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The FIFA Ban on Third-Party Ownership of Football Players

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Submitted in partial fulfillment of the requirements for the degree

LLM (Private Law)
Faculty of Law
University of Pretoria

2017

Supervisor:
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Acknowledgements

I would like to thank my supervisor, Professor Steve Cornelius, of the Faculty of Law at the University of Pretoria, for consistently steering me in the right direction and encouraging my independent research. Your advice, guidance and inspiration have been inestimable.

I would also like to thank my parents, who have been an inspiration throughout my life. They have always supported my dreams and aspirations, and I am greatly thankful to the both of them, as they have instilled in me the discipline to reach my goals.

To my brothers, Jarryd and Cayl, thank you for joining me in my educational journey and for the support you offered as you read and critiqued each chapter along the way.

Most importantly, I would like to thank my wife for providing me with unfailing support and continuous encouragement throughout my years of study and through the process of researching and writing this dissertation. She has been my inspiration. This accomplishment would not have been possible without her.

Thank you.

Abstract

Third-party ownership is a type of alternative financing model in which an investor takes ownership of all or part of a football player's economic rights and is thereby entitled to a percentage of the transfer fee each time the player is sold. Third-party ownership of players' economic rights is of growing concern in the global football sphere. Despite this business practice having been partially regulated by FIFA in 2009, third-party ownership continued to grow. This practice was subsequently banned by FIFA on 1 May 2015. In the international football community, there are different opinions of third-party ownership. Some state that a complete ban is necessary while others insist that the practice be better regulated.

The purpose of this dissertation is to demonstrate that FIFA has come to the correct decision when imposing a blanket ban on third-party ownership. This dissertation deals with the history of third-party ownership, the different arguments brought forward by the opposing parties, and how FIFA came to the conclusion to ban the practice.

This research assumes a quantitative approach comprising an in-depth analysis of third-party ownership from the available case law, journal articles and news articles on what is a considerably opaque topic.

The shady practice of third-party ownership is a difficult topic to research because the majority of the parties enter into non-disclosure agreements in order to protect themselves. This secrecy has played an important role in perpetuating the existence of third-party ownership.

[Word Count: 24 734]

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Chapter 1: Introduction

Investors no longer view football as a traditional niche market, with the return on investment greater than it was before due to the popularity of football, and sport as a whole. The key to any investment would be to buy something at the cheapest possible price and sell it for the maximum. If we had to look at transfers like Marcos Rojo and Eliaquim Mangala, both transferring from smaller clubs to top-tier clubs and competing in the UEFA Champions League,¹ this would definitely be a step in the right direction for these players. In these transfers, Marcos Rojo transferred from FC Spartak Moscow, in Russia to Sporting Clube de Portugal, in Portugal for a fee of €4 million.² He was then later transferred to Manchester United in England for €20 million.³ Similarly, Eliaquim Mangala transferred from Standard Liege, in Belgium, to Porto, in Portugal, for €6.75 million,⁴ and then later to Manchester City, in England, for €32 million.⁵

However, when looking more closely at these transfers, and many others, the details of how they came about start to raise some concerns. The use of the questionable business practice of third-party ownership was cause for concern from many parties across the footballing nations.⁶

¹ The UEFA Champions League is an annual football competition for top-tier clubs from various European countries, organised by the Union of European Football Associations (UEFA). It is the most distinguished club tournament in the world and the most prestigious football competition in Europe, played by the national league champion (and, for some nations, one or more runners-up) of each UEFA national association.

² See Transfer History at <http://www.transfermarkt.com/marcos-rojo/profil/spieler/93176> (Last Accessed: 20 April 2017)

³ *Ibid.*

⁴ See Transfer History at <http://www.transfermarkt.com/eliaquim-mangala/profil/spieler/90681> (Last Accessed: 20 April 2017)

⁵ *Ibid.*

⁶ England, France and Poland have taken initiatives to establish strict rules prohibiting all third party entitlements. See Krishnan, A., Explaining Third Party Ownership and How Banning it Affects Football's Crazy Transfer Market, FirstPost, 30 April 2015, <http://www.firstpost.com/sports/explaining-third-party-ownership-and-how-banning-it-affects-footballs-crazy-transfer-market-2220032.html> (Last Accessed: 17 July 2017)

Third-party ownership is where a third party, be it an individual, company or fund, purchases either all or part of a player's economic rights so that the third party can share in the transfer fee every time the player gets sold.⁷ The third party believes that the player whose economic rights they are purchasing has the potential to improve and be sold for more than the club originally bought him for. Cash-strapped clubs found such a model to be an immense relief as it offers capital investment from alternative sources and thus offers the club more disposable income for operations.

This business model thus gained popularity but it was not met without controversy. UEFA raised some concerns stating that this type of business model diminishes the control that a club has in its transfer of players and also obscures the boundaries between sporting activity and pure capitalism.⁸ The UEFA general secretary Gianni Infantino states "It raises ethical and moral questions... Is it appropriate for a third party to own the economic rights to another human being and then to trade this 'asset'? This would be unacceptable in society and has no place in football... Footballers (like everyone else) should have the right to determine their own future."⁹

If we take, for example, a player like Eliaquim Mangala, it was later found that he was part-owned by two investment firms. These firms being Doyen Sports

⁷ Investigations Team, What is Third-Party Ownership in Football and Why is it so Controversial?, The Telegraph, September 2016, <http://www.telegraph.co.uk/news/2016/09/26/what-is-third-party-ownership-in-football-and-why-is-it-controve/> (Last Accessed: 26 March 2017)

⁸ Dimond, A., News Report Finds 1000 Footballers in Europe Part-Owned by Third-Party Investors, 20 November 2013, BleacherReport, <http://bleacherreport.com/articles/1859052-new-report-finds-1000-footballers-in-europe-part-owned-by-third-party-investors> (Last Accessed: 23 April 2017)

⁹ Goal.com, UEFA general secretary Gianni Infantino has stated that the controversial practice of third-party player ownership (TPO) has "no place" in football, 20 March 2013, <http://www.goal.com/en-ke/news/4631/soccerex/2013/03/20/3839871/third-party-ownership-has-no-place-in-football-infantino> (Last Accessed: 20 April 2017)

Investment Limited (Doyen) and Robi Plus Limited (Robi Plus).¹⁰ Mangala's transfer from Porto to Manchester City was complex due to his economic rights being split between three different parties. The club, Porto, owned 56.67% of his economic rights. Doyen, on the other hand, owned 33.33%, and Robi Plus held the remaining 10%. Manchester City agreed to pay Porto €30.5 million for their share (56.6%) of the player. However, that would have only extinguished the debt owed to Porto and not to the other economic rights' owners. Thus, Manchester City would have probably had to pay €53.8 million to acquire the total economic rights of the Eliaquim Mangala.¹¹ More unnerving is that when Eliaquim Mangala was questioned whether he knew about such ownership agreements he said, "I didn't know about it, I wasn't in the loop... I learnt about it from the media. I wasn't consulted before."¹² And that he feels, "We are financial products... A football club is like a factory, and we are its outputs. You have to be realistic."¹³

While the media tends to draw our attention to the minority of players that make it to such a high level with the aid of third-party investors, herein lies great opportunity for exploitation as there are thousands of players aiming to leave their difficult environments in the hope of a better life for themselves, and their families, who would enter into these agreements only to get exploited on their arrival in a foreign country.

¹⁰ Sharp, A., Manchester City Defender Eliaquim Mangala Reveals he was Clueless to Investment Firm Ownership during Porto Spell, 31 August 2014, The Daily Mail, <http://www.dailymail.co.uk/sport/football/article-2739023/Manchester-City-s-Eliaquim-Mangala-reveals-clueless-split-ownership.html> (Last Accessed: 20 April 2017)

¹¹ Newman, B., Leaked: Eliaquim Mangala's Transfer Contract from FC Porto to Man City Exposed, www.101greatgoals.com, 20 January 2016, <http://www.101greatgoals.com/blog/leaked-eliaquim-mangalas-transfer-contract-from-fc-porto-to-man-city/> (Last Accessed: 20 April 2017)

¹² King, D., Eli's Shocker: City Star Reveals Ownership Truth, 31 August 2014, The Sun, <https://www.thesun.co.uk/archives/football/1545/elis-shocker/> (Last Accessed: 20 April 2017)

¹³ Scott, M., Player Trades Boost Third Party Balance Sheet, 17 September 2013, InsideWorldFootball, <http://www.insideworldfootball.com/2013/09/17/matt-scott-player-trades-boost-third-party-balance-sheets/> (Last Accessed: 20 April 2017)

These third-party ownership agreements are complex in nature and often the parties associated with such investment firms are not easily identified, as they are offshore companies, who do not disclose their shareholders and enter into non-disclosure agreements with clubs with regards to their dealings.¹⁴ This makes them dangerous tools to enter into criminal activities such as human trafficking, match-fixing, tax fraud and money-laundering, *inter alia*.

The subsequent sections will deal with how third-party ownership is possible, the different types of third-party ownership, why the various parties enter into these agreements, and an introduction to the FIFA ban on such practice.

1.1 How third-party ownership is made possible

Players possess a number of rights; namely, economic rights, federative rights and labour rights. Such separation of rights is what allows a club to enter into a third-party ownership agreement, as the economic rights are the specific rights being sold in these agreements. The economic right is a financial right that pertains to any transfer or negotiation of the player's federative rights. Due to the fact that the player has signed an employment contract with the club, this leaves the club as the natural holder of the economic rights.¹⁵ The third party ownership model relates mainly to the ability of clubs to separate the economic right from the others as this allows a club to enter into a private commercial contract with the interested third party in which the third party enters into a credit agreement where he will in return be paid nothing less than the minimum interest amount.¹⁶ The economic right differs from the other two rights as the

¹⁴ Van Maren, O., Duval, A., La Liga et al. International Sports Law Journal (2016), 19 November 2015, <http://link.springer.com/article/10.1007/s40318-015-0080-x> (Last Accessed: 20 April 2017)

¹⁵ KPMG Asesores, S. L., Project TPO, 8 August 2013, at p. 11, <http://www.ecaeurope.com/Research/External%20Studies%20and%20Reports/KPMG%20TPO%20Report.pdf> (Last Accessed: 28 June 2017)

¹⁶ A minimum interest amount is an amount payable to the investor which would be the initial investment amount plus the minimum interest earned for the

other rights are exclusive to clubs and players and cannot be purchased by third parties.¹⁷

The federative rights arise from the fact that a player has signed an employment contract with the club, and these rights allow such a player to register with the specific domestic federation.¹⁸ In South Africa, a professional player would be allowed to register with the South African Football Association (SAFA) by way of his employment contract and thus compete in the local league and cup competitions.

The third right is a labour right; this right is derived from the employment contract between the club and the player.¹⁹

1.2 Different types of third-party ownership

There are three dominant third-party ownership models, these are:

1.2.1 Financing third-party ownership

This is where a third-party, such as an individual, agent, private company or investment fund, grants credit to a club in exchange for a percentage of the economic rights of one or several players. The club then uses this investment to carry out their usual economic activities. This type of third-party ownership is beneficial to cash-strapped clubs who need to remain liquid and balance their

specific transaction. This minimizes the investor's chances of operating at a loss as the minimum interest amount is usually included in the third party ownership agreement and thus the investor's return will be nothing less than the amount stated (or amount initially invested).

¹⁷ Williams, B., *The Fate of Third-Party Ownership of Professional Footballers' Rights: Is a Complete Prohibition Necessary?*, *Texas Review of Entertainment and Sports Law*, vol. 10, no. 1, 2009, at p. 83.

¹⁸ KPMG Asesores *op. cit.*, at p. 10.

¹⁹ By means of an employment contract between the player and the club.

accounts, by using such investment to offset the external and internal expenses of the club.²⁰

1.2.2 Investment third-party ownership

This type of third-party ownership is the most popular worldwide. It occurs when a club and third-party enter into an agreement whereby the third-party will pay part or all of the transfer fee of a player which the club is interested in but does not have the adequate financial resources to pay for such a transfer, and in return the third-party will receive a percentage of the player's economic rights (and therefore a share in the future transfer).²¹

Such co-ownership of the player's economic rights creates a joint venture between the club and the third-party. According to this agreement they jointly own these economic rights of the player and are entitled to their respective share in the return of any transfers.²²

By way of an illustration, Sporting entered into a third-party ownership agreement with Doyen in order to purchase Marcos Rojo from Spartak Moscow. Doyen contributed €3 million and Sporting the remaining €1 million in order to pay Spartak Moscow for the player.²³ Thus when Marcos Rojo was transfer from Sporting to Manchester United for €20 million, Doyen received 75% of the transfer fee and Sporting received the remaining 25%.²⁴

²⁰ KPMG Asesores *op. cit.*, at p. 13.

²¹ *Ibid.*

²² *Ibid.*

²³ See Villas-Boas Pires, L., What Has The Marcos Rojo Case Taught Us About Third Party Investment in Footballers?, LAWINSPOORT, 16 March 2016, <https://www.lawinsport.com/articles/item/what-has-the-marcos-rojo-case-taught-us-about-third-party-investment-in-footballers> (Last Accessed: 17 July 2017)

²⁴ KPMG Asesores *op. cit.*, at p. 13.

The duration of Financing and Investment third-party ownership agreements are generally linked to the length of the employment contract of that player, and such duration may be increased if the employment contract was to be extended.²⁵

1.2.3 Recruitment third-party ownership

These agreements are usually concluded with regards to young players, who are not professionals yet, but have great potential. The club grants a percentage of the economic rights of the talented player to his agent, a company, the player's parents, a relative of the player, or even to the player himself, in order to lure that player to the club.²⁶

The economic rights issued in terms of this type of agreement are usually smaller than the other types of third-party ownership, and would usually range between 10% - 20% of the future transfer fee.²⁷

Such a method of attracting players is not popular in Europe but is more often used in South America where clubs grant percentages to agents with appropriate potential to persuade young players.²⁸ This method was alleged to have occurred with star player Neymar, where his parents received an amount of £34 million of the transfer fee when their son transferred from Brazilian club Santos to Barcelona in Spain.²⁹

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ White, J., Neymar's parents pocketed £34 million for move to Barcelona. Duncan Edwards' mum got a washing machine, 15 January 2014, The Telegraph, <http://www.telegraph.co.uk/sport/football/teams/barcelona/10575223/Neymar-parents-pocketed-34-million-for-move-to-Barcelona-Duncan-Edwards-mum-got-a-washing-machine.html> (Last Accessed: 24 April 2017)

The above three types of third-party ownership are the standard models. The most standard models in Europe are the financing and investment models, while in South America, the recruitment model seems to be the most widespread.³⁰

1.3 Why do the parties enter into third-party ownership agreements?

Clubs view third-party ownership as a new source of finance which was not available previously. While the traditional streams of income become more difficult to obtain, clubs enter into these different third-party ownership models usually demanding inflated interest rates. In essence, clubs are able to maintain the quality of their squad by signing better quality players due to the available finances while sharing such financial liability with a third party.³¹

For the third parties on the other hand, these business models constitute an opportunity to gain significant financial reward with minimal risk. This limited risk is due to clauses in the agreements requiring that the club pay a minimum return on the investment,³² or the payment of interest, even if the player is not transferred before the end of the player's employment contract. The principal area of risk for third parties lies in the club's solvency.³³

1.4 Third-party ownership and the FIFA ban

There have been many different points of view regarding third-party ownership from the various leagues and associations around the world. The clubs based in South America claim that third-party ownership is an integral part of the football sphere as it aids the clubs in remaining financially solvent, as they do not have

³⁰ KPMG Asesores *op. cit.*, at p. 13.

³¹ *Ibid.*, at p. 12.

³² *Ibid.*

³³ *Ibid.*

the substantial financial backing like European clubs and therefore cannot offer players competitive salaries.³⁴ In contrast, clubs based in Europe are in favour of the ban on third-party ownership. These European clubs have significant financial support from both their leagues as well as competitions such as the UEFA Champions League and the UEFA Europa League.³⁵ From this stance it can be seen that these clubs will not suffer as big a loss, both financially and competitively, as the clubs in South America.³⁶

After studies³⁷ requested by FIFA into the different positions of the various stakeholders in international football, it was decided at a meeting held by the FIFA Executive Committee on the 18th and 19th December 2014,³⁸ that new provisions were to be included in the Regulations on the Status and Transfer of Players (herein referred to as RSTP) with the focus being on third-party ownership. On the 1st May 2015 FIFA officially banned the practice of third-party ownership in the economic rights of football players.³⁹

The FIFA ban on third-party ownership reads as follows:

1.4.1 Article 18ter: Third party ownership of players' economic rights

³⁴ Lindholm, J., Can I Please Have a Slice of Ronaldo? The legality of FIFA's Ban on Third-Party Ownership, *International Sports Law Journal*, at p. 3, <http://dx.doi.org?10.1007/s40318-015-0075-7> (Last Accessed: 17 February 2017)

³⁵ The UEFA Europa League, previously called the UEFA Cup, is an annual football club competition organized by UEFA since 1971 for eligible European football clubs. Clubs qualify for the competition based on their performance in their national leagues and cup competitions.

³⁶ Lindholm *op. cit.*, at p. 4.

³⁷ See *infra* chapter 2 at subsection 2.5.

