Introduction

• Harper Macleod LLP
• All service law firm
• Scotland’s leading sports law firm
• Involvement in sport, in all shapes & sizes
  – Glasgow 2018 European Championships
  – Glasgow 2014 Commonwealth Games
  – Scottish Rugby Union
  – sportscotland
  – SPFL
• Senior Partners: Professor Lorne Crerar & Rod McKenzie
Agenda

• 1980s – 1995
• *Bosman*
• History of FIFA Regulations on the Status and Transfer of Players
• Terminating a contract without just cause
• Transfer compensation
• Arguments for and against the current transfer system
Structure of Decision Making within Football

- FIFA
- Confederations
- National Associations
- Clubs & Players
Governing Football Transfers

• FIFA Regulations on the Status and Transfer of Players
• Compulsory set of rules rolled out worldwide
• Why?
  – Certainty
  – Equality
  – Uniformity
• Applied by National Associations
• Provides the backdrop for the transfer market as we know it today
• Very first set of regulations implemented
• UEFA not FIFA
• Principles of Co-operation between Clubs of Different National Associations of the EEC Countries
• Expiry of existing contract rule
• Maximum transfer fee of 5m Franc
1991

- No other Regulations governing transfers up until this time
- April 1991 – FIFA steps in
- International Regulations governing the Status and Transfer of Players
  - Applied to all participants in football – amateurs & non-amateurs
  - Compensation compulsory in case of transfer of player between clubs from different national associations.
- Expiry of contract rule
  - 6 months (exception)
Bosman Case

- Union Royale Belge des Societes de football association v Jean Marc Bosman [1995] ECR I-4837
- Huge impact on international football world
- One of the most important sports cases in relation to EU law
- Court of Justice of the European Union
  - Sport, just like any other economic activity, is subject to European law
  - FIFA’s transfer system incompatible with EU law.
Article 45 TFEU

EU Citizens have the right to live and work freely in any EU Member State without being discriminated against on the grounds of nationality.
Background to *Bosman*

- Jean Marc Bosman
- Professional player for RC Liege
- April 1990 – refused to sign new contract with the club
- Placed on transfer list
- Transfer agreement between Bosman, RC Liege & Dunkerque
- RC Liege pulled out of agreement
- Bosman starts proceedings in Belgian Court
- Belgian Court refers to CJEU
Bosman and CJEU
Bosman and CJEU

- 2 main arguments
  - Legality of requiring and receiving payment of a transfer fee upon the transfer of a player to a new club, after his contract has expired.
  - Provisions that restrict the number of foreign players in national football competitions (3+2 Rule)

- Does European Law prohibit the above rules?
- Article 45 – Freedom of Movement of Workers
Article 45 TFEU – 4 Step Test

1. Is the rule a restriction on a worker’s freedom of movement?
2. If yes, can it be justified objectively?
3. Is the rule effective in promoting the objectives pursued?
4. Is the rule a proportionate means of pursuing the objective?
Issue 1: Is FIFA’s transfer system (in respect of fees once contract expired) a breach of Article 45?

- Rule with regards to transfer fees clearly restrictive
- But is it justified?
  - UEFA and Belgian Football Association say yes:
    - Maintains financial and sporting balance between clubs
    - Transfer fees represent compensation for clubs involved with training player
- CJEU acknowledged it was a legitimate aim but not appropriate means
Issue 2: Was the foreign quota rule (3+2 rule) a violation of Art. 45?

- The Rule was clearly restrictive in terms of freedom of movement
- But is it justified?
  - UEFA said yes
    - Maintained traditional link between club and country
    - Ensued sufficient pool of nationally qualified players playing in country’s top league to feed its national team
    - Maintained competitive balance between clubs by preventing the richest clubs from acquiring best players
Bosman – 4 Step Test

• CJEU Response
  – It is not necessary for the organisation of football for a club to have a link with the country, region or city/town that it is based
  – A player can be selected to play for his country no matter where he is based and what club he is playing with
  – Rich clubs will still be able to buy the best players, regardless of the foreign quota rule. The rich clubs will be able to hoard the best players but not field them all at once
Bosman – Summary of CJEU Judgement

- Professional football constitutes economic activity
- Professional football is therefore subject to community law
- Obliged to adhere to basic legal principles
- Right of employees within Europe to freedom of movement
- Can be no limitation on foreign players for Member States in EU
- Demand of transfer fee when player contract has expired violated freedom of movement of workers and people
Bosman video

