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The Contractual Dynamics of Team Stability Versus Player Mobility: Who Rules 'The Beautiful Game'?

Simon Gardiner
Leeds Metropolitan
University
Roger Welch
University of
Portsmouth

ABSTRACT

The specific focus of this article is on present and future contractual relations between footballers and their clubs, with an examination of arguments that players should have

the 'right' unilaterally to terminate contracts providing compensation is paid to the current club. The article also seeks to make sense of the changing relationship between players and clubs within the cultural and economic transformation in football - particularly with regard to the issues of the traditional self-regulation of sports governing bodies and the implementation of effective internal governance. The major contentions of the article are that the current transfer system in the domestic leagues should be reformed along the lines of the current FIFA rules; Transfer windows should be abolished and the rules defining what constitutes an unlawful approach to a player should be significantly revised. Finally, resolution of the tensions between self governance and external regulation could be achieved by the application of reflexive regulatory theory to abolish, or at least reform, the transfer system throughout the EU.

KEYWORDS

Transfer systems – footballers' contracts – sports governance – reflexive law - transfer windows – '

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INTRODUCTION

The contractual and organisational dynamics of football have changed dramatically in the years since the European Court of Justice (ECJ) delivered its momentous ruling in *ASBL Union Royale Belge des Societes de Football Association & others v Jean-Marc Bosman* [1996] 1 CMLR 645 (Case C-415/93). The *Bosman* ruling heralded an increasing juridification of professional football which has been, and is, generated by an increasing commodification of the sport. *Bosman* remains pivotal to the emergence of a football 'industry' in Britain and a number of other European countries. Football has been transformed from a semi-commercialised activity (in which financial benefactors supported teams and any aim of making financial profit was secondary to the glory of the game) to a ruthless business operation (Walvin, 2001). Today, the traditional stakeholders in football – clubs, players, sports administrators and supporters and the wider local communities from which they come – fight over the destiny of the game with the new men in football ranging from football agents to rich benefactors.

These tensions within the game are most visibly demonstrated by the aspirations of the people, who, along with football fans, arguably matter the most, that is, professional footballers. Throughout the history of professional football, players have been subservient and very much treated as commodities. However, today's star players have become highly paid and sought after, and possess significant leverage in moving between clubs. Consequently, the balance of power between clubs and players has become tentative with conflicts emerging between contract stability and player mobility. This poses the major question as to the role the law should play in regulating the relationship between player and club; the changing dynamic in this specific relationship has been reflected at a general level over the last ten years or more by a contest as to who has the right to govern the game – the football authorities or external regulatory regimes supported by judicial rulings and decisions.

The analysis in this article will be at two levels. First, the specific focus will look at present and future contractual relations, with an examination of arguments that players should have the 'right' unilaterally to terminate contracts providing compensation is paid to the current club. Emphasis will be given to the implications of the FIFA transfer rules, which were adopted in July 2001 and revised in October 2003, and whether they should be adopted or adapted by the English and Scottish

Secondly, the discussion will focus on the general, 4
with an attempt to make sense of the changing
relationship between players and clubs within the
cultural and economic transformation in football -
particularly with regard to the issues of the
traditional self-regulation of sports governing
bodies and the implementation of effective internal
governance. Over the last ten years, the transfer
system has represented the central issue that
reflects the debate around the regulation of
football on the one hand and the impact of the
system on the contractual position of players on
the other. There is still divided opinion as to
whether some form of transfer system should be
regarded as operating to the benefit of clubs and
fans, if not players, and whether the law really
matters if economic factors will provide the basis
for the collapse of transfer systems.

This article examines developments that took place 5
in the wake of the *Bosman* ruling and explores a
number of contentions:

Following the example provided by the
essential principles underpinning the
FIFA rules, the British Courts should
be encouraged to grant injunctions to
hold footballers to their contracts and
to prevent clubs/agents from inducing
breaches of contracts.

The current transfer system in the
domestic leagues fails to operate as
an effective mechanism either to
support some notion of contract
stability or to facilitate the appropriate
mobility of players. Additionally it fails
to distribute equitably the resources
of football, namely talent and capital,
within the professional game. The
domestic system should thus be
reformed along the lines of the current
FIFA rules.

Two devices that support the system
should be reviewed. Transfer windows
operate to the benefit of no-one,
except perhaps the top super-rich
clubs and, as they have little legal
standing, should be abolished. The
rules defining what constitutes an
unlawful approach to a player (so-
called tapping-up) should be
significantly revised.

Resolution of the tensions between
self governance and external
regulation could be achieved by the
application of reflexive regulatory

theory to abolish, or at least reform, the transfer system throughout the EU.

CONTRACTUAL RELATIONS OF PLAYERS: THE POSITION AFTER *BOSMAN*

The immediate consequence of the *Bosman* ruling 6 was that an out-of-contract player had an absolute freedom to negotiate a new contract with a new club in a different EU Member State. However, an important legal issue that was not resolved in *Bosman*, as it was not specifically addressed in either the Opinion of Advocate-General Lenz or the ECJ's ruling, is whether an out-of-contract player can move as of right to a new club in the same country. Arguably, this is the logic of *Bosman*, but as noted by Gardiner and Welch (1998) and subsequently up to now, the point has not been specifically clarified in case law. In the UK, primarily to pre-empt litigation by players on this issue, the Premier and Football Leagues decided to adopt new transfer rules that give complete freedom of movement to players whose contracts ended after they had attained the age of 24.

Another issue, not addressed in *Bosman*, is 7 whether freedom of movement as guaranteed by Article 39 permits players unilaterally to terminate existing contracts of employment to move to another club. The possibility that contract-jumping might be permitted under EU law was identified as a result of the announcement by Nicolas Anelka in the summer of 1999 that he no longer wanted to honour his contract to play for Arsenal FC. Anelka wished to leave the UK and play for the Italian club, Lazio. At the time of this announcement Anelka had another four years of his contract to run. The problem for Anelka was that Arsenal was not prepared to release him from his contractual obligations, and Lazio was not prepared to pay the sizeable transfer fee that Arsenal required. Fixed-term contracts are the norm in professional football. The use of 'long' contracts is one mechanism for tying a valuable player to a club (Gardiner & Welch, 1998, pp. 297-300). It is permissible for clubs and players to enter into contracts for short periods. Indeed a player can be employed on a match by match basis, but this is relatively unusual. Hence, the emphasis in this article is on the issue of contract-jumping. The transfer system operates on the basis of a rule that provides that the club that holds the registration for a player under contract is not required to release that registration until and if a transfer fee has been agreed. Therefore, even if Anelka had walked out on Arsenal he would not have been able to play for any other club until his contract with Arsenal had expired.

