GSLTR

Global Sports Law & Taxation Reports

Contents

NOLOT

8·4

DECEMBER 2017

Colofon

COORDINATOR
Erica Pasalbessy (MSc)
Nolot
P.O. Box 206
5270 AE Sint-Michielsgestel
The Netherlands
Tel.: +31 (0)625279308
Fax: +31 (0)735530004
E-mail: erica@nolot.nl

For further information on the activities of Nolot see:
www.nolot.nl.

ISSN nr.: 0000-0000

Preferred citation: GSLTR 2017/4, at page number(s)

Table of Contents

Vol. 8 No. 4 December 2017

EDITORIAL

It is with much pleasure that we welcome readers to the December 2017 edition (citation: GSLTR 2017/4) of our ground-breaking journal (www.gsltr.com), a very useful resource: **Global Sports Law and Taxation Reports (GSLTR)**.

2017 has thrown up a wide range of sports legal and sports tax issues, of which mention may be made of some of the highlights of them as follows.

Once again, association football (soccer) has dominated the sporting legal and tax headlines during the past year. The 2017 Summer "transfer window" saw the world record transfer fee of US$ 263 million – almost double the previous world record – being paid for the move of Neymar Jr. from FC Barcelona to Paris Saint-Germain FC. This has provoked some controversy and UEFA are investigating whether this transaction is compliant with their Financial Fair Play Rules.

Again in 2017, the taxation of sports image rights has occupied the attention of tax advisers and tax authorities alike, culminating in a € 15 million tax fraud case brought against the Real Madrid forward, Cristiano Ronaldo, who is reputedly the highest paid athlete in the world, in relation to the commercial exploitation of his image rights.

Also, the FIFA world bribery scandals rubble on and the first of the 42 people and entities involved in the US investigations into them has been sentenced by a New York Court – others will follow.

E-Sports has continued its inexorable rise in popularity and value in 2017, including the launch of the Formula One E-Sports Series, and is well on its way to becoming an Olympic sport in the foreseeable future! Perhaps debuting in the 2024 Paris Olympics?

Doping has also grabbed the headlines again, including a controversial proposal for the microchipping of athletes in the continuing fight to catch drugs cheats and bring them to justice; and also a legal claim brought in the Canadian courts by three Russian road cyclists against WADA and Prof. Richard McLaren arising out of his report on the alleged Russian athletes' systematic doping claims.

In the sports broadcasting field, 2017 has seen the further expansion of the IOC multi-platform Olympic Channel, which was launched on 21 August 2016 at the closing of the 2016 Rio Summer Olympic Games, and also a review by the UK Competition and Markets Authority of Rupert Murdoch's bid to acquire the rest of Sky, a significant sports broadcaster in the UK, the completion of which has been delayed, if not put in jeopardy.

And, at the time of writing, the Paralympian athlete, Oscar Pistorius has had his sentence doubled by the Appeal Court in connection with the killing of his girlfriend!

Turning now to the articles. In this issue, on the sports legal side, we feature an article on an ever-green topic, "ambush marketing ", in which Stefan Fabien reports on the steps being taken in the Caribbean, which hosts a number of regional and international sporting events, to fight this phenomenon. In his article, he reaches the following conclusions:

"The Caribbean experience in combatting "ambush marketing" is similar to that of many other countries. The main difference is that the majority of these Caribbean economies are beginning to diversify into the very lucrative market of sports tourism. As such, they will be very eager to put in place whatever necessary legislative provisions are required to provide title sponsors of major sporting events with the comfort of hosting a tournament in their backyards.

To the traditionalists, who fear a loss of the Caribbean sporting experience that they grew up loving, the stark reality is that large professional sporting events cannot take place without the infusion of sponsorship investment and, when businesses sponsor an event, they want to be assured that the organizers protect their exclusivity, so they get maximum value for their investment.

[...] *It is likely that anti-ambush marketing legislation will become, more and more, a recognisable feature of sporting tournaments in the Caribbean, as the islands vie to stay competitive. At the time of writing, many such islands have been ravaged by an unforgiving hurricane season and will, therefore, require any and every advantage for their heavily tourism-dependent economies."*

We also include an article by Vassil Dimitrov on another perennial sports law issue, namely, match-fixing in football – this time in Bulgaria. In his introduction, he comments as follows:

"To fight match-fixing in sport requires the criminalisation of the acts that are harmful towards the social relations associated with sporting competitions governed by the respective sports federations. Crimes against sport threaten not only the normal and lawful conduct of the sporting competitions, but also reveal a high degree of social danger, which threatens the integrity of sporting events and violates the fundamental principles of sports law: the prohibition of any unsporting advantage and also the principle of fair play. These crimes cause significant damage to the sports federations,

their members, the clubs and also the players. Match-fixing has become one of the main issues which has placed a black stain on modern football. It is often linked with illegal betting activities and organised criminal groups for manipulating the development and the outcome of football matches."

And in his article, he goes on to examine and comment on some recent cases of football match-fixing in Bulgaria, including the imposition of suspended sentences, reaching the following conclusions:

"The Bulgarian jurisprudence related to sports crimes is still too modest to determine any consistent trends; but, in any event, imposing more severe punishments could lead to the prevention of such crimes, especially in cases of manipulation of matches which are part of gambling games organised by bookmakers, and also in those instances where more than one aggravated circumstance applies.

The right balance, when applying the criteria for imposing suspended sentences for match-fixing in football, could prove to be the biggest challenge facing Bulgarian judges when ruling on similar cases in the future!"

On the subject of crime and sport, again in relation to football, we also publish an article by Steve Mould, Head of Criminal Law at VII Law in London. In his article, he endeavours to answer the question whether the Criminal Law should have any place on the sports field, and, if so, to what extent. He concentrates on violence on the football pitch and on whether the leading English Court of Appeal decision in R v. Barnes has clarified or confused the Law on this subject, particularly in relation to the defence of consent.

He reaches some general conclusions as follows:

"As we have seen, the application of the Criminal Law to sport is problematic and, notwithstanding the guidance given in the leading English Appeal Court case of R v. Barnes, some "grey areas" still remain and need to be clarified.

However, what can be said with some certainty is that each case of violence on the football field needs to be considered on its own particular facts, circumstances and merits when deciding whether or not a criminal charge should be brought and also its likely outcome. Further, the view of the referee will be an important consideration in determining whether criminal charges should be brought against the "offender". Also, the views of past and present players will need to be taken into account and given in evidence in any resulting criminal proceedings.

[...] *Of course, in all these cases, it may be difficult to prove intent – "mens rea" – whilst the wrongful act – "actus reus" – is usually there for all to see! It will be remembered that both elements need to be established and proved to constitute a crime.*

Again, the English Law Commission [...] *have looked into the matter, may need to take another look at this controversial area of the Law and determine what role and to what extent the Criminal Law should intervene in the field of sport and, not least, in the case of football, which is the world's favourite game and followed by millions of fans."*

We also publish three articles with a common and important theme running through them, namely the independence and transparency of sports' governing bodies.

In the first article by Juan de Dios Crespo Pérez and Paolo Torchetti, entitled "Legal foundations of sports federations and the Court of Arbitration for Sport: Increased transparency as a tool to pursue institutional independence", the authors point out in their introduction that:

"As the CAS case load has grown, so too has the complexity of the legal landscape underpinning the open system of the international sport world pyramid. One of the more vital issues that the CAS has had to deal with, during this period of growth, is that of institutional independence from some of the larger international sports federations (IFs) that have supported the centrality of the CAS in the sports law world, such as the IOC and the Fédération Internationale de Football Association (FIFA). [...] The issue of independence has again reared its head as the Pechstein series of cases have raised some of the same arguments that have been articulated over the course of the past 30 years or so."

To increase such transparency, the authors propose in their article certain amendments to the CAS Code of sports-related arbitration. These involve the composition of CAS arbitration panels and the disclosure of links to IFs; the publication of CAS awards; and the holding of certain types of hearings in public.

Crespo Pérez and Torchetti go on to reach the following main conclusion that:

"[...] *the pursuit of absolute transparency in CAS appeal proceedings is necessary. The public interest functions pursued by IFs, where the CAS is the gatekeeper of the decisions of those organizations, from a policy perspective ought to supersede any competing interests. It is possible that such changes would require a paradigm shift in mentality on behalf of IFs to accept such a system. Considering that IFs are the "world governing body" of their respective sports and pursue the public interest, the authors of this article are hopeful that they would be magnanimous in their approach and agree to complete transparency in CAS proceedings."*

In the second article, Dr. Thilo Pachmann and Oliver Schreier, pose the question: "Are sports' governing bodies above the law?" In their article, the authors analyse the legal structure applicable to sports' governing bodies in Switzerland, where many of them are based, and, in the light of that analysis, consider whether these bodies are kept in check through judicial review by the CAS and the Swiss Federal Tribunal.

They finally answer the question in the affirmative in the following terms:

"Given the legal concept of the one (and only) independent judicial entity capable of reviewing the decisions of sports' governing bodies and the lack of a realistic possibility to appeal any decisions before the Swiss Federal Tribunal – a problem which is even magnified when the CAS Panel makes use of its de novo powers – it can be argued, with good reason, that sports' governing bodies are, in fact, above the law."

The third article is by Prof. Dr. Ian Blackshaw in which he considers the role and powers of sports' governing bodies and reaches the following conclusions:

"[...] *sports' governing bodies jealously guard and defend their autonomy and powers to organise their own affairs without any outside interference of any kind, including national governments and reviews of their activities by the ordinary courts.*

However, [...] there are, in fact, some legal limitations on their autonomy and powers in that they may not oust the jurisdiction of the courts in all cases, not least, where there has been a breach of the "rules of natural justice" or of their own rules or where their own adjudication procedures are found to be wanting in other respects to such an extent that a just and fair outcome for the claimant is not possible outside the courts. There is always a "public interest" or "public policy" element to be satisfied.

Of course, sports' governing bodies always claim that they are in the best position to determine sports disputes and there is some sympathy for this point of view shown by the ordinary courts, which, in general, are reluctant to get involved in such cases.

Sports' governing bodies also argue that sport is "special" with its own particular characteristics and dynamics and, as such, should be outside the normal legal system. And they support this contention by pointing to the fact that the Court of Arbitration for Sport (CAS) is, after its thirty-three years of operations and currently registering between four and five hundred cases a year, proving, in practice, to be a fair and effective body for settling, in a timely and relatively inexpensive manner, a wide range of sports-related disputes [...].

This latter claim is difficult – if not impossible – to refute, but, of course, a proper balance needs to be struck between the roles that should be played by sports' governing bodies and by the courts, which, ultimately, it is submitted, are the guarantors of the rights and freedoms of all enjoyed in a free and democratic society!"

Turning now to the sports tax side, we include a timely article by Kevin Offer on further developments in the taxation of sports image rights in the UK following the recent publication of the so-called Bermuda "Paradise Papers". As he points out in his article:

"[...] *in the current climate where, in the UK, the distinction now appears to be drawn between tax planning and tax avoidance, rather than avoidance and evasion, tax authorities and governments are under increasing pressure to clamp down on what was previously considered to be acceptable tax planning."*

He goes on to explain the current thinking on the part of the UK tax authority, HMRC (Her Majesty's Customs and Revenue), in relation to the commercial exploitation of sports image rights, as set out in their latest Guidance, which was published on 16 August 2017, and provides the following pertinent advice:

"Any club or player in the UK, or a player considering a move to the UK, would be advised to take advice on any image rights arrangements that they have in place to ensure that they are on a commercial basis, taking into account HMRC current guidance."

We also publish an article by Dr. Dick Molenaar, a regular contributor on tax matters to GSLTR, on the highlights of the Seminar on the International Taxation of Sportsmen and Entertainers, organised by the Tax Policy Center of the University of Lausanne and held on 22 September 2017. Amongst other current sports tax policy issues that were covered at the Seminar was the taxation of sports image rights and, in particular, the valuation of them. This topic was presented by Emmanuel Linares, His starting question was: "What is the value of the image rights of a young football player?"

As was pointed out, even though Emmanuel Linares is not a tax expert, but an economist, he also understands that this is important, because a sportsperson or entertainer wants to transfer his image rights to a separate limited company, when possible, preferably resident in a low-tax jurisdiction. With the transfer, the sportsperson or entertainer hands over the image rights to the limited company and this needs to be done at an arm's length price. This price will be lower when the sportsperson or entertainer is younger and not yet successful and will become higher when his/her career develops.

Linares gave information about available statistics, especially for football players, such as wins and losses, goals, passes completed, tackles, throw-ins, speed and distances, injuries, and noted that these can be interesting in determining the value to be placed on a player for image rights purposes.

We also include a contribution on Turkey by Dr. Z. Ertunç irin, of the Istanbul University Faculty of Law, and Metin Abut, Associate of Moro lu Arseven, as part of a comparative survey of the tax implications, in a number of countries, arising from the international transfer of professional football players.

As mentioned in the general introduction to this survey:

"An international transfer of a football player from one professional club to another may cause various financial streams with specific tax ramifications with sometimes doubtful solutions. The purpose of this comparative survey will be to analyse the most common tax ramifications and how these are dealt with in the national systems of several countries. The survey will cover the tax treatment of the income paid to the player and other payments, such as agent's fees or

commission fees, from the point of view of the player and agent. There may also be consequences for other parties involved, for example, parties owning part of transfer rights, etc."

Finally, we round off the December 2017 issue of GSLTR with two further contributions to the above comparative survey on the taxation of international transfers of professional football players in respect of The Netherlands by Cees Goosen and Wim R.M. Nan of Loyens Loeff, Amsterdam; and in respect of Italy by Mario Tenore of Maisto e Associati, Milan.

So, another year is coming to an end and, as noted above, has brought with it its own veritable crop of interesting and significant developments in sports law and sports-related tax law. No doubt, the New Year will also be full of other challenging sports legal and tax issues, which will keep sports lawyers and sports tax advisers well and truly – metaphorically speaking – on their toes!

We should mention that many of this year's legal and tax developments have been covered on our dedicated website (www.gsltr.com), including the bitter feuding that has been raging in the highest echelons of the International Boxing Association (AIBA), both in and out of court, which has finally been settled out of court, and also in our journal, which all goes to show the need for it. We hope, therefore, that existing subscribers will spread the word about GSLTR, amongst their colleagues and contacts, to encourage new subscribers and thereby help us to increase our global footprint and continue to provide a must-have resource and service for the international sporting community and their legal and tax advisers.

Finally, and as always, we would welcome and value your contributions in the form of articles and topical case notes and commentaries for our journal and also for posting on the GSLTR dedicated website at www.gsltr.com. A number of you have already responded to this invitation, but, as they say, the more of you who do so, the merrier!

So, now read on and enjoy this information-packed December 2017 edition of GSLTR and we take this opportunity of wishing all our existing and new readers our sincere compliments of the season and also all the very best in their sporting endeavours in 2018!

Dr. Rijkele Betten (Managing Editor)

Prof. Dr. Ian S. Blackshaw (Consulting Editor)

December 2017

Sports' governing bodies: their role and powers

BY PROF. DR. IAN BLACKSHAW[1]

Introduction

Sports' governing bodies take various forms and their powers and influence vary from one sport to another.

In most sports, there are national as well as international bodies which regulate them. In the case of association football, as well as national bodies, for example, the English FA, and the global body, FIFA, there are also regional bodies on various continents, for example, UEFA, which is the governing body of the sport in Europe.

However, all sports' governing bodies have one thing in common:

"[...] *they are composite bodies with a membership of others involved in the sport, and they control the organisation of a particular element of the sport or the commercial exploitation of it."*[2]

One other thing that sports' governing bodies have in common is the extent to which they go to safeguard their autonomy and exclude outside interference of any kind in their internal affairs.

In this article, we will consider the role and powers of sports' governing bodies and, in particular, we will comment on certain legal limitations that affect their autonomy and powers, including the doctrine of "ousting the jurisdiction of the courts".

Their role

Most sports belong to the Olympic Movement, and, according to the Olympic Charter, which codifies the "Fundamental Principles of Olympism", the role of sports' bodies is stated as follows:

"Recognising that sport occurs within the framework of society, sports organisations within the Olympic Movement shall have the rights and obligations of autonomy, which include freely establishing and controlling the rules of sport, determining the structure and governance of their organisations, enjoying the right of elections free from any outside influence and the responsibility for ensuring that principles of good governance be applied."[3]

The key word in this "sporting manifesto" is "autonomy", which, as mentioned, sports' bodies jealously guard and defend on every possible occasion. In other words, they expect to be left alone to govern their sports and conduct their affairs without any external interference, including the ordinary courts. However, they are not – whatever they might think – above the law and, in the final analysis, are subject to the general law as interpreted and applied by the ordinary courts. On the whole, the courts, especially the English courts, leave sports' bodies alone to get on with their affairs, particularly when it comes to the application of their "rules of the game" and their disciplinary regulations. See the comments of Vice Chancellor Megarry in the case of McInnes v. Onslow-Fane where he said that sports bodies are "[...] *far better fitted to judge than courts".*[4] *Also, Lord Denning, a former Master of the Rolls, went further stating in the case of Enderby Town Football Club Ltd v. Football Association Ltd: "*[...] *justice can often be done in domestic tribunals better by a good layman than a bad lawyer".*[5]

However, the English courts will intervene when there has been a breach of the rules of natural justice[6] and also in cases of "restraint of trade", where livelihoods are at stake.[7] Also, on an exceptional basis, in cases where the parties have expressly agreed to arbitration, but where the arbitration arrangements and procedures would

1 Prof. Dr. Ian Blackshaw is an international sports lawyer, academic, author and member of the Court of Arbitration for Sport. He may be contacted by e-mail at ian.blackshaw@orange.fr. This article is based on Chapter 4 on "Sports' Governing Bodies" of a new book by Prof. Blackshaw, entitled *International Sports Law: An Introductory Guide,* published in September 2017 by the Asser Press, The Hague, The Netherlands.

2 Lewis, Taylor, De Marco and Segan, *Challenging Sports Governing Bodies* (Bloomsbury Professional Limited, UK, 2016), p. 1.

3 Para. 5 of the Fundamental Principles of Olympism as set out in the Olympic Charter, which is in force as from 2 August 2016.

4 [1978] 1 WLR 1520, p. 1535.

5 [197] 1 Ch. 591, p. 605. A "Domestic Tribunal" under English law is defined as a body that exercises jurisdiction over the internal affairs of a profession or an association under powers conferred by statute (Act of Parliament) or by contract, for example, the disciplinary committee of a sports' governing body.

6 *Revie v. Football Association*, in: The Times, 19 December 1979. The Rules of Natural Justice are: the rule against bias ("*nemo judex in sua casa*"); and the right to be heard ("*audi alteram partem*").

7 *Greig v. Insole* [1978] 3 All ER 449.

not lead to justice being done in the particular case.[8]

A similar legal position of general non-intervention by the courts in sports disputes exists in the United States. In the case of Harding v. United States Figure Skating Association,[9] the Federal District Court made the following observations:

"The courts should rightly hesitate before intervening in disciplinary hearings held by private associations [...]. *Intervention is appropriate only in the most extraordinary circumstances, where the association has clearly breached its own rules, that breach will imminently result in serious and irreparable harm to the plaintiff, and the plaintiff has exhausted all internal remedies. Even then, injunctive relief is limited to correcting the breach of the rules. The courts should not intervene in the merits of the underlying dispute."*

Likewise, the legal situation is similar in Canada. In the case of McCaig v. Canadian Yachting Association & Canadian Olympic Association,[10] the judge made the following pertinent remarks about the role of the courts in the resolution of sports disputes:

"[...] *The bodies that heard the appeals were experienced and knowledgeable in the sport of sailing, and fully aware of the selection process. The appeal bodies determined that the selection criteria had been met [... and] as persons knowledgeable in the sport* [...] *I will be reluctant to substitute my opinion for those who know the sport and knew the nature of the problem."*

In Continental Europe, which follows and applies the Napoleonic civil law tradition, the courts are generally amenable to the parties trying to settle their disputes, including sports disputes, by arbitration and other extra-judicial methods, and will adjourn proceedings where there is an express contractual requirement to refer disputes to, say, arbitration, to allow this process to be pursued. Only in the event of failure to reach an extra-judicial solution, and in some other very limited cases, will the courts be prepared to entertain a suit and adjudicate on the dispute. Also, generally speaking, the European courts will not intervene in sporting disputes, which concern the "rules of the game" of the sport concerned.

The legal position in Switzerland provides a good example of these general principles. Under art. 190(2) of the Swiss Federal Code on Private International Law of 18 December 1987, a decision (known as an "award") of an arbitral body, such as the CAS (Court of Arbitration for Sport), can only be challenged in the following limited circumstances:

"[The Award] can be attacked only:

- *a if a sole arbitrator was designated irregularly or the arbitral tribunal was constituted irregularly;*
- *b if the arbitral tribunal erroneously held that it had or did not have jurisdiction;*
- *c if the arbitral tribunal ruled on matters beyond the claims submitted to it or failed to rule on one of the claims;*
- *d if the equality of the parties or their right to be heard in an adversarial proceeding was not respected;*
- *e if the award is incompatible with Swiss public policy."*

In practice, perhaps ground d is the most important one, and the CAS bends over backwards in each case to ensure that the parties are properly heard and receive a fair hearing.[11]

It will be noticed that one of the other grounds is that of Swiss public policy and mention should be made here of the first and only case to date, decided on 27 March 2012, under this ground, involving the Brazilian professional footballer, Matuzalem Francelino da Silva.

This particular ground for legally challenging arbitral awards in Switzerland, whether rendered by CAS or any other Swiss arbitral bodies, is notoriously difficult to establish in practice, as "public policy" ("ordre public") is a complex and vague concept and one that is restrictively assessed and interpreted by the Swiss courts.[12]

For the legal position in other countries, see the book Sport, Mediation and Arbitration by Prof. Dr. Ian Blackshaw.[13]

One particular area of external influence, which sports' bodies, such as the IOC, the custodian of the Olympic Movement,[14] will not generally tolerate is political interference.

