

THE PRIVATE LEGAL ORDER OF FIFA

BETWEEN THE GREEN PITCH AND THE RED TAPE:  
THE PRIVATE LEGAL ORDER OF FIFA

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*FIFA, football's (or soccer's, as it is known in some countries) world governing body, has long been associated with the World Cup and, lately, the corruption scandal. Less known is FIFA's success in building a legal order that competes with public orders. This study explains how and why this private legal order has succeeded in governing the behavior of the involved actors by keeping them away from regular courts. We argue that the ability of the order to offer what other governance modes could not is the key: FIFA, as a transnational private authority, offers harmonized institutions that apply across national borders and in many cases are better accustomed to the needs of the involved parties than their state-made alternatives, which often are based on one-size-fits-all approach and lack certainty of application. FIFA's rules increase the gains of clubs and prominent footballers. And while the interests of some other involved parties, less known players in particular, might have been better served by the application of formal state laws, the established equilibrium discourages deviation. The results contribute to the better understanding of alternative modes of supplying institutional design, particularly by illustrating how private orders function in the environment where reputation plays limited role.*

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## I. INTRODUCTION

The Fédération Internationale de Football Association, better-known as FIFA, is the governing body for football (or soccer, as it is known in some countries), futsal, and beach soccer.<sup>1</sup> Founded in 1904 under Swiss law by seven European countries—Belgium, Denmark, France, the Netherlands, Spain, Sweden, and Switzerland—and based in Zurich, Switzerland, currently it comprises 211 national associations.<sup>2</sup> Although FIFA's most important objective is staging major tournaments,<sup>3</sup> particularly the FIFA World Cup, it has gone further by creating common rules of behavior for thousands of parties—players, clubs, coaches, their representatives, investors, sponsors of tournaments, and even spectators of the beautiful game.<sup>4</sup> These rules, given FIFA's reach, cover almost the entire globe and pretty much every essential football tournament.

FIFA, however, is not the only private actor that has established its own legal order. Scholars have documented numerous examples—both historical, such as private prosecution associations during the Industrial

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1. See FIFA, FIFA STATUTES, REGULATIONS GOVERNING THE APPLICATION OF THE STATUTES, AND STANDING ORDERS OF THE CONGRESS, art. 6.1 (football), art. 6.4 (futsal), art. 47 (beach soccer) (2015), available at [http://resources.fifa.com/mm/document/affederation/generic/02/58/14/48/2015fifastatutesen\\_neutral.pdf](http://resources.fifa.com/mm/document/affederation/generic/02/58/14/48/2015fifastatutesen_neutral.pdf) [hereinafter FIFA STATUTES].

2. See <http://www.fifa.com/associations/> (listing all current FIFA members).

3. Additionally, FIFA aims to improve and promote the game of football. See FIFA STATUTES, *supra* note 1, art. 2 (a), (b).

4. See *id.*, art. 2 (c) (one of the FIFA's objectives is "to draw up regulations and provisions and ensure their enforcement"). See also FIFA, FIFA REGULATIONS ON THE STATUS AND TRANSFER OF PLAYERS (2015), available at [http://resources.fifa.com/mm/document/affederation/administration/02/70/95/52/regulationsstatusandtransfer\\_2015\\_e\\_v051015\\_neutral.pdf](http://resources.fifa.com/mm/document/affederation/administration/02/70/95/52/regulationsstatusandtransfer_2015_e_v051015_neutral.pdf) [hereinafter TRANSFER REGULATIONS] (laying down rules concerning the status of players, their eligibility to participate in organized football, and their transfer between clubs belonging to different member associations); FIFA, REGULATIONS ON WORKING WITH INTERMEDIARIES (2015), available at [http://resources.fifa.com/mm/document/affederation/administration/02/36/77/63/regulationsonworkingwithintermediariesii\\_neutral.pdf](http://resources.fifa.com/mm/document/affederation/administration/02/36/77/63/regulationsonworkingwithintermediariesii_neutral.pdf) (establishing rules for the professional representatives of players and clubs whose services can be engaged when concluding an employment contract or a transfer agreement); FIFA, REGULATIONS: CLUB LICENSING (2007), available at [http://resources.fifa.com/mm/document/affederation/administration/67/17/66/club\\_licensing\\_regulations\\_en\\_47341.pdf](http://resources.fifa.com/mm/document/affederation/administration/67/17/66/club_licensing_regulations_en_47341.pdf) [hereinafter LICENSING REGULATIONS] (defining minimum requirements for the licensing of clubs by national member associations, including restrictions on the ownership of football clubs); FIFA, FIFA DISCIPLINARY CODE (2011), available at <http://resources.fifa.com/mm/document/affederation/administration/50/02/75/discoinhalte.pdf> [hereinafter DISCIPLINARY CODE] (e.g., authorizing banning fans from entering a stadium for infringements of the rules in FIFA regulations).

Revolution in England,<sup>5</sup> early attempts of self-regulation by American securities traders under the helm of the New York Stock and Exchange Board (renamed in 1863 to the New York Stock Exchange),<sup>6</sup> or medieval merchant guilds<sup>7</sup> and pirate organizations,<sup>8</sup> and contemporary, such as small local communities<sup>9</sup> or business associations<sup>10</sup>—where non-state actors develop institutions that support order. These privately-created legal orders often function successfully in the shadow of or without state-made laws. What clearly distinguishes FIFA's private legal order, which is distinctly law-like, from many other examples, is, most notably, its stark contrast with state-made laws in some fields. The controversy has focused on, inter alia, the compatibility of the regime with the freedom to choose employment, competition laws, and free movement rules of the European Union.<sup>11</sup>

This study aims to explain how and why this private legal order has succeeded in governing the behavior of the involved actors by keeping them away from regular courts. We propose that the ability of the order to offer what other governance modes could not is the key: FIFA, as a transnational private authority, offers harmonized institutions that apply across national borders and in many cases are better accustomed to the needs of the involved parties than their state-made alternatives, which often are based on one-size-fits-all approach and lack certainty of application. FIFA's rules increase the gains of clubs and prominent footballers. And while the interests of some other involved parties, less known players in particular, might have been better served by the application of formal state laws, the established equilibrium discourages

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5. See Mark Koyama, *Prosecution Associations in Industrial Revolution England: Private Providers of Public Goods?*, 41 J. LEGAL STUD. 95 (2012).

6. See Stuart Banner, *The Origin of the New York Stock Exchange, 1791–1860*, 27 J. LEGAL STUD. 113 (1998).

7. See Avner Greif, Paul Milgrom, & Barry R. Weingast, *Coordination, Commitment, and Enforcement: The Case of the Merchant Guild*, 102 J. POLIT. ECON. 745 (1994).

8. See PETER T. LEESON, *THE INVISIBLE HOOK: THE HIDDEN ECONOMICS OF PIRATES* (2009).

9. See, e.g., ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991).

10. See, e.g., Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992) [hereinafter *The Diamond Industry*]; Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724 (2001) [hereinafter *The Cotton Industry*].

11. See *infra* Part IV.A (describing challenges to FIFA's private legal order from public law).

deviation. Further, we identify factors that, notwithstanding alleged contradictions with formal state-made law, contributed to the rise of this private legal order.

One of the contributions of this article lies in illustrating how private ordering evolves and functions in the setting where reputation plays limited role. Most prior studies of private legal orders share a similar underlying structure: reputation-based mechanisms—either independently or in combination with more formal mechanisms—induce parties to behave in a manner beneficial to the parties and other members of a group.<sup>12</sup> We consider a case where an extremely big number of the involved actors and the absence of entry and exit barriers weaken reputation mechanisms. Although information about opportunistic behavior can be monitored and communicated easily among the actors, collective punishment is not guaranteed. Hence, bad reputation does not necessarily lead to ostracism. We show that private legal orders can function without reputation-based mechanisms. This, however, necessitates a different structure. In order to be successful, a coordinated system of privately-designed rules, dispute resolution venues, and enforcement mechanisms emerge. This public order-like system is supported by a strong member association which performs a role similar to the position of a government in a public order.

One last point that needs to be addressed here is the clarification of the meaning of norms (rules) supplied by private actors. Since FIFA is a centralized private organization, this article focuses mainly on formal, centralized private rules of governance, rather than on societal norms. We contrast these rules with state-made legal rules.<sup>13</sup>

The rest of this article is organized as follows. Part II briefly discusses the role of decentralized self-governance and centralized governance by private organizations in supporting cooperation. This part also proposes FIFA as an organization that has developed its own private legal order for governing football-related matters: an order that co-exists in parallel with formal state-made law. Part III puts forward the *how* question: how does FIFA organize the world of football and keep involved actors out of state courts? Part IV briefly discusses challenges to the

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12. See *infra* Part II (describing conditions for creating cooperation by both decentralized and centralized private ordering).

13. See Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 351 (1997) (treating both societal norms and organizational rules of centralized private organizations as privately-designed norms, as long as the distinction between their supply by decentralized and centralized means is observed).

FIFA's order from formal state-made law. Part V then proceeds to the *why* question: why is the organized football subject to FIFA's rules and institutions rather than alternative governance structures in general and formal state law in particular? We answer this question by identifying factors that increase the costs of other means of governance and thus make them no viable option. Under these circumstances, FIFA offers supportive institutions for governance that others fail to provide. Some of these factors are not football-specific. Hence, it is reasonable to expect that other groups can benefit from organizing a similar private order as well. In part VI, we discuss the reasons that contributed to the success of FIFA in building its own private legal order. At the end, we offer some conclusions.

## II. THE THEORY OF PRIVATE MODES OF GOVERNANCE

Several governance mechanisms provide institutional support for economic activity: markets, firms, states, or communities and private group organizations.<sup>14</sup> Obviously, none has a monopoly. For example, where a state is not able or willing to provide institutions, alternative private modes of governance can fill the gaps.<sup>15</sup> These instances include mostly historical examples, which predated modern state institutions, present-day cases from developing countries, where institutions are weak, or illegal activities, which certainly cannot be supported by formal law.<sup>16</sup> Indeed, such private orders might be inferior to the centralized provision of reliable institutions by states, but in the absence of state action even such substandard alternatives create economic value.<sup>17</sup>

The situation is different where one mode of governance competes with an already existing order for organizing specific activities. In this case, the least-cost method will be chosen from among the available institutions.<sup>18</sup> The question about the preferred source of governance then boils down to the ability of a certain governance mode to offer rules that

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14. See Avery Katz, *Taking Private Ordering Seriously*, 144 U. PA. L. REV. 1745, 1754 (1996).

15. See AVINASH K. DIXIT, LAWLESSNESS AND ECONOMICS: ALTERNATIVE MODES OF GOVERNANCE 3–4 (2004); John McMillan & Christopher Woodruff, *Private Order Under Dysfunctional Public Order*, 98 MICH. L. REV. 2421, 2448–53 (2000).

16. See Barak D. Richman, *Firms, Courts, and Reputation Mechanisms: Towards a Positive Theory of Private Ordering*, 104 COLUM. L. REV. 2328, 2335–36 (2004).

17. See McMillan & Woodruff, *supra* note 15, at 2425.

18. DIXIT, *supra* note 15, at 4.

suffer the least from market failures.<sup>19</sup> If private ordering is preferred to formal state law, there is a strong case that the private order better suits the needs of the involved actors.<sup>20</sup> This favored position flows largely from the proximity of private associations to the involved actors which leads to two advantages. One is informational advantage in designing specialized rules of behavior and resolving the arising disputes in swift, qualified, and maybe even less costly manner.<sup>21</sup> Another is the responsiveness of the order to the special needs of the involved actors owing to the greater involvement of the latter in the formation of the rules.<sup>22</sup>

Certainly, privately designed institutions are not necessarily the most efficient from the perspective of maximizing social welfare (consider, for example, negative externalities they may create for third parties).<sup>23</sup> They also do not undoubtedly imply maximum individual gains for all involved actors, because the development and maintenance of such orders may be the result of efforts by specific power groups (speaking of influential interest groups, state capture is not uncommon either).<sup>24</sup>

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19. See Katz, *supra* note 14, at 1753–55 (showing that the question about the best governance mode depends on possible costs of supplying institutions, among which are externalities, informational asymmetries, strategic behavior, network and learning externalities).

20. Surely, path dependency, collective action problems, and other factors might deter a shift from a bad equilibrium to a better one. We discuss factors contributing to the maintenance of an established equilibrium below. See *infra* notes 210–219 and accompanying text.

21. See DIXIT, *supra* note 15, at 32–48 (showing the advantages of private contract enforcement, whether by the parties and industry peers based on relational contracting or by arbitration, as opposed to a state law that must use worse public information); Bernstein, *The Cotton Industry*, *supra* note 10, at 1741 (arguing that insider information available to arbitrators transforms considerations that in the public legal system would have been only observable to the parties into considerations that are also verifiable, thereby expanding the "contractible" aspects of an exchange and making contracts more complete); David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 HARV. L. REV. 373, 409 (1990) (the same).

22. See Eric A. Posner, *Law, Economics, and Inefficient Norms*, 144 U. PA. L. REV. 1697, 1700–01 (1996) (contrasting the ability of private ordering to accommodate the interests of the governed to the less responsive nature of centralized rule-making).

23. See Robert C. Ellickson, *When Civil Society Uses an Iron Fist: The Roles of Private Associations in Rulemaking and Adjudication*, 18 AM. L. & ECON. REV. 235, 253 (2016) (listing the collective action problem and the pursuit of ends other than economic efficiency along with negative externalities as explanations for the existence of non-efficient private orders); Maria Larrain & Jens Prüfer, *Trade Associations, Lobbying, and Endogenous Institutions*, 7 J. LEGAL ANALYSIS 467, 486–91 (showing formally that when property rights are weakly protected by the state, private trade associations increase welfare by lobbying for stronger property rights; contrary, when property rights are strong, trade associations engage in rent-seeking which leads to negative spillovers); Posner, *supra* note 22, at 1722–23 (discussing the negative externality argument).

24. See Posner, *supra* note 22, at 1718–19. See also Joel S. Hellman, Geraint Jones, & Daniel Kaufmann, *Seize the State, Seize the Day: State Capture and Influence in Transition*

Nevertheless, it is reasonable to assume that private orders increase the collective gains of the involved actors relative to other available governance mechanisms, including a public ordering regime.<sup>25</sup> In other words, private orders can offer organizational support that other competing alternatives, due to high transaction costs, struggle to provide.<sup>26</sup> Otherwise, the private order would lose the race in the competition with formal state law and other alternatives, as dissatisfied actors have strong incentives to challenge its validity referring to the order's incompatibility with mandatory state laws and public order concerns.<sup>27</sup>

There are two possible ways for actors to opt out of the existing governance modes in favor of a private ordering. First, self-enforcing governance systems (self-governance) can organize behavior in reputation-based networks.<sup>28</sup> Second, private third parties can step in the role of the state and offer privately-designed rules for governing the behavior of their members on a coordinated basis (governance by private associations).<sup>29</sup> Numerous case studies demonstrate the ways how the two modes work independently or in interaction.<sup>30</sup> These studies, along with

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*Economies*, 31 J. COMP. ECON. 751, 758 (2003) (ranking 22 post-Communist countries by the level of state capture by influential private businesses).

25. The concept of "relative efficiency" should be distinguished from the argument that group norms tend to maximize the welfare of the group in which they arise. The latter has been advanced by Robert Ellickson. See ELLICKSON, *supra* note 9, at 167.

26. See Richman, *supra* note 16, at 2338–50 (explaining that the choice of a governance mode depends on its relative superiority in offering effective and cheap enforcement, market entry, and high-powered incentives); Barak D. Richman, *Norms and Law: Putting the Horse Before the Cart*, 62 DUKE L.J. 739, 762–64 (2012) (the same). Various examples of private orders often outperform public orders and firms in enforcement and market incentives, respectively, but limit market access. Hence, a private order arises where the effects of entry barriers associated with reputation mechanisms are insignificant or the order can offer methods for strengthening access without compromising the credibility of the order. See Richman, *supra* note 16, at 2346–47. One such method described by Richman is *ex ante* screening of new entrants. *Id.* at 2347. Our case study shows that not all private legal orders are reputation based. Such orders can effectively function even if they involve a large number of heterogeneous actors.

27. As already mentioned, it is possible that costly institutions persist even though efficiency requires changes. According to Douglas North, the two main reasons to blame are the powerful vested interests of some actors or multiple equilibria and historical accidents. See DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE 92–104 (1990).

28. See DIXIT, *supra* note 15, at 12–13.

29. See *id.* at 13.

30. The early literature is classified in McMillan & Woodruff, *supra* note 15, at 2435 (for spontaneous self-governing private orders), 2444 (for organized private orders). More recent examples of uncoordinated self-governing mechanisms of private ordering include the practice of contracting in Hollywood (see Jonathan M. Barnett, *Hollywood Deals: Soft Contracts for*



more recent theoretical work, reveal the necessary conditions for the functioning of either of the two modes of private ordering.

*A. Private Ordering by Decentralized Self-Governance*

Self-governing decentralized systems are found in two different environments: where the same actors interact with each other repeatedly (bilateral interactions) or where actors meet different counterparties each time, but they all belong to a homogenous group (multilateral interactions). Under repeated interactions between the same parties, direct reciprocity can discipline the parties and discourage them from taking short-term opportunistic actions. But in order to work effectively, certain minimum conditions should be met: (1) the parties should have sufficient regard for the future (long-term gains of cooperation must exceed the payoffs of opportunistic actions and the parties should be certain about the continuation of the relationship); (2) any deviation should be detected quickly and accurately in order to impose punishments in time and correctly; and (3) the parties should be willing to punish, costly though it may be, the deviating actors.<sup>31</sup>

However, often actors interact with different parties, rather than meet the same counterparty each time. The small likelihood of bilateral dealings weakens the disciplinary effect of direct reciprocity.<sup>32</sup> In such situations, self-governance is viable only if an actor's opportunistic behavior can lead to future costs for him/her through interactions with other non-affected actors belonging to the same group.<sup>33</sup> In other words, if sanctions cannot be imposed by the affected party directly, the entire collective must participate in punishing the deviating actor. This will

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*Hard Markets*, 64 DUKE L.J. 605 (2015)), cooperation between large US mid-western original equipment manufacturers and their suppliers (see Lisa Bernstein, *Beyond Relational Contracts: Social Capital and Network Governance in Procurement Contracts*, 7 J. LEGAL ANALYSIS 561 (2015)), the relationships of investment banks with their clients (see Alan D. Morrison & William J. Wilhelm Jr., *Trust, Reputation, and Law: The Evolution of Commitment in Investment Banking*, 7 J. LEGAL ANALYSIS 363 (2015)), and the means of protecting copyright in stand-up comedy (see Dotan Oliar & Christopher Sprigman, *There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 VA. L. REV. 1787 (2008)). For the recent studies of governance by private associations see, e.g., Ellickson, *supra* note 23, at 254–261 (discussing the role of various strong membership associations in coordinating the behavior of actors).

31. DIXIT, *supra* note 15, at 60–61.

32. *Id.* at 63.

33. *Id.*

transform breach of contract as to one party into breach of contract as to numerous actors involved in the industry, thereby increasing the magnitude of the expected penalty.<sup>34</sup> Accordingly, two additional necessary conditions should be present: (4) information about wrongful acts has to be conveyed—typically through gossip—to all other actors in the group,<sup>35</sup> and (5) all group members have to be interested in imposing and enforcing sanctions against the deviating actor, even though this might mean forgoing mutually beneficial actions with him/her.<sup>36</sup> Gossips about wrongful acts and imposed sanctions help refining the meaning of the norms of behavior within the group.<sup>37</sup> Without developing common understanding as to what constitutes a wrongful act, group norms cannot support cooperation.<sup>38</sup>

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34. See Bernstein, *The Cotton Industry*, *supra* note 10, at 1764.

