

CHAPTER TWO

LITERATURE REVIEW

A. The Dispute and Settlement

1. Dispute in General

Dispute is a situation where there are parties who suffer disadvantaged by others parties, who then the party convey this dissatisfaction to second parties. If the situation shows dissent, then what is called a dispute happens. In the context of law, especially law of contract, the definition of a dispute that occurs between the parties because of a violation of agreement that has been put in a contract either in part or whole. In other word, there has been breach of agreement/contract by parties or one of party.¹

There are two processes to settle down the dispute arises, litigation and non-litigation. Dispute settlement through court or often reffered in term “litigation”, ie settlement of dispute which are carried out with the procedings at the court trial in which the authority to regulate and decide were carried out by the judge. Litigation is the process of dispute settlement in court, at where all the parties in disputes face each other to defend their rights in court. The end result of a dispute settlement through litigation is a verdict stated win-lose solution.²

¹ Nurnaningsih Amriani, 2012, *Mediasi (Alternatif Penyelesaian Sengketa di Pengadilan)*, Jakarta, PT Raja Grafindo Persada, p. 12.

² *Ibid.*, p. 35.

The procedure is more formal and technical resulting a win and lose; it tends to cause new problems, takes time for completion, has expensive cost, unresponsive and creates hostile between parties in the dispute. This condition affected the society to look for alternative settlement outside the formal judicial process. This dispute settlement outside the formal judicial process is called an alternative dispute resolution.³

There have been some non-litigations settlement such as alternative dispute resolution (ADR) which is regulated in Law No. 30 Year 1999 on Arbitration and Alternative Dispute Resolution. Alternative Dispute Resolution (ADR) is a non-court dispute settlement arrangement under the agreement of the parties to the exclusion of a litigation in court. There are several alternative dispute resolutions to settle down the dispute between parties:

a) Arbitration

Article 1 paragraph (1) of Law No. 30 Year on Arbitration and Alternative Dispute Resolution explains that arbitration means method to settle the private dispute outside of general court which is based on arbitration writing agreement between by the parties to the dispute. Arbitration is used to anticipate possible dispute occur or which are experiencing disputes that can't be settled in negotiation/consultation or

³ Yahya Harahap, 2008, *Hukum Acara Perdata tentang (Gugatan Persidangan, Penyitaan, Pembuktian, dan Putusan Pengadilan)*. Jakarta, Sinar Grafika, p. 234.

through the third party as well as to avoid dispute settlement through the judicial body which has been taking a long time.

b) Negotiation

Negotiation is a two-way communication designed to reach agreement between both parties that have different perception each other. Negotiation is the process of bargaining to reach agreement with others through dynamic interaction, communication process with the aim of obtaining a solution or solving the problem faced by both parties.⁴

c) Mediation

Mediation, essentially negotiation involving third parties who have expertise on effective mediation procedure, can assist in conflict situation to coordinate their activities so as to be more effective in the bargaining process. Mediation can also be interpreted as an effort to settle the disputes of the parties by mutual agreement through a mediator who is neutral and doesn't make decisions or conclusions for the parties but accomodates the facilitator for the implementation of inter-party dialogue with an atmosphere of openness, honesty and exchange of opinion for the achievement of consensus.

⁴ Susanti Adi Nugroho, 2009, *Mediasi Sebagai Alternatif Penyelesaian Sengketa*, Jakarta, PT Telaga Ilmu Indonesia, p. 21.

d) Conciliation

Conciliation is a continuation of mediation. The mediator turns the function into a conciliator. In this case the conciliator exercises a more active function in finding dispute resolution forms and offering them to the parties. If the parties agree, the conciliator's solution will be resolved. The agreement is final and binding on the parties. If the party to the dispute is unable to formulate an agreement and the third party proposes a way out of the dispute, this process is called conciliation.

e) Expert Assessment

Expert assessment means dispute resolution by the parties by seeking expert opinions or judgments on the dispute's related.⁵

f) Fact Finding

The fact-finding is a means of dispute resolution by the parties by requesting the assistance of a team usually consisting of odd-numbered experts who carry out the investigation function or the discovery of facts that are expected to clarify the issue and may end the dispute.⁶

Dispute may occurs in any aspects such politics, law, economics and so does in sports. Besides physical and mental activities, sports also have economics activity. Professional athlete's sports get paid when he/she participates in a tournament or competition.