8 See the Trinidad and Tobago High Court case of *Thema Yakaena* Williams v. Trinidad and Tobago Gymnastics Federation & Others, Claim No. CV2016-02608, 25 April 2017, in which the Court refused to stay Court proceedings to allow the parties, who had expressly and exclusively agreed in their contract to arbitration, to do so, on the grounds that the arbitration provided by the Federation was inadequate and would not serve the needs of justice in the particular case. See also the post "Sports Arbitration: Resort to the Courts" by Prof. Dr. Ian Blackshaw of 22 May 2017 on this case on the *GSLTR* website http://www.gsltr.com.

9 [1994] 851 F Supp 1476.

10 [1996] Case 90-01-96624.

11 See the Judgement of 22 March 2007 in the ATP Tour Appeal case brought before the Swiss Federal Court against a CAS Award of 23 May 2006 (reference: 4P 172/2006), which was brought under either paragraph d or e of art. 190(2) of the Swiss Federal Code on Private International Law of 18 December 1987.

12 For further information on this important ruling of the Swiss Federal Supreme Court, see the article entitled "Matuzalem case: red card to FIFA?" by Alara Efsun Yazıcıo lu, in: GSLTR 3-2, June 2012, p. 17-21.

13 TMC Asser Press, The Hague, The Netherlands, p. 8.

14 See "The contemporary Olympic movement" by Dr. Dikaia Chatziefstathiou, in: GSLTR 3-3, September 2012, p. 7-10. See also "Olympic Agenda 2020 – The strategic roadmap for the future of the Olympic Movement" at www.olympic.org/olympic-agenda-2020. This Agenda is designed to safeguard the uniqueness of the Olympic Games and to strengthen sport in society. It addresses such issues as reducing the costs of bidding to host the Games and encouraging candidate cities to present a proposal that fits their sporting, economic, social and environmental long-term planning needs.

Political interference

Sports' governing bodies will not generally tolerate political interference in their affairs.

In the case of the IOC, the Olympic Charter lays down the following provisions on this important matter:

"The NOCs must preserve their autonomy and resist all pressures of any kind, including but not limited to political, legal, religious or economic pressures which may prevent them from complying with the Olympic Charter."[15]

"Apart from the measures and sanctions provided in the case of infringement of the Olympic Charter, the IOC Executive Board may take any appropriate decisions for the protection of the Olympic Movement in the country of an NOC, including suspension of or withdrawal of recognition from such NOC if the constitution, law or other regulations in force in the country concerned, or any act by any governmental or other body causes the activity of the NOC or the making or expression of its will to be hampered. The IOC Executive Board shall offer such NOC an opportunity to be heard before any such decision is taken."[16]

A recent example of this kind of situation is the disbandment, on 25 August 2016 by the Kenyan Cabinet Secretary for Sports and Culture, of the Kenya National Olympic Committee, following certain of its members' involvement in the so-called "Rio fiasco". See the post on this affair by Elvis Majani on the GSLTR website.[17] See also his post on the GSLTR website on "Kenya: Autonomy of the National Olympic Committee and the legal consequences of government interference".[18] As he points out in this post:

"Interference is inextricably linked to the concept of sports autonomy.
It can be described in the following terms: the legal autonomy of a sports organisation can be defined as the private autonomy of the organisation, to adopt rules and norms that have a legal impact, in a legal framework imposed by the State, be it at national or at international level.[19]

Sports autonomy is, therefore, a broad concept which requires that the affairs of sports organisations be run without interference from governmental or non-governmental bodies, which interference might be political, religious, economic, judicial or otherwise.[20] *Interference in the management of sports organisations by governments and courts has often seen several federations suspended by their umbrella bodies from participating in their respective sports."*[21]

And he adds:

"The principle of autonomy of sport is a universally accepted principle that cuts across all sports and is widely embraced as forming part of the distinct body of law called "lex sportiva".[22] *The situation is no different in the case of the Olympic Movement. This is a Movement with various stakeholders, including the International Olympic Committee at the apex; International Federations; National Federations; National Olympic Committees; and Organising Committees for Olympic Games.*[23] *The International Olympic Committee (IOC), at the apex, is in charge of the Olympic Movement and determines which games are to be played in the Olympics*[24] *depending on the accreditation of the statutes of the various international federations.*

The IOC, therefore, admits, as its members, international federations, but not before it has checked, for compliance with the Olympic Charter, the statutes of the international federations. Such compliance is usually principally based on issues such as whether or not the statutes of the federations allow for sports dispute resolution through recourse to ordinary courts of law and whether or not they recognise the Court of Arbitration for Sport as the apex dispute resolution body."

As mentioned, failure to comply with the IOC requirement of non-governmental interference in sport results in the suspension of the NOC concerned and withdrawal of IOC funding. This creates a tense and difficult situation, not only for the NOC and athletes, but also for the national authorities. For example, in October 2015, the membership of the National Olympic Committee of Kuwait was withdrawn by the IOC, for governmental interference. This meant

15 *Ibid*., art. 27.6.

16 *Ibid*., art. 27.9.

17 "Kenya: disbandment of National Olympic Committee", posted on www.gsltr.com on 4 October 2016.

18 www.gsltr.com, 4 January 2017.

19 See Michaël Mrkonjic and Arnout Geeraert, *Sports organisations, autonomy and good governance* (Play the Game/Danish Institute for Sports Studies 2013, p. 135, available at www.playthegame.org/fileadmin/documents/Good_governance_reports/AGGIS-report_-_13Sports_organisations__autonomy_and_good_governance__p_133-150_.pdf (accessed 29 November 2017).

20 Kilili Nthiw'a, *Autonomy of Sport: The Role of National Courts in Sports Dispute Resolution* (LL.B Dissertation, unpublished, 2015),. See also Farai Razano, "Keeping Sport Out Of The Courts: The National Soccer League Dispute Resolution Chamber – A Model For Sports Dispute Resolution In South Africa And Africa", in: *African Sports Law And Business Bulletin* 2/2014, available at www.africansportslawjournal.com/Bulletin_2_2014_Razano.pdf (accessed 29 November 2017).

21 FIFA, the world's governing body for association football, futsal and beach football, has been notorious in cracking the whip in respect of sports bodies that do not discourage government interference. The Nigerian Football Federation, the Kenyan Football Federation and the Kuwait Football Association are some of the federations that have, in the past, been banned by FIFA for alleged governmental interference.

22 Kenneth Foster, "Is There A Global Sports Law", in: *Entertainment and Sports Law Journal 2*, no. 1 (2003).

23 www.olympic.org/about-ioc.

24 See *Sagen v. Vancouver Organising Committee for the 2010 Olympics and Paralympics winter games*, 2009, BCSC 942, where some female ski jumpers challenged the Committee for enforcing the decision of the IOC to prevent them from competing in the Olympics.

that Kuwait could not participate in its own right in the Rio 2016 Summer Olympics.[25] The national government of Kuwait had enacted several laws that were deemed, by the IOC, to interfere with the autonomy of the various sports federations. In the event, the Kuwait government, bowed to this pressure, and decided to amend the offending laws and restructure its various federations in line with the provisions of the Olympic Charter.[26] This shows not only the power of major sports bodies, such as the IOC, but also the power and importance of sport itself in a nation's life!

For further information on the meaning and application of so-called "Olympic law", see The Law of the Olympic Games by Alexandre Miguel Mestre.[27]

But, it is not all plain sailing for and sports governing bodies do not always get their own way, as the Wilhelmshaven FC case clearly demonstrates.

Wilhelmshaven FC case[28]

This is an important case concerning the German football club, SV Wilhelmshaven (Wilhelmshaven), which had been ordered by FIFA to pay training compensation, pursuant to the FIFA Regulations on the Status of Players and Transfers, to two Argentinian clubs in respect of a player, who had been trained by these clubs.

Wilhelmshaven consistently refused to pay the compensation and appealed against the FIFA decision to the CAS, which upheld the FIFA ruling on both claims. However, Wilhelmshaven did not challenge the CAS ruling before the Swiss Federal Tribunal (Supreme Court).

Eventually, a FIFA disciplinary committee imposed fines on Wilhelmshaven, and, following further fines, league points were also forfeited and the club was relegated to a lower league.

After further unsuccessful proceedings before the CAS, Wilhelmshaven decided to refer the matter to the German national courts and to fight the forfeiture of the league points, as well as their relegation.

The State Court in Bremen ruled that the awards made by the CAS against Wilhelmshaven and the fact that Wilhelmshaven had failed to take the CAS awards on appeal to the Swiss courts, precluded the club from challenging the FIFA disciplinary committee's decisions and the resulting penalties before the German courts according to the legal principle of "*res judicata*". In other words, the matter had already been adjudicated.

However, on further appeal to the Higher State Court in Bremen, this Court ruled that the disciplinary measures imposed by the NFV, the German National Football Association, were against the public interest under German law, because, in effect, they implemented the CAS and FIFA decisions, which were contrary to the free movement of workers under art. 45 of the Treaty on the Functioning of the European Union, to which the NFV was subject.

In essence the ruling in the Wilhelmshaven case is that sports authorities in Germany, like all other persons and businesses, are subject to German and EU law. Sports authorities in Germany cannot merely enforce decisions of sports bodies that are based in Switzerland and, therefore, not directly subject to German law and the authority of the EU, without having regard to the principles of German law and also EU law.

Thus, the Court was prepared to hear Wilhelmshaven's case. After all, it was a German football club that opposed the decision of a German sports federation in a German court.

On further appeal by the NFV to the German Federal Court, the Court did not address the question of whether the order to pay training compensation was contrary to art. 45 of the EU Treaty, but left open this point. Instead, the Court based the dismissal of the appeal by NFV on the principle that a parent association makes rules only for its members. Wilhelmshaven was a member of the NFV, but it was neither a member of the German Federal Football Association, DFB, nor of FIFA. The Court explained that an association makes rules only for its members. The mere fact that the NFV was a member of the DFB and that the DFB was a member of FIFA, did not provide the legal basis on which the FIFA decision could be enforced against Wilhelmshaven. It also did not warrant a conclusion that Wilhelmshaven had submitted itself to the disciplinary jurisdiction of FIFA.

This aspect turned out to be the decisive factor on which the German Federal Court concluded that the compulsory relegation of Wilhelmshaven by the NFV was not appropriate. Also, the rules of the NFV did not empower it to impose relegation on the club because Wilhelmshaven did not pay the training compensation as ordered by FIFA.

The appeal was, therefore, dismissed and, at least as far as Germany is concerned, Wilhelmshaven was not obliged to pay the training compensation.

This case has important implications for international sports federations (IFs), such as FIFA.

The essence of the judgment is that IFs can only impose disciplinary measures on their own subordinate members. IFs, therefore, cannot impose sanctions on clubs that are affiliated only to those subordinate members. Thus, IFs do not have any disciplinary jurisdiction over clubs that are affiliated to national federations. In other words, there is no "privity of contract"; that is, there is no contractual nexus between clubs and the IFs, of which they are not members.

25 Kuwait's nine qualifying athletes had to compete under the Olympic flag at the Rio Games.

26 www.insideworldfootball.com/2016/06/17/another-kuwaiti-goal-government-edge-dissolving-sports-bodies (accessed 29 November 2017).

27 TMC Asser Press, The Hague, The Netherlands, 2009.

28 *SV Wilhelmshaven eV/Norddeutscher Fußball-Verband eV.*

Where the contractual nexus exists, so-called "association law" applies and determines the rights and obligations of the members of sports' bodies at all levels.

Ousting the jurisdiction of the courts

In line with the desire of sports' governing bodies to preserve their autonomy, as described above, and, in particular, to exclude the jurisdiction of the ordinary courts in settling various kind of sports-related disputes, especially disciplinary ones, within their own organisations and according to their own procedures, the statutes of these bodies usually include express provisions denying their members access to the ordinary courts of justice. In other words, provisions that expressly "oust the jurisdiction of the courts".

Take FIFA, for example, its Statutes (April 2016 edition) provide in art. 59.2 and 3 (Obligations relating to dispute resolution) as follows:

> *"2 Recourse to ordinary courts of law is prohibited unless specifically provided for in the FIFA regulations. Recourse to ordinary courts of law for all types of provisional measures is also prohibited.*
>
> *3 The associations shall insert a clause in their statutes or regulations, stipulating that it is prohibited to take disputes in the association or disputes affecting leagues, members of leagues, clubs, members of clubs, players, officials and other association officials to ordinary courts of law, unless the FIFA regulations or binding legal provisions specifically provide for or stipulate recourse to ordinary courts of law. Instead of recourse to ordinary courts of law, provision shall be made for arbitration. Such disputes shall be taken to an independent and duly constituted arbitration tribunal recognised under the rules of the association or confederation or to CAS."*

Apart from this, FIFA requires in art. 59.1 of its Statutes that CAS shall be the final "court of appeal" for football disputes for all its stakeholders as follows:

"The confederations, member associations and leagues shall agree to recognise CAS as an independent judicial authority and to ensure that their members, affiliated players and officials comply with the decisions passed by CAS. The same obligation shall apply to intermediaries and licensed match agents."

As regards the Olympics, the Olympic Charter contains similar provisions to those of FIFA in art. 61 of the Charter as follows:

> *"1 The decisions of the IOC are final. Any dispute relating to their application or interpretation may be resolved solely by the IOC Executive Board and, in certain cases, by arbitration before the Court of Arbitration for Sport (CAS).*
>
> *2 Any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport, in accordance with the Code of Sports-Related Arbitration."*

Notice the word "exclusively" in art. 61.2 above.

Similar provisions are also found in the rules and regulations of national sports' governing bodies. See, for example, art. K.1(e) of the English Football Association Rules of 2015-2016, which provides for arbitration for the settlement of disputes and expressly excludes the powers of the English courts under sections 44, 45 and 69 of the UK Arbitration Act of 1996.

It is clear from the above that international and national sports' governing bodies, in effect, aspire to being a law unto themselves! But how far is this legal under the general law?

Ousting the jurisdiction of the ordinary courts is contrary to public policy and any agreements to do so are void and unenforceable under the English Common Law and in other countries that follow this legal system. Take for example the US case of Doyle v. Insurance Company, in which the US Supreme Court refused to sanction a contract in which it was agreed that neither party shall resort to the US courts.[29]

However, what is generally permitted is to provide, in the first instance, for arbitration and, if the parties in dispute are not satisfied, then and in such a case, they may refer the matter to the ordinary courts.[30] But, see the Trinidad and Tobago Gymnastics Federation case (mentioned above) for a particular exemption to this general rule. Also, what about the requirement for athletes who qualify of and wish to participate in the Summer and Winter Games who must submit exclusively to the CAS for the settlement of their disputes and expressly renounce their rights to resort to the ordinary courts? The wording of this "undertaking", which is quite comprehensive and all-embracing, is as follows:

"I shall not constitute any claim, arbitration or litigation, or seek any other form of relief in any other court or tribunal."

Can such a clear ousting of the jurisdiction of the courts be justified on sporting grounds? See "CAS at the London 2012 Olympics: a question of jurisdiction" by the author of this article.[31] See also the CAS Statement of 27 March 2015 on the Claudia Pechstein case, which also involved "forced" arbitration by the CAS under the Sports' Governing Body (ISU) Rules. In that statement the CAS made, inter alia, the following comment:

"The [Munich] Appeals Court also mentioned that CAS arbitration does not breach Article 6 para. 1 of the European Convention for Human Rights and recognized the need to have a specialized international tribunal, instead of state courts, ensuring the uniform adjudication of sports-related disputes."[32]

29 94 U.S. 535 (1876).

30 See the English House of Lords Decision in the case of *Scott v. Avery* (1856) 5 HLC 811.

31 *GSLTR* 3-3, September, 2012, p. 11-12.

32 See the CAS official website at www.tas-cas.org for the complete text

This need for uniformity in determining sports disputes is a persuasive legal argument for justifying mandatory reference of all sporting disputes by sports persons to the CAS rather than to the ordinary courts.

See also the controversial Claudia Pechstein case, in which the German speed skater, sought to pursue a claim for damages outside the CAS arbitration system in the German courts. Her case has gone all the way up to the German Federal Constitutional Court, where a final decision is currently pending.[33]

Conclusion

As we have seen, sports' governing bodies jealously guard and defend their autonomy and powers to organise their own affairs without any outside interference of any kind, including national governments and reviews of their activities by the ordinary courts.

However, as we have also seen, there are, in fact, some legal limitations on their autonomy and powers in that they may not oust the jurisdiction of the courts in all cases, not least, where there has been a breach of the "rules of natural justice" or of their own rules or where their own adjudication procedures are found to be wanting in other respects to such an extent that a just and fair outcome for the claimant is not possible outside the courts. There is always a "public interest" or "public policy" element to be satisfied.

Of course, sports' governing bodies always claim that they are in the best position to determine sports disputes and there is some sympathy for this point of view shown by the ordinary courts, which, in general, are reluctant to get involved in such cases.

Sports' governing bodies also argue that sport is "special" with its own particular characteristics and dynamics[34] and, as such, should be outside the normal legal system. And they support this contention by pointing to the fact that the Court of Arbitration for Sport (CAS) is, after its thirty-three years of operations and currently registering between four and five hundred cases a year, proving, in practice, to be a fair and effective body for settling, in a timely and relatively inexpensive manner, a wide range of sports-related disputes, purely sporting as well as commercial ones.

This latter claim is difficult – if not impossible – to refute, but, of course, a proper balance needs to be struck between the roles that should be played by sports' governing bodies and by the courts, which, ultimately, it is submitted, are the guarantors of the rights and freedoms of all enjoyed in a free and democratic society!

of the CAS Statement.

33 For a full report on this case and its current status, see section 13.10 of chapter 13 in the new book, entitled *International Sports Law: An Introductory Guide*, by Prof. Dr. Ian Blackshaw (The Asser Press, The Hague, The Netherlands, September 2017).

34 See the EU Commission "White Paper" on sport of 11 July 2007 which recognises the so-called "*specificity*" of sport.

UK developments in the taxation of image rights

BY KEVIN OFFER[1]

Introduction

The recent revelations in the press from the so called "Paradise Papers", a number of documents obtained from the hacking of the computer systems of the Appleby law firm in Bermuda and other related entities, has once again brought the avoidance of tax into the press.

In addition, a number of high profile cases involving footballers in Spain and press reports in the UK have highlighted the use of structures for the exploitation of image rights. These tax planning arrangements are usually legal so do not constitute evasion. However, in the current climate where, in the UK, the distinction now appears to be drawn between tax planning and tax avoidance, rather than avoidance and evasion, tax authorities and governments are under increasing pressure to clamp down on what was previously considered to be acceptable tax planning.

I commented in a previous article on the football leaks revelations and how they have affected UK tax planning.[2] This article looks at developments in the UK during 2017 and how they may impact on structures in the future.

Image rights structures

Image rights structures have been around in the UK for many years. With a growing number of such structures the payments to image rights companies was the subject of a challenge by HMRC in 2011. After lengthy negotiations it was believed by the clubs and their advisers that an agreement had been reached with HMRC in 2015 that allowed clubs to treat up to 20% of the salaries paid to players as a payment for the use of their image rights. Documents published as part of the football leaks revelations included an e-mail from an adviser indicating that the position had been "agreed formally with the clubs" and that, although nothing would be formally published, all clubs had been provided with details of the agreement with HMRC. However, when asked about these arrangements, HMRC denied agreeing any deal with the clubs in 2015. Earlier this year they stated that they are currently investigating more than 100 players over their use of "tax avoidance schemes". This does not specifically mean that they are investigating image rights companies, as it is known that a number of individual players are caught up within enquiries into other tax arrangements, but it can be concluded that image rights payments are included in the enquiries.

The number of players based in the UK setting up companies to exploit image rights has increased by around 80% in the past two years with more than 180 players in the English Premier League now appearing to have companies that may receive income from the exploitation of image rights. A little over 100 of those companies are reported to hold a total of £ 60 million and are reported to have avoided at least £ 21 million in tax.[3] Such companies can be used to provide pension type benefits or create a capital payment after retirement.

Image rights companies are particularly attractive to overseas players who can pay funds outside the UK after ceasing to play in the UK and avoid further taxes altogether. Foreign players with an international earning potential may be able to set up a company outside the UK and take advantage of the UK's non-domicile regime. This can allow payments for image rights and so on that arise outside the UK to be paid to an offshore company without incurring any UK tax charge. It is not uncommon, therefore, to see endorsement contracts to cover exploitation of a player's image in certain areas of the world with the UK specifically excluded. Such companies may be set up in tax havens, although the need for access to tax treaties and the reluctance of some sponsors to be associated with a company in a tax haven make this less likely. It is, however, still possible to have the best of both worlds by using structures, such as the one it is suggested was set up for Jose Mourinho, which can allow a small amount of income to be taxed in Ireland at a rate of 12.5% with the balance flowing through to a company in a tax haven such as the British Virgin Islands.

The use of image rights companies as highlighted in the football leaks papers led Meg Hillier, the Labour MP and chairperson of the House of Commons Public Accounts Committee, to say "I am frankly amazed that HMRC can seemingly rubber-stamp such a practice which, on the face of it, seems solely designed to minimise tax. Although this is legal it is certainly not in the spirit of the law." This increasing pressure on HMRC to challenge such structures led to an announcement in the UK Budget statement in March 2017 that HMRC would "publish guidelines for employers who make payments of image rights to their

1 Kevin Offer is a partner at Gabelle in London and a member of the International Taxation of Entertainers Group (ITEG). He may be contacted by e-mail at at kevin.offer@gabelletax.com.

2 "Tax planning and the "football leaks"", in: *GSLTR* 8-1, March 2017.

3 Reported in the Sunday Times,11 December 2016.

employees to improve the clarity of the existing rules".[4]

Image rights in practice

In July 2017, the Entertainment, Sports and Media Group of the ICAEW published a document Image rights – a whole new ball game which set out the way in which image rights work in practice in the UK and the tax implications arising from such arrangements. This identified that image rights had become an integral part of football and were included within negotiations whenever a player switched clubs or signed a new contract. The document even goes on to say that a club would agree to pay a proportion of salary to a player's image rights company.

The tax benefits were indicated, but the only issue identified within the document was the problem of valuing the image rights which, the author of this article comments, was "subjective".

