From *Eastham* to *Bernard* – An Overview of the Development of Civil Jurisprudence on Transfer and Training Compensation

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1. INTRODUCTION

In the following article, the author provides an overview of the jurisprudence of civil courts regarding sports associations' rules on transfer and training compensation. Based on this overview, the author establishes that sports associations generally operate in an area of tension between their freedom of association and mandatory civil law when issuing rules about transfer and training compensation.

In this respect, the author first demonstrates that sports associations' freedom of association, particularly when issuing rules on transfer and training compensation, was almost unlimited until close to the end of the 20th century. In fact, until the 1960s, sports-related disputes were in general considered to be non-judiciable. Therefore, the prevailing opinion was that civil courts lacked the authority to decide sports-related disputes[1]. Consequently, sports associations were not subject to any restriction on their freedom of association at that time and did not have to respect any limit when issuing rules on the transfer of players between clubs and on transfer and training compensation.

Secondly, the author shows that above all in the 1990s and the first few years of the following decade, rules on transfer and training compensation were generally considered invalid by civil courts based on totally unrealistic conditions. Sports associations' freedom of association when issuing rules on transfer and training compensation was thus basically inexistent at that time.

Finally, the author demonstrates that, nowadays, it is established that sports associations' freedom of association when issuing rules on transfer and training compensation exists but is only effective in as far as the rules issued do not conflict with mandatory norms of civil law. Consequently, sports associations' rules on transfer and training compensation need to comply with mandatory civil law. In this regard, sports associations' freedom of association is limited in particular by players' right of personality. For example, in view of his right of personality, a young player should not be limited by rules on transfer and training

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[1] BRUCE S. MEYER/ ARON N. WISE, International Sports Law and Business, Vol. 2, Den Haag 1997, 1421 f.

compensation beyond a certain degree when seeking employment, but in reality, rules on transfer and training compensation may prompt a club to refrain from signing this young player and thus infringe his right of personality. Further restrictions on sports associations' freedom of association may also arise from competition law.

In conclusion, if a sports association wishes to issue or apply rules on transfer and training compensation today, its possibilities are limited to a certain degree by mandatory civil law. In order to define those limits and the conditions under which civil courts may now accept sports associations' rules on transfer and training compensation, reference is made hereinafter to the most important decisions of civil courts on such rules.

2. THE EASTHAM CASE (WALES & ENGLAND 1963)

Until the 1960s, a so-called retain-and-transfer system was applied in English football. According to the retention rules, a club could renew expiring employment contracts with its players unilaterally and repeatedly without any time limit. Thus, a club could continually prevent its players from moving to another club. At the same time, the salary conditions of the renewed employment contract could be worse than the conditions of the previous contract. The application of these retention rules could be avoided only if a committee of the English Football Association considered the salary conditions to be inappropriate. Based on the transfer rules, a player could only be transferred if his current and his future club reached an agreement on the financial compensation for the transfer. The player himself had basically no influence on his transfer. He could only challenge the amount of compensation requested by his club before a body of the English Football League. A player could thus move to a new club only if his club did not apply its right of retention or transfer, if the promised salary was considered inappropriate, or if the requested transfer compensation was excessive[2].

In a judgement dated 4 July 1963, the Chancery Division of the High Court of Wales and England considered that the retention rules were a restraint of trade, as they limited the right of football players to perform their profession even if they were no longer bound to a club by an employment contract[3]. The court also considered the transfer rules to be a restraint of trade, but decided that such restriction was less serious than the restraint produced by the retention rules, as a player had the possibility to either challenge the amount of the requested transfer sum or to move to a club outside the English Football League, in which case no compensation was due[4]. With respect to the question of whether such interference in players' rights was justified, the court considered on the one hand that the rules in question were based on a legitimate public interest, i.e. the solidarity and the principle of equal opportunity among clubs, but on the other that the requirement of proportionality was not fulfilled, as the degree of the limitation on the players' right to seek employment, particularly the clubs' rights to their players even after the expiry of their employment contract, was neither necessary nor suitable to uphold the existing legitimate public interest. The court therefore concluded that the restraint of trade resulting from the retain-and-transfer-system was unjustified[5].

