

# Major League Soccer's Exceptionalism in FIFA's Transfer System: For How Much Longer?

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# MAJOR LEAGUE SOCCER'S EXCEPTIONALISM IN FIFA'S TRANSFER SYSTEM: FOR HOW MUCH LONGER?

REMO DECURTINS\*

## I. INTRODUCTION

It is widely recognized that in the United States, soccer is not as popular as it is in the rest of the world. Major League Soccer (MLS) does not compete in terms of importance with the four major American sports leagues.<sup>1</sup> Internationally, MLS is followed only marginally, if at all, and usually only makes headlines when an aging star decides to join the league, such as in the last few years with *Steven Gerrard*, *Andrea Pirlo*, *Kakà*, *Didier Drogba*, *Frank Lampard*, or *Bastian Schweinsteiger*.

In the foreseeable future, MLS may depart from its wallflower existence. During its twenty-one years, the league has experienced a positive development, both from a sporting and an economic perspective. MLS' self-proclaimed, ambitious goal is to become one of the major soccer leagues in the world by 2022.<sup>2</sup> Without a doubt, there is the necessary economic potential in the U.S. sports market for the league to get there. Crucial will be whether MLS will succeed in the balancing act between the requirements of a league in a U.S. sports environment and a league as part of the FIFA<sup>3</sup> framework.<sup>4</sup>

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1. The National Football League (NFL), the National Basketball Association (NBA), Major League Baseball (MLB), and the National Hockey League (NHL).

2. Chris Smith, *MLS Commissioner Don Garber on the League at Twenty Years*, FORBES (Dec. 2, 2015), [www.forbes.com/sites/chris-smith/2015/12/02/mls-commissioner-don-garber-on-the-league-at-twenty-years/#462d8cde285b](http://www.forbes.com/sites/chris-smith/2015/12/02/mls-commissioner-don-garber-on-the-league-at-twenty-years/#462d8cde285b).

3. The Fédération Internationale de Football Association (FIFA) is the international governing body of association football. FIFA has its headquarters in Zurich, Switzerland.

4. See Diana C. Taylor, *Aimed at the Goal? The Sustainability of Major League Soccer's Structure*, 9 WILLAMETTE SPORTS L.J. 1, 19 (2011).

Due to its current organizational structure, MLS is characterized as an American sports league. In particular, this manifests itself in its transfer system. Regular MLS players cannot choose their own employer; rather, they are allotted to a team by the league. Also, their salary is kept artificially low due to a salary cap. Such regulations are completely unknown in European professional soccer, and they also have a great impact on MLS' international competitiveness.

Following a brief introduction of MLS' structure, which is unique even for a U.S. sports league<sup>5</sup> (Parts II & III), this article will examine how MLS' transfer system significantly differs from international practices in FIFA's transfer system (Parts IV & V), what impact this has, and for what reasons MLS' transfer system is increasingly coming under pressure (Part VI).

## II. BACKGROUND OF MLS' STRUCTURAL PECULIARITIES

### A. *Origin and Basics of the Single-Entity Structure*

The modern era of soccer in the U.S. began in the mid-1990s when the U.S. successfully hosted the 1994 World Cup. In exchange for being awarded the right to host this tournament, the national governing body of soccer in the U.S., the United States Soccer Federation (USSF), had to promise FIFA it would establish a professional soccer league.<sup>6</sup> This was realized by launching MLS in 1996.

From 1968 to 1985, there had already existed a professional soccer league in the U.S., the North American Soccer League (NASL). In the late 1970s, this league was able to attract the global soccer icons *Pelé*, *Franz Beckenbauer*, and *Johan Cruyff*. Hence, for a few years, the "focal point of world soccer" had been on the U.S.<sup>7</sup> However, the league did not manage to have sustainable success. Excessive player salaries, the lack of centralized control, as well as a heterogeneous soccer market resulted in "wide disparities in the financial resources of the league's independently owned teams[,]” which finally led to the league's demise in 1985.<sup>8</sup>

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5. See *Fraser v. Major League Soccer, L.L.C.* (Fraser II), 284 F.3d 47, 53 (1st Cir. 2002).

6. *Id.* at 52–53.

7. See Tyler A. Coppage, Comment, *Taking the Training Wheels Off MLS: Why the Single Entity Antitrust Exemption Should No Longer Apply*, 25 MARQ. SPORTS L. REV. 545, 548 (2015).

8. See *Fraser II*, 284 F.3d at 52.

When MLS was conceptualized, lessons from these historical mistakes were drawn. The intent was to prevent a similar fate by implementing a centralized control of the financial equilibrium between the teams and a salary cap.<sup>9</sup> In order to create competitive balance in the interest of the league as a whole, the central resource “players” would have to be allocated by the league. It is within these parameters that in the mid-1990s, Alan Rothenberg, a Los Angeles lawyer and then-President of the USSF, designed MLS on the drawing board. He structured the league as an entity of separately operated units (“single-entity structure”) in the legal form of a limited liability company (LLC)<sup>10</sup> under Delaware law, with the units being individual MLS teams. According to the “MLS Agreement,” which governs the league’s structure and mode of operation, MLS is owned by a group of independent investors. They may either acquire the exclusive right to operate one or several MLS teams as an “investor-operator” or remain passive. Not unlike the distribution of dividends to shareholders in a corporation, the profits (and losses) of MLS are distributed to its investors. The individual investors thus have a direct economic interest in the financial well-being of the league as a whole.

The authority to manage the business and affairs of MLS is vested with the board of governors, consisting of representatives of each of the investors. The board appoints a League Commissioner to whom the day-to-day management of the league is delegated. This means that MLS monitors and controls both the league and the individual teams. MLS is solely responsible for recruiting players, for negotiating and paying their salaries, and also for determining where each of them will play. The players are thus employees of the league rather than of the individual teams. Furthermore, the league, among others, is originally entitled to all intellectual property rights, ticketing income, and broadcasting rights.

The limited rights and obligations of the investors regarding their “own” team derive from an “Operating Agreement” with MLS. Among others, they are obliged to hire, at their own expense and discretion, the coaches and other staff. In return, they periodically receive from the league a management fee, mainly consisting of 50% of the team-specific ticket and stadium revenues, as well as revenue from local sponsorship and television broadcast rights. As a result, investors not only benefit from sharing equally in the league’s profits

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9. For MLS’s structure, see *id.* at 52–55; see also *Fraser v. Major League Soccer, L.L.C.* (Fraser I), 97 F. Supp. 2d 130, 132–33 (D. Mass. 2000); see also PAUL C. WEILER ET AL., *SPORTS AND THE LAW: TEXT, CASES, AND PROBLEMS* 290–92, 383–85 (5th ed. 2015).

10. “An LLC is a form of statutory business organization that combines some of the advantages of a partnership with some of the advantages of a corporation.” *Fraser I*, 97 F. Supp. 2d at 134.

and losses, but they also benefit on an individual basis, if and to the extent that their team attracts interest.

*B. Early Success in the Courtroom*

Not long after its launch, MLS faced a judicial challenge to its structure from an antitrust perspective. In February 1997, eight named players, representing all MLS players at the time, filed a class action against MLS, various investors, and the USSF with the U.S. District Court for the District of Massachusetts.<sup>11</sup> Primarily, they claimed the single-entity structure is an illegal restraint of trade pursuant to the Sherman Antitrust Act (Sherman Act).<sup>12</sup> Section 1 of the Sherman Act prohibits every contract or conspiracy among two or more economic actors in restraint of interstate trade or commerce.

American sports leagues, which typically feature organizational characteristics that restrict the players' market (e.g., drafts, limited free agency and salary caps),<sup>13</sup> time and again have seen themselves confronted with claims concerning concerted action that potentially may be in breach of the Sherman Act. In effect, they repeatedly had to endure antitrust lawsuits.<sup>14</sup> In these

previous proceedings, the leagues had often resorted to the argument that they were organized as a single-entity, and as such could not conspire in violation of § 1 of the Sherman Act.<sup>15</sup> The basis for this argumentation was the *Copperweld Corp. v. Independent Tube Corp.* decision of the U.S. Supreme Court in 1984,<sup>16</sup> which established that a parent and its wholly-owned subsidiary are not subject to attack under § 1 of the Sherman Act for agreements among them. As a result of the "complete unity of interests" shared by the parent and its wholly owned subsidiary, a *single* economic actor is concerned and is not a cooperative

arrangement between independent competitors covered by § 1 of the Sherman Act. However, the courts usually would not follow the single-entity

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11. *Fraser I*, 97 F. Supp. 2d 130.