³⁸ FIFA Circular no. 1464, Regulations on the Status and Transfer of Players – third party ownership of players' economic rights ("TPO"), 22 December 2014, http://www.fifa.com/mm/document/affederation/administration/02/49/57/42/tpocircular1464_en_neutral.pdf (Last Accessed: 19 April 2017)

³⁹ *Ibid.*

1. *No club or player shall enter into an agreement with a third party whereby a third party is being entitled to participate, either in full or in part, in compensation payable in relation to the future transfer of a player from one club to another, or is being assigned any rights in relation to the future transfer or transfer compensation.*
2. *The interdiction as per paragraph 1 comes into force on 1 May 2015.*
3. *Agreements covered by paragraph 1 which predate 1 May 2015 may continue to be in place until their contractual expiration. However, their duration may not be extended.*
4. *The validity of any agreement covered by paragraph 1 signed between 1 January 2015 and 30 April 2015 may not have a contractual duration of more than one year beyond the effective date.*
5. *By the end of April 2015, all existing agreements covered by paragraph 1 need to be recorded within the Transfer Matching System (TMS). All clubs that have signed such agreements are required to upload them in their entirety including possible annexes or amendments, in TMS, specifying the details of the third party concerned, the full name of the player as well as the duration of the agreement.*
6. *The FIFA Disciplinary Committee may impose disciplinary measures on clubs and players that do not observe the obligations set out in this article.⁴⁰*

1.5 Conclusion

The constructing of this ban had global ramifications, with the professional Spanish football league, as well as the professional Portuguese football league filing a complaint with the Commission of the European Union on the 2nd February 2015, even before the ban's implementation.⁴¹ In light of these diverse opinions, the subsequent chapters will cover the reasons FIFA's decision to implement the ban were the correct ones, how FIFA has justified their actions

⁴⁰ *Ibid.*

⁴¹ Lindholm *op. cit.*, at p. 4.

against those objecting to the ban and why third-party ownership is an unwelcome practice in professional football.

Chapter 2: A brief history of third-party ownership

2.1 Introduction

In order to understand how the third-party ownership business model developed we first need to understand the structure of the model and how these transactions are possible.⁴²

As previously discussed, third-party ownership or investment is where an investment company, or an individual gives a club a sum of money, in order to buy or develop a player, in exchange for a percentage of the future transfer fee of such player.⁴³ Firstly, transactions are made possible by the international transfer system.⁴⁴ This is where a player transfers between clubs whereby one club buys the player and the other club sells the player for a specified fee. The player in turn has to sign an employment contract with the buying club and receives a 'signing-on' fee, and the buying club pays the specified transfer fee to the selling club.⁴⁵ Secondly, these third-party ownership agreements are made possible by the fact that a player possesses a number of rights; namely economic, federative and labour.

Third-party ownership allows clubs to reduce their initial capital investment, and alleviate the risk of buying a player who may potentially not perform as required.⁴⁶ Thus the club will be able to purchase the players that they originally did not have the money for.⁴⁷ However, this financial reward will be short-lived due to the fact that the transfer fee has to be shared with the third-party owner.⁴⁸

⁴² Williams *op. cit.*, at p. 82.

⁴³ See *supra* Chapter 1 at subsection 1.1.

⁴⁴ Williams *op. cit.*, at p. 83.

⁴⁵ *Ibid.*

⁴⁶ Hall, W.T., After the Ban: The Financial Landscape of International Soccer After Third-Party Ownership, Oregon Law Review, vol. 94, no. 179, at p. 185.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

2.2 The effect of the *Bosman* ruling

The *European Court of Justice* (ECJ) ruling changed football in that pre-1995, a player was not allowed to leave his club on a free transfer at the end of his contract. The club to which a player wanted to move would have to pay a fee even if such a player's contract was set to end.⁴⁹ Nowadays, players may enter into a pre-contract with an interested club for a free transfer if the player's existing contract has six months or less remaining. This ruling also dealt with the freedom of movement of workers within the EU as well as freedom of association,⁵⁰ and banned restrictions on foreign EU players in national leagues and thus allowed players to move more freely in the member states.

The first big-named player to benefit from this ruling was Steve McManaman moving from Liverpool to Real Madrid in 1999. Following him were a range of players from member states through the years, such as Sol Campbell, Michael Ballack, Andrea Pirlo and, most recently, Robert Lewandowski who transferred from BV Borussia Dortmund to F.C Bayern Munich in 2014.⁵¹

In an interview with *The Guardian* Bosman says; "At that point I realised that my career was going to end so I decided to take action against the nationality clauses. My reasoning was that I was a European citizen and I should be able to move as freely as other workers."⁵² The success of Bosman then gave players leverage to demand higher salaries and sign-on fees due to the fact that transfer fees at the end of contracts were no longer payable on the expiration of a contract. This also led to the further use of agents. Bosman sees the negative side

⁴⁹ Union Royale Belge des Sociétés de Football Association ASBL v Jean-Marc Bosman (1995) C-415/93.

⁵⁰ The Treaty establishing the European Community, Article 39 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12002E039:EN:NOT> (last accessed: 24 February 2017)

⁵¹ Riach, J., Jean-Marc Bosman: 'I think I did something good – I gave players rights', *The Guardian*, <https://www.theguardian.com/football/2015/dec/12/jean-marc-bosman-players-rights-20-years> (Last accessed: 24 February 2017)

⁵² *Ibid.*

to this ruling, when he states: “The upshot is that now the 25 or so richest clubs transfer players for astronomical sums [of money] and smaller clubs cannot afford to buy at those prices. So the 25 pull further and further away from the rest, deepening the gap between big and small.”⁵³ This disparity of buying power, as well as the ability of players to move freely between member states, aided in the birth of third-party ownership.

The leverage a player, or his agent, had at that point in time can be seen in comparing two transfers; namely that of Chris Sutton, who in 1994 transferred from Norwich City F.C to Blackburn Rovers F.C and became the first player to earn a wage of ten thousand pounds per week in Britain, to Sol Campbell who in 2001 could secure a one hundred thousand pound per week wage when he moved from Tottenham Hotspurs F.C to Arsenal F.C.⁵⁴ The change can be further emphasized by the *AFC Ajax* squad of 1995 which, out of the 23 competing players only 3 (two from Nigeria and one from Finland) were from outside of the Netherlands. Within four years, this Champions League winning team had entirely broken up.⁵⁵

The economic prospect of grooming a young player into a superstar would almost guarantee financial success for the third-party owner or agent as football shifted to an age of billionaire owners in order to meet player demands and ensure club success by assembling the best squad.⁵⁶ With the rise in the buying power of clubs, coupled with freedom of movement and transfer fees at the end of players’ contracts no longer being an issue, third party owners and investors as well as agents, began to search for where they could find the best player for the cheapest amount of money possible and then move the player to another

⁵³ *Ibid.*

⁵⁴ Liew, J., How the Bosman revolution changed football forever, *The Telegraph*, 12 December 2015, <http://www.telegraph.co.uk/sport/football/competitions/premier-league/12047806/How-the-Bosman-revolution-changed-football-for-ever.html> (Last accessed 25 February 2017)

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

club, thus making money off the transfer fee. This shifted the focus to the large amount of talent in South America and the need for financial assistance by those clubs.⁵⁷

2.3 The Brazilian approach

The reason a practice like third-party ownership of economic rights became so popular in Brazil stems from the fact that they boast a developing economy and cannot match the salaries and transfer fees paid by European clubs. Brazilian clubs thus operate on a *develop-and-sell* business model which soon attracted investment firms that were not previously affiliated to the sporting sphere. Also, European clubs found it to be more economical to purchase already developed players than to run the risk of developing players through their own youth academies.⁵⁸ As Brazil is a developing economy, it cannot run the risk of spending large sums of money on a youth academy players, by means of housing, food, and training equipment, and then not have that player progress to professional football, where the club would recoup some of the costs should the player be sold. The third-party ownership business model was further allowed in the Brazilian private contract law, where the awarding of a signing-on fee falls within the scope of private contract law according to The Brazilian Civil Code (herein referred to as The Code).⁵⁹

Since signing-on fees are claims to future profits, they are deemed ‘credits’ in terms of The Code. According to Article 286 of The Code, the assignment of rights is permitted if it does not oppose the nature of the obligation, the law, or the agreement with the debtor. But express consent of the creditor is needed in order to assign such rights as stated in Article 299 of The Code.⁶⁰ This should have been a topic of concern from the onset as these types of contracts could be

⁵⁷ Williams *op. cit.*, at p. 87.

⁵⁸ Williams *op. cit.*, at p. 87.

⁵⁹ Title II, Chapter 1, Articles 286 to 298 of the Brazilian Civil Code.

⁶⁰ Morscher, L., *Sourcing World: Jurisdictional Comparisons*, Thomson Reuters, Second Edition, 2015, at p. 42.

established without any consent of the player concerned. Third parties and clubs could conclude transfers deals which would have been against the players wishes, causing the player to lose control of his right to choose for whom he wants to play (i.e. losing control of his own career).

2.4 Tévez and Mascherano

The transfer of Javier Mascherano and Carlos Tévez from Corinthians of São Paulo to West Ham United⁶¹ brought the practice of third-party ownership to the public eye.

This was made possible when in 2004 Kia Joorabchian through his investment firm, Media Sports Investments (herein referred to as MSI), concluded a 10-year agreement where MSI would pay Corinthians \$35 million cash in exchange for 51% of any future profits, while covering losses. Approximately \$20 million would be used to cover the debts of Corinthians.⁶²

Corinthians then purchased Carlos Tévez from Atlético Boca Juniors of Argentina for \$22 million and Javier Mascherano from Club Atlético River Plate, also of Argentina, for \$15 million.⁶³ Such transfers raised the suspicion of local journalists⁶⁴ as Brazilian clubs were usually the sellers of players to big money leagues and also were generally not solvent enough to make such purchases.

⁶¹ A London-based English Premier League club.

⁶² Bellos, A., Is This Man the New Abramovich or Is He a Front for the Real Thing?, The Guardian, 10 December 2004, <https://www.theguardian.com/football/2004/dec/10/newsstory.sport> (Last Accessed: 20 March 2017)

⁶³ *Ibid.*

⁶⁴ *See supra* Bellos, discussed therein: Juca Kfourri, a Brazilian Sports Journalist, stating: “Brazilian football doesn’t have the resources to maintain a player like Tévez.”

West Ham United then signed Tévez and Mascherano in 2006⁶⁵ after the players had spent only one season at *Corinthians* and guided them to a league title within that season (2005). Further suspicion followed the players as West Ham were not known to have adequate financial backing to land the players of such caliber. It was later discovered that preceding this transfer Kia Joorabchian was involved in the potential acquisition of West Ham United but was out-bid by Eggert Magnusson, an Icelandic businessman, and former president of the Football Association of Iceland, with an amount of £85 million.⁶⁶ Joorabchian had also resigned from MSI but had kept his economic rights percentage in Tévez.

In January 2007, Mascherano was sent out on loan from West Ham to Liverpool in order to get more playing time, and this loan agreement was approved by the English Premier League as not to be subject to any third party influence.⁶⁷ Later that year, on the 7th of April, Tévez and Mascherano were once again the subject of controversy when West Ham was fined £5.5 million for breaching the Premier League regulations when they signed the players.⁶⁸

The Premier League board found that West Ham had breached Rule U6, U18 and B13 of the Premier League Rules and Regulations. Such rules read as follows:⁶⁹

⁶⁵ BBC Sport, Football, West Ham sign Tévez and Mascherano, BBC, 31 August 2006, http://news.bbc.co.uk/sport2/hi/football/teams/w/west_ham_utd/5301068.stm (Last Accessed: 20 March 2017)

⁶⁶ BBC Sport, Football, West Ham Accept £85m Takeover Bid, BBC, 21 November 2006, http://news.bbc.co.uk/sport2/hi/football/teams/w/west_ham_utd/6165272.stm (Last Accessed: 20 March 2017)

⁶⁷ BBC Sport, Football, Mascherano Free to Join Liverpool, BBC, 20 February 2007, <http://news.bbc.co.uk/sport2/hi/football/teams/l/liverpool/6379977.stm> (Last Accessed 20 March 2017)

⁶⁸ Ornstein, D., West Ham Charged over Mascherano and Tévez Deals, *The Guardian*, 3 March 2007, <https://www.theguardian.com/football/2007/mar/03/newsstory.sport8> (Last Accessed: 20 March 2017)

⁶⁹ *Ibid.*

Rule U6: No person may either directly or indirectly be involved in or have any power to determine or influence the management or administration of more than one club.

Rule U18: No club shall enter into a contract which enables any other party to that contract to require the ability materially to influence its policies or the performance of its teams in league matches.⁷⁰

Rule B13: In all matters and transactions relating to the League, each club shall behave towards each other club and the League with the utmost good faith.⁷¹

The Premier League Panel recommended that the Premier League Board should cancel Tévez's contract of employment with West Ham and deduct points for the games in which he participated. The Premier League Board found that the amendment of the employment contract was sufficient, that a point deduction was not necessary and that West Ham pays a fine as punishment.

In April 2007 West Ham stated that they had torn up their agreements with MSI due to the fact that the conclusion of these agreements had transgressed three Premier League rules.⁷² In August 2007, West Ham agreed that it would transfer Tévez to Manchester United. This deal would put pressure on West Ham as the Premier League ordered that West Ham be the only party to share in the transfer fee, due to the fact that West Ham claimed to have torn up their third-party influence agreements.⁷³

⁷⁰ English Premier League Handbook 2007-2008, Rule U18 (Now Premier League Rule V20).

⁷¹ English Premier League Handbook 2007-2008, Rule B13.

⁷² Scott, M., Joorabchian sues West Ham for Breach of Contract over Tévez, The Guardian, 25 July 2007, <https://www.theguardian.com/football/2007/jul/25/newsstory.sport5> (Last Accessed: 20 March 2017)

⁷³ Williams *op. cit.*, at p. 86.

Joorabchian argued that he was still the owner of Tévez's economic rights as he did not agree to cancel the agreement and that he, as owner, was entitled to the full transfer fee. According to the economic rights participation agreement Tévez was only on loan at West Ham, and Joorabchian sued West Ham for breach of contract.

Both parties requested FIFA's assistance on the matter, however FIFA stated that such matter should be heard before the CAS.

West Ham received £2 million on 8 August 2008 when parties agreed that such amount would be sufficient to satisfy the debt for Tévez's registration at West Ham and consequently allowed him to sign for Manchester United.⁷⁴ Joorabchian then entered into a loan agreement with Manchester United, where the parties agreed that Manchester United would pay MSI £5 million and a further £5 million per annum in wages for Tévez.

Following this transfer saga, FIFA reacted by implementing Article 18bis, of which the content is similar to that of the English Premier League Rule U18 of 2007-2008. The FIFA article read as follows:

*No club shall enter into a contract which enables any other party to that contract or any third party to acquire the ability to influence in employment and transfer-related matters its independence, its policies or the performance of its teams.*⁷⁵

The Premier League followed suit by amending Rule U18 so that clubs would have to satisfy the league that any player that they signed was free of any third-

⁷⁴ BBC Sport, Football., Tévez Cleared to Sign for Man Utd, BBC, 3 August 2007, <http://news.bbc.co.uk/sport2/hi/football/6922733.stm> (Last Accessed: 20 March 2017)

⁷⁵ FIFA Regulations on the Status and Transfer of Players, Article 18bis, at p. 16. https://www.fifa.com/mm/document/affederation/administration/regulations_on_the_status_and_transfer_of_players_en_33410.pdf (Last Accessed: 21 March 2017)

party ownership.⁷⁶ FIFA then also enacted a penalty clause⁷⁷ where any player found to be in contravention of Article 18bis could be sanctioned by means of suspension of the specific player, through to expulsion from the league.⁷⁸

2.5 The road to the FIFA ban- Article 18ter

As early as the 16th November 2012, the FIFA committee has stated their intentions to ban third-party ownership and to introduce a mandatory regulatory approach that forbids any party from undertaking such a business model.⁷⁹

In January 2013, FIFA announced that such an issue was being discussed amongst its standing committees and the football fraternity at large.⁸⁰ The discussions focused mainly on Article 18bis paragraph 1 of the RSTP, which basically outlines third-party influence and the restrictions thereon,⁸¹ as well as Article 1 paragraph 3 of the RSTP.⁸²

⁷⁶ Wilson, J., Premiership Third Party Ownership Set to End. The Telegraph, 2 February 2008, <http://www.telegraph.co.uk/sport/football/2290672/Premiership-third-party-ownership-set-to-end.html> (Last Accessed: 21 March 2017)

⁷⁷ FIFA Regulations on the Status and Transfer of Players *op. cit.*, at p. 16.

⁷⁸ FIFA Statutes, Article 57(3), May 2008 Edition, at p. 38, https://resources.fifa.com/mm/document/affederation/generic/01/09/75/14/fifa_statutes_072008_en.pdf (Last Accessed: 21 March 2017)

⁷⁹ FIFA Media Release, Football Committee Steps Up its Mission for the Game under New Composition, www.fifa.com, 16 November 2012, <http://www.fifa.com/about-fifa/news/y=2012/m=11/news=football-committee-steps-its-mission-for-the-game-under-new-composition-1912294.html> (Last accessed: 1 March 2017)

⁸⁰ See *supra* note 70.

⁸¹ *Ibid.*

⁸² Article 1 paragraph 3 of the RSTP states that such provision (Article 18bis) is binding at national level and must be included without modification in the association's regulations.