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[2] BRUCE S. MEYER/ ARON N. WISE,, International Sports Law and Business, Vol. 2, Den Haag 1997, 1484 f.; ANDREW CAIGER/JOHN O'LEARY, Contract Stability in English Professional Football, in: ANDREW CAIGER/SIMON GARDINER, Professional Sport in the European Union: Regulation and Re-regulation, Den Haag 2000, 200.

[3] Chancery Division of the High Court of England and Wales, judgement of 4 July 1963, *Eastham v Newcastle United* [1964] Ch. 413, 430 f.

[4] Ibid., 431.

[5] Ibid., 433 ff.

The retain-and-transfer rules described above are a typical example of the various transfer systems that existed in national and international sports associations until close to the end of the 20th century. The Eastham judgement was the first judgement of a civil court that considered such transfer rules to be illegal[6]. The message of the Eastham judgement was unambiguous: any rights of a club to retain a player upon expiry of his employment contract are unjustified. In all cases, a player shall be entitled to move to another club and to immediately play for his new club in official matches if the employment contract with his previous club has expired. The interest of players to seek employment and to work, i.e. to play, is placed above any possible legitimate public interest or interest of the clubs. However, the decision of the Chancery Division of the High Court of Wales and England did not address whether and under which conditions it was justifiable for a sports association to enact a rule stipulating that financial compensation was payable in the case of an out-of-contract player moving to a new club when the compensation payment was not combined with a retention right of the player's former club.

3. The Perroud Case (Switzerland 1976) and the Decision of the Cantonal Civil Court of Basel (Switzerland 1977)

In the 1970s, the regulations of the Swiss Professional Football League stipulated that a professional footballer could leave his club and register as a professional for another club in the same league only if he were given a release letter (*lettre de sortie*) by his club. The issuance or refusal of the release letter was at the club's discretion and did not depend on whether the player's employment contract was still valid, had already expired, or had been terminated by mutual agreement or unilaterally by one of the parties with or without just cause. Without a release letter, a player could register with another club in the Swiss Professional Football League only after a retention period of two years, beginning with the end of the season of his last match for his club[7].

Before the Perroud case, sports-related disputes were generally considered by Swiss courts to be non-judiciable. For example, in 1956, a Swiss civil court rejected a club's appeal against a points deduction pronounced by a football association committee, considering that the dispute was non-judiciable due to its relation with sport[8]. However, based on the distinction between the rules of a game and the rules of law, established and published by Kummer[9] in 1973, Swiss courts in the 1970s started to consider sports-related disputes in which rules of law were to be applied as judiciable[10].

In its decision in the Perroud case of 1976, the Swiss federal tribunal considered a dispute about the validity of the Swiss Professional Football League's rules such as outlined above as a dispute about rules of law and therefore judiciable, and decided that these rules infringed three aspects of mandatory civil law:

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[6] Steve Greenfield, The Ties that Bind: Charting Contemporary Sporting Contractual Relations, in: Steve Greenfield/Guy Osborn, Law and Sport in Contemporary Society, London 2000, 134 ff.

[7] Swiss Federal Tribunal, BGE 102 II 211, 213, available at http://www.bger.ch/index/juridiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-leitentscheide1954.htm.

[8] Court of Cassation of Zurich, judgement of 18 June 1956, in: Schweizerische Juristen-Zeitung SJZ 53 (1957) p. 152 ff.; for further comparable jurisprudence cf. Max Kummer, Spielregel und Rechtsregel, Bern 1973, 80 f.

[9] Max Kummer, Spielregel und Rechtsregel, Bern 1973, 45.

[10] For an overview on the jurisprudence after the publication of the distinction by Max Kummer, cf. Bruce S. Meyer/ Aron N. Wise, International Sports Law and Business, Vol. 2, Den Haag 1997, 1422 ff.