This situation generated legal debate (initiated by 8
Jean-Louis Dupont, the Belgian lawyer who
advised Bosman) whether preventing a player from
terminating his employment contract in order to
move to another club, as the transfer system does,
is as much a restraint on a player's freedom of
movement as the rules declared invalid in *Bosman*
(see Tsatsas, 1999). Thus, Caiger & O' Leary
(2000) argue that a player should have the right to
terminate his contract providing he is prepared to
pay compensation to his club by reference to the
normal contractual principles for calculating
damages. In such circumstances a club is then
obliged to release the player's registration so that
he can join and play for the club of his choice.

The position with respect to Anelka was ultimately 9
resolved when Arsenal accepted a transfer bid
submitted by Real Madrid. However, the incident
cast doubt on the original assumption, in the
aftermath of *Bosman*, that Article 39 only applied to
out of contract players. It also generated
(ongoing) debate over the legal validity of the
transfer system within the framework of EU law. It
has been contended by Roger Blanpain (quoted by
O'Leary and Caiger, 2000, p. 321)) that the
transfer system is a form of slavery, and that
players should be freed from the shackles it
provides to enable clubs to tie players to them for
the entire period of their contracts. If clubs were
no longer able to hold on to a player by refusing to
release that player's registration, a footballer
would be in the same position as employees in
general.

Typically, employees are, in effect, free to change 10
their employers in breach of contract where they
pay compensation equivalent to the sum of
damages a court is likely to award for breach of
contract. Although for many employees it is
important to take into account that only nominal
damages will normally be awarded – in which case
there is no real legal constraint on an employee's
ability to contract-jump. Those who oppose any
form of transfer system argue that professional
footballers should enjoy the same 'freedom' to
break their employment contracts (indeed, this
'freedom' has always been possessed by a
player's manager or coach).

It can also be argued that abolition of the transfer 11
system would end the current controversies over
inflated transfer fees and the murky world behind
transfer deals being investigated by Lord Stevens
(Gardiner, 2006). However, in sport, as epitomised
by football, there is a never ending search for the
'star player' who can produce something
remarkable that might be the difference between
winning and losing and the subsequent financial
rewards. At the time that Anelka was seeking to

leave Arsenal he considered to be one of these relatively rare stars. This search for talent often leads to sports clubs making business decisions that would not be seen as rational ones in many other areas of business.

Indeed, it is this essentially commercial factor that 12 suggests that, even were the transfer system abolished tomorrow, the buying and selling of players under contract with agents acting as the middle-men would continue. The issue then becomes one that is resolved by commercial considerations that replace notions of legally enforceable contracts. In short, is a potential new club prepared to pay whatever sum of damages is likely to be awarded by a court to secure a player that his existing club is not prepared to release? If not, then the player will effectively be forced to stay with his current club. If so, then in practice, even if there were no formal transfer system, there will be a tendency for clubs to avoid litigation by agreeing on a sum of money to buy out a player's contract. Such an agreement may well involve a higher sum of money than any sum of damages that would have been obtained from a court. Similarly, players and their agents will still seek to negotiate substantial signing-on fees and salaries as their price for joining a new club. Whilst commodification of the player's relationship with the club has generated in many ways a juridification of that relationship, the former remains the dominant player. The power - particularly of the super rich clubs - to attract the star player is massive.

THE TRANSFER SYSTEM AND THE CURRENT FIFA RULES

At present, of course, contractual relations in 13 football continue to be under-pinned by the transfer system. The impetus for what turned out to be significant changes to transfer rules was a decision by the European Commission that it would challenge the transfer system before the ECJ on the basis of EU competition law unless the footballing regulatory bodies - in particular FIFA - voluntarily formulated and implemented new rules which the Commission could regard as consistent with EU law. The *Balog* case (unreported) was also part of the background to the European Commission's intervention. This case was dropped after the Advocate General gave his Opinion but before the ECJ could give its ruling. The ECJ had been asked to rule on whether applying transfer rules to out of contract players offended Article 81 of the EC Treaty and, if so, whether the protection of EU law extended to nationals of countries with third party status. Despite speculation that this litigation in itself could have led to the demise of the transfer system, it is clear that, even if the ECJ had ruled in Balog's favour on both of these

issues, such a ruling would have fallen well short of declaring the transfer system to be inherently contrary to EU law. Hence the pressure brought to bear by the Commission on FIFA to engage in voluntary reform.

Consequently, new transfer rules were adopted by 14 FIFA with the Commission's approval in July 2001. These have been replaced with revised rules that were adopted in October 2003 and which came into force on July 1 2005. Generally, for the purposes of this article the salient features of the new rules remain the same. However, whilst both the original and revised rules apply specifically only to international transfers whereby players move from one Association to another (as demonstrated by the 'Webster case' discussed below, this includes from a Scottish club to an English or Welsh one, or vice-versa) the latter stipulate more precisely and cogently the principles that must also be reflected in national rules.

In particular, the rules of national associations 15 must incorporate the principle of enabling players to terminate their contracts for 'sporting just cause'. The meaning of sporting just cause is not defined and there is clearly scope for different interpretations at the level of national courts. However, for the purposes of international transfers only, Article 15 of the FIFA rules stipulates that sporting just cause includes failure to involve an 'established Professional' in more than 10% of a club's official matches. It is of interest to note that the Premiership and Football League rules have yet to embrace the principle let alone the detail of contract termination for sporting just cause. If this situation persists, this, in itself, could provide the basis for future litigation between a player and his club.