Although such provision was included by the member states, third-party ownership gained more popularity across the globe.⁸³ Due to the increase in awareness of TPO and the discussions between the various football bodies, FIFA decided to undertake two studies in order to comprehensively understand TPO.⁸⁴ FIFA instructed the *Centre for Sports Studies* (CIES) to survey the FIFA member associations and identify the different regulatory approaches to third-party ownership.⁸⁵ FIFA aimed at trying to understand the member association's stance with regard to third-party ownership and what rules these member associations applied to the practice.⁸⁶

The second study conducted by the *Centre de Droit et d'Economie du Sport* (CDES) undertook to focus on the economic and financial effect that third-party ownership had at a club level and, more importantly, the ethical concerns for players, staff and football as a whole.⁸⁷

Following such studies, Geoff Thompson, the chairman of FIFA's Dispute Resolution Chamber and member of FIFA's Players' Status Committee, briefed the delegates at the 64th FIFA Congress on FIFA's progress with regard to their position on third-party ownership. FIFA looked to create a foundation on which it understood all the aspects relating to third-party ownership and could identify

⁸³ FIFA Circular no. 1335, Research on Third-Party Ownership of Players' Economic Rights, [www.fifa.com](http://resources.fifa.com/mm/document/affederation/administration/01/98/73/55/circularno.1335-researchonthird-partyownershipofplayerseconomicrights.pdf), 14 January 2013, at p. 1, <http://resources.fifa.com/mm/document/affederation/administration/01/98/73/55/circularno.1335-researchonthird-partyownershipofplayerseconomicrights.pdf> (Last Accessed: 21 March 2017)

⁸⁴ FIFA, Third-Party Ownership of Players' Economic Rights, Background Information, [www.fifa.com](https://resources.fifa.com/mm/document/affederation/footballgovernance/02/59/55/80/third-partyownershipofplayerseconomicrights-backgroundinformation_neutral.pdf), April 2015, at p. 3, https://resources.fifa.com/mm/document/affederation/footballgovernance/02/59/55/80/third-partyownershipofplayerseconomicrights-backgroundinformation_neutral.pdf (Last Accessed: 21 March 2017)

⁸⁵ FIFA Circular no. 1335 *op. cit.*, at p. 1.

⁸⁶ *Ibid.*

⁸⁷ FIFA Circular no. 1373, Research on Third-Party Ownership of Players' Economic Rights (Part 2), [fifa.com](http://resources.fifa.com/mm/document/affederation/administration/02/14/91/72/circularno.1373-researchonthird-partyownershipofplayerseconomicrights(part2)_neutral.pdf), August 2013, [http://resources.fifa.com/mm/document/affederation/administration/02/14/91/72/circularno.1373-researchonthird-partyownershipofplayerseconomicrights\(part2\)_neutral.pdf](http://resources.fifa.com/mm/document/affederation/administration/02/14/91/72/circularno.1373-researchonthird-partyownershipofplayerseconomicrights(part2)_neutral.pdf) (Last Accessed: 21 March 2017)

the various stances of all those involved, so that they could produce the most suitable result in light of all the varying points of view.⁸⁸

The FIFA Players' Status Committee then enacted a working group to further communicate with all interested parties and explore what the most appropriate regulatory method should be.⁸⁹

On the 2nd September 2014, the working group had their opening meeting. The group comprised a range of officials from confederation right through to club level, including FIFPro.⁹⁰ On the 23rd September 2014, the Chairman of the working group updated the Players' Status Committee that the group was in favour of the ban on third-party ownership.⁹¹ Three days later, under the guidance of the Players' Status Committee, the FIFA Executive Committee concluded that third-party ownership would be banned but such ban would be inclusive of a transitional period. The Executive Committee then tasked the working group to draft the necessary regulations. The working group then convened for the second time on the 30th October 2014 in order to carry out the instructions of the Executive Committee. On the 19th November 2014, the draft articles concerning third-party ownership and third-party influence were put forward by the Players' Status Committee.⁹²

The FIFA Executive Committee approved the provisions on the 19th December 2014. Such proposal by the Committee stated that the provisions to be included in the Regulation on the Status and Transfer of Players (RSTP) are as follows:

1. *"No club or player shall enter into an agreement with a third party whereby a third party is being entitled to participate, either in full or in part, in compensation payable in relation to the future transfer of a player"*

⁸⁸ FIFA, Background Information *op. cit.*, at p. 1.

⁸⁹ *Ibid.*

⁹⁰ The International Federation of Professional Footballers.

⁹¹ FIFA, Background Information *op. cit.*, at p. 2.

⁹² *Ibid.*

from one club to another, or is being assigned any rights in relation to a future transfer.

2. *The TPO ban will come into force on 1 May 2015.*
3. *Existing agreements can remain in place until their ordinary contractual expiry.*
4. *As an additional obligation, all existing agreements covered by the ban need to be recorded within FIFA's Transfer Matching System by the end of April 2015.*
5. *Agreements made between 1 January and 30 April 2015 will be subject to a time limit (one year maximum)⁹³*

This new provision (to be enacted as Article 18ter) was binding at national level and was to be included in the member associations' regulations.⁹⁴ On the 22nd December 2014, FIFA announced that the new provisions in the RSTP would come into force on the 1st January 2015.⁹⁵

2.6 Conclusion

While many parties believed third-party ownership to be a new business practice, the practice had in fact been in operation for many years. Third-party ownership was only brought to light when Tévez and Mascherano were transferred, and a need to further regulate this business practice arose as this method of financing started to cause international problems. The international conflict which this practice began to create due to the transfer of players from leagues where third-party ownership was allowed to leagues where the practice was prohibited forced FIFA to extend the scope of the ineffective Article 18bis and therefore created a blanket ban with regards to third-party ownership.

⁹³ *Ibid.*, at p. 1-2.

⁹⁴ *Ibid.*, at p. 2.

⁹⁵ *Ibid.*, at p. 1.

Chapter 3: Servitude or modern day slavery

The fact that football players are treated as a commodity in this generation leaves a significant margin for exploitation. This causes third party owners or investors to prey on individuals in dire economic conditions with the false promise of a better future. And, after the *Bosman ruling*,⁹⁶ the transfer of players has become a great deal easier. The fact that players were allowed to leave their clubs on free transfers caused the signing-on fees and salary demands by the players to increase, thus causing the concomitant rise of agents and third-party owners and investors years down the line.⁹⁷

FIFA came to the realization that the third-party owners and investors find themselves in powerful, dominant positions, with influence over both clubs and players, and thus created Article 18bis and 18ter, in an attempt to regulate third party influence and, later, ban third-party ownership, respectively. FIFA came to the correct conclusion by banning the practice of third-party ownership, as FIFA does not operate in isolation and, together with the United Nations, other governmental organizations and the various member states, it must aim to protect and promote the rights of players at all times.

3.1. Human trafficking

When observing the definition of third-party ownership and comparing it to the definition of human trafficking as articulated by the United Nations (herein referred to as the UN), we find the definition of third-party ownership to be

⁹⁶ Union Royale des Societes de Football Association ASBL v Jean-Marc Bosman (1995) C-415/93. This ruling allowed players to leave a club on a free transfer upon the expiration of their contract period. Prior to this ruling, clubs even if a players contract had expired, could prevent a player from joining a new club by demanding a transfer fee.

⁹⁷ Brand, G., How the Bosman Rule Changed Football – 20 Years On, Skysports, 15 December 2015, <http://www.skysports.com/football/news/11095/10100134/how-the-bosman-rule-changed-football-20-years-on> (Last Accessed: 10 October 2016)

indistinguishable from that of human trafficking. The UN's definition of human trafficking reads as follows:

Article 3, paragraph (a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons defines Trafficking in Persons as the recruitment, transportation, transfer, harbouring or receipt of persons, by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.⁹⁸

But, are these third-party ownership agreements a type of modern day slavery or do they amount to a lawful servitude?

In the UN definition above, we find similarities to the practice of third-party ownership. A player is recruited or transferred by his club due to the influence of the third-party owner, i.e. by his abuse of power, or either by the transferring club which finds itself in a vulnerable position (which is more than likely related to its financial status), to the receiving club which pays a transfer fee for the services of the player.

Even the European Parliament sided with FIFA on the subject of third-party ownership in European sport.⁹⁹ In a written declaration submitted under Rule

⁹⁸ United Nations Office of Drugs and Crime, 2004, United Nations Convention Against Transnational Organized Crime and the Protocols Thereto, New York, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolTraffickingInPersons.aspx> (Last Accessed: 25 September 2016)

⁹⁹ Under Rule 136(4) and (5) of Parliament's Rules of Procedure, where a declaration is signed by a majority of Parliament's component Members, it is

136 of the Rules of Procedure, on the ban of third-party ownership in European sport, it states:

1. *Respect for human dignity (Article 2 of the Treaty on European Union) is one of the values of the European Union, and the [European Union] therefore aims to protect the integrity of sportsmen and women and to combat human trafficking.*
2. *There is a growing trend towards third-party ownership in team sports in Europe, whereby players, many of whom are very young, are partially or fully 'owned' by private investors and can no longer determine the future path of their career.*
3. *Third-party ownership raises important concerns regarding the integrity of competitions, since the lack of transparency of third-party ownership arrangements creates further risks of result manipulation, money laundering and other criminal activities, as well as some broader ethical considerations regarding what amounts to 'ownership' and 'trading' of the 'economic rights' of another human being.*
4. *The ownership of players by third-party investors is therefore strongly condemned.*
5. *A cross-border solution is required in order to effectively tackle the threats posed by [third-party ownership].*
6. *The decision to ban [third-party ownership] as from 1 May 2015 is a very welcome one.*
7. *The Commission is called upon to incite Member States to support the ban and take additional measures to implement it in the [European Union].*
8. *This declaration, together with the names of the signatories, is forwarded to the Council and the Commission.¹⁰⁰*

published in the minutes with the names of its signatories and forwarded to the addressees, without however binding Parliament.

¹⁰⁰ European Parliament, Written Declaration submitted under Rule 136 of the Rules of Procedure on the ban on third-party ownership in European sport, 11 November 2015, at p. 2, <http://www.europarl.europa.eu/sides/getDoc.do?type=WDECL&reference=P8-DCL-2015-0066&format=PDF&language=EN> (Last Accessed: 29 April 2017)

The president of UEFA, Michel Platini, supported the FIFA ban on third-party ownership from the onset. He opposed this business model even before the implementation of the ban, stating, “it is not human that people should belong to other people who sell them off.”¹⁰¹ Also claiming; “today, it’s shameful to see some players with one of their arms belonging to one person, a leg belonging to a funds pension located who knows where, and a third person owning his foot... It is shameful; we’re dealing with a type of slavery that belongs to the past. Everyone earns money on such transfers, and while we are trying to find money to invest in football, that money goes in the pockets of I don’t know who, and I don’t know where.”¹⁰²

One example of a transfer against a player’s wishes could be seen in that of Radamel Falcao, a Columbian striker, who transferred from Porto, in Portugal, to Atletico Madrid for a fee of €40 million plus another potential €10 million from performance based clauses via the aid of third-party ownership. This transfer made him the most expensive transfer in Atletico Madrid’s history, after helping Porto win the Portuguese Premier League and Europa League.¹⁰³

This transfer was not met without speculation, as Atletico Madrid were, at the time, a poor club in a large amount of debt. Atletico entered into an agreement with Doyen where the investment fund would pay the purchase price that Atletico could not afford in exchange for 50% of the economic rights of Falcao.¹⁰⁴ Over the span of two seasons Falcao made 90 appearances, scoring 70 goals and

¹⁰¹ Madu, Z., Falcao, Atletico Madrid, Third-Party Ownership and Deferred Dreams, 13 June 2013, www.sbnation.com, <http://www.sbnation.com/soccer/2013/6/13/4399382/falcao-monaco-third-party-ownership> (Last Accessed: 30 April 2017)

¹⁰² Press Association, Michel Platini Defends Ban on Third-Party Ownership, 16 March 2015, The Guardian, <https://www.theguardian.com/football/2015/mar/16/michel-platini-defend-ban-third-party-ownership> (Last Accessed: 30 April 2017)

¹⁰³ Madu *op. cit.* at note 101.

¹⁰⁴ *Ibid.*

helping his club win the Copa Del Rey,¹⁰⁵ the UEFA Europa League and a UEFA Supercup.¹⁰⁶ After this successful spell at the club, Falcao was transferred again. Such transfer was not concluded under the same conditions as when he joined the club, where Atletico approached Doyen for financial assistance, this time Doyen had decided to sell Falcao to whomever offered the highest amount, with very little consideration for the club's or the player's wishes.¹⁰⁷

Third-party ownership walks a fine line between integrity and profitability. In most cases, it involves the concluding of transfers for the mere fact of gaining a profit and failing to uphold the integrity of the sport. For clubs, the challenge remains in being competitive without the necessary financial backing. This is when suspicious practices start to occur and clubs end up selling off majority shares in players' economic rights.¹⁰⁸

To be straightforward, Doyen owned Falcao. Doyen notified interested parties that he was for sale, using his outstanding professional form to drive his price tag higher, all the while hoping to earn a large return on investment. Meanwhile, Falcao could not voice his opinion as he did not own his own person, nor could Atletico prevent the negotiations, as they did not have a majority claim on him.¹⁰⁹

When the economic rights of a player are wholly owned by a club, the transfer of that player from one club to another is at least a contractual issue and still humane in the understanding that the player knows of his transfer, and majority of the time has consented to such a transfer. The player would also have discussed the issue with the club coach and the administration. Also, the player can in some instances request his own transfer or release if the situation at his club has become intolerable. This is not the case when a player is third-party

¹⁰⁵ An annual football cup competition for Spanish football teams.

¹⁰⁶ The UEFA Super Cup is an annual football match organized by UEFA and contested by the reigning champions of the two main European club competitions, the UEFA Champions League and the UEFA Europa League.

¹⁰⁷ Madu *op. cit.* at note 101.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

owned and the player loses control over his own career. In light of the above scenarios, the third-party ownership business model delivers the impression of being a form of modern day slavery.¹¹⁰

3.2. Slavery and servitude

The exploitation in Article 3 (a) is said to include slavery as well as servitude. Therefore, the definition of human trafficking can be taken a step further by referring to it as modern day slavery.¹¹¹ Thus conflating the practice of third-party ownership with modern day slavery. Firstly, we have to determine what a servitude comprises. A servitude is the *state of being a slave or completely subject to someone more powerful*.¹¹² As established previously, the practice of third-party ownership infringes on a player and a club due to the third-party owner being in a dominant position, causing the player to be subjected to the will of the third-party owner. Third-party ownership in some instances will also amount to an involuntary servitude, which is where a person is forced to work against his will to benefit another, under some form of coercion other than the worker's financial needs.¹¹³

There is not a complete lack of freedom for the player, as there would be in the case of chattel slavery, but the third parties pay money to clubs to receive economic rights in order to share in the transfer fee of such player. The club is in control of the player and the third-party owner receives consent from the club in order to exploit revenue made from the transfer of the player. Therefore, third-party owners are human traffickers as per the UN definition. But, in essence, the

¹¹⁰ *Ibid.*

¹¹¹ Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 7 September 1956, <http://www.ohchp.org/EN/ProfessionalInterest?Pages?supplementaryConventionAbolitionOfSlavery.aspx> (Last Accessed: 23 September 2016)

¹¹² Oxford Dictionaries, <http://en.oxforddictionaries.com/definition/servitude> (Last Accessed: 23 September 2016)

¹¹³ Legal Dictionary, <http://legal-dictionary.thefreedictionary.com/Involuntary+Servitude> (Last Accessed: 23 September 2016)

same occurs during the standard club-to-club transfer. Monies are transferred from one person to another with the aim of exploiting the player.¹¹⁴ Does this mean that the human trafficking argument fails? No, the fact that the player and club receive hefty remuneration fees for such transfers does not detract from the fact that it amounts to slavery, human trafficking or an involuntary servitude. This logic is echoed in the hypothetical situation where a battered wife who lives a luxurious life remains oppressed regardless of the fact that she lives in abundance.¹¹⁵ Further, set out in Article 3, paragraph (b) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons states:

*The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used.*¹¹⁶

Remuneration received and the fact that there is not a complete lack of freedom (or the presence of consent) are not the main characteristics when determining whether the club and player have been oppressed. FIFA have taken the correct stance by banning the practice of third-party ownership as this practice leads to the third-party owners possibly finding themselves in a dominant position and therefore in a position to exploit players and/or clubs potentially. The danger lies not in if this exploitation will occur but in the fact that the opportunity may possibly present itself.

3.3 Conclusion

While third-party ownership offers clubs and players better financial means, the investors also have their own specific agenda in mind. The various football regulatory bodies have a duty, while wanting to see the clubs operate at a break-even point and see players adequately compensated, to protect the rights of

¹¹⁴ Williams *op. cit.*, at p. 95.

¹¹⁵ As per my discussion with Professor Steve Cornelius, Head of Department of Private Law at the University of Pretoria, 4 July 2016.

¹¹⁶ United Nation Office of Drugs and Crime, *op. cit.*, at p. 43.

clubs and players alike. By allowing third-party ownership to continue, these regulatory bodies would not be maintaining the level of integrity in sport which is demanded not only by world regulatory bodies, but by the population as a whole. If the practice were to continue and ownership, whether partial or in full, of players' economic rights were to be allowed, FIFA would have failed in delivering the necessary protection which should be afforded to footballers, more specifically those sportsmen and women who find themselves in vulnerable, desperate positions.

The ban on third-party ownership offers the most appropriate cross-border solution. This is done so in order to maintain the integrity of the sport as well as to prevent human trafficking.

FIFA will need to monitor the effectiveness of the implementation of the ban on third-party ownership and they will need to actively visit those areas which are rife with the practice to see if the ban, while theoretically sound, will have the required reach envisaged by FIFA.

Chapter 4: Preserve the integrity of football

Within the football community there are those who are supportive of third-party ownership, like smaller clubs and those players coming from developing economies,¹¹⁷ and those against the practice, coming from individuals such as Michel Platini, the President of UEFA, right through to specific clubs, such as West Ham when they signed Carlos Tévez and Javier Mascherano. The proponents state that the practice of third-party ownership only needs to be better regulated, while the opponents state that there should be a total prohibition.

The immediate problem is that clubs¹¹⁸ operate at an international level and compete in competitions with other clubs from different countries. This causes a disparity between teams as these teams operate in different economies and on different financial scales. This then allows third party investors to focus on cash-strapped clubs with unreasonable ambitions and use this as leverage for the specific terms of a third-party ownership agreement.

4.1 Third-party ownership supporters

Those in favour of third-party ownership argue that this practice benefits football players and clubs from smaller countries with developing economies as it allows clubs to afford the players that they want despite the poor financial conditions.