Emphasis was placed on HMRC's acceptance that image rights are separate after the Sports Club case[5] and it is commented that the agreement with the 20% cap was a temporary arrangement for the 2016-2017 season. What is not addressed in the document, however, is the question of whether payments made are actually for the exploitation of image rights or relate to an employment. For example, is a simple split of a salary within the 20%/80% agreement sufficient?

Rangers

The final decision in the Rangers case was the subject of an article in this journal by one of my colleagues[6] so is not considered further here. However, within paragraph 39 of the decision, the court set out the principle that employment income paid from an employer to a third party is still taxable as employment income. HMRC's view is that this principle applies to a wide range of "disguised remuneration tax avoidance schemes no matter what type of third party is used". HMRC guidance, published on 29 September 2017, stated that HMRC intended to use the decision to take action against a number of schemes.[7] Whilst that guidance does not refer to image rights structures it could be argued that payments made to an image rights company negotiated as part of the salary of a player could be challenged on those grounds.

HMRC guidance

The awaited HMRC guidance on image rights payments was published on 16 August 2017.[8] The actual guidance document is very short and, on an initial look, does not seem to contain much in the way of guidance. It is identified that payments for the use of an individual's image rights can be taxed in different ways. The guidance then goes on to indicate that tax may be charged in one of three ways.

- Payments made to a self-employed individual are taxable as professional income.

- Payments to employees for the duties of an individual's employment must be taxed as earnings subject to tax deductions at source and not as payments for the use of image rights. It is the employer's obligation to ensure that deductions are made.

- Image rights payments made to a UK company will give rise to a liability to UK corporation tax on profits. Income received by the individual from their company is taxable in accordance with the type of income received (i.e. dividends, salary, etc.).

The guidance does not go into further detail but refers the reader to the HMRC Employment Income Manual for further information.[9]

HMRC employment income manual

HMRC have made their internal manuals available online for many years. They provide guidance to HMRC staff on how HMRC interpret UK tax law and how taxpayers' affairs should be handled by HMRC staff. Whilst the manuals do not have the force of law it can be taken that HMRC will take the view expressed in the manuals and argue against any taxpayer or adviser who takes a different view.

At the same time as publishing the guidance on the tax payments for use of image rights, HMRC also published additional guidance within their Employment Income Manual.[10]

Firstly, HMRC define "image rights" as likely to be dependent upon a bundle of different rights. It is noted that image rights contracts are popular with sportspersons but are likely to allow for the exploitation of an individual's public appearances, copyrights, trademarks, etc., as well as an individual's name, likeness, etc.

The next section of the manual comments on payments to an image rights company (IRC). It is noted that, in recent years, the assignment of an asset described as "image rights" to an IRC has become common practice. However, in HMRC's view, it is not correct to regard the transfer of a registered trademark, such as a person's name, caricature, etc., as a transfer of "image rights". It is noted that an individual may

4 Para 4.13 of the Spring Budget 2017 Policy Paper, published 8 March 2017.

5 *Sports Club plc and others v. CIR* [2000] STC 443

6 "The final whistle: Rangers in the UK Supreme Court", in: *GSLTR* 8-3, September 2017.

7 HMRC Guidance – Disguised remuneration: A Supreme Court decision (Spotlight 41).

8 HMRC Guidance – Tax on payments for use of image rights.

9 HMRC Internal Manual – Employment Income Manual, published at www.gov.uk/hmrc-internal-manuals/employment-income-manual (accessed 30 November 2017).

10 HMRC Employment Income Manual, published at www.gov.uk/hmrc-internal-manuals/employment-income-manual/eim00731 (accessed 30 November 2017).

agree to perform services in connection with the "image rights" which are exploited by the IRC resulting in the payment of royalties or licence fees. The justification often quoted by advisers for arrangements such as this is the Sports Club case referred to above. HMRC, however, note that this was a decision by the Special Commissioners published in anonymous form. As the Inland Revenue (the predecessor to HMRC) did not appeal this decision it did not proceed to the courts and HMRC, therefore, regard the decision as "informative rather than having created precedent".[11] This leads to the conclusion that the Sports Club case cannot be relied upon and that other factors need to be considered before HMRC will accept an IRC is effective for tax purposes.

The manual goes on to consider the Sports Club case in more detail. It is noted that the Special Commissioners recognised there was no property in a person's image and the description of the arrangements in the case as "image rights agreements" was misleading. The arrangements were, therefore, referred to as "promotional agreements". These promotional agreements led to payments being made to the IRCs of the two players involved by the club in respect of promotional services provided by the players.

The case before the Special Commissioners was whether the payments were earnings from the employment of the players by the club (and so chargeable to income tax as employment income) or, if not, benefits in kind (and so treated as earnings from the employment). In order to consider these points, the following questions were identified.

1 Did the promotional agreements have independent values?

2 Were the promotional agreements a "smokescreen" for additional remuneration?

3 Were the payments under the agreements emoluments from the employments?

The Special Commissioners decided that the promotional agreements were capable of and did have independent values and were genuine commercial agreements. As a result, in the light of the specific facts of the case, the payments were not earnings from the employment with the club.

The Special Commissioners also decided that a "benefit" cannot include something in return for "good consideration under a separate commercial contract". The payments were not, therefore, benefits in kind and should not be regarded as earnings of employment.

In conclusion, HMRC, whilst accepting the decision, consider that it is based on the specific facts and should not be regarded as a precedent to justify the arrangements of other taxpayers. HMRC will still consider whether the payments to an IRC should be regarded as income arising from an employment. Whilst it is not referred to in the manual, the decision in the Rangers case may assist HMRC with this argument in future cases.

The manual then moves on to consider whether deduction of tax should be made from payments made to an IRC. Royalties and other income arising from intellectual property, which has a source in the UK, are liable to UK income tax[12]. HMRC believe that some of the intellectual property rights that form the image rights assigned to an IRC will meet the definition of intellectual property within s.579(2) ITTOIA. The payer may then be placed under an obligation to deduct tax from any payment made under Part 15 of the Income Tax Act 2007. Consideration of the individual circumstances is, therefore, required to determine whether tax should be withheld.

In addition, s.906 of the Income Tax Act 2007 places an obligation to deduct tax on the payer of a payment for the use of intellectual property to a non-UK resident. The definition of intellectual property, for these purposes, was expanded by the Finance Act 2016 (with effect from 28 June 2016) to cover a wide range of payments and follows that contained in the OECD model tax treaty. In particular, HMRC will consider the commentary to art. 12 when determining whether a payment gives rise to an obligation to deduct tax at source. If the payment is from the UK to a country, with which the UK has a tax treaty, then the obligation to deduct tax may be reduced or eliminated. The availability of relief under a treaty will, however, be denied if the parties are connected and the payment is made under tax avoidance arrangements. Anti-abuse provisions within a treaty must also be considered.

Having set out the view that they consider the payments made to an IRC as, potentially, of more than one type, HMRC will seek to apply tax to each element of the payment in accordance with UK tax law. Where the payment is considered to be a royalty, then an obligation to deduct tax will be placed on the payer, and HMRC will pursue the payer where this has not been done. Where a payment is determined to be employment income, then an obligation to deduct payroll taxes will arise, and HMRC will, again, pursue the payer where this has not been done. It is in the area of employment taxes that HMRC are now pursuing clubs and players.

HMRC enquiries

The internal manual contains some guidance on how an enquiry will be conducted.

Firstly, when looking at whether a payment constitutes employment income, HMRC make it clear that they are only looking at a situation when a payment purporting to

11 HMRC Employment Income Manual, published at www.gov.uk/hmrc-internal-manuals/employment-income-manual/eim00733 (accessed 30 November 2017).

12 Part 5 of the Income Tax (Trading and Other Income) Act 2005 (ITTOIA).

be for image rights is made where there is an employment relationship, such as between a club and a player. Agreements with a third party should not, therefore, give rise to employment income although HMRC may still seek to collect tax from the payer, if they believe the payments constitute a royalty, or challenge any arrangements where the payment is connected with an employment.

HMRC consider that a player is employed by a club to be a member of a team. Remuneration under a contract of employment will, therefore, arise from the performance of the duties of the employment, which may include promotional services as well as playing for the club. These duties may be split between two (or more) contracts but may constitute one arrangement. HMRC, therefore, believe there must be a commercial justification for distinguishing between payments for performance of the duties of the employment and payments for promotional services through an IRC.

HMRC go further in their internal manual to say that agreements for promotional services are generally negotiated to run alongside a contract of employment. Renegotiation of the employment contract may also result in a renegotiation of the image rights agreement leading to an impression that the total payments are considered by the employer to be an overall package. A similar argument was made in the Rangers case, but HMRC do accept that there may be circumstances where there is a distinct commercial reality to each element. HMRC expect that those drawing up contracts covering image rights payments will have sufficient experience and expertise to ensure that the arrangements are commercial. In particular, HMRC consider the employer (i.e. the club) to have proper regard to the commercial revenues expected to be achieved. The actual payments, as well as the contractual terms, will, therefore, need to reflect commercial terms and so the previous practice of making a payment of up to 20% of remuneration is clearly at an end.

From the above, it is clear that HMRC regard commerciality as the main consideration, and each case may, therefore, be reviewed on its own facts rather than on any accepted principle. Some examples of the records that a club may consider keeping are set out in the manual[13] but the list is not exhaustive. The list includes evidence of the consideration of the commercial activities to be performed; business plan; individual negotiations; independent advice; etc. What is sufficient will, however, depend upon each individual case.

HMRC enabler penalties

Although not specifically relating to image rights, it is worth mentioning the new penalties recently enacted in the UK to cover those who enable a person to avoid taxation[14]. Under this new legislation, a criminal penalty may arise on any party who enables a person to avoid tax. The definition of an enabler is quite wide and includes a party to a contract if it is reasonable to conclude that the party should have known the arrangements they were entering into could be used to avoid tax. A club may, therefore, be caught by these provisions if they do not take care to ensure any image rights payments are made on a commercial basis.

Geovanni and the future

As has already been mentioned, HMRC are investigating more than 100 players. Whilst not all of these are related to image rights arrangements it is becoming clear that this is an area HMRC are targeting. In addition, it appears that the target of the enquiries is the obligation of the club to deduct tax rather than the structures themselves. The author of this article has seen a few cases which are still at the early stages of an enquiry, but one case that is going before the tax tribunal in the UK is that involving the Brazilian player Geovanni[15]. The actual case has yet to be heard, but most of the background detail to the case is set out in the decision of the tribunal on an application to vary directions.[16]

HMRC have challenged the arrangements between Hull City and Geovanni, whereby a payment was made for use of image rights to an IRC. HMRC's view is that the payments were a "sham"; should be considered part of the remuneration of the employment; and taxed as employment income. This is fully in line with HMRC's views, as expressed in their internal manual guidance, but it should be noted that the case arose long before the guidance was published. HMRC are, therefore, looking to apply the guidance issued in the summer to past years so that the previously perceived agreement will not provide any protection if the arrangements are not commercial. The Geovanni case will be interesting to follow and will be the subject of a future article in this journal once the decision is known. In the meantime, there are likely to be many more cases like this one.

Any club or player in the UK, or a player considering a move to the UK, would be advised to take advice on any image rights arrangements that they have in place to ensure that they are on a commercial basis, taking into account HMRC current guidance.

13 HMRC Employment Income Manual, published at www.gov.uk/hmrc-internal-manuals/employment-income-manual/eim00739 (accessed 30 November 2017).

14 Schedule 16 Finance (No.2) Act 2017.

15 *Hull City AFC (Tigers) Limited v. HMRC*.

16 First Tier Tribunal decision, available at www.bailii.org/uk/cases/UKFTT/TC/2017/TC06065.html (accessed 30 November 2017).

Seminar Université de Lausanne
International taxation of sportsmen and entertainers

BY DR. DICK MOLENAAR[1]

Introduction

On 22 September 2017, the Tax Policy Center of the University of Lausanne (UNIL) organized a seminar about two topics regarding the international taxation of international sportsmen and entertainers.[2]

Prof. Robert Danon was the initiator of the seminar, because UNIL has sports law as one of its focus research areas. Also, the LLM program of UNIL has the taxation of sportsmen and entertainers in its curriculum. UNIL is an inspiring place with its view on the Lake of Geneva.

The opening speech of the seminar was given by Prof. Dr. Laurent Moreillon, the Dean of the Faculty of Law, Justice and Public Administration of UNIL. He welcomed the speakers and the Swiss and foreign attendees to the seminar and wished them an inspiring discussion.

Current tax policy issues

The first topic dealt with current tax policy issues around art. 17, OECD Model Treaty, which were discussed by Dick Molenaar[3] and Manuel de los Santos[4]. In 2014, the OECD has decided to keep art. 17, despite the calls for the removal of the article from the OECD Model, but it has also recognised the practical problems with the article.

Dick Molenaar gave an overview of these practical problems, such as:

1 non-deductibility of expenses in the work state, creating a (much) higher taxable base than the one in the residence state, which leads to excessive taxation, even when the tax rate in the work state is lower than in the residence state. Almost every sportsperson or entertainer experiences this over-taxation.
2 problems with tax credits, because of tax certificates missing, in unreadable languages, in the name of a group while the tax credit needs to be obtained individually, and more. This leads to double taxation, because the residence state does not allow the tax credit.
3 high administrative expenses in both the work and residence state to eliminate double taxation as much as possible. Especially for medium and smaller sportsmen and entertainers, these administrative expenses are relatively high compared with their earnings.

Dick Molenaar gave some striking examples of these tax problems from his practical experience in the international sports and entertainment businesses.

He also showed the examples from the Netherlands[5] and major sports events[6], which have unilaterally removed the source taxation for sportsmen and entertainers, taking away the risk of excessive or double taxation and the extra administrative expenses. This works very well in practice, as Ireland and Denmark have already shown for many years with not having a source withholding tax for non-resident performing sportsmen and entertainers.

Manuel de los Santos explained how and why the OECD had come to its decision in 2014 to keep art. 17 in the OECD Model. The OECD member States had insisted on keeping the article and had given three reasons for that[7]:

a it is often hard for the residence state to obtain information about income from foreign performances;
b high-earning sportsmen and entertainers still want to move their residency to a low-tax jurisdiction;
c a source tax is easy to administer.

1 Dr. Dick Molenaar is a partner with All Arts Tax Advisers and researcher at the Erasmus School of Law in Rotterdam, The Netherlands.

2 The brochure of the seminar can be found on www.unil.ch, search for "*sportsmen*".

3 Dr. Dick Molenaar is the author of this summary from the seminar.

4 Manuel de los Santos is from Spain, where he was working at the Spanish tax administration, but currently working at the OECD in Paris, France.

5 The Netherlands removed its taxation of non-resident sportsmen and entertainers unilaterally per 2007.

6 Examples are the Olympics (IOC), Champions and Europa League finals and the European Championships (UEFA) and the World Cup Football (FIFA).

7 These reasons are mentioned in the report "Issue related Article 17 of the OECD Model Tax Convention", part 1 (26 June 2014).

But he also explained that the OECD has given several (new) options in the revised 2014 Commentary to restrict art. 17.[8] Together, Manuel de los Santos and Dick Molenaar discussed these options.

- For employees, priority can be given to art. 15 of the OECD Model. The 2014 Commentary gives a text proposal for art. 17, with which the article can be restricted. This takes away the three problems for employment situations to which the three new reasons for art. 17 do not apply.

- A minimum threshold per person per year can be inserted in the bilateral tax treaties. The 2014 Commentary gives the example of IMF SDR 15,000 per year, equivalent to € 20,000, but leaves the amount open for negotiating states. It has also given an example of a variable threshold, related to the GDP for OECD states. The US already has, for many years, a minimum threshold for entertainers and athletes in art. 16 of its Model Tax Convention and raised this from US$ 20,000 to US$ 30,000 per person per year in its latest 2016 version. The minimum threshold would very much help the smaller and medium-sized performers when performing abroad, especially when the threshold can be applied directly at the moment of the performance and not just after the taxable year.

- The exception for performances supported by public funds is already widely used, in approximately 67% of the bilateral tax treaties, while some States have it in almost every treaty.[9] It sets a minimum of 50% subsidy, but this becomes problematic for many orchestras and groups after budget cuts in various States.

- The deductibility of expenses and after the year use of normal tax rates, which has been recognized with the EU with three ECJ decisions[10] and is mentioned in paragraph 10 of the Commentary on Article 17 since the 2008 Update.

- Cross-border competitions can also be exempted from source tax. An example of the use of this exception comes from the US-Canada treaty, which helps the baseball, hockey, basketball, soccer and other competitions held in both States.

- With the limited approach of art. 17(2), the second paragraph only applies when the sportsperson or entertainer is related to the entity receiving the income as owner or is sharing in the profit and such. The US also has had this exception for many years in its Model Tax Convention, exempting many legitimate legal entities, such as classical orchestras, theatre and groups and independent production companies.

The speakers both acknowledged that art. 16 of the 2016 US Model Tax Convention with its minimum threshold of US$ 30,000 and the limited approach of paragraph 2 in the text of the article is much better than art. 17 of the OECD Model with only options in the Commentary. Until now States almost only use the option for "performances supported by public funds" and not more. This gives the US performers a better competitive position on the global market.

And after the turmoil of the BEPS project might ease down in the coming time, it may be that the position of art. 17 in the OECD Model comes back in discussion at the OECD level, either for removal or otherwise for inserting the restricting options in the text of the article.

Taxation of image rights

Speakers for the second topic about the taxation of image rights were Prof. Dr. Robert Danon[11], Dr. Mario Tenore[12], Dr. Emmanuel Linares[13], Dr. Vikram Chand[14] and Manuel de los Santos[15].

Mario Tenore: legal introduction

First, a legal introduction to the topic was given by Mario Tenore. He explained that the income from advertising, sponsoring and image rights for sportspersons and entertainers should fall under art. 17 of the OECD Model when it is connected to performances. Especially paragraph 9 about sponsoring and advertising has been inserted and extended in the 2014 update of the Commentary on Article 17 to cover this. Before 2014, there was quite often discussion whether there was a direct link between performances and the income from advertising and sponsoring. Then paragraph 9 stated that other articles would apply when there was no direct link between the income and a public exhibition of the performer in the country concerned. But since 2014, paragraph 9 states that art. 17 will apply to advertising and sponsoring income, which is directly or indirectly related to performances in the given state, which means that also income from off-court activities but linked to performances, such as during a golf or tennis tournament, fall under art. 17.[16]

8 See also Dick Molenaar, *New Options to Restrict Article 17 for Artists and Sportsmen*, 44(12) Intertax 972 (2016)

9 See Dick Molenaar, *Article 17(3) for Artistes and Sportsmen: Much More than an Exception*, 40(4) Intertax 270 (2012).

10 ECJ 12 June 2003, C-234/01 (Gerritse), ECJ 3 October 2006, C-290/04 (Scopio) and ECJ 15 February 2007, C-345/04 (Centro Equestre).

11 Prof. Dr. Robert Danon is professor of Swiss and international tax law and director of the Tax Policy Center of the University of Lausanne, Switzerland.

12 Dr. Mario Tenore is working with Maisto e Associati in Milan, Italy.

13 Dr. Emmanuel Linares is senior vice president of NERA in Paris, France.

14 Dr. Vikram Chand works with the Tax Policy Center of the University of Lausanne, Switzerland.

15 See footnote 4.

16 This goes further after the case law in the UK with the Agassi decision (House of Lords 17 May 2006, [2006] UKHL 23) and in the USA with the Goosen decision (TC 9 June 2011, 136 T.C. No. 27) and Garcia decision (TC 13 March 2013, 140 T.C. No. 6).

New in the 2014 update of the OECD Commentary on Article 17 is paragraph 9.5 about image rights. But it follows the same pattern as paragraph 9 by stating that, when the use of the image rights is not connected to performances, the income is not covered by art. 17, which is in line with the phrase from paragraph 9 that royalties from intellectual property rights will normally be covered by art. 12 rather than art. 17[17]. According to the new paragraph 9.5, art. 17 should prevail in conflicting cases, especially when the use of image rights constitutes substance remuneration for activities in the work state.

Emmanuel Linares: valuation of image rights

Then, an economic approach was presented by Emmanuel Linares, with which he intended to come to the valuation of image rights. His starting question was: "What is the value of the image rights of a young football player?" And even though Emmanuel Linares is not a tax expert, he also understands that this is important, because a sportsperson or entertainer wants to transfer his image rights to a separate limited company, when possible, preferably resident in a low-tax jurisdiction. With the transfer, the sportsperson or entertainer hands over the image rights to the limited company and this needs to be done at an arm's length price. This price will be lower when the sportsperson or entertainer is younger and not yet successful and will become higher when his/her career develops.

Emmanuel Linares gave information about available statistics, especially for football players. These statistics about wins and losses, goals, passes completed, tackles, throw-ins, speed and distances, injuries and such can be interesting to determine how much value a player may have. This will become clear in transfers or temporary loan-outs and in salaries with the new clubs.

For football players the remuneration of image rights may come from two sources.

1 A fixed share of the player's salary from the club can be treated as income from image rights, because the club will be entitled to use the image of the player for commercial purposes. But the amount depends on the country in which the club and player are located and are very different across European countries.

2 Income received from sponsorship contracts concluded between the player and third-party sponsors (e.g. Nike, Adidas or Under Armour) are shared between image rights revenues and players' personal services.

In general, the valuation methods for firms are:

– income approach: present value of the future economic benefits that accrue to investors of the business. This estimates the fair market value of a company or asset based on the earnings, or cash flow capacity of the company or asset. The underlying concept is that this is the realistic valuation of any investment in an income-producing property;
– market approach: the value of an asset is estimated based on available market references;
– asset approach: this is an alternative approach to value an enterprise or an asset, which is often called the asset-based or cost approach. It entails the adjustment of the primary asset and liability classifications of the company to their fair market value.

The income approach seems to be the only approach applicable to image rights, while the others are not (and the asset approach is even criticized by the OECD). The income approach has a two-step process, in which, first, the future net cash flows attributable to the business or asset are estimated and then, second, the net present value is determined by application of a discount rate.

But it is important to take into account the uncertainty of each player's career, such as the length, potential evolution and success, etc. For this, *e.g.*, the German website *Transfermarkt* can be used, which gives information about the market value of talented young players in the past. This can be screened for comparable players for their stage of development, which provides a set of possible future career evolutions. Emmanuel Linares gave the example of the Argentinian football player Mascherano, with a graphic of the development of his market value. Most often there is a direct relationship between transfer value and salary, which he also showed in two graphics. Altogether, this leads to minimum and maximum market values for a player at the relevant stage in his career.