12. Sherman Antitrust Act, 15 U.S.C. §§ 1–7 (2016); *Fraser I*, 97 F. Supp. 2d at 137–38.

13. *See infra* Part IV.

14. *Mackey v. NFL*, 543 F.2d 606, 609 (8th Cir. 1976); *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1174 (D.C. Cir. 1978). For a long time, Major League Baseball for historically evolved reasons had enjoyed immunity from antitrust scrutiny. *See Flood v. Kuhn*, 407 U.S. 258, 282 (1972). This immunity was partially repealed by the Curt Flood Act in 1998. Pub. L. No. 105-297, 112 Stat. 2824 (1998). For material on antitrust and American sports leagues, see WEILER ET AL., *supra* note 9, at 204–06, 261–63.

15. *See* WEILER ET AL., *supra* note 9, at 282–83.

16. *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 771 (1984).

argumentation of the major sports leagues as they would not be deemed to be organized as a functional entity, but rather as a joint venture, formed by largely independently operated teams. According to the courts, each team would pursue individual interests different from the interests of the league, namely the interest of winning soccer games and ultimately of having economic success. Thus, there would be no unity of interests in the league's structure as would be necessary for the single-entity immunity to apply.<sup>17</sup>

Besides the need for a subsidy for joint growth, the hope to evade from being subject to attack under § 1 of the Sherman Act has also been a major reason for conceptualizing MLS as a single-entity. In the year 2000, MLS eventually achieved a success in the courtroom, which arguably proved to be essential for the survival of the league. In the context of summary judgment proceedings, the U.S. District Court for the District of Massachusetts, by following the *Copperweld* decision, characterized MLS as a single-entity that as such could not conspire in violation of § 1 of the Sherman Act.<sup>18</sup> The court compared MLS to a corporation, with its investor-operator treated as directors and shareholders. According to the court, the investor-operators do not engage in concerted action as long as they "are not acting to promote an interest, from which they would directly benefit, that is independent from the corporation's success."<sup>19</sup>

The U.S. Court of Appeals for the First Circuit, however, upon appeal by the players, put a question mark on this single-entity qualification.<sup>20</sup> According to the appellate court, MLS' structure cannot be compared with the parent/wholly-owned subsidiary scenario underlying the *Copperweld* decision. Rather, "MLS and its operator-investors comprise a hybrid arrangement, somewhere between a single company (with or without wholly-owned subsidiaries) and a cooperative arrangement between existing competitors."<sup>21</sup> For procedural reasons, however, the court ultimately did not have to answer this crucial single-entity question.<sup>22</sup> The U.S. Supreme Court then refused to grant certiorari to the appeal brought by the players.<sup>23</sup> Therefore, the trial court's ruling, according to which MLS is qualified as a single-entity due to

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17. *Sullivan v. NFL*, 34 F.3d 1091, 1099 (1st Cir. 1994); see *Am. Needle, Inc. v. NFL*, 538 F.3d 737, 743 (7th Cir. 2008).

18. See *Fraser v. Major League Soccer, L.L.C. (Fraser I)*, 97 F. Supp. 2d 130, 139 (D. Mass. 2000).

19. *Id.* at 135.

20. See *Fraser v. Major League Soccer, L.L.C. (Fraser II)*, 284 F.3d 47, 58 (1st Cir. 2002).

21. *Id.*

22. *Id.* at 60–61.

23. *Fraser v. Major League Soccer (Fraser III)*, 537 U.S. 885, 885 (2002).

unity of interests shared by the league and its individual investors, remained in full force and effect.

Thus, unlike any other American sports league, MLS has managed to conclusively and comprehensively defend itself against an antitrust challenge by successfully invoking the single-entity immunity.<sup>24</sup> This early victory in court affirmed the league's significant strategic and operational leeway, which the league would widely make use of in the following years.

### III. THE SINGLE-ENTITY PERSPECTIVE IS OUTDATED

In its twenty-one years, MLS has undergone a predominantly positive development, characterized by steady and sustainable growth. The league has made significant strides in terms of sporting quality and international relevance. In the 2016 season, the average attendance amounted to a remarkable number of 21,692; compared to other leagues in world soccer, MLS is ranked sixth in terms of attendance.<sup>25</sup> The league has also continuously expanded into other domestic geographic markets. Since MLS' inaugural season, the number of teams has more than doubled to twenty-two, equally divided into an Eastern and Western Conference. Also, three Canadian teams (Montreal Impact, Toronto FC, and Vancouver Whitecaps FC) are part of MLS.

The league generates more and more revenues from sponsorship deals. Additionally, MLS has managed to enter into lucrative broadcasting agreements, which are estimated to yield on average USD 90 million per season until 2022.<sup>26</sup> Meanwhile, both the league overall and the majority of the teams seem to operate at a profit.<sup>27</sup> In 2016, the teams reported an estimated average market value of USD 185 million, 80% more than three years earli-

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24. *Fraser II*, 284 F.3d at 59. Selectively concerning league-wide restrictions of local television broadcasts by so-called "Super Stations," the NBA was qualified as a single-entity. However, the court explicitly abstained from any generalization, in particular regarding the players' market. *Chi. Prof'l Sports Ltd. P'ship v. NBA*, 95 F.3d 593, 600 (7th Cir. 1996).

25. See Jeff Carlisle, *MLS Sets Average Attendance Record in 2016 as Seattle Sounders Lead All Clubs*, ESPN FC (Oct. 24, 2016), <http://www.espnfc.com/major-league-soccer/story/2980505/mls-sets-average-attendance-record-in-2016-as-seattle-sounders-lead-all-clubs>.

26. Chris Smith, *Major League Soccer's Most Valuable Teams 2015*, FORBES (Aug. 19, 2015), [www.forbes.com/sites/chris-smith/2015/08/19/major-league-soccers-most-valuable-teams-2015-2/#4352ae883ba4](http://www.forbes.com/sites/chris-smith/2015/08/19/major-league-soccers-most-valuable-teams-2015-2/#4352ae883ba4).

27. MLS as a privately held company does not publicly communicate its financial results. The assumption of economic success is based on publicly available indicators. See Joseph Lennarz, *Growing Pains: Why Major League Soccer's Steady Rise Will Bring Structural Changes in 2015*, 16 U. DENV. SPORTS & ENT. L.J. 137, 171-73 (2014); see also Chris Smith, *Major League Soccer's Most Valuable Teams 2016: New York, Orlando Thrive in First Seasons*, FORBES (Sept. 7, 2016), <http://www.forbes.com/sites/chris-smith/2016/09/07/major-league-soccers-most-valuable-teams-2016-new-york-orlando-thrive-in-first-seasons/#6d5185a8266a>.

er.<sup>28</sup>

Meanwhile, the pool of investor-operators has greatly expanded and diversified. The twenty-two teams are now operated by many independent investors. Initially, only a handful of investors and, due to lack of interest, even the league itself operated several teams.<sup>29</sup> Over the coming two years, two

additional investors are expected to enter MLS with their teams: Los Angeles FC in the 2018 season and a team from Miami in the 2019 season. As declared by MLS, the long-term goal is to expand to twenty-eight teams.<sup>30</sup>

Due to increased opportunities for individual revenue generation, there are wide disparities in the financial resources of the teams today despite still existing league-wide redistribution mechanisms. An important factor is that today most teams play in soccer-specific stadiums and no longer in leased American football stadiums, which were oversized for the existing fan interest. This not only provides for a more attractive soccer experience for spectators, but it also gives investors additional opportunities for individual revenues and influence, as they are responsible for the planning, financing, and operation of the stadiums themselves.<sup>31</sup> Investors also make money from selling to sponsors the right to have the name on the stadium. Furthermore, MLS teams since the 2006 season are allowed to advertise sponsorship on their jerseys, which is unique for American sports teams.<sup>32</sup> All these sources of revenue are individual in nature and mainly benefit the stronger teams in more populated areas.