The proponents further argue that third party ownership is a necessity, as it is required to finance the club in order to avoid insolvency. Such capital investment can be achieved easily by the sale of economic rights to third party investors. Smaller clubs do not have many routes to raise capital as the transfer window is only open twice a year (thus they cannot sell players quickly in order to have

¹¹⁷ Williams *op. cit.*, at p. 91

¹¹⁸ “Clubs” will refer to professional clubs.

liquid funds available), neither can these types of clubs generate lucrative sponsorships nor attract many paying spectators.

Those in favour of third-party ownership also feel that these investors, who are often based in large European countries with economies which are better than those countries where third-party ownership was evident, have a greater reach in terms of promoting players' futures than the club itself.¹¹⁹ If we look at the case of Carlos Tévez and Javier Mascherano,¹²⁰ specifically from the players' point of view, the third-party owners are embraced as they create a pathway to better leagues that were not previously available to the player¹²¹ and the third party does not pose a financial threat to the player as the investment firm or individual makes their money from the transfer fee. Thus, the player will still receive their full signing-on fee and a notable increase in salary.¹²²

Those in favour of third-party ownership state that this business model benefits football through the financial support that it generates directly for players and clubs and thus the regulatory bodies should accept its presence and, rather than a complete ban on the practice, should rather look to properly regulate it. A total prohibition on the practice would leave a gap that would be damaging to the sport, especially to the smaller clubs with fewer resources, and thus create an even greater disparity between these struggling clubs and the top-tier clubs.¹²³

4.2 Third-party ownership opponents

Those against the practice of third-party ownership are of the opinion that a total prohibition is necessary. This is mainly due to the fact that FIFA Article 18bis of the RSTP¹²⁴ failed in that it allowed third-party owners and investors to

¹¹⁹ Williams *op. cit.*, at p. 91.

¹²⁰ See *supra* Chapter 2 at subsection 2.5.

¹²¹ Williams *op. cit.*, at p. 92.

¹²² *Ibid.*

¹²³ *Ibid.*

¹²⁴ FIFA Regulations on the Status and Transfer of Players, www.fifa.com, 2016, <https://www.fifa.com/mm/document/affederation/administration/regulations>

unduly influence clubs' policies. This situation causes a player and/or the club to be essentially shackled by the investor which limits their freedoms with regard to their player-club contracts.

There are various ways that these agreements could be structured so that a third-party owner or investor could subjugate a club's interest to their own. Firstly, directly in the terms of the contract, through buy or sell clauses, or where the third-party owner is reimbursed on the non-transfer of a player of which he owns a percentage of the economic rights, or by a shift of the initial investment from one player to another player upon non-transfer of the initial player (with this shift of investment the third-party owner can always hold a percentage of the most in-form or most economically viable players).¹²⁵

Secondly, such influence could also be established indirectly where investors leverage the clubs financial need for investment against their own interest to affect club policy.¹²⁶

The undue influence carried out by the third party investors has proven to lead to many deceitful arrangements, such as fraud, money-laundering and corruption, amongst others. Football super-agent, Jon Smith having mentioned, "in eastern Europe, criminal gangs now own players. They bring in players from Africa, they wash their EEC regulation passports through Cyprus and take them into the Ukraine."¹²⁷ It is unnerving to think that such dishonesty is occurring at the top tier of football, and can only leave one to imagine what abuse is being

[_on the status and transfer of players en 33410.pdf](#) (Last Accessed: 10 April 2017)

¹²⁵ Hall *op. cit.*, at p. 197.

¹²⁶ *Ibid.*

¹²⁷ Mullock, S., FIFA must Clean Up Third-Party Ownership – it's like the Wild West in some countries, says super-agent Jon Smith, Mirror UK, 8 October 2016, <http://www.mirror.co.uk/sport/football/news/fifa-fix-third-party-ownership-9006227.amp> (Last Accessed: 30 January 2018)

carried out on young vulnerable players hoping to embark on a successful career path.¹²⁸

Those against third-party ownership, like the Secretary General of UEFA, Gianni Infantino, states that such business model causes many ethical dilemmas, and: “It threatens the integrity of sporting competition, it damages contractual stability, it undermines the relationship of trust that should exist between a player and the club that employs him, it creates conflicts of interests, it means that players have less control over the development of their own careers, it keeps clubs in a vicious cycle of debt and dependence and damages the overall image of football.”¹²⁹

Such a business model has been described by Sporting Clube de Portugal’s President, Bruno de Carvalho, as a “monster”¹³⁰ and that he had only entered into such an agreement due to the clubs’ financial situation from their previous president, Gordinho Lopes.

In brief, this type of business model is not only dangerous for clubs but also for the players and their respective national bodies. Third-party ownership, as we have seen, threatens the independence of clubs as it allows these fund-owners to influence clubs’ policies and decisions. It allows them to pressurize clubs to sell their greatest asset due to the fact that the club is cash-strapped and cannot meet the financial demands of the contract if the player is not sold. Also, it allows owners, investors or agents to influence coaches or staff if these individuals have been involved in the division of such transfer profits. This would cause

¹²⁸ *Ibid.*

¹²⁹ Gibson, O., Conn, D., Fifa Inactivity Allows Menace of Third-Party Ownership to go Unchecked, *The Guardian*, 23 September 2014, <https://www.theguardian.com/football/2014/sep/23/fifa-third-party-ownership> (Last Accessed: 12 April 2017)

¹³⁰ Shaunton, P., Sporting President Rages against Third-Party Monster After Rojo’s Manchester United Move, *www.goal.com*, 10 September 2014, <http://www.goal.com/en/news/91/portugal/2014/09/10/5096035/sporting-president-rages-against-third-party-monster-after-rojos-> (Last Accessed: 12 April 2017)

favouritism and can reach as far as pressure being put on national teams to select the player to increase his value. It is not unimaginable that national team coaches can be swayed to select specific players. In September 2016, Sam Allardyce was filmed by undercover journalists discussing ways to bypass Article 18ter.¹³¹ In such meeting, the former England manager was negotiating a deal worth £400 000 to be a consultant to parties in Hong Kong and Singapore to evade these FIFA regulations.¹³²

Several of the other concerns of the opponents to third-party ownership will be dealt with in detail below:

4.2.1 Contractual stability

Third-party owners are interested in return on their investments which means that players need to be bought for the least possible amount and sold for as much as possible. At times, this isn't in the best interests of the club that wishes to maintain its best players to promote squad stability and success.¹³³ This promotes short-termism as the club cannot retain specific players¹³⁴ nor can the club build up its monetary reserves due to the fact that it does not cash in on the transfer of the players because it holds a relatively small portion of the economic rights and the fact that it has been losing money by paying salaries and signing-on fees.

If third-party owners can control club transfers by exploiting the clubs' policies then it will have no problem finding a way around a mere employment contract between the club and player.¹³⁵ This was again the case in the third-party

¹³¹ ESPN Staff, Sam Allardyce Filmed Advising on How to Evade Transfer Rules – Report, www.espnfc.com, 26 September 2016, <http://www.espnfc.com/england/story/2959827/sam-allardyce-filmed-advising-on-how-to-evade-transfer-rules-report> (Last Accessed: 12 April 2016)

¹³² *Ibid.*

¹³³ Hall *op. cit.*, at p. 198.

¹³⁴ *Ibid.*, at p. 196.

¹³⁵ *Ibid.*, at p. 198.

ownership agreement between Sporting Clube de Portugal (Sporting) and Doyen Sports. The club president stated that Sporting did not want to sell one of their best players, Marcus Rojo; however, Doyen Sports went beyond the scope of their contract and initiated transfer talks with Manchester United and others. Sporting claims that Doyen, who owned 75% of the economic rights of Marcus Rojo, influenced transfer policy and necessitated the sale to Manchester United, and, in doing so, breached the FIFA regulations.¹³⁶ It was further stated by the President, de Carvalho, that the Doyen executives would represent themselves as officials from Sporting when meeting other clubs regarding the transfer of Rojo, without Sporting's consent.¹³⁷ De Carvalho had no desire to sell the player, who was outstanding for Argentina in the World Cup Final in 2014, but caved into the demand of having to sell him.

“This instability in contracts favours neither stability and transparency in competitions nor loyalty of supporters and consequently, the best performing clubs have the most stable squads.”¹³⁸ This quote perfectly encapsulates two polar opposites as summed up in the following position: the clubs striving for stability in contracts which would lead to better performance in competitions, which directly leads to increased support, and the third-party owners who tend to want to maximize profits without regard to contractual stability, and also do not favour transparency¹³⁹ in their dealings, nor seem to care about the sporting function of a club.

¹³⁶ *Ibid.*, at p. 198 to 199.

¹³⁷ *Ibid.*, at p. 199.

¹³⁸ Rossi, G., Semens, A., Brocard, J.F., *Sports Agents and Labour Markets: Evidence from World Football*, Routledge, 2016, at p. 169.

¹³⁹ See “Funds are mostly based in offshore tax havens with undeclared owners.” – Conn, D., *Marcos Rojo Deal Prompts Third-Party Revolt from Sporting Lisbon President*, *The Guardian*, 10 September 2014, <https://www.theguardian.com/football/2014/sep/10/sporting-lisbon-third-party-ownership-attack-marcos-rojo-manchester-united> (Last Accessed: 12 April 2017)

4.2.2 Conflict of interest

Furthermore, when investors are able to influence club policies and decisions, this causes a conflict of interest. Such conflict can be seen where an investor holds economic rights of players from two or more teams who compete in the same competitions. This creates a situation where there is potential for match fixing and criminal activity to occur. This trail of thinking was echoed in *AEK Athens and Slavia Prague v. UEFA*,¹⁴⁰ where CAS dealt with the following rule: "Integrity of the UEFA club competitions: independence of the clubs".¹⁴¹ In the UEFA arguments for negative clearance,¹⁴² it is maintained that:

"According to UEFA the rule: 1. is designed to preserve the integrity of competition and the uncertainty of outcome in the international club competitions it organises, 2. Seeks to achieve this objective by avoiding the "conflict of interests" which would result if an individual or a company was able to influence the sporting performance of two (or more) teams participating in the same competition and which might lead to the manipulation of results. 3. Is not concerned with economic or commercial activities but is concerned with football as a sport, 4. The rule falls outside the scope of the competition provisions of the EC Treaty because it pursues a sporting objective; the rule does not restrict competition but even if it was

¹⁴⁰ CAS 98/200, in this case ENIC plc (an English company) had invested in various European football clubs. In the 1997/1998 European football season, three of the clubs in which ENIC plc held a controlling interest qualified as quarter finalists for the UEFA Cup Winners' Cup. ENIC plc and UEFA met in order to discuss multi-club ownership, where UEFA proposed (and later adopted) the Contested Rule, which states "in the case of two or more clubs which are under common control, only one may participate in the same UEFA club competition". This meant that only Slavia Prague would be allowed to compete. Slavia Prague as well as AEK Athens proposed that the matter be referred to CAS, and UEFA agreed.

¹⁴¹ Case No 37.632 - UEFA rule on "integrity of the UEFA club competitions: independence of clubs".

¹⁴² On 14 October 1999 the Union des Associations Européennes de Football (UEFA) applied for negative clearance or, failing this, for exemption pursuant to Article 81(3) of the EC Treaty in respect of the rule named "Integrity of the UEFA club competitions: independence of the clubs".

held to restrict competition on the market for ownership interests in football clubs capable of taking part in UEFA competitions, the rule would not still violate Article 81 of the EC Treaty as it is needed for the proper functioning of sporting competition.”

UEFA took the correct stance as it needed to prohibit any potential opportunity for corruption leading to the certainty of events in sport. However, this rule was adopted by UEFA on 19th May 1998 and has not successfully implemented the restrictions it intended to impose as third parties could possibly own controlling percentages in competing clubs due to the lack of transparency of third-party ownership agreements.

Also, in 2013, UEFA echoed a stance taken by the European Parliament in that they called for a ‘common and concerted’ approach by all relevant parties to combat match fixing in football and other sports. UEFA undertook a zero tolerance policy for criminal activity, organized crime and match fixing in football. Therefore, to reach such a common goal a total prohibition of third-party ownership is necessary, as rules to regulate multi-club ownership as well as third party influence have both failed.

4.2.3 Immorality

The various aspects regarding whether or not an agreement is immoral will be examined with reference to Swiss Law as well as South African law of contract.¹⁴³

In order to find such agreements void one has to prove that they are incompatible with Swiss Civil law.¹⁴⁴ The party would need to prove that such agreement is

¹⁴³ These agreements will be examined with regard to Swiss Law as both FIFA and CAS are based in Switzerland, and in terms of the South African law of contract in order to comprehend these issues in my personal legal surroundings.

¹⁴⁴ Defeating Swiss Civil Code would most likely bring success as both FIFA and the CAS are based in Switzerland.

contrary to the boni mores (illegal). According to Article 20.1 of the Swiss Code of Obligations:

“A contract is void if its terms are impossible, unlawful or immoral.”

Immorality, in law of contract, is constituted if a contract displays a serious imbalance between the obligations of the parties.¹⁴⁵ The South African law is of importance, as at times FIFA member countries tend to feel that FIFA’s focus lies mainly in Europe and other first-world areas, whereas the law on the African continent, specifically in South Africa, provides for the proper protection of parties in these instances. In South African law of contract, where an agreement that is unconscionable and incompatible with public interest will be contrary to public policy,¹⁴⁶ and the need to address the inequality of bargaining power between the parties is a public interest.¹⁴⁷ Therefore one need only look at the terms and surrounding circumstances of the agreement in order to determine whether such agreement displays an imbalance between the obligations of the parties.

A practical example of the operation of a third-party ownership agreement can be seen in the case below, as well as the CAS decision and findings on such agreements. It is important to note that this agreement was concluded before Article 18ter arose (and the ban is not retroactive) and thus the focus is of a purely contractual nature and challenged third-party ownership agreements in terms of legality and whether performance of the agreement is immoral.

¹⁴⁵ Duval, A., Van Maren, O., Unpacking Doyen’s TPO Deals- Sporting Lisbon’s Rebellion in the Rojo Case, Asser International Sports Law Blog, 9 December 2015, <http://www.asser.nl/SportsLaw/Blog/post/unpacking-doyen-s-tpo-deals-sporting-lisbon-s-rebellion-in-the-rojo-case-by-antoine-duval-and-oskar-van-maren> (Last Accessed 2016-11-12)

¹⁴⁶ SASFIN (Pty) Ltd v Beukes 1989 (1) SA 1 (A).

¹⁴⁷ AFROX healthcare Ltd v Strydom 2002 (6) SA 21 (SCA).

4.3 Sporting Clube de Portugal Futebol v. Doyen Sports Investment Limited¹⁴⁸

The CAS had to decide on a contractual dispute between the Club and the investment firm at the end of 2015. Sporting argued that the Third-Party Ownership Agreement (TPOA) between themselves and Doyen was invalid and thus refused to pay Doyen their share in Marcos Rojo's transfer fee between Sporting and Manchester United. The CAS had to decide whether the TPOA was compatible with Swiss Civil Law. Despite all the negativity surrounding third-party ownership agreements, due to the ban in May 2015, the CAS hearing (which took place in June 2015) found in favour of Doyen.¹⁴⁹ The facts of the case and findings were as follows:

4.3.1 The facts

In July 2012, Marcos Rojo signed a four year contract for Sporting Lisbon transferring from Spartak Moscow for a fee of €4 million.¹⁵⁰ Prior to this, Sporting and Doyen concluded an agreement where Doyen financially assisted Sporting in acquiring Marcos Rojo in return for a share in the player's economic rights. In this agreement Sporting would transfer 75% of Marcos Rojo's economic rights for an amount of €3 million.¹⁵¹ This agreement also set out a unilateral put option¹⁵² in favour of Doyen. This meant that Doyen had the right to sell back to Sporting its share in the player's economic rights at a predetermined price if Sporting should not have transferred the player on or before 1 July 2015.¹⁵³

¹⁴⁸ CAS 2014/O/3781 and 3782, Sporting Clube de Portugal Futebol SAD v. Doyen Sports Investment Limited, Award of 21 December 2015.

¹⁴⁹ Duval, A., Doyen v. Sporting I: Doyen's Pyrrhic Victory at the CAS, Asser International Sports Law Blog, 17 February 2017, <http://www.asser.nl/SportsLaw/Blog/post/doyen-vs-sporting-i-doyen-s-pyrrhic-victory-at-the-cas> (Last Accessed: 15 April 2017)

¹⁵⁰ Transfer History *op. cit.* at note 2.

¹⁵¹ Doyen v. Sporting I: Doyen's Pyrrhic Victory at the CAS *op. cit.*

¹⁵² An option to sell assets at an agreed price on or before a particular date.