- https://www.youtube.com/watch?v=Fa8pdSdzDm4
Bosman – The Aftermath

• Regulations required to be brought into line with Bosman
• Bosman marked beginning of greater intervention from the European Commission (EC)
• FIFA Goals
  – Protect contractual stability, status of transfers & training facilities
• EC Goals
  – Protection of minors
  – Appropriate Dispute Resolution Mechanisms
  – Ensuring that the new rules are compliant with EU law
2001

- Agreement reached between FIFA and the EC
- FIFA’s Regulations on the Status and Transfer of Players
  - Mixture of strict requirements imposed by EC and FIFA’s own goals
  - Also known as the Monti Rules
- Introduction of 3 new rules led to the agreement
  - Minimum and Maximum duration for player contracts
  - Introduction of two registration periods
  - Protection system for the international transfer of minors
- FIFA Dispute Resolution Chamber (DRC)
2005

- First revisions since 2001
  - New user friendly structure
  - Introduction of 5 technical annexes
  - DRC Judge
  - First registration period reduced from 12 weeks to six weeks
  - Restrictions to what constitutes sporting just cause
  - Changes to provisions in relation to the transfer of minors
2008 – Third Party Influence

- Introduction of Article 18bis

No club shall enter into a contract which enables another party to that contract or any third party to acquire the ability to influence employment and transfer-related matters, its independence, its policies or the performance of its teams

- Binding on a national level
- Required to be implemented verbatim in national regulations
• New strict monitoring in relation to the transfer of minors
  – Sub Committee of Players’ Status Committee
  – Responsible for checking every single international transfer of a minor
  – Must be approved by the Committee
  – Also charged with checking every first registration
2010 – FIFA Transfer Matching System

• Introduction of FIFA Transfer Matching System (TMS)
  – Online System
  – Mandatory for international transfers
  – Optional platform for domestic transfers
  – All relevant transfer data input in system
  – Produces data reports
  – Video: https://www.youtube.com/watch?v=Nl7aifZYVrw
2015

- Introduction of Article 18ter – Third Party Ownership Prohibition

*Clubs and players entering into agreements with third parties in which the third party is entitled to participate in compensation payable in relation to the future transfer of a player, or is assigned certain rights in relation to a future transfer or transfer compensation*

- Binding at national level
- Must be included in national regulations, without amendment
2015

- **Transfer of Minors**
  - Age limit for which an International Transfer Certificate is required is reduced from 12 to 10
  - Any player who is aged 10 and above must receive approval from FIFA

- **Introduction of Overdue Payables provision**
  - Stronger system to protect players and clubs
  - Wide scope of powers for DRC and Players’ Status Committee
  - Formal adaptations to take into account new Intermediaries rules
  - All training compensation claims must be submitted through FIFA TMS
• Transfer of Minors
  – Formally implements ‘five year’ rule to bring rules into line with the jurisprudence of FIFA DRC
    • Minor living continuously in a country in which he is not a national for a period of five years, immediately prior to registration
Termination of a player contract without just cause
Termination of a player contract without just cause

Article 13 FIFA RSTP

A contract between a professional and a club may only be terminated upon expiry of the contract or by mutual agreement.

Article 17 FIFA RSTP

A contract may be terminated by either party without consequences of any kind where there is just cause.
Termination of a player without just cause

- So what if a contract is terminated without just cause?
  - No definition of ‘just cause’
    - Factual circumstances important
  - Sanctions also provided for under Article 17 FIFA RSTP
    - Sporting sanctions
    - Financial Compensation
  - Protected Period also determines whether sporting sanction will apply
    - 3 entire seasons or 3 years (whatever comes first) if player contract concluded prior to player’s 28th birthday
    - 2 entire seasons or 2 years if concluded after 28th birthday
Heart of Midlothian v Andy Webster & Wigan Athletic
Heart of Midlothian v Andy Webster & Wigan Athletic

- Andy Webster – Professional player at Heart of Midlothian
- Disagreement with owner of club and benched
- Webster unilaterally terminates contract (May 06)
- Contract terminated outside protected period
  - No sporting sanctions
- Webster signs new contract with Wigan Athletic (August 06)
Heart of Midlothian v Andy Webster & Wigan Athletic

- Scottish FA refused to issue ITC to English FA
- Wigan reports grievance to FIFA & is granted provisional registration
- Hearts submit claim to FIFA DRC
  - Compensation and playing ban
- How should compensation be calculated?
- Jointly and severally liable?
- FIFA DRC Decision:
  - £625,000 compensation to Hearts
  - No sporting sanction (article 17.3)
Heart of Midlothian v Andy Webster & Wigan Athletic