The basic concept of a balanced league for the benefit of all is increasingly sidelined due to such individual opportunities to generate revenues. The team operators hire their own technical directors, who are charged with forming the most successful and attractive team possible by means of skillful player transactions. A milestone in this development was the introduction of the "Designated Player Rule"<sup>33</sup> at the end of 2006, which shortly afterwards allowed the league to facilitate the transfer of *David Beckham* to the Los Angeles Galaxy. With a purported salary of USD 250 million over five years, this transfer would not have been permitted under the existing salary cap. Ever

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28. Smith, *supra* note 27.

29. See *About Major League Soccer*, PRESS BOX, <http://pressbox.mlssoccer.com/content/about-major-league-soccer> (last visited May 15, 2017).

30. See *2017 MLS Season Brochure*, MLSSOCCER, <http://www.mlssoccer.com/post/2017/01/01/2017-mls-season-brochure> (last visited May 15, 2017).

31. See Thomas D. Stuck, Comment, *Facilities Issues in Major League Soccer: What Do Soccer Stadiums Have to Do with Antitrust Liability?*, 14 MARQ. SPORTS L. REV. 551, 551 (2004).

32. See Taylor, *supra* note 4, at 14.

33. See *infra* Part IV.C.

since, the Designated Players Rule has allowed a team to engage up to three players who are not subject to the salary cap. In addition, all teams today run their own youth academies and farm teams for purposes of forming and recruiting talented players for their MLS team roster.

In retrospect: initially, a single-entity structure featuring redistribution mechanisms and centralized control was supposed to facilitate an overall sustainable growth of the league. Over the last twenty-one years, however, MLS' economic reality has changed. Today's pool of investors is more heterogeneous. The investors are increasingly pursuing separate interests and running their business independently.<sup>34</sup> The progressive growth of MLS and the fact that today the majority of the teams even seem to be profitable—which would rather be the exception in the international soccer business<sup>35</sup>—diminishes the need for financial stabilization for purposes of joint growth and mutual support.<sup>36</sup> Irrespective of a changed economic reality, the league's single-entity structure is still in place today. This protectionist and centralist attitude of MLS particularly manifests itself in its transfer system, which is still characterized by strong regulation to the detriment of the players.

In the following sections, MLS' unique current transfer system will be examined in greater detail. As will be described, it significantly differs from the transfer system in European soccer and, therefore, is increasingly coming under pressure.

#### IV. CORNERSTONES OF MLS' TRANSFER SYSTEM

##### A. *Basis in a Collective Bargaining Agreement*

The major American sports leagues have a long tradition of player unions.<sup>37</sup> In 2003, in the wake of the unsuccessful antitrust challenge to the league structure, MLS players similarly formed a union under the National Labor

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34. See Lennarz, *supra* note 27, at 197–98.

35. See, e.g., SIMON KUPER & STEFAN SZYMANSKI, *SOCCERONOMICS* 49–71 (3d ed. 2014).

36. See Copping, *supra* note 7, at 558–59; see also Mark W. Lenihan, *Major League Soccer Scores an Own Goal: A Successful Joint Venture Attains Market Power in an International Sport*, 62 *DEPAUL L. REV.* 881, 893–97 (2013).

37. The first form of a players' union dates back to 1885. See *Our History*, MLB PLAYERS ASS'N, [http://www.mlbplayers.com/ViewArticle.dbml?ATCLID=211042995&DB\\_OEM\\_ID=34000](http://www.mlbplayers.com/ViewArticle.dbml?ATCLID=211042995&DB_OEM_ID=34000) (last visited May 15, 2017). For collective bargaining in American sports leagues, see WEILER ET AL., *supra* note 9, at 97–99.

Relations Act (NLRA).<sup>38</sup> Ever since, the Major League Soccer Players Union (MLSPU) has been entitled as the players' exclusive bargaining representative to collectively bargain with MLS on employment law matters.<sup>39</sup> The currently applicable collective bargaining agreement (CBA 2015) was entered into under great negotiation pressure only two days before the start of the 2015 season; it remains in full force and effect up to and including the 2019 season.<sup>40</sup>

The CBA 2015 contains mandatory minimum employment-related rights and obligations applicable to all MLS players.<sup>41</sup> Furthermore, it governs the league schedule and disciplinary proceedings, as well as the elaborate system for player allocation and compensation.

*B. Key Question: Reserve Clause System or Free Agency?*

In terms of freedom of contract, the major American sports leagues generally keep their players on a relatively short leash. Historically, the "reserve clause system" used to be the predominant form of organization.<sup>42</sup> In this system, the fate of a player's career was largely determined by the clubs themselves. Firstly, they would acquire a player's services within the framework of a league-wide draft. Subsequently, they would retain the rights to them as long as they like. Upon the expiration of a first-time contract term, each year the club would have the right to exercise a unilateral option for renewed employment on equal terms. As such system artificially prevents competition for players, this would almost inevitably lead to lower wages. The reserve clause system's counterpart is "free agency," which is preferred by the players as it allows out-of-contract players to freely choose their new employer, negotiate a salary in line with the market, and transfer between clubs free of a transfer fee.

Repeatedly, the players across all major sports leagues have pursued their free agency claims by judicial process, and at the negotiating table the players' unions have obtained concessions from the leagues in this regard.<sup>43</sup> Thus, over

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38. National Labor Relations Act, 29 U.S.C. §§ 151–169 (2016).

39. *Id.* §158(d).

40. COLLECTIVE BARGAINING AGREEMENT BETWEEN MAJOR LEAGUE SOCCER AND MAJOR LEAGUE SOCCER PLAYERS UNION art. 3, § 3.1 (2015) [hereinafter CBA 2015], <http://www.mlspu.org/images/Collective%20Bargaining%20Agreement%20-%20February%201,%202015.pdf>.

41. *See id.* art. 1, § 1.1.

42. For reserve system and free agency, see WEILER ET AL., *supra* note 9, at 153–55, 350–52.

43. Free agency was first established in *Mackey v. NFL*, 543 F.2d 606, 621–22 (8th Cir. 1976); *see supra* Part II.B.

the course of the past decades, the needle has continuously moved from reserve clause system to free agency. In the meantime, all four major American sports leagues recognize free agency to varying degrees, at least for certain seniority-based player categories.<sup>44</sup>

By contrast, MLS today is still strongly characterized by the reserve clause system. Since the last round of CBA negotiations, a “restricted free agency” is available only for players who are at least twenty-eight years of age and who have already been playing in the league for eight years.<sup>45</sup> Such out-of-contract players may enter into a new contract with a MLS team of their choice. However, any resulting wage increase may only be within narrow margins.<sup>46</sup> Currently, only between 10–15% of MLS players meet these free agency criteria.<sup>47</sup> Therefore, the majority of players do not benefit from this achievement.

As a rule, players who are new to MLS cannot choose the team for which they will play. Rather, the teams secure the services of graduates from NCAA college teams within the framework of the annual “SuperDraft.”<sup>48</sup> Foreign players that laterally enter the league are assigned to the team who has first acquired the right to sign them,<sup>49</sup> or a right of first refusal.<sup>50</sup> When former MLS players at a later point in their career return to MLS, they are allocated to a team by way of an “allocation ranking.”<sup>51</sup>

The standard player agreements with MLS, which are based on the CBA 2015, are limited in duration.<sup>52</sup> A maximum length is not stipulated.<sup>53</sup> For most players, the contracts are “guaranteed,” which means that they cannot be terminated by the league “by virtue solely of the quality of the [p]layer’s

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44. See WEILER ET AL., *supra* note 9, at 154–55, 350.

45. CBA 2015, *supra* note 40, art. 29, §§ 29.5(a)(1), 29.6(a)(i); *MLS Roster Rules and Regulations*, MLSSOCCER (Feb. 1, 2017), <http://www.mlssoccer.com/league/official-rules/mls-roster-rules-and-regulations> [hereinafter *MLS Roster Rules*].

