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Dear ECA Members,

Here at ECA we take your feedback and suggestions on the services we provide with great pride and attention.

Many of you will remember the ECA Legal Bulletin, our annual publication designed to provide you with useful and practical information regarding football law matters. As part of our revamp of ECA Legal Services, some of which have already been launched, with others in the pipeline, it's my pleasure to introduce you to the new ECA Legal Journal, which will be a key pillar in our new programme of legal activities.

Based on your feedback and legal needs, this Journal will have a different structure than its predecessor and will be more recurrent, with volumes being released in November and May of each year.

It will be divided in two parts: the first one containing articles from ECA's in-house counsels and guest authors, with the second comprising the most recent and relevant jurisprudence from the newly established FIFA Football Tribunal, the Court of Arbitration for Sport and/or the Swiss Federal Tribunal. Relevant domestic caselaw will also be monitored and referred to whenever appropriate.

The ECA Legal Journal, together with the frequent Legal Alerts (which we launched last year), have the overall objective to provide you with the most up-to-date information and relevant judgements, so you can take the most informed day-to-day business decisions possible.

In this first volume, it was impossible for our authors not to talk about the COVID-19 pandemic. You will, therefore, find an article about the contractual disputes originating from the pandemic and the first findings of the FIFA DRC. Likewise, you will find articles related to Third Party Investment, Article 17 RSTP and the Swiss law concept of loss of chance, as well as some useful and important tips related to proceedings before the Court of Arbitration for Sport. In the jurisprudence section, you will find cases covering a wide range of topics, ranging from issues related to the jurisidiction of FIFA's deciding bodes to unilateral extension options and the calculation of compensation de to a club on the basis of Article 17 RSTP.

I trust that this new ECA publication will be of significant added value to our Member Clubs and their legal teams. In the meantime, our Legal Department will continue to work on developing the legal services that we offer to our members for the benefit of our entire ECA community.

As ever, our Legal Team and entire administration remains at your disposal to assist your clubs in any way we can.

Yours sincerely,

Charlie Marshall
ECA CEO

I. DOCTRINE

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DOCTRINE

Article 17(1) RSTP and recoverability of the loss of a chance under Swiss Law

By Marco Vedovatti and Tim Isler, Schellenberg Wittmer[69]

Introduction

FIFA introduced Article 17 of the FIFA Regulations on the Status and Transfer of Players **(RSTP)** in 2001 with the aim of fostering contractual stability (i.e. pacta sunt servanda, also called "sanctity of contract") in international football[70]. Article 17 RSTP was then modified four times and in June 2018, FIFA adopted the version of Article 17 RSTP currently in force[71].

Much has been written about Article 17 RSTP since its adoption as to how compensation must be calculated in the event of a unilateral termination of the contract without just cause (Article 17(1) RSTP) . Case law of the Court of Arbitration for Sport **(CAS)** has also come into play concerning how to construe Article 17(1) RSTP, evolving from the residual value approach in the WEBSTER case[73], to a positive interest approach in the MATUZALEM case in 2009[74].

That said, does Article 17(1) RSTP allow for a claim to be made for the loss of a chance? What does loss of a chance mean under Swiss law? Is it recoverable under Swiss law? In this Article, the authors reflect on the meaning of Article 17(1) RTSP under Swiss Law, and namely whether Article 17(1) RSTP allows a party to recover the loss of a chance.

Compensation criteria under Article 17(1) of RSTP

According to Article 17(1) RSTP:

> *"The following provisions apply if a contract is terminated without just cause:*
>
> *"1. **In all cases,** the party in breach s**hall 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*

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70. FERRER Lucas, 17 Years of Article 17 RSTP: An Overview, in: Football Legal, The international journal dedicated to football law, 9/2018, p. 42.

71. For the RSTP version currently in force see https://digitalhub.fifa.com/m/b749cc4c9afcbf56/original/qdjmoxn91xciw41tojii-pdf.pdf (last access on 23 August 2021. The RSTP version 2021 did not modify Article 17 RSTP.

72. GRADEV Georgi, The application of loss of chances, player's market value, replacement costs, and specifity of sport criteria under Art. 17 RSTP in CAS jurisprudence, in: Football Legal, The international journal dedicated to football law, 13/2020, pp. 198 et seqq.; KAISER Martin, Rechtliche Überlegungen zur Vertragskündigungen eines Spielers gemäss Art. 13 ff. des FIFA Reglements bezüglich Status und Transfer von Spielern (RSTS), Unter Berücksichtigung der Rechte und Pflichten des Arbeitnehmers betreffend vorzeitige, einseitige Beendigung eines Arbeitsvertrages gemäss Art. 337 ff. OR, in: Jusletter 23 Mai 2016; ONGARO Omar, Maintenance of contractual stability between professional football players and clubs – the FIFA regulations on the status and transfer of players and the relevant case law of the dispute resolution chamber, in: European Sports Law and Policy Bulletin, Contractual Stability in Football, Sports Law and Policy Centre, 1/2011, pp. 27-68; PARRISH Richard, Contract stability: The case law of the court of arbitration of sport, in: European Sports Law and Policy Bulletin, Contractual Stability in Football, Sports Law and Policy Centre, 1/2011, pp. 69-94; ROUMELIOTIS Panagiotis C., Automatic joint liability mechanism of Article 17 FIFA RSTP re-visited, April 2020.