Finally, he concluded that practitioners use the same valuation principles across most industries, but available data and the factor of uncertainties in the valuation will usually differ. Improved access to data means that some valuations are becoming easier, although he also realizes that there is a trade-off between model complexity and the need for accuracy. As the OECD has issued in a recent Discussion Draft, it is hard to value intangibles. And it may be very different when there is a one-shot transaction made or that contingent payments will follow. The latter protects the seller, so the value will go down. For the transfer of image rights, it has become possible to determine maximum and minimum values, between which choices can be made.

Case study about the image rights of a football player

The panellist had drawn up a case study about a very successful football player in State S, who has transferred his image rights to a limited company in State T. The conclusions from the perspective of the State S, where also the football club is located, were:

– income from the contract to wear shoes during matches falls under art. 17 OECD Model, because they are linked to performances;
– income from television commercials not related to football matches falls under art. 7;

17 See also para. 18 of the OECD Commentary on Article 12. But, it may cause confusion, as can be seen in the Pierre Boulez case (83 T.C. no. 584 (1984)).

- income from promotional activities every quarter also falls under art. 7;
- income from advertisements before and after matches may fall under art. 17, although it can also be argued that there is no directly linked performance, which means that art. 12 applies;
- income from the use of image rights in promotional material throughout the year falls under art. 12;
- income from the use of the image on T-shirts, being sold throughout the country also falls under art. 12.

For the limited company to which the image rights are being transferred and resident in State T, some other aspects may be relevant. Such as the beneficial ownership of that company, for which some States have a broad definition, while others are stricter. The 2014 Commentary gives more guidance on this in paragraph 9.5 and it can be discussed under the Principal Purpose Test (PPT) and BEPS Action 6, because it can be seen as a conduit situation. Important for the PPT test is whether the structure in State T has been set up solely to avoid tax in State S. But when there is a realistic management of the image rights by the company in State T, the PPT test will be positive, while only collecting the income will not get through the PPT test.

Final words

The UNIL seminar was very active and lively with clear presentations by the speakers and interesting interventions from the audience. Two very different subjects were discussed:

- the problems with excessive and double taxation following from the strict application of art. 17, but also the options from the OECD to cut down art. 17 with restrictions given in the Commentary; and
- the search for ways to come to non-taxation with the use of image rights, especially by football players, was discussed in the light of both the OECD Model Treaty and the BEPS implementations.

These subjects will be studied further at the University of Lausanne.

Are sports' governing bodies above the law?

BY DR. THILO PACHMANN AND OLIVER SCHREIER[1]

Introduction

Sports and, in particular, sporting events, have come a long way from the humble roots of simple gatherings, in which athletes can participate with the sole objective of winning the championship for glory and honour. It is undeniable that, in the past decade, world sport has become more complex, involving more stakeholders, and has entered a new dimension.

Testament to this evolution is the increased power and wealth of international sports organizations and governing bodies, many of which have their headquarters in Switzerland.[2] International sports' governing bodies, such as the International Olympic Committee (IOC) and the Fédération Internationale de Football Association (FIFA) contribute CHF 1.07 billion to the Swiss economy per year.[3]

Another issue to be considered are the increasingly important – and potentially dramatic – consequences of an involvement in an event or an individual game play situation for the athlete involved. A false positive during a drug test conducted during the Olympic Games may cost an athlete his or her entire career.[4] A wrongly denied goal costs top-striker Zlatan Ibrahimovi a bonus of £ 143,000 – which he receives per goal scored.[5] These facts, in turn, lead to a need for higher precision of referee decisions and clearer rules regarding participation and sanctions.[6]

All this contributes to the increasing imbalance in power between sports' governing bodies and their stakeholders, such as athletes, media, etc. Against this background, the importance of an adequate judicial or review system, which polices sports' governing bodies, cannot be overstated.

This article analyses the legal structure applicable to sports' governing bodies in Switzerland and considers whether these bodies are kept in check.

What are sports' governing bodies?

Sports' governing bodies, such as the IOC and FIFA for example, have a regulatory function and are tasked with setting up rules and regulations pertinent to their specific sport. Furthermore, they also have a sanctioning function and, therefore, police sports events; athletes' participation rights and duties; and address any other conflicts that may arise with the regulations that they set up.[7]

What legal form do sports' governing bodies adopt and what implications does this have?

Remarkably, most of the sports' governing bodies have their legal seat in Switzerland and almost all have adopted the form of an association.[8]

The association must not have an economic purpose and must set up their own articles of association or statutes, which indicate the objectives of the association; its resources; and its organisation.[9]

1 Dr. Thilo Pachmann and Oliver Schreier of Pachmann Attorneys at Law, Switzerland. They can be reached by e-mail at thilo.pachmann@pachmannlaw.ch and oliver.schreier@pachmannlaw.ch.

2 Within Switzerland, the city of Lausanne clearly steals the show, as it hosts many of the world's sports governing bodies and other important sports organisations, including the IOC and the World Anti-Doping Agency. The city has even been named "the silicon-valley of sports". See the *New York Times* article dated 22 April 2016 by Rebecca Ruiz: "Swiss City is "the Silicon Valley of Sports"", available at www.nytimes.com/2016/04/23/sports/olympics/switzerland-global-sports-capital-seeks-new-recruits.html (accessed 30 November 2017).

3 The study was conducted by the International Academy of Sports Science and Technology, a not for profit foundation incorporated in Switzerland under Swiss private law (art. 80 of the Swiss Civil Code [SCC]). See AISTS, *The Economic Impact of International Sports Organisations in Switzerland 2008–2013*, www.aists.org/sites/default/files/publication-pdf/aists_economic_impact_study-english-web.pdf (accessed 30 November 2017).

4 Not only does the athlete face possible sanctions and the exclusion from future sporting events, but also the elimination of the main source of income.

5 During the last season, this clause earned him close to £ 1 million in just 30 days. See The Daily Mail article dated 9 May 2017, by Jack Gaughan: "Manchester United included gigantic goal bonus in Zlatan Ibrahimovi 's contract... earning him an extra £3m!", available at www.dailymail.co.uk/sport/football/article-4489690/Manchester-United-gave-Zlatan-Ibrahimovic-huge-goal-bonus.html (accessed 30 November 2017).

6 An example of a technological solution to this problem is the video assistant referees. These were introduced at the 2017 Confederations Cup. See BBC article dated 19 June 2017: "Confederations Cup: Video assistant referees are "the future of football" says Fifa", available at www.bbc.com/sport/football/40335718 (accessed 30 November 2017).

7 E.g. art. 2 lit. d UCI Constitution, ed. 14. October 2016 and art. 3.6 FIS Statutes, ed. June 2016.

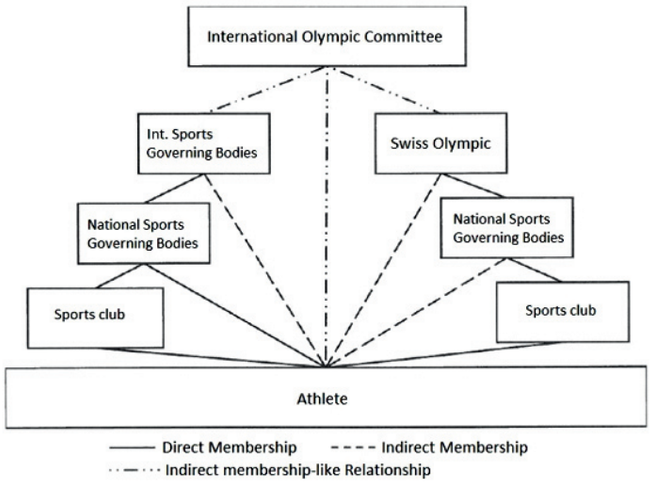
8 A private corporate legal entity governed by art. 60 et seq. SCC.

9 Art. 63 para. 1 and para. 2 SCC.

There are many reasons for this, chief amongst which is that this legal form offers freedom and flexibility to set up private rules and regulations and to structure the legal entity without large restrictions. This is based on the principle of autonomy, which is granted to associations.[10] Furthermore, even though associations are, in principle, subject to taxes,[11] there is a tax exemption for associations that have public or charitable purposes.[12]

From a critical point of view, the non-economic purpose of an association[13] stands in stark contrast to the financial reality of the events organised by large sports' governing bodies. These events (e.g. Olympic Games, UEFA Champions League, and the like) generate unbelievably high revenues (billions of US$ per year) that keep on rising.[14] However, due to the legal form of the association, the revenue generated must (at least in theory) be utilised by sports' governing bodies for the specific goal of promoting sports; setting up regulations governing sports; and financing lower-tiered sports organisations. The profits may not, therefore, be utilised freely.[15]

Concerning the organisation, the supreme body of the association is the general assembly,[16] which is in charge of setting up and amending the statutes of the association;[17] admitting new and excluding existing members;[18] and fulfilling any other task set up in the statutes, such as, for example, introducing important new competitions.[19] Members have voting rights which grant them a possibility to "steer" the association.[20]



Graph from Thilo Pachmann, Sportverbände und Corporate Governance (Zürich 2007), p. 29.

While stakeholders usually are members of regional sports federations, sports' governing bodies are integrated in a complex hierarchical system. Athletes – the stakeholders who ultimately have the strongest interests to control the association – are, however, not members of the most important sports' governing bodies and, therefore, cannot "steer" them.[21] To participate in sporting events, athletes are, therefore, often compelled to acquire a license by the national sports federation.[22] Otherwise, they must either conclude a separate contract with the sports' governing

10 Art. 60 et seq. SCC. The autonomy of associations results from the right of self-determination, which is a fundamental pillar in Swiss Law.

11 Art. 20 para. 1 Federal Act on Harmonization of Direct Taxes and art. 49 para. 1 lit. b Federal Act on the Federal Direct Tax.

12 Art. 23 para. 1 lit. f and g Federal Act on Harmonization of Direct Taxes. Despite its obvious financial power and influence in Switzerland and in the world, the IOC, for example, is still tax exempt. See Michaël Mrkonjic, "The Swiss regulatory framework and international sports organizations" in: Danish Institute for Sports Studies (ed.), *Action for Good Governance in International Sports Organizations*, p. 129 et seq.

13 See e.g. the Fundamental Principles of Olympism and art. 2 of the Olympic Charter, ed. 2 August 2016; art. 2 lit. c FIFA Statutes, ed. April 2016 and art. 2 UCI Constitution, ed. 14 October 2016.

14 The total revenue for the 2016 Rio Olympics for the IOC (2013-2016) amounts to US$ 5.7 billion and is almost double of the revenue from 2001-2004. See IOC Annual Report 2016, p. 103. The 2014 World Cup in Brazil generated a total revenue of US$ 4.826 billion. See FIFA, *Financial Report* 2014, p. 36. Finally, the gross commercial revenue of the 2016-2017 Champions League, Europa League and Super Cup amounted to 2.35 billion. It must be taken into account, that this event – unlike the other two – takes place every year. See UEFA article dated 25 August 2016, "2016/2017 Champions League revenue distribution", available at www.uefa.com/uefachampionsleague/news/newsid=2398575.html (accessed 30 November 2017).

15 Decision of the Swiss Federal Tribunal (DFT) 90 II 333. Many Swiss scholars agree with this position.

16 *See e.g.* art. 13.1 FIS Statutes, ed. June 2016.

17 Statutes must be set up by the general assembly of the association. Heini/Scherrer, Basler Commentary SCC, vor art. 65-79 N 10 and 16. This right cannot be abrogated or stripped from the general assembly. According to the Swiss Federal Tribunal, a self-imposed rule in the statutes, which makes all decisions of the general assembly subject to approval from third parties (e.g. other associations), is null and void. DFT 97 II 108, con. 3. Such a rule would amount to gagging the association. Heini/Scherrer, Basler Commentary SCC, art. 65 N 5.

18 This right can be transferred to another organ. Heini/Scherrer, Basler Commentary SCC, art. 65 N 2.

19 For the latter see *e.g.* art. 13.2.7 FIS Statutes, ed. June 2016.

20 This is a cornerstone of associations. Voting also grants legitimacy to important decisions of the association, which may be incorporated in the statutes. Members of the association also have the right to express themselves at the general assembly and to submit a request. Heini/Scherrer, Basler Commentary SCC, art. 66 N 16.

21 The IOC, for example, is composed of members, who are natural persons, tasked with representing the IOC in their respective countries. See IOC members list: www.olympic.org/ioc-members-list (accessed 30 November 2017). Sports governing bodies, such as UCI or FIS, are – despite not being members of the IOC – compelled by their own statutes to cooperate directly with the IOC, setting up an indirect membership-like relationship (art. 2.2 FIS Statutes, ed. June 2016 and art. 2 lit. k UCI Constitution, ed. 14. October 2016). The members of UCI are the continental confederations, such as the European Cycling Union (in Switzerland, this is Swiss Cycling, another association under Swiss law with its headquarters in Lausanne), whose members are – in turn – the national cycling federations.

22 See e.g. art. 203 of the FIS International Ski Competition Rules (ICR), Book IV Joint Regulations for Alpine Skiing.

bodies or another sports federation[23] or – on a lower level – may participate based on a direct membership with a sports association.[24] All the while they must adhere to rules and regulations of international sports' governing bodies.[25] Furthermore, given the monopoly position of sports organisations, it is also impossible to somehow influence international sports' governing bodies by "exiting" lower-tiered sports organizations.[26] Stakeholders must, consequently, be protected by laws. This is the only solution.

What laws apply to sports' governing bodies and what are the requirements in this respect?

As mentioned, the most important sports' governing bodies in Switzerland are associations, which are not formally lawmakers and do not represent the State; they are simply private entities. Thus, statutes cannot be onsidered law, but are contractual in nature only[27] and must be interpreted according to the principle of good faith; the objective of the association; and the interests of its members.[28] The same principle applies to the sanctions imposed by sports' governing bodies, which are based on the contractual or, at least, quasi-contractual acceptance of the rules of the sports' governing body.[29]

The limits to the freedom of setting up rules must always be respected. An important limit is the obligation of associations to treat all members equally.[30] Other limitations are based on unwritten laws, such as the right of an athlete to be heard, before disciplinary measures are issued against him or her. Based on the principle of legality,[31] the association must base all duties, which it imposes on its members, on a provision in the statutes.[32] The principle of legality also serves to protect the legal certainty[33] and the freedom of its members.[34] Another essential principle of Swiss law is the principle of proportionality.[35] Within the membership-like relationship between stakeholders and sports' governing bodies, if a rule from sports' governing bodies deviates from non-mandatory law, the legal basis for this must exist in the statutes of the association themselves, i.e., must be legitimated directly by the general assembly.[36]

Finally, given the contractual nature of the relationship between sports' governing bodies and athletes, the same limits, which apply to contracts, also apply to the statutes and regulations of sports' governing organisations. These limits originate primarily from private law.[37] Other limitations stem from association law;[38] individual personality rights;[39] public policy; morality or rights of personal privacy;[40] and antitrust laws, the latter being particularly important regarding EU-anti-trust laws.[41]

23 Athletes are compelled to sign an entry form to be able to participate to the Olympic Games. Bye-law to Rule 44, para. 6 of the Olympic Charter, ed. 2. August 2016.

24 *E.g.* art. 7.2 of the Statutes of the Cantonal association for cycling of Lucerne, ed. February 2016.

25 *E.g.* art. 59 para. 2 Statutes of Swiss Cycling, ed. December 2016.

26 See further Thilo Pachmann, *Sportverbände und Corporate Governance* (Zürich 2007), p. 239 et seq.

27 DTF 140 V 77.

28 DTF 87 II 95; Heini/Scherrer, Basler Commentary SCC, art. 60 N 22, and Thilo Pachmann, *Sportverbände und Corporate Governance* (Zürich 2007), p. 228 et seq. In larger associations, the principles of interpreting laws can be applied analogically.

29 Omar Ongaro and Marc Cavaliero, "Dispute Resolution at the Fédération Internationale de Football Association and its Judicial Bodies" in: Michele Colucci and Karen L. Jones, *European Sports Law and Policy Bulletin, International and Comparative Sports Justice*, p. 100.

30 Art. 63 para. 2 SCC.

31 DTF 46 II 313 et seq. Wolfgang Portmann, "Das Schweizerische Vereinsrecht , in: Pierre Tercier (ed.): *Schweizerisches Privatrecht, Vol. II/5*, 2nd ed. (Basel 2005), N 305.

32 At the very least, the statutes must define the person who can impose such duties and define a given framework to do so.

33 A consequence thereof is the need to formulate the rules and regulations of the association in such a defined manner, to allow athletes to predict, to the highest degree possible, what the actions or the response of an association will be regarding a certain situation.

34 Häfelin/Müller/Uhlmann, *Allgemeines Verwaltungsrecht*, 5th ed. (Zürich 2006), N 368 et seq. Even though this principle stems from public law, it can also be applied in private law. See Honsell, Basler Commentary to SCC, art. 2 N 21.

35 Häfelin/Müller/Uhlmann, Allgemeines Verwaltungsrecht, 5th ed. (Zürich 2006), N 381 et seq. and 387. This compels sports' governing bodies, to act in such a way that infringes the least amount possible on the rights of its members. Thilo Pachmann, S*portverbände und Corporate Governance* (Zürich 2007), p. 251 et seq. Furthermore, an infringement is only possible, if absolutely necessary, whereby there must be a balance between the contrasting interests. Lukas Handschin, in: Bernasconi (ed.), *International Sports Law and Jurisprudence of the CAS*, p. 126 et seq.

36 This means, that if a lower-tiered provision would conflict with a higher-tiered law or provision, the former would have to be considered null and void. Jérome Jaquier, *La qualification juridique des règles autonomes des organisations sportives* (Neuchâtel 2004), N 212 and 293 et seq.; and Anton Heini, Wolfgang Portmann and Matthias Seemann, *Grundriss des Vereinsrecht* (Zürich 2009), N 21 and 58.

37 *E.g.* the rules of the Swiss Code of Obligation (SCO) regarding the conclusion of a contract and possible issues of a contract (unfair advantage, error, fraud and duress). Art. 19 et seq. SCO in connection with art. 7 SCC.

38 Especially mandatory rules (art. 63 para. 2 SCC and art. 67 para. 1 SCC).

39 By virtue of art. 27 and 28 SCC.

40 Art. 19 para. 2 SOC in connection with art. 7 SCC.

41 The case law of the Court of Justice of the European Union (CJEU) confirms that international sports organisations, like FIFA, are considered "*associations of undertakings*" pursuant to art. 81 and 82 of the Treaty establishing the European Community. CJEU Decision dated 26 January 2015, *Piau v. European Commission and FIFA*, T-193/02, N 112 et seq. See also Thilo Pachmann, Sportverbände und Corporate Governance (Zürich 2007), p. 242 et seq.

Taking into consideration the different types of laws which may apply to sports' governing bodies, the following hierarchy of norms applies:

1 mandatory statutory law;
2 articles of association and continuing practices;
3 non-mandatory statutory law; and
4 regulations and other rules of the association.[42]

Even if the parties in a dispute specifically choose to apply rules of sports' governing bodies,[43] the judicial body needs to still respect mandatory provisions of state law and other limitations mentioned above. These rules were issued within the Swiss legal framework and are only valid according to that framework.[44] It is within those parameters, that sports' governing bodies should, therefore, act.

The special case of rules of the game versus rules of law

Sports' governing bodies can set up rules that dictate how the game is played[45] and include corresponding sanctions, which the referee can issue during the game, *i.e.*, a direct free-kick after a player tackles another player from the opposing team using excessive force.[46] Decisions based on the rules of the game are referred to as "field-of-play decisions".

In Switzerland, some legal scholars have argued that the above-mentioned rules of the game are not subject to judicial review, unless the rules have an impact beyond the game as such.[47] The initial problem of this paradigm is the inherent difficulty, namely, to distinguish between the two types of rules.[48] Especially considering that, in most, if not all cases, any breach of a rule of the game has an impact beyond the game.[49] The restrictions of judicial review, coupled with the lack of a clear distinction between the two rules, inexorably leads to a legal vacuum.[50]

The limitation of the Court of Arbitration for Sport (CAS) to review "field-of-play decisions" may go even further than that of State courts, since it only reviews such decisions – in theory – if the decision is further based on arbitrariness and/or bad faith.[51] This reluctance to review such decisions[52] is a matter of arbitral self-restraint.[53] Moreover, the possibility of judicial review depends on other factors,[54] such as the rights granted in the articles of association to the concerned stakeholder.[55]

The reasoning of the CAS to exercise self-restraint 56 does not hold water. While the autonomy of officials is important, due to the situation they find themselves in, it must not lead to a complete lack of review of "field-of-

42 While the hierarchy regarding the first three types of laws is widely recognised within Swiss legal doctrine (Heini/Scherrer, Basler Commentary SCC, vor art. 60-79 N 24), placing regulations and other rules of the association under the non-mandatory statutory laws follow the logic that rules of private organizations are not state "law".

43 See art. R45 or R58 CAS Code.

44 Sadly, the CAS often only reviews the rules and regulations insofar as they impair the fundamental legal principles belonging to the Swiss public policy, as the Swiss Federal Tribunal only reviews violations of these principles. See CAS 2005/A/983-98, *Club Peñarol v. Bueno, Rodriguez & PSG*. This does not, however, mean that sports' governing bodies may

.

45 These include everything from field size and layout, over ball or equipment to team size and specific gameplay rules (such as duration of a game, points-system, *etc.*). *E.g.* the UCI Cycling Regulations for cycling and the IFAB Laws of the Game, which apply to football.

46 Art. 1 IFAB Laws of the Game, Law 12 Fouls and Misconduct.

47 Such as the personality rights of the athlete. In such a case, the Swiss Federal Tribunal dismissed the distinction between rules of the game and rules of law: DTF 120 II 369, cons. 2. This distinction is between rules of the game and rules of law based on a publication by Max Kummer from almost 45 years ago. Max Kummer, *Spielregel und Rechtsregel* (Bern 1973).