- The rules of the Swiss Professional Football League were understood as a restraint of competition (art. 340 ff. of the Swiss Code of Obligations[11]). However, as these rules did not constitute a valid restraint of competition such as stipulated in the Swiss Code of Obligations, they were considered null[12].
- According to the applicable rules, if a professional player under contract with a club wanted to avoid a retention period of two years, he had to accept any offer of renewal of his employment contract. In view thereof, the federal tribunal decided that the rules in question were null[13] also because they illegally restricted the players' right of personality, as protected by art. 27 par. 2 of the Swiss Civil Code[14], particularly players' right to carry out their sports activity[15].
- Moreover, the respective rules were considered by the federal tribunal to interfere with Swiss anti-trust law without justification[16].

One year later, in 1977, the cantonal civil court of Basel, Switzerland, had to consider whether a football club could, based on the regulations of the association it was affiliated to, validly refuse to release an amateur player who wished to play as an amateur for another club, for a retention period of one year. As in the Perroud case, the court decided that the regulations invoked violated the players' right of personality as protected by art. 27 par. 2 of the Swiss Civil Code, because this provision protected not only economic aspects of the personality, but the personality in general. According to the court, the rules challenged in the case seriously affected amateur players' right of personality, particularly their right to play association football without remuneration[17]. Moreover, the rules in question also constituted an indirect restriction of the right to withdraw from an association and thus conflicted with art. 70 par. 2 of the Swiss Civil Code[18].

In the Eastham case and the two aforementioned Swiss cases, the violation of the players' rights essentially resulted from the retention rights. The main difference between the rules challenged was that the rules examined in the Eastham case stipulated an unlimited retention right, whereas in the Perroud case and the Basel civil court case the retention right was for periods of two years and one year respectively. This leads to the conclusion that applying retention rights to out-of-contract professional players or to amateur players is to be considered illegal regardless of the duration of the retention period. Neither the Eastham nor the Swiss decisions explicitly excluded the validity of rules stipulating that financial compensation was payable upon the transfer of an out-of-contract player. Instead, these decisions allowed the assumption that obligatory compensation payments for the transfer of an out-of-contract player would be acceptable as long as the retention rights were entirely eliminated. However, the question remained: under what conditions were such obligatory compensation payments acceptable and to which amount?

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[11] The Swiss Code of Obligations is available at http://www.admin.ch/ch/d/sr/220/index2.html (september 2010).

[12] Swiss Federal Tribunal, BGE 102 II 211, consid. 5., 217 f., available at http://www.bger.ch/index/juridiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-leitentscheide1954.htm (september 2010).

[13] Ibid., consid. 8. b), 222.

[14] The Swiss Civil Code is available at http://www.admin.ch/ch/d/sr/210/index1.html (september 2010).

[15] Swiss Federal Tribunal, BGE 102 II 211, consid. 6., 218 ff., available at http://www.bger.ch/index/juridiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-leitentscheide1954.htm (september 2010).

[16] Ibid., consid. 7., 220 f.

[17] Cantonal civil court of Basel, judgement of 15 July 1977, in: Basler Juristische Mitteilungen 24 (1977) consid. 4.a), 244 ff.

[18] Ibid., consid. 4.b), 246.

4. THE BOSMAN CASE (EU 1995)

In the field of sports law, the Bosman case is without doubt the most cited case ever. I shall therefore refrain from describing the regulations that were challenged in that procedure and the decision of the European Court of Justice (ECJ), as I assume that every reader of this publication is aware of them. Instead, I shall draw the conclusions from the Bosman case which are relevant to the present article and in respect of the aforementioned Eastham and Swiss decisions.

Just like the courts in the aforementioned cases, the ECJ could not find any justification in the Bosman case for imposing a retention period on a player moving to a new club upon termination of the employment contract with his previous club. The interest of an out-of-contract player to seek employment was placed above the interests of clubs by the ECJ. Art. 20 par. 1 of the FIFA Regulations for the Status and Transfers of Players that came into force shortly after the Bosman ruling in 1997 therefore stipulated that "Any disagreement between two clubs regarding the amount of compensation for the training or development of a player shall not affect his sporting or professional activity and an international transfer certificate may not be refused for this reason. The player shall therefore be free to play for the new club with which he has signed a contract as soon as the international transfer certificate has been received."