73. CAS 2007/A/1298, 1299 & 1300 Webster & Wigan Athletic FC v. Heart of Midlothian, award of 30 January 2008, paras. 152 to 153.

74. CAS 2008/A/1519 FC FC Shakhtar Donetsk v. Matuzalem Francelino da Silva & Real Zaragoza SAD & FIFA & CAS 2008/A/1520 Matuzalem Francelino da Silva & Real Zaragoza v. FC Shakhtar Donetsk & FIFA award of 19 May 2009

*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 whetherthe 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 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." (emphasis added)

Article 17(1) RSTP does not specifically mention the loss of a chance. Assuming that Swiss law applies, does it allow to recover the loss of a chance? The authors deem appropriate to first explain how the concept of loss of a chance is dealt with under Swiss law, before addressing whether the loss of a chance may be recoverable under Article 17(1) RSTP.

Swiss Contract Law

General Provisions

Under Swiss law, Articles 97 to 109 of the Swiss Code of Obligations **(CO)** govern the general conditions for contractual liability.

In addition to a fault and a contractual breach, first there must be a **loss or damage**. Swiss law defines it as an involuntary reduction of the assets, which may consist of a reduction of assets or an increase of liabilities *(damnum emerges)* or in lost profits *(lucrum cessans)*[75]. According to the prevailing and applicable theory of difference (*Differenztheorie, principe de la différence)*, the current status of the damaged party's assets at the time of the termination is to be compared with the status that the assets would have had, had the damaging event not occurred.[76]

75. Decision of the Supreme Court 129 III 331, p. 332 para. 2.1. SCHWENZER Ingeborg/FOUNTOULAKIS Christiana, p. 86 Fn. 14.03.

76. SCHWENZER Ingeborg/FOUNTOULAKIS Christiana, p. 86 Fn. 14.03.

According to Article 42(1) CO, the burden of proving the damages incurred lies with the party claiming them. Where the exact value of damages cannot be quantified, the adjudicating body shall estimate the value at its discretion in the light of the normal course of events and the steps taken by the person suffering damages (Article 42(2) CO). It follows that, based on the theory of difference, damages are recoverable under Swiss law only if they are certain[77].

In relation to the calculation of damages, Swiss law distinguishes between **positive interest and negative interest.** The positive interest – also called "positive interest in the performance of the contract" – aims at putting the aggrieved party in the situation as if the contract had been correctly performed. Compensation thus equals the difference between the current financial situation of the aggrieved party and the hypothetical situation in which the aggrieved party would have been had the contract been correctly performed. Positive interest therefore includes the loss sustained (damnum emergens) and loss of profits (*lucrum cessans*)[78]. On the contrary, negative interest – also called "negative interest in the entering into the contract" – places the aggrieved party in the situation as if the contract had never been concluded[79]. Negative interest allows the aggrieved party to recover the costs incurred in connection with the negotiation of a contract, such as for instance, the costs connected with the preparation of an offer. That said, the aggrieved party may also claim lost profits if able to prove that they would have gained such profit from a contract with a third party that it could not enter into because of the contract eventually concluded with the aggrieved party[80].

Second, there must be a causal connection (causation) between the contractual breach and the damages suffered. Swiss law distinguishes on this front between:

- The "natural" causation, also referred to as the *conditio sine qua non:* The contractual breach must be the necessary condition for the damage incurred; and
- The "adequate" causation: In the ordinary course of life and human experience, the act in question was likely to lead to a result of the same kind as that which actually occurred.

Both the "natural" and the "adequate" causation must be met for a party to be contractually liable. While the "natural" causation is a factual test, the "adequate" causation is a legal one: The latter is determined by the adjudicating body by taking into consideration all circumstances underlying the events at the time the contractual breach occurred, up until the time when the damages were suffered. The "adequate" causation allows the adjudicating body to set limits to liability, by considering disruptive events that may have interrupted the causal link between the loss incurred and the non-performance or incorrect performance of the obligation, for instance force majeure, contributory fault of the aggrieved party or a third party's fault. If a disruptive event has interrupted the "adequate" causation, the breaching party cannot be held liable.

