Introduction

1. This paper considers the principles for assessing compensation under the FIFA Status Regulations, in circumstances where a footballer’s employment contract is terminated unlawfully. Given the vast sums of money involved in the operation of the international transfer market, it is plainly a matter of considerable importance to clubs and players alike.

2. There is a widely held view amongst football fans that contracts of employment (certainly at the higher level of the professional game) are of little value. Fans are unsurprisingly annoyed and frustrated when star players, who are signed for colossal sums of money, agitate for a move away from their club only a relatively short period into the term of a lengthy contract. ‘Fan fatigue’, as regards the perceived inequality of bargaining power between clubs and their household name players, is prevalent.

3. Recent decisions emanating from the Court of Arbitration for Sport (“CAS”) have, however, emphasised the need for contractual stability within the world of professional football. It follows that players seeking to force a move away from their employer, during the currency of their employment contract, would be well advised to tread extremely carefully.
The FIFA Status Regulations: Article 17

4. Article 17 is entitled ‘Consequences of terminating a contract without just cause’. Paragraphs 1 and 2 of Article 17 provide as follows:

1. 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.

2. 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.

5. The “protected period” is defined as:

   “a period of three entire seasons or three years, whichever comes first, following the entry into force of a contract, where such contract is concluded prior to the 28th birthday of the professional, or two entire seasons or two years, whichever comes first, following the entry into force of a contract, where such contract is concluded after the 28th birthday of the professional.”

6. Paragraphs 3 – 5 of Article 17 concerns sporting sanctions which may be imposed on players and/or clubs who participate in the unlawful termination of a player’s employment contract.
7. Article 17 (1) provides that the payment of compensation is mandatory, in circumstances where an employment contract is terminated without just cause. The level of compensation is, however, a matter of discretion for the relevant decision maker. It is not subject to any mathematical formula, nor does Article 17 contain any guidelines regarding the order in which the “objective criteria” should be considered / applied in any given case, or the weight which should be attached to each of them.

8. The proper interpretation and application of Article 17 has been considered by CAS on a number of occasions. Although the approach adopted by CAS has been far from consistent, it is possible to identify an emerging jurisprudence pointing firmly towards the promotion of contractual stability within the game, and the legitimate expectation of clubs to be properly compensated for the (unfair and unlawful) loss of key assets.

Ortega v Fenerbache

9. In this litigation, CAS upheld a decision of the FIFA Dispute Resolution Service (“DRS”) that the Argentinean international (“O”) must pay $11 million in compensation to his former employer, F. Applying what was then Article 22 of the FIFA Status Regulations (replicated in essence by Article 17), CAS noted that the unlawful termination had occurred during the first year of the player’s four year contract. F had paid $2.5 million to Parma AC and $5 million to River

---

1 CAS 2003/0/482
Player in order to obtain the “federative rights” to O, in what was a somewhat complicated tripartite transfer. F had also incurred other expenses in the region of $2.85 million in order to sign O; these included tax payments, stamp duties, fees for bank guarantees and a substantial payment ($1.5 million) to acquire the player’s image rights. Under his contract with F, O was entitled to receive a salary of $1 million per season plus $2 million per season as compensation for his image rights.

10. Taking all of these factors into account, CAS upheld the decision of the DRS that O was liable to compensate F in the sum of $11 million for the unlawful termination of his contract. It is clear that the DRS viewed the timing of O’s termination very seriously – F had lost a player, in respect of whom it had paid a substantial sum of money to sign, after only nine months of his four year contract.

Mutu v Chelsea Football Club Limited\(^2\)

11. Romanian striker Adrian Mutu (“M”) was signed by Chelsea (“C”) in August 2003 for a fee of €22.5 million and entered into a five year contract with the club. On 11 October 2004, M tested positive for cocaine use. C treated this as a repudiatory breach of contract by M and terminated his contract on 28 October 2004. C claimed compensation for its losses sustained as a result of M’s gross misconduct.

\(^2\)CAS 2008/A/1644
12. CAS upheld the decision of the FIFA Dispute Resolution Chamber ("DRC") that M be required to compensate C in the sum of circa. €17 million. This amount corresponded to the unamortised portion of the €22.5 million transfer fee paid by C to Parma ($16.5 million), plus approximately €675,000 in respect of unamortised signing on fees and agency fees. In reaching its conclusion the DRC had taken into account “the massive financial investment made by Chelsea in order to secure the services of Mr Mutu”, and “the enormous damage suffered by Chelsea in terms of image, on account of the fact that one of its most popular players was tested positive to cocaine, with all the consequences related to social responsibility such as fans in general and grassroots in particular”. This was not, however, treated as a separate head of financial loss.