¹⁵³ Doyen v. Sporting I: Doyen's Pyrrhic Victory at the CAS *op. cit.*

Early in 2013, a new board of directors was appointed by Sporting. In order to alleviate the club from its financial situation, the board decided to place Marcos Rojo on the transfer list. And at the same time Sporting requested Doyen to assist in finding a solution for the player. Doyen allegedly agreed to transfer Rojo to a top-tier Italian club, Calcio Catania. In the meantime Sporting had appointed a new coach, who decided on keeping Rojo at the club, and Sporting notified Doyen to revoke the transfer agreement.¹⁵⁴

Following Rojo's notable performance at the 2014 World Cup Finals, he attracted interest from various prominent clubs in Europe, among others. Manchester United F.C. placed an offer for the services of Rojo at €20 million. On 19 August 2014, Sporting agreed to transfer Marcos Rojo to Manchester United for the sum of €20 million net, plus 20% of the capital gain of any future transfer above the amount of €23 million.¹⁵⁵ Also, on this day Manchester United agreed to transfer Nani, a Portuguese international, to Sporting on a temporary loan basis for a one-year period.¹⁵⁶

Sporting and Doyen had different views regarding the applicability of the TPOA to the transfer of Rojo, which caused a decline in the relationship between the parties. Thus, Sporting informed Doyen of its intention to terminate the TPOA. Doyen objected to such termination and affixed to its response an invoice of €15 million to be paid by Sporting in two installments.¹⁵⁷ On the 28 August 2014, Sporting then reimbursed Doyen only the amount that Doyen had invested (€3 million) in terms of the TPOA.¹⁵⁸

'On 16 October 2014, Sporting filed with the CAS a combined request for arbitration and statement of claim against Doyen in accordance with Article

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.*

R38 *et seq.* of the Code of Sports-related Arbitration.¹⁵⁹ On 21 October 2014, Doyen filed its request for arbitration against Sporting. Later that month, the parties agreed to consolidation of both procedures. The hearing before the CAS was held on the 16 to 18 June 2015. Finally, on 21 December 2015, the CAS rendered its arbitral award in favour of Doyen.¹⁶⁰

4.3.2 The CAS rationality

The CAS had to decide on whether the TPOA was in fact valid, as well as the lawfulness of Sporting's breach of contract. Thus, the CAS had to investigate whether such contracts were compatible with Swiss and EU Law.¹⁶¹

In order to determine whether this TPOA was in fact valid we must bear in mind that according to Article 19 and 20 of the Swiss Code of Obligations, these Articles 'prohibit contracts which are impossible, unlawful, immoral and/or contravene public policy or personality rights,'¹⁶² and that Sporting claimed that the performance of such agreement is unlawful and immoral.¹⁶³

4.3.3 Step 1: The legality of the TPOA

1. Whether the TPOA is unlawful in terms of Swiss law

According to Swiss law, a contract is null and void if such contract is unlawful. Furthermore, a contract is unlawful if its contents violate Swiss law (federal and/or cantonal).¹⁶⁴ Sporting raised two points, firstly, that the TPOA contradicts Swiss labour law and secondly, that such contracts also violated Article 157 of the

¹⁵⁹ Court of Arbitration for Sport, Procedural Rules, Code of Sports-related Arbitration, Article R38, <http://www.tas-cas.org/en/arbitration/code-procedural-rules.html> (Last Accessed: 28 June 2017)

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*

¹⁶² CAS 2014/O/3781 & 3782, *op. cit.*, at para. 190.

¹⁶³ Doyen v. Sporting I: Doyen's Pyrrhic Victory at the CAS, *op. cit.*

¹⁶⁴ CAS 2014/O/3781 & 3782, *op. cit.*, at para. 195.

Swiss Penal Code.¹⁶⁵ The CAS panel quickly rejected Sporting's first point, as the players were not parties to the TPOA. Article 157 condemns profiteering and overlaps with Article 21 of the Swiss Code of Obligations with regard to unfair advantage. Also, any demand arising from Article 21 of the Swiss Code of Obligations has to be raised within one year after the conclusion of the contract. This meant that Sporting was time-barred.

The CAS panel found, with regard to Article 157, that the provision "cannot be deemed violated in this case, since the acts invoked as being criminal by Sporting all fall outside the territorial scope of application of the CPS [Swiss Penal Code], bearing in mind that the contracts were signed outside Switzerland by non-Swiss individual/entities without any of the Parties' acts or their effects occurring in Switzerland."¹⁶⁶ This reasoning would basically shield any contract from being declared null and void if such contract was signed and enforced exclusively outside of Switzerland, even if such contract was contrary to the Swiss criminal law.¹⁶⁷

According to Swiss Federal Tribunal, profiteering occurs "when business good practice requirements are grossly violated and the limits of what seems normal and usual in light of all the circumstances, are significantly exceeded (ATF 92 IV 132, consid.1)"¹⁶⁸ and, that "the offender must know that the other party is in a weak position and must be aware of the fact that a) there is a disparity between the respective considerations and b) the victim accepts this unbalanced deal because of its weakened state (ATF 130 IV 106 consid.7.2)"¹⁶⁹

¹⁶⁵ Article 157 of the Swiss Penal Code reads as follows: Any person who for his own or another's financial gain or the promise of such gain, exploits the position of need, the dependence, the weakness of mind or character, the inexperience, or the foolishness of another person to obtain a payment or service which is clearly disproportionate to the consideration given in return, any person who acquires a debt originating from an act of profiteering and sells or enforces the same, is liable to a custodial sentence not exceeding five years or to a monetary penalty.

¹⁶⁶ CAS 2014/O/3781 & 3782, *op. cit.*, at para. 211.

¹⁶⁷ Doyen v. Sporting I: Doyen's Pyrrhic Victory at the CAS *op. cit.*

¹⁶⁸ CAS 2014/O/3781 & 3782 *op. cit.*, at para. 212.

¹⁶⁹ *Ibid.*, at para. 213.

The CAS panel made reference to the following elements when coming to its decision:

- *“Sporting was not inexperienced in sharing its players’ economic rights with investment funds.*
- *Sporting entered into contact with Doyen and asked for its financial assistance.*
- *Sporting needed Doyen’s support to finance the transfer of two players; one of them (Rojo) was also the “target” of another club, SL Benfica.*
- *The TPOAs were negotiated for a month, each party being assisted by lawyers and experts.*
- *The signatories confirmed that they freely chose to sign the TPOAs.*
- *Sporting’s new management was aware of the scope of the TPOAs but never contested their validity before August 2014.*
- *There is no evidence that the signature of the TPOAs has deteriorated Sporting’s financial situation”¹⁷⁰*

The CAS panel came to the conclusion that at the time Sporting entered into the TPOA it was not in a position of “need, dependence, inexperience, or weakness of mind or character”¹⁷¹ and that “Sporting was not forced to sign these players and the acquisition of their services was certainly not a ‘matter of life and death’ for the club.”¹⁷² Thus the CAS panel ruled that the relevant conditions for Article 157 of the Swiss Penal Code to apply were not fulfilled.¹⁷³

2. Whether the TPOA is immoral under Swiss law

The CAS panel alluded to immoral contracts being those contracts, according to Swiss Law, that:

¹⁷⁰ *Ibid.*, at para. 220.

¹⁷¹ *Ibid.*, at para. 221.

¹⁷² *Ibid.*

¹⁷³ *Ibid.*, at para. 222.

1. fall under a dominant moral disapproval; or
2. contravene the general sense of what is right and what is wrong; or
3. go against the ethical principles and values of the legal system as a whole.¹⁷⁴

But Swiss law is very restrictive with regards to immorality and therefore the fact “that there is a big disparity between the respective considerations is not in itself immoral”, as “the Swiss legal order does not forbid a difference in value between the contractually agreed performance”.¹⁷⁵ Thus the CAS placed a demanding task on Sporting to constitute proof that the TPOA was in fact immoral.

The CAS Panel took account of the fact that a “global evaluation of the two TPOAs shows that both the club and Doyen entered into a standard business oriented deal, where the amount of the loan granted was not necessarily in relation with the percentage of the assigned economic rights”.¹⁷⁶ The panel also stated that “[s]uch a profit sharing is quite usual in the football industry, where the transferee clubs often undertake to share a percentage of the future transfer with the player’s former club”.¹⁷⁷ Thus, it “finds that the object of the TPOAs is not legally immoral”.¹⁷⁸

During the case at hand, Sporting raised in court the fact that Doyen had earned a huge return on investment with regards to the TPOA, to highlight that there was a discrepancy between the two sides of the contract. The CAS panel maintained, “that the fact that there might be a disparity between the respective considerations is not immoral”.¹⁷⁹ In addition, the panel indicated that “a

¹⁷⁴ Doyen v. Sporting I: Doyen’s Pyrrhic Victory at the CAS *op. cit.*

¹⁷⁵ CAS 2014/O/3781 & 3782 *op. cit.*, at para. 227.

¹⁷⁶ *Ibid.*, at para. 231

¹⁷⁷ *Ibid.*, Also, In this case Sporting had to share the transfer fee of Marcos Rojo to Manchester United F.C. with the players former club Spartak Moscow, after it had paid the percentage due to Doyen.

¹⁷⁸ CAS 2014/O/3781 & 3782 *op. cit.*, at para. 232.

¹⁷⁹ *Ibid.*, at para. 234.

discrepancy in possible profits (one party making more profit than the other) is quite different from the scenario where only one party stands to gain and the other to lose”.¹⁸⁰ As a result, it gathered that there was no economical bias between Sporting and Doyen’s respective shares according to Swiss law.¹⁸¹ Furthermore, as Sporting was struggling financially when they entered into the TPOA, the CAS panel “disagree[d] with Sporting when it claims that Doyen’s investment was risk free”,¹⁸² as it stated that even if the “put option” and the “minimum interest fee” were regarded as immoral, they would not be a factor in the present case as they were not activated.¹⁸³

In conclusion, the CAS panel was dealing with the claim made by Sporting that the TPOA amounted to an excessive restriction of the club’s economic freedom in terms of Article 27(2) of the Swiss Civil Code.¹⁸⁴ In line with the Swiss Federal Tribunal, the CAS panel held that “a contractual limitation of economic freedom is disproportionate within the meaning of Article 27 [paragraph] 2 [Swiss Civil Code] only when the obligee submits to someone else’s arbitrariness, gives up his economic freedom or restricts it in such a way that the foundation of his economic existence is jeopardized”.¹⁸⁵ Concerning Article 27(2) above, the CAS panel found that with reference to Sporting’s creditors as a whole, which combined adds up to €500 million,¹⁸⁶ Doyen were not in the position to prohibit Sporting from continuing their economic or other activities.¹⁸⁷ In reality, would Sporting “have failed to meet its commitments, it would not have been subjected for that reason alone to Doyen’s arbitrariness or threatened in its economic freedom in such a serious manner that the foundations of its economic existence would be jeopardized”¹⁸⁸ and in addition to this, answering to the claim that the TPOA restricted Sporting’s ability to act freely, the panel found that, with

¹⁸⁰ *Ibid.*, at para. 236.

¹⁸¹ *Ibid.*, at para. 237.

¹⁸² *Ibid.*, at para. 239.

¹⁸³ *Doyen v. Sporting I: Doyen’s Pyrrhic Victory at the CAS op. cit.*

¹⁸⁴ CAS 2014/O/3781 & 3782 *op. cit.*, at paras. 240 to 249.

¹⁸⁵ *Ibid.*, at para. 242.

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.*, at para 246.

¹⁸⁸ *Ibid.*

reference to the facts laid out by Sporting, at key moments Sporting had the ability to act as it so desired.¹⁸⁹ Thus, Sporting failed to constitute material proof that the TPOA affected the club's economic decision-making process.¹⁹⁰

3. Whether the TPOA is compatible with EU law

At this stage, Sporting failed, due to a lack of evidence, with its claims regarding the TPOA based on EU law and the ECHR. Also, a full discussion regarding how third-party ownership agreements affect EU competition law will be dealt with in a later chapter, as a number of parties have already lodged complaints with FIFA in this regard. Furthermore, the CAS panel rejected Sporting's argument that there is potential infringement of the free movement rights of the player, and that Sporting was not entitled to raise the argument in the name of the players.¹⁹¹ In any event, this argument would be problematic for clubs to engage in, because such contracts could only limit a player's freedom to work where a club feels the need to punish a player for not accepting a transfer ordered by a third party.¹⁹²

In light of the above, the CAS panel found the TPOA to be consistent with Swiss and EU law.

4.3.4 Step 2: Did Sporting unlawfully breach the TPOA?

The dominant concern is no longer the validity of the TPOA but whether, as proposed by Sporting, Doyen has contravened the non-interference obligation enshrined in Articles 6.2¹⁹³ and 14¹⁹⁴ of Rojo's TPOA. The decision on these

¹⁸⁹ *Ibid.*, at para. 248.

¹⁹⁰ *Doyen v. Sporting I: Doyen's Pyrrhic Victory at the CAS op. cit.*

¹⁹¹ CAS 2014/O/3781 & 3782 *op. cit.*, at para. 260.

¹⁹² *Doyen v. Sporting I: Doyen's Pyrrhic Victory at the CAS op. cit.*

¹⁹³ Article 6.2 of the TPOA states that: "[Doyen] shall not share the Transfer Information with third parties other than its own advisers while such information remains out of the public domain, and shall be strictly prohibited from contacting or interfering in any way whatsoever, either directly or indirectly, with any of the parties (other than the Club) which is directly or

averments is greatly reliant on accurate testimony or evidence brought forward by both parties.¹⁹⁵

The CAS panel established, regarding Article 6.2 of the TPOA, “that Sporting has not established in a convincing manner that it expressly and unequivocally asked Doyen to stop looking for transfer offers for Mr Rojo”.¹⁹⁶ Especially regarding “the fact that the President and Vice-President of the club admitted that they would “keep the door open” to any sufficiently interesting offer”.¹⁹⁷ The CAS panel also stated “that given the very long period of time during which Sporting expressly requested and/or implicitly accepted that Doyen seek offers on its behalf, it would have taken particularly clear written instruction for the latter to be led to believe in good faith that it must cease all activity”,¹⁹⁸ and as a result, “in the absence of a clear revocation, Doyen was entitled to continue looking for better transfer conditions”.¹⁹⁹ Thus, the panel agreed that Doyen had not contravened Article 6.2 of the TPOA.

Even though Sporting’s arguments were dismissed regarding whether Doyen applied pressure on Sporting’s transfer-related policy, the panel’s findings were less favourable to Doyen than that above, when dealing with Article 14 of the TPOA. However, the panel refused that Sporting had proved that Doyen applied undue pressure to force the transfer of Rojo.²⁰⁰

The CAS panel maintained that:

indirectly involved in the negotiations of the potential Transfer, except with the written permission of the Club.”

¹⁹⁴ Article 14 of the TPOA states that: “[Doyen] recognizes that the Club is an independent entity in so far as the Club’s employment and transfer-related matters are concerned and [Doyen] shall not, either through this Agreement or otherwise, seek to exert influence over these matters or the Club’s policies or the performance of its teams.”

¹⁹⁵ Doyen v. Sporting I: Doyen’s Pyrrhic Victory at the CAS *op. cit.*

¹⁹⁶ CAS 2014/O/3781 & 3782 *op. cit.*, at para. 279.

¹⁹⁷ *Ibid.*

¹⁹⁸ *Ibid.*, at para. 280.

¹⁹⁹ *Ibid.*

²⁰⁰ *Ibid.*, at para. 287.

1. "Doyen was only 'relying on a contractual right' when drawing attention to the fact that it would claim the €15 million if Sporting refused to transfer Rojo;
2. Doyen was willing to consider ways of improving (compared to the TPOA) the benefit Sporting would get from the transfer;
3. Sporting never seemed impressed by Doyen's messages and refused numerous proposals in the past;
4. Doyen's intervention led to a substantial increase of the transfer fee from €12.5 million to €20 million;
5. Doyen tried desperately to get a meeting with Sporting's President;
6. Sporting went on to transfer Rojo to Manchester United by itself".^{201 202}

While one can see from the above points that some pressure was placed on Sporting in terms of the Marcos Rojo transfer, the panel felt that such pressure by Doyen was done "in an attempt to obtain a meeting with [the club president] Mr Bruno de Carvalho".²⁰³ Also, that the parties have had a lengthy business relationship and were accustomed to continual, open communication channels.²⁰⁴

The CAS panel ruled in favour of Doyen and rejected that it had contravened its obligations in terms of Article 14.²⁰⁵ Finally, the CAS panel decided that "Sporting cannot, in good faith, claim that it had a just cause to terminate its contractual relationship with Doyen unilaterally".²⁰⁶ Subsequently, Sporting was authorized to pay to Doyen roughly €12 million.²⁰⁷

²⁰¹ *Ibid.*

²⁰² Doyen v. Sporting I: Doyen's Pyrrhic Victory at the CAS *op. cit.*

²⁰³ CAS 2014/O/3781 & 3782 *op. cit.*, at para. 289.

²⁰⁴ *Ibid.*, at para. 290.

²⁰⁵ Doyen v. Sporting I: Doyen's Pyrrhic Victory at the CAS *op. cit.*

²⁰⁶ CAS 2014/O/3781 & 3782 *op. cit.*, at para. 296.

²⁰⁷ *Ibid.*

4.4 Conclusion

While this award is great news for Doyen, it does allow a view into the nature and substance of these third-party ownership agreements. With the rejection of Sporting's argument that Doyen contravened the terms of the TPOA, such case has shone the spotlight on the shady nature of football transfers and the large potential for conflicts of interest when concluding third-party ownership agreements.²⁰⁸ This award does not pose a threat to the FIFA ban, and if anything, aids in showing why such a ban is needed to better regulate the transfer market.²⁰⁹ The opaque complex nature of third-party ownership funding is an unwelcome burden on FIFA as player transfers, when taking into account the transfer of a person from one country to another to undertake an employment contract and for a club to keep to specific regulations, be it financial or other, is a difficult task on its own without the introduction of a third party. Add a third party and such agreements turn into an unmanageable and unethical task, as we have seen in the previous chapters.

The judgment by the CAS is of paramount importance as it displays that the court would, if third-party ownership agreements were not banned by FIFA, in similar circumstances find in favour of third-party owners. This would allow a continuation of this unethical practice and the clubs and players would not be afforded the necessary protection. While the large-scale transfers have shone the light on third-party ownership, there are thousands of players being exploited and mistreated on a regular basis due to the fact that this method of financing has not been adequately regulated.

The only option currently available to stop the dire circumstances in which players and clubs find themselves is to maintain the ban of third-party ownership. In the previous chapters it has been demonstrated that allowing third-party ownership but preventing third-party influence has not been

²⁰⁸ Doyen v. Sporting I: Doyen's Pyrrhic Victory at the CAS *op. cit.*

²⁰⁹ *Ibid.*

successful. Now it has been demonstrated that clubs cannot successfully defend themselves in court against third-party investors. The best alternative would be to prevent the entire issue from occurring in the first place.

Chapter 5: Clubs' financial needs

While the focal point has been on why third-party ownership as a business model is detrimental to football, many clubs across the world entered into these agreements freely. Therefore, a logical deduction would be that certain clubs found such a business model beneficial to their objectives, or were in such dire circumstances that they had no alternative options available.