35. See DIXIT, *supra* note 15, at 63–64.

36. See *id.* Incentives for collective punishment can be material, psychological, or a combination of both. For example, in medieval Iceland, if a person failed to comply with the court order, he/she could be declared an outlaw. Once declared an outlaw, anyone might punish the offender by taking the offender's property. This material incentive supported broad participation in collective punishment. See David Friedman, *Private Creation and Enforcement of Law: A Historical Case*, 8 J. LEGAL STUD. 399, 405 (1979); Gillian K. Hadfield & Barry R. Weingast, *Law without the State: Legal Attributes and the Coordination of Decentralized Collective Punishment*, 1 J. L. & COURTS 3, 13 (2013). Another example is the community responsibility system described by Avner Greif. According to Greif, prior to the 13th century, when communities were relatively small and homogeneous, a host community would punish all members of a foreign community if any merchant from the foreign community cheated the members of the host community and the foreign community failed to discipline this behavior. This threat provided members in each community with the incentives to police the behavior of all merchants in their own community. See AVNER GREIF, *INSTITUTIONS AND THE PATH TO THE MODERN ECONOMY: LESSONS FROM MEDIEVAL TRADE* 310 (2006). Other scholars focus on psychological factors to explain human behavior in groups. For example, group members are likely to behave in the group's collective interest, even though such behavior is costly, if they believe that other members in the group behave similarly. Thus, the desire of individuals to contribute to public goods may become stronger or weaker depending whether others are contributing or not. See, e.g., Lior Jacob Strahilevitz, *Social Norms from Close-Knit Groups to Loose-Knit Groups*, 70 U. CHI. L. REV. 359, 364–65 (2003). Lastly, a combination of monetary and non-monetary benefits can explain the ability of private groups to provide public goods. See Koyama, *supra* note 5, at 114–15 (explaining the rise of the private associations for the prosecution of criminals in England during the period between 1750 and 1850, in addition to material incentives such associations offered to their members, by the desire the association members had for the esteem of others).

37. See Richard H. McAdams, *Group Norms, Gossip, and Blackmail*, 144 U. PA. L. REV. 2237, 2256–27 (1996) (comparing the role of gossip in close-knit social groups to that of common law courts: gossip applies the general social norm to the particular situation, thereby clarifying its exact meaning).

38. See Avner Greif, *Contract Enforceability and Economic Institutions in Early Trade: The Maghribi Traders' Coalition*, 83 AM. ECON. REV. 525, 542 (1993) (explaining that credible

The size of the group affects its ability to meet the two additional conditions. The larger the group, the weaker information dissemination mechanisms are.<sup>39</sup> Accordingly, instances of cheating counterparties are not always reflected in the reputation of an actor. Large groups also pose complications for collective punishment of wrongdoers.<sup>40</sup> Not only do they face coordination problems, but may include free-riding members who refuse to incur the costs of punishing others, for example, by not willing to give away potential profit-making transactions with the wrongdoers.<sup>41</sup> Thus, deviations from the established rules of behavior may go unpunished. The anticipation of these problems weakens incentives to cooperate in the first place.<sup>42</sup> In addition to size, homogeneity in the group

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collective punishment requires a definition of "cheating" that ensures collective response); Gillian K. Hadfield & Iva Bozovic, *Scaffolding: Using Formal Contracts to Support Informal Relations in Support of Innovation*, 2016 WIS. L. REV. 981, 1010–12 (2016) (explaining how detailed business contracts, which the parties do not intend to enforce formally, support cooperation by coordinating the interpretation of various acts and events); W. Bentley MacLeod, *Reputations, Relationships, and Contract Enforcement*, 45 J. ECON. LIT. 595, 596 (2007) (noting the importance of a mutual understanding of the events that determine contract breach in ensuring reputation-based cooperation).

39. See Charny, *supra* note 21, at 418–19 (proposing that collective reputational enforcement should work well in small groups; conversely, mass markets based on reputational bonds are feasible only with technology that conveys information cheaply to a large group of actors); Strahilevitz, *supra* note 36, at 365 (pointing out that reputation mechanisms may weaken when relied upon outside small groups, but explaining that the mechanisms of successful cooperation depend primarily on the group members' ability to observe and share information about others' behavior, rather than on the group's size).

40. See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 49–52, 53–56 (1965) (showing that size is one of the key factors affecting the ability of groups to promote common interests of their members: small groups have an advantage).

41. See McMillan & Woodruff, *supra* note 15, at 2429. Incentives for free-riding do not arise if sanctioning wrongdoers is not costly. See McAdams, *supra* note 13, at 358–65 (offering the theory that social norms arise because people seek the esteem of others; because withholding or granting esteem is costless, violations of norms can be easily sanctioned, thereby leading to their development).

42. As mentioned above, collective punishment can be supported by the tendency of human beings to act in the common interest if others are behaving cooperatively. See *supra* note 36. If this is the case, then the collective action problem goes away. Hence, promoting trust, rather than material incentives, can support cooperation. Moreover, material incentives supposed to encourage behavior in the interests of the group may backfire by eroding trust, thereby removing the psychological motives to cooperate. See Dan M. Kahan, *Trust, Collective Action, and Law*, 81 B.U. L. REV. 333, 338 (2001) (explaining the negative effect of material incentives on voluntary contributions to public goods by signaling that individuals are not likely to cooperate voluntarily and by concealing information about the real motives of cooperation); Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*, 102 MICH. L. REV. 71, 76–77 (2003) (the same).

will affect communication networks and enforcement mechanisms in a group. For example, information flows better in networks that are connected by business ties<sup>43</sup> or ethnicity.<sup>44</sup> Similarly, high costs of entry into another ethnic community increase the value of belonging to one's own community, thereby stipulating loyalty and rule-compliance.<sup>45</sup>

### B. Centralized Governance by Private Associations

The failures of decentralized self-governing mechanisms of cooperation can be corrected by private governance groups. First, private groups can extend cooperation by creating formal channels of communication that foster accurate distribution of information among all interested members of the group.<sup>46</sup> Second, if the mere provision of accurate information about wrongful actions is not enough to impose self-organized collective punishments on wrongdoers, private associations can assist in coordinating collective punishment.<sup>47</sup> For instance, the failure to

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43. See Bernstein, *The Diamond Industry*, *supra* note 10, at 140–41 (1992); Bernstein, *The Cotton Industry*, *supra* note 10, at 1751–52.

44. See Avner Greif, *Reputation and Coalitions in Medieval Trade: Evidence on the Maghribi Traders*, 49 J. ECON. HIST. 857, 879 (1989) (explaining the retention of a separate social identity of the 11th-century Maghribi traders within the larger Jewish communities by their desire to have a closed homogeneous network for the transmission of information inside the group); Janet T. Landa, *A Theory of the Ethnically Homogeneous Middleman Group: An Institutional Alternative to Contract Law*, 10 J. LEGAL STUD. 349, 359–60 (1981) (contrasting higher costs in searching for information regarding potential counterparties across ethnic boundaries with lower costs of informal communication within the trader's own ethnic community); James E. Rauch, *Business and Social Networks in International Trade*, 39 J. ECON. LIT. 1177, 1182, 1184–88 (2001) (presenting evidence that ethnic networks improve both the transmission of information regarding past opportunistic conduct and about current opportunities for profitable cooperation); James E. Rauch & Vitor Trindade, *Ethnic Chinese Networks in International Trade*, 84 REV. ECON. & STAT. 116, 122–26 (2002) (the same).

45. See Landa, *supra* note 44, at 356 (explaining that "outsiders" may substitute good reputation for kinship/ethnic status; but because reputation building, unlike obtaining status rights, is costly, members of an ethnically homogeneous group have strong incentives to preserve their status by abiding to the rules of the community). Avner Greif made a similar argument later in his study of the practices of the 11th-century Maghribi traders. See Greif, *supra* note 44, at 867–68; Greif, *supra* note 38, at 539.

46. See McMillan & Woodruff, *supra* note 15, at 2427 (explaining that private organizations not only collect and store information, but also reduce the likelihood of mistakes in the transmission of this information in large groups); Jens Prüfer, *Business Associations and Private Ordering*, 32 J. L. ECON. & ORG. 306, 321–22, 335 (2016) (formally showing how membership in private business associations improves on social networks by facilitating more cooperation between weakly connected actors; social networks, on the other hand, are better suited for situations where cooperating actors have strong informal connections).

47. See McMillan & Woodruff, *supra* note 15, at 2429–30.

participate in collective punishment can itself be subject to punishment.<sup>48</sup> Third, organized institutions can also facilitate common classification of acts, for example, by defining the terms of the agreement between the parties or distinguishing acceptable from unacceptable behavior.<sup>49</sup>

The historical narrative of diamond trade illustrates the functioning of self-enforcing mechanisms of cooperation which are assisted by a the organized regional membership associations of diamond dealers. Given industry-specific factors, formal courts face complications in enforcing contracts between diamond traders and various middlemen.<sup>50</sup> This failure can be corrected by reputation-based trade as long as the same actors deal with each other repeatedly and the benefits of cooperation for both parties exceed the one-time gain of cheating. Yet, the trade is multilateral involving many different actors; moreover, extreme rewards of cheating, given the price of stones, can be well above of the benefits of long-term cooperation.<sup>51</sup> A combination of industry and community institutions dealt with these challenges. While industry institutions—the membership association of diamond dealers and its arbitration panel—facilitated the exchange of reputational information among the actors,<sup>52</sup> long-term family reputations<sup>53</sup> and community institutions<sup>54</sup> removed the incentives to

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48. See DIXIT, *supra* note 15, at 63–64; McMillan & Woodruff, *supra* note 15, at 2440. See also Prüfer, *supra* note 46, at 331–32, 335 (showing the conditions under which business associations that offer arbitration services can broaden the scope of cooperation as opposed to social networks). In general, a collective action problem can be solved by selective incentives which can be either negative or positive, in that they can either punish actors that fail to act in the interests of the group or offer benefits to those who act in the group's interests. See OLSON, *supra* note 40, at 51.

49. See Bernstein, *The Cotton Industry*, *supra* note 10, at 1771–74; Hadfield & Weingast, *supra* note 36, at 8–9.

50. See Barak D. Richman, *How Community Institutions Create Economic Advantage: Jewish Diamond Merchants in New York*, 31 LAW & SOC. INQUIRY 383, 390–92 (2006) (explaining the inability of formal law to support diamond trade, which heavily relies on credit sales, because of wide opportunities to cheat by hiding unpaid-for or stolen diamonds from law enforcement officials).

51. See *id.* at 393–94.

52. See *id.* at 396–97 (describing information exchange mechanisms such as rumors within the association and official publication of information about members for members).

53. See *id.* at 400–04 (showing that the main diamond traders belonged to families with long histories in the industry which extended beyond the limited lifespan of an individual trader; limited entry for traders without family connections and the risk of expulsion of all traders from a family with a damaged reputation leveraged the value of reputation).

54. See *id.* at 404–07 (showing that small independent contractors, such as diamond brokers and cutters, were the members of ultra-Orthodox Jewish communities which put collective efforts to ensure that community members complied with their contractual obligations).

deviate from cooperation.<sup>55</sup> Similar structure is observed in the cotton industry.<sup>56</sup>

### *C. Private Governance in the World of Football*

The conditions for self-governance are not always met in the world of professional football. The relationships between the football-related actors cannot be continued forever. While clubs have separate legal identity distinct from their members (shareholders) and players, and thus have unlimited existence, the career durations of footballers is restricted in time. As a result, the actors can predict accurately the end of the interaction: the closer the end date, the stronger their incentives to act opportunistically are.

In addition, football clubs and players deal with different partners at different times and the sheer size of the group impedes disciplining infringers by collective reciprocity. Although contracts between clubs or between clubs and players are typically confidential, there is lot of media coverage of these transactions, their conditions, internal environment in clubs, and personal life of star players.<sup>57</sup> These information flows, although sometimes leaked strategically and with limited reliability, are instrumental for the functioning of reputation-based disciplining mechanisms.<sup>58</sup> The ability of clubs and players to learn of the prior behavior of their counterparties coupled with constrained exit (given FIFA's monopoly power), creates potential conditions for the functioning of decentralized collective punishment. Nevertheless, the extremely large

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55. Market, technological, and cultural developments have eroded trust in the diamond industry recently and have led to the decline of the industry's famous private ordering system. See Barak D. Richman, *An Autopsy of Cooperation: Diamond Dealers and the Limits of Trust-Based Exchange* (Apr. 13, 2016), at 41–42, available at <http://ssrn.com/abstract=2764470>.

56. See Bernstein, *The Cotton Industry*, *supra* note 10, at 1745–54 (describing reputation-based non-legal sanctions in the cotton industry and the role of centralized industry institutions in supporting their effective functioning).

57. For example, the specialist German-based website TransferMarkt ([www.transfermarkt.com](http://www.transfermarkt.com)) reports almost all actual or likely transfer fees paid by clubs for signing players.

58. See Strahilevitz, *supra* note 36, at 365 (noting that reputation mechanisms can remain effective even in large loose-knit groups if the involved actors receive accurate and necessary information). Many online peer-to-peer platforms, like eBay and Airbnb, have created sophisticated review mechanisms that smoothen information flows between the users and facilitate cooperation in extremely large groups. See Liran Einav, Chiara Farronato, & Jonathan D. Levin, *Peer-to-Peer Markets*, 8 ANN. REV. ECON. 615, 620–22 (2016); Tamar Frankel, *Trusting and Non-Trusting on the Internet*, 81 B.U. L. REV. 457, 471 (2001).

number of the involved actors in football generates strong incentives for opportunistic behavior. Even if information about bad reputations is available, the solidarity among the actors is not strong.<sup>59</sup> Accordingly, there will always be clubs and players willing to benefit from cooperating with the wrongdoers.<sup>60</sup> Actors can try to sustain bilateral relations in order to be able to discipline each other by direct reciprocity, but this limits the scope of their trading opportunities.<sup>61</sup>

Instead of an elaborate dispute resolution and enforcement systems, theoretically FIFA could have established formal mechanisms for rating the behavior of football-related actors and sharing the results with every interested party. Bad reputation of an actor would have lowered the likelihood of being approached by others, thereby encouraging compliance with the rules and contractual obligations. However, the presence of collective action and free-rider problems casts doubts whether the "alternative FIFA" (in the capacity of an information intermediary) could have equivalently substituted the "present-day FIFA" (in its capacity as an arbiter and enforcer).

The lack of reputation-based non-legal sanctions is compensated by stronger formal rules of behavior designed by FIFA, a private organization. In the absence of the conditions making relation-based self-governance possible, private ordering in football takes place with the help of a strong member association that supplies common rules of behavior, considers disputes arising from this behavior, and imposes sanctions to enforce its decisions.<sup>62</sup> FIFA thus, similar to a formal state, plays a

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59. See generally Timothy W. Guinnane, *A Failed Institutional Transplant: Raiffeisen's Credit Cooperatives in Ireland, 1894–1914*, 31 EXPL. ECON. HIST. 38, 56 (1994) (explaining the failed effort to transplant German credit cooperatives to Ireland by the reluctance of Irish people, as opposed to Germans, to force their neighbors to repay loans or face adverse consequences).

60. Scholars have shown that the increase in the distance or dissimilarity between actors reduces the reliability of community institutions in enforcing contracts and calls for their replacement with formal courts and enforcement mechanisms. See Scott E. Masten & Jens Prüfer, *On the Evolution of Collective Enforcement Institutions: Communities and Courts*, 43 J. LEGAL STUD. 359, 367–74 (2014). They attribute this need to the increased information distance between the interacting actors. In modern societies, information technologies allow creating databases that accumulate vast reputational information and provide easy access to any interested party at a low cost. Therefore, even large groups can rely on reputational mechanisms to support cooperation. See Charny, *supra* note 21, at 419.

61. See DIXIT, *supra* note 15, at 67.

62. The reliance on formal dispute resolution and enforcement systems in football may be the reason of handicapped reputational enforcement of agreements, rather than vice versa. If parties had only reputational mechanisms of enforcement to rely upon, they would have refused to deal with actors having a reputation of an opportunist. Formal institutions, by ensuring the

coordinating role. Indeed, establishing and maintaining such external governance structure is costly, but these costs are covered by the benefits of organizing behavior in large communities.<sup>63</sup> The question then is why do the actors involved in football subject themselves to the rules of an order designed by a third private party, namely FIFA, instead of complying with formal state law? But before answering this question, we need first to understand how FIFA's private order is functioning.

### III. ORGANIZATION OF THE WORLD OF FOOTBALL

This section describes the functioning of FIFA's private legal order. Weak reputation-based non-legal sanctions in football are compensated by stronger formal rules of behavior designed by FIFA. FIFA's role is to (1) design common rules of behavior, (2) record deviations from the common rules and impose sanctions on wrongdoers, and (3) create incentives for all others to participate in enforcing these sanctions. Accordingly, we proceed in three steps by first describing the rules of behavior, then considering the private dispute resolution system, and lastly discussing the enforcement mechanisms designed by FIFA.

#### *A. The Legal Order that FIFA Built: Privately-Designed Rules of Cooperation*

What sets football in particular and other sports in general apart from each other is the rules of the game. The common rules of football are described by FIFA in the Laws of the Game.<sup>64</sup> The organization of the

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compliance with contractual obligations, encourage transactions even with actors with bad reputations, thereby reducing the reputational consequences of opportunistic behavior. *See generally* Masten & Prüfer, *supra* note 60, at 377–78 (using this logic to explain how formal legal enforcement may crowd out informal reputational enforcement). This relationship is two-sided, as the presence of strong informal networks of cooperation may discourage the improvement of functionally equivalent formal legal institutions. *See* Avner Greif, *Cultural Beliefs and the Organization of Society: A Historical and Theoretical Reflection on Collectivist and Individualist Societies*, 102 J. POLIT. ECON. 912, 937 (1994).

63. *See* DIXIT, *supra* note 15, at 74–76 (showing that the size of a community defines the efficiency of a governance mode: small communities can achieve full self-governance using their own information systems; cooperation in large communities fails without external governance; intermediate communities fare worst, for they are too large for self-governance but too small to afford the costs of external governance).

64. *See* FIFA, LAWS OF THE GAME (2015/2016), available at [http://resources.fifa.com/mm/document/footballdevelopment/refereeing/02/36/01/11/lawsofthegamewebn\\_neutral.pdf](http://resources.fifa.com/mm/document/footballdevelopment/refereeing/02/36/01/11/lawsofthegamewebn_neutral.pdf)



game, however, is not limited to a mere unification of the playing rules and coordination of the timetables. Thousands are involved in football—the most popular game in the majority of the world—as athletes, clubs, coaches, managers, club investors, officials, sponsors, and spectators. Football (and sports in general) has even been compared to religion.<sup>65</sup> What is more, reportedly, it has more followers than either Christianity or Islam.<sup>66</sup> The presence of so many interested parties requires common and predictable rules of behavior if the game is to be played internationally with equal opportunities for everyone. Only if all participants meet similar organizational conditions there is level playing field. With this purpose in mind, FIFA has developed a complex organizational structure that practically spans every involved party.

At the top of the pyramidal network is FIFA with its member associations. The members are national associations each, as a rule, representing one independent country.<sup>67</sup> They are grouped into six confederations representing different geographic regions—CAF in Africa, CONCACAF in North and Central America, CONMEBOL in South America, OFC in Oceania, AFC in Asia, and UEFA in Europe.<sup>68</sup> National associations have their own members—licensed football clubs with at least one team participating in national competitions. This structure is illustrated in Figure I below.

### Figure I. The Structure of FIFA

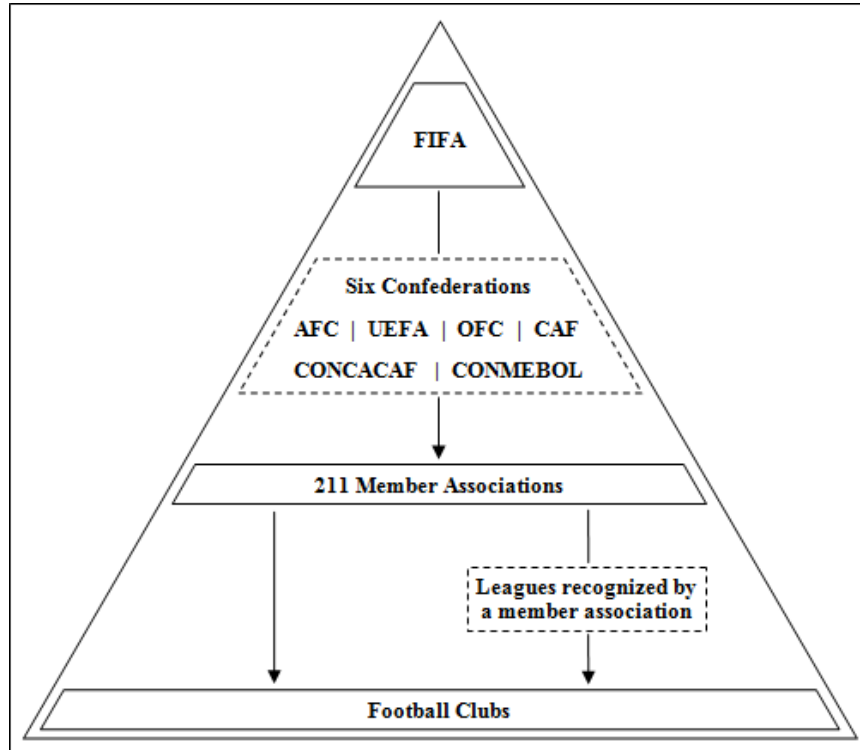
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65. See, e.g., JOE HUMPHREYS, *FOUL PLAY: WHAT'S WRONG WITH SPORT* 6, 8 (2008).