With respect to the financial compensation payable upon the transfer of an out-of-contract player, the ECJ considered that such compensation might represent an interference with the players' freedom of movement. However, it also decided that, in view of the social importance of sporting activities and in particular of football, encouraging the recruitment and training of young football players should be accepted as a legitimate public interest for this interference with the players' rights. Furthermore, the ECJ accepted that the prospect of receiving transfer, development or training fees was indeed likely to encourage football clubs to seek new talent and train young players. However, since it was impossible to predict the sporting future of young players with any certainty and because only a limited number of such players would go on to play professionally, those fees would by nature be contingent and uncertain and in any event unrelated to the actual cost borne by the clubs of training both future professional players and those who would never play professionally. According to the ECJ, the prospect of receiving such fees could not therefore be either a decisive factor in encouraging the recruitment and training of young players or an adequate means of financing such activities. Furthermore, the court considered that the intended objectives could be achieved at least as efficiently by other means that would not impede the players' freedom of movement[19].

Despite rejecting the validity of rules stipulating that financial compensation was payable upon the transfer of an out-of-contact player, the ECJ indirectly gave an indication of the following conditions that a system of compensation for the transfer of out-of-contract players would have to fulfil in order to justify the interference with the players' freedom of movement that resulted immanently from such a system:

- compensation payments should not be contingent and uncertain;

[19] ECJ, 15 December 1995, *Bosman*, C-415/93, ECR I-4921.

- the amount of compensation should be related to the actual cost borne by clubs of training both future professional players and those who will never play professionally, and
- the payment of compensation shall not be combined with the club's right to retain a player.

5. Decision of the Zurich Commercial Court (Switzerland 2004)

According to the FIFA rules on training compensation that came into force on 1 April 1999, training compensation was due whenever an out-of-contract player moved to another club and registered as a professional player with it, except if the transfer took place within the EU or the EEA. The amount of training compensation was to be agreed upon by the clubs involved in the transfer. In case of dispute about the amount, the clubs could refer the case to a body of FIFA. This body had discretionary power to fix the amount of compensation, as the FIFA regulations did not specify how the compensation was to be calculated.

In 2004, the commercial court of Zurich had to examine a decision of the said FIFA body ordering a Spanish club to pay USD 500,000 to a Croatian club based on the rules described. The court was of the opinion that the provision applied by FIFA interfered without any justification with the clubs' economic liberty, as protected by art. 27 of the Swiss Civil Code, and with Swiss and European anti-trust law. In particular, the court could not accept that an association body could fix the amount of training compensation with discretionary power, and that the association's regulations did not contain any indication on how the amount of compensation was to be calculated. Therefore, it decided that the rules in question were invalid[20].

This decision did not have a huge impact on FIFA, as by the time it was taken, in 2004, FIFA had already fundamentally changed its rules on training compensation, particularly with the edition of these rules that came into force on 1 September 2001. As a side note to its sentence, the commercial court of Zurich mentioned that the 2001 edition of the relevant FIFA rules did not seem to interfere with European anti-trust law, as the said edition of the FIFA rules was based on an agreement between FIFA and the European Commission[21].

6. The Kienass Case (Germany 1996) and successive decisions

Shortly after the Bosman ruling of the ECJ, the German Federal Labour Court was confronted with an almost identical case, in which a German ice hockey player called Kienass had unilaterally terminated the employment contract that had bound him to his German club on the grounds of outstanding salary payments, and had signed a new contract with another German club. A body of the German Ice Hockey Federation, based on that federation's own rules, decided that the player's new club had to pay training compensation of approximately EUR 70,000 to his previous club.

The German Federal Labour Court decided that the rules applied in the case interfered with the constitutional right of professional liberty, as stipulated in art. 12 of the German

[20] Zurich commercial court, judgement of 21 June 2004, in: Zürcherische Rechtsprechung 104 (2005), 97 ff.
[21] Ibid., 106.

Constitution[22]. Such interference could not be legitimated either with reference to the economic interests of the clubs or to the interest of achieving financial equalisation between clubs of different economic power. The latter objective could also have been achieved without infringing the player's rights. In addition, the court denied that the compensation was to be understood as an indemnity for the cost of training players, as the compensation was focused on the value of players and not on the costs of their training. Only those costs that could be allocated to a specific player were applicable in the case of a reimbursement of training costs. In any case, this was not possible in the case of team sports[23].