⁵ Takdir Rahmadi, 2011, *Mediasi (Penyelesaian Sengketa Melalui Pendekatan Mufakat)*, Jakarta, PT Raja Grafindo Persada, p. 19.

⁶ *Ibid.*, p. 17.

In implementation of the working contract in sport, the dispute between professional athlete's sports and the employer frequently arises. In Indonesia, those disputes were settled down through litigation or non-litigation procedures. Nevertheless, due to existence of Law No. 3 Year 2005 on National Sporting System, non-litigation settlement has more priority than litigation. There is principle of *lex sportiva* which in generally means limiting the intervention from court (state-law) in the sports affair proceedings.

2. Dispute in Football

Professionalism distinguishes football from merely a sport activity into a mixture of sport and commercial activity. It was started in England, 1879 when the Darwin club, paid two footballers as remuneration of their talent. Later, footballers become a professional job due to the talent recognition by paid or remuneration. Footballers become a profession, beside a paid work, also need a special skill to do it (playing football). Football as the sport which related to mid and lower-class society, develop progressively in so many years after it invention in England.⁷ Then popularity of football enhancing the commercial power that brings football to business.

Today, playing football can earn good living like other professionals. Thus, the players and their clubs should obey the rule and regulation. This mean, footballers shall obey any statutes from FIFA, association underneath and such regulation in

⁷ Fajar Junaedi, 2017, *BONEK Komunitas Suporter Pertama dan Terbesar di Indonesia*, Cetakan 2, Yogyakarta, Buku Litera, p. 3.

state (private law, national sport law, labour law, tax law and etc), beside the agreement reached with the club.

Football as the sport, develops as the material on globalization through cultural cross between nations.⁸ The development of football player's transfer has rapid growth in Europe, as the basis of civilization in football. Under Regulation of Status and Transfer Players, FIFA was the only international football organization which competent to establish the rules and to give decisions in relation to the legal status and transfer of players. European Commission, however, considered that 1994 Regulation of Status and Transfer Players could not be maintained because of crucial judicial shortcomings that should be amended.⁹

FIFA exclusive position met the end after the decision of the Court of the Justice of the European Union (CJEU) on famous Bosman Case. The Belgian professional footballer, Jean-Marc Bosman, refused to renew contract which proposed by his club, Racing Club Liege and Bosman request to be put on transfer list. Dunquerkue, club from France interest to sign Bosman, however the deal was agreed had cancelled by Liege due to Dunquerkue financial problem. Then, Bosman tried to sue Liege in Belgian court.¹⁰

This case finally ended up in the Court of the Justice of the European Commission (CJEU). The court determines that professional footballer, so far as the

⁸ Franklin Foer, 2010, *Memahami Dunia Lewat Sepak Bola: Kajian Tak Lazim tentang Sosial-Politik Globalisasi*, Cetakan 2, Tengerang: CV. Marjin Kiri, p. 231.

⁹ Frans de Weger, 2016, *The Jurisprudence of FIFA Dispute Resolution Chamber*, 2nd Edition, The Hague, T.M.C Asser Press, p. 6.

¹⁰ *Ibid*

economic activity which is obeying the community law. All the football association, in order to organize football activity, shall comply with legal principles, such right of employees in Europe within freedom of movement. The decision contains the prohibition to the clubs for paying the compensation in an amount of transfer of player who ended his contractual relation with his former club. So, footballer who have contract expiration, may leave as free as a bird.¹¹

The Bosman case gave a fundamental new point of view on football, especially about the freedom of player as the worker in a situation when his contract had expired in his old club. This case became famous with the name of Bosman Ruling. After Bosman case, the dynamic of players transfers in football grows rapidly. FIFA as the highest authoritative government body in football had several amended the FIFA Statutes especially in Regulation on Statutes and Transfer Players to provide adaptive development of transfer player in football.