77. WERRO Franz, Le dommage: l'etat d'une notion plurielle, in: Le dommage dans tous ses états, Sans le dommage corporel ni le tort moral - Colloque du droit de la responsabilité civile 2013, Université de Fribourg, p. 12.
78. WIEGAND Wolfgang, Basler Kommentar Obligationenrecht I, Art. 1-529 OR, Widmer-Lüchinger Corinne/Oser David (Eds.), 7. ed., Basel 2019, Art. 97 para. 38a.
79. GAUCH Peter et al., Schweizerisches Obligationenrecht Allgemeiner Teil – Band I und Band II, 11th ed. Zurich 2020, para. 2899.
80. GAUCH Peter et al., paras 2901 and 2903; SCHWENZER Ingeborg/FOUNTOULAKIS Christiana, p. 102 Fn. 14.31.

The Loss of Chance Doctrine

The general concept of loss of a chance

The concept of loss of a chance has been established in a number of jurisdictions such as the UK and in particular, France where it is referred to as the *"perte d'une chance"*[81]. Examples of loss of a chance are given in the literature and include, among others, chances of recovery after illness, probability of prevailing in legal proceedings, chances in connection with competitions or lotteries[82].

The concept of loss of a chance is different from lost profits in that what is recoverable is not a (certain) lost profit, but the damage resulting from the consequences of a person having been deprived of the chance for a beneficial event to occur[83]. In other words, under the loss of a chance doctrine, the damage is the lost chance to have a profit or to avoid a loss. The peculiarity of the loss of a chance is thus that there is no certainty that the beneficial event would have indeed occurred. The aggrieved party receives compensation based on the likelihood of the chance taking place, which is calculated by quantifying said likelihood as a percentage[84]. In practice, compensation is limited to that part of the damage (the lost chance to have a profit or to avoid a loss) which corresponds to the degree of probability that the party liable has caused the damage[85].

For example, an injured horse cannot take part in a race and is therefore deprived of the opportunity to compete and, in turn, of the chance to win and be awarded the prize money[86]. This example shows that it may *prima facie* be difficult to reconcile the doctrine of the loss of a chance with the requirement of causation (factual and adequate) and loss with the prevailing and applicable theory of difference. Indeed, had the horse not been injured, would it have won the race ("natural" causation)? – This is simply not possible to know. Further, based on the attributes and career history of the horse, can the (non-awarded) prize be sufficiently certain to be considered part of the hypothetical assets of the aggrieved party (*theory of difference*)? And fundamentally, is the loss of a chance an issue for establishing causation or of quantification of the damage? What is the approach under Swiss law?

Decision of the Swiss Supreme Court BGE/ATF 133 II 462

In a landmark decision of 2007, the Swiss Supreme Court expressly rejected the loss of a chance doctrine, both from the point of view of causation and of quantification of the damage[87].

The court first recalled that under Swiss law, an event is the natural cause of a result if it constitutes one of the conditions sine qua non, meaning that there is a natural causation between two events when, without the first, the second would not have occurred, even if it is not necessary that the event in question be the sole or

81. SCHWENZER Ingeborg/FOUNTOULAKIS Christiana, p. 93 Fn. 14.12a.

82. SCHWENZER Ingeborg/FOUNTOULAKIS Christiana, p. 93 Fn. 14.12a

83. ZINGG Nicolas, La réparation des vacances gâchées en droit suisse – Vers une redéfinition du préjudice au regard de la jurisprudence européenne, in: AISUF – Arbeiten aus dem Juristischen Seminar der Universität Freiburg, Schweiz, Band/Nr. 309, para. 837.

84. WEBER H. Rolf/EMENEGGER Susan, BK OR 97-109, Art. 97 para. 236.

85. WEBER H. Rolf/EMENEGGER Susan, BK OR 97-109, Art. 97, para. 236.

86. ZINGG Nicolas, La réparation des vacances gâchées en droit suisse – Vers une redéfinition du préjudice au regard de la jurisprudence européenne, in: AISUF – Arbeiten aus dem Juristischen Seminar der Universität Freiburg, Schweiz, Band/Nr. 309, para. 839.

87. Decision of the Swiss Supreme Court 4A_61/2007 of 13 June 2017, BGE/ATF 133 III 462; see also decision of the Swiss Supreme Court 4A_516/2012 of 8 February 2013, para. 8; WIEGAND Wolfgang, BSK OR-I, Article 97 para. 38b.

immediate cause of the result[88]. The court then explained that the existence of a natural causal link between the event giving rise to liability and the damage is a question of fact which the judge must decide according to the rule of the preponderant degree of probability[89]. Further, the court underscored that damage is defined as the involuntary reduction of net assets, and that it corresponds to the difference between the current value of the injured party's assets and the value of these assets if the harmful event had not occurred. It can take the form of a decrease in assets, an increase in liabilities, a non-increase in assets or a non-decrease in liabilities[90]. The Swiss Supreme Court proceeded with explaining that the purpose of Article 42(2) CO is to lighten the burden of proof, yet not to exempt the aggrieved party from providing the judge, as far as possible, with all the factual elements evidencing the existence of the damage and allowing for the evaluation *ex aequo et bono* of the amount of the damage[91]. The court in particular pointed out that the aggrieved party must show that the damage is practically certain and that a mere possibility is not sufficient to award damages, Article 42(2) CO being in any event an exceptional rule that must be applied restrictively[92].