66. *Id.* at 231.

67. See FIFA STATUTES, *supra* note 1, art. 10.1 (only one association shall be recognized in each country). A special case is the four British associations—the Football Association, the Scottish Football Association, The Football Association of Wales, and the Irish Football Association (Northern Ireland)—which are separate members of FIFA. An association from a region that has not yet gained independence may apply for FIFA membership with the approval of the association in the country on which it is dependent. See *id.*, art. 10.6. Currently several other football associations which do not represent independent nations are FIFA members—the associations of Faroe Islands, Gibraltar, and Kosovo in Europe, Chinese Taipei, Guam, Hong Kong, and Macau in Asia, American Samoa, New Caledonia, and Tahiti in Oceania, and some American, British, and Dutch overseas territories in the Caribbean.

68. See *id.* art. 20.1.



This structure allows FIFA to influence the game of football at every level. By relying on direct application of its rules to the member national associations and everyone participating in the matches and tournaments organized by FIFA, as well as indirect effect via its members, FIFA stretches its influence to the very bottom of the structure where players, coaches, referees, and other individuals—who are neither FIFA members, nor the members of national associations—are located.

The centerpiece of the relations regulated by the rules of FIFA are employment-related questions and the participation of clubs in various competitions. With the purpose of protecting its monopoly, FIFA obliges the six confederations to ensure that international football tournaments with the participation of the clubs from national associations will not be organized without the consent of the affected confederation and the approval of FIFA.<sup>69</sup> This monopoly is crucial in supporting the proper

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69. *See id.* art. 20.3 (e).

functioning of FIFA's private order. Employment matters cover relations between the clubs and their primary employees—professional athletes—and relations among different clubs with regard to soliciting professional athletes from each other. Both employment aspects are regulated by FIFA's Transfer Regulations.<sup>70</sup>

Organized football is not available to everyone. In order to be able to play in organized football—national tournaments organized by a member association or international competitions under the aegis of a confederation of which the association is a member—football players must be registered with a member association of FIFA.<sup>71</sup> The registration, which implies that a player agrees to be bound by the rules of FIFA, the respective confederations, and national associations, is key in extending FIFA's reach to players.<sup>72</sup> Since players are formally neither the members of FIFA, nor of its member associations, the registration system is needed to give players incentives to comply with the rules. The alternative to registration is ostracism—an absolute prohibition to take part in organized football.<sup>73</sup> And because any more or less significant tournament is organized under the auspices of FIFA, the prohibition turns to be extremely effective.

The minimum length of a contract between a club and a professional player is from its effective date till the end of the season, while the maximum length is five years.<sup>74</sup> The length of a football season is defined by each national association and normally lasts one year on a fall/spring or spring/fall calendar basis.<sup>75</sup> The principle of contractual stability forms the basis of employment relationships between clubs and professional athletes.<sup>76</sup> Accordingly, a contract between a professional and a club, apart

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70. See TRANSFER REGULATIONS, *supra* note 4.

71. See *id.* art. 5 (1).

72. See *infra* notes 144–147 and accompanying text.

73. See *supra* note 71 and accompanying text.

74. See TRANSFER REGULATIONS, *supra* note 4, art. 18 (2). Contracts without fixed terms are thus not allowed.

75. *Id.* art. 6 (1) and (2). Because in most member associations player registration is allowed at the start and in the middle of the season, the minimum term contracts typically last six months. See *infra* notes 242–243 and accompanying text.

76. Note that not all countries qualify professional athletes as employees under domestic laws. An overwhelming majority of countries—most EU member states and the US included—treat professional athletes as employees, albeit sometimes subject to a special legal regime of employment. See Adam Epstein, *The ADEA and Sports Law*, 16 J. LEGAL ASPECTS SPORT 177, 178 (2006) (discussing the status of athletes in the United States); Michele Colucci, *Compensation in Case of Breach of Contract: Italy*, EUR. SPORTS L. & POL'Y BULL., no. 1, 2011, at 199, 202 (explaining that professional athletes in Italy, although qualified as employees, are

from the contract term's expiry, may only be terminated (1) by the mutual agreement of the parties, (2) by either party based on just cause, or (3) by the player who has, in the course of the season, appeared in less than 10% of the official matches of his/her club (sporting just cause).<sup>77</sup>

Any unilateral termination in breach of the listed grounds leads to adverse consequences for the terminating party. The scope of these consequences depends whether the contract is terminated during a so-called "protected period"—a period of three years after the entry into force of a contract signed prior to the 28th birthday of the player or of two years if the player is older than 28 at the signing date—or after it.<sup>78</sup> If a player terminates the contract during the protected period without just cause, he/she is, as a rule, banned from playing in official matches for four months.<sup>79</sup> Similar breach during the protected period by a football club results in a restriction to sign new players for two consecutive registration periods, which typically are open before (at) the start of a season and during its middle break.<sup>80</sup> Thus, the sanction lasts approximately one year. Both players and clubs are not subject to non-monetary sanctions if a

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exempt from traditional protections prohibiting employee monitoring by cameras, limiting the repeated use of fixed-term labor contracts, and ensuring employee reinstatement in cases of unilateral dismissal without just cause). For the sake of simplicity, we disregard special treatments offered in some jurisdictions (for example, as a special category of professional athletes or even as enterprises) and assume that all professional footballers are employees.

77. TRANSFER REGULATIONS, *supra* note 4, art. 13 (termination by mutual agreement), art. 14 (termination by just cause), art. 15 (termination on the ground of sporting just cause). The main instance of just cause from the player's perspective is non-payment or late payment of a salary by the club. From the club's perspective, just cause can be present if a player breaches his/her contractual obligations, including failure to report for work. *See* FIFA, COMMENTARY ON THE REGULATIONS FOR THE STATUS AND TRANSFER OF PLAYERS, art. 14, comment no. 3, 4 (2007), *available at* [http://www.fifa.com/mm/document/affederation/administration/51/56/07/transfer\\_commentary\\_06\\_en\\_1843.pdf](http://www.fifa.com/mm/document/affederation/administration/51/56/07/transfer_commentary_06_en_1843.pdf) [hereinafter FIFA COMMENTARY]. Sporting just cause applies only to established professional athletes and can be invoked during a 15-day period following the club's last official match in the season. An established player is a player who has completed his/her training period and whose level of football skills is at least equal to or even superior to those of his/her team-mates who play regularly. *See id.* art. 15, comment no. 2.

78. TRANSFER REGULATIONS, *supra* note 4, art. 17 (3) and (4). A protected period starts again when the duration of an existing contract is extended. *Id.*, art. 17 (3).

79. *Id.* art. 17 (3). The restriction can be six months if there are aggravating circumstances, such as repeated breaches. *See also* Jean-Philippe Dubey, *The Sanctions Imposed on the Players for Breach or Unilateral Termination of Contract*, CAS BULL., no. 1, 2010, at 35–36 (explaining the established practice that the decision-making body must apply the sanction always aside from exceptional circumstances where the playing ban is not applied or its length is reduced).

80. TRANSFER REGULATIONS, *supra* note 4, art. 17 (4).

contract is terminated after the protected period. However, whether during or after the protected period, the terminating party shall always pay monetary compensation.<sup>81</sup> If not set in the contract, the compensation amount due to a player is normally his/her full salary for the remainder of the contract.<sup>82</sup> The following case illustrates how the compensation is calculated if a contract is wrongfully terminated by a player.

In February 2008, Essam El-Hadary, an Egyptian goalkeeper capped more than 100 times by his country's national team, terminated his employment contract with Egyptian club Al-Ahly Sporting Club and moved to Swiss club Olympique des Alpes SA, known as FC Sion.<sup>83</sup> The decision to terminate the employment contract unilaterally without just cause and to enter into a new contract with FC Sion came after the negotiations between the two clubs on the transfer of the player failed.<sup>84</sup> In the absence of a contractual buyout clause in Mr. El-Hadary's contract with his former club, the compensation for the unilateral termination had to be calculated based on Art. 17 (1) of the Transfer Regulations.<sup>85</sup> In doing so, the arbiters relied on the so called principle of "positive interest" or "expectation interest," which aims to put the injured party in the position it would have had if no contractual breach had occurred.<sup>86</sup> Accordingly, the compensation awarded to the Egyptian club reflected an amount it had to spend on a market to find an equivalent replacement for the moving player—both in sporting value and the period of remaining contractual time.<sup>87</sup> The final award thus included the amount that FC Sion was ready to pay for the player's transfer (\$600,000) plus the player's salary under to the new contract for the remaining period of the terminated contract (\$488,500); the player's salary Al-Ahly Sporting Club saved in the result of the termination (\$292,000) was deducted from the sum.<sup>88</sup> The amount

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81. *Id.* art. 17 (1).

82. *See* FC Shakhtar Donetsk v. Matuzalem Francelino da Silva & Real Zaragoza SAD & FIFA, CAS 2008/A/1519 and 2008/A/1520, para. 88 (May 2009) [hereinafter *Matuzalem*].

83. *See* FC Sion & Essam El-Hadary v. Fédération Internationale de Football Association (FIFA) & Al-Ahly Sporting Club, CAS 2009/A/1880 and 2009/A/1881, paras. 6–18 (Jun. 2010).

84. *Id.*

85. *Id.* para. 198.

86. *Id.* para. 204.

87. *Id.* para. 241.

88. *Id.* paras. 225–26. Importantly, the third-party decision-maker, when calculating the amount of compensation, has a wide margin of appreciation and can consider different factors that may affect the size of the compensation in each specific case. For instance, if Al-Ahly Sporting Club would have paid a transfer fee for obtaining the services of Mr. El-Hadary, the awarded compensation might have also included the non-amortized part of these expenses. *See id.* paras. 214–15. On the other hand, if there is no specific evidence on the estimated value of

Mr. El-Hadary and FC Sion had to pay (\$796,500), which exceeded the club's valuation of the player, jointly with the disciplinary sanctions imposed on both, deter other actors from breaching or inducing to breach existing contracts.<sup>89</sup>

The transfers of players between clubs belonging to different associations are governed by FIFA's Transfer Regulations.<sup>90</sup> National associations are responsible for regulating the transfers of players between clubs from the same country.<sup>91</sup> Nevertheless, FIFA preserves effective control over the content of domestic transfer rules by requiring their compliance with the Transfer Regulations and submission to FIFA for approval.<sup>92</sup>

The move of a player between two clubs usually follows one of the standard practices. A player whose contract has expired is free to move to any other club of his/her choice.<sup>93</sup> Players with acting contracts are bound with their current clubs and can move based on two grounds. First, the move can be based on the transfer of the rights of the player's services from one club to another.<sup>94</sup> Second, clubs can enter into a so called "loan contract," pursuant to which one club loans a player to another club for a fixed period of time after which the player must return to the loaning club.<sup>95</sup> Whereas the first ground leads to the termination of the player's

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the player in the market, the decision-maker may use other calculation method. *See* Sevilla FC SAD v. Udinese Calcio S.p.A., CAS 2010/A/2145, Morgan de Sanctis v. Udinese Calcio S.p.A., CAS 2010/A/2146, Udinese Calcio S.p.A. v. Morgan de Sanctis & Sevilla FC SAD, CAS 2010/A/2147, paras. 76–78, 86 (Feb. 2011) (the arbitrators did not include the lost transfer fee and the replacement value of the player in the calculation of the compensation).

89. The player was banned from playing in any official football match for four months, whereas the club was prohibited from registering new players for two registration periods. *See id.* paras. 184, 249. Defining compensation under Art. 17 (1) of the Transfer Regulations requires taking into account not only the interests of the involved player and club, but also of the whole football community, in particular, the need to promote contractual stability. *See Matuzalem, supra* note 82, paras. 153–55.

90. TRANSFER REGULATIONS, *supra* note 4, art. 1 (1).

91. *Id.* art. 1 (2).

92. *Id.*

93. Historically clubs could ask for compensation in exchange for letting a player to move even if the player's contract had expired. The European Court of Justice put an end to this practice in 1995. *See* Case C-415/93, Union Royale Belge des Sociétés de Football Ass'n (ASBL) v. Jean-Marc Bosman, Royal Club Liégeois v. Jean-Marc Bosman and others, and UEFA v. Jean-Marc Bosman, 1995 E.C.R. I-5040 [hereinafter *Bosman*].

94. *See* TRANSFER REGULATIONS, *supra* note 4, art. 18 (3).

95. *Id.* art. 10. Loans often aim to give a promising athlete regular playing time where there are very few opportunities to play in the main team of his/her club of origin. If national football associations do not allow reserve teams to participate in lower tier tournaments, clubs

contract with the current club, in the second case the contract is suspended during the entire period that the player is on loan and the new club, based on the new contract with the player, is obliged to pay the player's salary.<sup>96</sup>

Normally, a club intending to conclude a contract with a professional player with a valid employment contract must inform the player's current club before starting negotiations with a player.<sup>97</sup> After reaching a general agreement on the terms and conditions of employment with a player, the club starts negotiations with the player's current club.<sup>98</sup> If the two clubs agree on the transfer compensation due to the player's current club, the contract between the player and the club is terminated by mutual agreement and the player can enter into a contract with the new club.<sup>99</sup> Contracts of players with clubs may include a so called "release" clause which requires the current club to let the player go if another club meets the trigger amount specified in the clause.<sup>100</sup> In the absence of an

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are effectively forced to loan their young players. Chelsea F.C. of England and Juventus F.C. and A.S. Roma of Italy are notorious examples, each loaning out more than 20 players every year, according to TransferMarkt. A player is expected to be more experienced after returning from a loan. If for the borrowing club this is an opportunity to boost its squad at low cost, the lending club, in addition to offering its young talented players regular football, saves on the rising cost of wages. See Gavin Hamilton, *Pogba Leads Record Transfer Spending*, WORLD SOCCER, Oct. 2016, at 25.

96. See FIFA COMMENTARY, *supra* note 77, art. 10, comment no. 4 (2).

97. TRANSFER REGULATIONS, *supra* note 4, art. 18 (3).

98. To protect the new club from the risk of missing a player's consent to enter into an employment contract after the transfer has been agreed between the two clubs, it is a standard contracting practice to precondition the performance of the transfer agreement on the consent of the player to sign with the new club. See *Real Betis Balompié SAD v. PSV Eindhoven*, CAS 2010/A/2144, para. 85 (Dec. 2010).

99. See, e.g., Agreement for Transfer of Registration of Mesut Özil between Real Madrid Club de Fútbol and The Arsenal Football Club PLC, FOOTBALL LEAKS (Sep. 1, 2013), available at <https://footballleaks2015.wordpress.com>; Agreement for Transfer of Registration of Luis Alberto Suarez Diaz between Futbol Club Barcelona and Liverpool Football Club and Athletic Grounds Limited, FOOTBALL LEAKS (Jul. 11, 2014), available at <https://footballleaks2015.wordpress.com>; Transfer Agreement between Manchester United Football Club Limited and PSV NV, FOOTBALL LEAKS (May 12, 2015), available at <https://footballleaks2015.wordpress.com> (concerning the professional football player Memphis Depay).

100. For example, in August 2012, Liverpool F.C., an English club, activated the release clause in Joe Allen's contract with Swansea City A.F.C., a Welsh football club that plays in the English Premier League. Liverpool F.C. exploited a technicality in the contract that required Swansea City A.F.C. to allow Mr. Allen to join one of the five specified clubs—Liverpool F.C. among them—that offered at least £15 million. See Andy Hunter, *Liverpool Near to Closing Deal for £15 Million Allen*, GUARDIAN, Aug. 9, 2012. In early June 2016, Borussia Dortmund signed Marc Bartra from FC Barcelona after the player's release clause fell from an initial €40 million to €8 million because of the limited playing time he received in Barcelona's matches the

agreement between clubs or a contractual release clause, unilateral termination of a contract by a player without just cause is clearly deemed a breach of contract.<sup>101</sup> Nevertheless, following this breach, a player may start employment with a new club. Certainly, this scenario entails the payment of a compensation to the old club for the loss of the services of the player in the result of terminating the existing contract and may also trigger non-monetary sanctions.<sup>102</sup>

Similar to a release clause, the amount of the compensation for unilateral termination of a contract without just cause may be specified by the parties in advance. The parties' agreement has primacy and compensation will be defined based on Art. 17 (1) of the Transfer Regulations only in the absence of an *ex ante* agreement about its size.<sup>103</sup> This clause, known as a "buyout clause," should be distinguished from a release clause.<sup>104</sup> Whereas a buyout clause defines the consequences of a unilateral termination of a contract by either of the parties, a release clause is conditional upon an offer from a third club and aims to secure a transfer compensation.<sup>105</sup> Therefore, a buyout clause allows a player to pay the specified amount to his/her club and terminate the contract prior to its expiry without specifying any reason.<sup>106</sup> In legal terms, buyout clauses are liquidated damages clauses and may thus be invalid under the domestic laws of some countries.<sup>107</sup> Formally, the compensation must be paid by the terminating player, but the new club, regardless of its involvement or

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previous season. See Andrew Murray et al., *81 Things We Want from the New Season*, FOURFOURTWO, Sep. 2016, at 62.

101. See Frans M. de Weger, *Webster, Matuzalem, De Sanctis . . . and the Future*, INT'L SPORTS L.J., no. 3–4, 2011, at 42, 47.

102. See *supra* notes 81–89 and accompanying text.

103. See, e.g., RCD Mallorca SAD & A. v. FIFA & UMM Salal SC, CAS 2009/A/1909, para. 47 (Jan. 2010).

104. See FIFA COMMENTARY, *supra* note 77, art. 17, comment no. 1 (3).

105. See de Weger, *supra* note 101, at 44, 56.

106. See FIFA COMMENTARY, *supra* note 77, art. 17, comment no. 1 (3).

107. See FC Pyunik Yerevan v. Carl Lombe, AFC Rapid Bucuresti & FIFA, CAS 2007/A/1358, para. 64 (May 2008) [hereinafter *FC Pyunik*] (qualifying buyout clauses as liquidated damages clauses). In some countries, buyout clauses in employment contracts with athletes are allowed by special statutory provisions. See FIFA COMMENTARY, *supra* note 77, art. 17, comment no. 1 (3) (mentioning special regulation in Spain). Under Spanish law, each player has a right to terminate employment contract at will anytime; accordingly, exercising such right is not a breach of a contract. This raises a question about the proper legal qualification of the termination compensation: whether it is liquidated damages or some form of indemnification for the loss of the services of a player. See art. 13 (i), art. 16, REAL DECRETO 1006/1985, de 26 de junio, por el que se regula la relación laboral especial de los deportistas profesionales, BOE núm. 153, de 27/06/1985.



inducement to terminate, is jointly and severally liable for its payment.<sup>108</sup> Thus, the payment may actually be made by the new club.<sup>109</sup> In practice, the buyout clause often serves as a starting point in negotiations between clubs, rather than a legal ground for the transfer of players.

Whereas some parties—whether players or clubs—insist on including release or buyout clauses in contracts, others prefer to enter into contracts without precisely defining such amounts.<sup>110</sup> In the latter case, the club has wide discretion in negotiations with other clubs over the transfer of a player, though this comes at the expense of clarity. In the absence of fixed release fees or compensation amounts, the parties have to rely on ex-post negotiations and, if they fail, on litigation.<sup>111</sup> However, such contracts with intentional gaps reduce the likelihood of transfers of players from a club without the club's consent and, more importantly, advance knowledge.<sup>112</sup> Accordingly, the decision to fix a release fee or a

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108. TRANSFER REGULATIONS, *supra* note 4, art. 17 (2); FIFA COMMENTARY, *supra* note 77, art. 17, comment no. 1 (4).