As was the case with the original 2001 rules, a 16 contract arising from an international transfer may only last for five years. Transfer fees can still be required for a player who is out of contract prior to his 23rd birthday. However, after that age a player only remains tied to his contract through the registration system for the relevant 'protected period'. This is now defined as a period of three entire years or seasons, whichever comes first, in the case of all contracts concluded prior to the 28th birthday of the player, and two years (or seasons) in the case of contracts concluded after the player's 28th birthday.

Under Article 17 of the FIFA rules, once the 17 protected period has expired, a player is able to terminate his contract in order to join a new club provided compensation is paid to his current club. This compensation should be at least equal to the remaining value of the player's contract plus any

transfer fee that the club paid for the player (the value of this fee decreases over the period of time that that the contract has lasted). It should be noted that even when the protected period has expired, or the player wishes to terminate for sporting just cause, he may not terminate his contract during a season. Indeed, a player only has 15 days after the last official match of the season to notify his club that he has decided to terminate his contract with it.

If there is unilateral breach without just cause during the protected period his club will again be entitled to claim compensation, but sports sanctions will also be applied against the player. Under Article 23, a player is prevented from participating in any official football match, except for the club to which he was contracted, for an effective period of 4 months as from the beginning of the next season. This period can be extended to a maximum period of 6 months in cases of aggravating circumstances, such as failure to give notice or recurrent breach. If a club has induced a player to act in breach of contract the ban may continue until the expiry of the second transfer window following the date the breach of contract was committed. However, any such ban cannot last for longer than 12 months. Where appropriate, sports sanction may also be imposed against the player's agent and the club inducing the breach. Sanctions against the latter may include fines, deduction of points and exclusion from competitions. 18

In essence then, the current FIFA transfer rules enhance player mobility by enabling a player over the age of 23 unilaterally to terminate his existing contract to move to another club once the appropriate protected period has expired. Potentially even greater mobility is provided by the ability of a player to terminate a contract for sporting just cause even though his club has not committed any breach of contract. In short, what can be perceived as the right to contract-jump is expressly recognised by the FIFA transfer rules. 19

However, the complexities involved in implementing this right are demonstrated by the findings of FIFA's Dispute Resolution Chamber (DRC) in the 'Webster case.' Andy Webster terminated his contract with Hearts at the end of the 2005/06 season and then agreed to move to Wigan. Hearts successfully argued that Article 17 did not apply, even though the protected period of Webster's contract had expired, as he had failed to give the requisite 15 days' notice. In fact, Webster gave notice within 15 days of the Scottish Cup Final, which he argued by custom and practice constituted the last match of the Scottish season. The DRC disagreed but, on the basis that this 20

constituted a minor breach of the rules, only banned him from the first two matches of the following season. With respect to compensation, the DRC rejected Hearts' claim of £5 million and awarded the club £625,000. This figure was arrived at by reference to the residual value of Webster's contract with Hearts and his salary in the first year of his contract with Wigan, which was then multiplied with a 1.5 coefficient.

Webster may appeal to the Court of Arbitration for Sport on the grounds that he had given the requisite notice, and that the 1.5 coefficient was incorrect as the contract with Wigan should not have been taken into account. Webster's reason for terminating his contract was a decision by Hearts not to select him for the first team after he failed to agree an extension to his contract. Therefore, there is perhaps the basis for also arguing that he had terminated his contract for 'sporting just cause' (see FIFPro, May 2007 for further discussion).

ENFORCEMENT OF PLAYERS' CONTRACTS AND ENGLISH LAW

On the face of it, the position under the FIFA rules is more liberal than that existing under the English contract law, as the player is given the right to terminate his contract in circumstances in which the club still wishes it to continue. In practice, however, the typical position is more restrictive. This is because the FIFA rules only permit players to terminate their contracts at the end of a season – otherwise the club is able to hold on to a player's registration so that the player is unable to play for the new club that he has joined. Under contract law, employees are able unilaterally to terminate their employment contracts at any time, although this may only be a viable option if an employee (or in practice the new employer) is able to pay the equivalent of any damages that a court is likely to award for the breach of contract involved. Theoretically, courts may grant injunctions to restrain an employee from terminating the employment in breach of contract where that contract contains a term under which the employee agrees not to work in the relevant line of business for anyone else during the currency of the contract. However, for the reasons stated below such injunctions are unlikely to be forthcoming.

It is a fundamental legal principle that courts will not compel performance of a contract of employment or any contract which involves the provision of personal services. Ever since the case of *Warner Brothers Pictures Incorporated v Nelson* [1937] KB 209, where the actress Bette Davies (unsuccessfully) sought to break her contract with her film studio it has been clear that this principle applies to the entertainment industry. Therefore,

as exemplified by the decision in *Page One Records Ltd v Britton* [1968] 1 WLR 157, injunctions will not be granted where their effect is in practice to compel performance of a contract. This makes it very difficult to secure injunctions in the context of sport unless the sports participant is in a position to earn an equally remunerative living by other means, such as advertising or television work, for the duration of his contract. The reluctance to grant injunctions is reinforced by the principle that courts will decline to grant injunctions in circumstances where damages can be regarded as an adequate remedy.

Indeed, recent case law demonstrates a very 24
strong reluctance on the part of modern judges to follow the example of the court in *Nelson* which did grant an injunction to Warner Brothers. In *Warren v Mendy* [1989] 1 WLR 853, the Court of Appeal refused an injunction to restrain the defendant from inducing boxer Nigel Benn to break his contract with his manager by participating in a match arranged by the defendant. The court held that it was unrealistic to conclude that a boxer could choose between his sport and alternative employment. This case was cited and followed by the High Court in *Subaru Tecnica International Inc v Burns & Others* (2001) WL 1479740. The court refused an injunction which would have prevented Richard Burns, the 2001 World Rally Champion, from breaking his contract with Subaru by driving for Peugeot.