The Swiss Supreme Court concluded that the loss of a chance doctrine in a nutshell boils down to admitting compensation for damages on the basis of the *probability* – whatever it may be – that the event giving rise to liability caused the damage[93]. For this reason the court rejected the loss of a chance doctrine under Swiss law. On the one hand, the court considered that the "natural" causation between the damaging event and the loss of an advantage cannot be proven in the event of a lost chance[94]. On the other, it concluded that even if a chance may have an economic value, a chance as such does not belong to the current assets nor to the hypothetical ones, making it impossible to quantify the damage by applying the theory of difference:

> *"La chance ne se trouve pas dans le patrimoine actuel dès lors qu'elle a été perdue. Mais elle ne figure pas non plus dans le patrimoine hypothétique car, soit elle se serait transformée en un accroissement de fortune, soit elle ne se serait pas réalisée pour des raisons inconnues. Par nature, la chance est provisoire et tend vers sa réalisation: elle se transmuera en un gain ou en rien. Vu son caractère dynamique ou évolutif, la chance n'est pas destinée à rester dans le patrimoine. Or, la théorie de la différence, applicable en droit suisse au calcul du dommage, se fonde sur l'état du patrimoine à deux moments précis; elle ne permet ainsi pas d'appréhender économiquement la chance perdue."*[95]

Unofficial translation into English:

> *"A chance is not part of the current assets because it has been lost. But it is not to be found in the hypothetical assets either, because it would either have turned into an increase in wealth, or it would not have been realized for unknown reasons. By nature, a chance is provisional and tends towards its realization, it will be transmuted into a gain or into nothing. Given its dynamic or evolutionary character, a chance will not remain in the assets. The theory of difference, which is applicable in Swiss law to the calculation of damages, is based on the state of the assets at two specific points in time, and thus does not allow for an economic assessment of the lost chance."*

88. Decision of the Swiss Supreme Court 4A_61/2007 of 13 June 2017, BGE/ATF 133 III 462, para. 4.4.2.
89. Decision of the Swiss Supreme Court 4A_61/2007 of 13 June 2017, BGE/ATF 133 III 462, para. 4.4.2.
90. Decision of the Swiss Supreme Court 4A_61/2007 of 13 June 2017, BGE/ATF 133 III 462, para. 4.4.2.
91. Decision of the Swiss Supreme Court 4A_61/2007 of 13 June 2017, BGE/ATF 133 III 462, para. 4.4.2.
92. Decision of the Swiss Supreme Court 4A_61/2007 of 13 June 2017, BGE/ATF 133 III 462, para. 4.4.2.
93. Decision of the Swiss Supreme Court 4A_61/2007 of 13 June 2017, BGE/ATF 133 III 462, para. 4.4.3.
94. Decision of the Swiss Supreme Court 4A_61/2007 of 13 June 2017, BGE/ATF 133 III 462, para. 4.4.3.
95. Decision of the Swiss Supreme Court 4A_61/2007 of 13 June 2017, BGE/ATF 133 III 462, para. 4.4.3.

In conclusion, the Swiss Supreme Court has expressly refused to accept the loss of a chance doctrine under Swiss law.

Opinions among Swiss scholars

While among Swiss scholars it is unsettled whether the loss of a chance is a matter of causation or damage[96], prominent scholars consider that the loss of a chance should be admissible under Swiss law based on Article 42(2) CO, pursuant to which:

> *"Where the exact value of the damage cannot be quantified, the court shall estimate the value at its discretion in the light of the normal course of events and the steps taken by the person suffering damage."*

The loss of a chance would then pertain to the quantification of the damage and not to causation. In particular, such an approach would allow a damage to be quantified based on its likelihood by applying a "probability percentage", thereby avoiding the disadvantages for the "all or nothing" approach of the Swiss Supreme Court[97]. Indeed: If we take as an example the horse case mentioned above, based on the Swiss Supreme Court's approach, the aggrieved party would simply not be entitled to any compensation, because it would not be possible to be establish a sufficient "natural" causation between the horse's injury and winning the race prize, and the lost chance of winning the prize would in any event not qualify as a damage under the theory of difference. On the contrary, based on the loss of a chance doctrine, if the aggrieved party can demonstrate the percentage of probability that had the horse not been injured it would have won the race prize, the aggrieved party can be compensated of that percentage applied to the race prize[98]. In other words, the loss of a chance doctrine would provide more flexibility and avoid the disadvantages of the "all or nothing" approach of the Swiss Supreme Court.