Third-party ownership is a great way for clubs to acquire players that they cannot actually afford. Thus the FIFA ban on the practice can be equated to UEFA's Financial Fair Play rules which essentially strive to force clubs to operate at break-even.²¹⁰ The Financial Fair Play rules merely exist to curb over-spending by clubs, without attempting to create a competitive balance on the playing field.²¹¹ Thus, the competitive disparity between clubs is maintained as the top finishing clubs get richer, and are able to attract talent, and the lower level clubs struggle economically and competitively. This is one of the main reasons third-party ownership thrived.

5.1 The purpose of third-party ownership for clubs

When dealing with the financial needs of various clubs, these clubs must be categorized into those which are Leading Clubs and others that are Selling Clubs.

Selling Clubs are all those clubs which are forced to trade their best players in order to generate revenue as their broadcasting, sponsorship and income earned

²¹⁰ UEFA Club Licensing and Financial Fair Play Regulations, 2015 Edition, https://www.uefa.org/MultimediaFiles/Download/Tech/uefaorg/General/02/26/77/91/2267791_DOWNLOAD.pdf (Last Accessed: 28 June 2017)

²¹¹ Lindholm, J., The Problem with Salary Caps Under European Union Law: The Case Against Financial Fair Play, Texas Review of Entertainment and Sports Law 12, 2011, at p. 189 to 213, http://heinonline.org/uplib.idm.oclc.org/HOL/Page?handle=hein.journals/tresl12&div=13&start_page=189&collection=journals&set_as_cursor=0&men_tab=src_hresults (Last Accessed: 6 June 2017)

from competitions is minimal compared to that of Leading Clubs. Leading Clubs are those clubs which are traditionally successful in their domestic league, as well as in international competitions. Examples of these Leading Clubs would be: Manchester United F.C., Manchester City F.C., and Chelsea F.C. of the English Premier League; F.C. Bayern Munich of the Bundesliga; Juventus F.C. of Serie A; and Real Madrid C.F. and F.C. Barcelona of La Liga.²¹²

This chapter will focus more on the reasons why Selling Clubs enter into third-party ownership agreements and the various notions as to why they choose such a financing or investment option.

The two main notions governing the decision-making process of the Selling Clubs are, firstly, that these Selling Clubs operate on the verge of economic breakdown due to clubs being overly ambitious and therefore have to sell their most talented players in order to stay solvent. Secondly, these clubs operate a specific business model in which they recruit, develop and sell players in order to maintain long-term financial stability.²¹³

These different notions governing Selling Clubs establish the reasons behind why the clubs enter into third-party ownership agreements. In line with the two notions above, certain clubs would use the third-party investment as a means to remain in existence, while other clubs would use the financial support to challenge the Leading Clubs and minimize the competitive disparity between themselves and traditionally larger, financially dominant clubs. Consequently, third-party ownership as a business model allows Selling Clubs the opportunity to replace the need to sell their talented players to meet their objectives.

²¹² Smith, M.N., The 19 Richest Football Clubs in The World, Business Insider UK, 20 April 2016, <http://uk.businessinsider.com/footballs-19-biggest-earning-teams/#19-inter-milan-italy-1> (Last Accessed: 6 June 2017)

²¹³ SoccerTips, Capitalising on Player Potential – The Myth of Moneyball in Soccer Part 1, www.soccertips888.com, 5 February 2017, <http://soccertips888.com/capitalising-player-potential-myth-moneyball-soccer-part-1/> (Last Accessed: 21 June 2017)

The various notions mentioned above will now be outlined and detailed where necessary in order to gain a better understanding of why clubs would undertake such an unpredictable, detrimental business model.

5.1.1 Clubs avoiding collapse

“[W]e use this kind of asset, the available asset that we have, on a large scale in Brazil... We don’t have plenty of money to share concerning television rights or sponsorship.”

The preceding statement is by Brazilian lawyer Daniel Cravo,²¹⁴ that displays the financial necessity of third-party ownership to the Selling Clubs in Brazil. The situation is worsened by the economic climate after the 2008 credit crisis, as clubs would not be able to loan money from traditional financial institutions.²¹⁵

The fact that investment firms operate in excess of millions of dollars coupled with the poor economic climate, create the necessary environment for Selling Clubs to turn to third-party ownership as a lifeline to avoid insolvency.

The President of R2 Asset Management Limited, and former English Premier League player turned entrepreneur, Ray Ranson, maintains, “[C]lubs need it”. Further insisting that such business model is a survival mechanism for cash-strapped clubs who are completely reliant on the support.²¹⁶ Additionally, Marcos Motta, partner at Brazilian firm Bichara e Motta Advogados, is of the opinion that the fact that numerous clubs are overly reliant on third-party ownership that if the practice were to cease to exist, that many leagues would

²¹⁴ Evans, S., Third Party Owner Ban Would be Bad for Brazil- Club Lawyer, Reuters, 22 October 2014, <http://uk.reuters.com/article/uk-soccer-fifa-tpo-idUKKCN0IB00R20141022> (Last Accessed: 21 June 2017)

²¹⁵ Duff, A., & Panja, T., Football Investors Get 62% in Run Around Players on Transfer Bet, Bloomberg, 3 June 2013, <http://www.bloomberg.com/news/articles/2013-03-06/football-investors-get-62-betting-on-player-transfers> (Last Accessed: 8 June 2017)

²¹⁶ *Ibid.*

collapse.²¹⁷ Fortunately, to date, no football leagues have collapsed due to the ban on third-party ownership.

5.1.2 Clubs competing, not merely existing

The Clubs in this category are those that have maintained financial stability, and want to compete with the Leading Clubs, but lack the resources to bridge this gap. These clubs use third-party ownership financing as a means to buy and retain talented players and better equip their facilities.²¹⁸

The Spanish La Liga possibly has the greatest wealth disparity in Europe, with F.C. Barcelona and Real Madrid C.F. basically being the only two clubs finishing top of the league for the past twenty seasons.²¹⁹ However, Atletico Madrid, who are renowned for making use of third-party ownership- with the approximately 30% of the club's finance being derived from third-party investment- was able to break the La Liga duopoly and win the league title in 2014.²²⁰ This would not have been possible without third-party ownership, as the increase in financial support allowed them to acquire and retain their star players which would have otherwise been outside of their financial means.²²¹

Without third-party ownership on offer, many Selling Clubs will not be able to retain their talented players when Leading Clubs tempt their players with lucrative offers. Thus, without investment from third parties, Selling Clubs will not have the ability to compete financially with Leading Clubs, and therefore will lose the ability to compete on the playing field.

²¹⁷ Bird, L., FIFA's Third-Party Ownership Crusade Has Major Implications in S. America, Sports Illustrated, 29 October 2014, <https://www.si.com/soccer/planet-futbol/2014/10/29/third-party-ownership-fifa-brazil-south-america> (Last Accessed: 21 June 2017)

²¹⁸ Hall *op. cit.*, at p. 192.

²¹⁹ *Ibid.*, at p. 193.

²²⁰ Football Investors Get 62% in Run Around Players on Transfer Bet *op. cit.*, at note 214.

²²¹ *Ibid.*

5.2 Third-party ownership: a prerequisite for certain clubs

Certain Selling Clubs do not see third-party ownership agreements as harmful, but are of the viewpoint that these agreements are necessary to level the playing field with the Leading Clubs. Third-party ownership is viewed by some Selling Clubs as the sole way to create a competitive balance on the field in the current international economic climate effectively, according to former president of Sporting Clube de Portugal, Luis Gordinho Lopes.²²²

Further, questions have been posed by large investment firms stating whether “...we want a world where only Barcelona, Real Madrid, Bayern or other giants win trophies due to the distorted market-place or do we want smaller clubs like Atletico Madrid, Sevilla, Porto, Benfica, PSV or other similar [clubs] to challenge them and provide competition?”²²³

The Spanish Football Association argues that the survival of all Spanish clubs is dependent on the continuation of third-party ownership as it is economically necessary, and produces superior competition,²²⁴ and together with the Portuguese Premier League, laid a formal legal complaint against FIFA stating that such a ban is in violation of EU competition law by limiting their investment in Selling Clubs, therefore impeding their ability to compete with Leading Clubs, and in doing this have established dominant market players.²²⁵ This argument will be dealt with at a later stage with reference to investors’ rights.

²²² *Ibid.*

²²³ Panja, T., FIFA Investors Ban Hurts Small Teams, Soccer’s Doyen Says, Bloomberg, 29 September 2014, <http://www.bloomberg.com/news/2014-09-29/fifa-investor-ban-hurts-small-teams-soccer-s-doyen-says.html> (Last Accessed: 8 June 2017)

²²⁴ Liga de Futbol Profesional, The Spanish and Portuguese Leagues Denounce FIFA’s TPO Ban to the European Commission, http://www.lfp.es/en/news/the-spanish-and-portuguese-leagues-denounce-fifas-tpo-ban-to-the-european-commission?action=redirect_site&continue=&no_show_redirect_site=on (Last Accessed: 8 June 2017)

²²⁵ Blog Symposium, FIFA must Regulate TPO, Not Ban It. The View of La Liga, Asser International Sports Law Blog,

5.3 The return on investment

Since the inception of FIFA Article 18bis up until the enactment of Article 18ter, the football authorities have found it difficult to rid the game of third-party ownership. Roughly a year after the blanket ban had been implemented the authorities had still not eradicated the practice, with several clubs being sanctioned for entering into third-party ownership agreements.²²⁶ Third-party investors, by trading players, have created an exceptionally profitable mechanism. Ray Ranson has explained how his company typically makes on average a 50% return on investment over a two-year period.²²⁷ In the years between 2008 and 2012, Traffic Sports, an investment company founded in Brazil, made a 62% return on their primary investment of \$50 million in twenty-one professional players.²²⁸ On one occasion Traffic Sports made a return of 114% in eight months when Keirrison de Souza Carneiro, the nineteen-year-old Brazilian footballer was transferred to F.C. Barcelona.²²⁹

With such a high return on investment and the relatively low risk for the investing party, many third-party investment firms entered into these loan and financing agreements, usually for the duration of the players contract, with the option of re-investment when the player transfers. Many clubs view this form of investment as a legitimate and necessary financial asset to challenge European dominance by competing with those clubs wishing to maintain their monopoly of the global football market.²³⁰

http://www.asser.nl/SportsLaw/Blog/post/fifa-must-regulate-tpo-not-ban-it-by-the-spanish-football-league-la-liga#_ftnrefl (Last Accessed: 10 June 2017)

²²⁶ FIFA, Several clubs sanctioned for breach of third-party influence, third-party ownership rules, www.fifa.com, 29 March 2016,

<http://www.fifa.com/governance/news/y=2016/m=3/news=several-clubs-sanctioned-for-breach-of-third-party-influence-third-par-2772984.html> (Last Accessed: 20 June 2017)

²²⁷ Football Investors Get 62% in Run Around Players on Transfer Bet *op. cit.*, at note 214.

²²⁸ *Ibid.*

²²⁹ *Ibid.*

²³⁰ SoccerEx, Brazilian Clubs Fight Back in Third-Party Ownership Debate, www.soccerex.com, March 2013,

It would be difficult not to envisage why the various parties, both club and investor, would not want to continue with this form of financial support as it creates a win-win situation for both of them.

5.4 Conclusion

In theory, and in light of the few practical examples mentioned above, third-party ownership seems to be an acceptable means of financing clubs' needs. However, such practice encourages short-termism and over-reliance on outside funding.²³¹

As previously mentioned, Bruno de Carvalho, the president of *Sporting Clube de Portugal*, a team renowned for entering into third-party ownership agreements, has labeled the practice as a “monster” as it creates a “vicious cycle of debt and dependence” due to the fact that it essentially drains clubs of their money.²³² From the examples above, it is demonstrated that the Selling Clubs benefit from such arrangement, as both parties to the third-party ownership agreements gain from the situation. However, this is now the case as Carvalho describes: “[p]eople are very happy to sell a player for £50m, but for the club it is £1m or £2m. And they paid more than that in the salary of one year. Almost all the time you lose money. This is mathematics.”²³³

<http://www.soccerex.com/news/2013/04/brazilian-clubs-fight-back-third-party-ownership-debate> (Last Accessed: 20 June 2017)

²³¹ Geey, D., Third Party Investment from a UK Perspective, Asser International Sports Law Blog, 17 April 2015,

<http://www.asser.nl/SportsLaw/Blog/post/blog-symposium-third-party-investment-from-a-uk-perspective-by-daniel-geey> (Last Accessed: 21 June 2017)

²³² FIFA Inactivity Allows Menace of Third-Party Ownership to Go Unchecked, *op. cit.*, at note 128.

²³³ European Football, Manchester United: Sporting Reveal Marcos Rojo Sale ‘Pressure’, BBC: SPORT, 3 October 2014,

<http://www.bbc.com/sport/football/29474696> (Last Accessed: 21 June 2017)

An unending sequence develops as Selling Clubs obtain third-party investment in order to acquire players which they cannot actually afford, but the club cannot later profit from the sale of such player as the third party is the majority economic rights holder. Thus the club ultimately loses money as they would have to cover the player's salary for the duration of the third-party ownership agreement which could amass to a greater amount than the club's actual share in the transfer fee. Consequently, the Selling Club would be more dependent on the investor as the club would find itself in a more unfavourable financial state than before.²³⁴ The pattern would continuously repeat as the clubs would essentially operate at below break-even, and every season become more dependent on the influx of capital from the third party, while the third party would be gaining the financial benefit with minimal risk, and free to move on to another club when the current club can no longer serve its purpose.

²³⁴ Hall *op. cit.*, at p. 196.

Chapter 6: Other means of securing players

With the financial disparity between clubs and leagues widening due to the influx of capital into professional football, the need for alternative means of financing greatens. Since the implementation of the ban on third-party ownership as a means of securing investment, clubs have had to source capital through other legitimate measures. In the past executives have relied heavily on third-party ownership in order to maintain the status of their clubs, and with such option no longer legally available clubs have attempted various alternatives. Such alternatives have unfortunately not been feasible due to their low return (in comparison to the large operation costs of the clubs and the clubs ability to rely on third-party ownership).

6.1 Unsuccessful financial measures

Previously, clubs have attempted to use various measures to raise capital either to remain competitive or avoid becoming insolvent. The following mechanisms and policies have been used in order to replace the economic advantage that the third-party ownership business model offered clubs. These measures were used to create a more balanced, financially secure, and thus more economical, international footballing sphere, and offered a more ethical approach to that of third-party ownership.²³⁵ However, these methods did not generate sufficient capital in relation to the clubs' growing demands and as a result clubs turned to third-party ownership although such a business practice was rendered illegal by the ban.

6.1.1 Minimizing the function of agents/intermediaries

By minimizing the amounts of money that clubs would have to pay agents as commission for transfer of the players which they represent, FIFA could have alleviated the financial pressure on the clubs. These are large sums of money

²³⁵ Hall *op. cit.*, at p. 216.

being drained out of football and represent notable income which the transferring club does not receive. A report compiled in 2014 by the European Club Association found that 14.6%²³⁶ of transfer fees paid between 2011 and 2013 went to agents' commissions.²³⁷ These commissions are on the rise as players' transfers tend to become more expensive every season. In the English Premier League, clubs paid \$179 million in agents' commissions for transfers occurring in 2014, which is an increase in \$30 million from the previous year.²³⁸ However, instead of limiting the amount of fees payable to agents, FIFA has done the contrary by deregulating the standard agency model by introducing the Regulations on Working with Intermediaries.²³⁹

6.1.2 Apportionment of income generated from tournaments

This mechanism illustrates the distribution of tournament profits. For example, as a result of a successful 2014 FIFA World Cup in Brazil, FIFA announced that it would establish a \$100 million "Legacy Fund" for the country. Although this may appear as a good deed by FIFA, these types of tournaments are tremendously profitable for FIFA as the financial burden rests on the host country to provide the required infrastructure; such as stadiums, transportation, accommodation, and so on.²⁴⁰ In total, the 2014 World Cup generated \$4 billion in sales for FIFA, and the 2018 World Cup is estimated to generate over \$5 billion.²⁴¹ These profits

²³⁶ 14.6% amounts to \$254 million of transfer fees paid.

²³⁷ European Club Association, Study on the Transfer System in Europe 86, 2014, http://www.ecaeurope.com/Research/Study%20on%20the%20Transfer%20System%20in%20Europe/ECA%20Study%20on%20Transfer%20System%20in%20Europe_WEB%20version.pdf (Last Accessed: 28 June 2017)

²³⁸ BBC: Sport, Premier League Clubs Spend Record £115m on Agent Fees, BBC: Sport, 28 November 2014, <http://www.bbc.com/sport/0/football/30254835> (Last Accessed: 19 June 2017)

²³⁹ FIFA Regulations on Working with Intermediaries (30 April 2014) https://www.fifa.com/mm/Document/AFFederation/Administration/02/36/77/63/RegulationsonWorkingwithIntermediariesII_Neutral.pdf (Last Accessed: 19 June 2017)

²⁴⁰ Panja, T., FIFA's \$100 Million to Boost Brazil as World Cup Gift, Bloomberg, 10 November 2014, <http://www.bloomberg.com/news/2014-11-10/fifa-s-100-million-to-boost-brazil-soccer-as-world-cup.html> (Last Accessed: 19 June 2017)

²⁴¹ *Ibid.*

are essentially used to pay FIFA's executives or accumulate in FIFA reserves. These reserves are then to be used when unexpected events occur.²⁴² The use of a "Legacy Fund" invites the idea that profits derived from such major tournaments could, instead of being routed to the FIFA reserves, be used to aid the financial disparity between clubs within the country where the tournament occurred. This will allow the smaller, more financially dependent clubs the opportunity to operate at a break-even point, or at a profit, and avoid relying on investment opportunities such as third-party ownership agreements.