The above cases reflected situations in which the 25
individual sportsman wished to walk out on a current contract in breach of its express provisions. It is interesting to reflect that there are circumstances in which English courts will grant injunctions to enforce clauses in contracts which, *prima facie*, constitute restrictive covenants in restraint of trade. This applies to two types of express terms that may be incorporated into a contract. First, the employer can provide for the employee being put on an extensive period of 'garden leave' whilst he works out his period of notice prior to resigning. Secondly, the employee may be subject to a term which continues to apply after the contract has ended, which prevents the employee from working in his (or her) chosen trade or profession for a specified period of time. Such terms providing for 'garden leave' and post-employment restraints will only be enforceable where the employer has legitimate commercial interests to protect and the terms are otherwise reasonable with respect to their duration and scope of geographical operation. Typically, protectable interests are restricted to confidential information (in the case of 'garden leave'), trade secrets and circumstances where an employee has personal influence over customers and could entice

them to move their custom to a competing business. It is pertinent to note that, whilst courts remain very reluctant to grant injunctions against the well-remunerated celebrity sports professional, post-employment restraints have been enforced against the relatively low status milkman and hairdresser (*Home Counties Dairies Ltd v Skilton* [1970] 1 ALL ER 1227 and *White (Marion) v Francis* [1972] ALL ER 857.

The only case in which garden leave provisions 26 have been enforced in the context of football was in *Crystal Palace v Bruce* (2002) QBD (unreported), where an injunction was granted for a short period to enforce terms in Steve Bruce's contract as manager of Crystal Palace F.C.. However, the injunction only applied to prevent Bruce from moving to manage Birmingham F.C. until after the fixture with Crystal Palace had taken place. This can be perceived as akin to protecting confidential information as clearly Bruce could have provided Birmingham with insider information that would have unfairly helped the Birmingham team prepare for its match with Palace.

This does suggest that there may be limited 27 circumstances in which the courts will accept that football clubs have legitimate interests to protect, and that these interests can only be protected effectively by court injunctions. Nevertheless, it is clear that the tendency of the courts in the entertainment/sporting contexts is to refuse to hold individuals to their contracts and simply to make an award of damages. There does seem to be some discrepancy between the reluctance of the courts to hold entertainers to their contracts, as exemplified by *Warren v Mendy*, despite the latter having committed a tort, and a greater readiness to enforce lengthy garden leave clauses or post-employment restraints to protect an employers interests in protecting their trade secrets or clientele. Generally, such clauses will be upheld providing they are reasonable as to their duration and area of geographical and/or commercial application. The case of *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* (1894) AC 535 originally set out the essential principles for regarding restraints of trade as valid. Contemporary case law continues to reflect this old case law. Arguably, the courts today should take a wider view of what constitutes a proprietary interest. Indeed, football managers, to whom transfer systems do not apply, provide a very good example of highly paid employees who are able to contract-jump providing the new club is prepared to pay the necessary compensation. However, it should be remembered that managers are as much sinned against as sinners in that they are often summarily dismissed in breach of contract to placate fans angry about their team's poor

performances on the field of play.

Therefore, so far as domestic transfers are concerned, it seems that British football clubs would be better protected by the FIFA rules where a player wished to jump contracts. However, this point remains academic given that the current Premier and Football League rules prevent a club securing a player's registration, whilst he is still under contract, unless a transfer fee is agreed. In contrast with the FIFA rules, this applies irrespective of the length of the contract and the age of the player. Indeed, the failure, to date, by the Premier and Football Leagues voluntarily to adopt the FIFA transfer system for domestic competitions may constitute a source of litigation in the future in the UK courts. This may be on the basis that the domestic transfer system is in restraint of trade and/or in breach of European law as it is a continuation of the type of transfer system that the European Commission challenged prior to the negotiation of the FIFA rules.

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TRANSFER WINDOWS: CAN THEY BE JUSTIFIED?

Transfer windows were introduced into Europe, from the beginning of the 2002-2003 season, by UEFA as a result of the UEFA/FIFA negotiations with the EU over the changed transfer system. They constitute a mechanism for restricting the ability of footballers under contract to move between clubs to two set periods during the year: first during January and second from the start of the close season through to the end of August. Although such windows had operated in certain European countries for a considerable period of time, they were a new restriction in other leagues including those in the UK. Not surprisingly, in a sport and industry that is parochial and conservative with a deep distrust of outside regulation, the introduction of the transfer window was universally criticised. Although the Premier league has now essentially accepted their legitimacy, the Football League has led an orchestrated campaign against them. It has argued:

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League clubs have traditionally relied on the flexibility to buy, sell or loan players whenever needed for either football or financial reasons. If this freedom is restricted clubs' financial health will suffer (Mawhinney, 2004).

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The Football League was given a temporary reprieve for seasons 2002-03 and 2003-04 (similarly in the Scottish league had extensions on the period the window was open plus three permitted (joker) transfers during the closed window; Italy had one extra month per season). However, transfer windows are now fully in place and, although not applicable to agreements

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between clubs for player loans and the signing of out-of-contract players, they operate as a clear restriction on mobility.

Arguments in support of windows are predicated 32
on the reality that team sport is seasonal and clubs need to plan for that period. The characteristic of competitive balance between clubs is partially determined by clubs being able to restrict the movement of players. The transfer system and the process of registration have certainly facilitated this traditionally. At certain points in the season when cups and league matters such as promotion and relegation are determined, the need for restrictions on transfers and temporary loans can be more readily justified. Indeed, for these reasons transfer deadlines and limits on loan players have operated in English football for many years. It can be argued that transfer windows similarly support the requirements of team stability by creating some notion of equal purchasing strength between clubs by limiting when purchases can be made. Additionally, it works to reinforce the stability of players' contracts.

Should transfer windows be seen as addressing 33
these concerns of team and player contract stability properly and, more importantly, proportionally? Some support can be found in the ECJ's ruling in *Jyri Lehtonen & Castors Canada Dry Namur-Braine v Fédération Royale Belge des Sociétés de Basketball ASBL* [2000] ECR I-2681. *Lehtonen* concerned the transfer system in basketball, where a Finnish basketball player sought to challenge rules on when transfers could take place imposed by the Belgian Basketball Federation, which effectively prevented him from playing in particular games. As in *Bosman* and other cases concerned with sport, the ECJ was quick to rule out any argument based on the idea of any general organisational autonomy of sports associations. However, the court did accept that where there were good sporting reasons to justify some kind of economic restriction, these would not be considered to be illegal. In *Lehtonen*, the restrictions, which operated as a form of transfer window, could be objectively justified as having sporting benefits connected with team stability and 'regularity' of sporting competition.