13. The circumstances of the following case were very different to those discussed above, concerning as it did the unlawful termination of a fixed term contract outside the protected period, and in circumstances where the departing player had given five years’ service to his employer. The material facts and the analysis of CAS are considered below.

**Heart of Midlothian v Webster & Wigan Athletic**

14. In March 2001, Andy Webster ("W"), a 19 year old central defender, was purchased by Hearts for a fee of £75,000. In July 2003, W signed a new four

---

3 CAS 2007/A/1298; 2007/A/1300
year contract with Hearts, which would terminate on 30 June 2007. During 2005 and 2006, W refused to accept offers of an extended contract. W was subsequently dropped from the squad and relations between him and the club (in particular, the club Chairman) deteriorated significantly. W considered that the decision to omit him from the squad was a cynical tactic designed to force him into signing a new contract with the club.

15. On 4 May 2006, W terminated his contract with Hearts. Three months later, he signed a three year contract with Wigan Athletic. Hearts claimed compensation in respect of W’s unilateral termination of his playing contract. W initially claimed that the termination was for “just cause” (namely the complete breakdown in relations between W and his employer), but this position was not maintained at trial.

16. The DRC ordered that W and Wigan were jointly liable to compensate Hearts in the sum of £625,000. The decision was appealed to CAS by both parties.

17. CAS held that the DRC’s decision was flawed. It was not possible to ascertain from the DRC’s judgment what method or figures it had used in reaching the conclusion that W and Wigan were liable to pay that particular sum.

18. CAS reviewed the list of “objective criteria” contained in Article 17. It held that the reference to “the law of the country concerned” does not require that compensation be determined by applying the domestic law governing the contract; it is merely one of the factors which may be taken into account in
assessing compensation. On the facts, CAS concluded that there were “several reasons not to apply the rules of Scottish law invoked by Hearts”. It noted that employment contracts for footballers are “atypical” and that it is important to consider “the particularities of the football labour market and the organization of the sport”. Article 17 was “adopted precisely with the goal of finding in particular special solutions for the determination of compensation payable by football players and clubs who unilaterally terminate their contracts without cause...”

19. CAS then considered what is meant by the “specificity of sport” criterion, stating at paragraph 67 that it is:

“...a reference to the goal of finding particular solutions for the football world which enable those applying the provision to strike a reasonable balance between the needs of contractual stability, on the one hand, and the needs of free movement of players, on the other hand, i.e. to find solutions that foster the good of football by reconciling in a fair manner the various and sometimes contradictory interests of clubs and players.”

20. The Panel emphasised that this “reasonable balance” required that Article 17 be interpreted and applied “in a manner which avoids favouring clubs over players or vice versa”.

21. CAS noted that Article 20 provides a specific legal basis for clubs to claim compensation for the money which has been invested in training and developing the departed player. Accordingly, these considerations could not come into play when assessing compensation under Article 17.
22. Hearts had originally signed W for a fee of £75,000 and sought compensation on the basis of the player’s current valuation, estimated to be in the region of £4 million.

23. The key part of the Webster judgment appears from paragraph 73 onwards. Several strong statements of principle are asserted by the Panel, which subsequently attracted a large degree of publicity and commentary. In the Panel’s view, there was “no economic, moral or legal justification for a club to be able to claim the market value of a player as lost profit”. Such an approach would “bring the system partially back to the pre-Bosman days...” and be “anachronistic and legally unsound”.

24. The Panel concluded that “From an economic perspective there is no reason to believe that a player’s value on the market owes more to training by a club than to a player’s own efforts, discipline and natural talent...”; and that “market value could stem in part from charisma and personal marketing”. In short, CAS could see no basis on which Hearts was responsible (wholly or principally) for the huge increase in W’s market value, since joining the club for a small fee in 2001, aged 19. The Panel further observed that the “objective criteria” listed in Article 17 (1) contain no specific reference to the transfer or market value of players. In the circumstances, CAS unhesitatingly rejected Hearts’ claim for compensation in the region of £4 million.
25. Not only was it impermissible to award compensation for “loss of profit”, Hearts was not entitled to be compensated for its “replacement costs”, i.e. the cost of replacing W with a player of comparable quality and experience.