48 Even the Swiss Federal Tribunal accepts that the distinction is blurry and the two rules gradually merge: DTF 103 IA 412 and DTF 118 II 12, cons. 2.a).

49 If, for example, during the 2016-2017 season a referee would not have granted Manchester United, or specifically Mr. Ibrahimovi , a penalty kick, even though the rules of the game would foresee one, he might have lost up to to £ 143,000 just for that single decision.

50 This limited review possibility increases the already troublesome disparity between sports' governing organizations and athletes and the balance of interest contained in non-mandatory law will be lost. This would also go against the mandatory art. 75 SCC. Anton Heini, Wolfgang Portmann and Matthias Seemann, *Grundriss des Vereinsrecht* (Zürich 2009), N 246; Jérôme Jaquier, *La qualification juridique des règles autonomes des organisations sportives* (Lausanne 2004), N 314 et seq.; Wolfgang Portmann, "Das Schweizerische Vereinsrecht", in: Pierre Tercier (ed.): *Schweizerisches Privatrecht*, Vol. II/5, 2. Edition (Basel 2005), N 291 et seq. and Thilo Pachmann, *Sportverbände und Corporate Governance* (Zürich 2007), p. 233 et seq.

51 *I.e.* fraud, corruption or malice, or some equivalent vice. This position is apparently consistent with judicial practice, which considers rules of the game, in the strict sense of the term, not to be subject to the control of judges. The idea behind this is that the game must not be constantly interrupted by appeals to the judge.

52 CAS 2010/A/2090 *Aino-Kaisa Saarinen & Finnish Ski Association v. Fédération Internationale de Ski (FIS)*, award of 7 February 2011. See also CAS OG 96/006 (low blow in boxing); CAS OG 02/007 (collision in skating); CAS 2004/A/727 (spectator inference with race); CAS 2004/A/704 (judges' admitted mismarking) and CAS 2008/A/1641 (running out of lane in athletics).

53 CAS 2006/A/1176, para 7.8.

54 For example, the extent to which the sports organization has used its autonomy, the rights are granted in the articles of association and the statutory rights to the respective stakeholder. See also Lucien W. Valloni and Thilo Pachmann, *Sports Law in Switzerland*, p. 43 et seq.

55 FIFA even goes as far as attempting to exclude the jurisdiction of CAS for violations of the Laws of the Game: art. 58.3 lit. a FIFA Statutes, ed. April 2016.

56 *E.g.*: supporting the autonomy of officials; avoidance of the interruption to matches in progress; seeking to ensure the certainty of outcome of competition; and the relative lack of perspective and/or experience of appellate bodies compared with that of match officials. CAS 2010/A/2090 *Aino-Kaisa Saarinen & Finnish Ski Association v. Fédération Internationale de Ski (FIS)*, award of 7 February 2011.

play decisions". Officials must rather be granted sufficient discretionary power, which can be – on the other hand – reviewed judicially.[57] The issue of interrupting matches must surely be considered, but is not all-encompassing[58] and even if it is not practicable to request a repetition of the game itself, this should not prevent a review of the "field-of-play decision" and – if necessary – allow a court to render a decision regarding the wrongfulness of the "field-of-play decisions" and the financial consequences for athletes.[59]

Even the argument of the certainty of a competition is only relatively correct, since the IOC, for example, shows no remorse in commencing an action against athletes, due to an anti-doping rule violation, eight years after the supposed violation.[60] Finally, it might be true, that officials have more experience than appellate bodies, but this does not preclude a State court judge – who is not a medic – from reviewing the liability of a potential medical error committed during an operation.[61]

If for example Mr. Ibrahimovi is – unjustly – not granted a penalty, he risks personally losing up to £ 143,000. There is an increasing personal and legal interest in reviewing "field-of-play decisions" and always more technology that supports this possibility. But the CAS continuously refuses to step in, even if such "field-of-play decisions" are – in theory at least – reviewable based on "arbitrariness".[62] Even in the case of the South Korean fencer, Shin A Lam, who during the 2012 London Olympics was not granted the qualifications to take part in the women's final, this was inexplicably not the case.[63] What is necessary to make CAS revert from their almost fanatical refusal to review "field-of-play decisions"?

If a stakeholder wishes to subsequently appeal a CAS decision, he or she can only do so before the Swiss Federal Tribunal.[64] Unfortunately there are severe limitations of review of the Swiss Federal Tribunal.[65] This lack of accountability inadvertently fosters lawlessness, a phenomenon which contradicts the principle of primacy of the legal order. In this context, it can be argued, that even though sports' governing bodies are not technically "above the law", when it comes to the rules of the game, they do – to a certain degree – stand next to it.

The justiciability of sports' governing bodies: are they above the law?

Judicial review within the association

Several international sports' governing bodies provide for an internal review system, setting up appeals or ethics commissions and other instances, which have the task of reviewing decisions of other organs of the association.[66] Depending on the situation, it is surely sensible that an association-internal organ reviews the decision of another organ, attempting to set aside issues in a more amicable way.[67] Whilst this remains a viable first step, the fact remains, that the commission or the FIS Court are organs of the same association and therefore are a part of the association.[68] An internal review only works, if the organ responsible is independent and there is a culture within the association that not only enables a free review of appealed decisions, but also promotes this freedom and the law.

Sadly, there is a tendency within associations that the organ in charge of the review process usually does not deviate from the appealed decisions of other organs. For this reason, the internal review process

57 Thilo Pachmann, *Sportverbände und Corporate Governance* (Zürich 2007), p. 234 et seq.

58 This issue does, however, not represent an unsolvable problem. Many sporting events allow a delayed decision and technology is being implemented to give officials the time to review the necessary footage. American football and hockey already have been implementing video assistance for years and it is slowly being introduced in football as well. See footnote 6 above.

59 See further Thilo Pachmann, *Sportverbände und Corporate Governance* (Zürich 2007), p. 234.

60 Art. 17 WADA Code, ed. 2015.

61 *In casu* the same reasoning applies, especially considering that all rules and regulations of sports' governing bodies are usually of contractual nature.

62 According to Swiss jurisprudence a decision is "arbitrary" pursuant to art. 9 of the Swiss Constitution, if the court or tribunal base their decision on facts, that are clearly in contradictions to the actual situation, if it is based on an apparent mistake or if the decision unacceptably contradicts the ideal of justice. See ATF 129 I 49, cons. 4. See further Tschentscher, Basler Commentary to the Swiss Constitution, art. 9 N 7.

63 In the case at hand the South Korean fencer was leading with one second to go to finish the match. When the game resumed, the 15-year-old British volunteer did not restart the clock. Since the game went on, although the time was clearly up, the German Britta Heidemann scored a point and was awarded the win. Shin A Lam did not even win the bronze medal in the final for third place. The IOC, who recognised the mistake, offered Shin a "special medal", which, however, was refused. See The Daily Mail article "Fencer Shin refuses to accept "special medal" after sit-in protest" dated 31 July 2012, available at www.dailymail.co.uk/sport/olympics/article-2181812/London-2012-Olympics-Shin-A-Lam-refuses-special-medal.html (accessed 1 December 2017).

64 Art. 77 Swiss Federal Tribunal Act (SFTA).

65 These will be illustrated in detail further below.

66 With regard to FIS, art. 41.1 FIS Statutes, ed. June 2016, stipulates that decisions rendered by a jury within a competition, can be appealed before the Appeals Commission, a body of the FIS: The decision of the Appeals Commission can then be brought before the FIS Court (art. 40.1 FIS Statutes, ed. June 2016). The inner workings of the FIFA Ethics Committee were illustrated at length in the last article by the undersigned: "The FIFA Ethics Committee as an institution for good governance" in: GSLTR 2016/3, p. 8 *et seq.*

67 Hans Michael Riemer, Berne Commentary to SCC, 1990, Vorbemerkungen zu art. 64-69, N 44 *et seq.* In the past, Swiss legal doctrine even suggested that the association could review all sanctions the association would want to impose, without interference of State courts. Such exclusion would now be considered a violation of the personality rights of the athlete in question, pursuant to art. 27 SCC. Thilo Pachmann, *Sportverbände und Corporate Governance* (Zürich 2007), p. 252.

68 Hans Michael Riemer, Berne Commentary to SCC, 1990, Vorbemerkungen zu art. 64-69, N 46.

often becomes a useless exercise and an independent court must review the decision of the association.

Judicial review from state courts

Within the legal framework of associations, art. 75 SCC represents one of the most important tools of judicial review. According to this article, decisions of the general meeting of the associations and – under certain circumstances – also final resolutions of other organs,[69] can be appealed before a State court, if they violate statutory law or the statutes of the association. This right is granted not only to members, but also to certain stakeholders of the association, which are not direct members.[70] The grounds for appeal are any breaches of statutory law (also non-mandatory) or the statutes (and regulations) of the association, including all explicit and implicit rules of law and rules of the association and even, in principle, "field-of-play decisions".[71] This represents a strong tool to compel associations, especially sports' governing bodies, to adhere to the law.

Judicial review from CAS

Sports' governing bodies regularly include in their contracts with athletes an arbitration clause, which excludes athletes from filing an appeal before State courts. According to Swiss jurisprudence, it is possible to include the arbitration clause in the articles of association or other regulations of the sports' governing body.[72] If the arbitration clause is contained in an entry form, which athletes must sign in view of a specific competition,[73] the Swiss Federal Tribunal found that the binding power of such forms extends only to the exact event they foresee. In the specific case, it found that an entry form in view of the 2007 Ice Hockey World Championship did not constitute a valid arbitration clause and annulled the CAS Award based on lack of jurisdiction.74

CAS arbitration not only allows international sports federations to enforce the awards with their monopoly power immediately, without state interference, but also compels all parties (even stakeholders) to choose the arbitrators for the CAS Panel from a closed list, which contains mostly persons with a direct or indirect connection to the sports' governing bodies themselves.[75] This is a highly problematic issue, which questions the need for independent judges pursuant to art. 30 para. 1 of the Swiss Constitution; art. 6 of the European Convention on Human Rights (ECHR); and art. 180 para. 1 of the Swiss Private International Law Act (SPILA).[76]

Another issue that is raised within sports arbitration is the adherence to the hierarchy of norms according to Swiss law. Pursuant to art. 187 SPILA, the arbitral tribunal shall decide the dispute in accordance with the law chosen by the parties or, in the absence of a choice of law, according to the law to which the case has the closest connection. The way the law applicable to the merits is established, varies between the ordinary and the appellate procedures. In both proceedings, the parties can make a choice of law. If no such choice is made, Swiss law applies during CAS ordinary arbitration proceedings.[77] Based on the CAS jurisprudence, this is even then the case, if there is no connection whatsoever to Switzerland.[78] In CAS appeals proceedings, the Panel decides the dispute according to the applicable regulations. Given that sports' governing bodies often have their seat in Switzerland, Swiss law should be applied, limiting the regulations through mandatory and partially non-mandatory statutory laws.[79] This means that the CAS would actually have to observe the hierarchy of norms illustrated above, as well as the other mandatory laws, such as anti-trust and competition laws.

Sadly, the CAS hardly makes this type of distinction and sometimes even decides not to apply certain laws

69 According to Swiss legal doctrine, also resolutions of organs, other than the general assembly, can be appealed. It is however necessary, that the stakeholder does not have any other legal remedies against such a decision. DTF 118 II 17 et seq. Simple statements made by such organs cannot be appealed.

70 It is necessary that the decision regards the rights of stakeholders, which are forcibly subordinate to the sports' governing body or association in question. DTF 118 II 17 et seq. and DTF 119 II 271 et seq. This right takes into consideration the reality of the complex hierarchical system, and the special relationship between indirect members and the association illustrated above ("III. What legal form do Sports Governing Bodies adopt and what implications does this have for athletes?").

71 Thilo Pachmann, *Sportverbände und Corporate Governance* (Zürich 2007), p. 337.

72 Decision of the Federal Supreme Courts 4A_548/2009 of 20 January 2010. In case of an arbitration clause by reference, it is essential that the consent of the parties be review pursuant to the principle of confidence, which stems from art. 1 SCO. The reference must be precise and concrete and the documents containing the clause clearly drafted and known to the parties.

73 See for example for the Olympic Games above, footnote 23.

74 Decision of the Swiss Federal Tribunal 4A_358/2009 dated 6 November 2009, *A v. WADA*.

75 Art. S14 CAS Code, which states that the persons on this mandatory list are brought to the attention of ICAS by the IOC, the international federations and the National Olympic Committees, which are members of the IOC. See also Heini/Scherrer, Basler Commentary SCC, art. 75 N 30. This problem is accentuated during the ad hoc CAS division at the Olympic Games, since there is a highly restricted number of arbitrators to be chosen from. Lucien W. Valloni and Thilo Pachmann, *Sports Law in Switzerland,* p. 121.

76 Anton Heini, Wolfgang Portmann and Matthias Seemann, *Grundriss des Vereinsrecht* (Zürich 2009), N 239; Noth, in: *Arbitration in Switzerland – The Practitioner's Guide*, Arroyo (ed.), art. R33 N 13 *et seq*., p. 927 et seq.; Rigozzi, Hasler and Noth, "Commentary on the CAS Code", in: *Arbitration in Switzerland – The Practitioner's Guide;* Arroyo (ed.), Introductions, p. 887. The Swiss Federal Tribunal, however, does not consider this to be a problem, because international arbitration would be a narrow field and it would be inevitable, after a few years on the circuit, to serve on the same panel with a fellow arbitrator or one of the counsels: DTF 4P.267/2002-270/2002 of 27 May 2003, A & B v. IOC & FIS.

77 Art. R45 CAS Code.

78 CAS 96/161, I*nternational Triathlon Union (ITU) v. Pacific Sports Corp. Inc.*

79 Art. R58 CAS Code. The Panel may also, if reasoned, apply other rules of law.

within the Swiss legal framework.[80] This weakens the protection for athletes and other stakeholders, since the non-mandatory law was set up by the Swiss lawmakers, keeping in mind a fair solution and the protection of members of associations. The same cannot be said for regulations of sports' governing bodies. Even though this may not always be the case, the CAS would have to respect the above-mentioned limitations of Swiss law.[81]

Other issues are the time-limits to file an appeal. Art. 75 SCC provides a time-limit of one month to do so before the competent court. According to art. R49 of the CAS Code, the time limit to file an appeal is shorter (21 days). Despite art. 75 SCC being mandatory under Swiss law and, therefore, superseding all other provisions,[82] a recent CAS decision[83] stated that the deadline set in art. R49 of CAS Code applies even if the decision is null and void. This is a clear violation of mandatory Swiss law, which has the objective of protecting stakeholders of associations, when the latter is in contravention to the law or the statutes. Worse still, since the possibilities to appeal CAS decisions are so limited,84 this deficiency cannot be corrected before the Swiss Federal Tribunal.85

Finally, art. R57 of the CAS Code, grants CAS the full power to reassess the facts and the law of the case and, if necessary, issue a new decision, thereby replacing the decision which was appealed (de novo rule). However, the appeal pursuant to art. 75 SCC – if granted – can only confirm the decision of the sports' governing body or render it null and void, from the date, it was taken.[86] This effect is universal and, therefore, applies also to third parties.[87] The main reason for this is to maintain the autonomy of associations.88 Art. R57 of the CAS Code, therefore, factually infringes the cornerstone of mandatory association law, which is to safeguard the autonomy of the association.[89] If, for example, the CAS then renders a faulty decision, in which mandatory rules of Swiss law were neglected, the affected athlete does not even have an effective possibility to review this decision before the Swiss Federal Tribunal.

Judicial review from the Swiss Federal Tribunal

When it comes to CAS awards, the Swiss Federal Tribunal is the only instance for recourse, without being a true court of appeal.[90] It is, therefore, widely known, that appeals to the Swiss Federal are almost hopeless, since 92% of all motions to set aside CAS decisions were dismissed.[91] One reason for this is that the grounds for a motion to set aside a CAS decision are severely restricted.[92] For example, with regard to the fundamental principle of the right to be heard,[93] the Swiss Federal Tribunal rejected the appeal of a stakeholder, who was not granted the possibility to be heard on new exhibits and amended submissions from the respondent, even if he was not present during the hearing.[94] In another case, the Swiss Federal Tribunal rejected an appeal based

80 CAS 2007/O/1255, D. v. R., award of 12 July 2007, para. 83 et seq.; Despina Mavromati and Matthieu Reeb, *The Code of the Court of Arbitration for Sport, Commentary, Cases and Materials* (Wolters Kluwer 2015), p. 354 et seq.

81 The CAS often only reviews provisions of the public policy, as this is the only reason to annul an arbitral award before the Swiss Federal Tribunal (so-called positive ordre public). The positive public policy includes art. 27 SCC regarding the protection of personality rights, the principle of substantive res judicata and other essential principles of law. The same applies, even if pursuant to art. 187 para. 2 SPILA, the parties authorize the arbitral tribunal to decide equitably ("*ex aequo et bono*"). It must not be allowed for sports' governing bodies to circumvent the rules that belong to the *positive ordre* public. For an overview of the jurisprudence of the CAS see: Despina Mavromati and Matthieu Reeb, *The Code of the Court of Arbitration for Sport, Commentary, Cases and Materials* (Wolters Kluwer 2015), p. 582 et seq. and p. 547 et seq. See for Swiss competition law Weber-Stecher, Basler Commentary to CartA, arts. 12-17 N 93 et seq.

82 Heini and Scherrer, Basler Commentary SCC, art. 75 N 22.

83 CAS 2011/A/2360, *ECF & GCF v. FIDE* and CAS 2011/A/2392, *ECF & GCF v. FIDE*, award of 3 July 2012, para. 97.

84 See in detail below.

85 Lukas Handschin, in: Bernasconi (ed.), *International Sports Law and Jurisprudence of the CAS*, p. 126 et seq., who considers this decision to be problematic, since the nullity-rules ensure correct decision-making by the sports association. See also Despina Mavromati and Matthieu Reeb, *The Code of the Court of Arbitration for Sport, Commentary, Cases and Materials* (Wolters Kluwer 2015), p. 435 et seq., who confirm that the possibility to invoke the nullity of a decision pursuant to art. 75 SCC is not subject to time-limits.

86 Heini and Scherrer, Basler Commentary SCC, art. 75 N 31.

87 The State court cannot issue a new decision, even if requested to do so. See DTF 118 II 12, cons. 1c.

88 See above chapter "What laws apply to sports governing bodies and what requirements are there in this respect?".

89 Lucien W. Valloni and Thilo Pachmann, *Sports Law in Switzerland*, p. 121.

90 Art. 191 SPILA. See Despina Mavromati, "Review of CAS-Related Jurisprudence of the Swiss Federal Tribunal", in: Bernasconi (ed.), *Arbitrating Disputes in a Modern Sports World, 5th Conference CAS & SAV/FSA Lausanne 2014*, p. 152 *et seq.*

91 Heini and Scherrer, Basler Commentary SCC, art. 75 N 30; Despina Mavromati and Matthieu Reeb, *The Code of the Court of Arbitration for Sport, Commentary, Cases and Materials* (Wolters Kluwer 2015), p. 596. As of August 2014, just 8% of all motions to set aside a CAS decision are accepted.

92 Art. 190 para. 2 SPILA, the grounds are: irregular constitution of the arbitral tribunal (art. 190 para. 1 lit. a SPILA); the arbitral tribunal erroneously held that it had or did not have jurisdiction (art. 190 para. 1 lit. b SPILA); the arbitral tribunal ruled on matters beyond the claims submitted to it or if it failed to rule on one of the claims (art. 190 para. 1 lit. c SPILA); the equality of the parties or their right to be heard in an adversarial proceeding was violated (art. 190 para. 1 lit. d SPILA) and the award is incompatible with Swiss public policy (art. 190 para. 1 lit. d SPILA).

93 Art. 190 para. 1 lit. d SPILA. The Swiss Federal Tribunal held that the appellant had not participated in the hearing, in which the new documents were presented and the submissions were changed and had, therefore, forfeited the right to address these issues.

94 DTF 4A_682/2012, *Egyptian Football Association v. Al Masry*, dated 20 June 2013, cons. 4.2.

on a violation of both substantive[95] and procedural public policy,[96] because these arguments fall outside the scope of what could be reviewed by the Federal Tribunal and were not well-founded,[97] Not only are the grounds themselves very restricted, the above-mentioned cases show a distinct restraint on behalf of the Swiss Federal Tribunal.

Furthermore, the Swiss Federal Tribunal bases its decision solely on the facts that are already established by the CAS, even if these are manifestly wrong or rely on a violation of Swiss law according to art. 95 SFTA.[98] Consequently, the following issues cannot be challenged before the Swiss Federal Tribunal: the faulty establishment of the fact or substantive mandatory law, arbitrariness[99], the obviously incorrect interpretation of a contract[100].

All these issues are, as seen above, of key importance regarding the relationship between sports' governing bodies and their stakeholders. Given the already inherent problems with the judicial review of CAS, it is absolutely necessary to have an adequate review of the first judicial and independent instance. This is not the case. As with the limited review of "field-of-play decisions", so does the lack of an effective second (or more likely first) judicial instance foster lack of control of sports' governing bodies. This lack of review is magnified significantly, if the CAS makes use of its de novo ruling powers[101] and decides – while still rejecting the appellant's claims – basing its reasoning on completely different (and possibly wrong) principles of law. Then the affected party – usually a stakeholder – would be confronted with a new argumentation and reasoning and could only turn to the limited judicial review of the Swiss Federal Tribunal.

The CAS or members of the Panel can decide on the matter in full knowledge of the fact, that they will not need to answer to a court. While this is part of the allure of arbitration, the imbalance in power between two parties, does not justify such a (lack of) access to the courts.

Conclusion

It is indisputable that sports' governing bodies in Switzerland, which are associations, wield an increasing amount of power and wealth. Due to the complex and intertwining structure of associations, the principal stakeholders of sports' governing bodies (athletes), are no longer direct members of these bodies, but must forcibly adopt and adhere to the rules and regulations which these governing bodies issue. Even though the sports' governing bodies are not exempt from the law, they have created a system which limits the legal review tremendously.

The judicial review of sports' governing bodies and referees regarding "field-of-play decisions" is – due to the highly questionable distinction between rules of law and rules of the game and the self-restraint of CAS – limited in its scope and, factually, leads to a legal vacuum. Already in this respect can sports' governing bodies be considered to be above the law.