However, it can be argued that the transfer 34
windows, as they operate in European football, would fail the test of proportionality in that they are too restrictive. Indeed the suspicion is that that they essentially favour the larger richer clubs who can afford to assemble large squads and spend significant sums on transfers in a concentrated period of time. FIFPro has issued a statement that supports the view that that

transfer windows in the UK constitute an invalid restraint of trade (FIFPro, 2004). Moreover, contract stability during a season is any case secured by the FIFA rules which prevent a player from moving clubs without his current club's consent.

Transfer windows can be seen as an emblem of 35
the wider tensions over who governs football and what form of regulatory mechanisms should operate. The Premier League has generally accepted their role - the Football League argues they present a potentially terminal problem for many clubs. The latter believes they serve the interests of the rich clubs and inhibit the manoeuvrability of the impoverished. The introduction of transfer windows was not part of the changes that the European Commission was seeking. It remains to be seen whether they will be subject to any legal challenge, and, if so, whether they will remain intact as an integral part of the transfer system (McAuley, 2003). It is our contention that transfer windows should be abolished, or at least significantly liberalised, as they do not provide any general sporting benefits to the majority of clubs, players or fans.

CONTRACT-JUMPING AND 'TAPPING-UP'

Players have been approached and courted by 36
clubs wanting their services for many years. But within current contractual dynamics this seems to be occurring more frequently. Take, for example, the Ashley Cole affair. As is well documented, Ashley Cole and Chelsea FC were fined by the Premier League (FAPL) for breach of rules which prevent clubs making an illegal approach to 'tapping-up' a player, or a player under contract from speaking to another club, with a view to negotiating a contract, without his current club's consent (see www.premierleague.com/en/files/publications - similar rules apply in the other domestic leagues.) In particular, Rule K.5 provides that ... "a Contract Player, either by himself or any Person on his behalf, shall not either directly or indirectly make any such approach ... without having obtained the prior written consent of his club" (Goldberg and Pentol, 2005).

It is important to understand that this applies at 37
any time to a player under contract and even to a player out of contract where his current club has offered him a new contract that he has not rejected. Under Rule K.2, an out of contract player, who wishes to move to another club, must wait until the third Saturday in May before he is able to talk to a new club and only has until the 1st of July to agree to move. The practice of entering into a contract to sign for another club six months prior to the expiry of a current contract only applies to

players for British clubs where they have negotiated to move to a club in another part of the world in accordance with the FIFA rules. Otherwise, unless a player has the consent of his current club to approach other domestic clubs, then Rules K.2 and K.5 (or their equivalents in the other domestic Leagues) require the player to wait until a current season is over.

To date, the validity of what is now Rule K5 has been accepted, at least implicitly, by the English courts. The rule was at the heart of the litigation brought by Middlesbrough against Liverpool as a result of their signing of Christian Ziege (*Middlesbrough Football & Athletic Co v Liverpool Football & Athletic Grounds plc* [2002] EWCA Civ 1929). In this case a Commission of Inquiry appointed by the Football Association Premier League (FAPL) found that that both Liverpool FC and the player Christian Zeige were in breach of Premier League Rules prohibiting clubs approaching players still under contract, or vice-versa, and also prohibiting players from disclosing confidential terms in their contracts to other persons. The Court of Appeal agreed with the Commission of Inquiry that there must have a breach of Ziege's contractual duties and made no comment on the validity of the rules (for further analysis, see Welch, 2005, pp. 527-528). However, whilst clubs may not wish to challenge a rule that they may perceive as typically being to their advantage, players are unlikely to be under any such inhibitions. 38

Whilst Ashley Cole has not sought to take this issue any further (the Court of Arbitration for Sport refused to hear his appeal), there is still the potential basis for litigation in the future. Yet again, the essential question is why should footballers be treated any differently to employees in general? Most employees, including those on fixed term contracts, are not restrained in any way, or at any time, from seeking to negotiate a contract with a prospective employer either on the expiry of a current contract, or with a view to the buying out of that contract. In short, it may be argued that Rule K.5 constitutes an invalid restraint of trade that is contrary to public policy. Additionally, it could be argued that the rule is an unjustifiable constraint on a player's freedom of movement under Article 39. The latter contention is reinforced by the fact other leagues in Europe do not have an equivalent to Rule K.5. Indeed, legal advice provided to FIFPro by its lawyer Wil van Megen suggests that the rule is contrary to EU law (FIFPro, 2005). 39

With respect to arguments as to whether the Rule is reasonable and thus a valid restraint, it can be argued that, as explained above, other 40

mechanisms to curtail the freedom of movement of valuable employees such as the use of 'garden leave' provisions and post-employment restraints are used by employers and upheld as valid by the courts. Moreover, players enjoy significantly high salaries and untypical security of employment during the currency of their contracts. Footballers are paid handsomely even when injured or when not selected, and for these reasons many players – particularly towards the end of their careers - perceive long fixed term contracts to be as much, if not more, in their interests than those of their clubs. In short, players are major business assets and thus clubs have a proprietary interest in holding them to their contracts. Rule K.5 constitutes an effective device in maintaining respect for subsisting contracts. Overall, there is an analogy between the operation of the Rule and using contractual mechanisms to protect other proprietary interests such as trade secrets and goodwill.

With respect to proportionality, the FAPL argue 41 that the Rule is necessary for competitive integrity, contractual and team stability and competitive balance (Shear and Green, 2005). It can also be added that contract stability is not just an issue for club and player but also for supporters who have paid significant sums of money for their season tickets in the anticipation, in part at least, that particular star players will, in accordance with their contracts, be with their club for the coming season.

However, the arbitrary nature of the Rule does 42 seem invidious. As the Rule stands, no distinction is made between a player whose contract has several years to run and a player who is in the last year of his contract and is free to move on expiry of it. The latter needs to establish his prospects both with his current club and prospective new clubs as far as the signing of a new contract is concerned. It is hard to see how preventing a player from doing this can be anything other than an unreasonable restraint or disproportionate restriction on his freedom of movement.