46. Players who had earned between USD 100,000 and USD 200,000 per year, under normal circumstances, are only entitled to a salary increase of up to 20%. CBA 2015, *supra* note 40, art. 29, § 29.6(b)(iii).

47. Brian Straus, *MLS CBA Deal Bob Foose Todd Dunivant*, SPORTS ILLUSTRATED (Mar. 6, 2015), <http://www.si.com/planet-futbol/2015/03/06/mls-cba-deal-players-union-bob-foose-todd-dunivant>.

48. See CBA 2015, *supra* note 40, art. 14, § 14.1(ii); *MLS Roster Rules*, *supra* note 45.

49. See *MLS Roster Rules*, *supra* note 45.

50. *Id.*

51. *Id.*

52. CBA 2015, *supra* note 40, art. 18, § 18.1(i).

53. See *id.* art. 18, § 18.8; UNITED STATES SOCCER FEDERATION, INC. POLICY MANUAL (2015–16) Policy 601-3, § 1, <http://www.ussoccer.com/~media/files/governance/2015/2015-16-policy-manual.pdf?la=en>.

on-field performance or the fact that the [p]layer may have sustained an injury.”<sup>54</sup> Without the player’s consent, a player under contract may be traded or loaned to another team in the league, provided that the league agrees (which usually is the case).<sup>55</sup> Also, a team may buy a player out of a current contract<sup>56</sup> or place him on “waivers,” “at which point he is made available to all other clubs.”<sup>57</sup>

Upon expiration of the agreed first-time contract term, a team may often make use of its unilateral option right for renewed employment. However, this option right is limited by CBA 2015; the agreement with players who are at least twenty-four years of age with at least two years’ league experience in total may only be extended for two years at most.<sup>58</sup> Players who are out of contract or whose options were not exercised, and who do not qualify as a free agent, may again be selected by another team by means of the “re-entry draft.”<sup>59</sup> In this scenario, the former team retains a right of first refusal “provided attempts were made to re-sign the player.”<sup>60</sup>

Overall, MLS’ reserve clause system has been somewhat weakened in the past rounds of CBA negotiations by features such as restricted free agency, limitation of the option right for renewed employment, and the re-entry draft. However, its contours are still clearly recognizable.

### C. Selective Salary Cap

CBA 2015 governs MLS players’ compensation in a detailed manner. As is also common in other American sports leagues for purposes of artificially leveling the playing field, there is a salary cap.<sup>61</sup> For the 2017 season, the per-team annual salary budget is USD 3.845 million; until the 2019 season the budget is planned to continuously increase to USD 4.24 million.<sup>62</sup> Among others, this budget also includes any transfer fees for players from foreign leagues.<sup>63</sup> No more than 12.5% of the salary budget (i.e., USD 480,625 per

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54. CBA 2015, *supra* note 40, art. 18, § 18.6(a).

55. *See id.* art. 15, § 15.1; *MLS Roster Rules*, *supra* note 45.

56. CBA 2015, *supra* note 40, art. 10, § 10.22; *MLS Roster Rules*, *supra* note 45.

57. *MLS Roster Rules*, *supra* note 45.

58. CBA 2015, *supra* note 40, art. 18, § 18.13(a).

59. *Id.* art. 29, §§ 29.1, 29.4; *MLS Roster Rules*, *supra* note 45.

60. *MLS Roster Rules*, *supra* note 45.

61. For information on salary caps in other American sports leagues, see WEILER ET AL., *supra* note 9, at 256–58.

62. CBA 2015, *supra* note 40, art. 10, § 10.6(a).

63. *Id.* § 10.6(b).

year) may be accounted for one single player.<sup>64</sup>

The league realized that a tight wage framework made imports of stars from the European top leagues unrealistic and that this negatively affected the league's development. Therefore, before the beginning of the 2007 season it introduced the Designated Player Rule, according to which the wages of up to three players per team may be excluded from the salary cap.<sup>65</sup> Hence, league star players such as *Kakà* of Orlando City SC in the 2016 season earned an annual salary of up to USD 7,167,500.<sup>66</sup> This salary counts to the per-team salary budget only to the aforementioned 12.5% limit.<sup>67</sup> Any further portion of the compensation (i.e., the bulk of the compensation) is paid by the club, and not by the league as it is for regular players.<sup>68</sup>

The CBA minimum annual base salary for regular MLS players is only set at USD 65,000 for the 2017 season but will reach USD 70,250 in the 2019 season.<sup>69</sup> The average player salary, including the designated players, in the 2016 season was USD 316,777. The majority of players, however, earned less than that; the median salary was only USD 117,000.<sup>70</sup> In the last few years, this has resulted in a dramatically increased wage gap among MLS players. In the case of Orlando City SC, even among teammates there was an astounding pay gap of 115 to 1 in the 2016 season. *Kakà* earned USD 7,167,500 which is 106 times more than what his teammate *Hadji Barry* made (USD 67,062.50).<sup>71</sup> Given such a stark discrepancy, the relation between a player's performance and salary gets lost. This may also negatively affect a team's sporting balance.<sup>72</sup>

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64. *Id.* § 10.6(c).

65. *MLS Roster Rules*, *supra* note 45; CBA 2015, *supra* note 40, art. 10, § 10.19(f); *see supra* Part III.

66. *2016 MLS Player Salaries*, MAJOR LEAGUE SOCCER PLAYERS UNION (Sept. 15, 2016), <http://www.mlssplayers.org/images/September%2015%202016%20Salary%20Information%20-%20By%20Club.pdf>. In addition to their annual salary, marquee players may also earn endorsement money from sponsors. For example, in the 2016 season, *Kakà* approximately earned an additional USD 2 million in endorsement money. *See* Christina Settimi, *Major League Soccer's Top-Earning Players*, FORBES (Sept. 7, 2016), <http://www.forbes.com/sites/christinasettimi/2016/09/07/major-league-soccers-top-earning-players/#1da99115bcc>.

67. CBA 2015, *supra* note 40, art. 10, § 10.6(d).

68. *MLS Roster Rules*, *supra* note 45.

69. CBA 2015, *supra* note 40, art. 10, § 10.1.

70. Jeff Carlisle, *Average MLS Salary Goes up, with Surprising Value Available Leaguewide*, ESPN (May 19, 2016), [www.espnfc.com/major-league-soccer/19/blog/post/2876311/average-mls-salary-goes-up-with-surprising-value-available-league-wide](http://www.espnfc.com/major-league-soccer/19/blog/post/2876311/average-mls-salary-goes-up-with-surprising-value-available-league-wide). Thus, an equal number of players earns more or less than USD 117,000. *See id.*

71. *See 2016 MLS Player Salaries*, *supra* note 66.

72. *See* Lennarz, *supra* note 27, at 180–85; David Peisner, *The Low-Budget, High-Pressure Life of an MLS Rookie*, BUZZFEED (Nov. 1, 2013), <https://www.buzzfeed.com/djpeisner/the-low-budget->

## V. COMPARISON WITH THE EUROPEAN TRANSFER SYSTEM AND FIFA-TRANSFER REGULATIONS

### A. *MLS as a Part of FIFA's Legal Framework*

MLS is a member of the USSF, which itself is a member association of FIFA and of the Confederation CONCACAF.<sup>73</sup> Therefore, MLS is part of the FIFA family and is “obliged to respect the statutes, regulations, directives, and decisions of FIFA.”<sup>74</sup> With regards to *international transfers*, MLS is subject to the FIFA Regulations on the Status and Transfer of Players (FIFA-Transfer Regulations).<sup>75</sup> International transfers are those between foreign leagues and MLS.<sup>76</sup> Transfers between Canadian and American MLS teams also fall into this category.<sup>77</sup> By contrast, the FIFA-Transfer Regulations do not directly apply to *local transfers*, i.e., national transfers between MLS teams. Rather, the member associations are mandated to adopt specific national regulations for local transfers, whereby such regulations must include some binding minimum requirements of the FIFA-Transfer Regulations.<sup>78</sup>

### B. *Post-Bosman Free Agency and FIFA-Transfer Regulations*

In European soccer, unrestricted free agency has existed since the groundbreaking *Union Royale Belge des Sociétés de Football Ass'n v. Bosman* decision of the European Court of Justice (ECJ) in 1995.<sup>79</sup> Ever since, out-of-contract professional soccer players in the European Union may freely choose their new employer, negotiate a salary in line with the market, and

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high-pressure-life-of-an-mls-rookie?utm\_term=.dcaPWO5o8#.idnokvxj2.