Moreover, the judicial review of all other actions and decisions of sports' governing bodies is limited, increasing the legal vacuum even more. In this respect, the right to appeal pursuant to art. 75 SCC should actually be the fulcrum upon which the judicial review rests. This effective tool is, however, circumvented by sports' governing bodies regularly compelling athletes to subject themselves first to internal reviews (which are not courts and may lack independence and a culture of free and unimpeded judicial review) and later to CAS arbitration. The latter presents parties with the problem of a closed (and mandatory) list of arbitrators. Moreover, CAS arbitration limits the effectiveness of art. 75 SCC and allows sports' governing bodies – thanks to the freedom to review the decision fully, the lack of proper application of Swiss law and the de novo rule – to circumvent the clear hierarchy of laws and the mandatory and non-mandatory Swiss laws.

Given the legal concept of the one (and only) independent judicial entity capable of reviewing the decisions of sports' governing bodies and the lack of a realistic possibility to appeal any decisions before the Swiss Federal Tribunal – a problem which is even magnified when the CAS Panel makes use of its de novo powers – it can be argued, with good reason, that sports' governing bodies are, in fact, above the law.

95 The ground brought forward was that the award was incompatible with Swiss public policy (art. 190 para. 1 lit. d SPILA). The appellant – basing the argument on the landmark Matuzalem Case – maintained that he could not work as a player and this would violate art. 27 of the Swiss Constitution, which protects the freedom to work.

96 The appellant claimed a violation of art. 8 SCC regarding the burden of proof.

97 The Court, however, maintained that art. 8 SCC, which establishes the rules regarding the burden of proof, does not represent material public policy and can therefore also not be reviewed. In addition, art. 27 of the Swiss Constitution was not violated, since the ban was only temporary. DTF 4A_304/2013, cons. 5.2.1 *et seq*.

98 E.g. DTF 4P_105/2006, *X v. Y & FFE*, dated 4 August 2006.

99 E.g. DTF 127 III 576 cons. 2b, with further references.

100 DTF 4P.134/2006, cons. 4-7. See also Despina Mavromati and Matthieu Reeb, *The Code of the Court of Arbitration for Sport, Commentary, Cases and Materials* (Wolters Kluwer 2015), p. 563. For an overview of the clear limitations of the appeal before the Swiss Federal Tribunal, see Despina Mavromati, "Review of CAS-Related Jurisprudence of the Swiss Federal Tribunal", in: Bernasconi (ed.), *Arbitrating Disputes in a Modern Sports World, 5th Conference CAS & SAV/FSA Lausanne 2014*, p. 152 et seq.

101 Art. R59 CAS Code.

Italy:
International transfers of professional football players

BY MARIO TENORE[1]

An international transfer of a football player from one professional club to another may cause various financial streams with specific tax ramifications with sometimes doubtful solutions. The purpose of this comparative survey will be to analyse the most common tax ramifications and how these are dealt with in the national systems of several countries. The survey will cover the tax treatment of the income paid to the player and other payments, such as agent's fees or commission fees, from the point of view of the player and agent. There may also be consequences for other parties involved, e.g. parties owning part of transfer rights, etc. In a later issue we will also look at the position of the clubs and the VAT consequences.

Player X's tax ramifications

Suppose player X, resident for tax purposes in Italy, is transferred end of July on a definitive basis from club B in state B to club C located in state C.

1 Will Player X cease to be a state B resident upon the transfer to state C for the fiscal year in which the transfer occurs? Will player X acquire state C tax residence in the same fiscal year in which the transfer occurs?

Under Italian tax rules, an individual is deemed to be resident in Italy for IRPEF purposes if for most of the tax period (i.e. the calendar year), i.e. 183 days, he/she satisfies any of the following three conditions, namely:

a the individual is registered in the official register of the Italian resident population (anagrafe della popolazione residente);
b the individual has a domicile in Italy according to art. 43(1) of the Civil Code, which is identified as the place in which a person has the centre of his personal and economic interest; and
c the individual has residence in Italy for civil law purposes, namely the place in which the person has his habitual abode according to art. 43(2) of the Civil Code.

Italian domestic law does not envisage the "split-year" period rule, as far as tax residence of individuals is concerned. In case any of the conditions outlined above under a to c is fulfilled in the calendar year, the individual is deemed to be a resident of Italy for the entire tax period (there is no split-year rule).

Accordingly, if the transfer occurs end of July, player X will continue to be considered Italian tax resident in the year of the transfer.

A few treaties (such as that concluded between Italy and Switzerland) provide for a split-year period rule which, if applicable, shall then prevail over Italian domestic rules.

Special rules apply in the case of transfer of residence to jurisdictions which are listed in the Ministerial Decree of 4 May 1999 (so-called "blacklist"). These rules provide for the shifting of the burden of proof on the Italian individual, who has removed himself from the Civil Register of the Resident Population upon transfer of his residence to a blacklisted jurisdiction. The individual is deemed resident of Italy unless proof to the contrary, i.e. the rules introduce a rebuttable presumption as they allow the taxpayer to demonstrate the actual transfer abroad and that he does not meet any of the criteria highlighted above.

1.1 What is the tax treatment for income tax purposes in state B of any payment made by club B to player X upon the termination of the employment relationship?

The payment will be classified as income from employment and subject to ordinary taxation for income tax purposes. Employment income includes any remuneration which is directly or indirectly paid by the employer in the framework of the employment relationship, also on the occasion of its termination.

1.2 What is the tax treatment for income tax purposes in state C of any payment made by club B to player X upon the termination of the employment relationship?

See reply to question 1.1. above. Player X will not be considered tax resident in state C in the year of the transfer. Therefore, the payment from club B will not be taxable in Italy, being a payment by a non-

1 Tax advisor at Maisto e Associati, Milan, Italy.

resident employer in favour of a non-resident employee for activity carried out outside the Italian territory prior to the taking up of Italian tax residence.

1.3 What is the tax treatment of one-time payments once re-transferred, e.g. player X is entitled to a percentage of any transfer sum in the event of a future transfer. Which country is entitled to tax such payments?

See reply to question 1.1. above.

1.4 What is the tax treatment of the payment of the agent fees by club B or club C on behalf of player X and in which country will the payment be taxed?

At present, there are no rules in Italy that deem the payment to constitute a fringe benefit for the player, i.e. a taxable income in kind. However, there is a risk that the Italian tax authorities could challenge the payment as being made for the benefit of the player and, therefore, could claim the existence of a taxable benefit in kind.

Suppose player X, resident for tax purposes in state B, is transferred end of July on a loan basis from club B in state B to club C located in state C.

2 Will player X cease to be a state B resident upon the transfer to state A for the fiscal year in which the transfer occurs? Will player X acquire state C tax residence in the same fiscal year in which the transfer occurs?

If Italy were state B, player X will have Italian tax residence in the year following that of the transfer, provided that the residence criteria are met for the most part of the tax period (calendar year). By contrast, if Italy were state C, the player will acquire Italian tax residence in the year following that of the transfer, provided that the residence criteria are met for the most part of the tax period (calendar year).

2.1 Should player X continue to be paid by club B, what is the tax treatment in state B and state C of such payment for income tax purposes?

Should Italy be state B, the payment will be taxable as employment income in the year of the transfer, since player X would still be considered tax resident there in the tax period in which the transfer occurs. For years subsequent to that of the transfer, assuming that player X would dismiss Italian tax residence, the player should no longer be taxable in Italy, both under Italian domestic law and under the tax treaty between Italy and state C.

Should Italy be state C, the payment will be taxable as employment income in the year of the transfer, to the extent that the payment is for carrying out an employment activity in Italy (such as when club B bears a part of the remuneration paid to player X for playing for club C).

2.2 Should player X be paid by club C, what is the tax treatment in state C and state B of such payment for income tax purposes?

Should Italy be state B, the payment will be taxable as employment income in the year of the transfer, since player X would still be considered tax resident there in the tax period in which the transfer occurs and, accordingly, would still be taxed there on a worldwide basis. Player X could claim in Italy a tax credit for taxes paid in state C. For years subsequent to that of the transfer, assuming that player X would dismiss Italian tax residence, the player should no longer be taxable in Italy, both under Italian domestic law and under the tax treaty between Italy and state C.

Should Italy be state C, the payment will be taxable as employment income in the year of the transfer since, although player X does not qualify as Italian tax resident in the year of the transfer, the payment refers to an employment activity performed in Italy.

2.3 What is the tax treatment of the payment of the agent fees by club B or club C on behalf of player X and in which country will the payment be taxed?

At present, there are no rules in Italy that deem the payment to constitute a fringe benefit for the player, i.e. a taxable income in kind.

Commission's agent tax ramifications

1 What is the tax treatment for income tax purposes of fees paid to the agent involved in the negotiation of the transfer?

1.1 Where the agent is resident in a treaty jurisdiction.

Under Italian tax rules, income paid to a foreign agent is subject to a 30% withholding tax. However, should the agent be resident in a treaty jurisdiction, the commission fee is not subject to tax in Italy under either art. 7 or 14 of the treaty stipulated between Italy and the State of residence of the agent.

1.2 Where the agent is not resident in a treaty jurisdiction.

Should the agent not be resident in a treaty jurisdiction, the commission fee is subject to a 30% withholding tax.

1.3 Where the fee is paid by club B in state B.

See answers under 1.1 and 1.2. above.

1.4 Where the fee is paid by club C in state C.

See answers under 1.1 and 1.2. above.

1.5 Where the fee is paid by player X.

In case the agent is resident in a treaty jurisdiction, see answer under 1.1. above.

In case the agent is not subject in a treaty jurisdiction, the agent will have to file a tax return to include the commission fee that will be taxable as ordinary self-employment income.

The Netherlands: International transfers of professional football players

BY CEES GOOSEN AND WIM R.M. NAN

General

Professional football players are frequently moving to different states from the one of origin. Identifying the state of tax residence is not always easy because of this mobility. It is common that the player is active in another state than the one in which his family and investment ties remain. To determine the player's tax residence, each state will apply its domestic tax law. If two (or more) states are of the opinion that the player involved is their tax resident, the applicable double income tax treaties provide (tie breaker) rules to determine the residency and subsequently divide taxation rights. The moment at which a tax resident ceases to be tax resident of one state is not necessarily at the same moment at which the incoming state considers the person involved to become tax resident. In such rare occasions, a tax gap might arise.

In The Netherlands, the place of residence is decided based on facts. Especially, social and economic interests are important in this matter. Facts and circumstances might be (but are not limited to):

- the availability of a permanent home;
- registration with the local municipality;
- the place where the partner and under-age children live;
- the place of personal and economic relations;
- nationality;
- in which country somebody is socially attached;
- in which country somebody visits doctor, dentist;
- what is the intention, i.e. in which country is somebody intended to live in;
- the duration of stay(s) in the relevant country;
- other personal ties, such as club memberships, bank accounts, etc.

In the next paragraphs, we elaborate on questions which arise upon transfers of players to or from The Netherlands. We focus on domestic tax law and tax treaty consequences. For the latter, we assume that the OECD Model Convention on Income and Capital of 2014 (OECD MIC 2014) is applicable.

Player X's tax ramifications

Suppose Player X, tax resident of The Netherlands, is transferred at the end of July on a definitive basis from a Dutch BVO to a club C in state C.

1 Will player X cease to be a tax resident of The Netherlands upon the transfer to state C for the fiscal year in which the transfer occurs? And will player X acquire tax residency in the same fiscal year in which the transfer occurs?

Usually, the Dutch tax authorities accept a change of residency of player X as of the date of transfer, unless it is clear that circumstances do not justify this position.[1] Please note that change of residency will have effect per the date of transfer which is seldom the first date of any tax year. In most cases, the receiving country accepts tax residency as of the date of transfer, so there will be no residency-gap. Because this is judged by domestic law,[2] it is possible that there is no back-to-back tax residency between The Netherlands and state C.

In The Netherlands, player X has to file a so-called F-form for the years of emigration. In this form he declares his taxable income from the period of 1 January up until the date of emigration during the tax year. It might be that player X becomes a non-domiciled tax payer in The Netherlands. Also a non-resident can still be subject to Dutch tax; this is definitely the case if (but not limited to!) player X holds Dutch real estate in his possession. Both residency and non-residency periods are filled in one return for the full year.

In most cases, the termination of residency in The Netherlands will coincide with taking up a residence in state C. However, for instance with the UK where the non-domiciled resident status can be obtained, there are limited possibilities to fine-tune timing and tax treatment of income. In Spain, the residency rules are such that in the first year, assuming less than 183 days of presence, a

1 For instance, if children of minor age and wife remain in The Netherlands and are not planning to emigrate.

2 For instance with respect to Italy, we refer to Stefano Dorgio and Pietro Mastellone, "Tax residence of professional football players", in: GSLTR 2017/3, September 2017. There are of course other examples.

special tariff could be applied, which advantage ceases once the tax payer becomes an ordinary resident. In that case, a bonus payment shortly after emigration to Spain might be advantageous. In general, a shift of residency is one of the few occasions left to investigate whether there is a possibility for tax optimization.

1.1 What is the tax treatment for income tax purpose in The Netherlands of any payment made by the Dutch BVO to player X upon the termination of the employment relationship?

Irrespective of whether the payment is made prior to or after termination of the residency in The Netherlands, any income paid to the player will be treated as employment income, subject to tax in The Netherlands.[3] Please note that also the additional levy, that is due in The Netherlands in case a termination payment exceeds certain limits, does apply to termination payments made to football players. The legislation was written to demotivate early retirement arrangements and certainly not aimed at burdening termination of football contracts. However, the generality of the provision was such that also termination payments, for instance based on transfer sum arrangements, paid to football players do trigger the application of this legislation.

There is no final view on whether this application is justified; AFC Ajax did lose a case in relation to the transfer remuneration paid in relation to the transfer of Jan Vertonghen;[4] whereas Feyenoord did win a litigation in relation to the payment made on the occasion of the transfer of Graziano Pellè.[5] Until a final verdict is given by the Supreme Court, clubs will have to be aware of this potential tax exposure.

1.2 What is the tax treatment for income tax purposes in The Netherlands of any payment made by a foreign BVO to player X upon the termination of the employment relationship?

If the payment is made to the player after he took up residency in another state, the tax laws of that state will have to be taken into account. In general, a payment based on the contractual arrangement between the previous club and the player, will for tax purposes be allocated to the country in which the player conducted his actual activities under the contract, in this case, The Netherlands. Depending on the tax system in the country of residence, the payment from his previous club will either be:

– excluded from tax (potentially UK);
– included in his worldwide income and exempted under the application of e.g. a tax treaty (e.g. Spain); or
– be included in the income and taxed, whereby a credit can be claimed for any Dutch tax withheld on the payment made to the player (art. 17 OECD MIC 2014).[6]

1.3 What is the tax treatment of one-time payments once re-transferred? E.g. player X is entitled to a percentage of any transfer sum in the event of a future transfer. Which country is entitled to tax such payment?

In case player X is entitled to a percentage of the transfer sum, from a Dutch perspective, the country in which the contractual obligation has been exercised is allowed to tax that income. So, if it were to be a Dutch player that moves abroad and receives such percentage afterwards, it will be subject to Dutch tax, inclusive of the potential "excessive termination payment tax" (see above).

More troublesome is the situation in which such an entitlement has to be waived by the player on the occasion of his transfer. It sometimes occurs that players have to waive certain rights before their club will allow them to transfer on to a new club. Formally speaking, such player can be deemed to have earned such income and can also be deemed to have paid such amount immediately back to his previous club. If the income were to be fully taxed and fully deductible at the same time, no tax consequences would occur. However, it may be doubted whether the deduction can be claimed against the income that has been waived. In practice, the income that is not recognized will very often not even be noticed, and the outcome makes sense from a practical perspective. However, the "contribution" by the player to his new contract by waiving an entitlement under the old contract could give rise to mismatches and taxation without a matching deduction for the contribution made by the player. We are not familiar with any practical dispute or litigation in this respect, but it is an issue that exposes the player that waives his entitlement.

1.4 What is the tax treatment of the payment of the agent fees by Dutch BVO or club C abroad on behalf of player X and in which country will the payment be taxed?

So far, The Netherlands tax authorities have not yet actively considered the payment of agent fees by clubs on behalf of players as income allocated to those players. In the UK meanwhile, a practice has been established whereby the income tax consequences of such payment have been more or less agreed by the football industry and the tax authorities. In The Netherlands, this discussion is at its early stages. The tax authorities are in discussion with representatives of all clubs and players' agents. The Dutch Act on Intermediary Labour Services contains a provision[7] based upon which the employers are not allowed to charge any fees from intermediaries to employees, *i.e.* the players. This legal prohibition does not, however, definitely resolve the question whether or not a player can be deemed to earn income if charges for his agent are paid for by the football club.

3 HR 10 February 1999, BNB 1999/173; HR 5 June 1996, *V-N 1996/2529, 13*; HR 11 July 2008, V-N 2009/8.26 and many more.

4 Rechtbank Noord-Holland, 24 April 2017, RBNHO 2017/3212.

5 Rechtbank Den Haag, 30 March 2017, RDDHA 2017/3429.

6 HR 7 May 2010, BNB 2010/245 for mirror situation.

7 Art. 3, lid 1, Wet allocatie arbeidskrachten door intermediairs (Law Placement of personnel by intermediaries).

For Dutch income tax purposes, the idea is to have a final wage tax levy to be paid by the club in relation to the fee that would be allocable to the player. The player would only suffer indirectly, i.e. to the extent that the clubs are able to amend the contractual arrangements in such a way that they are partly compensated for the additional wage tax that is due. So far, this system has not yet been implemented.

Suppose player X, resident for tax purposes in state B, is transferred at the end of July on a loan basis from club B in state B to club C in state C.

2 Will player X cease to be a tax resident of The Netherlands upon the transfer to state C for the fiscal year in which the transfer occurs? And will player X acquire tax residency in the same fiscal year in which the transfer occurs?

Considerations about tax residency are the same as mentioned in 1.1. In the case of a loan, there is a bigger chance that residency remains in the country where his former employer resides. However, facts and circumstances, such as the term of the loan and residence of family members, girlfriend, etc., remain decisive.

2.1 Should player X continue to be paid by club B, what is the tax treatment in state B and state C of such payment for income tax purposes?

If player X continues to receive income from his Dutch club despite the circumstance that he is on loan to a club abroad, the tax consequences strongly depend on whether or not he continues to be a resident of The Netherlands or not. We thereby assume that the foreign club will pay an amount to the former employer in The Netherlands. This payment may or may not be identical to the obligation that the Dutch club has towards the player. Subsequently, the Dutch club continues to pay the contractually obliged salary to the player.

If the player continues to be a resident of The Netherlands, the player will also continue to be taxed in the Netherlands. However, the income of the player will, based on art. 17 of OECD MIC 2014, be subject to tax in the country in which the actual activities are conducted. The Netherlands will grant a credit to the extent that income tax is paid abroad.

In case the player ceases to be a resident of The Netherlands, he would only be subject to tax in The Netherlands to the extent that he performs activities in The Netherlands. On activities conducted abroad, he would not be due to pay any Dutch income tax.

2.2 Should player X be paid by club C, what is the tax treatment in state C and state B of such payment for income tax purposes?

If the player is paid by the club for which he actually conducts the activities, it will be considered regular employment income in the country in which he conducts the activities. If, in addition to the salary paid by club C, his former employer (club B) also pays an amount, that income would also be allocated to the country of factual activities.

If the player continues to be a resident of The Netherlands, he will have to report his worldwide income and will again be able to credit the tax paid in the state where he plays football. If he moves abroad and takes up tax residence there, he will no longer be subject to Dutch tax on his income.

2.3 What is the tax treatment of the payment of agent fees by club B or club C on behalf of player X and in which country will the payment be taxed?

We refer to the considerations as described in paragraph 1.4.

Commission's agent tax ramifications

General

The Royal Dutch Football Association Regulations define a player's agent as a natural person or legal entity who or which, for a fee or not, represents players and/or clubs with negotiations regarding an employment contract or to conclude a transfer agreement. A player's agent might be a legal entity, in which case each employee of the legal entity, who is directly involved in such negotiations, has to be registered.

Player's agents might be organised as a business, but it is also possible that they carry out their activities on a stand-alone basis.

A player's agent being a Dutch tax resident is taxed on his worldwide income, so basically the fee is taxable in The Netherlands. From the Dutch point of view, it makes no difference whether the activities carried out are considered to be business profits or income from independent personal services. If and when the business is carried out through an entity, Dutch corporate income tax (CIT) is levied.

1 What is the tax treatment for income tax purposes of fees paid to the agent involved in the negotiation of the transfer?

1.1 Where the agent is resident in a treaty jurisdiction and the fee is paid by a Dutch club.

Assuming that the player's agent does not carry out his business through a permanent establishment in The Netherlands, the fee might be taxable in The Netherlands as income from independent personal services ("resultaat uit overige werkzaamheden"). OECD MIC 2014 will label this income as "Other Income" and the state of residency is granted the right to levy taxes.

If the player's agent is organised as a business, the fee (profit) is only taxable in The Netherlands if there is a permanent establishment in The Netherlands. In that case, OECD MIC 2014, grants the right to tax to The Netherlands. In all other cases, the state of residency is entitled to tax the fee.

1.2 Where the agent is resident in a treaty jurisdiction and the fee is paid by a non-Dutch club.

In such a case, The Netherlands do not have any right to tax, unless the state of residency of the agent is The Netherlands.

1.3 Where the fee is paid by player X.

The same considerations, as elaborated on in 1.1. and 1.2., are applicable. For the agent, it does not make any difference who is paying the fee.

1.4 Where the agent is not resident in a treaty jurisdiction and the fee is paid by a Dutch club.

Assuming that the player's agent does not carry out his business through a permanent establishment in The Netherlands, the fee might be taxable in The Netherlands as income from independent personal services ("resultaat uit overige werkzaamheden"). The Netherlands do not grant any relief for foreign tax.

1.5 Where the agent is not resident in a treaty jurisdiction and the fee is paid by a non-Dutch club.

In such a case, The Netherlands do not have any right to tax.