While tournament profits should be used to aid the host countries and encourage a more financial stable internal football environment, the idea as a whole still promotes short-termism. Major tournaments, like the FIFA World Cup, have only occurred more than once in a handful of countries and even then it was decades between the tournaments. Although the profit generated from these types of tournaments is large, it would not be sufficient to meet the needs of all the financially desperate clubs for an extended period of time.

6.1.3 Recovery of training compensation and the solidarity mechanism

The FIFA RSTP provides for Training Compensation and the Solidarity Mechanism under Article 20 and 21, and Annexes 4 and 5.

Article 20 RSTP is entitled "*Training Compensation*" and states the following:

"Training compensation shall be paid to a player's training club(s): (1) when a player signs his first contract as a professional, and (2) each time a professional is transferred until the end of the season of his 23rd birthday. The obligation to pay training compensation arises whether the transfer takes place during or at the end of the player's contract. The provisions

²⁴² FIFA, Financial Report 2013, 2014 Edition, at p. 20, http://www.fifa.com/mm/document/affederation/administration/o2/30/12/07/fifafr2013en_neutral.pdf (Last Accessed: 19 June 2017)

concerning training compensation are set out in Annexe 4 of these regulations.”²⁴³

Article 21 RSTP is entitled “*Solidarity Mechanism*” and reads as follows:

“If a professional is transferred before the expiry of his contract, any club that has contributed to his education and training shall receive a proportion of the compensation paid to his former club (solidarity contribution). The provisions concerning solidarity contributions are set out in Annexe 5 of these regulations.”²⁴⁴

In terms of the solidarity payment, 5% of the fee paid for the player is to be distributed amongst the clubs responsible for the player’s training between the ages of twelve and twenty-three.²⁴⁵

However, only 1.15% of the total solidarity payments were paid²⁴⁶ and 1% in training compensation, amounting to \$57.9 million of the \$200 million and \$18 million, respectively.²⁴⁷ Even though these payments are provided for in the FIFA regulations, the purchasing clubs have little incentive to make these payments which suggests that FIFA are to blame for the poor enforcement of the rules.

Regardless of the failure to implement the rules properly, top-tier clubs with large financial backing can purchase a player, who has been trained by a club for a number of years, for a low transfer fee and then are only liable to the training club for 5% of such amount for the player’s development, which is already included in the transfer fee received. This is clearly visible, especially in

²⁴³ FIFA, Regulation on the Status and Transfer of Players 16, at p. 34, http://www.fifa.com/mm/document/affederation/administration/regulations_on_the_status_and_transfer_of_players_en_33410.pdf (Last Accessed: 19 June 2017)

²⁴⁴ *Ibid.*, at p. 38.

²⁴⁵ *Ibid.*

²⁴⁶ European Club Association *supra*, at note 236.

²⁴⁷ *Ibid.*

countries where third-party ownership agreements are a common occurrence. Brazil, for example, produce a large number of rising stars, however, the fact that the clubs do not received the appropriate compensation forces them to look for alternative methods of finance which would give them cash-in-hand in order to either replace the player or merely remain solvent.

It is easy to understand why clubs turn to third-party ownership agreements in light of what is available to them in terms of financing or investment options. While all of the above options have been discussed separately, they do however operate simultaneously. A cash-strapped club in Brazil, for example, would not receive a portion of the profits generated from the FIFA World Cup, but when a top-tier club purchases their player, they would have to share such a transfer fee with the intermediary and may also possibly not recoup the exact amount spent on developing the player over the years, even if they are entitled to receive it in terms of the regulations. This loss causes them to look for alternative financing options, with third-party ownership being the most readily available option.

6.2 Alternative financing models

Third party investors are not banned from investing in football as a whole; they are merely banned from receiving a percentage of a transfer fee in relation to economic rights held by them in that respective player. These investors are unlikely to withdraw from such a lucrative market and thus have to invent creative legitimate solutions in order to reinvest their capital.

There are other investment models that have not been mentioned above that are likely to fall outside of the scope of the wording, and purpose, of the ban. In an attempt to adhere to the rules and regulations set out by FIFA, executives have endeavored to look for more legitimate methods of securing players and means to finance the operation of their clubs. These clubs trying to abide by Article 18 have already implemented the subsequent alternative financing methods,

whether these alternative methods will be a success, and whether FIFA will deem them acceptable remains to be seen.

Various clubs have implemented the following alternative financing methods:

6.2.1 Loans

Third-party ownership, in essence, is a loan to a club in which the club repays the third party the principal debt plus interest, and such repayment varies according to economic rights held and the fee the player was transferred for. However, the intention of Article 18ter was not to exclude all loan agreements which a club intends on entering. A club could enter into an agreement with a third party (such as the traditional financial institutions like a bank), which falls outside the scope of the banned agreements. The agreement should be drafted as a regular financial loan, where the third party loans the club a sum of money and levies interest on the amount, but the repayment of such debt is not linked to the future transfer of a player. Such situation would be possible, as the bank would have access to the financial information of the club and therefore would be able to determine that the repayment was not based on the sale of economic rights to the bank but from the income received from the usual economic transactions of a club. Thus the bank will be able to monitor exactly where such repayment of the loan would be derived from.

6.2.2 Acting as an intermediary

FIFA have promulgated new, less-restrictive regulations which allow any person or company that complies with these rules to act as an intermediary.²⁴⁸ The liberalization of the intermediary (previously agency) market has allowed those acting as an intermediary for a club to be permitted to receive remuneration for

²⁴⁸ Regulations on Working with Intermediaries *supra*, at note 222.

assisting in the transfer of a player which they represent,²⁴⁹ and that this transfer of the player entitles the intermediary to a sum of money related to a percentage of the transfer fee of the economic rights of the player that they represent. For example, Interfootball Management SL was entitled to receive 10% of the transfer fee from Sport Lisboa e Benfica in the event that Alejandro Grimaldo was transferred to a third club.²⁵⁰ This percentage of the transfer fee tends to technically operate like a standard sell-on clause, which is still allowed in terms of the FIFA regulations. Thus the club can establish a company in which it represents the player, upon the club and player agreeing to such representation. This representation agreement would have to be registered with FIFA upon the transfer of the player and the company would get paid a commission as an intermediary upon the transfer of the player. This allows the club, working together with the company acting as an intermediary, to possibly gain a higher percentage when transferring players that the club, in essence, represents.

6.2.3 Purchasing shares in a club

The purchasing of shares can occur in two ways, firstly, by the incorporation of a new club by investors, or secondly, by purchasing shares in an existing club.

This method of exchange allows third parties currently holding economic rights in several players at a single club to exchange those rights with a club in return for shares in the club, in order to avoid breaching Article 18ter. The club would possibly have to increase its share capital, which could be determined by an independent chartered accountant who would compile a report on the value of economic rights held by the third party investor.

²⁴⁹ Villas-Boas Pires, L., A Review of FIFA's TPO Ban and Alternative Financing Models for Clubs, LAWINSPOORT, 15 March 2016, <https://www.lawinsport.com/articles/item/a-review-of-fifa-s-tpo-ban-and-alternative-financing-models-for-clubs#references> (Last Accessed: 20 June 2017)

²⁵⁰ Football Leaks, Football and TPO Whistleblowing, <https://footballleaks2015.wordpress.com> (Last Accessed: 20 June 2017)

This method is made possible only if the investing club does not influence the club where the invested player plays on matters relating to club policy, team independence or performance within labour and transfer matters.²⁵¹

Investors need to be careful not to use their investments in football players as “bridge transfers”, where such investment would be made for no sporting purpose. The club in which the investment is being made cannot exist as a vehicle for exclusively circumventing Article 18ter, and such club would need to be registered and compete in a league or tournaments organized by the relevant local football association.²⁵² If this does not occur, then the club would be operating contrary to the FIFA Disciplinary Committee who are of the opinion that: “*transfers for reasons that are not of a sporting nature are not permitted and must be considered illegitimate in terms of the Regulations*”.²⁵³

This proposed solution is in line with the legitimate objectives which UEFA and FIFA aim to protect,²⁵⁴ in that the money flows directly to the clubs instead of being transferred to third-party investors, and thus large sums of capital would remain with clubs and in the footballing sphere.²⁵⁵

While this form of financing might not breach Article 18ter, it could possibly have an impact on the integrity of football. Various questions could be raised where an investor would want to exchange his economic rights of several players for shares in their respective clubs and these clubs directly compete against one

²⁵¹ As per Article 18bis.

²⁵² Reck, A., ‘What is a Bridge Transfer in Football’, LAWINSPOORT, 30 April 2014, <https://www.lawinsport.com/sports/football/item/what-is-a-bridge-transfer-in-football/> (Last Accessed: 20 June 2017)

²⁵³ CAS 2014/A/3536 Racing Club Asociación Civil v. FIFA, Arbitral Award, <http://sennferrero.com/descargaspdf/tas-cas/201507/CAS2014.A.3536-Racing-Club-Asociacion.pdf> (Last Accessed: 20 June 2017)

²⁵⁴ Doyen Sports & RFC Seraing v. FIFA, UEFA & URBSFA, Brussels Court of First Instance, n°15/67/C, 24 July 2015, at para. 95.

²⁵⁵ Villas-Boas Pires *supra*, at note 248.

another. Thus, the general public could perceive such a transaction as affecting the integrity of the sporting results.²⁵⁶

6.2.4 Providing collateral

This financing mechanism is a simple lending method in which third parties require clubs to furnish security for the amount loaned. And the third party acquires no influence or control in the transfer related matters. The following procedure will be followed:

1. *“Lenders will take floating charge security over the entire squad of player registrations, such security being enforceable only upon an event of default by the club.*
2. *Additional collateral²⁵⁷ be granted to the lender by the club (which will obviously vary on a club-by-club basis), the terms of the loan being such that this additional collateral would have to be realised before realising any security over player assets.*
3. *Any need to enforce security over player registrations, only after an event of default and only after the lender has not been repaid from the enforcement of the additional collateral, would follow the exact same process as if an administrator had been appointed over the club. If an administrator is appointed over a club, the administrator tries to obtain the best possible price for a player for the benefit of creditors whilst ensuring fixtures are fulfilled to maintain the club as a going concern. The club would have total control of which player assets are sold and for what value prior to any default.*
4. *The ability of lenders to be repaid principal and interest from the proceeds of a future sale. Such a scenario would be structured in a way that does not*

²⁵⁶ *Ibid.*

²⁵⁷ Such as a pledge on ticketing, sponsorship, bank accounts, etc.

give any proprietary rights to the lender in the player registration itself, but is simply a commercial term of the loan facility.”²⁵⁸

The above method could be disputed as it is still linked to compensation payable for the future transfer of a player (Article 18ter). However, in terms of the literal interpretation of Article 18ter, this would be correct. But, if a purposive interpretation were to be adopted, and the intention of Article 18ter was to be considered, the question arises of whether such Article was enacted to prevent clubs (that are mostly incorporated as companies) from pledging economic rights of their squad for purposes of receiving a loan. This was not the intention of FIFA and would fall outside the intention of the Article, as this would not allow clubs to enter into loans under the normal course of business.²⁵⁹

6.3 Conclusion

The proposed alternative financing methods could be applied without being in contravention of Article 18ter. However, each option could be accompanied by their respective counter-arguments. One ought to take into consideration that these financing methods have been available to third-party investors before the enactment of the ban on third-party ownership agreements and were not utilized. Therefore, it is plausible to assume that these mechanisms were examined by third-party investors but that the investors chose to enter into third-party ownership agreements as they were the superior (more economically beneficial) option or that the clubs were in such poor financial condition that they would either not qualify for the traditional loan method, or due to the current economic climate financial institutions would deem financing a football club by means of collateral too risky and in terms of generating share capital, there may not be parties interested at this point in time at the share price that clubs would want. In light of the ban, investors would now have to resort to

²⁵⁸ Villas-Boas Pires *supra*, at note 248.

²⁵⁹ *Ibid.*

the specific, limited means available to them and these options dealt with above would possibly be the best, legal and ethical alternatives available.

Chapter 7: Investors' rights

When FIFA first announced that it was going to ban third-party ownership, it was met with serious resistance, mainly from areas where the practice was rife. The two main focuses of the opposition were that the enactment of Article 18ter would amount to an unlawful restraint of trade, and that the ban is an unjustified restriction on competition. In both these instances, FIFA has the opportunity to display how such restriction is reasonable and that the restriction can be justified by legitimate objectives that it wishes to protect. As the practice of third-party ownership is rife in mainly developing and third-world countries, it must clearly be displayed that FIFA has taken a step in the right direction, as the law in a developing country such as South Africa provides for protection against this practice, and thus would be illogical, and illegal, if FIFA were to allow such practice to continue.

7.1 Restraint of trade

An instance arose after the ban had been instituted where FC Seraing and Doyen had transgressed Article 18ter, and Article 18bis, in that Doyen had paid €300 000 to increase the clubs operational budget and in return the club would transfer 30% of the economic rights of some of the players to Doyen. FIFA decided to punish the club by issuing a fine of CHF 150,000 and a two-year transfer ban.²⁶⁰

The guilty parties appealed FIFA's decision and decided to challenge the merits in a Belgian court. The parties argued that Article 18ter of the FIFA Regulations was disproportionate as it did not protect a legitimate interest and therefore the parties tried to obtain relief that included an interim ruling stating that Article

²⁶⁰ The transfer ban prevented the club from registering any new players for four complete and consecutive registration periods (i.e. four transfer window periods).

18ter of the FIFA Regulations was not lawful, pending a full reference being made to the European Court of Justice.

The Belgian court, when taking the application into consideration, had to scrutinize Article 18bis of the FIFA Regulations and found that it had proved ineffective in seeking to regulate third-party ownership and third-party investment in football. As such, the Belgian court indicated that a complete ban on third-party ownership as introduced by Article 18ter of the FIFA Regulations might well be necessary. Consequently, the appeal failed.

Following the aforementioned failure, the parties saw their formal appeal to FIFA's Appeal Committee reach the same unsuccessful conclusion. The Appeal Committee upheld the decision of FIFA's Disciplinary Committee in its entirety.

7.1.1 The South African context

In order to ascertain whether such a ban would constitute a restraint of trade in the South African context, South African case law must be used as a guide to grasp the approach that the courts take with regards to the subject matter. It was argued in the case above that the ban was a restraint of trade as it was disproportionate and did not protect a legitimate interest.

In South Africa, the courts follow an approach where the party seeking to enforce an agreement in restraint of trade traditionally had to only invoke the provisions of such agreement and prove that these provisions had been breached. The party attempting to prevent such enforcement had to prove on a preponderance of probability that it would be unreasonable to enforce such restraint.²⁶¹ The legality of the restraint can be dealt with in a two-fold approach.

²⁶¹ Canon Kwazulu-Natal (PTY) LTD t/a Canon Office Automation v Booth and Another 2005 (3) SA 205 (N) at para. 208H to 209A.

Firstly, taking into account what has been said above, the ban can be proved to be reasonable with reference to:

7.1.2 Basson v Chilwan²⁶²

Firstly, in South African law of contract, the following four questions have been used to determine whether an agreement in restraint of trade is reasonable:

1. *Is there an interest of one party worthy of protection?*
2. *If so, then is that interest threatened by the conduct of the other party?*
3. *If that is further so, then does such interest weigh up qualitatively and quantitatively against the interest of the other party to be economically active or productive?*
4. *Is there another aspect of public policy having nothing to do with the relationship between the parties that requires that the restraint should either be maintained or rejected?²⁶³*

It would be difficult to see how a court would not deem the restraint to be reasonable with reference to the above questions, especially in answer to the fourth question posed above, and possibly the most important would be that the aspect of public policy that requires that the restraint should be maintained would be that the third-party ownership business model amounts to a form of modern-day slavery, and/or involuntary servitude as discussed previously in Chapter 3. With reference to question 3, the investment firms would still be able to invest in football clubs, in the scope of traditional investments, however, they would not be entitled to acquire a percentage of the fee, in relation to the percentage of the economic rights held, from the transfer of certain players.

Furthermore, contained in the judgment of the Belgian court was a list of legitimate objectives, by FIFA and FIFPro, which were fundamental to the ban:

²⁶² 1993 (3) SA 742 (A).

²⁶³ *Ibid.*, at para. 767.

1. *These practices are mainly the deed of investment firms;*
2. *From which we do not know the shareholders;*
3. *Which conclude contracts with different clubs, potentially directly competing against each other on the field.*
4. *These contracts are opaque as they are not registered;*
5. *They can be easily transferred;*
6. *The third-party investors are interested in the players' quick transfers, in short sequences, as they will then reap their benefits;*
7. *This is contradictory with the objective of contractual stability during the players contract with their club;*
8. *If the transfer is not effected before the end of the employment contract (knowing that at this time the player recovers his full contractual freedom), the clubs are due to pay compensation.²⁶⁴*

Secondly, in light of the legitimate objectives stated above, the courts determine the legitimacy of the restraint by deciding whether the restraint is contrary to public policy. The court determined what would amount to such conflict in the following case:

7.1.3 Canon KwaZulu-Natal (PTY) LTD t/a Canon Office Automation v Booth and Another²⁶⁵

The court held:

“insofar as a restraint of trade is a limitation of the right to freedom of trade, occupation and profession as entrenched in section 22 of the Constitution, the common law as judicially developed complies with the requirements laid down in section 36 of the Constitution regarding the limitation of such right.

²⁶⁴ Doyen Sports & RFC Seraing v. FIFA, UEFA & URBSFA *op. cit.*, at note 253.

²⁶⁵ *See supra*, at note 260.

The common law on restraints of trade is of general application, and restraints are only enforceable if they are not in conflict with public policy. A restraint is contrary to public policy if its enforcement would be contrary to the public interest, and it would, most likely, be contrary to the public interest if it is unreasonable, and further, it would be unreasonable and to the extent that it does not seek to protect a legitimate interest of the one party, or if it does purport to protect an interest, such interest is eclipsed by the interest of the party not so restrained.”²⁶⁶

Therefore, the conclusion drawn from the various cases is that such restraint is valid and lawful, in terms of the South African law of contract, as it is reasonable, and that is due to the legitimate objectives which it protects.