26. The Panel held that W and Wigan were liable to compensate Hearts in the sum of £150,000. This was the “residual value” of W’s contract with Hearts, i.e. the total amount of wages outstanding under the fixed term contract. The Panel did not consider that it was appropriate to take into account the level of salary being paid to W by his new employer, concluding that such an approach would be “potentially punitive”. The Panel considered that its method of calculating compensation had the benefit of predictability, which was “in the interest of the football world”.

27. Furthermore, CAS considered that its approach to assessing compensation did indirectly account for the value of the player in question, on the basis that the better the player, the higher his wages, and the greater the amount of compensation which will be payable.

28. It may be said that the decision in Webster constituted the high water mark for players’ rights to freedom of movement. The implications of the decision were manifestly clear: players employed on a fixed term contract, and who had exceeded the protected period of the contract, could simply ‘buy out’ the remainder of their contract and join a rival club immediately (which may in turn agree to indemnify the player for the losses he sustains as a result). The innocent party would, according to Webster, have no claim to be compensated
for the loss of opportunity to obtain a substantial transfer fee for the player, or the costs associated with replacing him.

29. Because W had completed the full term of his initial contract of employment with Hearts, there were no ‘unamortised’ costs relating to his transfer that could be recovered by the club; in light of the small transfer fee, any such costs would in any event have been nominal.

30. Although training and development costs could potentially result in some compensation being awarded to the innocent party, this would have to be pursued under Article 20. Players should not be treated as commodities or company assets, and it was not permissible for clubs to seek compensation on that basis.

31. Unsurprisingly, this decision was greeted with a large measure of concern by clubs, and greeted as a welcome development by players’ associations. The President of FIFA, Sepp Blatter, stated that the decision was:

“...a Pyrrhic victory for those players and their agents who toy with the idea of rescinding contracts before they have been fulfilled.”

32. Notwithstanding the unequivocal statements of principle laid down by CAS in Webster, the approach of the Panel in that case has not been followed in subsequent disputes before CAS. It is clear from a number of more recent judgments that the pendulum has swung firmly back in favour of the innocent
contracting party, and that the consequences of unlawfully terminating an employment contract are far from predictable and potentially severe.

**FC Pyunik Yerevan v L, AFC Rapid Bucaresti & FIFA**

33. Judgment in this litigation was handed down by CAS on 26 May 2008, only five months after the decision in *Webster*. It did not, however, generate anything like the level of attention or coverage amongst the international sporting media; and it was not until *Matuzalem* (see below) that the ‘orthodoxy’ propounded in *Webster* was laid to rest.

34. In *Pyunik*, the player (referred to only as “L”) signed a three year contract on 1 March 2003. In August 2005, approximately six months prior to the expiration of the contract, L left the club without permission and refused to return, thereby terminating the contract. The club alleged that L’s conduct had been induced by AFC Rapid Bucaresti (“RB”).

35. CAS found that RB had successfully rebutted the presumption that it induced L to breach his contract with P. L was, however, liable to compensate P in the sum of $25,000.

36. P argued that the appropriate compensation figure should be $250,000, which was (it contended) the amount of money that other clubs were prepared to pay in order to buy L. CAS observed that “the jurisprudence of CAS is not strictly

---

4 CAS 2007/A/1358
consistent with regard to the issue whether a club can request the compensation for an opportunity of a transfer fee which went lost because of the breach of contract by the player”. On the facts, however, it concluded that this issue need not be determined, as there was no evidence to support P’s contention.

37. Significantly, however, CAS departed from the approach in Webster by taking into account the salary earned by L at his new club. Although the salary paid by P provided “some information with regard to the value of the services rendered by the Player to the Appellant”, that was “true to some extent only”. The Panel was very clear that “the loss of an asset can hardly be always just the equivalent of the sum of the amounts due to keep the right to use such an asset”.

38. L earned a salary of $25,000 for the first six months of his new contract with RB which, CAS concluded, was the appropriate measure of damages. This figure was substantially more than L would have earned in the final six months of his contract with P ($7,200). As regards the potential loss of a transfer fee, CAS did not rule this out as a head of compensation. However, it rightly concluded that an award of compensation “cannot take any unsubstantiated offer into consideration”.