73. The Confederation of North, Central America and Caribbean Association Football is the continental governing body for association football in North America, that includes Central America and the Caribbean regions.

74. BYLAWS OF THE UNITED STATES SOCCER FEDERATION, INC. art. 103 (2015), <http://www.ussoccer.com/~media/files/governance/2015/2015-16-bylaw-book.pdf?la=en>; See CBA 2015, *supra* note 40, art. 5, § 5.

75. REGULATIONS ON THE STATUS AND TRANSFER OF PLAYERS art. 1.1 (2016) [hereinafter FIFA-Transfer Regulations], [http://resources.fifa.com/mm/document/affederation/administration/02/70/95/52/regulationsonthestatusandtransferofplayersjune2016\\_e\\_neutral.pdf](http://resources.fifa.com/mm/document/affederation/administration/02/70/95/52/regulationsonthestatusandtransferofplayersjune2016_e_neutral.pdf); CBA 2015, *supra* note 40, art. 15, § 15.5.

76. See FIFA-Transfer Regulations, *supra* note 75, art. 9.1.

77. The three Canadian teams are members of the Canadian Soccer Association (CSA).

78. FIFA-Transfer Regulations, *supra* note 75, art. 1.2.

79. See Case C-415/93, *Union Royale Belge des Sociétés de Football Ass'n v. Bosman*, 1995 E.C.R. I-04921.

transfer between clubs free of a transfer fee. This ECJ decision also banned restrictions on foreign European Union players within national leagues, which had previously existed in European soccer. This decision primarily benefited players from European Union countries and from countries who have entered into freedom of movement treaties with the European Union (e.g., Switzerland).<sup>80</sup> Subsequently, the Court of Arbitration for Sport (CAS)<sup>81</sup> has selectively also applied these freedoms to other countries.<sup>82</sup>

In the wake of the *Bosman* decision, FIFA was forced to amend its rules on international transfers in order to reflect the changed power balance between the clubs and players. Hence, the currently applicable FIFA-Transfer Regulations provide that players shall be bound by their clubs for a fixed term only, normally for a maximum of five years,<sup>83</sup> and will then be free to transfer to another team free of a transfer fee.<sup>84</sup> While protection of contractual stability is a core principle of the FIFA-Transfer Regulations, both parties are granted certain rights to an early termination of the contract on an exceptional basis.<sup>85</sup> Transfers of players under contract against a transfer fee (or loans against a loan fee, respectively) are permitted, as long as they occur for the duration of the biannual national transfer windows.<sup>86</sup> Regardless of whether the transfer takes

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80. The impact of UK's vote of June 23, 2016 on exiting the European Union ("Brexit") on free agency of European players in the Premier League is not clear at this stage but may be severe. *See generally* Bobby McMahon, *11 Ways Brexit Will Impact the Premier League and Soccer Worldwide*, FORBES (June 24, 2016), <http://www.forbes.com/sites/bobbymcmahon/2016/06/24/this-week-in-soccer-biz-special-11-ways-brexit-vote-will-impact-premier-league-and-soccer-worldwide/#773495b52513>; Cristina Criddle, *What Will Brexit Mean for the Premier League?*, TELEGRAPH (June 24, 2016), <http://www.telegraph.co.uk/football/2016/06/21/what-would-brexit-mean-for-the-premier-league/>.

81. The CAS, headquartered in Lausanne, Switzerland, is an international, independent institution established to resolve legal disputes in the field of sport through arbitration or mediation. In sections 57–59 of its Statutes, FIFA explicitly recognizes CAS's jurisdiction over FIFA matters. FIFA STATUTES art. 2, ¶ 15(f) (Apr. 2016 ed. 2016), [http://resources.fifa.com/mm/document/affederation/generic/02/78/29/07/fifastatutswen\\_neutral.pdf](http://resources.fifa.com/mm/document/affederation/generic/02/78/29/07/fifastatutswen_neutral.pdf).

82. *See generally* Club Atlético Peñarol v. Suárez, CAS 2005/A/983 & 984. In this judgment, the so-called "South American Bosman," unilateral options that were valid according to national rules on transfers of the Uruguayan Association were declared invalid due to a conflict with the FIFA-Transfer Regulations and international law principles (i.e., freedom of movement for free agents). *See* JUAN DE DIOS CRESPO PÉREZ, CAS AND FOOTBALL: LANDMARK CASES 116–18 (Alexander Wild ed., 2012) [hereinafter PÉREZ].

83. FIFA-Transfer Regulations, *supra* note 75, art. 18.2.

84. The *Regulations on the Status and Transfer of Players* do not explicitly stipulate that the transfer of a free agent must be free of a transfer fee. Nevertheless, see *id.* art. 9.1 (pursuant to which an international transfer certificate shall be issued *free of charge*).

85. *Id.* arts. 13–17.

86. *See id.* arts. 6.1–6.3.

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during or at the end of the player's contract, the player's new team under certain conditions may be required to pay training compensation<sup>87</sup> or a solidarity contribution to the player's former training club(s).<sup>88</sup>

### C. Differences

Unmistakably, MLS' transfer system substantially differs in essential aspects from the post-*Bosman* transfer system in Europe and the FIFA-Transfer Regulations.

#### 1. No Free Choice of Employer

In Europe, out-of-contract players may freely choose which team they want to sign on to next, but this is not the case in MLS. Unlike in Europe, MLS players without their consent are assigned to teams by means of allocation mechanisms that are centrally controlled by the league (e.g., SuperDraft, re-entry draft, or allocation ranking).<sup>89</sup>

#### 2. Salary Limitations

The salary of MLS players (with the exception of the Designated Players) is not the result of supply and demand, as in Europe, but factually is limited by the lack of competition for players. Even for free agents, any salary increase resulting from a transfer to a new team may only be within narrow margins.<sup>90</sup> Additionally, salaries are limited by the team-specific salary cap. On the other hand, a minimum annual base salary is provided for in the CBA 2015.<sup>91</sup> By contrast, collective salary regulations are a foreign concept in European leagues. The sole safeguard for some competitive balance is the Financial Fair Play Regulations of UEFA,<sup>92</sup> pursuant to which clubs must not spend more than they earn.<sup>93</sup>

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87. *Id.* art. 20.

88. *Id.* art. 21.

89. *See supra* Part IV.B.

90. *Id.*

91. *See supra* Part IV.C.

92. The Union of European Football Associations (UEFA) is the administrative body for association football in Europe.

93. UEFA CLUB LICENSING AND FINANCIAL FAIR PLAY REGULATIONS (2015), [http://www.uefa.org/MultimediaFiles/Download/Tech/uefaorg/General/02/26/77/91/2267791\\_DOW](http://www.uefa.org/MultimediaFiles/Download/Tech/uefaorg/General/02/26/77/91/2267791_DOW)

### 3. Lack of Self-Determination for Players Under Contract

In Europe, players under contract cannot be transferred or loaned to another club without their consent. In MLS, however, the players have no say in trade or loan deals to other league teams during the term of their contract.<sup>94</sup> Also, they may not be “solicited” during the term of their contract; transfers in exchange for a cash compensation are not permitted within MLS.<sup>95</sup>

### 4. Termination Rights to the Player’s Disadvantage

FIFA requires that the national associations “include in [their] regulations appropriate means to protect contractual stability[,]” with equal consideration given to teams’ and players’ interests.<sup>96</sup> However, in the CBA 2015, MLS players are granted virtually no rights in respect to an early termination of the contract on an exceptional basis.<sup>97</sup> In addition, a (small) number of the players’ contracts still are only “semi-guaranteed,” which means that those contracts

during a certain timeframe may be arbitrarily terminated by the league without compensation should the player fail “to exhibit sufficient skill or competitive ability.”<sup>98</sup> Furthermore, the league may terminate a player contract for disciplinary reasons should a player be found guilty of off-field conduct that is “detrimental to the public image and/or reputation of MLS, the Team and/or the game of soccer.”<sup>99</sup>

### 5. Limits on Foreign Players

The number of foreign players in MLS is currently limited to a total of 176. Roster spots for foreigners are tradable. There are now teams with more or less than the originally allocated eight foreigner roster spots. There is no team-specific limit on foreign players or a minimum number of locally trained

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94. *See supra* Part IV.B.