Then, in 2006 a Scottish football player, Andy Webster terminated before his four-year contract ended. Webster should pay amount of money for one more year remaining of his contract to Hearts. He has terminated unilaterally according to article 17, FIFA Regulation on Status and Transfer Players.¹²

Contractual stability is paramount importance in football, from the perspective of clubs, players, and the public. Since the Bosman case, the issue of contractual

¹¹ Bernd Frick, 2009, "The Impact of Bosman-Ruling on Player Migration in Professional Soccer", *Journal of Sports Economics*, Vol. 10 No. 1, Sage Publications, Paderborn, University of Paderborn.

¹²Juan de Dios Crespo Perez, <http://www.ruizcrespo.com/wp-content/uploads/2012/07/16-article-worldsportlaw%20report.pdf> downloaded on 8 May 2017, at 9.08 p.m.

stability develop in dynamic. There are several kinds of contractual stability issue when discussing about relation between footballers and clubs:

a) Unilateral Contract Termination

Firstly, FIFA ensured that contract is honoured by both parties, footballers and clubs. It means the contract will discourage both parties from unilateral termination. However, in case without just cause, FIFA defines that footballers unilaterally may breach or terminated his/her contract with club under Article 17 of Regulation on Status and Transfer of Players unless not in protection of period. FIFA through Regulation on Status and Transfer of Players define protection of period as “a period of three entire seasons or three years, whichever comes first, following the entry into force of a contract, where such contract is concluded prior to the 28th birthday, or two entire seasons or two years, whichever comes first, following the entry into force of a contract, where such contract is concluded after the 28th birthday of the professional”.¹³

b) Players Status and First Contract Protection

In football, footballers or players are the person participating in any organised football either amateurs or professionals. FIFA clearly defines that “a professional is a player who has written contract with a club and is paid more for his footballing activity than the expenses he effectively incurs. All

¹³ Diego F. R Compaire, Gerardo Planas R.A. and Stefan-Eric Wildemann *Op cit.*, 32.

other players are considered to be amateurs".¹⁴ Contractual stability maintenance depends on the player's status. Only under a professional status-- the club in which the player is registered-- is entitled to earn a transfer fee. The first contract for footballers (usually young footballers under 18) are frequently problem subject in professional football.

The club often offers agreement to the footballers in design with semi-professional offer such as scholarship, apprenticeship or another pre-agreement contract with small salary to bind the footballers before giving a professional contract. For any reasons, footballers who have earned or received remuneration or fee for his footballing activity categories as professional, but, sometime they are considered non-professional because in the practice, also considered on each federation and state regulation of the players belong.¹⁵

c) Unilateral Extension of Contract

Option for contract extension is commonly practiced in European and South American football. Basically, footballers are offered short-time contract with the clause which include a clause granting the club option to extend unilaterally the contract in certain number and years. Footballers often accept the offer from clubs, because the salary will increase. There was a case about unilateral contract extension involving two Urugayan

¹⁴ Article 2, FIFA Regulations on Status and Transfer of Players.

¹⁵ Diego F. R Compaire, Gerardo Planas R.A. and Stefan-Eric Wildemann *Op cit.*, 25.

footballers named Carlos Bueno and Cristian Rodriguez, and Uruguayan club named Penarol and French club, Paris Saint-Germain.

Bueno and Rodriguez had an employment agreement with Penarol for one year, but the club had option for contract extension for certain years. In order to do so, there are salary increasing clause in their contract with Penarol and the amount of increasing was based on living cost in Uruguay. By the end of the first-year contract, however, Bueno and Rodriguez didn't accept the prolongation contract from Penarol and join Paris Saint-Germain. This case was trapped in two dimensions, whether national (Uruguay) law which applied or freedom of movement principle should be considered. Firstly, FIFA didn't issue international transfer certificate which mean Bueno and Rodriguez were not allowed to play for Paris Saing-Germain. The former club, Penarol, stubborn that this case shall refer to Uruguayan law, which accomodate the unilateral contract extension. FIFA as well as the CAS disregard Penarol position by referring to FIFA Regulations and general principles of labour law as well as international treaties that signed by Uruguay on labour matters.¹⁶ Carlos Bueno and Cristian Rodriguez finally played for Paris Saint-Germain after the CAS decided that FIFA Regulations and Swiss code (where the organisation located) prevailed over Uruguayan national law.