With the future adoption of the FIFA rules by our 43 domestic Leagues in mind, it would also seem logical to permit a player to approach clubs towards the end, or at the very least after the expiry, of the contract's 'protected period'. Similarly, it can be argued that the rules should reflect whether a player may have a sporting just cause to terminate his contract, and thus should be able to talk to other clubs about his future in order to weigh up his options in terms of whether or not to move to another club.

FOOTBALL GOVERNANCE - WHO RULES?

The transformations of the contractual dynamics in 44

football as represented by the transfer system, transfer windows and the legitimacy of approaches to under-contract players are reflected on a more general level by challenges as to who should have the legitimate role in governing the sport. Historically, the position was clear and straightforward - the English Football Association governed the national game, the Union de European Football Associations (UEFA) governed the European game and the Fédération Internationale de Football (FIFA) governed the international game. These bodies have existed within a paradigm of self-regulation and autonomy (on regulation generally see, Baldwin and Cave, 1999; Sinclair, 1997; Black, 1997; as far as sport is concerned see Gardiner et al 2005 and Weatherill, 1999). A number of events can be used to illustrate the isolationism that all these bodies have exhibited in resisting any challenges to their domain. Clearly, the *Bosman* case is central, as UEFA believed up to the day of the decision that it would win the case in the face of the legal argument supported by the European Union. The subsequent conflict over the legitimacy of the transfer system led to a compromise between FIFA and the European Commission about how the new system should operate so as to comply with EU Law. It has become clear that in the modern professional game, the sport's governing bodies need to comply with, or at least accommodate, the demands of external legal regulators, most notably the European Commission. This has resulted in ongoing tensions concerning compliance with external legal norms and regulatory mechanisms.

Additionally, a variety of stakeholders have emerged challenging the traditional bodies. The new money in the guise of sponsors and media companies has demanded a voice. New competitive frameworks have emerged, for example, the breakaway Premier League: or have been threatened, for example, a 'European Super-League'; or envisaged as possible developments, e.g. a global football league (Szymanski and Zimbalist, 2006). The most powerful clubs have networked to provide a collective voice, the G14 organisation representing the interests of eighteen of the top European clubs. The significance of the latter development is illustrated by the involvement of the G14 in the case brought by Belgian club Charleroi against FIFA, claiming compensation over a player, Moroccan Abdelmajid Oulmers, who was injured in an international match against Burkina Faso in November 2004 (G14 press release, 2006). He was not able to play for Charleroi for eight months. At the time of writing, this case has been referred to the ECJ for a preliminary ruling.

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Do the obligations on clubs and football players having employment contracts with those clubs imposed by the provisions of FIFA's statutes and regulations providing for the obligatory release of players to national federations without compensation and the unilateral and binding determination of the coordinated international match calendar constitute unlawful restrictions of competition or abuses of a dominant position or obstacles to the exercise of the fundamental freedoms conferred by the EC Treaty and are they therefore contrary to Articles 81 and 82 of the Treaty or to any other provision of Community law, particularly Articles 39 and 49 of the Treaty? (Official Journal of the European Union 2.9.2006. C212/11).

These challenges to the orthodox regulation of football have led to a focus on two main issues. 47 First, can football reform itself so as to develop effective internal mechanisms that reflect contemporary values of governance found in the general corporate world (and, in so doing, simultaneously protect the game from the ravages of that world)? (see www.governance-in-sport.com, 2001; Caiger and Gardiner, 2001). The implementation by the English FA of the recommendations of the Burns Report (Burns, 2005) suggests welcome proclivity as to the necessity for change (Gardiner, 2006). Second, if football fails in this endeavour of improved governance, will it be subject to further external regulation? (Gardiner, 2005). It has become increasingly recognised that there needs to be a division between managing commercial interests on the one hand and issues related to the organisational 'rules of the game' on the other. This has also occurred in a number of other sports in recent years including cricket, horse racing and

The European Commission has been the driving force concerning this move to improved governance. Together with the freedom of movement provisions behind the outcome in *Bosman* and the pressure put on FIFA/UEFA over changes to the transfer system, the Competition Commission has targeted a number of sports particularly in relation to the abuse of a dominant position exercised by some sports governing bodies. The investigation of the Fédération Internationale de L'Automobile (FIA), specifically concerning its favouring of Formula 1 Grand Prix racing, resulted in a compromise that saw the FIA divesting its commercial interests in F.1 (EU Media Statement 2003). The subsequent period, has seen the Competition Commission adopt a less interventionist role with the emphasis being on negotiation between parties and the granting of negative clearances. A recognisable delineation has been drawn between those sports business issues where the EU will be prepared to intervene and those sporting issues that are essentially to be determined by sports bodies, see Case C-51/96 and C-191/97 *Deliège v Ligue Francophone de Judo et Disciplines Associées ASBL*, [2000] ECR I-2549. This has resulted in what Foster (2000) has termed 'supervised autonomy', with sport acquiescing to compliance with external legal norms. It is highly unlikely that there will be a 'sporting exemption' from the provisions of EU law (see Arnaut 2006, Garcia 2006). However, there is recognition that, although sport is an economic activity, it is a 'special' case. Sport will however have to ensure that it complies with the provisions of EU law in areas such in competition law. The dialogue between the European Commission and the football federations concerning the 'voluntary' changes to the transfer system is a good illustration of what seems to be a 'new realism' (Parrish, 2003).

Nevertheless, it is clear that sport will have to ensure that it complies with the provisions of EU law in areas such as competition law, and the complexities involved in determining when EU law will be applicable are vividly demonstrated by the ECJ's ruling in Case C519/04P *Meca-Medina v Commission of the European Communities* [2006] 5 CMLR 18. The case itself concerned swimmers who were banned after testing positive for the banned drug Nandrolone. Whilst the ECJ upheld the Commission's decision that this ban did not violate EU competition law, it also rejected the reasoning of the European Court of First Instance that EU law had no jurisdiction over purely sporting rules relating to questions of purely sporting interest, which, as such, have nothing to do with economic activity.