39. Also of significance was the fact that CAS left open the possibility of claiming compensation for “economic damage suffered through the loss of the Player”, including the costs associated with replacing L.
40. Brazilian midfielder Matuzalem (“M”), Shakhtar’s captain and top scorer, unilaterally terminated his employment contract with the club (“S”) on 2 July 2007, and joined Real Zaragoza (“RZ”). M had signed a five year contract with S on 26 June 2004; he was therefore 1 week outside the protected period.

41. The DRC awarded S £6 million in compensation, pursuant to Article 17. S was dissatisfied with this decision and appealed to CAS. Upon a consideration of the relevant factors, CAS increased the amount of compensation payable by M and/or RZ to £11m.

42. In the Panel’s view, the purpose of Article 17 is:

“...basically nothing else than to reinforce contractual stability, i.e. to strengthen the principle of *pacta sunt servanda* in the world of international football, by acting as a deterrent against unilateral contractual breaches and terminations, be it breaches by a club or by a player...”

43. Interestingly, CAS did not refer to the need to balance the objective of contractual stability with the need to promote and/or protect players’ rights to freedom of movement between clubs.

44. CAS concluded that in order to calculate what level of compensation should be awarded under Article 17, the decision maker “will have to establish the...”

---

5 CAS 2008/A/1519; 2008/A/1520
damage suffered by the injured party”. In undertaking this task, the Panel held that the principle of “positive interest” / “expectation interest” will apply. It stated at paragraph 86 that a decision maker should:

“...aim at determining an amount which shall basically put the injured party in the position that the same party would have had if the contract was performed properly, without such contractual violation to occur. This principle is not entirely equal, but is similar to the praetorian concept of in integrum restitutio, known in other law systems and that aims at setting the injured party to the original state it would have if no breach had occurred.”

45. In addition to increasing the award of compensation by a substantial amount, CAS sent out a clear waning to any parties involved in the premature and unlawful termination of a player’s employment contract. The Panel stated at paragraph 89:

“...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...”

46. CAS calculated the “lost services of the value” of M in the region of €11.3 million. In contrast to CAS’ rejection in Webster of a market driven / commodities analysis, in Matuzalem the Panel acknowledged the “economic reality in the world of football”, stating that “services provided by a player are
traded and sought after on the market, are attributed an economic value and are – according to art. 17 FIFA Regulations – worth legal protection...”

47. The Panel considered that a number of factors were potentially of probative value in assessing the value of “lost services” to the innocent party, following an unlawful contract termination by a player. These included:

47.1 the amount previously paid by the innocent party to acquire the services of the player;

47.2 the amount offered by a third party to purchase the player, at a time when the player was under contract with the innocent party; and

47.3 the amount offered by a fourth party to purchase the player from a third party; and/or the player’s signing on fee (the player having joined the third party for no transfer fee, following the unlawful termination of his contract).

48. On 17 July 2008, approximately one year after joining RZ, M was transferred to Lazio pursuant to a loan agreement between the parties. The agreement contained an option clause, entitling Lazio to purchase M at the end of the loan period for a fee of between €13 – 15 million (the precise fee being dependent on
(a) whether Lazio qualified for the Champions League and (b) the outcome of the legal proceedings instituted by S against M and RZ).

49. Taking into account this agreement (i.e. the market value placed on M by RZ and Lazio), and the wages earned by M at both RZ and Lazio, CAS concluded that the services of M had, for a remaining duration of two years (i.e. the unexpired period of M’s contract with S), a value of approximately €13.7 million.

50. Importantly, at the point in time when Lazio entered into the option agreement with RZ, there were only two seasons remaining on M’s fixed term contract with RZ; in short, he was in the same contractual position as at the date of his departure from S. Assessing the value of M’s services on the basis of a proposed transfer fee would have been far less reliable in circumstances where M had (for example) four years remaining of a five year contract with RZ.

51. CAS then deducted from the above sum the amount which S was no longer obliged to pay M for the remainder of his contract, assessed at €2.4 million.

52. In addition to compensation for “lost services”, CAS awarded S an “additional indemnity” of circa. €600,000, which was equivalent to value of six months’
wages under M’s contract with S. M had unilaterally terminated his contract only a few weeks before the Champions League qualification round was due to begin. The Panel concluded that “the exact entity of the damage” caused by the timing of M’s departure could not be established, and it was therefore appropriate to award an additional indemnity on the terms set out above.