Provisions Specific to Employment Law

Swiss employment law contains a specific provision for termination without just cause by the employer (*ungerechtfertigte Entlassung/résiliation injustifiée/licenziamento ingiustificato*), which applies as a lex specialis to the general provisions of Swiss contracts law. According to Article 337c CO:

> *"1. Where the employer dismisses the employee with immediate effect without good cause, the employee is entitled to damages in the amount he would have earned had the employment relationship ended afterthe required notice period or on expiry of its agreed duration.*
>
> *2. Such damages reduced by any amounts that the employee saved as a result of the termination of the employment relationship or that he earned by performing other work or would have earned had he not intentionally foregone such work.*

96. ZINGG Nicolas, La réparation des vacances gâchées en droit suisse – Vers une redéfinition du préjudice au regard de la jurisprudence européenne, in: AISUF – Arbeiten aus dem Juristischen Seminar der Universität Freiburg, Schweiz, Band/Nr. 309, para. 840; MÜLLER Christoph, Schadenersatz für verlorene Chancen – Ei des Kolumbus oder Trojanisches Pferd?, in: AJP 2002 p. 389, p. 396.
97. MÜLLER Christoph, Schadenersatz für verlorene Chancen – Ei des Kolumbus oder Trojanisches Pferd?, in: AJP 2002 p. 389, p. 397.
98. Assuming for instance that the race price is 100,000 euros, and the probability for the horse to win the race is 80% (for instance, based on statistic data from previous races), the aggrieved party would be compensated of 80% of the race price, i.e. 80,000 euros.

> *3. The court may order the employer to pay the employee an amount of compensation determined at the court's discretion taking due account of all circumstances; however, compensation may not exceed the equivalent of six months' salary for the employee."*

The authors consider unnecessary, for the purpose of this contribution, to explain more into detail Article 337c CO. It suffices to mention that under Article 337c CO the employee is entitled to claim positive interest[99]. Article 337c CO, however, does not address the loss of the chance doctrine.

Recoverability of the loss of a chance under Article 17(1) RSTP

Having explained the core principles of Swiss law on contractual liability and the approach taken under Swiss law regarding the loss of a chance doctrine, the authors now turn to the analysis of whether the loss of a chance could nevertheless be recovered under Article 17(1) RSTP.

Preliminary remarks: Article 17(1) RSTP and contractual freedom under Swiss law

CAS panels have ruled that positive interest applies when calculating compensation under Article 17(1) RSTP, irrespective of whether the contract is terminated without just cause by the player or the club[100]. As explained, under Swiss law positive interest may include the direct damage (*damnum emergens*) or lost profits (lucrum cessans). It does not, however, include the loss of a chance[101]. Bearing this in mind, and assuming that Swiss law applies in a given case, does it mean that the loss of a chance cannot, in any event, be awarded under Article 17(1) RSTP?

Given that according to Article 1(1) FIFA is a Swiss association of private law (Articles 60 to 79 CC), the RSTP is a contractual document in character[102],to which Swiss contract law applies. On this front, Swiss contract law is based on the core principle of the parties' contractual freedom to decide the content of a contract (Article 19(1) CO), within the limits of the law. Clauses that deviate from those prescribed by law are admissible only where the law does not prescribe mandatory forms of wording or where deviation from the legally prescribed terms would contravene public policy, morality or personality rights (Article 19(2) CO). A contractual obligation is namely null and void if its terms are impossible, unlawful or immoral (Article 20(1) CO). In addition, within the personality rights, Article 27(2) CC prohibits excessive commitments:

> *"No person may surrender his or her freedom or restrict the use of it to a degree which violates the law or public morals."*

Whether an obligation violates Article 27(1) CC must be assessed on a case-by-case basis and cannot be determined *in abstracto*.

99. CARRUZZO Philippe, Le contrat individuel de travail, Commentaire des articles 319 à 341 du Code des obligations, Schulthess 2009, p. 542.

100. CAS 2008/A/1519 FC Shakhtar Donetsk v. Matuzalem Francelino da Silva & Real Zaragoza SAD & FIFA & 2008/A/1520 Matuzalem Francelino da Silva & Real Zaragoza SAD v. FC Shakhtar Donetsk & FIFA of 19 May 2009, para. 42.

101. Decision of the Swiss Supreme Court 4A_61/2007 of 13 June 2017, BGE/ATF 133 III 462.

102. Decision of the Swiss Supreme Court BGE/AFT 132 III 285, para. 1.3.; KREN KOSTKIEWICZ Jolanta, Zürcher Kommentar zum IPRG, 3. ed., Zurich 2018, Art. 116 para. 86.

Based on the above, one may argue that Article 17(1) RSTP constitutes a contractual agreement by means of which the parties involved have decided how to calculate the consequences of a termination without just cause. In other words, provided that Article 17(1) RSTP may be construed so as to include the loss of a chance, one could argue that the parties involved have agreed to make the loss of a chance recoverable under Article 17(1) RSTP, even if Swiss law does not accept the loss of a chance doctrine. Articles 20 CO and 27(2) CC would in any event intervene as boundaries to determine what can be claimed as a loss of a chance.