In 1999, the German High Court had to consider the case of a German amateur footballer who had moved within Germany from his training club to another club to become a professional player. Based on the rules of the regional football association in question, the player's new club had to pay training compensation of approximately EUR 25,000 to the player's training club. The German High Court took the view that, although there might be a legitimate public interest for the rules in question, the application of such rules interfered with the players' professional liberty without justification. The court declared those rules to be null for the following four reasons:

- due to the impossibility of predicting the sporting future of young players with any certainty, training compensation is contingent and uncertain;
- the amount of compensation is fixed as a lump sum;
- the compensation is unrelated to the actual cost borne by the training clubs; and
- the training compensation is aimed at economic rather than idealistic interests[24].

After this decision of the German High Court, the rules in question were revised. The new rules stated that if an amateur player moved to another club and, at the same time, became professional for the first time before the age of 23, training compensation was payable by his new club. The amount of compensation was based on the division to which the player's previous and new clubs belonged, but could not be higher than DEM 17,500 (approximately EUR 9,000). Ten per cent of such compensation was to be paid to the club for which the player had first played for a period of three years, and the remainder was to be distributed *pro rata temporis* between those clubs that had trained the player during the five years before he turned professional.

These revised rules were examined by a German civil court, i.e. the Oldenburg State High Court, in 2005. This court considered that in application of the revised rules, the amount of training compensation could, under certain circumstances, be negligible, but was high enough in most cases to prevent a club from signing a talented young player. The rules thus interfered with the players' constitutional right of professional liberty. The court considered that this interference with the players' rights was not justified and that three of the four criteria established by the German High Court in its decision of 1999 had still not been fulfilled: training compensation was still contingent and uncertain; unrelated to the actual training cost borne by clubs; and not aimed at idealistic interests. The only criteria fulfilled in the revised rules was that compensation was no longer fixed as a lump sum, as the amount of compensation depended on the divisions to which the two clubs involved in the transfer belonged[25].

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[22]The German Constitution is available at http://www.gesetze-im-internet.de/gg/art12.html (september 2010).

[23] German Federal Labour Court, judgement of 20 November 1996, Az. 5 AZR 518/95, in: SpuRt 3 (1997) 94 ff.

[24] German High Court, judgement of 27 September 1999, Az. II ZR 305/98, in: NJW 52 (1999), 3552 ff.

[25] Oldenburg State High Court, judgement of 10 May 2005, Az. 9 U 94/04, in: Causa Sport 2 (2005), 186 ff.

In conclusion, while the Bosman ruling only indicated two conditions under which an interference with players' freedom of movement caused by rules on training compensation could be justified (training compensation shall not be contingent and uncertain; it shall be related to the actual training cost borne by the training club), the German civil courts established two additional conditions (training compensation shall not be fixed as a lump sum; it shall be aimed at idealistic rather than economic interests). The jurisprudence of the German civil courts was strongly criticised by several authors, particularly by GERLINGER. Concerning the reproach that training compensation would be contingent and uncertain, GERLINGER stated that a system of training compensation could obviously be based only on cases of players who became professionals. In this respect, practical experience would show that clubs that invested in the training of young players would benefit from the training compensation system. Concerning the reproach that economic interests would dominate the system of training compensation, GERLINGER stated that the economic interests of the clubs would indeed be a factor, as any system encouraging the training of young players would not work without a financial incentive for the training clubs. Concerning the fact that the training compensation was unrelated to the actual cost borne by the training clubs, the author stated that while consideration of the actual training cost was indeed necessary, it was in reality only possible up to a certain point, beyond which it became unrealistic. Finally, on account of the "freedom of sport" and the freedom of association, and for reasons of legal security, GERLINGER supported to a certain degree the fixing of training costs as lump sums[26].