53. Accordingly, the total sum payable by M and/or RZ (who were jointly and severally liable under Article 17 (2)) was €11.9 million.

54. With regard to the costs of replacing M, S argued that it had been forced to purchase another midfielder, Mexican international Nery Albert Castillo, for €20 million; and that it should receive additional compensation for this expenditure. CAS rejected this argument. It held that S was:

“...not able to convince the Panel that the transfer of the player Castillo and the payments made for this transfer were linked to the gap left by the Player or that the costs of hiring the player Castillo have been somehow increased by the termination of the Player.”

**El-Hadary & FC Scion v FIFA & Al-Ahly Sporting Club**

55. In this case El-Hadary, the Egyptian national goalkeeper (“El-H”), signed a contract with Al-Ahly on 1 Jan 2007, which was effective until the end of the
2009/10 season. On 25 Feb 2008, El-H terminated his contract and subsequently sought to sign for FC Sion, a Swiss club.

56. The DRS initially awarded Al-Ahly compensation of €900,000. On appeal, CAS reduced the award to $796,500. In defining its terms of reference, CAS stated:

“...the Panel will aim at determining an amount which shall basically put the injured party in the position that the same party would have had if no contractual breach had occurred...”

57. Once again, the “positive / expectation interest” principle was given express endorsement, and CAS confirmed that the “objective criteria” listed in Article 17 are illustrative and not exclusive (thereby negating the effect of the Panel’s observations in Webster: see paragraph 24 above).

58. Significantly, CAS accepted that Al-Ahly had been deprived of the opportunity to obtain a transfer fee by El-H’s unlawful conduct. It stated that, in accordance with CAS’ decision in Matuzalem, this:

“...may be considered as a compensable damage heading if the usual conditions are met, i.e. in particular if it is proven that the necessary logical nexus between the breach of the unjustified termination of the agreement and the lost opportunity to realize a certain profit.”

59. On the facts of El-Hadary, CAS found that FC Sion had, prior to the unlawful termination, been willing to pay $600,000 to buy El-H. Accordingly, Al-Ahly had been unfairly deprived of this potential profit and was entitled to be
compensated for its loss. CAS further observed that this was the amount it would cost Al-Ahly to buy a player of analogous value from another club.

60. In addition to the figure of $600,000, CAS went on to consider how much it would cost Al-Ahly to pay a replacement goalkeeper of analogous value to El-H, for the remaining period of El-H’s contract. CAS assessed this to be $488,500, which was the amount of wages received by El-H at his new club (and substantially more than El-H was being paid by Al-Ahly at the date of termination).

61. CAS then deducted from this figure the amount of money saved by Al-Ahly, from not having to pay El-H for the remainder of his contract. Accordingly, the Panel concluded that $796,500 was the amount of money which would “allow Al-Ahly to go on the market and replace the Player with a player of analogous value”.

62. El-H’s breach took place within the protected period. Although CAS recognised that this would usually constitute an aggravating feature (justifying an increase in compensation), on the particular facts CAS did not consider that it would be appropriate to award any additional sum. CAS concluded that El-H’s “advanced sporting age” (he was 37 at the date of the hearing) and his “inevitably declining career” meant that any additional award would overcompensate Al-Ahly.
With regard to the “specificity of sport” criterion, CAS emphasised that it must not be used as a cloak for punitive damages or unjust enrichment, holding that:

“the factor of the specificity of sport must not be misused to compensate the injured party with an amount which would put such party in a better position than the one it would have if the termination had been mutually agreed...”

**De Sanctis v Udinese**

In this case, Italian goalkeeper Morgan de Sanctis (“De S”) signed a new 5 year contract with Udinese (“U”) on 1 July 2005. De S was a long-standing servant of U and had originally joined the club from Juventus in July 1999. De S terminated the contract on 8 June 2007, following an approach by Sevilla; and signed a 4 year contract with Sevilla on 10 July 2007.

When the case came before CAS, the Panel stated that replacement costs seem a “logical place to start” in the assessment of compensation under Article 17.

When faced with De S’s premature departure from the club, U took the following remedial action: first, it recalled its young goalkeeper, H, from a loan spell at Rimini. This resulted in the loss of a transfer fee of €1.2m (which Rimini had agreed to pay upon the expiry of the loan period) and expenditure of €250k, which U was required to pay Rimini as a consequence of its termination of the loan / permanent transfer agreement.

