesting the FIFA Disciplinary Committee to open disciplinary proceedings and impose sanctions under article 64 of the FDC.

In recent years, the specific issue of overdue payables has been dealt with by article 12bis of the RSTP, which seems to have been an effective tool in the three years since its inception.

Article 12bis provides a fast-track procedure, whereby if there is no *prima facie* contractual basis to delay a payment, then the matter should be dealt with swiftly. Under article 12bis, the relevant FIFA decision-making body “may” impose sanctions at the end of the procedure.

On the other hand, the new article 24bis is clear in indicating that the relevant FIFA decision-making body “shall” include with a monetary decision, be it compensation for contractual breach or overdue payables, the specified sanction that will apply in the event of non-compliance with such decision.

In this respect, Article 24bis may be seen as having a different nature and purpose to other sanctions, such as those under article 12bis or article 17 par. 3, 17 par. 4 or 17 par. 5 of the RSTP. At first sight, Article 24bis appears to be an automatically applied regulatory provision, which is purely intended to instigate enforcement of decisions. Whereas, sanctions such as those under article 12bis or article 17 are penalties, used as a measure to punish parties for committing a certain violation, such as having overdue payables or terminating a contract without just cause/inducing the contractual breach, etc.

Therefore, the two categories of sanction described above could theoretically exist together, and we may well see them appearing together in the same FIFA decisions in the future. One (permanent) sanction applied to punish a party for a specific violation of the RSTP, and another (temporary) sanction to punish any subsequent non-compliance with the decision.

However, there might be some confusion in the way that the different sanctions co-exist under the various regulatory provisions: article 24bis, articles 12bis, 17 par. 3, 17 par. 4 and 17 par. 5 of the RSTP, and the new procedure under article 64 of the FDC.

It is theoretically possible to envisage a scenario where sanctions are applied to the same party under both article 24bis and article 12bis, and then a disciplinary procedure begins under article 64 FDC. This is obviously an extreme example, but may be possible within the new regulatory framework.

Ultimately, only time (and in fact the scrutiny of CAS) will tell how the different sanctions co-exist in future cases. However, it appears on first inspection that the sanctions under article 24bis do have a different nature compared to those under articles 12bis and 17 of the RSTP. And while it is understandable that in order to avoid confusion, FIFA might wish to avoid overlaps occurring between the different types of sanction, it is not inconceivable that they will be used in combination.

In fact, article 24bis openly refers to the possibility of other sanctions being applied at the same time, when it states what the overall maximum duration of the registration ban or playing restriction will be, “**including possible sporting sanctions**”. This is to say, “sporting sanctions” under articles 17 par. 3, 17 par. 4, 17 par. 5 or 12bis would be factored in when assessing what the maximum duration of the sanction under article 24bis could be.

Therefore, according to the new regulatory provisions, the different types of sanction may exist together. However, it is likely that initially, FIFA will take a prudent approach and possibly avoid overlapping of sanctions in practice.

What practitioners may expect - Possible CAS appeals involving article 24bis

Of course, parties will still be able to lodge appeals with CAS against monetary decisions of the FIFA decision-making bodies, and the challenge here will be for CAS to provide a sufficiently swift appeals procedure so as not to counter-act the positive impact of the new RSTP amendments.

There are however some interesting procedural considerations, bearing in mind that FIFA decisions appealed to CAS may well now have article 24bis sanctions attached to them.

One would expect that, if a monetary decision of FIFA were to be confirmed by CAS, then the relevant article 24bis sanction would also be confirmed. However, there will be situations where the FIFA body rejects a claim (for example, a player's claim against a club under article 17) and therefore does not include an article 24bis sanction with the decision, but the decision is then appealed to CAS. In such cases, if CAS decides to overturn the FIFA decision, the Panel may be of the opinion that an article 24bis sanction should have been included in the erroneous decision. After all, article 24bis sanctions are effectively an automatic temporary sanction that must be included with certain monetary decisions in order to sufficiently enforce them.

However, according to article 24bis, the sanction can only be imposed by FIFA bodies ("*the Players' Status Committee, the DRC, the Single Judge or the DRC judge*"). Therefore, several questions arise in relation to the application of article 24bis in CAS proceedings. How could CAS impose a sanction pursuant to article 24bis? Would CAS be able to impose article 24bis sanctions without FIFA being a party to the CAS proceedings? What would the chances be of a party successfully challenging an article 24bis sanction without calling FIFA as a co-respondent? And if FIFA were to be called as a co-respondent, would it adopt a passive role in the proceedings? Furthermore, if CAS decided to amend a decision, would the case be referred back to the relevant FIFA decision-making body for the article 24bis sanction to be applied? Or would the CAS award have to be enforced exclusively through article 64 of the FDC?

For the answers to these questions, we will need to wait for the first related CAS appeals, which will possibly be within the next year from the time of writing, and these should shed light on certain aspects, such as the position of FIFA as a party in CAS proceedings. It is not inconceivable that, in the future, established jurisprudence may determine that appeals revolving around article 24bis sanctions may be conducted without FIFA necessarily taking part.

It will be interesting to see what happens, and whether CAS will apply article 24bis in certain awards, and indeed, whether FIFA will be called as a party in more appeals at CAS, albeit with a passive role in the proceedings.