7. THE BERNARD CASE (EU 2010)

On 17 July 2008, the French Court of Cassation referred the following two questions to the ECJ for a preliminary ruling:

> *"1. Does the principle of the freedom of movement for workers laid down in [Article 39 EC] preclude a provision of national law pursuant to which an espoir player who at the end of his training period signs a professional player's contract with a club of another Member State of the European Union may be ordered to pay damages?*
>
> *2. If so, does the need to encourage the recruitment and training of young professional players constitute a legitimate objective or an overriding reason in the general interest capable of justifying such a restriction?"* [27]

The ECJ first noted that the damage rules at stake were a restriction on the freedom of movement for workers guaranteed within the EU by Art. 45 of the Treaty. This restriction was acceptable only if the rules in question were compatible with the Treaty based on a legitimate aim and justified by overriding reasons in the public interest[28]. In view of the considerable social importance of sporting activities and in particular football in the EU, the ECJ accepted the objective of encouraging the recruitment and training of young players as a legitimate aim

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[26] MICHAEL GERLINGER, Anmerkungen zum Urteil des Oberlandesgericht Oldenburg vom 10. Mai 2005, in: Causa Sport 2 (2005), 192 f.

[27] Reference for a preliminary ruling from the Court of Cassation (France) lodged on 17 July 2008, *Olympique Lyonnais v Olivier Bernard, Newcastle United FC,* C-325/08, not yet published in the ECR.

[28] ECJ, 16 March 2010, *Olympique Lyonnais v Olivier Bernard and Newcastle United FC*, C-325/08, paragraphs 34 – 36, not yet published in the ECR.

for a restriction on the freedom of movement for workers[29]. It then examined whether the system in question was suitable to attain the said objective and did not go beyond what was necessary to attain it.

With respect to the question of suitability, the ECJ accepted that the prospect of receiving training compensation is likely to encourage football clubs to seek new talent and train young players[30]. With respect to the question of necessity, it stated that clubs might be discouraged from investing in the training of young players if they could not obtain reimbursement of the amounts spent for that purpose in cases where, at the end of his training, a player enters into a professional contract with another club[31]. Consequently, the ECJ concluded that a system of training compensation could, in principle, be justified in cases where a young player, at the end of his training, signs a professional contract with a club other than the one that trained him[32]. The fact that the returns on the investment in training made by the clubs providing such training are uncertain by their very nature[33] was not considered by the ECJ to be an obstacle to the previous conclusion, as long as the compensation scheme took due account of the costs borne by the clubs in training both future professional players and those who will never play professionally[34]. Furthermore, the ECJ stated that the costs generated by training young players should be only partly compensatable, as the benefits that the club providing such training could derive from those players during their training period would also have to be taken into consideration[35].

Finally, the ECJ considered that the compensation scheme at issue was characterised by the payment to the club which provided the training not of compensation for training, but of damages, to which the player concerned would be liable for breach of his contractual obligations and the amount of which was unrelated to the real training costs incurred by the club[36]. The possibility of obtaining such damages went beyond what was necessary to encourage recruitment and training of young players and to fund those activities[37]. In consequence, the court considered that the restriction on the freedom of movement for workers in this case was unjustified.

In conclusion, according to the decision of the ECJ in the Bernard case, a restriction on the players' rights resulting from a system of training compensation may be justified only under the following three conditions:

- a player enters into a professional contract with a club other than his training club at the end of his training (this implies that training compensation may not be payable in cases where an amateur player moves to another club where he also registers as amateur);
- training compensation shall be a reimbursement of the amounts spent for the purpose of training young players (as far as that condition is fulfilled, training compensation may take into due account the costs borne by the clubs in

[29] Ibid., paragraphs 38 and 39.
[30] Ibid., paragraph 41.
[31] Ibid., paragraph 44.
[32] Ibid., paragraph 45.
[33] Ibid., paragraph 42.
[34] Ibid., paragraph 45.
[35] Ibid., paragraph 43.
[36] Ibid., paragraph 46.
[37] Ibid., paragraph 48.

training both future professional players and players who will never play professionally); and

- benefits a club providing the training to a player could derive from that player during the training period shall be taken into consideration.

The reproaches made by German civil courts, according to which compensation schemes were fixed as lump sums and aimed at economic rather than idealistic reasons, were ignored by the ECJ.