---

7 CAS 2010/A/2145, 2146, 2147
67. Secondly, U considered that H was too inexperienced to be an immediate direct replacement for De S, and so also signed a 37 year-old goalkeeper, C, on a free transfer.

68. CAS accepted that U’s conduct in seeking to mitigate its losses (following De S’s unlawful termination) was reasonable and awarded compensation for these direct replacement costs. Including wages payable to H and C, these replacement costs were assessed at €4.5 million. CAS then deducted from this sum the figure of €1.6 million, to account for savings made in respect of De S’s wages for the remainder of his contract.

69. No evidence was put forward by U that any offers to buy De S were either on the table or pending, at the time of the termination. Accordingly, no additional compensation was awarded for loss of a prospective transfer fee.

70. Surprisingly, no detailed or expert evidence was put forward by U as to the cost of replacing De S with goalkeeper of comparable value (C and H plainly did not fall within this category). Nevertheless, CAS elected to award an additional sum under the “specificity of sport” criterion. CAS stated that this criterion:

“...is not an additional head of compensation nor a criteria allowing to decide in equity, but a correcting factor which allows the Panel to take into consideration other objective elements which are not envisaged under the other criteria of Art. 17...”

(Emphasis added)
71. CAS was not convinced that U’s direct replacement costs had “fully compensated [it] for the loss it suffered as a result of the breach”. It further concluded that the club’s replacement strategy “was a factor that is specific to football and sport in general, that is the effect it will have on the fans and sponsors...”, and stated:

“The panel believes that at any club, when a key player is sold or goes and time is required for a new “hero” to materialise, revenues will be affected, the injured party will suffer losses which it may not be able to prove in Euros. This...is where the specificity of sport can be used and should be used.”

72. Although the FIFA Status Regulations provide no express guidance as how compensation should be calculated under this head, CAS referred to the commentary to the Regulations, which includes as a footnote on the specificity of sport:

“...This additional compensation may, however, not surpass the amount of six monthly salaries...”

73. CAS therefore assessed the “additional indemnity” in the sum of €690,789, which was equivalent to 6 months’ remuneration under De S’s new contract of employment (with Seville).

74. It is interesting to note that CAS elected not to award compensation based on the transfer fee (€1.5 million) which Napoli paid to purchase De S from Sevilla approximately two years after his premature departure from U. Although not ruling out the possibility of taking into account (as a relevant factor) what did in
fact transpire during the lengthy period of time between the breach of contract and date of trial, CAS noted the considerable uncertainties and potential unfairness which could arise as a result (see in particular paragraph 85 of the judgment).

**Appiah v Fenerbahçe**

75. Ghanaian international midfielder Stephen Appiah (“A”) was signed by Fenerbahçe (“F”) in July 2005 for a sum of €8 million. The contract was for a fixed term of four years, and included a €250,000 signing on fee.

76. In January 2007, A suffered a knee injury during a friendly match. The symptoms persisted and in March 2007 A was diagnosed with a cartilage problem which required surgery. A elected to delay the surgery until the end of the season, and F won the league. A underwent surgery on 24 May 2007 and, following a course of physiotherapy, resumed playing in October 2007.

77. During the post-operative period, however, A reported significant problems with shortness of breath and general fatigue. By December 2007, A’s health was not improving and he was referred back to hospital. Following a medical assessment in January 2008, A was diagnosed with a severe venal thrombosis in the left inferior artery. The doctors recommended treatment and “non-competitive physical activity”.

---

8 CAS 2009/A/1856 and 1857
78. In the months which followed, a serious communication breakdown between the parties took place. There was, for example, confusion over the process of de-registering A from the first-team squad for Champions League matches (in light of his injury and the applicable quota on non-EU nationals).

79. Ultimately, F treated the contract as having come to an end at the end of the 2007/08 season, in light of A’s persistent and unjustified absence from the club. A contended that there was just cause for the termination, arguing that F had failed to fulfill its contractual obligations to him. Both parties sued the other for compensation.

80. The DRC concluded that A had terminated the contract without just cause, contrary to Article 17, and ordered him to pay €2.3 million in compensation to F. A appealed to CAS and F cross appealed, claiming that the damages should have been assessed in the region of €12 million.