95. *Fraser v. Major League Soccer, L.L.C. (Fraser I)*, 97 F. Supp. 2d 130, 133 (D. Mass. 2000).

96. *See* FIFA-Transfer Regulations, *supra* note 75, art. 1.3(b).

97. A player’s only possibility of a unilateral early termination is if MLS defaults in its obligation to pay the player’s salary. CBA 2015, *supra* note 40, art. 18, § 18.4.

98. *Id.* art. 18, § 18.7(i).

99. *Id.* art. 20, § 20.2 (ii)(a). This provision includes a list of possible violations, such as being tested positive for a banned substance, betting, match-fixing, failure to maintain an appropriate level of physical and mental condition and refusal to report to work. *Id.* § 20.2(ii)(b)(i)-(ii), (viii)-(ix).

players, respectively.<sup>100</sup> By contrast, since the *Bosman* decision, quotas for European players are taboo in Europe.<sup>101</sup> Conversely, however, many leagues since then demand a minimum number of locally trained roster players.<sup>102</sup> Today, quotas still exist for third country nationals.<sup>103</sup>

## 6. Questionable Elements of Reserve Clause System

The CBA 2015 does not stipulate a maximum length of player contracts.<sup>104</sup> Based on publicly available information, however, it appears that in practice the maximum period of five years as required by FIFA<sup>105</sup> usually is not exceeded. In addition, according to the CBA 2015, the teams are entitled to a limited number of unilateral annual options for renewed employment.<sup>106</sup> It is questionable whether these are permissible by FIFA's legal framework. The CAS has closely examined such unilateral options on a case-by-case basis; in certain cases it has prohibited the exercise of such options.<sup>107</sup> Furthermore, it is questionable whether the right of first refusal of the former club provided for by the CBA 2015 is compatible with FIFA's legal framework.<sup>108</sup>

## 7. No Training Compensation and Solidarity Contributions

FIFA mandates that national associations provide “a system to reward clubs investing in the training and education of young players.”<sup>109</sup> The USSF and MLS, however, have not implemented such a system. They argue that due to a procedural settlement in the context of the former antitrust proceedings,

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100. The only relevant regulation there is, is the requirement that Canadian clubs must have at least three Canadian roster players. *MLS Roster Rules*, *supra* note 45.

101. *See supra* Part V.B.

102. *E.g.*, the UEFA Homegrown Player Rule for the Champions League. REGULATIONS OF THE UEFA CHAMPIONS LEAGUE 2015–18 CYCLE: 2016/17 SEASON, art. 43.02, [http://www.uefa.com/MultimediaFiles/Download/Regulations/uefaorg/Regulations/02/35/87/89/2358789\\_DOWNLOAD.pdf](http://www.uefa.com/MultimediaFiles/Download/Regulations/uefaorg/Regulations/02/35/87/89/2358789_DOWNLOAD.pdf).

103. *E.g.*, SWISS FOOTBALL LEAGUE, REGULATIONS FOR THE LEAGUE OPERATION OF SFL, art. 3 (2015).

104. *See supra* Part IV.B.

105. FIFA-Transfer Regulations, *supra* note 75, art. 18.2 .

106. *See supra* Part IV.B.

107. Club Atlético Boca Juniors v. Genoa Cricket and Football Club S.p.A, CAS 2006/A/1157; Panathinaikos Football Club v. S., CAS 2005/A/973; *see* PÉREZ, *supra* note 82.

108. *See supra* Part IV.B; *see also* Omar Hafez Ayad, *Take the Training Wheels Off the League: Major League Soccer's Dysfunctional Relationship with the International Soccer Transfer System*, 10 VAND. J. ENT. & TECH. L. 413, 432 (2008).

109. FIFA-Transfer Regulations, *supra* note 75, art. 1.2.

they would not be allowed to pay “transfer fees.” Consequently, payments of training compensation to American or foreign clubs would not be possible.<sup>110</sup> American training clubs challenge USSF and MLS on this point and have initiated proceedings with FIFA’s Dispute Resolution Chamber (DRC).<sup>111</sup> Their separate class action lawsuit with the U.S. Court for the Eastern District of Texas has recently been dismissed.<sup>112</sup> In any event, it remains to be seen how this issue will evolve.

#### D. *International Transfers from or to MLS Clubs: Particularities*

International transfers, i.e., transfers between foreign leagues and MLS on the basis of the FIFA-Transfer Regulations, are located at the interface between MLS’ transfer system and international practices. Accordingly, they have the particular feature that the contractual partner of foreign clubs is MLS and not one of its teams.<sup>113</sup> The league pays any applicable transfer fee for a purchase from abroad from league funds and it determines which MLS team the player will play for.<sup>114</sup> Only Designated Players are usually free to choose their MLS team themselves.<sup>115</sup>

A transfer of an MLS player to a club abroad is only made in agreement between MLS and that player.<sup>116</sup> For players under contract, MLS usually would demand a transfer fee. The bulk of this fee is allocated to the player’s last MLS team,<sup>117</sup> 10% of the fee to the player himself, and the rest to the

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110. See *supra* Part II.B; see Luca Smacchia, *Difficulties Claiming Training Compensation in US Soccer*, 13 WORLD SPORTS L. REP., 6, 6–7 (2015).

111. See Jorge Arangure Jr., *Youth Clubs File Class Action Lawsuit vs. MLS Players Union and Dempsey, Yedlin and Bradley*, VICE SPORTS (Jul. 1, 2016), [https://sports.vice.com/en\\_us/article/youth-clubs-class-action-mls-players-union-dempsey-yedlin-bradley-solidarity-payments/](https://sports.vice.com/en_us/article/youth-clubs-class-action-mls-players-union-dempsey-yedlin-bradley-solidarity-payments/); see also Howard Walker, *Pay Us!*, JAMAICA OBSERVER (Jan. 28, 2015), <http://www.jamaicaobserver.com/sport/Pay-us->.

112. *Dallas Texans Soccer Club v. Major League Soccer Players Union*, No. 4:16-CV-00464, 2017 WL 1165662 at \*5 (E.D. Tex. Mar. 29, 2017); Fola Akinnibi, *MLS Union Sheds Suit over Youth Soccer Training Fees*, LAW360 (Mar. 30, 2017), <https://www.law360.com/articles/907778/mls-union-sheds-suit-over-youth-soccer-training-fees>.

113. See CBA 2015, *supra* note 40, arts. 15, 18, §§ 15.2, 18.1(ii).

114. *Id.* art. 15, § 15.1.

115. See *supra* Parts IV.B–C; in theory, the league may also intervene with these transfers, but it wisely refrains from doing so, see *Steven Gerrard's Transfer to Major League Soccer*, ANDREW VISNOVSKY (Jan. 21, 2015), <https://andrewvisnovsky.wordpress.com/2015/01/21/steven-gerrard-and-transfer-of-players-between-the-mls-and-other-leagues/>.

116. CBA 2015, *supra* note 40, art. 15, § 15.2; see *supra* Part IV.B.

117. See CBA 2015, *supra* note 40, art. 10, § 10.19(e); see also *MLS Roster Rules*, *supra* note 45.

league.<sup>118</sup> For out-of-contract players, MLS does not seem to demand a transfer fee nor any training compensation or similar compensation.<sup>119</sup>

## VI. HOW WILL MLS'S TRANSFER SYSTEM EVOLVE?

MLS' single-entity structure that is still in place today proves to be a target for attack not only because it differs significantly from international practices and restricts the autonomy of the players and teams drastically, but mainly also because it has a significant impact on the economic success of the various actors involved. In the coming years, it will likely increasingly come under pressure from various stakeholders.