109. *See, e.g.*, Sevilla FC v. RC Lens, CAS 2010/A/2098, para. 10 (Nov. 2010) (when Malian football player Seydou Keita unilaterally terminated his employment contract with Sevilla Fútbol Club SAD, a Spanish football club, the club received the amount specified in the buyout clause from another Spanish club, Fútbol Club Barcelona, through the offices of the Spanish National Professional Football League).

110. *E.g., compare* Professional Player Employment Contract between Real Madrid Club de Fútbol and Luka Modric, FOOTBALL LEAKS (Aug. 27, 2012), *available at* <https://footballleaks2015.wordpress.com> (the contract fixed the amount of a compensation for unilateral termination at the will of the player at €500 million) *with* The Standard Premier League Playing Contract between Manchester United Football Club Limited and Memphis Depay, FOOTBALL LEAKS (Jun. 10, 2015), *available at* <https://footballleaks2015.wordpress.com> (the contract required calculating the amount of the compensation in the case of terminating the contract by the player without just cause based on the player's true transfer market value as at the date of the termination).

111. *See, e.g.*, Shakhtar Donetsk v. Ilson Pereira Dias Junior, CAS 2010/O/2132 (Sep. 2011); Sevilla FC SAD v. Udinese Calcio S.p.A., CAS 2010/A/2145, Morgan de Sanctis v. Udinese Calcio S.p.A., CAS 2010/A/2146, Udinese Calcio S.p.A. v. Morgan de Sanctis & Sevilla FC SAD, CAS 2010/A/2147 (Feb. 2011); FC Sion & Essam El-Hadary v. Fédération Internationale de Football Association (FIFA) & Al-Ahly Sporting Club, CAS 2009/A/1880 and 2009/A/1881 (Jun. 2010).

112. In April 2013, about one month before the UEFA Champions League final between Borussia Dortmund and FC Bayern München, two German clubs, the news about the transfer of Borussia Dortmund's star player Mario Götze to their bitter rivals in Munich at the end of the season shocked the players, managers, and all fans of the club. FC Bayern München, after negotiating general terms of employment with Götze, triggered the €37 million (\$48 million) release clause included in the player's four-year contract with Borussia Dortmund signed the previous summer. This move, which came as a surprise in Dortmund, worsened the relations of the two clubs ahead of the final. *See* Marcus Christenson, *Götze Transfer Adds Hostility to the Mix: Respect between Clubs Disappeared After the Move was Announced*, OBSERVER, May 19,

compensation amount *ex ante* or leave the matter open and rely on *ex post* negotiations (or litigation) is a trade-off between incurring costs at the two different stages.<sup>113</sup> This trade-off obviously affects the choice of the contracting parties. Where a player has a large growth potential and the parties are uncertain about the limits of such growth, or the player is crucial for the club, leaving gaps in a contract may better serve the club's interests. Its presence in or absence from the contract, and the size, then reflect the strength of the bargaining power of the parties.

### *B. FIFA's Private Dispute Resolution System*

The success of the private legal order built by FIFA relies on the effectiveness of its dispute resolution and enforcement mechanisms. Private adjudication provides information and expertise advantages over adjudication in formal state courts.<sup>114</sup> In addition, FIFA has at its disposal dire punishment mechanisms for actors that violate its rules, ranging from fines and temporary restrictions of rights up to ostracism.<sup>115</sup> The results of adjudication are buttressed up by an effective enforcement system: if the rules cannot be enforced against their infringers or they can be challenged in public courts, the whole system of rules will be shattered.

Disputes within FIFA are resolved by the internal judicial bodies of FIFA. These are the Disciplinary Committee, which is responsible for imposing sanctions according to the FIFA Disciplinary Code, the Ethics Committee, which may pronounce sanctions provided by the FIFA Ethics Code, and the Appeal Committee, which hears appeals from the two other

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2013; Joshua Robinson, *Dortmund Dismayed by Transfer; Supporters In Shock as Rival Bayern Munich Poaches Star Player Mario Götze*, WALL ST. J. ONLINE, Apr. 23, 2013. The club has avoided including release or buyout clauses in contracts with players since then. See Borussia Dortmund GmbH & Co. KGaA, *Ad Hoc Announcement: Transfer Rumours about Mats Julian Hummels* (Apr. 28, 2016), available at <http://aktie.bvb.de/eng/IR-News/Ad-Hoc-News/Transfer-rumours-about-Mats-Julian-Hummels> (stating that Borussia Dortmund has not agreed on an "exit clause" with any of its current players).

113. See generally Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L.J. 814 (840–44) (2006) (the parties engage in an efficiency-based choice between rules and standards at the contracting stage; where *ex ante* transaction costs are lower than *ex post* enforcement costs, the parties prefer to negotiate and draft clear rules instead of relying on abstract standards that depend heavily on the enforcement by a third-party adjudicator).

114. See *infra* notes 291–293 and accompanying text.

115. See *infra* notes 133–134 and accompanying text.

judicial bodies.<sup>116</sup> These judicial bodies resolve disputes based on the FIFA regulations or, in the absence of relevant rules, first, in accordance with the FIFA's customs and second, pursuant to the rules they would lay down if they were acting as legislators.<sup>117</sup> Disputes arising from international transfers of players are considered by another internal body—the Dispute Resolution Chamber of the FIFA Players' Status Committee.<sup>118</sup>

In addition to the internal mechanisms of dispute resolution, FIFA recognizes the mandatory jurisdiction of the Court of Arbitration for Sport (CAS) to decide on disputes between FIFA, its members, confederations, leagues, clubs, players, intermediaries, and other involved parties.<sup>119</sup> CAS, founded in 1984 and headquartered in Lausanne, Switzerland, is an international arbitration court for resolving sport-related disputes and is independent from FIFA.<sup>120</sup> FIFA's members and six confederations have not only agreed to be bound by the decisions of CAS, but are obliged by the FIFA membership rules to create mechanisms that will ensure compliance with these decisions by their member clubs and affiliated athletes and coaches.<sup>121</sup>

FIFA recognized CAS as a final appeal jurisdiction in 2002 and this has brought a dramatic increase in the caseload of the court.<sup>122</sup> The court's 352 arbitrators, of which only 93 are eligible to consider football-related disputes, received a record 503 filings in 2015, compared with less than 100 complaints filed annually during the 1990s.<sup>123</sup> In practice, most cases are considered by a panel of three arbiters, though there are also cases

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116. See FIFA STATUTES, *supra* note 1, arts. 62 (Disciplinary Committee), 63 (Ethics Committee), and 64 (Appeal Committee).

117. See DISCIPLINARY CODE, *supra* note 4, art. 144.

118. See FIFA STATUTES, *supra* note 1, art. 54.2; TRANSFER REGULATIONS, *supra* note 4, art. 24 (1).

119. See FIFA STATUTES, *supra* note 1, art. 66.

120. See Louise Reilly, *An Introduction to the Court of Arbitration for Sport (CAS) and the Role of National Courts in International Sports Disputes*, 2012 J. DISP. RESOL. 63, 63–64 (2012); Richard H. McLaren, *Twenty-Five Years of the Court of Arbitration for Sport: A Look in the Rear-View Mirror*, 20 MARQ. SPORTS L. REV. 305, 306, 309 (2010).

121. See FIFA STATUTES, *supra* note 1, art. 68.1.

122. See McLaren, *supra* note 120, at 315. This recognition, given the growing interest of public bodies to intervene in sports, was driven by the strategy to keep formal courts and public law away from football. See Antoine Duval, *The Court of Arbitration for Sport And EU Law: Chronicle of an Encounter*, 22 MAASTRICHT J. EUR. & COMP. L. 224, 225–26 (2015).

123. General information about CAS, including statistics on filed cases and the list of arbitrators, is available on the court's website at <http://www.tas-cas.org/en/index.html>.

decided by one arbiter.<sup>124</sup> Currently, football-related disputes account for about 30–40% of all cases considered by CAS.<sup>125</sup> Most are appeals from the decisions of the internal judicial bodies of FIFA.<sup>126</sup> As a rule, the cases involve contractual disputes between clubs, clubs and players, or intermediaries and clubs; indeed, there are also disciplinary cases.<sup>127</sup> CAS resolves all these disputes by applying primarily the various regulations of FIFA and, additionally, Swiss law.<sup>128</sup>

Internal judicial bodies and the recognition of CAS as an independent appeal instance, which rules primarily using the rules of FIFA, form the system that aims to resolve disputes without external influence.<sup>129</sup> This system is further backed by a waiver of any right to take recourse to ordinary courts of law.<sup>130</sup> FIFA takes significant efforts to prevent external intervention into its legal order. An actor that successfully takes a dispute to formal state courts not only imposes costs on its counterparty by escaping from its obligations, but also creates a negative externality for all other actors, for any such intervention reduces the clarity of the established rules of behavior. First, the new interpretation of the challenged rule changes the case law of the internal dispute resolution bodies and might require a long period to develop new concepts for compliance. Second, any successful challenge provides other actors that lose their arguments in the internal dispute resolution venues with stronger incentives to seek for justice elsewhere.

*C. The Ties that Bind: The System of Sanctions and Incentives Promoting Compliance with the Decisions of the Private Dispute Resolution Bodies*

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124. Original Research (on file with the authors).

125. See McLaren, *supra* note 120, at 315.

126. See FIFA STATUTES, *supra* note 1, art. 64.2 (recourse may only be made to CAS after all other internal channels have been exhausted).

127. See Ulrich Haas, *Applicable Law in Football-Related Disputes: The Relationship between the CAS Code, the FIFA Statutes and the Agreement of the Parties on the Application of National Law*, CAS BULL., no. 2, 2015, at 7.

128. See FIFA STATUTES, *supra* note 1, art. 66.2. The role of Swiss law is to assist in interpreting the rules of FIFA. See Haas, *supra* note 127, at 15–16.

129. See Kate Youd, *The Winter's Tale of Corruption: The 2022 FIFA World Cup in Qatar, the Impending Shift to Winter, and Potential Legal Actions against FIFA*, 35 NW. J. INT'L L. & BUS. 167, 181 (2014).

130. See *infra* Part IV.B (describing the obligation to refrain taking disputes outside the system mandated by FIFA and mechanisms for enforcing this obligation).

FIFA not only has its own dispute resolution system, but also has developed effective enforcement mechanisms relying on sanctions and, to a lesser extent, reputation and social ties. Without such mechanisms the value added of the private legal order would be shattered, for any actor dissatisfied with the decision entered against it could easily challenge it elsewhere by asking for the application of relevant state-made laws.<sup>131</sup> Therefore, one of the main concerns of FIFA is to ensure the compliance of its members and all football-related non-members—like players, clubs, and coaches—with its privately-designed rules.<sup>132</sup> And FIFA has put in a great deal of effort to achieve this objective.

The sanction system includes fines, temporary bans, or ostracism. They may be applied directly to member associations which, under the threat of sanctions, are obliged to comply with the regulations and decisions of FIFA, as well as with the decisions of CAS.<sup>133</sup> Clubs, players, and other involved actors may be subject to direct sanctions as well, but in many instances FIFA reaches them indirectly through the affiliated member association. It is the obligation of member associations to ensure that their own members—that is football clubs—and affiliated players and coaches, comply with all applicable rules and decisions.<sup>134</sup> Accordingly, FIFA uses three means for extending its reach to non-members. First, FIFA can apply its regulations directly to everyone participating in matches and competitions organized by FIFA, like the FIFA World Cup.<sup>135</sup> Second, member associations are charged with applying FIFA regulations directly to all affected parties within their responsibility territories.<sup>136</sup> And third, member associations are under obligation to transpose FIFA regulations into national regulations.<sup>137</sup> In the last case, FIFA regulations draw the minimum line and member associations are free to establish stricter rules.

Possible sanctions vary but they are leveraged by the monopoly power of FIFA. Consider the right of FIFA to suspend a member association for a specific period or expel it fully from FIFA for failure to

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131. *See infra* Part IV.A (describing challenges to FIFA's legal order from state law).

132. FIFA's other main concern is the protection of its private legal order from outside challenges. *See infra* Part IV.B (exploring the interests and incentives of different actors to challenge the private legal order of FIFA).

133. *See* FIFA STATUTES, *supra* note 1, art. 13.1 (a).

134. *See id.* arts. 13.1 (d), 68.1.

135. *See* DISCIPLINARY CODE, *supra* note 4, art. 2.

136. *See, e.g.*, DISCIPLINARY CODE, *supra* note 4, art. 70.1.

137. *See, e.g.*, LICENSING REGULATIONS, *supra* note 4, art. 1.

comply with its obligations, including an obligation to comply with FIFA or CAS decisions.<sup>138</sup> In such cases, other members may not entertain sporting contacts with a suspended or expelled member.<sup>139</sup> Given FIFA's monopoly, this, in fact, means that national teams and licensed clubs from the suspended or expelled country cannot participate in any organized game with national teams or clubs from other associations.

Similar actions by clubs may result in fines, deduction of points, relegation to a lower competition division, or a transfer ban, which prevents a club from registering new players during a specific period.<sup>140</sup> Via its power over the member associations, FIFA can require enforcement of these sanctions even for matches and competitions not organized by it.<sup>141</sup> In the absence of alternative equivalent competitions organized outside FIFA's reach, clubs have strong incentives to comply or face the negative consequences. The most effective compliance-encouraging instrument, though, is the regular, typically on an annual basis, obligation of clubs to go through a licensing procedure as a condition to participate in international and, as a rule, top-division national competitions.<sup>142</sup> Particularly, the recognition by the applicant of the binding effect of the FIFA's private legal order and a promise to keep disputes within the "football family" by refraining from filing petitions and complaints with ordinary courts is an essential mandatory licensing condition.<sup>143</sup>

An equivalent effect for players, coaches, and other individuals is reached by imposing a possible ban on any football-related activity.<sup>144</sup> This punishment is credible only if other members of the community, clubs in our context, are willing to participate in its enforcement by

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138. See FIFA STATUTES, *supra* note 1, arts. 14 and 15; DISCIPLINARY CODE, *supra* note 4, art. 64.1 (d).

139. See FIFA STATUTES, *supra* note 1, art. 14.3.

140. See DISCIPLINARY CODE, *supra* note 4, art. 64.1 (c).

141. See *id.* art. 70.1.

142. See LICENSING REGULATIONS, *supra* note 4, art. 2.2.9.1 (national associations must decide to which clubs the licensing requirement applies; as a minimum, the requirement is applicable to top-division clubs which qualify for confederation club competitions on sporting merit, but it is best practice to implement the club licensing system for all top-division clubs of the national association). In strict legal terms, a license is granted to a legal entity responsible for a football team participating in national and international competitions. See *id.*, art 4.3.1.1.

143. See *id.* art. 9.2.1 (L.01).

144. See DISCIPLINARY CODE, *supra* note 4, art. 64.4.

refusing to deal with the infringer.<sup>145</sup> FIFA achieves this by making participation in collective punishment part of the equilibrium: clubs themselves are liable for registering "outlawed" players.<sup>146</sup> Since all players involved with a club shall be registered with member associations, deviations from participating in collective punishments are both easily observable and verifiable. At the same time, club participation in organized national and international tournaments is conditioned upon the affiliation of a club with one of the membership associations.<sup>147</sup> In the absence of alternative tournaments and leagues not affiliated with FIFA that can generate significant financial rewards, clubs have strong incentives to comply with the established rules, including the obligation to enforce the decisions of FIFA and its dispute resolution bodies. Accordingly, if a player is banned temporarily from playing football, hardly any club will risk to employ him/her. This allows the system to work effectively in practice.

In brief, a wish to play or coach football professionally requires players and coaches to comply with the multi-layer regulations governing the organization of the game; an intention by clubs to participate in national and international matches and competitions forces them to comply with the rules and decisions of FIFA and a respective confederation or a national association; finally, membership in FIFA—or in other words, access for the national team and local clubs to the world of football—calls for agreeing to all obligations imposed by FIFA. In the absence of alternatives, these are inevitable decisions. The lack of alternatives explains why every involved party commits to be bound by the rules of the game in the first place and sticks to this commitment subsequently.

Reputation or unwritten norms of behavior play a certain role as well, although this role is much limited compared to other instances of

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145. See DIXIT, *supra* note 28, at 63–64; Avinash Dixit, *Governance Institutions and Economic Activity*, 99 AM. ECON. REV. 5, 9, 12–13 (2009) (noting that collective action problems of punishment can be solved by stipulating equilibrium strategies where taking punishment actions is part of compliance with the rules of the game). See also Greif et al., *supra* note 7, at 757–58 (documenting various strategies used by medieval merchant guilds for sustaining credibility of their sanctions, including by imposing fines or commercial sanctions on their non-complying member merchants; for instance, the rules of behavior of the 13th century Flemish cloth merchants imposed secondary punishments on those who failed to comply with injunctions not to deal with merchants who cheated Flemish merchants).

146. See TRANSFER REGULATIONS, *supra* note 4, art. 11.

147. See *supra* Figure I.

promoting cooperation by the private means of governance.<sup>148</sup> First, clubs deal with each other regularly in national and international transfer markets where they sign players from each other. Strained relationships between two clubs based on their prior dealings can be the reason of rejecting any friendly contacts in the future.<sup>149</sup> A hostile move by one party can spark retaliation by another.<sup>150</sup> In addition, it is not uncommon when strong rivalries between the clubs put additional pressure on players who move to the camp of the "enemy."<sup>151</sup> This might suffice to support bilateral cooperation without external intervention, but cannot satisfy the conditions for successful multilateral cooperation.<sup>152</sup> Indeed, given the extremely large number of the involved actors, as well as geographical lines of demarcation among member association/confederations, reputation alone is not enough to support cooperation by creating conditions for collective punishment of wrongdoers. For example, a

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148. *E.g.*, compare the following discussion with Barnett, *supra* note 30, at 646 (explaining the role of reputational capital in contracts with established Hollywood stars) and Bernstein, *supra* note 30, at 592–96, 604–07 (showing how relational ties substitute or complement procurement contracts of large original equipment manufacturers).

149. Recall the case of Mario Götze discussed earlier. *See supra* note 112. Trust between the two clubs has improved in the summer of 2016, when they completed the transfers of three players, including the return of Mario Götze to Dortmund, based on mutually negotiated agreements. *See* Ballspielverein Borussia 09 e.V. Dortmund, *Personnel Matters: Borussia Dortmund Re-Sign Mario Götze* (Jul. 21, 2016), available at <http://www.bvb.de/eng/News/Overview/Borussia-Dortmund-re-sign-Mario-Goetze> (quoting Hans-Joachim Watzke, the CEO of Borussia Dortmund, thanking the Chairman of the FC Bayern Munich Board of Directors, Karl-Heinz Rummenigge: "We have negotiated three transfers with Bayern this summer. All of our negotiations have been characterised by great seriousness and mutual trust.").

150. Information about the existence of a gentlemen's agreement among a group of about 200 European clubs not to employ players who had terminated their contracts unilaterally, which was denied by the European Club Association, surfaced in 2013. *See* FIFPro, *Article 17: Rummenigge Furious, FIFPro Reacts* (Dec. 13, 2013), available at <https://fifpro.org/en/news/article-17-rummenigge-furious-fifpro-reacts>.

151. One of the most controversial transfers in the history of football was the decision of Luis Figo, the once Portugal captain, to swap FC Barcelona for their long-standing rivals CF Real Madrid in the summer of 2000. FC Barcelona's supporters felt so betrayed and angry that a pig's head and coins were thrown at him when he returned with Madrid to the Nou Camp for the Spanish *La Liga* game between the two clubs. *See* Sarah Edworthy, *8 Footballers Who Have Sparked Fans' Fury by Leaving in Acrimony*, DAILY TELEGRAPH, Feb. 19, 2005, at 06; *Loyalty's for Mugs? The Men Who Crossed the Great Divide*, DAILY MIRROR, May 27, 2004, at 79.