The ECJ ruled that this was an error of law as, 'the 50 mere fact that a rule is purely sporting in nature does not have the effect of removing from the scope of the Treaty the person engaging in the activity governed by that rule or the body which has laid it down. If the sporting activity in question falls within the scope of the Treaty, the conditions for engaging in it are then subject to all the obligations which result from the various provisions of the Treaty' (paras 27 and 28).

As Infantino (2006) has argued, this opens the ' 51 Pandora's box' of what constitutes a condition for engaging in sporting activity. There are many rules, which might be perceived as purely sporting rules in that they are designed to ensure fair play, which can also be regarded as constituting a condition for participating in a sport. This ruling certainly suggests that the ECJ will agree that it has the jurisdiction, in the 'Oulmers case', to review the validity of FIFA's rules concerning the obligatory release of players for international games (see Blackshaw, 2007; Szyszczak, 2007; Weatherill, 2006 for further analysis on the implications of *Meca-Medina*).

WHO RULES? - THE FUTURE

The transfer system is not in itself a legal construct 52 given that its central regulatory mechanism is to enable clubs to restrain player mobility by retaining their registrations. However, the whole edifice of the transfer system is dependent on law insofar as it can be constrained, or indeed dismantled, by jurisprudential developments – in particular future rulings or decisions of the ECJ. Indeed, it may still be the case that the FIFA transfer rules will be challenged on the basis of Article 39 or EU competition law. Whilst there is no indication that such arguments will succeed, the ECJ is yet to rule on these issues, and there is never any guarantee that the Court will agree with the Commission's interpretation of what EU law requires or permits.

Ultimately, the determining factor will be whether 53 the revised FIFA transfer system meets the requirement of proportionality. Arguably this is the case, given the circumstances in which a player is permitted to leave a club through unilaterally terminating his current contract in circumstances where the club will have no option other than to release that player's registration. However, it is acknowledged that there is some validity to the argument that any form of transfer system is obnoxious because it reduces players to mere chattels and thus offends the freedoms that lie at the core of EU law.

Whilst it cannot be guaranteed that the FIFA 54 transfer rules are compatible with EU law, the *imminent* destruction of the transfer system by

legal means appears unlikely given that both the European Commission and FIFPro have approved the current FIFA transfer rules. Indeed, arguably, the maintenance of some form of transfer system has been reinforced and validated by the fact the FIFA rules have been accepted by FIFPro. Moreover, there is the potential for future modifications to be secured through collective bargaining rather than the product of judicial interventions (Branco-Martins, 2003). Thus, for better or for worse, from a legal perspective it can be predicted that the transfer system in some form or another is here to stay for the foreseeable future. If the transfer system goes, this is more likely to be the result of economic rather than juridical factors.

The fact that the current FIFA transfer rules only came about under pressure from the European Commission exemplifies and perpetuates the conflict between traditional notions of self regulation and juridification. It is argued that the piecemeal nature of the latter is a particular problem – particularly as it has been based on instances of threatened rather than actual litigation. In this context it is useful to note that, to date, the only judicial decision of any note since *Bosman* has been the ECJ's ruling in *Deutscher Handballbund eV v Maros Kolpak* [2003] ECR I-4135 (Case C-438/00) and this has not had the far-reaching consequences for player mobility as was once envisaged (see Hendrickx 2003; Boyes 2003; Van de Bogaert 2004). Moreover a number of the countries to which *Kolpak* applied are now EU Member States and their nationals are (or will be by 2009) fully protected by Article 39. The threat remains nevertheless (from the perspective of international and domestic footballing authorities) of litigation with consequences of at least *Bosman* proportions. This can be seen in the here and now by the 'Oulmers' case. 55

In his analysis of the application of regulatory theory to the employment relation, Collins (2000) argues that external regulation is necessary where deregulated market mechanisms generate injustices and/or imbalances and private law fails to provide appropriate correctives. By analogy, it can be argued that self regulation in professional football has distorted the market through a transfer system that both restrains players' freedom of movement and inflates transfer fees for players under contract who wish to move clubs. The application of the doctrine of restraint of trade, the availability of private law remedies such as injunctions and potential regulation by EU law are all characterised by juridical uncertainty. 56

Once justified, legal regulation can obviously take the form of detailed substantive rules. However, 57

reflexive law provides an alternative to this approach. Its origins lie in the sociology of law (see Teubner, 1982; Habermas, 1996), and it supports perspectives based on notions of legal pluralism. The advantage of reflexive law is that it enables a set of principles to be provided, that must be adhered to as a minimum, but permits delegation of detailed implementation to relevant bodies be they, as examples, national legislators or governing bodies of particular sports. A system of reflexive law can provide a compromise between ensuring that particular standards are complied with and respecting the autonomy of those concerned with operating a particular system or activity and who understand the specificities involved. This presents a symbiotic relationship between normative rules within and without the particular activity in question (see Barnard, Deakin and Hobbs, 2004) for application to other areas of labour relations). As Rogowski and Wilthagen (1994) state, "reflexive law reminds legal intervention that it is dependent on self-regulation within the regulated systems."

Thus, as Wynn (2000) has argued, reflexive law 58 can be seen as the most appropriate form of legal regulation in any context where the relevant system or relationship is resistant to external intervention. Reflexive law can both reflect the norms of that system and impose modifications to those norms that can be enforced by legal means. This perspective seems to encapsulate the situation in football given the ongoing but intermittent tensions between self-regulation and external regulation.

It is contended that the best basis for resolving 59 these tensions is by moving to a system of reflexive law using the method of EU social law as a paradigm. The advantage of EU social law is that it requires the involvement of the relevant social partners. Under Article 138 of the EC Treaty, the European Commission must engage in dialogue with the social partners as to the content of any proposed directive. Moreover, Article 139 permits the relevant social partners to conclude their own collective agreements, which, if the social partners so request, may then be given legal force through an EC directive. For example, Council Directive 97/81 implemented the framework agreement on part-time work that was concluded by UNICE, CEEP and the ETUC. Article 137(4) permits member states to entrust management and labour with negotiating their own agreement on the implementation of a directive within that member state. The Information and Consultation of Employees Regulations (SI 2004 No. 3426), which transpose EC Directive 2002/14, are based on an agreement between the British TUC and employers associations such as the CBI. The advantage of

these processes is obvious, as those directly affected by legal regulation become central to the formulation of the specific rules to be adopted. The role of law is reduced to acting as a mechanism for ensuring that agreed minimum standards are complied with.