81. CAS overturned the decision of the DRC, concluding that although the contract had been terminated by A without just cause, he was not liable to pay F anything. Following the termination of his contract with F, A did not again play professionally until November 2009, when he signed a one year contract with Serie A club Bologna (i.e. five months after his contract with F would have expired).

82. On the basis of the medical evidence before it, the Panel was satisfied that A had not been in a condition to play professionally, without exposing himself to
major health complications, throughout the whole of the period January 2008 to (at the very least) June 2009.

83. In those “exceptional circumstances”, the DRC had failed properly to take into account the fact that A would not have been able to play for F for the remainder of his four year contract, had the contract remained in force. By unilaterally terminating the contract, A had in fact saved F the expense of paying an injured player for a substantial period of time.

84. Accordingly, CAS found that the amount of money saved by F (through not having to pay A for the remainder of his contract) exceeded the amount of F’s unamortised transfer costs by approximately €137,000. Accordingly, F’s (valid) claim for compensation had been extinguished by the financial benefit it enjoyed as a consequence of the unlawful termination.

85. Replacement costs were not recoverable because F would have had to replace A in any event, due to his long-term injury. As regards F’s alleged loss of commercial revenues flowing from the unlawful termination, no evidence was adduced by F to corroborate its claim under this head.

86. CAS elected not to order any “additional indemnity” by reference to the specificity of sport criterion. It recognised that A had not only suffered significant financial loss (as a result of foregoing his contractual entitlement to a monthly salary of €200,000), but also physical damage. It had been established that A’s injury “caused him irreparable harm and kept him away from the
football scene for a period of over 18 months...” In all the circumstances, therefore, CAS concluded that the appropriate order was one of nil compensation.

**Conclusion**

87. A number of key principles can be identified from those decisions of CAS which have post-dated *Webster*, and which involved a fundamentally different approach to the assessment of compensation for contract breaches. These may be summarised as follows:

(i) Unlawful contract terminations during the protected period will be viewed more seriously and generally result in higher awards of compensation;

(ii) Compensation under Art. 17 is not limited to the residual value of the player’s contract;

(iii) The ‘positive / expectation interest’ principle is applicable;

(iv) The sums earned by a player at his new club will be a relevant consideration when assessing the value of lost services;

(v) Reasonable replacement costs are recoverable: both immediate costs (e.g. urgent loan cover) and those incurred in the longer term - subject to the court’s discretion;
(vi) Loss of future transfer fees can, in principle, be recovered (although persuasive evidence will be required);

(vii) Loss of sponsorship / shirt sales etc. may form part of the losses arising directly from the breach;

(viii) The specificity of sport is a “correcting factor”, which permits a decision maker to augment an award in circumstances where concrete statistical evidence as to (certain types of) financial loss cannot be adduced;

(ix) Parties may make express provision as to termination payments in the contract itself;

(x) However, precise drafting is particularly important, in order to stay on the right side of the liquidated damages / penalty clause dividing line;

(xi) Any award of compensation will be reduced to take into account the savings made by the innocent party as a result of the unlawful termination (most obviously, the cost of the player’s wages for the remainder of the contract).

88. The CAS decisions which post-date Webster have emphasised the wide margin of discretion which is afforded to decision makers. Provided that appropriate criteria have been taken into account (which, it is important to remember, are not limited to those specifically listed in Article 17 (1)), the weight to be
attached to each factor is a matter for the decision maker and will be difficult to challenge on appeal.

89. The recent jurisprudence of CAS emphasises the overriding need to promote contractual stability in professional football. Players who do not wish to be ‘tied in’ to a long term contract should negotiate shorter deals. Players who are willing to sign lucrative contracts, in return for giving their employer a contractual commitment for a fixed term of several years, can reasonably be expected to comply with their side of the (freely entered into) commercial bargain. Failure to do so is likely to result in substantial adverse implications, both in terms of financial and sporting sanctions.

90. The ‘positive interest /expectation’ principle is a sensible rationale for the assessment of compensation under Article 17 and (compared with the approach adopted in Webster) provides in my opinion a more equitable balance between the competing interests of the contracting parties.

ANDREW SMITH
MATRIX CHAMBERS

6 July 2011
asmith@matrixlaw.co.uk

Matrix,
Griffin Building,
Gray’s Inn,
London
WC1R 5LN