



### HOW MAJOR LEAGUE SOCCER'S TRANSFER AND ACQUISITION RULES AFFECT ITS STANDING IN THE INTERNATIONAL TRANSFER MARKET...TO ITS DETRIMENT

While the various European football leagues generally follow FIFA's Regulations on the Status and Transfer of Players ("RSTP") to control the player transfer system through rules that balance player and team interests, New York-based Major League Soccer ("MLS") operates its US and Canadian-based teams under a vastly different system that loosely and partially follows the RSTP - arguably to its detriment with respect to obtaining international players. This article provides an overview of the differences between MLS and the European transfer and acquisition systems and argues that, although the MLS system is slowly catching up to those in European leagues, the lack of uniformity in its transfer system is harmful to MLS' teams in their international player acquisitions.

#### Introduction

Born out of the unique founding and development of MLS, the player acquisition and transfer system for the league, as well as a the league's structure as a whole (a "single entity" model that is discussed below), has an impact on the league's global competitiveness. MLS, which acts as a US-styled professional sports league but within the confines of a global sport, must walk the fine line between its needs of survival and growth and being part of a global framework governed by FIFA regulations.

FIFA states that all of its national association members must adopt FIFA's rules and regulations, except when compliance with a specific FIFA rule is illegal under national law. Since MLS is US Soccer Federation ("USSF") member, which is itself a national association member of FIFA, it is obliged to respect the rules, regulations, and directives of FIFA, including the



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RSTP – yet its policies differ from the RSTP in many areas with respect to international transfer and acquisition (and it has not necessarily adopted regulations for local transfers that include certain minimum requirements of the RSTP).

MLS has a myriad of rules and regulations governing transfer and acquisition of players and here are several ways that MLS' system differs from that of European leagues, where the transfer regulations more closely follow the RSTP.

### Several Differences

#### 1. The Single-Entity, Centralized Structure of MLS

Unique even in the US for professional sports leagues, MLS operates under a centrally-governed “single entity” model, where the league itself controls all player rights. (The league is a limited liability company owned by independent investors who have the right to operate an MLS team as an “investor-operator” rather than a team “owner.”) This structure may be the most jarring difference between MLS and European leagues, as players attempting to enter MLS are negotiating and signing with the league itself not a team. Because of this structure, the league can overrule individual teams' desires to sign a particular player (which allegedly happened with Toronto FC's intention to sign Olof Mellberg in 2012, where MLS argued that it was not in the league's best interests to sign him) or provide salary increases (which reportedly arose in Stefan Frei's situation with Seattle, where the team was prevented from using “targeted allocation money” to re-sign him), and can move a player to a different team (as discussed further below).

This alone demonstrates the incompatibility of the MLS transfer and acquisition system and those governed more closely by the RSTP. In a centralized structure, competitiveness is arguably affected, because generally speaking the league ultimately controls where the players are allocated (although the “discovery process” discussed below changes this somewhat, for the team's benefit). Additionally, the single entity structure greatly favors MLS' bargaining power – if a player wants to play and/or stay in the top tier division of US soccer, he has no choice but to deal with MLS rather than just seek a different top tier team.



## **2. Salary Cap**

Similar to other North American professional sports leagues, MLS has a salary cap that individual teams may not exceed. The general purpose is to stabilize teams - something that prior pro North American soccer leagues failed to do (such as the North American Soccer League's ("NASL") original incarnation and the dozens of franchises that have dissolved in the United Soccer Leagues ("USL")). At the same time however, a salary cap suppresses player salaries. In MLS, the maximum salary per player may not exceed more than 12.5% of each team's cap (US\$504,375 in 2018). Such salary regulations are quite a departure from European leagues, where caps are not used and the only defense for competitive balance (at least from a monetary standpoint) are the Financial Fair Play regulations. These artificial constraints on a player's salary arguably makes MLS an unattractive destination for top international players.

However, MLS has attempted to alleviate the stringent salary rules in two ways. First, in 2007 the league created the "Designated Player" rule, which allows a team to sign a player for above the cap level (only the initial 12.5% of the player's salary will be credited against the cap – the individual team's operator is liable to reimburse MLS for the portion above such cap percentage). This rule was famously put in place so that the LA Galaxy could sign David Beckham. It has often been used to sign aging European stars (including the just-transferred Wayne Rooney to DC United), but more recently for up and coming South American stars that are earlier in their careers. Each MLS team has the right to sign up to 3 Designated Players.