### A. Pressure from Investors

MLS League Commissioner Don Garber officially announced that the league intends to hold on to its single-entity structure for the years to come.<sup>120</sup> However, this will raise the question as to whether holding on to this organizational model also in the long run will prove to actually be in the best interest of the league and thus the investors.

Increasingly, the league's collective interests tend not to correspond to the interests of team operators.<sup>121</sup> While the league promotes competitive balance, the investor would prefer to have the marquee player on his own team rather than on the opposing team.<sup>122</sup> In recent years, there has been a great number of transfers, in which the league, according to arbitrarily established and more or less transparent criteria, decided over the heads of the investors on the allocation of a player. For example, during the 2012 season, MLS decided not to meet Toronto FC's desire to sign the former Swedish star defender, Olof Mellberg. This transfer apparently was not in the "league's best interests," i.e., not worthy of investment.<sup>123</sup> Such seemingly arbitrary interference by the league at times may raise suspicion that for strategic reasons, teams in the key markets would be favored against teams in the periphery. It goes without say-

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118. CBA 2015, *supra* note 40, art. 15, § 15.3.

119. *Id.* art. 15, § 15.4.

120. See Jared E. Young, *The MLS CBA: Unpacking Don Garber's Recent Comments on Single-entity*, SB NATION: BROTHERLY GAME (Sept. 24, 2014, 10:00 AM), <http://www.brotherlygame.com/2014/9/24/6836267/the-mls-cba-unpacking-don-garbers-recent-comments-on-single-entity>.

121. See *id.*

122. See Lennarz, *supra* note 27, at 176–78.

123. See Cathal Kelly, *Toronto FC's Hands Tied by Meddling MLS: Kelly*, STAR (Oct. 28, 2012), [www.thestar.com/sports/soccer/tfc/2012/10/28/toronto\\_fcs\\_hands\\_tied\\_by\\_meddling\\_mls\\_kelly.html](http://www.thestar.com/sports/soccer/tfc/2012/10/28/toronto_fcs_hands_tied_by_meddling_mls_kelly.html).

ing that such interventions by the league have the potential to cause conflict.<sup>124</sup>

Another challenge is MLS' competitive disadvantage in the international transfer market due to its unique and player unfriendly transfer and salary system.<sup>125</sup> Today, it proves to be difficult for MLS to attract mid-range foreign players without "top star status." In addition, even for talented American players, foreign leagues often offer better financial perspectives. In the 2013 season, MLS only spent about 20% of its total revenues on player salaries. This is a low amount compared to proportions of 40% and above in European leagues.<sup>126</sup> Another obstacle is the unorthodox league schedule from March to December, which also for practical considerations makes transfers from other leagues difficult.<sup>127</sup> A harmonization of MLS' transfer system and league schedule with international practices, and the expected resulting increase in transfers of foreign players, would result in an additional increase of the league's overall competitive level.<sup>128</sup> This in turn would generate a larger national and international audience appeal, which again would be in the economic interest of the investors.

MLS now seems to be stable enough for the club investors to engage in unfettered competition without centralized league control.<sup>129</sup> An unfettered competition among the teams may also result in more legitimacy of the league with fans, players, and the international soccer community.<sup>130</sup> It remains to be seen if and when the league will decide to take this step, potentially due to pressure by individual investors. In any event, at the latest, when a new CBA will be negotiated before the 2020 season, the league, in its own interest, probably will be more susceptible to deregulation requests from its players.

### B. Pressure from the Players

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124. See Geoff Gibson, *Discovery Claims Are an Embarrassment to MLS*, SB NATION: STUMPTOWN FOOTY (Feb. 16, 2013, 9:02 AM), <http://www.stumptownfooty.com/2013/2/16/3995274/discover-claims-embarrassment-mls-portland-timbers>; see also Hank Stebbins, *Blind Draw: How Major League Soccer's Single Entity Structure and Unique Rules Have Impacted Soccer in the United States*, 13 WILLAMETTE SPORTS L.J. 1, 31–35 (2015).

125. See Lennarz, *supra* note 27, at 188, 192–94.

126. See *Is Greed Good?, Part II: Hey MLS Corporate, Ante up!*, SHIN GUARDIAN (June 5, 2013), <https://theshinguardian.com/2013/06/05/is-greed-good-part-ii-hey-mls-corporate-ante-up/>.

127. On the one hand, the MLS' league schedule without summer break is due to climatic reasons and on the other hand, it is due to the fact that in the summer months the league does not face competition from the NFL, the NBA, and the NHL. Taylor, *supra* note 4, at 9–10; see Lenihan, *supra* note 36, at 903–04.

128. See Hafez Ayad, *supra* note 108, at 438–39.

129. See Young, *supra* note 120.

130. See Stebbins, *supra* note 124, at 39.

The players are subject to the CBA 2015 until the end of the 2019 season.<sup>131</sup> Until then, neither a players' strike nor a league lockout—as has happened in American sports history before, most recently in the NHL in 2012—is allowed.<sup>132</sup> Hence, the players union, MLSPU, will not again be in the position to engage in collective bargaining with the league until the end of the 2019 season.

In case of a deadlock in the CBA negotiations, it is not impossible that the players at that point will again try to bring down the single-entity system by means of an antitrust challenge in court. At least at first glance this seems to be a viable option, as it is highly questionable whether given the changed economic reality the league would still benefit from single-entity immunity in antitrust matters, as it did in the *Fraser v. Major League Soccer, L.L.C.* (*Fraser I*) decision of 2000.<sup>133</sup> There are, however, high procedural hurdles for such proceedings. According to established jurisprudence of the U.S. Supreme Court, for the duration of an existing CBA and also for a certain period after its expiration (provided that the players continue to be unionized and in a position to collectively bargain with the league), a sports league is immune against antitrust lawsuits from the players.<sup>134</sup> As a result, the only remaining option would be to formally decertify the union following the expiration of the CBA 2015. However, even this measure would remain ineffective if according to the court's opinion the decertification were to merely be a tactical maneuver and, therefore, were not to actually signify the end of the collective bargaining relationship—a decision on a case-by-case basis.<sup>135</sup> Although, it is also quite possible that at that time, due to changed circumstances and further concessions of MLS to the players, an antitrust challenge would no longer be necessary in the first place.

### C. Pressure from FIFA or International Sports Courts

The FIFA-Transfer Regulations aim to “establish basic principles that guarantee a uniform and equal treatment of *all* participants in the [soccer]

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131. See *supra* Part IV.A.

132. CBA 2015, *supra* note 40, art. 6, §§ 6.1, 6.3.

133. See *supra* Parts II.B, III.

134. See *Brown v. Pro Football, Inc.*, 518 U.S. 231, 235–37 (1996); see also WEILER ET AL., *supra* note 9, at 389–90.

135. See WEILER ET AL., *supra* note 9, at 426–28.

world.”<sup>136</sup> “As a general rule, FIFA does not interfere in the day-to-day business of the associations,” and allows them “to adapt their own regulations to the[ir] particular conditions and circumstances[,]” “provided that severe infringements of the FIFA statutes and/or regulations do not occur.”<sup>137</sup> “The autonomy of the associations is, however, limited by the basic principles of the [r]egulations that have to be observed at all times and in particular by those provisions that are . . . binding at the national level and [must] be included without modification in the association’s regulations.”<sup>138</sup>

As outlined above, MLS’ transfer system contrasts with the practices in international soccer and with the FIFA-Transfer Regulations.<sup>139</sup> A national single-entity structure and a protectionist and centralized transfer policy, as that of MLS, are not explicitly prohibited in FIFA’s legal framework. However, implicitly, this system seems to be incompatible with the spirit and purpose of the FIFA-Transfer Regulations, which are based on an equal consideration of clubs’ and players’ interests.<sup>140</sup> Moreover, contrary to the FIFA mandate, the USSF and MLS have failed to comprehensively implement nationally binding regulations, such as a system of rewarding training clubs,<sup>141</sup> appropriate means to protect contractual stability,<sup>142</sup> and a ban on “third-party ownerships.”<sup>143</sup>

In the event that FIFA would want to urge MLS to harmonize its transfer policy, there would probably be a basis in FIFA’s legal framework to do so. However, it is not realistic that in the short and medium term FIFA will put any increased pressure on the USSF and MLS in a call for harmonization. As far as can be seen, FIFA has largely not interfered with the USSF and MLS’ internal matters in the past twenty-one years. In the early 1990s, it was FIFA that had initiated a renewed attempt for professional soccer in the U.S., after all.<sup>144</sup> The subsequent positive development of the league and of soccer in the

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136. See COMMENTARY ON THE REGULATIONS FOR THE STATUS AND TRANSFER OF PLAYERS, art. 1, ¶ 2, [http://resources.fifa.com/mm/document/affederation/administration/51/56/07/transfer\\_commentary\\_06\\_en\\_1843.pdf](http://resources.fifa.com/mm/document/affederation/administration/51/56/07/transfer_commentary_06_en_1843.pdf) (last visited May 15, 2017) [hereinafter Transfer Regulations-Commentary] (emphasis added).