- All parties appeal to the Court of Arbitration for Sport (CAS)
- How do you calculate the compensation owed?
  - Due consideration to national law
  - Specificity of sport
  - Considering objective criteria
- What is objective criteria?
Objective Criteria

• Article 17.1 gives us a clue:

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 and whether the contractual breach falls within a protected period.
Heart of Midlothian v Andy Webster & Wigan Athletic

• CAS Decision
  – No economic, moral or legal justification for club to claim market value
  – Remuneration & benefits under player’s new contract also not appropriate
  – Difference between value of old & new contract also not appropriate
  – Remaining remuneration owed to player at date of termination of old contract deemed to be most appropriate way to calculate compensation
  • £150,000
Matuzalem
Matuzalem – Termination of Contract

- Matuzalem Francelino da Silva under contract with Shakhtar Donetsk
- Star player & Captain
- Contract contains a release clause (€25m)
- Matuzalem unilaterally terminates contract 2 weeks before CL campaign
- Thereafter, signs for Real Zaragoza
Matuzalem – Termination of Contract

• Shakhtar Donetsk file compensation claim with FIFA DRC
  – Seek £25m as per release clause

• FIFA DRC Decision
  – Release clause not valid for calculating compensation
  – No liquidated damages clause within the contract
  – What about Webster decision?
    • Other criteria must be considered too!
Matuzalem – Termination of Contract

• Criteria to be considered:
  – Outstanding remuneration owed to player at date of termination
  – Non-amortised expenses incurred by club in securing services of player
  – Other benefits due to player under previous and new contract
  – Specificity of sport
    • Sports related damage caused to club by player’s departure
  – The impact of the serious disrespect of good faith
    • Player’s behaviour and individual circumstances
Matuzalem – Termination of Contract

• FIFA DRC Decision
  – Termination was without just cause
  – Compensation due
  – €6,800,800 owed by Matuzalem to Shakhtar Donetsk
  – Real Zaragoza jointly and severally liable
  – Termination was outside protection period so no sporting sanctions

• All parties appealed to the CAS
  – Keep in mind the CAS decision in Webster that was only one year earlier
Matuzalem – Termination of Contract

• CAS Decision
  – Stresses players do not have free pass to unilaterally terminate their contractual obligations, once protection period expires
  – Agrees with FIFA DRC points on criteria to be considered
  – Goal of ‘positive interest’
  – CAS also takes into account
    • Potential future transfer sum given Lazio loan
    • Deductions for remaining player salary on old contract
  – Award: €11,858,934
Training Compensation
What is training compensation?

• FIFA RSTP regulate the sum of compensation due to clubs for training and education of former players.

• Incentive for clubs to provide quality training and create solidarity amongst clubs.

• Article 20 RSTP
  
  – *Training compensation must be paid to a player’s training clubs when a player signs his first contract as a professional and on each transfer of a professional until the end of his 23rd birthday.*

• Not to be confused with Article 21 RSTP – Solidarity Payment.

• Is the training compensation system EU proof?
Olivier Bernard
Olivier Bernard – Training Compensation

• 1997
  – French player, Olivier Bernard signs youth contract with Lyon for 3 seasons
  – Special rule concerning youth contracts in France
    • Article 23 French Charter – joueur espoir

• 2000
  – Lyon offers Bernard professional contract in July 2000
  – Bernard declines and signs first professional contract with Newcastle Utd
Olivier Bernard – Training Compensation

- Employment Tribunal in France
  - Lyon claims €55,357 in training compensation
    - Said to be value of contract with Lyon
  - Tribunal awards €22,867
- Decision appealed to Court of Appeal in Lyon
  - Was Article 23 a violation of EU law?

*The obligation on a player at the end of his training, to sign a professional contract with a club that had provided the training, and that also prohibited the player from signing such a contract with a club in another member state of the EU, was in violation of the free movement of workers.*
Olivier Bernard – Training Compensation

• Lyon appeals again – Court of Cassation
• Interpretation issues: Article 23 French Charter
  – Was Article 23 a complete restriction or a deterrent?
  – Was Article 23 pursuing a legitimate aim? (4 step test)
  – Is it proportionate? Salary calculation not training costs
  – Refer to CJEU for opinion
Olivier Bernard – Training Compensation

• CJEU Decision
  – Article 23 of French Charter was a restriction on freedom of movement of workers
  – HOWEVER:
    – Scheme that compensates clubs for training can be acceptable if:
      • Proportionate & necessary – sum calculated on true training costs
      • Specific characteristics of football
      • Serves a social and educational function
  – Article 23 was deemed not proportionate or necessary
  – FIFA’s training compensation system likely to be justified
Wilhelmshaven case – Training Compensation
Wilhelmshaven case – Training Compensation