152. *See supra* note 36 and accompanying text.



player rejected in one country (or region) can find employment in another.<sup>153</sup>

Second, reputational mechanisms are further strengthened by the involvement of specialized intermediaries between the clubs and players. Previously known as agents, these intermediaries perform two tasks: they negotiate better terms for their clients and close information gaps between players and clubs.<sup>154</sup> While the first task is clear, the second needs further explanation. Each intermediary typically has a pool of players and is well aware of their abilities. Accordingly, an intermediary can offer the services of its clients to clubs that are in specific needs.<sup>155</sup> For example, one club may look for a midfielder player with an ability to support teammates in an intensive high-pressing game, whereas another may need a midfielder that can exploit open spaces and find teammates to pass the ball. Top clubs often bring this task "in-house" by employing special data analysts and scouts who study player performance stats and attend (youth) tournaments worldwide to select talented players for their employers.<sup>156</sup> The latter has arguably reduced the role of intermediaries.<sup>157</sup>

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153. Clubs from leagues in North American, East Asian, and Middle East countries, which are not yet competing with top European leagues in terms of either sporting or financial power, can use such situations as an opportunity to snap talented players who are otherwise reluctant to play in these leagues.

154. The role of some intermediaries is much more than that. They may have a key influence on the player's football career, particularly by motivating and directing them at young age. For instance, Mino Raiola, one of the most influential intermediaries in modern football, offers personal service to each of his clients, varying from dealing with daily routines to managing their funds: the former may include a call from a player asking a shopping advice; at the other extreme, Mr. Raiola reportedly manages a whopping €900 million investment portfolio in the interests of his clients. See Simon Kuper, *The Dealmaker*, FINANCIAL TIMES, Oct. 29, 2016. We received similar information about the role of highly-regarded intermediaries during an interview with an ex-legal counsel at a FIFA member association (Sep. 6, 2016).

155. A similar argument has been advanced by Professor Bernstein in other contexts. See Bernstein, *The Diamond Industry*, *supra* note 10, at 133 (arguing that brokers reduce transaction costs in the diamond trade because they can obtain relevant information at lower cost than individual buyers and sellers; the chief reason is that the information obtained by brokers is less transaction specific and can be offered to many interested parties); Lisa Bernstein, *The Silicon Valley Lawyer as Transaction Cost Engineers?*, 74 OR. L. REV. 239, 246–47 (1995) (depicting a similar role for lawyers in Silicon Valley).

156. See, e.g., Jack Gaughan, *Manchester United Appoint 50 New Scouts in Double-Quick Time as Premier League Giants Scour Globe for the Next Generation of Young Talent*, DAILY MAIL, Oct. 13, 2016 (describing the rise of football scouts and the importance of identifying talent in ensuring sustainable sporting success); Adam Isaacs, *Analytics Level Playing Field in Identifying Football Talent*, FINANCIAL TIMES, Dec. 1, 2014.

157. See Simon Kuper, *Clout of Football Managers Relegated by Data and the Total Squad Wage Bill*, FINANCIAL TIMES, Aug. 13, 2016, at 3 ("Whereas managers used to make new

Many of these intermediaries are repeat players and thus have strong incentives to protect their reputational capital that they have developed in a close-knit industry of top clubs and football academies. As a result, they mostly act according to the established norms of behavior. But the world of intermediaries is big and outside the small group of top agents self-governance is pushed to the margins.

Lastly, clubs and other actors put peer-pressure on each other to comply with the decisions of FIFA's dispute resolution bodies. There are two reasons for this. First, the clubs that had been punished and complied with the imposed sanctions previously, are interested for others to comply as well, because non-compliance by others will impair the level playing field by putting complying actors in a disadvantaged position. Second, and more importantly, FIFA has developed sanctions that punish the entire collective if one of the actors fails to comply with the ruling entered against it. Accordingly, everyone in the collective is strongly interested in ensuring compliance by the wrongdoer.<sup>158</sup> The case of FC Sion is illustrative.

As described earlier, *El-Hadary* ruling imposed a one-year ban on Swiss club FC Sion to sign new players.<sup>159</sup> Notwithstanding this, FC Sion signed six new players and, after securing the order of a local court that the new players were eligible to play, fielded them against Celtic FC, Scottish club, in a qualifying match of the Europa League in August 2011. Although the Swiss club was the winner of the pair, UEFA disqualified the club from the competition for a clear breach of a transfer ban imposed on it; FC Sion's place in the tournament was handed to the Scots. FC Sion brought the dispute to Swiss courts and obtained an interim measure—later ignored by UEFA—ordering the reinstatement of the club in the Europa League.<sup>160</sup> In December 2011, FIFA stepped up the dispute threatening to suspend the Swiss Football Association—and therefore its member clubs—should the authorities fail to impose sanctions on FC Sion

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signings based on intuition, tips from friendly agents and chance past experiences of a player, now transfers are increasingly informed by data.").

158. See generally GREIF, *supra* note 36, at 310–11 (explaining the incentives structure of the medieval community responsibility system).

159. See *supra* note 89.

160. FC Sion and several of its players also complained to the European Commission and the Swiss competition authority about the behavior of UEFA. They argued that UEFA's rejection to reinstate the club in the Europa League was an abuse of a dominant position.

for using ineligible players.<sup>161</sup> This put additional peer-pressure on the management of FC Sion.<sup>162</sup>

To conclude, this is an example of an effective complex enforcement system that is not backed by the coercive power of any state. FIFA acts as a coercive power itself; in addition, incentive mechanisms complement the sanctions.<sup>163</sup>

#### IV. THE PARALLEL WORLD OF PUBLIC LAW AND THE MECHANISMS OF LOCKING IN FIFA'S PRIVATE LEGAL ORDER

Following the explanation of FIFA's private legal order above, this part describes the challenges to the order from public law. Subsequently, the analysis moves to the mechanisms used by FIFA to promote the exclusive reliance of actors on its private order.

##### *A. Challenges to the Private Legal Order from Public Law*

###### *1. Employment Laws and FIFA's Transfer Regulations*

FIFA's Transfer Regulations, which set "global and binding rules concerning the status of players, their eligibility to participate in organized football, and their transfer between clubs belonging to different associations,"<sup>164</sup> create strong tensions between FIFA's regulatory autonomy and the sovereign jurisdictions of its member associations (and supra-national organizations, such as the EU). Apart from the Transfer Regulations and the corresponding rules adopted by the continental confederations and national football associations, clubs and their players

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161. This narrative is based on official documents and news articles compiled by History Commons. See *Football Business and Politics: FC Sion Affair*, HISTORY COMMONS, available at

[http://www.historycommons.org/timeline.jsp?timeline=ftbl\\_bus\\_pol\\_tmIn&ftbl\\_bus\\_pol\\_tmIn\\_specific\\_issues=ftbl\\_bus\\_pol\\_tmIn\\_fc\\_sion\\_affair](http://www.historycommons.org/timeline.jsp?timeline=ftbl_bus_pol_tmIn&ftbl_bus_pol_tmIn_specific_issues=ftbl_bus_pol_tmIn_fc_sion_affair).

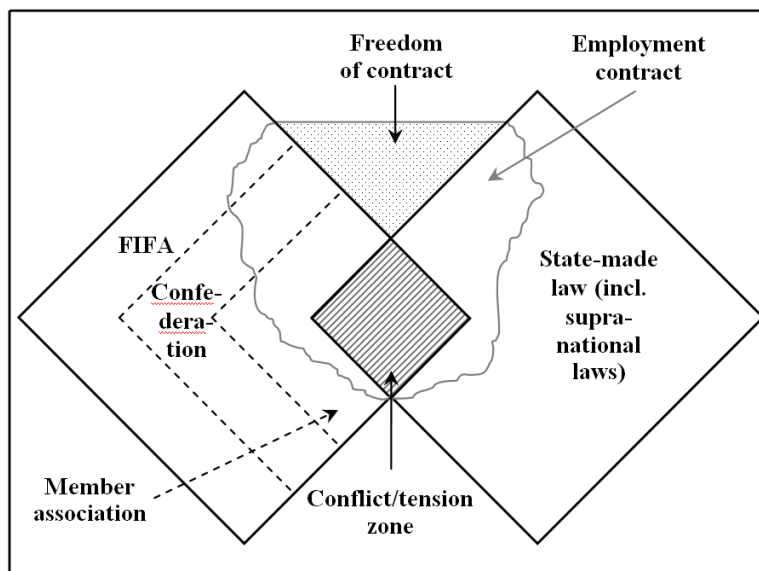
162. See Graham Dunbar, *FIFA Threat to Suspend Switzerland over Sion Case Jeopardizes Basel Place in Champions League*, ASSOCIATED PRESS NEWSWIRE (Dec. 17, 2011) (describing the efforts of the vice president of a rival Swiss club, FC Basel, in securing the support of other European clubs to end the resistance by the management of FC Sion).

163. See William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 247 (1979) (showing that unless ostracism or reputation-related private remedy is available because the dispute is between members of a close-knit community, a public remedy will often be necessary to induce parties to submit the dispute to arbitration and comply with the arbitrator's award).

164. TRANSFER REGULATIONS, *supra* note 4, art. 1.1.

also have to adhere to (supra-)national labor laws.<sup>165</sup> This system of overlapping, and sometimes contradicting, rules has its origins in the historical practice of national and international legislatures of refraining from regulating the area of sports, thereby leaving the ordering of the matter to the sporting associations themselves.<sup>166</sup> Figure II below illustrates the relationships between the different levels of public and private ordering.

**Figure II. The Relationship of Labor Rules in Football**



Tensions between different levels of employment rules are especially visible in matters such as equality and/or non-discrimination of workers, the treatment and qualification of minors, the freedom to choose employment, and the freedom of movement. Each is described briefly below.

*Employee Discrimination.* Rules restricting the number of foreign players a football club is allowed to register as well as their eligibility to

165. Although not all countries qualify professional athletes as employees under domestic laws, we assume that all professional footballers are employees. *See supra* note 76.

166. *See* Steven F.H. Jellinghaus, *Een introductie tot sport en recht*, ARBEID INTEGRAL, no. 3, 2003, at 70. *See also* MARCO MOSSELMAN, *INLEIDING SPORT EN RECHT* (2012); HEIKO VAN STAVEREN, *SPORT EN RECHT* (2007).

play are commonplace among national associations. Numerous national football associations—such as that of China, Russia, and the United States—have quotas in place today,<sup>167</sup> whereas some national associations within the EU maintain a quota that makes a distinction between EU and non-EU nationals.<sup>168</sup> This limit has led to several lawsuits filed with the European Court of Justice (ECJ) or CAS.<sup>169</sup> The EU and the ECJ rebuked football governing bodies on the matter of treating players from all EU member states as "domestic" and non-EU players as "foreign," yet the problem remains unsolved in countries like Italy and Spain.<sup>170</sup> On the contrary, there is, instead, a movement in the opposite direction—national football associations that do not have quotas in place currently opt for their introduction in the future, as planned by the English Football Association and declared by its chairman Greg Dyke, for example.<sup>171</sup> In no field other than football restrictive quotas are imposed for employees, for they would be a blatant discrimination.<sup>172</sup> This is indeed a fair point that the ECJ has refuted nonetheless.<sup>173</sup>

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167. In China, each club can have only five foreign players, of which four can play at any one time. See John Duerden, *China: The Great Leap Forward*, WORLD SOCCER, Mar. 2016, at 26. The clubs of the Russian Premier League are not allowed to field more than six players that are not eligible to play in the Russian national team. See RUSSIAN FOOTBALL UNION, REGULATIONS OF THE RUSSIAN FOOTBALL CHAMPIONSHIP AMONG THE TEAMS OF THE CLUBS OF THE PREMIER LEAGUE, 2016–2017, art. 5.10, available at <http://rfpl.org/rfpl/documents/> (in Russian). The rules of Major League Soccer, men's professional soccer league in the United States and Canada, allocate 160 international roster spots among the 20 clubs. Each club was given eight international roster spots in 2008. Since there is no limit on the number of international players on each club's roster and the spots can be traded, currently some clubs have more than eight international players. The total number of international players in the league, however, cannot exceed the maximum limit. See MAJOR LEAGUE SOCCER, 2016 MLS ROSTER RULES AND REGULATIONS, art. II, available at <http://pressbox.mlssoccer.com/content/roster-rules-and-regulations>.

168. See *Rules for Non-EU players*, GOLDEN GOALS, available at <http://www.golden-goals.com/content/rules-for-non-eu-players>.

169. See, e.g., Case C-152/08, *Real Sociedad de Fútbol SAD and Nihat Kahveci v. Consejo Superior Deportes and Real Federacion Espanola de Fútbol*, 2008 E.C.R.; *Racing Club Asociación Civil v. FIFA*, CAS 2014/A/3536 (May 2015). See also Zeynep Ilay Gümrük, *The European Court of Justice's Ruling in the Kahveci Case Lights the Way for Other Turkish National Sportsmen in the European Union*, ANKARA BAR REV., no. 2, 2009, at 102, 111–12.

170. See *supra* note 168.

171. See Ben Smith, *FA's Greg Dyke Announces Plans to Restrict Non-EU Players*, BBC (Mar. 23, 2015), available at <http://www.bbc.com/sport/football/32024808>.

172. See H.W.P. van den Hout, *6+5=11: Nationaliteitsclausules na het Bosman-arrest*, ARBEIDSRECHT, no. 3, 2009, at 13, 13–14.

173. See Joseph Maguire & Robert Pearton, *The Impact of Elite Labour Migration on the Identification, Selection and Development of European Soccer Players*, 18 J. SPORTS SCI. 759, 761 (2000).

*Freedom to Choose Employment.* Football players are strictly bound to their employment contracts and have limited means to terminate employment during the contract's term.<sup>174</sup> This is a unique situation, as other employees typically are free to seek and solicit for new employment. The inability of players to terminate their contracts without cause, before expiry and without paying compensation, is in stark contrast with traditional employment law, according to which employees are free to end employment without cause by prior notice. The special treatment of football players comes close to forced or compulsory labor.<sup>175</sup> As explained above, early termination of employment contract by a player without just cause always leads to the payment of a compensation to the player's club and may also result in a temporary ban from playing.<sup>176</sup>

*Freedom of Movement.* The freedom of movement for workers has come up implicitly throughout the discussion of the previous two problems. It has to be mentioned—perhaps even redundantly so—that this is a specific problem regarding the EU.<sup>177</sup> The groundbreaking case here is, of course, the *Bosman* ruling of the ECJ.<sup>178</sup> Prior to this decision, football players were tied to their clubs indefinitely and could move between clubs only after the payment of a compensation. When the employment contract of Jean-Marc Bosman, a Belgian player, with his club Royal Club Liègeoise SA expired, he intended to move to USL Dunkerque, French football club. The latter, however, was not willing to pay the transfer fee and, as a result, the Belgian football authorities did not transfer the player's certificate, rendering Mr. Bosman ineligible for playing in France. Mr. Bosman took the matter to court and the ECJ declared the rule incompatible with the freedom of movement for workers and competition law.<sup>179</sup> This decision shook up the entire football world

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174. See *supra* notes 76–77 and accompanying text.

175. More than three decades ago the European Commission of Human Rights, the predecessor of the European Court of Human Rights, refused to qualify pre-*Bosman* transfer rules as leading to forced labor. See *X. v. Netherlands*, App. No. 9322/81, 32 Eur. Comm'n H.R. Dec. & Rep. 180, 183 (1983) (explaining the applicant voluntarily chose to become a professional football player knowing that he would be affected by the transfer rules).

176. See *supra* notes 78–81 and accompanying text.

177. The freedom of movement for workers is one of the four economic freedoms within the EU. See Consolidated Version of the Treaty on the Functioning of the European Union, art. 45, May 9, 2008, 2012 O.J. (C 326) 47, 65–66 [hereinafter TFEU].

178. See *Bosman*, *supra* note 93.

179. See *id.*

at the time, leading to the reshaping of transfer rules into the order we know today.<sup>180</sup>

The concept of contractual stability has been introduced into player transfer rules to replace the pre-*Bosman* system of transfer fees.<sup>181</sup> Accordingly, transfer fees due after the expiry of a contract have been substituted with a compensation due for the unilateral termination of a valid contract without just cause. The new system, which is a product of negotiations between the European Commission, FIFA, UEFA, and FIFPro, a global organization representing the interests of professional football players, aims to promote contractual stability between players and clubs while respecting each player's right to free movement.<sup>182</sup> Nevertheless, the prevailing interpretation of art. 17 of the Transfer Regulations by FIFA's internal dispute resolution bodies and by the CAS strongly favors contractual stability over free movement.<sup>183</sup> It is fair to acknowledge that even the involvement of the EU has not been a game changer in bringing football's special legal order under the requirements of formal state laws.

## 2. Competition Laws and the Monopoly of FIFA

Anti-competitive activities, due to potential implications for free trade and the common market, are a main feature of the European Union's work, and in particular of the European Commission.<sup>184</sup> The powers of the Commission are based on articles 101 and 102 of the TFEU.<sup>185</sup> The way FIFA can run afoul of both of these clauses is extensively discussed in literature, so we merely present a brief overview.<sup>186</sup>

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180. See Steven F.H. Jellinghaus, *Het opleidings- en solidariteitssysteem van de FIFA: de stand van zaken*, ARBEIDSRECHTERLIJKE ANNOTATIES, no. 2, 2005, at 4, 27–31.

181. See *Matuzalem*, *supra* note 82, para. 79.

182. See Paul A. Czarnota, *FIFA Transfer Rules and Unilateral Termination without "Just Cause"*, 2 BERKELEY J. ENT. & SPORTS L. 1, 3–5, 7 (2013).

183. See *id.* at 37–38.

184. See DAMIAN CHALMERS, GARETH DAVIES, & GIORGIO MONTI, EUROPEAN UNION LAW 943 (2014).

185. See TFEU, *supra* note 177, at 88–89. Article 101 deals with distortion of the market by agreements between competitors, such as price-fixing; article 102 covers abuse of a dominant position in a specific market.

186. See, e.g., RICHARD PARRISH, SPORTS LAW AND POLICY IN THE EUROPEAN UNION 109–59 (2003); Ben Van Rompuy, *The Role of EU Competition Law in Tackling Abuse of Regulatory Power by Sports Associations*, 22 MAASTRICHT J. EUR. & COMP. L. 179, 198–206 (2015).

FIFA has a near monopoly in organizing official football tournaments.<sup>187</sup> Relying on its regulatory rights, FIFA can restrict access to the market, thereby entrenching its market power.<sup>188</sup> Whether by refusing to authorize any event organized by potential competitors or, alternatively, by prohibiting the participation of its members, and as a consequence of football clubs and players, in competitor-organized events, FIFA can effectively establish barriers for competition.<sup>189</sup> Though not challenged directly, competition authorities and courts in Europe considered several cases that can be easily extended to FIFA.<sup>190</sup> Other potential competition law challenges to FIFA concern its rules on third party ownership<sup>191</sup> and player transfers.<sup>192</sup> These and similar potential actions taken against FIFA under both articles of the TFEU may void and imperil many of FIFA's actions.<sup>193</sup> An additional problem is the European Commission's insistence on pursuing its competition policy through national courts, which is discussed next.

### *3. Access to Justice and the Prohibition to File Complaints in Public Courts*

FIFA's compliance with the fundamental freedoms and anti-competition law is not subject to challenges solely from the EU bodies, either acting on their own or on a request; national courts also have a duty to uphold these rules. It is thus not strange that FIFA has been "fiercely territorial" when it comes to allowing athletes to bring cases to national

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187. See *supra* note 69 and accompanying text.

188. See Van Rompuy, *supra* note 186, at 199.

189. See *id.*

190. Two cases, one at the EU level and one national, considered the power of sport associations to block the organization of sport events by competing bodies. In *FIA/Formula One*, the European Commission considered whether the Fédération Internationale de l'Automobile (or FIA), the governing body for motor sport, used its power to block the organization of races that competed with its own events. In *Gargano Corse/ACI*, the Italian national competition authority questioned whether the regulations of the domestic motor sport association intended to restrict competition by prohibiting the arrangement of motor sport events by private organizers. Three other national cases (one from Ireland and two from Sweden) focused on the right of sport associations to effectively restrict competition by discouraging athletes from competing in events run by other organizations. See Van Rompuy, *supra* note 186, at 200–06 (describing all five cases).

191. See W. Tyler Hall, Comment, *After the Ban: The Financial Landscape of International Soccer after Third-Party Ownership*, 94 Or. L. Rev. 179, 202–15 (2015).

192. See Richard Parrish, *Article 17 of the FIFA Regulations on the Status and Transfer of Players: Compatibility with EU Law*, 22 MAASTRICHT J. EUR. & COMP. L. 256, 267–75 (2015).