137. *Id.* art. 1, ¶ 2(1).

138. *Id.* art. 1, ¶ 2(2).

139. See *supra* Part V.C.

140. See Hafez Ayad, *supra* note 108, at 430–34.

141. See *supra* Part V.C.7.

142. See *supra* Part V.C.4.

143. FIFA-Transfer Regulations, *supra* note 75, art. 18ter.1; see W. Tyler Hall, Comment, *After the Ban: The Financial Landscape of International Soccer After Third-Party Ownership*, 94 OR. L. REV. 179, 180 (2015).

144. See *supra* Part II.A.

U.S. in general has been in FIFA's best interests too.

At most, FIFA's position towards MLS may change if one day MLS, due to a further increase in success, actually were to be in a position to directly compete with the major European leagues, and thereby in the eyes of FIFA in a distortive manner would benefit from its single-entity structure—e.g., due to the possibility of paying transfer fees from league funds.<sup>145</sup>

The transfer system itself may possibly be attacked by invoking sports courts.<sup>146</sup> For this to happen, one would need to find a foreign MLS player—an “*MLS-Bosman*”—that would be prepared to initiate employment-related proceedings against his MLS team with FIFA's DRC.<sup>147</sup> However, the DRC would only be competent to hear the case if it took the view that MLS' internal arbitration pursuant to CBA 2015 does not comply with FIFA's requirement of independent and fair national proceedings that respect the principle of equal representation of players and clubs. MLS' internal arbitration only provides for *one* impartial arbitrator whose judgment furthermore must be within the framework of the CBA 2015.<sup>148</sup> FIFA, however, expressly requires an arbitration tribunal composed of members chosen in equal number by players and clubs with an independent chairman, i.e., a tribunal of no less than *three* people.<sup>149</sup> In previous proceedings, the DRC has strictly applied this requirement.<sup>150</sup> Materially, one would argue that elements of MLS' transfer policy, such as unilateral options rights, rights of first refusal, one-sided

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145. See *supra* Part V.D.

146. See Andrew Visnovsky, *FIFA Dispute Resolution Chamber Jurisdiction over MLS Contract Disputes*, ANDREW VISNOVSKY (Feb. 1, 2015), <https://andrewvisnovsky.wordpress.com/2015/02/01/jurisdiction-of-the-fifa-dispute-resolution-chamber/>; see also Andrew Visnovsky, *The 2015 MLS CBA, Bosman, and How European Law Affects Free Agency in American Soccer*, ANDREW VISNOVSKY (Feb. 22, 2015), <https://andrewvisnovsky.wordpress.com/2015/02/22/the-2015-mls-cba-bosman-and-how-european-law-affects-free-agency-in-american-soccer/>.

147. FIFA-Transfer Regulations, *supra* note 75, arts. 22.b, 24.1. There would already be an international dimension if the plaintiff player is a non-American or a non-Canadian for Canadian teams, respectively. See Transfer Regulations-Commentary, *supra* note 136, art. 22.b.

148. CBA 2015, *supra* note 40, art. 21, §§ 21.6, 21.8.

149. Transfer Regulations-Commentary, *supra* note 136, art. 24, ¶ 2; NATIONAL DISPUTE RESOLUTION CHAMBER (NDRC) STANDARD REGULATIONS, art. 3, ¶¶ 1, 3, [http://resources.fifa.com/mm/document/affederation/administration/67/18/19/national\\_dispute\\_resolution\\_efsd\\_47338.pdf](http://resources.fifa.com/mm/document/affederation/administration/67/18/19/national_dispute_resolution_efsd_47338.pdf) (last visited May 15, 2017); Memorandum from Urs Linsi, Gen. Sec'y, to the Members of FIFA and the Confederations (Dec. 20, 2005), [http://goldengate-law.com/pdf/fifa\\_circular/fifa\\_circular\\_1010.pdf](http://goldengate-law.com/pdf/fifa_circular/fifa_circular_1010.pdf).

150. See *Player J. v. Club A.*, Case No. 8122302 (FIFA Dispute Resolution Chamber Aug. 17, 2012), <http://resources.fifa.com/mm/document/affederation/administration/01/96/95/56/8122302.pdf>.

termination rights, or lack of player's self-determination,<sup>151</sup> violate the FIFA-Transfer Regulations or principles of international law in light of the *Bosman* decision.<sup>152</sup> A judgment of DRC may be appealed to CAS.<sup>153</sup>

## VII. CONCLUSION AND OUTLOOK

MLS' founding fathers learned from historical mistakes and designed the league as a single-entity with league-wide redistribution mechanisms and centralized control. These measures, aimed at overall and sustainable economic development, have paid off. In the past twenty-one years, MLS has developed positively and, financially, it seems to be on a solid track. The league aims for further growth and pursues the self-proclaimed ambitious goal to become one of the major soccer leagues in the world by 2022.<sup>154</sup> The enabling conditions for this endeavor seem to be in place: financially strong investors; a large market for sponsorship and broadcasting revenues; soccer-specific stadiums; a functioning youth development concept; the U.S. as an attractive destination for players; as well as the country's growing soccer affinity, in particular with the younger generation and Latin American immigrants.<sup>155</sup>

The decisive factor for MLS' future success is likely going to be how it will be able to position itself in the international transfer market in the upcoming years. At this, its unique single-entity structure and player unfriendly transfer system may prove to be a competitive disadvantage and an obstacle in the league's further growth and expansion plans. Therefore, it seems to be merely a matter of time until MLS will get rid of its "single-entity training wheels."<sup>156</sup> In any event, it seems likely that MLS' investors in their own interests will be more susceptible to free agency requests from the players' side in the next CBA negotiations after the 2019 season. In this scenario, the "single-entity problem" may one day be solved by itself, without being prompted by a court judgment or an intervention by FIFA. Regardless, it will be inter-

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151. *See supra* Part V.C.

152. Case C-415/93, *Union Royale Belge des Sociétés de Football Ass'n v. Bosman*, 1995 E.C.R. I-04921.

153. *See* FIFA-Transfer Regulations, *supra* note 75, art. 24.2.

154. *See* Smith, *supra* note 2.

155. *See* KUPER & SZYMANSKI, *supra* note 35, at 407, 414; *see also* GARY HOPKINS, STAR-SPANGLED SOCCER: THE SELLING, MARKETING AND MANAGEMENT OF SOCCER IN THE USA 285-87 (2010); *Soccer Flourishes: Kick Turn*, *ECONOMIST* (May 26, 2016), <http://www.economist.com/news/united-states/21699484-more-and-more-americans-watching-people-kick-round-balls-kick-turn>.

156. *See* Coppage, *supra* note 7, at 559, 561, 563; Hafez Ayad, *supra* note 108, at 442-44.

esting to follow the development of MLS in the upcoming years, both from a sport and a structural perspective, and to see how MLS' balancing act between a league in a U.S. sports environment and a league as part of the FIFA framework will evolve.