That said, the authors now turn to analyze whether Article 17(1) RSTP can be construed as to include the loss of a chance.

Do the compensation criteria of Article 17(1) RSTP have the potential scope to include the loss of a chance?

According to Article 17(1) RSTP, compensation must be calculated with due consideration for the three categories of factors; (i) the law of the country concerned, (ii) the specificity of sport and (iii) any other objective criteria. The scope for each criterion to include and or make way for a compensation to be calculated for loss of a chance is addressed in turn below:

Loss of a chance under Swiss law as *"the law of the country concerned"*

The first option could be to contend that it could be feasible to claim the loss of a chance under Swiss law as the law applicable to the employment contract[103]. That said, it is clear where Swiss law stands and there has been yet no change in stance since the landmark decision of 2007 when the Swiss Supreme Court explicitly rejected the possibility to claim the loss of a chance based on Article 42(2) CO, despite Swiss scholars contending that claiming the loss of a chance should be possible by applying Article 42(2) CO[104].

Recovering the loss of a chance under Swiss law as the "law of the country concerned" has therefore very little chances of success. That said, it is important to mention that in the WEBSTER case the CAS panel ruled that:

> *"It is clear from its wording that the reference to the "law of the country concerned" is not a choice- of-law clause, since it merely stipulates that such law is among the different elements to be taken into consideration in assessing the level of compensation. In other words, article 17 par. 1 does not require that compensation be determined in application of a national law or that the rules on contractual damage contained in the law of the country concerned have any sort of priority over the other elements and criteria listed in article 17 par. 1. It simply means that the decision-making body shall take into consideration the law of the country concerned while remaining free to determine what weight is to be given to the provisions thereof in light of the content of such law, the criteria for compensation laid down in article 17 par. 1 itself and any other criteria deemed relevant in the circumstances of the case."*[105]

103. Decision of the Swiss Supreme Court 4A_61/2007 of 13 June 2007, BGE/ATF 133 III 462, para. 4.4.2.

104. BREHM Roland, Berner Kommentar, Obligationenrecht – Die Entstehung durch unerlaubte Handlungen, Art. 41-61 OR, 4th ed., Berne 2013, Art. 42 para. 56f;; WERRO Franz, La responsabilité civile, 3rd ed., Berne 2017, MÜLLER Christoph, La perte d'une chance, in: Foëx Bénédict/Werro Franz (eds.), La réforme du droit de la responsabilité civile, Geneva/Zurich,Basel 2004, p. 143-181, MÜLLER Christoph, La perte d'une chance - Etude comparative en vue de son indemnisation en droit suisse, notamment dans la responsabilité médicale, Berne 2002, p. 372 paras. 548 et seqq.; THÉVENOZ Luc, La perte d'une chance et sa réparation, in: Werro Franz (ed.), Quelques questions fondamentales du droit de la responsabilité civile: actualités et perspectives, Colloque du droit de la responsabilité civile 2001, Université de Fribourg, Fribourg 2001, pp. 254 et seq. ENGEL Pierre, Traité des obligations en droit suisse, 2nd ed., Berne 2007, pp. 479-481.

105. CAS 2007/A/1298, 1299 & 1300 Webster & Wigan Athletic FC v. Heart of Midlothian, award of 30 January 2008, paras. 22-23.

In particular, in the WEBSTER case, the panel did not rely on local law when determining the level of compensation:

> *"Article 17 par. 1 itself refers to the specificity of sport and that it is in the interest 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."*[106]

In other words, national law should not be seen as precluding the applicability of the other compensation criteria set forth under Article 17(1) RSTP, which are addressed below.

Loss of chance as "*specificity of sport*"

The second option would be to consider that claiming the loss of a chance could be found within the consideration of the criterion of the *"specificity of sports"* even though the loss of a chance is not recognized under Swiss law.

The RSTP does not define this concept, only that it shall be taken into consideration[107]. According to CAS case law, while assessing the criterion of the *"specificity of the sport"* of Article 17(1) RSTP, the judging body needs to take into due consideration the:

> *"[...] specific nature and needs of sport, so as to attain a solution which takes into account not only the interests of the player and the club, but also, more broadly, those of the whole football community" including its stakeholders."*[108]

The criterion of specificity of sport goes back to the notion of how important sport is to the society, especially to social and educational function[109].The Panel of the Webster focused on the specific nature of football and the need to balance the conflicting needs of players and clubs:

> *"In light of the history of article 17, the Panel finds that the specificity of sport is a reference to the goal of finding particular solutions for the football world which enable those applying the provision to strike a reasonable balance between the needs of contractual stability, on the one hand, and the needs of free movement of players, on the other hand, 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."*[110]