193. See Van Rompuy, *supra* note 186, at 207.



courts,<sup>194</sup> and actually prohibits this in its statutes; member associations, in turn, have to prevent their members from going to the courts.<sup>195</sup> Clauses prohibiting access to courts are void in many legal systems,<sup>196</sup> but football players would have them struck down at their peril, for bringing a case to court is accompanied by heavy internal sanctions for the member allowing it and negative consequences for the athlete's personal career.<sup>197</sup>

Nevertheless, there are a few potential problems for FIFA and other sports organizations with respect to keeping their disputes away from external judicial scrutiny. First of all, there is always the possibility that a player will ignore all the obstacles and will bring a dispute to a state court anyway.<sup>198</sup> Secondly, standard clauses on accepting the exclusive jurisdiction of the CAS are controversial given the question as to whether their acceptance is voluntary.<sup>199</sup> Indeed, in an ongoing dispute in Germany, the appeal court of Munich (*Oberlandesgericht München*) struck down the exclusive arbitration clause of a sport association as invalid.<sup>200</sup> Thirdly, the parties to disputes are often able to rely on FIFA's internal mechanisms to ensure that CAS awards are enforced, but, like any arbitral award, they might need the help of state courts.<sup>201</sup> Some courts, like the Swiss and the French, apply a very light review, but some are more critical: for example, in the *Wilhelmshaven* case, a German court held that it could not enforce a CAS award without going against public policy,

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194. See Burgess Williams, *The Fate of Third Party Ownership of Professional Footballers' Rights: Is a Complete Prohibition Necessary?*, 10 TEX. REV. ENT. & SPORTS L. 79, 95–96 (2009).

195. See FIFA STATUTES, *supra* note 1, art. 64.2.

196. See, e.g., Ian Blackshaw, *ADR and Sport: Settling Disputes through the Court of Arbitration for Sport, the FIFA Dispute Resolution Chamber, and the WIPO Arbitration and Mediation Center*, 24 MARQ. SPORTS L. REV., 1, 38 (2013).

197. See *infra* notes 213–214 and accompanying text.

198. For the discussion of some examples, see *infra* Part IV.B.

199. See Reilly, *supra* note 120, at 67.

200. See OLG München, Jan. 15, 2015, Az. U 1110/14 Kart. The case involves Claudia Pechstein, a speedskater, but could set a precedent. The decision of the Munich regional court has been reversed recently by Germany's Federal Court of Justice, but the athlete considers filing a complaint with the German constitutional court; a related case is pending before the European Court of Human Rights. See Rebecca R. Ruiz, *Sports Arbitration Court Ruling against German Speedskater Claudia Pechstein is Upheld*, NYTIMES.COM FEED (Jun. 7, 2016), available at [http://www.nytimes.com/2016/06/08/sports/sports-arbitration-court-ruling-against-german-speedskater-claudia-pechstein-is-upheld.html?\\_r=0](http://www.nytimes.com/2016/06/08/sports/sports-arbitration-court-ruling-against-german-speedskater-claudia-pechstein-is-upheld.html?_r=0). See also Duval, *supra* note 122, at 249–50; Despina Mavromati, *The Legality of the Arbitration Agreement in Favour of CAS under German Civil and Competition Law*, CAS BULL., no. 1, 2016, at 27, 28–30.

201. See McLaren, *supra* note 120, at 324.

namely the EU laws concerning free movement.<sup>202</sup> Therefore, by ignoring public laws, FIFA and CAS might expose themselves to outside interference.<sup>203</sup>

*B. Keeping Governments and Public Courts at Bay: Mechanisms for Advancing the Exclusive Use of the Private Legal Order*

Part IV.A shows that FIFA's rules and regulations, particularly player transfer rules and the exclusivity of official tournaments organized under the helm of FIFA, may be in conflict with the laws of nation states and supra-national jurisdictions.<sup>204</sup> This implies that FIFA members, clubs, footballers, and other involved actors have strong grounds to challenge the established rules and decisions of FIFA or CAS in public courts with the purpose of avoiding obligations or limitations imposed on them by these rules and decisions. This, indeed, happened previously.<sup>205</sup>

Incentives of the involved actors to challenge FIFA's private legal order are particularly strong where the established rules of behavior contradict the interests of a specific group of actors. The main two groups of actors include clubs and footballers. Although neither of the two is directly represented in FIFA or regional confederations, both have established external networks to influence football governance.<sup>206</sup> In particular, both clubs and players have representative organizations that promote their interests in football matters. The European Club Association (ECA), headquartered in Nyon, Switzerland, counts among its members 200 clubs from 53 European member associations of FIFA.<sup>207</sup> FIFPro, based in Hoofddorp, the Netherlands, is the worldwide

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202. See OLG Bremen, Dec. 30, 2014, 2 U 67/14. See also Duval, *supra* note 122, at 248–49.

203. See Duval, *supra* note 122, at 254; Reilly, *supra* note 120, at 80.

204. See *supra* Part IV.A.

205. Two cases are described in this article. See *supra* notes 160–162 and accompanying text and *infra* notes 235–236 and accompanying text (describing FC Sion and Matuzalem affairs, respectively).

206. See Matthew Holt, *The Ownership and Control of Elite Club Competition in European Football*, 8 SOCCER & SOC'Y 50, 54, 61 (2007) (distinguishing between internal and external governance in football and describing the means of external governance available to stakeholders).

207. See <http://www.ecaeurope.com/eca-members/eca-members/> (listing all current ECA members). The interests of wealthy and powerful clubs, however, are overrepresented in ECA. See Michele Colucci & Arnout Geeraert, *Social Dialogue in European Professional Football*, INT'L SPORTS L.J., no. 3–4, 2011, at 56, 64. Football clubs are also indirectly represented by the Association of European Professional Football Leagues (EPFL). *Id.*, at 63.

representative organization for more than 65,000 professional footballers, both male and female.<sup>208</sup> It has 58 national players' associations as its members currently.<sup>209</sup> Had clubs or players acted separately, they would have lacked incentives to deviate from the established private legal order even if it contradicted their interests.

First, the desire of each actor to leave may be constrained by the equilibrium—if all other actors are satisfied with the status quo the motives of separate actors to deviate are weakened.<sup>210</sup> They have to predict the behavior of other actors and act accordingly. If the dissatisfied actor is not likely to be joined by others, costs of his/her actions are high.<sup>211</sup> For example, before breaching the existing player transfer rules, a player has to examine the probability of being hired by other clubs after the breach. If the breach leads to an effective ostracism, a player may stick to the rules even if he/she disagrees with them. The likelihood to find a new club is certainly higher when many others, and hopefully all, boycott the transfer rules.

Second, cases challenging the rules of established private orders require accumulation of substantial financial resources and time. Sport associations clearly realize that most of the individual athletes lack both.<sup>212</sup> Moreover, "rebellious" athletes may be banned from competitions during the entire period of judicial proceedings. Given the length of legal battles and the limited span of sport careers, such challenges, in fact, are likely to end the athlete's career.<sup>213</sup> Add to this possible negative public opinion

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208. See <https://www.fifpro.org/en/about-fifpro/about-fifpro>.

209. See *id.* It is difficult to conclude which interest group is stronger, but anecdotal evidence suggests that some clubs strongly discourage their players from being affiliated with FIFPro, thereby weakening the representation of the players' interests. We obtained this information during an interview with an ex-legal counsel at a FIFA member association (Sep. 6, 2016). This practice, however, might be limited to particular countries and be induced by personal hostility between top officials of clubs and national players' unions.

210. See Mark Granovetter, *Threshold Models of Collective Behavior*, 83 AM. J. SOCIOLOGY 1420, 1424–25 (1978) (showing that for explaining outcomes of collective actions, in addition to individual preferences of all actors, we need to know how these individual preferences interact).

211. See *id.* at 1422.

212. Commenting on the case initiated by speedskater Claudia Pechstein against exclusive arbitration clauses, CAS Secretary General noted: "I don't think every athlete in the world can afford this kind of marathon," referring to Ms. Pechstein's seven-year legal battle. Accordingly, he did not expect many similar suits. See Ruiz, *supra* note 200.

213. For example, Jean-Marc Bosman had to sacrifice his career and endure a long legal battle to challenge the then-effective transfer rules of football players. See Stefaan Van den Bogaert, Editorial, *Bosman: One for All* . . . , 22 MAASTRICHT J. EUR. & COMP. L. 174, 178 (2015). Less known is the story of Carlos Gonzalez Puche, an ex-footballer who had to hang up

surrounding the cases, and there is a strong case against challenging the established order.<sup>214</sup>

Third, challenging the existing rules, which contradict formal law, in state courts involves classic collective action and free-rider problems.<sup>215</sup> Even though multiple actors might all benefit from changing the rules, bringing a challenge in state courts is associated with a cost which makes it unlikely that any individual actor will move alone.<sup>216</sup> The costs of such action will be borne by the activist, whereas the benefits will be shared by all other affected actors.<sup>217</sup> Hence, such activism is a public good which is better accomplished if the actors act collectively and share the costs.<sup>218</sup> But if collective action is associated with costs as well, then there always will be free-riding actors which increase the costs shared by others and thereby discourage any action.<sup>219</sup> As a result, the actors may be trapped in a sub-optimal equilibrium.

Acting as an interest group, the likes of ECA and FIFPro deal with the described problems and, as a result, strengthen the voice of the actors they represent.<sup>220</sup> The question is what the interests of the two main involved groups, players and clubs, are? FIFPro is dissatisfied with the current transfer system and is interested in changes.<sup>221</sup> One of its main motivations is that the existing rules fail to correct financial imbalances

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his boots early due to a "club cartel that blacklisted players fighting for their rights." He dared to speak out about the oppressed rights of players in Colombia in 1980s, an era when the country's big clubs were under the control of drug barons, and later, with the help of FIFpro and high-profile Colombian players, set up a union to represent players in disputes with clubs. These efforts, arguably, contributed to reducing the influence of the criminal underworld over Colombian football and led to fairer and more professional relationships between players and clubs. See Carl Worswick, *Colombia's Finest*, WORLD SOCCER, Dec. 2016, at 70, 72.

214. After the *Bosman* ruling, Mr. Bosman was portrayed as the villain who had inflicted irreparable harm to football. Van den Bogaert, *supra* note 213, at 175.

215. A collective action problem arises when there is a conflict between a behavior that maximizes the welfare of an individual and the individual's behavior that maximizes the welfare of the group to which he/she belongs. See RUSSELL HARDIN, *COLLECTIVE ACTION* 8–9, 16–22 (1982); OLSON, *supra* note 40, at 5–16.

216. See KEITH DOWDING, *POWER* 33 *ff.* (1996); OLSON, *supra* note 40, at 5–16.

217. See OLSON, *supra* note 40, at 13–15.

218. See *id.*

219. See *id.* at 40–41.

220. Indeed, these interest groups, brokered by the European Commission and UEFA, are involved in a social dialogue with the aim of improving the practices of employee protections in football. See Colucci & Geeraert, *supra* note 207, at 57–58.

221. See Gavin Hamilton & Keir Radnedge, *20 Stories to Follow in 2016: Will FIFPro Win Its Legal Challenge to the Transfer System?*, WORLD SOCCER, Jan. 2016, at 25.

between big and small clubs.<sup>222</sup> Although FIFPro has not specified the preferred alternative, it is clear that formal law is not the solution: FIFPro is rather interested in overhauling the current system.<sup>223</sup> ECA, on the other hand, seems to be in strong favor of preserving the status quo.<sup>224</sup> Notwithstanding the divergence in the interests of the two main interest groups, legal challenges to the private legal order are rare. The parties rather prefer to preserve the order and modernize it to accommodate their interests.<sup>225</sup>

To avoid outside challenges, FIFA Statutes prohibit recourse to outside dispute resolution venues, including ordinary state-sponsored courts.<sup>226</sup> This prohibition extends to obtaining provisional measures—such as restraining orders, asset freezing orders, or provision of security for costs.<sup>227</sup> FIFA sanctions non-complying members directly and requires them to establish effective mechanisms discouraging actors that are outside FIFA's direct reach from taking actions in national courts.<sup>228</sup> For example, FIFA can suspend a member association should it fail to discipline local actors, meaning that neither the national team, nor local clubs can participate in official tournaments. This collective responsibility scheme provides all involved actors with incentives to promote compliance with the rules and intensifies pressure on individual wrongdoers.<sup>229</sup>

The practice indicates that clubs and players challenge FIFA's rules in state courts when they face dire consequences that can threaten their existence (for clubs) or careers (for players). To avoid this, the rules promote sanctions that do not create such a classic end-game problem.<sup>230</sup>

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222. *See id.* ("Some stars [players] are incredibly wealthy but in small clubs and small countries there is almost slavery. . . . FIFPro would like to make the system much more equitable.").

223. *See id.* (FIFPro is not intent on scrapping the transfer system altogether; it just wants to bring "balance between the rights of players and the clubs").

224. *See id.*

225. Rare instances of challenging FIFA's rules by various stakeholder interest groups are strategically motivated. *See, e.g.,* Colucci & Geeraert, *supra* note 207, at 63–64 (describing the use of public courts by G-14, an informal network of leading football clubs in Europe, to strengthen its position in negotiations to obtain from football governing bodies compensation for clubs if players are injured while representing their national teams).

226. *See* FIFA STATUTES, *supra* note 1, art. 68.2.

227. *Id.*

228. *See id.* art. 70; DISCIPLINARY CODE, *supra* note 4, art. 64.1 (d).

229. *See supra* notes 158–162 and accompanying text.

230. In a similar vein, Professor Bernstein notes that the Board of Arbitrators of the New York Diamond Dealers Club uses suspension more frequently than expulsion to secure

As described above, the sanctions provide for temporary bans to play football for players or register new players for clubs.<sup>231</sup> Clubs may also be relegated to lower divisions or banned from participating in international tournaments for a specific period of time.<sup>232</sup> But permanent banes are rare: they are typically imposed to promote compliance with already instituted sanctions. However, large sums of material fines related to the breach of employment contracts can be equivalent to a temporary ban, particularly for players who cannot afford paying huge compensation amounts associated with breaching transfer rules.<sup>233</sup> To avoid a scenario when a player hit with a large fine and unable to pay it launches a war against FIFA in state courts, the rules impose joint and several liability both on the player and his/her new club.<sup>234</sup> This means that if a player fails to pay, the club is obliged to make the payment. Accordingly, the player has less incentives to take the dispute to state courts. Not surprisingly, one of the rare challenges of the CAS awards in state courts took place when the compensation sum was beyond the financial means of the player and the jointly liable club; moreover, the club was in insolvency proceedings and the player had to bear the entire burden alone.<sup>235</sup> Not able to pay, the player took the case to Swiss federal courts, arguing that the ban from playing football imposed on him for the failure to comply with the CAS award violated the fundamental principles of public policy.<sup>236</sup>

This discussion shows that FIFA's private legal order is effective in locking all involved actors as long as it does not impose excessive sanctions creating an end-game situation. In result, even though separate actors or even some interest groups may be interested in replacing it with an alternative, they do not have incentives to exit the system. This, however, does not mean that the existing system is efficient. Nevertheless,

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compliance with its decisions. "The expelled member may feel like he has nothing to lose by challenging the club." Bernstein, *The Diamond Industry*, *supra* note 10, at 129. See also Jack Hirshleifer, Anarchy and Its Breakdown, 103 J. Pol. Econ. 26, 30–33 (1995) (showing that a spontaneous order can be sustained when (1) the decisiveness of conflict is sufficiently low and (2) income inadequacy is not large enough to push some participants beyond the line of survival).

231. See *supra* notes 79–80 and accompanying text (describing the typical sanctions for breaching transfer rules that may be imposed on players, and clubs, respectively).

232. See *supra* note 140 and accompanying text (describing other possible sanctions that may be imposed on clubs).

233. See, e.g., *Matuzalem*, *supra* note 82, para. 179 (where the CAS award ordered Mr. Matuzalem, who breached his employment contract with FC Shakhtar Donetsk, to pay a fine approximating €12 million).

234. See TRANSFER REGULATIONS, *supra* note 4, art. 17.2.

235. See Parrish, *supra* note 192, at 264–65 (describing the saga of the *Matuzalem* case).

236. See *id.*

the absence of coordinated actions against the system by the involved actors in state courts is a strong suggestion that the private legal order provides something that is not offered by its state-provided alternatives. In the following section, we show the advantages of the private order as opposed to formal law.

## V. ADVANTAGES OF THE PRIVATE LEGAL ORDER

After describing FIFA's private legal order—explaining how it operates in practice and what are the incentives of the involved actors—we turn to the discussion of the reasons for the development of the private legal order. Although tempting, we do not put forward an efficiency hypothesis that explains FIFA's role in governing football-related behavior by its ability to increase the collective gains of the involved actors. To establish this we would need to show that FIFA's rules are not merely redistributing gains among different involved actors, but are creating an added value. Given many path dependencies, this is a task difficult to achieve.<sup>237</sup> Accordingly, we propose that the private legal order owes its existence to the shortcomings of the alternatives. Unlike other available governance modes, the private order has been able to offer advantages that others failed to provide.<sup>238</sup> Some of these advantages—such as harmonized rules, effective mechanisms of deterring their breach, and lower costs of enforcement—are commonly discussed in the literature on

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237. See *supra* notes 210–219 and accompanying text. Available evidence points to the direction that some rules have redistributive effect. For instance, the average employment contract length increased by about 6 months (or 20%) after the *Bosman* ruling, thus strengthening player security. See Bernd Frick, *The Football Players' Labor Market: Empirical Evidence from the Major European Leagues*, 54 SCOTTISH J. POL. ECON. 422, 437 (2007). The reality may be more complicated, as some rules may not merely affect the position of players versus clubs, but the outcomes may vary for different classes of players (i.e., depending on age, performance, nationality) and clubs (i.e., depending on wealth). When some of these nuances are taken into account, abolishing transfer rules is expected to increase player salaries, but players' gains are not sufficient to cover the losses suffered by clubs, thus reducing the joint surplus. See Marko Terviö, *Transfer Fee Regulations and Player Development*, 4 J. EUR. ECON. ASS'N 957, 969–72 (2006).

238. See, e.g., Bernstein, *The Cotton Industry*, *supra* note 10, at 1739 (arguing that the benefits of a private legal order stem from structures that improve on aspects of the public legal system); Prüfer, *supra* note 46, at 309 (noting that where non-contractibility or too high transaction costs make state governance no available option, private institutions can mitigate cooperation problems). See also *supra* notes 23–27 and accompanying text (discussing the efficiency of private orders).

private legal orders, whereas others—such as incentives for developing players—are specific to football.

*A. Substituting a Patchwork of National Laws with Common Rules  
Applicable across Countries*

One of the main reasons for the emergence of transnational private orders is the need to overcome fragmented regulatory regimes created by diverse state legislations. Indeed, actors often opt out of formal law and form private orders where their activities transcend national borders and are subject to competing regulatory regimes.<sup>239</sup> Football is not a special case. It would be complicated to establish level playing field if clubs were to compete under different rules. Under the current regime, although national football authorities are responsible for organizing local competitions, they act within the minimum requirements of FIFA and regional confederations. The opposite would be a myriad of national associations with their own rules. Accordingly, clubs and players in some countries would receive lighter regulation than in others. Likewise, similar behavior would be subject to different consequences in various jurisdictions. This would drive talented players and investments to clubs from a handful countries, thus effectively excluding others from competition.

Uniform rules cover not only employment matters, but also dates for organizing international fixtures and periods during which clubs are allowed to register new players. Uncoordinated dates for competitions may lead to clashes between different games forcing a player to choose between his/her national team and a club. Similarly, uniformity, or at least similarity, across different countries regarding player registration periods, also known as "transfer windows," allows player mobility without causing major disruptions to national tournaments.<sup>240</sup> Otherwise, major transfers from a club in the most crucial period of the season would disorganize the team and upset its tournament plans. Consequently, although it is up to member associations to define specific time-frames of registration periods, the current tendency is towards uniformity of periods among the different associations, not only within the same confederation, but also among

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239. See Fabrizio Cafaggi, *New Foundations of Transnational Private Regulation*, 38 J.L. & SOC'Y 20, 25 (2011); Steven L. Schwarcz, *Private Ordering*, 97 NW. U. L. REV. 319, 327–28 (2002).