• Professional player with dual nationality: Italian & Argentinian
• Played amateur with two Argentinian clubs
• Player signed first professional contract with German club, SV Wilhelmshaven
• No contract offered by Argentinian clubs
• Both Argentinian clubs claimed training compensation
• German club refused to pay compensation
If the former club does not offer the player a contract, no training compensation is payable unless the former club can justify that it is entitled to such compensation. The former club must offer the player a contract in writing via registered post at least 60 days before the expiry of his current contract. Such an offer shall furthermore be at least of an equivalent value to the current contract. This provision is without prejudice to the right to training compensation of the player’s previous club(s).
Wilhelmshaven Case – Training Compensation

- Argentina clubs submit claim to FIFA DRC
  - DRC rules that Wilhelmshaven is to pay compensation
  - Wilhelmshaven still refuses and appeals to the CAS
- CAS upholds FIFA DRC decision – Compensation is due
  - Wilhelmshaven still refuses
- FIFA takes action against Wilhelmshaven
  - Additional fines
  - Docked 6 points
  - Forced relegation
Wilhelmshaven case – Training Compensation

• Wilhelmshaven takes case to German Court

• Argument:
  – FIFA’s training compensation rules were contradictory to EU law
  – Article 6 of Annex 4 applied to EU player transferring from non-EU country and not just EU-EU

• Decision in favour of Wilhelmshaven

• Highest German Civil Court also ruled in favour of Wilhelmshaven
What would the impact be on football’s key stakeholders if the current transfer system disappeared?
FIFPro Argument

• 2015 – Files competition complaint with European Commission
• Arguments for the complaint
  – Fails to protect players from abuses of labour contracts
  – Harms the interest of players
  – Commercial abuse by third party owners and agents
  – Prevents clubs from competing to acquire the best sporting talent
  – Harms small & medium sized clubs
• Video: https://www.youtube.com/watch?v=9x9jYl
Impact on Clubs

- Current transfer system encourages the recruitment & training of young players
- Ensures downstream financial flows especially to mid-tier football clubs who benefit from transfer activity

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<th>#</th>
<th>Team</th>
<th>Expenditure</th>
<th>Income</th>
<th>Net</th>
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<th>Expenditure</th>
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Source: transfermarkt.de (2010/11-2014/15 season; incl. loans)
Impact on Clubs

- Abolishing transfer fees will not rectify the rich club status quo
  - Will still be able to offer largest salary packages
  - No financial benefit to former clubs
- Long term squad stability
- Fan engagement
  - Fans expect stable squads
  - Identity and loyalty with their team
Impact on Players – Benefits of Transfer System

• 2013 Study on Transfers found that between 1995 and 2011
  – the number of transfers has been multiplied by a factor of 3.2, and
  – the total value of transfer fees by a factor of 7.4

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<tr>
<th>Year</th>
<th>Number of transfers</th>
<th>Value (€)</th>
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<td>1994-95</td>
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<td>1999-2000</td>
<td>8,531</td>
<td>€1,704,603,000</td>
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<td>2005-06</td>
<td>15,952</td>
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<td>2010/11</td>
<td>18,307</td>
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Estimation of the weight of transfers in Europe, 94/95, 99/00, 05/06, 10/11 seasons (source: CDES).
Impact on Players – Benefits of Transfer System

- Would majority of players be worse off if there was no transfer system
  - Only the top players would benefit?
  - Players lacking such talent would obtain less favorable conditions in terms of salary, duration, protection and forced mobility
- Investing time and money in youth talent would be less attractive
- Current protection of players’ rights stipulated in FIFA RSTP goes beyond employment law
  - Work permit, medical examination, teams bear risk of injury, just cause required for club to terminate
  - Maximum duration of contracts of minors
Conclusion

- Since 2013, several changes have been introduced in the FIFA Regulations:
  - Better enforcement in case of overdue payables: fast track procedure and severe sanctions, incl. for repeat offenders (12bis proceedings)
  - Prohibition of Third Party Ownership (TPO)
  - Better dispute resolution procedures (single judges, fast track procedures, deadlines & extensions for exchange of submissions etc.)
  - FIFA Transfer Matching System (TMS)

- Room for improvement remains
  - Overdue payables
  - UEFA Financial Fair Play

- Getting rid of transfer system not the answer
Contact details

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THANK YOU