106. CAS 2007/A/1298, 1299 & 1300 Webster & Wigan Athletic FC v. Heart of Midlothian, award of 30 January 2008, para. 64.
107. CAS 2007/A/1298, 1299 & 1300 Webster & Wigan Athletic FC v. Heart of Midlothian, award of 30 January 2008, para. 66.
108. CAS 2008/A/1644 M. v. Chelsea Football Club Ltd of 31 July 2009, para. 57; CAS 2008/A/1568 M. & Football Club Wil 1900 v. FIFA & Club PFC Naftex AC Bourgas of 24 December 2004, para. 47.
109. CAS 2008/A/1519 FC Shakhtar Donetsk v. Matuzalem Francelino da Silva & Real Zaragoza SAD & FIFA & 2008/A/1520 Matuzalem Francelino da Silva & Real Zaragoza SAD v. FC Shakhtar Donetsk & FIFA of 19 May 2009, para. 106.
110. CAS 2007/A/1298, 1299 & 1300 Webster & Wigan Athletic FC v. Heart of Midlothian, award of 30 January 2008, para. 67.

Examples of factors which CAS panels considered as pertaining to the specificity of sport include the particularities of the football labour market and the organization of the sport[111]. Bearing this in mind, particularly relevant in the context of Article 17(1) RSTP might be the loss of a top player due to early termination of the contract without just cause and the speculative damage to a club such as a possible failure to win the championship or an early elimination in an (international) competition (for e.g. the national cup or the Champions or Europa League), which could lead to less income e.g. television income, less other income e.g. sponsorships support and further lost profit e.g. merchandise and ticket sales. In this sense, in the case *FC Pyunik Yerevan v. L. AFC Rapid Bucaresti & FIFA*[112], the panel explained that:

> *"[...] a panel may consider that in the world of football, players are the main asset 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 of 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 their transfer to another club. Taking into consideration all of the above, the asset comprised by a Player is obviously an aspect which cannot be fully ignored when considering the compensation to be awarded for a breach of contract by a player.[113]" (emphasis added)*

The lost *"possible gain"* resulting from the potential transfer of a player to another club would very likely qualify as a lost chance under Swiss law in that the player's transfer at the moment of the termination is a mere speculation. The resulting "possible damage" would therefore not be recoverable under Swiss law. In the same vein, the CAS panel in the MATUZALEM case ruled that while specificity of sport is about fairness it should not add an additional amount of compensation where the facts have already been accounted for – and the compensation must be clearly compensable and it is acknowledged that lost chance is indeed an example of damages which are not clearly compensable:

> *"Furthermore, the element of the specificity of sport may not be misused to undermine the purpose of Art. 17 para. 1, i.e. to determine the amount necessary to put the injured party in the position that the same party would have had if the contract was performed properly. In light of this the assessment of damages that are punitive in character is particularly sensitive. Finally, it follows from this that no compensation is possible for facts and circumstances that are clearly not compensable otherwise (e.g. lost chances)[114].*

That said, as explained above prominent Swiss scholars are of the opinion that the loss of a chance should be accepted under Swiss law for fairness reasons, i.e. to counterbalance the "all or nothing" approach of the Swiss Supreme Court[115]. That said, as explained above prominent Swiss scholars are of the opinion that the loss of a chance should be accepted under Swiss law for fairness reasons, i.e. to counterbalance the "all or nothing" approach of the Swiss Supreme Court[115].

111. CAS 2007/A/1298, 1299 & 1300 Webster & Wigan Athletic FC v. Heart of Midlothian, award of 30 January 2008, para. 63.

112. CAS 2007/A/1358 FC Pyunik Yerevan v. L., AFC Rapid Bucaresti & FIFA of 26 May 2008, para. 40.

113. CAS 2005/A/902 Philippe Mexès & AS Roma c. AJ Auxerre and CAS 2005/A/903 AJ Auxerre c. Philippe Mexès & AS Roma, of 5 December 2005, paras. 122 et seqq.; more restrictive CAS 2007/A/1298, Wigan Athletic FC v/ Heart of Midlothian, CAS 2007/A/1299, Heart of Midlothian v/ Webster & Wigan Athletic FC and CAS 2007/A/1300 Webster v/ Heart of Midlothian of 30 January 2008, paras 120 et seqq.; CAS 2007/A/1358 FC Pyunik Yerevan v. L., AFC Rapid Bucaresti & FIFA of 26 May 2008, para. 105 as well as CAS 2007/A/1359 FC Pyunik Yerevan v. E., AFC Rapid Bucaresti & FIFA of 26 May 2008, paras. 48, 108; CAS 2008/A/1568 M. & Football Club Wil 1900 v. FIFA & Club PFC Naftex AC Bourgas of 24 December 2004, para. 47.

114. CAS 2008/A/1519 FC Shakhtar Donetsk v. Matuzalem Francelino da Silva & Real Zaragoza SAD & FIFA & CAS 2008/A/1520 Matuzalem Francelino da Silva & Real Zaragoza SAD v. FC Shakhtar Donetsk & FIFA award of 19 May 2009, para. 110.