240. FIFA COMMENTARY, *supra* note 77, art. 6, comment no. 2.



associations belonging to different confederations.<sup>241</sup> The first transfer window, which usually is open during the entire summer, is the main period and is used by the clubs to set up their squads for the forthcoming season.<sup>242</sup> The second shorter period opens in the winter, which approximately corresponds to the middle of the season, and is intended to provide clubs with an opportunity to adjust their squads or replace injured players.<sup>243</sup>

*B. Strengthening Predictability by the Means of Ensuring Stable Contractual Relations*

As discussed earlier, one of the stark contrasts of FIFA's private order from public laws is the private order's strong adherence to the principle of contractual stability in employment relations.<sup>244</sup> This makes a big difference in dealing with potential hardships in replacing players that depart unexpectedly in the middle of a season. Football has very specific needs that leverage the importance of human capital. Players are the main asset of a club, both from sporting and economic perspective.<sup>245</sup> Clubs invest considerable resources in intelligent squad building.<sup>246</sup> They organize extensive pre-season and mid-season training camps and develop playing schemes around players at their disposal. An entire game pattern can be built on the skills of specific players. Unexpected departures can thus leave gaps that are not easy to fill promptly.

Players not only contribute their sporting abilities to the team for which they play, but also are valuable assets in the balance sheet of a club.<sup>247</sup> Clubs typically pay significant amounts to sign their star players, they generate revenues by using these players' value for merchandising activities, and expect to recover their investments either by achieving successful sporting results with the help of players over long-term or by

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241. *Id.*

242. *Id.*

243. *Id.*

244. *See supra* notes 174–176 and accompanying text.

245. *See FC Pyunik, supra* note 107, para. 82.

246. *See* Murad Ahmed, *Big-Money: Beautiful Game Splashes Out £1bn*, FINANCIAL TIMES, Aug. 31, 2016, at 15 (reporting that during the three-month summer period in 2016 when clubs can sign players, English top-league football clubs broke all previous records spending more than £1 billion on new players); John Burn-Murdoch, *The Baseline*, FINANCIAL TIMES, Jan. 11, 2016 (noting that every football season billions of pounds change hands in transferring players among clubs).

247. *See FC Pyunik, supra* note 107, para. 82.

releasing players prior to the expiry of their contracts in exchange of hefty transfer fees.<sup>248</sup> The resulting economic reality in the world of football is that the services provided by a player are attributed an economic value and are traded and sought after on the market.<sup>249</sup> This reality pressured FIFA to offer legal protection for the rights of clubs to the services of players.<sup>250</sup>

For this reason, FIFA aims to reinforce contractual stability. The main purpose of art. 17 of the Transfer Regulations in the light of its interpretation by CAS is to deter unilateral contract terminations, whether by players or clubs.<sup>251</sup> Contractual stability increases certainty. Accordingly, a club that develops a player, or secures the services of a player by paying a large transfer fee, or builds its game around a group of players can plan for a longer term without a fear that its arrangements will be shattered by unexpected player exits. And if a player walks away prematurely, the club can expect compensation—an important source of income, specifically for clubs that do not have access to extensive broadcasting, commercial, and game attendance revenues.<sup>252</sup> This allows many small clubs to retain competitiveness by securing replacements for leaving players.<sup>253</sup>

Compensation itself may not be enough to deter violations of the established rules of behavior. Many private orders make opportunistic behavior extremely costly by spreading information about the reputation of their members.<sup>254</sup> When future dealings with the fellow members and non-economic benefits, like community status, are conditioned upon good reputation, deviations from the established rules do not only lead to costs associated with the compensation of actual damages, but also create additional opportunity costs.<sup>255</sup>

As discussed earlier, reputation plays insignificant role in football.<sup>256</sup> To compensate for this, FIFA rules, along with making the principle of contractual stability the cornerstone of employment relations in football, create incentives for the enforcement of the principle. First,

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248. *See id.*

249. *See Matuzalem, supra* note 82, para. 103.

250. *See* TRANSFER REGULATIONS, *supra* note 4, art. 17.

251. *See supra* note 89 and accompanying text.

252. *See Czarnota, supra* note 182, at 8–9.

253. *See id.* at 9.

254. *See* Richman, *supra* note 16, at 2335 (showing that many works on private orders uncovered similarly organized reputation mechanisms that induced certain mutually and socially beneficial behavior).

255. *See id.* at 2344–45.

256. *See supra* notes 148–153 and accompanying text.

additional sanctions are applied jointly to the more traditional punishment of damage compensation. Temporary bans imposed on players to practice football and on clubs to sign new players aim to promote compliance with the rules.<sup>257</sup> Their equivalents are not available in formal law and, accordingly, cannot be applied by public courts. Second, the rules promote compliance with the principle by allocating liability for its breach. The rule of strict liability, according to which a club that signs a player who has unilaterally terminated his/her contract is jointly and severally liable for the payment of a compensation, regardless of the club's involvement in inducing the breach, has a discouraging effect on clubs considering to offer employment to deviating players.<sup>258</sup> By limiting employment opportunities, this further strengthens contractual stability.

The rule of strict liability for "player poaching" places the responsibility for the risk of breaching a contract with the lowest cost risk avoider, so that this party has an incentive to limit the possible occurrence of those risks. A party with such an incentive will take the steps necessary to reduce the risk, thereby avoiding both the costs of the danger manifesting and saving another party, someone to whom avoidance would come at a higher price, from taking less efficient measures. Particularly, if a player from one club, club A, illegally signs with or transfers to another club, club B, it will be presumed that this latter club, club B, enticed the player to sign with them.<sup>259</sup> The club will thus be held liable. Proof of whether or not club B actually "poached" the player is unnecessary: in any dispute resolution, club B will be jointly and severally liable for the payment of a compensation.<sup>260</sup> This provides club B with an incentive not to illegally sign players from other teams: club B is perhaps the lowest cost risk avoider in the case of poaching because for regulatory bodies or club A to prevent the player to move illegally they would have to take far more extensive measures: club A might, in the extreme, have to monitor its each

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257. *See supra* notes 78–80 and accompanying text (describing sporting sanctions for the breach of transfer rules).

258. *See Parrish, supra* note 192, at 270–71.

259. *See* TRANSFER REGULATIONS, *supra* note 4, art. 17 (4).

260. *See id.* art. 17 (2). This rule is of an objective nature and does not require that the new club be considered as instigator of the player's breach. *See* Ascoli Calcio 1898 S.p.A. v. Papa Waigo N'diaye & Al Wahda Sports and Cultural Club, CAS 2014/A/3852, para. 110 (Jan. 2016). However, if club B can prove it had nothing to do with the transfer, it might still avoid liability. *See, e.g.,* Al Gharafa S.C. & Mark Bresciano v. Al Nasr S.C. & Fédération Internationale de Football Association (FIFA), CAS 2013/A/3411, para. 6 (May 2014). This is to ensure that the strict rule does not become too costly: clubs might be very hesitant to sign with any players if they were always suspect.

player's every move constantly. Club B just has to refrain from doing something. Furthermore, investigation into actual collusion can be expensive and hard. A rule of strict liability saves this cost, too.<sup>261</sup>

### *C. Giving Clubs Incentives to Invest in Training Young Players*

Football education, unlike general education, is rarely publicly funded and thus requires private investments. Football academies are often operated by or have links to clubs. Although players under the age of 18 are allowed to sign professional contracts, only a small proportion of talented youngsters are able to land such contracts.<sup>262</sup> Hence, many are amateurs without contracts that tie them to a specific club and are free to move, at least within the country of their residence.<sup>263</sup> The right of young players to move from football academies and less known clubs to leading football clubs distorts the incentives of the former to invest in the training of young players.

FIFA's Transfer Regulations include rules that financially motivate football academies and clubs, particularly in less developed and advancing countries, to invest in training young players. After a player signs his/her first professional contract and each time a player is transferred from one

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261. In a similar manner, and with similar incentives, does FIFA employ a rule of strict liability for match-fixing (if any club official has done so, the club will be held responsible if it cannot demonstrate innocence) and a rule holding clubs strictly liable for the behavior of their fans. *See* Public Joint-Stock Company "Football Club Metalist" v. Union des Associations Européennes de Football (UEFA) & PAOK FC, CAS 2013/A/3297, para. 3 (Nov. 2013) (for match-fixing); DISCIPLINARY CODE, *supra* note 4, art. 67.1 (for fans' misbehavior). The latter might seem a tall order, but clubs are perhaps often the party with the closest connection to their fans and the ones with the most information and understanding of their own fans, making them the lowest cost risk avoider, even if they cannot avoid everything.

262. *See* TRANSFER REGULATIONS, *supra* note 4, art. 18 (2). Contracts with players under the age of 18 may not be longer than three years—a limitation that aims to promote career development and progress of young players by preventing clubs from excessively tying in players at an age when their bargaining power is, as a rule, weak.

263. Only players over the age of 18 are eligible for international transfers. TRANSFER REGULATIONS, *supra* note 4, art. 19 (1). There are three exceptions to this rule: (1) where the player's parents, for reasons not linked to football, move to the country where the new club is located; (2) the player lives no further than 50 kilometers from a national border and the new club in the neighboring association is located within the same distance of that border; or (3) the transfer takes place within the European Union or the European Economic Area and the player's age is above 16. TRANSFER REGULATIONS, *supra* note 4, art. 19 (2). The last special geographic exception is, indeed, the result of the requirement to ensure the freedom of movement among EU member states. *See supra* notes 177–180 and accompanying text (briefing the *Bosman* case and its outcomes).

club to another until the end of the season of his/her 23rd birthday, clubs that contributed to the player's training are entitled to a training compensation.<sup>264</sup> The period between the age of 12 and 21 is normally considered as a player's training period.<sup>265</sup> On signing the first contract as a professional, the new club must pay training compensation to every club with which the player has previously been registered during the training period.<sup>266</sup> If the player changes the club again until the end of the season of his/her 23rd birthday, the last club has a right to receive training compensation for the period the player was effectively trained by that club.<sup>267</sup> Accordingly, every club where an athlete played during the age of 12 and 21 is eligible for a training compensation. However, it is possible for a player to complete his/her training period earlier.<sup>268</sup> A major indication of the completion of a player's training period is regular performance for a club's main team; other possible factors include the player's value at a club (for instance, reflected in the salary), public notoriety, or regular playing time in the national team.<sup>269</sup>

The rules for calculating training compensation aim to discourage clubs in developed countries from hiring talented young players in less developed countries only because the training costs in less developed countries are lower.<sup>270</sup> Therefore, training compensation a new rich club must pay a player's foreign training club is calculated based on the training costs in the country of the new club.<sup>271</sup> The training compensation is thus a reward, which gives football academies and clubs incentives to train players, rather than a mere refund of the costs of training.<sup>272</sup>

In addition to training compensation, former clubs of a transferring player have a right to receive solidarity contribution.<sup>273</sup> The purpose of this payment is similar—supporting the training of young players by clubs.<sup>274</sup> Yet, there are important differences. Unlike training

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264. TRANSFER REGULATIONS, *supra* note 4, art. 20. Training compensation is not due for a period after the completion of training.

265. *Id.* Annexe 4, art. 1 (1).

266. *Id.* Annexe 4, art. 3 (1).

267. *Id.*

268. *See id.* Annexe 4, art. 1 (1).

269. *See* Jean-Philippe Dubey, *The Jurisprudence of the CAS in Football Matters (Except Art. 17 RSTP)*, CAS BULL., no. 1, 2011, at 3, 8.

270. *See id.*

271. *See* TRANSFER REGULATIONS, *supra* note 4, Annexe 4, art. 5 (1).

272. *See* CD Nacional SAD v. CA Cerro, CAS 2015/A/3981, para. 81 (Nov. 2015).

273. *See* TRANSFER REGULATIONS, *supra* note 4, art. 21.

274. *See* Dubey, *supra* note 269, at 9.

compensation, which a club can get only once, solidarity contribution is paid to the player's all former clubs that have contributed to his/her training upon every transfer, regardless of the age. Total solidarity contribution equals 5% of a compensation (transfer fee or transfer amount) paid by the player's new club to the former club.<sup>275</sup> Thus, it is due only if a player moves from one club to another before the expiry of the existing contract.<sup>276</sup> Each club receives a specific proportion of the total solidarity contribution according to the length of a period it contributed to the training of a transferring player.<sup>277</sup>

In sum, the described rules reward smaller clubs financially and give them reasons to remain under the clout of the private order.

#### *D. Correcting Market Failures by Tailored Contracting Practices*

FIFA regulations and the practice of CAS respect the freedom of contract and enforce provisions agreed by the parties, first and foremost players and clubs, in their contracts.<sup>278</sup> When the preferred contracting practices in a given industry cannot be enforcement in state courts, membership in private associations that offer enforcement support increases in its attractiveness.<sup>279</sup> Legal counsel of clubs and players have designed various contractual mechanisms that correct market failures associated with cooperation. Because not all of these mechanisms can be

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275. See TRANSFER REGULATIONS, *supra* note 4, Annexe 5, art. 1.

276. See *id.* Since a player is free to transfer to any club after the expiry of an existing contract, such transfers, in the absence of compensation paid by the player's new club to his/her former club, do not trigger solidarity contributions.

277. Proportions of solidarity contribution due to the player's former training clubs are defined in Annexe 5 of the Transfer Regulations. Clubs involved in the early years of training of a player are entitled to 0.25% of the total solidarity contribution for each year of training, whereas each subsequent year of training confers a right to receive 0.10% of the total contribution. See TRANSFER REGULATIONS, *supra* note 4, Annexe 5, art. 1.

278. See, e.g., *Shakhtar Donetsk v. Ilson Pereira Dias Junior*, CAS 2010/O/2132, paras. 49–52 (Sep. 2011) (the employment contract between the Ukrainian club and Brazilian player Ilsonho stipulated that unless the club sold the player's rights during the first year of employment, the parties would extend the four-year contract by another year under the threat of a heavy fine equaling the player's one-year salary; the CAS enforced this clause as valid agreement between the player and the club).

279. See *Banner*, *supra* note 6, at 125–26 (arguing the New York Stock and Exchange Board's ability to enforce "time bargains," or what we would today call futures transactions, was a major incentive for securities traders to join the board; these transactions, which were common practice, could not be enforced in New York's courts until 1858).

enforced in state courts, the private legal order adds value to the transactions governed by its rules.

As an illustration, consider information asymmetries between clubs in the case of transferring players (it is not uncommon when players fail to adapt to the new environment or are not a good fit to the new club's squad) and contractual techniques for dealing with them. These failures are corrected by contractual sell-on or conditional transfer fee clauses, thus facilitating cooperation. Under a sell-on clause, if the new club transfers the player to a third club for a compensation exceeding the compensation paid to the player's old club, the old club is entitled to receive a portion of the transfer fee expressed as a percentage of the capital gain made by the new club.<sup>280</sup> In fact, the transfer fee is divided in two components: a fixed amount due at the time of the transfer of a player to a new club, and a variable, notional amount, payable to the old club in the event of a subsequent transfer of the player from the new club to a third club.<sup>281</sup> This increases the total transfer fee the old club receives for releasing its player. A similar mechanism is offered by contingent transfer fee clauses. Likewise, the transfer amount has two parts: a fixed amount and a contingent amount depending on the future performance of the transferred player in the new club or of the new club.<sup>282</sup> Not surprisingly, both clauses are not enforceable under traditional employment laws.

Loan agreements between clubs, which are supposed to meet the short-term needs of clubs to find replacement for injured players, can also be used to mitigate information asymmetries. According to a loan agreement, a player employed by one party plays for the other club during a specific period.<sup>283</sup> Often such contracts contain a buy option allowing

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280. *See, e.g.*, Sevilla FC v. RC Lens, CAS 2010/A/2098, paras. 4–5 (Nov. 2010) (in 2007, Racing Club de Lens agreed to release its player Seydou Keita to Sevilla Fútbol Club SAD for the transfer fee of €4 million; according to the transfer agreement, in case of the subsequent transfer of the player from Sevilla FC to another club, RC Lens had to receive 10% of the capital gain between €4 million and €8 million and 15% beyond €8 million).

281. *See id.* para. 49.

282. *See, e.g.*, Agreement for Transfer of Registration of Mesut Özil between Real Madrid Club de Fútbol and The Arsenal Football Club PLC, FOOTBALL LEAKS (Sep. 1, 2013), *available at* <https://footballleaks2015.wordpress.com> (in addition to the fixed transfer amount of €44 million, the old club was entitled to a contingent transfer compensation in the maximum amount of €6 million depending on the qualification of the new club to play in the UEFA Champions League, a prestigious club tournament in Europe).

283. *See supra* note 95 and accompanying text.

the borrowing club to sign the player permanently if satisfied with the player's contribution to its squad.<sup>284</sup>

Another example is the use of liquidated damages clauses or penalties. When it comes to the enforcement of these clauses, national legislations vary significantly. Penalty clauses are invalid in some jurisdictions, whereas courts may reduce the contractually agreed amount of a penalty in others.<sup>285</sup> The amount of initially agreed liquidated damages, similarly, cannot be discretionary and must be a reasonable estimation of the expected damages.<sup>286</sup> Under FIFA's Transfer Regulations, meanwhile, contractual liquidated damages clauses have clear priority over other rules and cannot be reduced by a third-party decision-maker.<sup>287</sup>

FIFA has designed effective mechanisms for enforcing the described contracting practices.<sup>288</sup> Recourse to ordinary state courts will undermine these practices because most cannot be enforced under national legislations. When the private group's enforcement mechanisms are superior to the enforcement by state courts, public involvement reduces the group's ability to regulate its members.<sup>289</sup> For example, when a state court rejects to enforce a contract valid under FIFA rules, both the rules and the private enforcement mechanisms become weaker. Differing approaches of courts from various jurisdictions toward the tailored contracting practices of football-related actors result in increased uncertainty, thereby reinforcing speculative incentives to litigate in courts instead of using the internal dispute resolution bodies. Not surprisingly, FIFA has concentrated its efforts on the allocation of institutional

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284. For example, FC Bayern Munich exercised an option to sign Kingsley Coman, a talented French youngster, following the player's successful stint in the club during the first year of his two-year loan move from Juventus F.C. See Rhodri Cannon, *Bayern Munich Set to Activate Option to Buy Kingsley Coman, Reveals Karl-Heinz Rummenigge*, MAILONLINE, Aug. 4, 2016. A.S. Roma has been pursuing the policy of signing players on temporary loan agreements and activating buy options if the players meet the club's expectations. See, e.g., Oliver Todd, *Mo Salah and Edin Dzeko Bag Permanent Roma Deals after Italians Activate Clauses*, MAILONLINE, Oct. 3, 2015.

285. See Ugo Mattei, *Comparative Law and Economics of Penalty Clauses in Contracts*, 43 AM. J. COMP. L. 427, 433, 435–38 (1995) (describing the common law ban on penalty clauses and the approaches of legislators and courts in modern civil law countries).

286. See *id.* at 435–36.

287. See Vladimir Mukhanov v. FC Aktobe, CAS 2014/A/3640 (Jan. 2014).

288. See *supra* Part III.C.

289. See Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. CHI. L. REV. 133, 156, 185 (1996).



responsibility for resolving football-related disputes.<sup>290</sup> Its rules discourage bringing matters governed by the private order into the realm of state courts: should there be contractual disputes involving clubs, players, or other actors, they are subject to exclusive adjudication by FIFA's (or its member association's) internal dispute resolution bodies and by the specialized CAS.

### *E. Arbitration*

One more reason FIFA may be attractive for its members and other football-related actors is the arbitration system. Disputes are solved by highly-specialized third-party decision-makers—national arbitration institutes formed by domestic football associations or CAS. Narrow specialization of arbiters increases the quality of dispute resolution without the expense of increased time and costs of considering cases. This leads to two major outcomes. First, inside information available to arbitrators specialized on football-related disputes expands the ability of the involved actors to contract over terms that would be difficult to explain and verify to generalist courts.<sup>291</sup> CAS, for example, has less stringent rules on evidence,<sup>292</sup> which adds to the verifiable knowledge of parties. As arbitrators are bound first by FIFA rules and CAS rules, they also have greater discretion to take into account matters that are peculiar to sport, and can be more knowledgeable concerning the needs of the parties to a dispute, for example, of the impact a breach of contract is likely to have on either side in a specific case.<sup>293</sup> Second, specialized arbitration by one decision-making body instead of many national courts increases certainty by making the applicable rules more predictable.<sup>294</sup>

In addition, specialization also reduces the costs of dispute resolution: arbitrators normally deliver decisions in periods that are much shorter than the periods required from state courts in many countries to consider similar cases; arbitral procedures are also simpler and less formal.<sup>295</sup> FIFA's internal dispute resolution bodies and CAS are said to

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290. *See supra* Part IV.B (describing the mechanisms employed by FIFA promoting the exclusive use of the private legal order).