Second, the league recently introduced "targeted allocation money" - a set of funds that allows teams to buy down a player's salary charge against the cap, effectively raising the team's budget (these funds are limited to all resources (i.e., loan/transfer fee, salary, immigration costs, and intermediary fees) paid for a player's transfer fee that is between the senior maximum salary and up to US\$1.5 million). For example, the LA Galaxy was limited to sign Zlatan Ibrahimović with "targeted allocation money" because they already had their 3 "Designated Player" roster slots filled.

As such, while MLS salaries are restrained due to the salary cap for each team, MLS is taking steps to help teams attract "bigger" players by developing these mechanisms for paying salaries above the mandatory cap, although all players on each team's 20-man senior roster has some part of the player's earnings allocated to the salary cap.



### 3. The Use of Unilateral Options

In every Standard Player Agreement ("SPA"), MLS may include up to 3 unilateral options for no more than 3 years in total, or, for players who are at least 24 years old with at least 2 years' experience in MLS, the agreement term may only be extended for 2 years at most. These options greatly benefit MLS, as it is able to retain a player with a pre-set (and likely low) salary, or decline the option and drop a player that is underperforming or, in the case of an international player, that did not adapt to the league. And again, this is the league as a whole, not just an individual team.

The right to such unilateral options is quite controversial, as such clauses allow teams to restrain a player from entering the open market and likely restrict a player's earning potential. FIFPro has argued that unilateral options are illegal and violate the principle of stability of contract. However, these clauses are not specifically prohibited by the RSTP and are even included in contracts in various European leagues. While FIFA's Dispute Resolution Chamber and various CAS panels have found such clauses to be unenforceable (as such clauses arguably curtails the freedom of player movement in an excessive way), other panels have enforced such clauses. (See e.g., the [Decision of the Dispute Resolution Chamber on 23 March 2006](#) and [Penarol v. Bueno Suarez](#) (CAS 2006); but see the [Panathinaikos v. Kyrgiakos](#) (CAS 2006) and [Ascoli v. Waigo](#) (CAS 2016) decisions). These decisions appear to turn on two primary points – whether the total length of the contract term exceed the 5 year maximum term set forth in the RSTP and whether the player receives increased benefits during the option terms. (MLS typically only offers a 5-10% salary increase during the option years, which a CAS panel would likely deem a lack of consideration necessary to deem the option valid.)

With respect to MLS' unilateral options, a handful of players and their international suitors have been challenging their validity – not yet in court, but in practice. For example, Turkish clubs Besiktas and Trabzonspor and Mexican club Queretaro signed MLS players Cyle Larin, Fabian Castillo, and Camilo Sanvezzo, in 2018, 2016, and 2014 respectively, even after the players' MLS teams allegedly exercised the applicable option terms. The players, their intermediaries, and the international clubs, acted as if the players were out of contract and available for a free transfer. In all three cases, MLS and the respective international club came to practical arrangements, either arranging an official transfer or settling for negotiated payments. Thus, there have been no legal decisions as to whether MLS' unilateral options are valid





and binding. But given MLS' superior negotiating power at the outset of the SPA negotiation and the likely low salary for the majority of MLS players, DRC and CAS precedent show that MLS' unilateral options may be vulnerable to challenge.

#### **4. Relocation Within MLS Without Consent**

MLS players under contract have no choice on where they may be traded, transferred, loaned, or sold within the league, whereas players on European teams cannot be transferred or loaned without their consent. (There are a few exceptions however, as some high-profile players are able to reportedly negotiate a "no trade" clause, but this is rare.) Except when MLS plans to transfer, loan, assign, or sell the rights to a player to a team or league outside of MLS, MLS does not need to obtain the player's consent to any of those actions – and can trade, relocate, or reassign a player at any time to any team in the league. A player would have to negotiate an addendum to the SPA in order to prevent such actions without consent – or bargain for other benefits.

#### **5. Lack of Autonomy in Choosing the Employing Team**

MLS players are allocated to MLS clubs in several ways – and not necessarily by the players' choice. These methods include the "SuperDraft" for university players and select international players (whereby teams pick via assigned draft slots, usually based on reverse order of finish in the prior year), a re-entry draft for a player who is out of contract or whose team option was not exercised (and who does not qualify for the limited free agency that MLS players have, noted below), and where a player was placed on waivers or otherwise had his contract bought out (which would then make him available to other teams).