8. CONCLUSION

Any rules of a sports association which stipulate that an amateur player or an out-of-contract professional player may be retained by his former club for a certain period of time if there is no agreement on his transfer or if compensation due to his club is outstanding are always invalid. The interference of retention rights with the personality rights of amateur or out-of-contract professional players is not justified under any circumstances.

Any rules of a sports association which stipulate that a club that wishes to register an amateur or out-of-contract professional player must pay compensation to the training club(s) of that player may also be in conflict with civil mandatory law. Under certain circumstances, however, such rules may be justified, as the objective of encouraging the training of young players has always been accepted as a legitimate aim for restricting players' rights. Civil courts have therefore never categorically excluded the possibility that a sports association's rule on training compensation may be valid, provided it was not combined with a retention right. However, the criteria used by courts to measure the validity of training compensation systems have changed fundamentally over the course of time.

Until the 1960s, sports associations were not limited at all in their acts by civil law, as civil courts considered sports-related disputes to be non-judiciable. As of 1963 (Eastham case), civil courts started to examine association rules, including rules on training compensation, and established the conditions under which such rules could be considered valid. During the development of this jurisprudence, the conditions applied to training compensation systems became more and more severe, culminating in a decision of the German High Court in 1999 in a catalogue of four conditions that could, in reality, not be fulfilled by any training compensation system.

Strict adherence to the German jurisprudence would have brought an end to training compensation systems in team sports. However, in the EU, a series of developments running counter to the development of the German jurisprudence took place after the Bosman ruling. The most important of these developments was the agreement of 5 March 2001 between the EU Commission, FIFA and UEFA setting out the principles for FIFA's new training compensation system[38]. Other important developments in this respect included the declaration on sport in the Amsterdam Treaty of 10 November 1997, the Helsinki report on sport of 10 December 1999, the Nice declaration on the specific characteristics of sport of 9 December 2000, and the White Paper on Sport of 11 July 2007. The most recent development is the ECJ decision in the Bernard case, which defines the conditions a training compensation system needs to fulfil in order that it may be considered valid.

[38] TIM KERR, Freedom of movement in sport inside and outside the European Union, in: MARCO DEL FABRO/URS SCHERRER, Freizügigkeit im Europäischen Sport, Zurich 2002, 22.

With its decision in the Bernard case, the ECJ mitigated the conditions established in the Bosman case and by the German civil courts. While the ECJ maintained the condition that compensation shall be related to the actual cost borne by the training club, it considered that returns on the investment in training made by a club providing such training are contingent and uncertain by their very nature. However, this uncertainty does not necessarily render a training compensation system invalid. Moreover, the ECJ ignored the reproaches made by the German civil courts that compensation schemes were illegally based on lump sums and aimed at economic rather than idealistic reasons. After all, if compensation is to be a reimbursement of the actual amount spent for training a young player, it cannot simply be a lump sum. Moreover, economic incentives are inevitable to encourage clubs to train young players.

In the Bernard case, however, the ECJ established two additional conditions: firstly, training compensation is only due if a player signs an employment contract, i.e. becomes a professional player, with a club other than his training club. In other words, training compensation is not payable in the case of an amateur player who moves to another club but retains his amateur status. Secondly, the training compensation must take into consideration benefits the club providing the training to a player could derive from that player during the training period. These conditions are, contrary to the conditions established by the German civil courts, conditions that may in reality be respected by training compensation rules. Unlike the German civil courts, the ECJ supported the basic idea behind training compensation. As far as a training compensation system fulfils the conditions established by the ECJ in the Bernard case, the concomitant interference with the players' rights will presumably be considered as justified by other civil courts. At the same time, training compensation systems that do not fulfil these requirements might not stand up before any tribunal in the future.

Thanks to the decision in the Bernard case, training compensation systems encouraging clubs to train and develop young players will continue to exist in the future. This is to the detriment of the minority of young players who may face difficulties finding a club ready to pay for their training compensation, but it is to the benefit of the majority, since a large number of players would never be trained by a club if the clubs did not have the incentive of compensation for training players that move to another club during or at the end of their training period.