291. *See generally supra* note 21.

292. *See, e.g.*, Samuel Inkoom v. Andrew Evans & Fédération Internationale de Football Association (FIFA), CAS 2015/A/3961, paras. 78–79 (Dec. 2015).

293. *See* Reilly, *supra* note 120, at 65–66.

294. *See generally* Richman, *supra* note 16, at 2341.

295. *See* Charny, *supra* note 21, at 410.

deliver their judgments faster than an ordinary judicial proceeding could do, which, given the time-pressure on resolution, particularly in the field of sport, is seen as an advantage.<sup>296</sup> Often, resolution is needed as soon as possible for athletes and clubs to know whether they can, for example, compete in the next tournament.<sup>297</sup> To further improve this, CAS sometimes expedites proceedings and declares the operational part of an award well before publishing the full decision, so that all parties may continue their normal activities as soon as possible.<sup>298</sup> Lastly, when it comes to disputes between parties with different nationalities, FIFA's internal dispute resolution bodies and CAS act as impartial third-party decision-makers that are not biased towards any of the disputing parties.<sup>299</sup>

Normally, arbitration comes with a downside. Adjudication in state courts is a public good that supplies the market with interpretations of laws.<sup>300</sup> Under widespread arbitration, which is commonly conducted in secret, case law is underprovided.<sup>301</sup> The situation is different in close-knit groups with their own "in-house" dispute resolution systems, because such groups can share the costs of precedents among all group members, thereby creating incentives for arbitrators to produce written and publicly-available opinions.<sup>302</sup> Indeed, CAS publishes some, but not all, of its awards, summarizing some others in the CAS Bulletin, the official publication of the court, and neglecting the rest.<sup>303</sup> The latter seems to be rather in the interest of expediency than privacy of the parties. Nevertheless, sport lawyers, as members of a close-knit group, are likely to be aware about the outcomes and reasoning of the awards by the means

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296. *See* Reilly, *supra* note 120, at 71.

297. *See* Blackshaw, *supra* note 196, at 14.

298. *See id.*

299. *See generally* DIXIT, *supra* note 15, at 29 (explaining that international arbitration can be used in international transactions to reduce the risks of favored treatment of parties by their domestic courts).

300. *See* Landes & Posner, *supra* note 163, at 236.

301. *See id.* at 248 (explaining that arbitrators, which are paid by private parties to resolve their disputes, have no incentives to produce precedents that would provide guidance to future parties by incurring additional unpaid costs).

302. *See id.* at 248–49.

303. The database of CAS awards is available at <http://www.tas-cas.org/en/jurisprudence/archive.html>. As of December 2016, CAS made about 330 football-related decisions publicly available. CAS Bulletin is published twice a year and is available at <http://www.tas-cas.org/en/bulletin/cas-bulletin.html>.

of social connections and gossips.<sup>304</sup> Hence, even unpublished awards do not decrease the public good effect of adjudication.

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In summary, FIFA's private order offers its incumbents advantages that alternatives cannot deliver. Some of them, such as increased certainty, are in the interests of all involved actors, whereas others, such as commitment to enforce contractual practices or training compensation awards, are more preferred by sophisticated actors (i.e. clubs and prominent footballers) and small clubs, respectively. This, though not allowing to state plainly that the private order is maximizing the welfare of all involved actors, also does not justify arguments for abandoning the current system in favor of state laws. To the contrary, the arguments demonstrate the private order's value.

#### VI. FACTORS THAT MADE THE RISE OF THE PRIVATE LEGAL ORDER FEASIBLE

Many other industries, where, similar to football, employee-specific capital is important, suffer from the application of rigid formal law that cannot be tailored to the needs of the industry. And although some have succeeded in obtaining the privilege of a closed group where non-members are excluded from participation in the industry—consider, for instance, laws requiring practicing lawyers to join a local bar association—they have fallen short of establishing own rules of conduct to replace formal state-made law. This is where these industries and their membership associations differ from FIFA. The question then is why FIFA has been successful in creating its own private legal system, whereas others, such as bar associations (or associations of law firms), failed or even did not try to establish something equivalent?

In brief, this can be explained by the combination of three factors. First, FIFA started as a small network to organize international competitions, develop commonly-shared fixture calendar, and harmonize the rules of the game across borders. This network was not costly to manage. Afterwards, FIFA was able to build on this foundation by adding

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304. See Bernstein, *The Diamond Industry*, *supra* note 10, at 151 (making a similar argument for the members of the Diamond Dealers Club when it comes to "new and unusual cases").

more powers. Second, all this was made possible by the reluctance of states to intervene in regulating sports in general and football in particular. Hence, supported by or benefitting from the special treatment of sports by nation states, FIFA filled the regulatory gap and strengthened its status as a private regulator. Third, in order to attract public interest football needed its own rules and regulations more than many other sectors. As a result, the new order has departed from traditional laws governing other fields in many ways. The remainder of this section discusses each factor in more details.

Aviram's theory for the formation of private legal orders explains that successful private legal systems do not form "out of the blue"; they build upon an existing basis, "typically by regulating norms that are not very costly to enforce" and then keep on growing and taking over more expensive norms as they mature and become ready to enforce those.<sup>305</sup> The more they develop, the more benefits there are to members of the network and the more incentives to belong to it.<sup>306</sup> Thus the network will be able to take the enforcement of yet costlier norms on board.<sup>307</sup>

FIFA's development fits into this framework. The organization stems from gentlemen's agreements that filled the void of international sports regulation then in place, and that benefited from a first-mover advantage.<sup>308</sup> Since there was little previous regulation in place, setting up a new organization provided membership benefits that had not been available before. The role of the new body was to oversee international games and competitions with the participation of its handful members' national teams. The original founders of FIFA were a few core people driven by a shared motivation for establishing the new organization.<sup>309</sup>

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305. See Amitai Aviram, *A Paradox of Spontaneous Formation: The Evolution of Private Legal Systems*, 22 YALE L. & POL'Y REV. 1, 14, 20–23 (2004) [hereinafter *A Paradox*]; Amitai Aviram, *Path Dependence in the Development of Private Ordering*, 2014 MICH. ST. L. REV. 29, 48–49, 50–53 (2014).

306. See Aviram, *A Paradox*, *supra* note 305, at 21–22.

307. See *id.*

308. Henk Eric Meier & Borja García, *Protecting Private Transnational Authority Against Public Intervention: FIFA's Power over National Governments*, 93 PUB. ADMIN'N 890, 893–94 (2015).

309. See Alan Tomlinson, *FIFA and the Men Who Made It*, SOCCER & SOC'Y, no. 1, 2000, at 55–59. The small number of member associations and close ties between them fostered decision-making and enforcement. Even nowadays FIFA remains at high levels a network of people who know one another fairly well and are willing to do one another favors. See Guillermo Jorge, *Fixing FIFA: The Experience of the Independent Governance Committee*, 21 SW. J. INT'L L. 165, 167 (2014).

This, coupled with the obvious need to organize international fixtures, provided incentives for complying with FIFA's rulings.

After World War I, FIFA strengthened its role by staging World Cups—the extremely popular and lucrative world championships for men's national teams of different countries.<sup>310</sup> Since only members were eligible for participation, FIFA membership increased in its appeal for both the incumbent and prospective members. The success of these tournaments meant that FIFA could make use of an already existing network, thus overcoming initial collective action problems, to broaden its rule-making powers. As it grew, more and more countries saw network benefits in joining. FIFA was thus able to regulate more exclusively and add the control mechanism, i.e. the ability to control interactions within the field, to its toolbox. Soon enough the network benefits its system provided—such as the rights to the games, the right to participate in tournaments, the rights of countries to host the tournaments, and even the notion that having one's team "recognized" meant having one's sovereignty recognized<sup>311</sup>—combined with the negative consequences of staying outside of the unrivalled network led to FIFA's transformation from a body responsible for a mere organization of international tournaments into a full-blown membership association regulating almost all aspects of organized football.

FIFA then made sure to keep its regulatory monopoly position in the field. To fend off state intervention, FIFA invoked the doctrine of "autonomy of sport",<sup>312</sup> to discourage those within the network to turn to formal courts outside of the private legal order, FIFA revoked the network benefits of those who violated the private legal rules.<sup>313</sup> Now that FIFA is thus embedded, its network benefits are inescapable and it is, thanks to its established structure, presumably still less costly than the alternative solutions.

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310. The inaugural FIFA World Cup was held in Uruguay in 1930 with the participation of thirteen national teams. Earlier attempts to organize an international competition among national teams were not successful. See Tomlinson, *supra* note 309, at 57. Not only has the World Cup become one of the biggest media spectacles, but participation in it is a big boost to a national pride and, for some, even a demonstration of a nation's power and success. Not surprisingly, it is considered the "greatest asset" of FIFA. *Id.* at 55. See also Frances Robinson & Gabriele Steinhauser, *Flemings Battle Walloons in Belgium, but They'll Always Have the World Cup*, WALL ST. J., Jun. 26, 2014.

311. See Meier & García, *supra* note 308, at 894.

312. See Meier & García, *supra* note 308, at 894–95.

313. See *supra* Part IV.B.

This was made possible by the reluctance of states to intervene in the governance of football. Just 40 years ago, FIFA was largely focused on organizing the game across the globe; it was a small gentlemen's club with a staff of 11, far from politics, which produced little cash.<sup>314</sup> Since then, it has evolved into a powerful organization generating billions of dollars in annual revenues through sales of media and marketing rights; now it employs hundreds.<sup>315</sup> In a similar way evolved the attention of state-related bodies to football. Pure sporting interests that had nothing to do with economic activity were exempted from formal regulation.<sup>316</sup> Accordingly, sports were not affected by state intervention and developed independently. But gradually, along with the increasing commercial dimension, state intervention has grown.<sup>317</sup> The period of independence allowed FIFA to create its private legal order that co-existed along with formal law, notwithstanding many conflicts. Later, it became so strong and vested that new interest from state-related bodies had only limited effect on it.<sup>318</sup>

The absence of state interest to intervene in the organization of sports, while explaining the ability of FIFA to develop its own legal order, does not answer the question why football needed alternative governance rules. The history of the development of player transfer rules sheds light on this. In brief, football's interest in securing contractual stability is not unique, but the stakes were much higher in football than in most of other fields.<sup>319</sup> Combined with an already existing network and green light to

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314. See HEIDI BLAKE & JONATHAN CALVERT, *THE UGLY GAME: THE QATARI PLOT TO BUY THE WORLD CUP 17* (2016); ANDREW JENNINGS, *FOUL! THE SECRET WORLD OF FIFA: BRIBES, VOTE RIGGING AND TICKET SCANDALS* 9, 19–21 (2008).

315. See JENNINGS, *supra* note 314, at 49, 52. See also Matthew Futterman, Aruna Viswanatha, & Christopher M. Matthews, *FIFA Corruption Allegations Reach Into Soccer's Highest Levels*, WALL ST. J., May 27, 2015.

316. See Richard Parrish, *Football's Place in the Single European Market*, SOCCER & SOC'Y, no. 1, 2002, at 14; Van Rompuy, *supra* note 186, at 180.

317. See Parrish, *supra* note 316, at 14; Van Rompuy, *supra* note 186, at 180.

318. See, e.g., Parrish, *supra* note 316, at 5–8 (describing post-*Bosman* negotiations between football governing bodies and the European Commission which resulted in a compromise reform of player transfer rules—a settlement that "was widely interpreted as a favorable" for FIFA and UEFA).

319. Contrast the following narrative with the evolution of employee mobility in investment banking. As any intensive human knowledge-based sector, investment banks are interested in maintaining stable employment: if employee turnover is weak, banks can invest in the development of industry-specific skills and, in addition, do not need to fear information leaks and client losses associated with the departure of key employees. Historically, the traditional investment bank's partnership structure weakened incentives for employee mobility, but this has changed during the last decades. See Morrison & Wilhelm, *supra* note 30, at 397–99 (explaining

self-organize with minimum public intervention, this led to the development of the order as we know it now.

Modern player transfer rules originated in England more than 100 years ago. The northern clubs—Blackburn Rovers F.C., Aston Villa F.C., and Notts County F.C.—dominated English football in the late 19th century.<sup>320</sup> Although professional football officially was not recognized, the big clubs had for some time been in a position to pay their players or offer other benefits.<sup>321</sup> The Football Association eventually embraced the reality and recognized professional players, but, in exchange, introduced transfer rules, according to which professionals had to register with their clubs every year and could move to other club only at the end of each season; old clubs could not prevent such moves.<sup>322</sup> In other words, clubs could commit players maximum for one year and had to renew their contracts annually. Accordingly, rich clubs from large cities could attract the best talent from clubs located in smaller towns by offering higher salaries.<sup>323</sup> For example, when Nottingham Forest F.C., then a small regional club, tried to obtain an injunction preventing one of its players from moving to Blackburn Rovers, both the first instance and the appeal courts refused to offer support.<sup>324</sup>

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that opaque individual performances of investment bankers discouraged competitors from soliciting laterals, which resulted in bankers spending their entire careers in one bank; the development of measures of individual performance and the following rise of "star" culture have changed this). Accordingly, investment banks lacked incentives for lobbying special employment laws. They have more reasons to do this nowadays and have relied on non-compete provisions to limit employee mobility. The effectiveness of these clauses though, given hostility of courts in many jurisdictions, is dubious. *See* Sujeet Indap & James Fontanella-Khan, *Battle of the Bankers*, FINANCIAL TIMES, Jan. 25, 2016 (describing a lawsuit filed by Perella Weinberg Partners L.P., a boutique M&A firm, against its former four bankers alleging their intention to "steal the practice group that PWP had spent millions of dollars and over seven years of effort to develop." This rare public move put the long-established practice of including non-solicitation and non-competition clauses into the bankers' employment contracts under judicial scrutiny, thus threatening to undermine the industry's traditional way of functioning. As explained by one attorney, even if the legality of these clauses is controversial, they are an effective tool to discourage employee mobility because "[t]he simple threat of litigation around these acts as an instrument to inflict pain on counter-parties with fewer resources.").

320. Half the 12 teams competing in the English Football League's 1888–89 inaugural season were from the north and half from the midlands; none was from south of Birmingham. Long after, football remained "a game of industrial England." *Football Geography: A Country of Two Halves*, ECONOMIST, Aug. 13, 2016.

321. *See* David McArdle, *Ignoring the Inevitable: Reflections on the Intervention of the English Courts in Football's Contract Disputes*, 2 EUR. SPORTS MGMT Q. 264, 265 (2002).

322. *See id.* at 265–66.

323. *See id.* at 267.

324. *See id.* at 266 (describing the facts of *Radford v. Campbell* decided in 1890).

After the English Football League was expanded to include smaller clubs, the football authorities decided to remove the imbalance between big and small clubs in order to promote competition with the resulting excitement and unpredictability.<sup>325</sup> A tournament dominated constantly by a handful of teams would hardly attract nation-wide interest. In the absence of support from the judiciary, the football authorities had to take action themselves: from the start of the 1893/94 season, the new transfer rules required each player to be registered with a club and once he had registered, he could not play for any other club without the permission of the old club.<sup>326</sup> This was the precursor of the pre-*Bosman* system of transfer rules.

This story shows how important competition in football is. Only at first glance football teams are competing with each other. When it comes to attracting audiences, football is in a huge competition. Its rivals are not only other sporting events, but the entertainment industry in general.<sup>327</sup> As a result, ensuring strong competition among the teams is crucial for maintaining and increasing the beautiful game's audience. In other industries, the competition, as a rule, is internal. For example, lawyers and law firms traditionally have been competing with other lawyers and law firms, rather than with bankers or auditors, or even with more remote specialties, such as journalists. Even though contractual stability would benefit law firms, the stakes are thus lower. Clients can afford having a stable list of top law firms or the Big Four auditing firms, but such consistency would most likely endanger the position of football as one of the most popular entertainments. This can explain why football authorities are so interested in creating conditions that would keep the game competitive. Since such conditions are not offered by public legal systems, football authorities step in by developing their own rules of the game.

## VII. CONCLUSION

States and supra-national organizations are far from being the sole suppliers of behavior-governing institutions. Scholars have documented

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325. *See id.* at 267.

326. *See id.*

327. For the review of literature arguing in favor and against viewing sports as operating in a larger entertainment market *see* Nathaniel Grow, *Regulating Professional Sports Leagues*, 72 WASH. & LEE L. REV. 573, footnote 2 (2015).



numerous examples where non-state actors develop institutions that support order. These privately-created legal orders often function successfully in the shadow of or without state-made laws. FIFA is yet another example of a private actor that has established its own rules and regulations and has designed sophisticated dispute resolution and enforcement systems for these rules. This private legal order has succeeded in governing the behavior of the involved actors by keeping them away from regular courts. The reason, as we show, is the ability of the order to offer what other governance modes, including state-backed public orders, could not.

One implication of this study is that FIFAGate, a recent money laundering and fraud conspiracy case under investigation by both the United States Department of Justice and the Swiss authorities, should not become a pretext for criticizing everything related to FIFA. FIFA's administrative structure, certainly, needs reforms that will limit future mismanagement and corruption risks.<sup>328</sup> But the scandal and the resulting reforms do not necessarily mandate changes in the entire private legal order. So far, the reform calls have focused on the administrative side of FIFA: reducing corruption risks by empowering professional staff, rather than top FIFA officials, to take commercial decisions; strengthening gender diversity among top officials; limiting maximum terms of their service, including for the FIFA's president; and increasing transparency.<sup>329</sup> The rules that regulate relations among different actors involved in football-related activities are not in the limelight. Nevertheless, further calls to increase state intervention in regulating football-related activities, which can be leveraged by corruption allegations, cannot be ruled out. Moreover, even in the absence of such calls, a shift in exogenous conditions—such as negative public perception of FIFA and continuous external threats—may weaken the self-enforcing mechanisms of the private legal order, thereby leading to its demise. This study implies that, unless a better alternative that meets the specific needs of the various

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328. See, e.g., Jorge, *supra* note 309, at 165–66 (arguing that FIFA combines enormous economic and social influence with very little constraints imposed by its "rather amateur governance structure").

329. See, e.g., Ralph Atkins, *European Football Official to Head FIFA World Governing Body*, FINANCIAL TIMES, Feb. 27, 2016; Keir Radnedge, *FIFA Faces Uncertain Future as Carrard Unveils Reforms*, WORLD SOCCER, Jan. 2016, at 18–19; Keir Radnedge, *Infantino, the Man*, WORLD SOCCER, Apr. 2016, at 14; Joshua Robinson, *FIFA Elects Gianni Infantino to Succeed Sepp Blatter as President*, WALL ST. J., Feb. 27, 2016.

groups of involved actors is found, there should be limits to external intervention in football-related matters.

Efforts should instead focus on identifying and dealing with some inefficiencies in the FIFA's private order. It is here that state involvement may help private orders to improve. One instance of such inefficiency may be the well-known practice of including excessively high buyout clauses, at the insistence of clubs, in contracts with athletes.<sup>330</sup> This practice, effective in discouraging early contract termination though it may be, comes at the cost of deterring efficient breaches of contracts.<sup>331</sup> Thus, FIFA's internal dispute resolution bodies and CAS may consider developing a practice of enforcing contractually agreed buyout clauses only if they reflect the real replacement value of the concerned player. Note that in jurisdictions where liquidated damages clauses are enforceable by state courts, the pre-agreed amount of damage cannot be arbitrary; rather, it has to be the expected approximation of a possible damage.<sup>332</sup> Such practice, at least at the beginning, may give the parties stimulus for speculative litigation, but along with the developing "case law" on the appropriate amounts of buyout clauses the incentives of the parties for filing speculative complaints with decision-making bodies will be corrected.

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330. *See, e.g., Matuzalem, supra* note 82, para. 36 ("it is a known fact that these [buyout] amounts are always set at a level far higher than the effective value of the player concerned"). *See also supra* note 110 (reporting the amount of the compensation for unilateral termination of the contract agreed by Real Madrid Club de Fútbol and its Croatian player Luka Modric).

331. For an argument on efficient breaches of contracts *see* RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 149–51 (8th ed. 2011); Charles J. Goetz & Robert E. Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 *COLUM. L. REV.* 554, 561–62 (1977).

332. *See supra* note 286.