¹⁶ *Ibid.*, 28.

d) Another Contractual Dispute

Since the development of football is very dynamics, the contractual stability issue is always appeared day to day. Beside contractual disputes above (dispute in the term of formal legality), there is another dispute in term material legality related to the impelentation of working contracts such as delayed salary and unpaid salary or another term in such as economics rights of footballers, or football agency / third party, respecting of contract and etc.

The settlement of disputes in football has been settled by several ways including non-litigation settlement, mainly through alternative dispute resolution such as mediation, negotiation, conciliation, arbitration and etc. Actually, several disputes were settled down through national court by the parties, however the existence of *lex sportiva* limited this courage.

B. Legal Principles

1. *Lex Sportiva*

The are two main legal principles in sports affairs, *lex sportiva* and *lex ludica*. Dimitrios Panagiotopoulos determine *lex sportiva* that is a legal order, which incorporated state-adopted law and the law adopted by the national and international bodies representing organized sport. These bodies are operated to the standards union and autonomy was granted to such bodies and operated within

states in a pyramid-like and at international level in the form of a special relationship linking them to the relevant international sports federation. The law produced in this manner is thus a law which is, in essence, non-national law, which claims for itself direct and preferential application within sports legal orders and the par excellence in sports life.¹⁷

Lex sportiva is also *sui generis* legal order. *Lex sportiva*, as a system for applying sports law rules at international sporting level, is a *sui generis* legal order, which has its own jurisdictional body, the CAS, based in Lausanne, to protect and ensure the application of its provisions. Thus, issues on the sanctions imposed and the implementation and execution of the decisions of this court of arbitration, and the issue of its problem-free integration in national jurisdictional system, are of capital importance for this manner. *Sui Generis* mean that, law in sport is specifically, and have autonomous position in national legal system.¹⁸

2. *Lex Ludica*

The principle of *lex ludica*, which focuses on sports technically has it autonomous in game regulations. All sporting institutions, and in particular all sporting federations, must be abided by general principles of law. Certainly, general principles of law drawn from a comparative or common denominator reading of

¹⁷ Dimitrios Panagiotopoulos, 2007, “The Application of the Lex Sportiva in the Context of National Sports Law”, *International Sports Law Review* Vol.7, issues 1-2, Athena, Nomiki Bibliothiki S.A, p. 1.

¹⁸ *Ibid.*

various legal systems and, in particular, the prohibition of arbitrary or unreasonable rules and measures can be deemed to be part of such *lex ludica*.¹⁹

Lex sportiva within *lex ludica* is understood as the global sports law which defined as the law order with the independency and transnationally created by global privat institution (football) to regulate, manage and organize football competition internationally which international in nature, sovereign and have immunity over its authority to manage, organize and settle the dispute in professional football from national law and international law.²⁰

So, basically not all sport affairs can be interfered by government or national law. Government and law in a state may interfere only in limited area such infrastructure procurement or another area related to sports. Government and national law have limitation to enter sporting affairs because sporting regulation is defined as global sports law. Global sports law may provisionally be also defined as a transnational autonomous legal order created by the private global institutions that govern international sport. Its chief characteristics are first that it is a contractual order, with its binding force coming from agreements to submit to the authority and jurisdiction of international sporting federations, and second that it is not governed by national legal systems.²¹

¹⁹ Ken Foster, 2003, "Is There a Global Sports Law?", *Entertainment Law* Vol. 2, No. 1, Spring, pp., 1–18, Warwick, University of Warwick, p. 41.

²⁰ Hince IP Pandjaitan, 2011, *Kedaulatan Negara versus Kedaulatan FIFA dalam Kompetisi Sepakbola Profesional untuk Memajukan Kesejahteraan Umum*, Jakarta, Gramedia Pustaka Utama, p. 40.

²¹ Ken Foster *Op.cit.*, p. 37.