1.6 Where the fee is paid by player X.

The same considerations, as elaborated on in 1.4. and 1.5., are applicable. For the agent, it does not make any difference who is paying the fee.

Turkey:
International transfers of professional football players

BY DR. Z. ERTUNÇ SIRIN[1] AND METIN ABUT[2]

An international transfer of a football player from one professional club to another may cause various financial streams with specific tax ramifications with sometimes doubtful solutions. The purpose of this comparative survey will be to analyse the most common tax ramifications and how these are dealt with in the national systems of several countries. The survey will cover the tax treatment of the income paid to the player and other payments, such as agent's fees or commission fees, from the point of view of the player and agent. There may also be consequences for other parties involved, for example, parties owning part of transfer rights, etc. In a later issue we will also look at the position of the clubs and the VAT consequences.

Player X's tax ramifications

Suppose player X, resident for tax purposes in state B, is transferred end of July on a definitive basis from club B in state B to club C located in state C.

1 Will player X cease to be a state B resident upon the transfer to state C for the fiscal year in which the transfer occurs? Will Player X acquire state C tax residence in the same fiscal year in which the transfer occurs?

Turkish tax liability is comprised of two kinds:

- resident tax liability, and
- non-resident tax liability.

Those persons within the scope of resident tax liability are taxed on all personal incomes accumulated within and outside of Turkey.

Those with non-resident tax liability are taxed only on personal income accumulated in Turkey. The principal element between the distinction of resident and non-resident tax liability is "having a domicile in or outside of Turkey." Having a domicile in Turkey in turn is determined by two criteria:
- residence, and
- duration of living.

Those who have a certified residence in Turkey and who live in Turkey continuously for more than six months in one calendar year are considered to have a domicile in Turkey.

Pursuant to art. 4 of the Turkish Personal Income Tax Law No. 193 ("PITL"), residence is determined as per art. 19 of Turkish Civil Law No. 4721, which stipulates that the place of residence is where one lives with the intention of permanent stay. Taking into account that international football players generally do not live in Turkey with the intention of permanent stay, we are of the opinion that they should not be deemed as residing in Turkey.

Further, if a professional football player lives in Turkey continuously for more than six months in one calendar year, then (s)he is considered as having domicile in Turkey, regardless of whether (s)he has residence in Turkey, and therefore as resident tax liable.

Fiscal year for employees, i.e. professional football players performing their activities as an employee of a sports club, is determined as calendar year, i.e. between 1 January and 31 December pursuant to Turkish tax legislation. In this respect, if a professional football player lives in Turkey continuously for more than six months between 1 January and 31 December of a calendar year, (s)he will be deemed as resident tax liable for the respective fiscal year regardless of whether (s)he has residence in Turkey.

Pursuant to art. 5 of PITL, those foreigners, who come to Turkey for specific and temporary duty or work, are not considered as having domicile in Turkey, even though they stay more than six months in Turkey. In other words, they still are deemed as non-resident tax liable. In this regard, it can be asserted that international football players performing activity in Turkey should fall within the scope of this provision, i.e. should be accepted as non-resident tax liable, provided that they do not live in Turkey with the intention of permanent stay.

Having said that, professional football players performing activities in Turkey are exempt from a work permit during term of their contract. However, they are obliged to obtain a residence permit within 30 days at most from the date of entrance into Turkey. Considering it is obligatory to declare a place to stay in Turkey, in order to obtain a

1 Dr. Z. Ertunç Sirin, MA – Istanbul University Faculty of Law.

2 Metin Abut – Associate of Moroglu Arseven.

residence permit, the Turkish Tax Authority might claim that the international football player has residence in Turkey by having a place to stay in Turkey and, therefore, deems him/her as resident tax liable. In this regard, we make our evaluation under this question in the light of the prospective approach of the Turkish Tax Authority.

In this respect, on the assumption that state B is Turkey and club B is a Turkish club, regardless of whether player X has/had residence in Turkey, since player X is transferred at the end of July from club B in state B to club C located in state C, i.e. at the end of the seventh month of the calendar year, (s)he is considered to have a domicile in Turkey, since (s)he lived in Turkey continuously for more than six months. Therefore, player X will not cease to be a state B resident upon the transfer to state C for the fiscal year in which the transfer occurs. (S)he will be deemed as resident tax liable for the relevant fiscal year as per Turkish tax legislation.

On the assumption that state C is Turkey and club C is a Turkish club, player X will be considered as having acquired state C tax residence, since (s)he will be considered as (s)he has residence in state C due to the obligation to have a residence permit in Turkey for performing activity as a professional football player. In other words, (s)he will be deemed as resident tax liable for the relevant fiscal year as per Turkish tax legislation.

1.1 What is the tax treatment for income tax purposes in state B of any payment made by club B to player X upon the termination of the employment relationship?

Pursuant to art. 61/5 of PITL, payments made and benefits provided to athletes as transfer remuneration, or under any other names, are determined as salary. In principle, such form of personal income is to be taxed via the method of taxation at source (withholding tax).

In this respect, payments under any name whatsoever made by Turkish clubs to international professional football players are accepted as salary and subject to withholding tax. Turkish clubs as an employer are responsible for paying the tax owed on behalf of international professional football players.

Pursuant to provisional art. 72 of PITL, which is in force until 31 December 2017, the tax rate to be applied to professional football players is determined as per the division in which the player plays. Within this context, professional football players are subject to the below listed tax rates depending on the division in which they play:

- Top League: 15%,
- league below the Top League: 10%,
- other leagues: 5%,

Taxation of professional football players is regulated in art. 17 of the Organisation for Economic Co-operation and Development's ("OECD") Model Taxation Convention ("MTC"), namely "Entertainers and Sportspersons". This article leaves the authority of taxation of payments made to professional football players to the Contracting State in which the professional football player performs the activity. As being a member state of OECD, Turkey has executed double tax treaties compliant with the MTC with 82 countries.

Within this context, on the assumption that state B is Turkey and club B is a Turkish club, any payment made by club B to player X upon the termination of the employment relationship, regardless of player X is resident tax liable or non-resident tax liable pursuant to Turkish taxation legislation, is subject to withholding tax from 5% to 15% depending in which division club B plays.

Further, on the assumption that payment made by club B is based on player X's activities in club B, state B is legally entitled to subject this payment to taxation as per the MTC.

1.2 What is the tax treatment for income tax purposes in state C of any payment made by club B to player X upon the termination of the employment relationship?

On the assumption that state C is Turkey and club C is a Turkish club and player X is resident tax liable pursuant to Turkish taxation legislation, any payment made by club B to player X upon the termination of the employment relationship must be declared and paid to state C by player X under the annual tax return to be submitted by player X.

However, on the assumption that payment made by club B is based on player X's activities in club B, state B is also legally entitled to subject this payment to taxation pursuant to the MTC. If player X proves that this payment is taxed in state B, then state C cannot levy any tax on this payment pursuant to the MTC, provided that the tax rate applied by state B is not lower than the tax rate of state C. If state C's tax rate is higher than the tax rate applied by state B, then state C can accrue taxation over balance tax rate.

If player X is non-resident tax liable in state C, state C will levy no taxation on this payment made by club B, since the activities giving rise to taxation were not performed in state C.

1.3 What is the tax treatment of one-time payments once re-transferred, e.g. player X is entitled to a percentage of any transfer sum in the event of a future transfer? Which country is entitled to tax such payment?

On the assumption that player X is re-transferred from club C located in state C to club B located in state B and state B is Turkey and club B is a Turkish club a one-time payment made by club B to player X will be taxed by state B from 5% to 15% depending in which division club B plays.

However, on the assumption that player X is re-transferred from club C located in state C to club B located in state B and state C is Turkey and club C is a Turkish club, a one-time payment made by club C to player X will be taxed by state C from 5% to 15% depending in which division club C plays, regardless of whether player X is resident tax liable

or non-resident tax liable pursuant to Turkish taxation legislation. Since the payment made by club C is based on player X's activities in club C, state C is also legally entitled to subject this payment to taxation pursuant to the MTC. Player X can prevent from being subject to double taxation by state B pursuant to the MTC stating that (s)he is paid due to his/her performance in club C and therefore (s)he was taxed in state C, provided that the tax rate of state C is not lower than that of state B.

1.4 What is the tax treatment of the payment of the agent fees by club B or club C on behalf of player X and in which country will the payment be taxed?

Pursuant to Turkish taxation legislation, an agent fee is accepted as self-employed income or commercial income depending on the status of the agent.

Regardless of whether club B or club C pays the agent fee and whether Turkey is state B or state C, if the agent is subject to resident tax liability according to Turkish taxation legislation, then (s)he will be taxed by Turkey. In such case, the agent must declare his/her gross personal income accumulated in one calendar year and will pay the tax amount accrued in accordance with their declaration.

If the agent is subject to non-resident tax liability, according to Turkish taxation legislation, on the assumption that Turkey is state C, the transfer of player X on a definitive basis is accepted as concluded in state C according to Turkish taxation legislation and, therefore, the agency fee is accepted as derived in state C and will be subject to taxation by state C. However, the agent can prevent from there being double taxation by state C by referring relevant provisions of the MTC. (For example, if the agency fee is deemed as commercial income, then the agent may allege that s(he) must be taxable only in the Contracting State in which (s)he is residing, not in state C since (s)he has no permanent establishment in state C.)

If the agent is subject to non-resident tax liability, according to Turkish taxation legislation, on the assumption that Turkey is state B, the transfer of player X from club B located in state B to club C located in state C on a definitive basis is accepted as concluded in state C according to Turkish taxation legislation and, therefore, the agency fee is accepted as derived in state C and the agency fee will not be taxable in state B.

Suppose player X, resident for tax purposes in state B, is transferred end of July on a loan basis from club B in state B to club C located in state C.

2 Will player X cease to be a state B resident upon the transfer to state C for the fiscal year in which the transfer occurs? Will player X acquire state C tax residence in the same fiscal year in which the transfer occurs?

Please see 1.1.

2.1 Should player X continue to be paid by club B, what is the tax treatment in state B and state C of such payment for income tax purposes?

On the assumption that state B is Turkey and club B is a Turkish club, any payment made by club B to player X playing for club C located in state C is subject to withholding tax from 5% to 15% depending in which division club B plays, regardless of whether player X is resident tax liable or non-resident tax liable pursuant to Turkish taxation legislation.

However, player X can prevent from being subject to double taxation by state C pursuant to the MTC by stating that (s)he is paid due to his/her performance in club B and therefore (s)he was taxed in state B, provided that the tax rate of state B is not lower than that of state C.

On the assumption that state C is Turkey and club C is a Turkish club and player X is resident tax liable in state C, pursuant to Turkish taxation legislation, any payment made by club B to player X playing for club C located in state C must be declared and paid to state C by player X under the annual tax return to be submitted by player X.

However, on the assumption that the payment made by club B is based on player X's activities in club B, state B is also legally entitled to subject this payment to taxation pursuant to the MTC. If player X proves that this payment is taxed in state B, then state C cannot levy any tax on this payment pursuant to the MTC, provided that the tax rate applied by state B is not lower than the tax rate of state C. If state C's tax rate is higher than the tax rate applied by state B, then state C can accrue taxation over balance tax rate.

If player X is non-resident tax liable in state C, state C will levy no taxation on this payment made by club B, since the activities giving rise to taxation were not performed in state C.

2.2 Should player X be paid by club C, what is the tax treatment in State C and State B of such payment for income tax purposes?

On the assumption that state B is Turkey and club B is a Turkish club and player X is resident tax liable in state B pursuant to Turkish taxation legislation, any payment made by club C to player X playing for club C located in state C must be declared and paid to state B by player X under the annual tax return to be submitted by player X.

However; on the assumption that the payment made by club C is based on player X's activities in club C, state C is also legally entitled to subject this payment to taxation pursuant to the MTC. If player X proves that this payment is taxed in state C, then state B cannot levy any tax on this payment pursuant to the MTC, provided that the tax rate applied by state C is not lower than the tax rate of state B. If state B's tax rate is higher than the tax rate applied by state C, then state B can accrue taxation over balance tax rate.

If player X is non-resident tax liable in state B, state B will levy no taxation on this payment

made by club C, since the activities giving rise to taxation were not performed in state B.

On the assumption that state C is Turkey and club C is a Turkish club, any payment made by club C to player X playing for club C located in state C is subject to withholding tax from 5% to 15% depending in which division club C plays, regardless of whether player X is resident tax liable or non-resident tax liable pursuant to Turkish taxation legislation. State C is also legally entitled to tax player X according to the MTC, since he performs his activities for club C located in state C.

2.3 What is the tax treatment of the payment of the agent fees by club B or club C on behalf of player X and in which country will the payment be taxed?

Please see 1.4.

Commission's agent tax ramifications

1 What is the tax treatment for income tax purposes of fees paid to the agent involved in the negotiation of the transfer?

1.1 Where the agent is resident in a treaty jurisdiction.

Regardless of whether player X, club B or club C pays the agency fee and whether Turkey is state B or state C, if the agent is subject to resident tax liability according to Turkish taxation legislation, then (s)he will be taxed by Turkey. In such a case, the agent must declare his/her gross personal income accumulated in one calendar year and will pay the tax amount accrued in accordance with their declaration.

Regardless of whether player X, club B or club C pays the agency fee and whether Turkey is state B or state C, if the agent is subject to non-resident tax liability, according to Turkish taxation legislation, and on the assumption that the negotiations, for which the agent is entitled to be paid the agency fee, are held and concluded in Turkey according to Turkish taxation legislation, the agency fee will be subject to taxation by Turkey, since the agency fee is accepted as derived in Turkey. However, the agent can prevent from being subject to double taxation by Turkey by referring relevant provisions of the MTC. (For example, if the agency fee is deemed as commercial income, then the agent may allege that s(he) must be taxable only in the Contracting State in which (s)he is residing, not in Turkey since (s)he has no permanent establishment in Turkey.)

1.2 Where the agent is not resident in a treaty jurisdiction.

Regardless of whether player X, club B or club C pays the agency fee and whether Turkey is state B or state C, if the agent is subject to non-resident tax liability, according to Turkish taxation legislation, and on the assumption that the negotiations, for which the agent is entitled to be paid the agency fee, are held and concluded in Turkey according to Turkish taxation legislation, the agency fee will be subject to taxation by Turkey, since the agency fee is accepted as derived in Turkey.

1.3 Where the fee is paid by club B in state B.

Please see 1.1 and 1.2.

1.4 Where the fee is paid by club C in state C.

Please see 1.1. and 1.2.

1.5 Where the fee is paid by player X.

Please see 1.1. and 1.2.

Football: the Criminal Law and sport

BY STEVE MOULD[1]

Executive summary

In this article, we will endeavour to answer the question whether the Criminal Law should have any place on the sports field, and, if so, to what extent. We will concentrate on violence on the football pitch and on whether the leading Court of Appeal decision in R v. Barnes has clarified or confused the law on this subject, particularly in relation to the defence of consent. We will begin with some general introductory remarks and end with some general conclusions.

Introductory remarks

As Prof. Steve Cornelius of the Centre for Sport and Entertainment Law at the University of Pretoria, South Africa, points out in the introduction to his comprehensive article, entitled "The Expendables: Do sports people really assume the risk of injury?"[2] as follows:

"Sport has been a significant aspect of human society since the earliest times. Ancient rock art depicts scenes of cave people apparently competing in running, swimming, archery and wrestling while spectators look on [...]. *It is probably fair to say that sports injuries have also been part and parcel of human society since ancient times. In this regard Spivey explains that the Greek word "agôn, or contest* [...] *leads to our word "agony"" as often "events were contested to the point of serious injury and fatality* [...]. *This notion of expendable athletes has, to some extent, remained with us throughout the ages. Today, sports people believe in "no pain no gain" as an acceptable by-product of sp*ort."

However, as Prof. Mark James of Manchester Metropolitan University, an acknowledged expert on sport and the Criminal Law, points out, as far as English law is concerned and quoting Bramwell LJ in the case of *R v. Bradshaw*[3]:

"A line of authority dating back to a football match in the Victorian era holds that, in the context of sport, "[n] o rules or practice of any game whatever can make that lawful which is unlawful by the law of the land"."

And adds:

"As a result, acts performed during participation in a sport are not automatically exempt from the criminal law, though it has become increasingly difficult to secure a conviction for sports assaults."[4]

Of course, in certain combat sports, such as boxing, the aim of the contest is to inflict physical injury/harm on one's opponent, but acting within the rules of the sport and, in particular, according to the Marquis of Queensbury's rules. The general position regarding boxing is that fighting, which is carried on in the context of a sport, is considered to be lawful and, therefore, is exempted from the law of assault.[5] Thus, any injuries inflicted during a professional or an amateur bout are consented to by the participants and do not, therefore, criminal offences. As mentioned, any blows outside the rules of the sport, such as those "below the belt", are outside the consent of the participants, and, as such, would constitute criminal assaults.[6]

The legal position concerning other contact sports is different and we will now turn our attention to football and the Criminal Law, which is the subject of this article, beginning with a review of the leading football case of R v. Barnes.[7]

Football

The Court of Appeal decision in R v. Barnes is generally regarded to have clarified and also confused the application of the Criminal Law to violence in football on the field of play.

1 Director and Barrister and Head of Criminal Law, at VII Law Ltd., 2 Dr Johnson's Buildings, The Temple, London, United Kingdom. He can be contacted by e-mail at smould@viilaw.com.

2 *GSLTR* 2015/4, December 2015 and *GSLTR* 2016/1, March 2016.

3 *R v. Bradshaw* (1878) 14 Cox CC 83, p. 84.

4 Lewis and Taylor, *Sport: Law and Practice*, 3rd. edition (Bloomsbury Professional Ltd., Haywards Heath, UK, 2014), chapter H8 "Sports Participation and the Criminal Law", p. 1654.

5 The terms "*assault*" and "*assaults*" are used throughout this article in the sense of "*battery*", that is, physical contact(s).

6 See further on this subject Jack Anderson, *The Legality of Boxing: A Punch Drink Love?* (Birkbeck Law Press, London, UK, 2007) ; and also the review of this book by Prof. Ian Blackshaw, ISLJ 2008/1-2, p. 117. See also the remarks of Lord Templeman in the English Appeal case of *R v. Brown* [1994] 1 AC 212 as follows: *"In some circumstances violence is not punishable under the criminal law. When no actual bodily harm is caused, the consent of the person affected precludes him from complaining. There can be no conviction for the summary offence of common assault if the victim consented to the assault [...]. Other activities carried on with consent [...] of the injured person have been accepted as lawful notwithstanding that they involve actual bodily harm or may cause serious bodily harm [...v] iolent sports including boxing are lawful activities."*

7 [2004] EWCA Crim 3246.

According to Adam Pendlebury of Edgehill University, UK, and setting the scene for our analysis:

"Prior to Barnes, the boundaries of injury-causing conduct in sport, susceptible in law to the concept of consent were confined to actions within the rules of a game. Despite Bradshaw and Billinghurst implicitly eluding to a wider interpretation of consent it was Barnes that first acknowledged that contacts outside of the rules of the game can in certain circumstances, be consented to. Thus, we now have the notion of "Playing Culture" firmly expressed in law."[8]

In this case, Barnes appealed against a conviction for unlawfully and maliciously inflicting grievous bodily harm, contrary to section 20 of the UK Offences Against the Person Act, 1861, which provides that "[w]*hoever shall unlawfully and maliciously wound or inflict grievous bodily harm upon any other person shall be guilty of an offence*". The victim had suffered a serious leg injury resulting from a tackle by Barnes during an amateur football match. His appeal was upheld.

He argued first that, although the tackle was "*hard*", it was fair, and that the resulting injury was accidental and incidental to what could be expected in a game of football. Secondly, he claimed that the trial judge's summing up had been inadequate on the application of the Criminal Law to "*sporting assaults*". And, thirdly, underlying the appeal essentially was the general issue when it might be appropriate for criminal proceedings to be brought after an injury had been caused to one player by another during a sports event.

The Court of Criminal Appeal restated the long-held view that, when injuries are suffered in the course of a contact sport, the defence of implied consent ("*volenti non fit injuria*") to a threshold determined by public policy applies. In this instance, the Appeal Court held that the threshold of this defence depends on all the circumstances and including a recognition that, in highly competitive sports, where conduct outside the rules could be expected to occur in "*the heat of the moment*", such conduct might not reach the threshold required for it to be criminal.

Regarding the judge's summing up, the Appeal Court found that it was inadequate, because the trial judge had failed to explain to the jury the fact that, because the tackle was a foul, this did not necessarily mean that the act concerned satisfied or exceeded the required level of criminal conduct.

Furthermore, the Lord Chief Justice, Lord Woolf stated that, as most organized sports have their own disciplinary procedures, in most cases, there is no need and, indeed, it is undesirable, for any criminal proceedings. Only in those cases, where the conduct was sufficiently serious to be properly characterised as being criminal, rather than being a matter for the sport's own disciplinary body, should give rise to criminal proceedings.

Also, Lord Woolf, developed the concept of what might be considered to be "*legitimate sport*" or part of the "*playing culture*". Thus, the Court considered that the required level of consent to injury in a contact sport should be viewed objectively and on a non-exclusive basis as follows:

- according to the kind of sport concerned;
- the level at which it was played;
- the nature of the act ("actus reus");
- the degree of force used;
- the extent of the risk of injury; and
- being a criminal matter, the state of mind ("*mens rea*") of the defendant.

As mentioned, Barnes won his appeal, but not on the application of the above criteria, but on the misdirection of the trial judge, and thus his criminal conviction for assault was quashed.

Therefore, those who inflict injury upon others, in the course of a sporting event, should only be held criminally liable where such conduct is serious enough to be regarded as a crime.

But, what is meant by the phrase "*the playing culture*" of a sport?

"*Playing culture*" of sport

It is submitted that, in practice, consent will be a defence in those cases where the injury caused is within the "*playing culture*" of the sport, that is, an inherent part of the playing of the particular sport. Put another way, according to what participants in the sport concerned may expect to occur on the field of play. This, of course, will vary from one contact sport to another.