As stated above, there is the possibility that a collective agreement regulating football could be entered into in the future. Arguably, this constitutes the ideal method of abolition or reform of the transfer system. However, if the conclusion of such an agreement were to prove impossible, at least in the shorter term, an EU directive, laying down binding principles but leaving detailed implementation to footballing authorities, could provide the way forward. In our view such a directive could take the FIFA transfer rules as its starting point. 60

This is not to suggest that the FIFA rules should be adopted in their entirety. Indeed, one possible basis for reform would be to abolish the registration system and permit clubs to use contractual mechanisms such as post-employment restraints or garden-leave clauses to impose some element of contract stability. This would have the advantage of ending a system where players are treated as assets and bought and sold by clubs accordingly. However, if the registration system were to go, it is clear from the above discussion that the circumstances in which UK courts should grant injunctions to enforce such clauses would have to be put on a statutory basis rather than left to judicial discretion. The FIFA rules permitting contract-jumping, but also limiting the circumstances in which it is permitted through the concept of a contract's protected period, could provide the basis for determining when statutory injunctions should be granted. 61

Similarly, the concept of contract termination for sporting just cause, as contained in the FIFA rules, should be incorporated into any Directive. Post-employment restraints and 'garden leave' clauses would thus cease to be enforceable not only in circumstances in which a player could terminate his contract for due cause, but also in contexts in which for sporting reasons a player should be permitted to leave his current club. The latter could be defined as including circumstances in which a player (whilst fit) has not been selected for x number of first team games, and where a player is informed, or has good reason to believe, that he is no longer wanted by his current club. As argued by Gardiner and Welch (1998, pp. 302-303), there will be circumstances in which the way in which a player is treated by his club constitutes destruction of mutual trust and confidence, and thus that player can argue that he has been constructively 62

dismissed and immediately terminate his contract for just cause. While simply informing a player that the club would be prepared to release him at the right price is unlikely in itself to constitute any breach of contract, let alone one which is repudiatory in nature, it can be argued that this should justify unilateral termination by the player on the basis of sporting just cause.

It is important to understand that, whilst such contractual mechanisms might replace the formal transfer system and thus the notion of a formal transfer fee, it would not end what in effect is the buying and selling of players. This is because, for both sporting and financial reasons, many players under contract will wish to move to another club, or will be happy to do so if the right deal, including an appropriate signing-on fee, can be struck. In such circumstances players, let alone clubs, will not want the complications that litigation tends to involve. In practice, therefore, whether a player can move will often be down to whether the new club is prepared to buy-out the existing contract. As argued above, the sum of money involved may or may not reflect the compensation a court might award for breach of contract, as the actual sum may be more linked to commercial and sporting considerations than to formal legal principles. In short, the buying out of a player's contract would be a transfer fee by any other name. Such arrangements already take place with respect to managers and coaches; they would simply be more frequent with respect to players. 63

The main drawback with the above approach is that litigation becomes the ultimate enforcement mechanism. This will often be costly, and in all probability will continue to contain an element of uncertainty. The alternative would be to leave the registration system intact whilst providing for appropriate rights to contract-jump on the basis of the FIFA rules. This would end the transfer system as it currently operates in the UK's domestic leagues, and would introduce the concept of contract termination for sporting due cause into the domestic system. 64

One possible variation to the current FIFA rules would be, on the expiry of a contract's protected period or where the contract is terminated for sporting just cause, to permit contract-jumping *during* a season if a player has negotiated a move to a club which is in a different league, and which is thus not in competition with his current club. The normal rules relating to such a player being cup-tied could continue to apply as far as cup competitions are concerned. Such a change should also reduce the complexities involved in the implementation of Article 17, as demonstrated by the 'Webster case' (see above). 65

It is true that this would leave intact a transfer system, which some will continue to find objectionable. However, as we have sought to demonstrate, unless players are given an absolute right to terminate their contracts unilaterally, any legal mechanism to secure some degree of contract stability will result in some form of transfer system, albeit an informal one, if players under contract are to be able to move to other clubs. 66

Moreover, it is important to take account of the fact that contract stability is not only the concern of clubs as employers. It is at least equally the concern of those large numbers of people who are normally forgotten in debates on the issues with which this article has been concerned. These people are the loyal football fans who almost from cradle to grave invest in their clubs at great personal expense – both financial and emotional – and who deserve some guarantee that *their* star players cannot simply walk out of *their* club at will because they have received a better offer elsewhere. 67

CONCLUSIONS

The on-going issues concerning the dynamics of contractual relations reflect tensions concerning the right to govern in football. It would seem that some accord has been reached between the football authorities (in the form of UEFA & FIFA) and external regulators (such as the European Commission and the ECJ), though this could yet be challenged by the outcome of the 'Oulmers' litigation. However, as has been argued above, this does not mean that the existing consensus as represented by the FIFA transfer rules will definitely be able to withstand legal challenge. It is suggested that sports bodies, at least at an international level, have taken legal compliance seriously and have indicated that they are prepared to develop effective internal governance. In turn, the external regulators have provided delineation as to the limits of their intervention. The threat to this world of re-regulated sports bodies comes primarily from commercial interests who are motivated by self-interest and financial greed rather than 'the good of the game'. Perhaps it is the time for the regulators to support the sports bodies in this regard. Surely, the optimum way in which this can be done is by encouraging a systematic basis for regulation throughout Europe based on the method of reflexive law rather than relying on the vagaries of individual litigation? 68

It is contended that the essential principles underlying such regulation, either through collective agreement or EU legislation, should be: 69

Provision within all European
Associations for unilateral termination

of a contract by a player after the expiry of a protected period, or for 'sporting just cause'.

Permitting players to approach other clubs in any European Association in the latter stages of their contracts, or towards the end of a contract's protected period.

The abolition (or extensive liberalisation of transfer windows) – both within and between European Associations.

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