The way international players (or elite US players playing abroad) typically enter MLS is through the "discovery process," whereby teams identify players not yet under MLS contract and submit a claim to the league office to add the players to the team's discovery list (which then gives such team the exclusive opportunity to offer a player on that list a contract), or through the "allocation process," whereby teams can acquire elite players appearing on an "allocation list" as long as such player is available when the team's allocation slot is up (which is determined by the reverse order of finish in the previous season). Even then, opportunities may be limited, as MLS limits the total number of international players in the league to 184, with each team receiving





8 international player slots (although teams can trade such slots and end up with more or less than 8 international players)

So again, rather than a player simply choosing where to go, he has to negotiate the complex maze of MLS rules in order to end up playing in the league – and possibly not on a team of his choosing.

### **6. No Training Compensation or Solidarity Contribution**

While the RSTP mandates the payment of training compensation to a player's youth team and solidarity fees to the youth teams that trained the player, USSF and MLS have thus far refused to implement such payment programs, thus depriving US youth teams from being compensated for the development of youth players who go on to sign pro contracts. Their reasoning – set forth by the MLS Players Union and echoed by USSF: enforcing the RSTP with respect to the training compensation and solidarity payment mechanisms likely violates US antitrust law given the mechanisms' potential impact on the mobility of players, which would be an illegal restraint on player trade. A recent challenge by several US youth teams against the MLS Players Union attempting to clarify whether such payment programs were indeed antitrust violations was dismissed by a federal court judge based on jurisdictional grounds - and thus the question remains as to whether a program for the payment of solidarity fees and training compensation violates US antitrust law. Nevertheless, as it currently stands, youth teams in the US will not receive training compensation or solidarity payments, in contrast to those youth teams abroad, and MLS and/or its teams have retained all of these types of funds triggered as a result of transfers.

Many commentators within the sport think that implementing a program for such payments would make MLS better – both from a player perspective (because youth teams would have more incentive to train quality players), as well as from a team perspective (as these types of payments allow “smaller” teams to share in transfer fees for the players they developed and further enhance their program).

### **7. The Term of Players' Playing Agreements and Termination Rights Thereunder**

Both the term of MLS SPAs and the termination rights thereunder differ from those leagues that follow the RSTP. Indeed, the SPA requires the player to







acknowledge that those sections of the RSTP addressing the guaranteed minimum term of one year or maximum term of five years (or three years, for players under 18), do not apply.

Additionally, not all MLS player contracts are guaranteed – and these semi-guaranteed or non-guaranteed contracts allow MLS to terminate for various reasons, including the quality of the player's on-field performance or due to the suffering of an injury during the performance of the player's duties in MLS. Unless a player negotiates a “guaranteed” contract or satisfies the “automatic guarantee” requirements (where the player must be at least 24 and has played at least one “MLS Guaranteed Service Year”), his semi-guaranteed or non-guaranteed contract makes him vulnerable to termination.

Further, MLS requires in the SPA that players waive certain RSTP provisions, including those addressing the players' right to terminate a playing contract, such as for unilateral breach or sporting just cause. However, the MLS collective bargaining agreement provides players with termination rights if MLS defaults in its obligation to pay the player's salary or fails to perform its other material obligations under the player agreement, which brings an MLS player's termination rights closer to those under RSTP.

### **8. “Reserve Clause” System**

Although largely abolished in other US pro sports leagues due to challenges brought by players to obtain free agency, as demonstrated above, MLS operates under something akin to a “reserve clause” system because it controls player movement, particularly the ability of a player at the end of his MLS contract to stay with the league (requiring entry into the re-entry draft, as noted above). Such a system is antithetical to the system of player movement in post-Bosman Europe. However, in its most recent collective bargaining agreement with the MLS Players Union, MLS did grant limited free agency rights to players with certain status (out of contract players that are at least 28 years old with at least eight years of MLS service), so movement away from a “reserve clause” system has been made.

### **Getting Better?**

MLS' salary cap and protectionist transfer and acquisition system is detrimental to international transfers to and from the league and restricts players' and teams' autonomy, thus putting MLS at a disadvantage for international





## Legal Newsletter

transfers. FIFA to date has taken a hands-off approach to MLS' transfer and acquisition system (and the structure of MLS as a whole), but players and/or international teams may start to challenge that system. Nevertheless, even without FIFA pressure or court-imposed demands, MLS is making great strides to make the league more friendly for player movement – particularly with the advent of the “Designated Player Rule” and “targeted allocation money” and the limited free agency that the league now offers. This commentator is hopeful that the MLS transfer system continues to move towards those found in Europe, which would benefit, players, teams, and the league as a whole.