115. MÜLLER Christoph, Schadenersatz für verlorene Chancen – Ei des Kolumbus oder Trojanisches Pferd?, in: AJP 2002 p. 389, p. 397.

CAS case law as well refers to the specificity of sport as a "correcting factor to other factors" and has the sole purpose of verifying whether the solution reached is fair, prior to assessing the final amount of the compensation:

> *"[...] in the Panel's view, the concept of specificity of sport only serves the purpose of verifying the solution reached otherwise prior to assessing the final amount of compensation. In other words, the specificity of sport is subordinated, as a possible correcting factor, to other factors."*[116]

The underlying rationale of both the loss of a chance doctrine and the specificity of sport of Article 17(1) RSTP is therefore to reach a solution which is fair. One may therefore argue that specificity of sport includes the loss of chance if claiming a lost chance is justified by fairness reasons.

Be as it may, the authors consider that the main obstacle would in fact be a practical one. How to calculate in practice the percentage of a probability of a "sports event" (e.g. the transfer of a player where no negotiations are ongoing or winning a championship)? Sport is as per its very nature speculative and sporting results depend on several factors, which may be speculated based on the consistency of wins for example but which are, however, otherwise highly unpredictable upfront. Claiming the loss of a chance would at the end of the day depend on the probative value of the evidence submitted to the adjudicative body.

To conclude, successfully claiming the loss of a chance under the concept of specificity of sport of Article 17(1) RSTP would ultimately be a question of evidence and assessment of the evidence.

Loss of a chance as "*any other objective criteria*"

When referring to *"any other objective criteria"*, Article 17(1) RSTP states that these 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 (amortized over the term of the contract) and whether the contractual breach falls within a protected period. The compensation criteria of Article 17(1) RSTP are not exhaustive[117].

The third option would therefore be to consider that the loss of a chance would be covered by "other objective criteria" that warrant compensation under the examples mentioned under Article 17(1) RSTP.

The same comments regarding specificity of sport apply though. The authors consider that while the loss of a chance could intervene as a correcting factor with the aim to reach a fair solution, whether the loss of chance would entitle the club or the player to additional compensation, or lead to a reduction thereof, would ultimately depend on the probative value of the evidence submitted and the adjudicating body's assessment of evidence.

116. CAS 2009/A/1880 FC Sion v. Fédération Internationale de Football Association (FIFA) & Al-Ahly Sporting Club and CAS 2009/A/1881 E. v. Fédération Internationale de Football Association (FIFA) & Al-Ahly Sporting Club of 1 June 2010, para. 109; CAS 2013/A/3411 Al Gharafa S.C. & Mark Bresciano v. Al Nasr S.C. & Fédération Internationale de Football Association (FIFA) of 9 May 2014, para. 118.

117. Decision of the Dispute Resolution Chamber REF 20-01802 Abdoulaye Sissoko (Mali) vs. Moghreb Athletic Tetouan (Maroc) of 8 April 2021, p. 7 para. 19.

Conclusions

The loss of a chance doctrine is not accepted under Swiss law. While Swiss scholars opine that it should be possible, for fairness reasons, to claim the loss of a chance under Swiss law, the Swiss Supreme Court expressly rejected the loss of a chance doctrine under Swiss law. According to the Switzerland's highest court, a loss of a chance does not meet the requirement of "natural" causation and it is not possible to quantify the chance by applying the theory of difference. Both are requirements that must be met under Swiss law for a party to be held contractually liable.

In addition, Swiss employment law, while containing a *lex specialis* provision on how to calculate compensation in the event of a termination without just cause by the employer, does not regulate the loss of a chance. That said, Swiss law is based on the core principle of contractual freedom. Within the limits of the law, the parties are therefore free to agree on the content of their obligations. On this front, the parties may contractually agree on making the loss of a chance a recoverable damage, provided that this is not consideredan excessive commitment as per Article 27(2) CC. Whether this may be the case cannot be answered *in abstracto* but must be determined on a case-by-case basis.

Within the limits of Article 27(2) CC, Article 17(1) RSTP may be construed as a contractual agreement allowing the parties to claim the loss of a chance. The loss of a chance could fall under the concept of "*specificity of sport*" or *"other objective criteria"*, both referred to under Article 17(1) RSTP. The loss of a chance could for instance be considered inherent to specificity of sport and intervene as a correcting factor with the aim to reach a fair solution which takes into consideration the special nature of sport and the interests at stake.

Notwithstanding the above, the authors consider that it may be difficult to quantify the loss of a chance in practice. A successful claim will thus ultimately depend on the probative value of the evidence submitted and on the adjudicating body's assessment of evidence. At the end of the day, the main obstacle to claim the loss of a chance under Article 17(1) RSTP would therefore be a practical one, namely the claiming party's capability of quantifying the chance.

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