Additionally; in:

7.1.4 Reddy v Siemens Telecommunications (PTY) LTD²⁶⁷

There is a possible fifth question with regards to reasonableness, which is implied in the third question in *Basson*, and that is whether the restraint goes further than necessary to protect the interest?²⁶⁸

A decision has already been made on this point by the Belgian court, after they had scrutinized Article 18bis, where the court ruled that Article 18bis was ineffective. Thus, Article 18ter had to be enacted in order to place a total ban on third-party ownership. Moreover from the case, it is not necessary that the protectable interest be infringed but merely that there exists the risk of infringement.²⁶⁹ This further falls in line with the argument relating to slavery and servitude, as the danger lies not in if this exploitation will occur, but in the fact that the opportunity may possibly present itself. Thus, both FIFA and the

²⁶⁶ *Ibid.*, at p. 209 paras. G/H to J.

²⁶⁷ 2007 (2) SA 271 (SCA).

²⁶⁸ *Ibid.*, at para. 17.

²⁶⁹ *Ibid.*, at paras. 18 and 19.

Belgian court have reached the correct decision in upholding the ban and limiting the rights of third party investors.

7.2 Restriction on competition

The Spanish and Portuguese leagues raised the second legal challenge against FIFA and Article 18ter shortly after the enactment of the ban. A formal complaint was lodged with the European Commission, arguing that banning third-party ownership is an unjustified and disproportionate restriction on competition.²⁷⁰

7.2.1 Laws governing restrictions on competition

Articles 101 and 102 of the Treaty on the Functioning of the European Union (herein referred to as the TFEU) govern whether such conduct would be found to be anti-competitive.²⁷¹ Jointly, Articles 101 and 102 of the TFEU prohibit any agreement between undertakings, decisions by associations of undertakings, and concerted practices by one or more undertakings that may affect trade and are intended to, or will in fact, prevent, or distort competition.²⁷²

Thus, in order for these Articles to govern in this instance, there must have been an undertaking or association of undertakings, an agreement or decision, a market and an anti-competitive effect on such market.²⁷³

The European Court of Justice (ECJ) has held that FIFA, and other continental federations such as UEFA, and the domestic football associations are subject to Articles 101 and 102 of the TFEU as each are simultaneously undertakings in

²⁷⁰ The Spanish and Portuguese Leagues Denounce FIFA's TPO ban to the European Commission *op. cit.*, at note 223.

²⁷¹ EU Competition Law: Rules Applicable to Antitrust Enforcement, Volume 1: General Rules, Situation as at 1 July 2013, at p. 10, http://ec.europa.eu/competition/antitrust/legislation/handbook_vol_1_en.pdf (Last Accessed 8 June 2017)

²⁷² *Ibid.*

²⁷³ *Ibid.*

their own right and an association of undertakings.²⁷⁴ Furthermore, an undertaking is any entity engaged in an economic activity, which includes employment procurement.²⁷⁵ In *Balog*,²⁷⁶ the ECJ found that a set of transfer regulations by FIFA amounted to a decision under Articles 101 and 102 of the TFEU since it was handed down by FIFA's Executive Committee and had binding legal effect on the FIFA members.²⁷⁷ Similarly, the ban proposed in Article 18ter is issued by FIFA's Executive Committee and is binding on its members. Accordingly, the FIFA ban would constitute a decision by an undertaking, as well as a decision by an association of undertakings, for the purposes of Article 101 and 102 of the TFEU.

In addition, the *Balog* case also dealt with the relevant markets in professional football. Firstly, there is the contest market, where the product is the game and contested on the field between two clubs. Secondly, we find the secondary market, which comprises goods such as sponsorships, broadcast deals, tickets, merchandise, and so on. Thirdly, the transfer market is where clubs compete to secure the services of various players - what the ECJ regards as the "raw materials required for clubs to produce a quality product in the contest market."²⁷⁸

By restricting third-party ownership, FIFA has restricted the clubs' ability to compete in the transfer market as such investment will not be readily available. In doing so, FIFA has affected the club's ability to compete in the contest and secondary markets as well.

²⁷⁴ Case C-246/98, *Balog v. Royal Charleroi Sporting Club ASBL*, 2001, at para. 57.

²⁷⁵ Case C-41/90, *Hofner v. Macrotron GmbH*, 191 E.C.R I-1979, at para. 21.

²⁷⁶ See *Balog*, *op. cit.*, at note 273.

²⁷⁷ *Ibid.*, at para. 66.

²⁷⁸ *Ibid.*, at paras. 77 to 78.

7.2.2 FIFA's response: Restriction justified under *Meca-Medina*²⁷⁹

Articles 101 and 102 of the TFEU only prohibit restrictions on competition if these restrictions would be unreasonable restrictions. And, furthermore, whether such restrictions would be justified by legitimate objectives. The ECJ has held, in instances prior to the ban, that even rules that restrict competition can be justified by legitimate EU objectives.²⁸⁰

The ECJ implemented these principles, most notably, in *Meca-Medina*. The test to determine whether a restriction on competition is justified is known as the *Meca-Medina* test. This test is a three-phase test, determined on a case-by-case basis, and the restriction in question must satisfy each phase to 'pass' the test.

7.2.2.1 First phase: The legitimate objectives

FIFA would have to show that such restriction created by the ban pursues legitimate sporting objectives. A list set out by FIFA and FIFpro have already been discussed, as contained in the judgment of the Belgian court. This list sets out the legitimate objectives FIFA has successfully relied upon in order to justify Article 18ter. The list, most notably, states that the presence of third-party ownership in professional football facilitates conflicts of interest between various parties, match-fixing, it undermines contractual stability and it is an unsustainable business practice with long-term financial harm. These legitimate objectives, coupled with the fact that the business practice amounts to modern day slavery and an involuntary servitude, and such ban already being supported by the European Parliament,²⁸¹ make it problematic if the ECJ were to decide that such restriction does not pursue legitimate objectives.

²⁷⁹ Case C-519/04, *Meca-Medina v Comm'n*, 2006 E.C.R. I-06991.

²⁸⁰ Case C-309/99, *Wouters*, 2002 E.C.R. I-01577, at para. 97.

²⁸¹ *See supra* Chapter 3 at note 100.

7.2.2.2 Second phase: Are restrictions inherent?

If the ban is justified by legitimate objectives, FIFA will then progress to the next step of the test. FIFA will have to show that the restrictions are inherent, or necessary, in the pursuit of justifying legitimate objectives. Consequently, there cannot be non-restrictive means of achieving the same objectives.

Fundamentally, both parties would feel a need that the practice of third-party ownership should be restricted in some way, but the parties would differ in the degree of such restriction.²⁸² The second prong is not as considerable in determining the issues as the third prong, which deals with whether the FIFA ban is disproportionately restrictive, and whether a less-restrictive alternative is actually available.²⁸³

7.2.2.3 Third phase: Proportionality of the FIFA ban

This step requires FIFA to prove that the restriction on competition is proportionate. Such restriction would be disproportionate if less-restrictive means can achieve the legitimate objectives used to justify the restriction.²⁸⁴ Therefore, the Spanish and Portuguese leagues in their challenge against the ban would just need to display viable, less-restrictive alternatives that will achieve the same legitimate objectives used in the justification of Article 18ter.²⁸⁵

If the Spanish and Portuguese would put forward that the practice of third-party ownership needs only to be regulated and not completely banned, their proposed regulations would need to satisfy dual objectives. Firstly, the regulation of the practice must create a stable investment environment where clubs do not overly depend on third-party investment nor allow the regulation to eliminate such investment. And secondly, these regulations must prevent third-party influence.

²⁸² Hall *op. cit.*, at p. 212.

²⁸³ *Ibid.*, at p. 213.

²⁸⁴ *Ibid.*

²⁸⁵ *Ibid.*

The ban currently prevents clubs from over reliance on third-party investment, as well as shielding the clubs from third-party influence. Thus, if the regulations were not able to attain this target then they would not be a suitable substitute to the ban.²⁸⁶

7.3 Conclusion

It appears that FIFA have listed legitimate objectives that have been readily accepted as such by both national courts, and have the backing of the European Parliament. Accordingly, the restriction on competition created by the ban does not seem to be disproportionate, and no less-restrictive means are currently available. One should take into account that Article 18ter was only designed due to the ineffectiveness of Article 18bis to regulate third-party influence.

The CEO of the English Premier League, Richard Scudamore, has said that “[i]t is impossible for me to believe that the person who has the financial interest in that player doesn’t have an influence over the future of that player.”²⁸⁷ The most crucial aspect of the ban can be derived from this statement, and any legal challenge against Article 18ter would need to display that any proposed alternative regulation of the practice of third-party ownership would mitigate the potential dangers of third-party influence without eliminating the investment altogether. If such a dual objective cannot be achieved then such a proposed alternative should not be considered, and the ban on third-party ownership should remain.

²⁸⁶ *Ibid.*, at p. 214.

²⁸⁷ Football Investors Get 62% in Run Around Players on Transfer Bet op. cit., at note 214.

Chapter 8: Conclusion

FIFA have been met with considerable opposition since the enactment of Article 18ter, especially since they deviated from their original suggestion where there would be a three-to-four year transitional period where the ban would gradually be introduced. This was to be done in order to give those clubs and associations that were party to third-party ownership agreements an opportunity to find alternative measures and conform with FIFA's new regulations. However, these parties were of the opinion that the ban hindered their rights to free and open competition in all economic activities, *inter alia*.

While the concept of third-party ownership of footballers' economic rights would be an acceptable practice if it could be regulated properly, this, however, is not the case. Similar to the situation of doping in sports where the World Anti-Doping Agency (WADA),²⁸⁸ and its medical staff, always seem to be one step behind those using the banned substances, such must have been the feeling of FIFA with regards to third-party ownership. Like any practice born before its regulatory body has had the chance to assess it and regulate it, this was the case with FIFA attempting to control the practice of third-party ownership once it was in full swing.

FIFA made an unsuccessful attempt at regulating the practice, or what they thought to be the main part of the practice, by the enactment of Article 18bis in January 2008. This provision banned the act of third-party influence, but did not mention anything about the banning of third-party ownership.

²⁸⁸ The World Anti-Doping Agency (WADA) is a foundation initiated by the International Olympic Committee based in Canada to promote, co-ordinate and monitor the fight against drugs in sports.

8.1 Article 18bis: Third-party influence on clubs

This was not a specific ban on third-party ownership but rather a ban on a third-party owner from influencing a club's employment policy or transfer related matters between the clubs.

We can see from the wording of Article 18bis that it makes no reference to essential aspects which define third-party ownership. The Article reads as follows:

- 1. No club shall enter into a contract which enables any other party to that contract or any third party to acquire the ability to influence in employment and transfer-related matters its independence, its policies or the performance of its teams.*
- 2. The FIFA Disciplinary Committee may impose disciplinary measures on clubs that do not observe the obligations set out in this article.*

The above rule does not specifically refer to the economic rights of players, and merely prohibits third parties from influencing the independent decision-making ability of a club (for example, influencing where a player should be transferred). This provision was declared as binding at the national level, and was therefore required to be included in the regulations of all FIFA member nations.

With the enactment of this provision FIFA envisaged that third-party influence would cease to exist; nevertheless, that was not the outcome.

The ban on third-party ownership, which goes hand-in-hand with third-party influence, should have occurred sooner. The proposed reasoning behind Article 18bis would have to have been that if FIFA could succeed in preventing third-party influence, then many third parties would no longer feel comfortable

investing in such a manner, and third-party ownership would disappear entirely.²⁸⁹

Despite the enactment of Article 18bis, clubs and third parties continued to enter into agreements which seemed to be one-sided in favour of the third parties. Evidently, Article 18bis did not serve its purpose and further measures needed to be taken by FIFA in order to prevent further damage.

Throughout 2014, UEFA and FIFA made numerous public statements concerning their goal of outlawing third-party ownership. In September FIFA's president Sepp Blatter expressed that: *"We took a firm decision that [third-party ownership] should be banned but it cannot be banned immediately, there will be a transitional period"*.²⁹⁰ FIFA then decided to implement a blanket global ban on third-party ownership, without the inclusion of the transitional period, to be effective from 1 May 2015.

8.2 Article 18ter: The global blanket ban

To supplement the aforementioned Article (18bis), FIFA issued a circular on 22 December 2014 giving effect to Article 18ter, which imposes a global blanket ban on third-party ownership, specifically prohibiting any entity that is not a club from being entitled to any economic benefits arising from player transfers.

FIFA and UEFA may have erred in not implementing a transitional period when first enacting the ban, but they have definitely taken a step in the right direction as this ban appears to combat the problematic areas caused by such business

²⁸⁹ As some parties only entered into third-party ownership agreements if entering into the agreements meant that they could influence club policy.

²⁹⁰ Wilson, J., Fifa Agrees to Impose a Worldwide Ban on Third-Party Ownership, but Move Could take up to Four Years, The Telegraph, 26 September 2014, <http://www.telegraph.co.uk/sport/football/news/11124934/Fifa-agrees-to-impose-a-worldwide-ban-on-third-party-ownership-but-move-could-take-up-to-four-years.html> (Last Accessed: 19 June 2017)

practices. The ban aided in reducing conflicts of interest, money laundering, human trafficking, the hampering of youth development, and the financial instability of clubs and player contracts. However, banning third-party ownership is only the beginning for FIFA as losing this method of financing drastically changed the financial and competitive landscape of international football. Certain clubs used third-party investment to compete with top-tier clubs, as well as to avoid bankruptcy. With the sudden implementation of the ban, these clubs were forced to find new sources of investment. These clubs had to adopt modern business practices, and better orientate themselves towards long-term, sustainable financial success.

However, this is a long-term solution to the difficulties faced by these clubs, and the harm of losing third-party investment will be much more immediate. Clubs' financial problems are further amplified by the transfer windows²⁹¹ and FIFA Financial Fair Play Regulations.²⁹²

Therefore, the ban needs to be developed and the impact which it has on the various leagues needs to be monitored. The effectiveness of the FIFA ban in its current state can be questioned, as it could have the tendency to force third parties to find creative ways to emulate the effects of third-party ownership or that banning investors will only make the practice more secretive and dangerous.²⁹³ For example, banning third-party ownership can cause a rise in the use of "bridge transfers" of players, which is where third parties using, or establishing their own, proxy clubs to transfer players, before loaning them or selling them to a final destination.²⁹⁴ Thus legitimizing the third party in the FIFA

²⁹¹ Prior to FIFA's enactment of the "transfer window", teams could sell players at any time of the year and could thus cover short-term financial problems. The implementation of the transfer window reduced these revenue-producing opportunities substantially, thus creating the need for capital from other sources.

²⁹² The Regulations were established to prohibit professional clubs spending more than they earn in the pursuit of success and in doing so getting into financial problems which might threaten their long-term survival.

²⁹³ What is a "Bridge Transfer" in Football *op. cit.*, at note 251.

²⁹⁴ *Ibid.*

regulations. This practice remains widespread across the world and such methods have already been sanctioned.²⁹⁵ Another way to avoid the repercussions of breaching Article 18ter would be for a club to, after entering into a secret agreement with a third party, assign the transfer profits to the player in question, and then these profits to be transferred to the third party. From the wording of Article 18ter, a player does not seem to be considered as a third party; therefore, assigning profits to the players themselves may be possible. This will create the difficult task for FIFA in deciding on these simulated transactions, as FIFA will have to determine the difference between the parties' intentions and their motives.

Furthermore, in most countries, even if the third-party agreement would be invalid according to the respective football association's regulations, FIFA only has the authority to punish players and clubs, but not the third parties. Consequently, it is possible to envisage a scenario where a desperate club enters into a third-party ownership agreement with an investor despite knowing the sanctions provided for in Article 18ter, resulting in a troublesome position for the club. The fact that FIFA can only sanction clubs and players could bring about the situation where third parties who have entered into these types of agreements could use this as leverage to intimidate or influence clubs by threatening to disclose the agreements to FIFA.²⁹⁶

8.3 Conclusion

In sum, FIFA has undoubtedly taken the correct decision in banning the practice of third-party ownership. The method of implementation of the ban may have been incorrect as FIFA did not include a transitional period. But with regards to the rights, it is absolutely accurate that such a ban protects FIFA. The Court of Arbitration for Sport echoed this when they upheld a recruitment ban on Belgian club *RFC Seraing* during four transfer window periods imposed back in

²⁹⁵ CAS 2014/A/3536 *op. cit.*, at note 252.

²⁹⁶ Hall *op. cit.*, at p. 202.

September 2015 for breaches relating to third-party ownership. This award was the first decision that unreservedly recognised the compatibility of the ban on third-party ownership with EU law. FIFA released a statement claiming that *“[w]ith this decision, which came after a thorough and comprehensive examination of the arguments raised and an analysis of all relevant legal provisions, mainly of EU law, and despite a slight reduction in the original transfer ban imposed from four to three registration periods, CAS has recognised and confirmed the validity of FIFA’s ban on [third-party ownership], which was adopted in order to preserve the independence of clubs and players in matters of recruitment and transfer, and to ensure the integrity of matches and competitions”*.²⁹⁷

The ban has managed to withstand legal battles thus far and it is currently supported, and deemed valid, by both the CAS and the European Parliament. However, such a ban cannot be enacted and left merely to exist. FIFA will have to monitor the global situation, analyze its Transfer Matching System and attempt to further develop the regulations where necessary or it will reach the same conclusion as it did with the enactment of Article 18bis.

²⁹⁷ Warshaw, A., CAS Ruling on Seraing Backs FIFA Ban on Third-Party Ownership, InsideWorldFootball, 10 March 2017, <http://www.insideworldfootball.com/2017/03/10/cas-ruling-seraing-backs-fifa-ban-third-party-ownership/> (Last Accessed: 19 June 2017)

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