C. Football Dispute Settlement

1. National Dimension

The settlement of dispute especially in sports field have its own specialty because the existence of *lex sportiva*. To accommodate this issue, each state and football federation belong, have its own mechanism to settle the disputes such as sports dispute settlement body or abitration to settle football disputes arises in a state.

a) The National Dispute Resolution Chamber (NDRC)

Beside the mechanism in each state and football federation, there is the National Dispute Resolution Chamber (NDRC). This dispute settlement body has jurisdiction to settle the contractual dispute in national football scope.²² The NDRC will be settle the disputes between footballers and clubs in same federation. This settlement body was established by the initiative of FIFA to the football federation in a state. The nature of the National Dispute Resolution Chamber is dispute settlement body to settle any contractual disputes arise between footballers and clubs in alternative dispute resolution settlement such as mediation, negotiation, consultation and arbitration.

The impartiality, equality and low-cost proceedings in of the National Dispute Resolution Chamber are important feature in this body to settle contractual dispute in national football. The establishment of the National Dispute Resolution Chamber (NDRC) was inherited by the spirit of the

²² Paragraph 5 on preamble of National Dispute Resolution Chamber Standard Regulation, FIFA.

establishment Dispute Resolution Chamber (DRC), which have broader scope either in jurisdiction (international) and authorities. The NDRC is set by the statute by national football federation. In order, the football federation didn't promulgate yet, then the FIFA Statutes and Regulations will be applied by analogy, especially related to the DRC.

2. International Dimension

The football association of the world football association, FIFA, was founded in 1904 for the purpose of achieving, globally, uniformity, equality and certainty in football, and refining the game, both on and off the pitch. To realize that goal, FIFA first established the Player Status Committee (PSC), one of the standing committees, with the aim of deciding all international football disputes.

a) The Dispute Resolution Chamber (DRC)

In early 2000's, FIFA set up the Dispute Resolution Chamber (DRC) in order to take over certain disputes from the PSC relating to the international status and transfer of players.²³ This disputes settlement body has jurisdiction to settle contractual dispute, not only national but also in international level or scope. It means the DRC may settle dispute arise from between parties' different football federation.

The DRC settles the dispute arise between footballers and clubs about the maintaining stability of contract in national (fall if there is credible dispute settlement body in national) or international, between a club or an association

²³ Article 34, FIFA Statutes.

and a coach, solidarity mechanism between clubs in national or international level.²⁴ The DRC is using the FIFA Statutes and Regulation on Status and Transfer of Player for legal basis to run their authority and jurisdiction.

3. The Court of Arbitration for Sports

The Court of Arbitration for Sports (CAS), is the highest arbitral body for settle any dispute arise in sports matters. The CAS was established by International Olympic Committee (IOC). The CAS is dedicated to hear and settle down any disputes directly or indirectly relating to sport. All of these disputes may involve matters of principle relating to sport or matters of pecuniary or other interests brought into play in the practice or the development of sport and any other activity related or connected to sports.²⁵

In term of settling football dispute, provisions of the CAS Code will govern these appeals and the CAS will primarily apply the various regulations of FIFA and additionally, Swiss Law.²⁶ The CAS is governed by seventy-six articles in total, with these articles determine composition of the formation of court, applicable law, competences, function, arbitration agreement, and the procedures.²⁷ The provision of Swiss law also applied because the CAS located in

²⁴ Article 22, FIFA Regulation on the Status and Transfer of Players

²⁵ Jason Gubi, 2008, "The Olympic Binding Arbitration Clause and the Court of Arbitration for Sports: An Analysis Due of Process Concerns", *Fordham Intellectual Property, Media and Entertainment Law Journal*, Vol. 18 Issue 4, Fordham University, p. 1015.

²⁶ Ian Blakeshaw, 2013, "ADR and Sport: Settling Disputes through the Court of Arbitration for Sports, the FIFA Dispute Resolution Chamber and the WIPO Arbitration & Mediation Center", *Marquette Sports Law Review*, Vol. 24 Issue 1 Fall, p. 6.

²⁷ Dimitrios Panagiotopoulos, 1999, "Court of Arbitration for Sports" *Villanova Sports and Entertainment Law Journal*, Vol. 6 Issue 1 Villanova University, P. 54.

Lausanne, Swiss. The CAS will be the appeal arbitration body for football dispute in first instance in country, the NDRC and also the DRC.