New procedure pursuant to article 64 of the FIFA Disciplinary Code

FIFA also recently issued Circular Letter 1628, announcing a new approach adopted in respect to debtor clubs and article 64 of the FDC.

Article 64 is applied to ensure that FIFA decisions are respected and complied with. In order to crack down on debtor clubs who fail to respect decisions, a new procedure has been applied to disciplinary cases as from 23rd May 2018.

The new approach is aimed at reinforcing the system, in combination with the new article 24bis of the RSTP, to ensure that all decisions are respected without necessarily requiring intervention by the FIFA Disciplinary Committee.

The new approach appears to be an attempt to fill in the gaps left by the new RSTP amendments and cover cases that are not affected by the new article 24bis *i.e.* cases that do not involve a club or player paying a club or player. Although, as mentioned above, if an article 24bis sanction does not result in payment by the debtor, then the creditor would still revert to the article 64 FDC procedure.

Article 64.2 of the FDC states that if a debtor club disregards the final time limit for a payment due to a player, coach or club, the relevant national association shall be requested to implement the sanctions threatened.

Under the new procedure, the debtor club's national association will be obliged to check if the relevant monetary decision has been complied with by the debtor club, and if it has not been complied with then the association will be required to automatically apply the relevant sporting sanction against such club (point deduction or transfer ban). This effectively cuts out a stage of the process, as the creditor will no longer need to request the FIFA Disciplinary Committee to intervene in order to have sporting sanctions imposed.

This burden on national associations should act as an additional tool for creditors to effectively enforce decisions, considering that if a national association fails to comply with its obligations then it may be subject to sanctions in accordance with articles 14, 60 and 61 of the FIFA Statutes.

Circular Letter 1628 also announced that the FIFA Disciplinary Committee will no longer enforce financial decisions if the parties reach a settlement agreement after the decision has been notified.

This change of stance may effectively mean the end of settlement agreements concluded after a final and binding decision has been reached, as creditors will no doubt be very reluctant to enter into such agreements knowing that if the debtor breaches the settlement agreement, then the creditor will need to start from the beginning and lodge a new claim with the relevant body for the payment to be enforced.

The ongoing balance between players and clubs

The overall changes to the RSTP announced in Circular Letter 1625 certainly seem to benefit the position of players. In fact, some of the changes apply solely to players who are having issues with their club, such as article 14bis (terminating a contract with just cause for outstanding salaries) and article 17.1 (when compensation is due to a player for termination of a contract without just cause).

Therefore, on the face of things, the majority of the amendments to the RSTP may be regarded as being aimed at protecting players rather than clubs. However, while this may be true, the relevant principles aimed at protecting players were already present in FIFA's case law.

Furthermore, some of the RSTP amendments will also benefit clubs (for example, the amendments to Article 14 - terminating a contract for abusive conduct - could in principle apply to clubs as well as players), and indeed there is still a clear balancing act going on between clubs and players at football governance level.

As mentioned above, the most significant amendment to the RSTP is article 24bis. A key concern for stakeholders FIFPro and ECA has been the enforcement of monetary decisions. This has resulted in the introduction of article 24bis, and the subsequent changes to the approach under article 64 of the FDC.

Article 24bis, in principle, equally benefits players and clubs, as it improves the current situation relating to enforcement of decisions, regardless of whether a decision is in favour of a player or a club.

Having said this, in practice, article 24bis may be more of an overall benefit to players due to the higher volume of cases against clubs rather than players. Players around the world, particularly in the lower profile leagues, often suffer from late salary payments. The FIFA Players' Status Department routinely deals with many such issues, and these incidences have only increased in recent years. The ratio between breaches of contract committed by clubs and breaches of contract committed by players is ever expanding. Nowadays, we understand that possibly only one case in 20 involves breach by a player, while the others concern breaches perpetrated by clubs.

The future

FIFA's regulatory reform will not be without challenges in the future. The ultimate aim of the amendments is to conclude, and effectively enforce, as many disputes as possible at the first instance stage.

Moving forward, the relevant FIFA decision-making bodies will be tasked with the challenge of applying the newly codified principles in a consistent manner. For example, it will be interesting to see where the line is drawn when it comes to establishing the extent to which a player may have been subjected to "abusive conduct", pursuant to the amended article 14 - should a player who is sent to train with the reserve/B team always be regarded as being treated "abusively"?

In addition, the FIFA Players' Status Department will no doubt be under increased pressure now that it will also deal with enforcement of decisions pursuant to article 24bis.

It should be noted that article 24bis does not apply to other FIFA members such as coaching staff, who therefore will not enjoy the same level of protection as players and clubs.

Of course, the recent regulatory reform does not apply to agents either, who have famously been outside of FIFA's jurisdiction since 2015. Although this will likely change in the not too distant future, as agents may be included again among FIFA's members (and effectively be re-regulated).

There is no doubt that this significant step, together with other major changes such as the possible reform of the player loan system, would again require further dialogue between FIFA and its prominent stakeholders, FIFPro and ECA, to ensure that the interests of the various parties are duly taken into account.

If you have any questions relating to any aspect of this article, please feel free to contact us at info@lombardi-football.com