According to Pendlebury:

"The "Playing Culture" of a sport refers to the way that the game is accepted and how it is expected to be played by those who are in some way involved in it. The law of consent is limited to the rules of the game, but "Playing Culture" would include codes of conduct, tactics and commonly occurring incidents of foul play. This has the potential to widen the scope of consent and is a controversial concept in that it suggests the "acceptability" of activity beyond the rules. It may, however, point to a more realistic way of controlling the sports-field."[9]

In other words, the "*playing culture*" test widens the scope of the defence of consent to a criminal charge.

Thus, in football, for example, heavy interpersonal contacts, which commonly occur in the game, such as tripping, which may result in serious physical harm, will be outside the remit of the Criminal Law and will not lead to

8 "Perceptions of playing culture in sport: the problem of diverse opinion in the light of *Barnes", ESLJ,* 2006, 4(2).

9 Op cit., footnote 7 *supra.*

criminal prosecution being taken against the "*offender*".

On the contrary, such contacts which are outside the "playing culture" of the game and cause bodily harm will be subject to the Criminal Law. Examples of these include biting and punching an opponent on the field of play.

In the English case of *R v. Davies*[10], the defendant footballer hit the victim in the face, fracturing his cheekbone, because he had just fouled him. The defendant was found guilty of assault occasioning actual bodily harm, for which he was given a custodial sentence of six months.

Likewise, acts which are intended to or recklessly cause injury will also be within the Criminal Law and subject to the corresponding sanctions. For example, such acts include a knee-high tackle in football.

In the English case of *R v. Chapman*[11], in an amateur football match, the other player was shadowing the ball out of play, when Chapman stamped on the back and side of his right leg, causing him a sever double fracture. The referee described this act as callous and deliberate with the intent to cause injury. Despite the similarity with the Barnes case, Chapman was convicted under section 20 of the UK Offences Against the Person Act of 1861. Chapman received a custodial sentence of six months.

On the other hand, in the English case of *R v. Blissett*[12], the defendant's elbow came into contact with an opponent's face, when they were both trying to head the ball in a professional football game. As a result, the opponent suffered a fractured cheekbone and eye socket, which prevented him from continuing his career as a professional player. The defendant was sent off and subsequently charged with causing grievous bodily harm with intent pursuant to section 18 of the UK Offences Against the Person Act of 1861, which provides as follows:

"[w]*hoever shall unlawfully and maliciously by any means whatsoever wound or cause grievous bodily harm to any person with intent to do some grievous bodily harm to any person shall be guilty of an offence.*"

The defendant was acquitted of the charge at trial because it was considered that this kind of challenge occurred so regularly at this level of football that it was an integral part of the game. Therefore, the victim should be considered to have consented to it and, thus, no criminal offence had been committed, notwithstanding that this behaviour, according to the evidence of the referee, amounted to violent conduct!

In determining whether the conduct of the player is or is not "*within the culture of the sport*" will depend, to some extent, on the view of the referee. At the end of the day, the test may well be: "*what do you expect when you play in a contact sport, such as football?*" So do not complain! Or, as Prof. Steve Cornelius puts it: "[..] *the universal message essentially seems to be: if you play and get hurt, that is generally your problem*."[13] In other words, the Criminal Law – and, indeed, the Civil Law – should not be invoked as a result of any injury suffered on the field of play.

Of course, this does not mean there is a general "licence for thuggery"[14], even though sports administrators, players and officials may wish to follow and apply the often-expressed line and point of view that "*what happens on the field of play should stay on the field of play!*" In other words, there should be no external intervention from any quarter. However, there is always a "public interest" element to be satisfied. Is it in the "public interest" that sport should be outside the Criminal Law and, in what circumstances?

On this point, Prof. Mark James remarks:

"In general, the prosecution of violence will always be in the public interest (R v Brown [1994] 1 AC 212 and Law Com no. 134, 1994, para. 10.17). Where participator violence [in sport] is concerned, however, the issue is not so clear-cut, as there are no written guidelines explaining what conduct in the name of sport is acceptable and what is not."

And adds:

"This issue is complicated further by the suggestion of Lord Woolf CJ in R v Barnes that, generally, it is not in the public interest for participator violence [in sport] cases to be heard before the criminal courts."[15]

On the other hand, the legal position regarding participator violence in sport off the field of play is quite clear and different and, for the sake of completeness, is briefly explained and illustrated as follows.

Off the field of play violence

The defence of consent does not apply in the case of assaults that are committed after the game or after the player has been sent off. Thus, any violent conduct which occurs off the field of play will be subject to the Criminal Law.

For example, in the English case of *R v. Kamara*[16], the defendant, a professional footballer, punched and broke the jaw of a player in the opposing team in the tunnel after the game. He was charged with assault inflicting grievous bodily harm, pursuant to section 20 of the UK Offences Against the Person Act of 1861. In his defence, he claimed that, throughout the game, he had been subjected

10 [1991] Crim LR 70.

11 3 March 2010, Crown Court, Warwick, unreported.

12 *The Independent Newspaper*, 4 December 1992.

13 *Op cit.*, footnote 2 *supra*.

14 See Anderson, "No licence for thuggery: violence, sport and the criminal law", in: *Criminal Law Review* 10-10, October 2008, Crim LR 751.

15 Op cit., footnote 2 supra at p. 1657.

16 *The Times*, 15 April 1988.

to a high degree of racial abuse, but nevertheless pleaded guilty to the charge. Having been fined and dropped by his club, the Court also fined him £ 1,200 and ordered him to pay compensation to his victim amounting to £ 250.

Likewise, in the famous – if not infamous! – English case of *R v. Cantona*[17], Eric Cantona, the former flamboyant football player, had been sent off for an "offence" during a professional football game. As he walked towards the players' tunnel, he was abused by a spectator, whereupon he took a flying kick at the spectator, catching him on his chest. Cantona was fined by his club as well as the English Football Association. In addition, he was sentenced to 120 hours' community service for the commission of this criminal assault!

Concluding remarks

As we have seen, the application of the Criminal Law to sport is problematic and, notwithstanding the guidance given in the leading English Appeal Court case of R v. Barnes, some "grey areas" still remain and need to be clarified.

However, what can be said with some certainty is that each case of violence on the football field needs to be considered on its own particular facts, circumstances and merits when deciding whether or not a criminal charge should be brought and also its likely outcome. Further, the view of the referee will be an important consideration in determining whether criminal charges should be brought against the "offender". Also, the views of past and present players will need to be taken into account and given in evidence in any resulting criminal proceedings.

Likewise, the governing bodies of football, in the light of particular cases, may need to amend and tighten up, as may be appropriate, their rules of the game, which may well assist in defining what is and what is not to be regarded as part of "the playing culture".

Of course, in all these cases, it may be difficult to prove intent – "*mens rea*" – whilst the wrongful act – "*actus reus*" – is usually there for all to see! It will be remembered that both elements need to be established and proved to constitute a crime.

Again, the English Law Commission, who, as mentioned above, have looked into the matter, may need to take another look at this controversial area of the Law and determine what role and to what extent the Criminal Law should intervene in the field of sport and, not least, in the case of football, which is the world's favourite game and followed by millions of fans.

In any event, sports lawyers are likely to continue to be professionally engaged in the future in this particular legal field. A case of more grist to the legal mill!

17 *The Times*, 25 March 1995.

The Caribbean: **Fighting ambush marketing**

BY STEFAN FABIEN[1]

Introduction

It has been questioned by many whether "ambush marketing" can properly be characterized as a "term of art". It has been similarly queried whether the actions classified by the term are illegal, immoral or anything other than clever marketing strategies. Whilst there is no agreed definition, it can perhaps be broadly described as an attempt by a competitor to engage in promotion activities during another's sponsorship.

It can also be subclassified into "ambush by intrusion" and "ambush by association".

"Ambush by intrusion" can be classified as the practice of non-sponsor brands seeking to gain exposure for their trademark and brand name at or around an event, when it is not entitled to do so (i.e. without the authorisation of the event organizer).

"Ambush by association" can be classified as the practice whereby the competitor carries out activities that mislead consumers into believing that it is an authorised sponsor of the event, and, arguably, it is the most difficult kind of "ambush" for organizers to prevent.

The profitability of sport in the Caribbean has been burgeoning over the decades, aided in part by the successes of many Caribbean athletes, in many sports, such as football, cricket and, in particular, track and field. Such profitability has also received support from the rise of the multibillion dollar sports tourism industry. It, therefore, comes as no surprise that, where such large sums are at stake, marketers will be attempting to use every opportunity, legitimately or otherwise, to create exposure for their brands through a tie-in to the event; and it is those attempts that have had Caribbean legislators and sports' governing bodies on the proverbial front foot in the fight against "ambush marketing".

The legislative regime

The manner in which Caribbean nations have treated "ambush marketing" has remained largely ad hoc, in what, even for more sophisticated jurisdictions, has been an ongoing challenge to curtail. For the most part, it is still being considered under domestic trade mark or competition laws in several countries, together with common law remedies, such as false advertising, the tort of passing-off and breach of contract.[2] As occurs the world over and widely in sport, when Caribbean nations host sporting tournaments, they are required to enact anti-ambush marketing legislation to protect the value of the sponsorship rights of title sponsors. In other cases, private franchises utilise contractual terms and conditions regarding access to sporting venues, in an attempt to control or minimise "ambush marketing".

Within the islands of the English-speaking Caribbean, there is a mixture of sophistication in respect of the advancement of IP laws. Many hold over the IP laws pre-independence, whilst others sought to change theirs, in order to be competitive and attractive to global business. By way of example, with Grenada's enactment of its Trademarks Act, 2012, it repealed the pieces of legislation which it had been previously utilising; both the Merchandise Marks Act 1899 and the Registration of United Kingdom Trade Marks Act, which dates from 1939.[3]

In Jamaica and Trinidad and Tobago, for example, companies such as Apple and Google have traditionally filed marks with the IP offices in these Caribbean nations for two main reasons. Firstly, United States trademark law permits a foreign filing in such countries, to ensure the priority of the trademark and serves as a basis for a domestic trademark application, as long as such an application is filed within six months. Secondly, these companies take advantage of the fact that a number of the IP registries of these countries ensure a level of secrecy of protection for the mark in question. A case in point, in respect of Apple's much vaunted Watch device, the company filed a trademark registration in Trinidad on 11 March 2014, almost exactly within the six-month time frame prior to the unveiling of the device in its unveiling ceremony on 9 September 2014.[4]

1 Attorney-at-Law, Port of Spain, Trinidad & Tobago. E-mail: sfablaw@gmail.com.

2 D. Stiebel, "The act of ambush", in: *Jamaica Observer*, 29 July 2015, available at www.jamaicaobserver.com/business/The-act-of---ambush_19221158 (accessed 2 Decembr 2017).

3 G. Moore and K. van Deusen, "Grenada: Comprehensive New Trademark Act Adopted", in: *INTA Bulletin*, Vol. 67, 1 September 2012, p. 15.

4 Gerben Law Firm, "Apple's Secret Trademark Filing in Trinidad and Tobago", 19 September 2014, available at www.gerbenlaw.com/blog/apples-secret-trademark-filing-in-trinidad-and-tobago (accessed 2 December 2017).

Whilst fostering an environment attractive enough for multinational corporations comfortable to entrust their filings to Caribbean IP nations, may offer that "static" protection over a period of months, sponsors in major sporting events, seek assurance of dynamic levels of protection, that can expeditiously respond to challenges to their IP rights and the value of their sponsored activity. For such a level of protection, sponsors would traditionally have to rely exclusively upon common law remedies, such as the tort of passing off, or a mixture of common law and statutory provisions, such as the Trinidad and Tobago Protection against Unfair Competition legislation[5]. With the aim of ensuring the maximum amount of protection to the value of their sponsored event, sports' governing bodies mandate the passing of specific anti-ambush marketing provisions for the event. In the case of the ICC Cricket World Cup 2007, such a mandate was foisted upon nine Caribbean nations, who were set to host the tournament for the first time ever.

Caribbean Cricket World Cup

In the lead up to the Cricket World Cup 2007 (CWC 2007), the Legal Affairs Committee of the Caribbean Community (CARICOM), comprising all the attorney-generals of CARICOM, was established, for the drafting of a model template for anti-ambush marketing specific legislation throughout the nine host venues. It was subsequently passed in all nine territories. It made "ambush marketing" illegal and made it both a criminal offence and a civil tort. However, oddly enough, remedies would have to be sought under the existing laws of the specific Caribbean nations, with the respective High Courts of Justice retaining jurisdiction.[6] All pieces of legislation retained a "sunset clause", meaning that they would expire on 30 June 2007.

Evidently, the major concern of the International Cricket Council (ICC) was to ensure that, as best as possible, the activity was defined and made sanctionable throughout the nine territories. In Trinidad and Tobago, for example, pursuant to its ICC Cricket World Cup West Indies 2007 Act, 2006, under Part IV, Control of Advertising, there were specific prohibitions on "ambush marketing", including direct or indirect and by association or implication, in "a manner calculated to achieve publicity for that mark, image, statement or brand with which that mark, image, statement or brand is associated and thereby deriving any special promotional benefit from CWC 2007 without the prior authority of CWC 2007 Inc. or IDI". [7]

Part II included items that were to be restricted at all CWC 2007 venues, including alcoholic beverages, bands and musical instruments, branded drinks, branded non-alcoholic beverages, branded snacks and the catch all clause, "any other article which in the opinion of CWC 2007 Inc. is offensive, disruptive, dangerous or likely to infringe the rights, safety or security of any person".[8]

Marketers, be they global conglomerates or the small local road-side vendor, eager to capitalize upon an influx of tourists, in their tourist reliant economies, were, for the duration of the legislation, saddled with a number of prohibitions. They were prohibited from combining parts of the host countries' names or collectively as a Caribbean, West Indies or Windies entity, with words such as "Cricket World Cup", "CWC", "CWC West Indies", "MMVII", Two thousand and seven," "2007," "World Cup", "World Cup Cricket" and "07. It remains to date, one of the most comprehensive set of sports-specific legislation to which the cricketing public in the Caribbean had ever been exposed.

It's just not cricket

Traditionalists and cricketing purists, however, have argued against such anti-ambush legislation, viewing that it was taking the soul out of the what for decades has been the immersive cricketing experience in the Caribbean. Other commentators have opined that such restrictions only serve to stifle freedom of expression and a marketers' creative appetite.[9] It is the inevitable battle between corporate sponsorship and traditionalism on the part of a sport- loving public, accustomed to being able to consume the favourite alcoholic beverage of their choice.

The Hero Caribbean Premier League (CPL) Twenty20 cricket (T20) tournament, started in 2013 and held annually amongst the islands of the Caribbean participants, is a case in point. The tournament, currently sponsored by Hero Motocorp, boasts of franchisee holders and owners, who would not be traditionally associated with the sport, such as actors Mark Wahlberg and Gerard Butler, who are part owners of the Barbados and Jamaica franchises respectively. Understandably, having attracted such non-traditional investment from far and wide, the tournament organizers would be keen to protect the rights of its premier sponsors. In the 2017 incarnation of the CPL T20 Finals, held at the Brian Lara Cricket Academy in Trinidad, the organizers enforced a "clean venue" policy to protect the exclusive rights of sponsors, one of which included a corporate brand that provided packaged snacks. A peanut vendor, fondly nicknamed "Jumbo", who for decades has been roasting his own peanuts and selling at various sports events, so much so that he became a fixture at various sporting events throughout the island, was prohibited from selling his peanuts; actions which,

5 Protection Against Unfair Competition Act 27 of 1996.

6 Advisory Committee on Enforcement, Third Session, Geneva, 15-17 May 2006, "Issues Related to The Enforcement of IP Rights: National Efforts to Improve Awareness of Decision Makers and Education Of Consumers in Antigua and Barbuda and The Caribbean", prepared by Senator the Honourable Colin Derrick and Ms. Laurie Freeland Roberts, Registrar of Intellectual Property and Commerce.

7 S.25(2) ICC Cricket World Cup West Indies 2007 Act, 2006.

8 *Ibid*, Second Schedule, Part II.

9 Stiebel, op. *cit.*

according to the vendor, "is so damaging to the culture".[10]

The CPL, however, has not taken the route of the ICC, for example, in mandating anti-ambush legislation in all host nations for the annual tournament; rather, it has sought to rely upon the existing statutory and common law provisions in the islands, coupled with ticketing terms and conditions to specifically restrict "ambush marketing" within the venue. The CPL ticketing terms and conditions specifically prohibit "ambush marketing" and any "intentional unauthorised activity", which associates a person with a CPL Limited event; exploits the publicity or goodwill of the event; or has the effect of diminishing the status of Event sponsors or conferring on other persons the status of an Event sponsor[11]. This latter phrase is borrowed from the long-since expired CWC 2007 legislation and has proved an effective guard against the dilution of an official sponsor's brand.

The anti-ambush legislation, however, has been felt particularly in tourist-reliant economies by persons, who would have once rejoiced at the opportunity to host such a prestigious sporting event, but then lament and feel disaffected when the criminalization of plying their trinkets, was rolled out by their home legislature.

"Bermuda's Cup"

America's Cup Bermuda (ACBDA) is one such example. Bermuda, situated in the Atlantic Ocean, many miles north of the nearest Caribbean island archipelago, has long been a premier destination for those with an affinity for sailing. Bermuda has also actively marketed itself as a destination for sports tourism, particularly in respect of the lucrative sailing competitions. In doing so, Bermuda has acceded the requests of tournament organisers, to ensure the protection of their sponsors, through the enactment of specific anti-ambush legislation.

In December 2014, Bermuda was announced as the host of the 2017 America's Cup after it was successful in its bid. It subsequently hosted the Louis Vuitton America's Cup World Series in October 2015 and enacted the America's Cup Act 2015 to ensure the protection of the sport's very lucrative sponsors. In the run up to the America's Cup in 2017, ACBDA enacted the Restricted Marketing Order 2017, which restricted various activities in certain areas on the island and water, for the duration of the tournament.

According to ACBDA, this Order was enacted to "prevent the ambush marketing and unauthorised commercial exploitation of the event by companies" and "prohibits attempts to position branding, signage and advertising in any locations where it will be in view of television cameras or spectator crowds, including aerial footage". The aim being to "protect the rights of America's Cup official licensees who are all local businesses, and commercial partners, sponsor organisations and suppliers that have signed contracts or participated in an official tender process to be associated with the prestige and opportunities that the America's Cup offers".[12] The fines for knowingly committing a violation of the Restricted Marketing Order 2017 are up to US$ 20,000.

To give one an idea of the elite-level of supporters and followers and the motivation for the organisers to ensure the legislative protection, with such hefty fines, there were numerous superyachts docked for this year's America's Cup, in and around the race course, including that of billionaire Larry Ellison, co-founder of Team USA's sponsor Oracle Corp, who docked his 255-foot yacht in front of the Hamilton Princess hotel.[13]

Additionally, Omega, which was co-sponsor of Team New Zealand with Emirates Airlines, used the 2017 America's Cup to launch two of its latest watches, with a combined value of just under US$ 20,000.[14]

Notwithstanding all the legislative protections and hefty sanctions, creative marketers will find a way to exploit or tie in their brand, even if it involves cutting out the middle man.

Player endorsements – the "personal ambush"

British-based Cable and Wireless (CWC) had, for years, maintained a long-standing monopoly in the telecommunications market in the islands of the former British West Indies. For many of those years, it also enjoyed the sponsorship of the West Indies cricket team and became synonymous with West Indies cricket. Digicel, owned by Irish billionaire Denis O'Brien, incorporated in Bermuda and headquartered in Jamaica, starting to challenge this monopoly in the early 2000s and that challenge would set off a battle between the providers, with players and fans being caught in the middle. In 2003, the West Indies Cricket Board (WICB) was renegotiating its long-standing title sponsorship with CWC. Five months in, those talks broke down, and WICB eventually signed with CWC direct competitor Digicel, in July 2004, under a Master Sponsorship Agreement, which is reported to have been, at the time, the largest sponsorship deal ever contracted by the WICB[15].

At the same time, WICB decided to embark upon drafting new contracts for the players, which included a controversial

10 Shaneika Jeffrey, in: Trinidad and Tobago Guardian, available at http://indepth.guardian.co.tt/lifestyle/2017-09-13/whey-'d-nuts-man-gone (accessed 2 December 2017).

11 *CPL Limited Ticketing Terms & Conditions*, available at http://cplt20.com/t%26c (accessed 2 December 2017).

12 *Bernews*, 17 May 2017, available at http://bernews.com/2017/05/ambush-marketing-and-unauthorised-commercial/ (accessed 4 December 2017).

13 M. Buteau, in *Forbes*, 12 June 2017, available at www.forbes.com/sites/mike-buteau/2017/06/12/omegas-americas-cup-sponsorship-pays-off-as-team-new-zealand-advances-to-final/#5e3088e07479.

14 *Ibid.*

15 T. Griffith, "The background to the dispute", in: *ESPN Cricinfo*, 4 March 2005, available at http://www.espncricinfo.com/westindies/content/story/208251.html (accessed 4 December 2017).

clause 5.1, which sought to commit the player, "to not do anything that constitutes a Player Endorsement in relation to a competitor of a WICB Major Sponsor unless he has a pre-existing agreement with such a competitor that has been approved in writing by the WICB".[16] As it was, CWC had, unbeknown to the WICB at the time, entered into individual player contracts with several of the West Indies players, including Brian Lara, the captain of the team and one of the world's best cricketers, who had a long-running sponsorship with CWC. CWC effectively ambushed the multimillion dollar sponsorship of its main rival Digicel, by negotiating personal deals with key players in the team. In doing so, CWC would have also been positioning itself for its title sponsorship of the Cricket World Cup to be held in the Caribbean for the first time, in 2007. In December 2004, an adjudicator, appointed by the CARICOM Sub-Committee on Cricket, held that a personal endorsement contract entered into by a player could be viewed as legitimately done if this contract were entered into by the player in his individual capacity.[17] However, the dispute endured, as WICB maintained that it was in the dark whether the personal endorsement contracts, entered into by the players in question, were truly in respect of the player in his individual capacity, as opposed to that of the West Indies team. The players maintained their refusal to permit inspection of their endorsement contracts and WICB maintained its position that the players' endorsements with CWC could have rendered it in breach of its lucrative Master Sponsorship Agreement with Digicel.[18]

In March 2005, the growing tension between the telecommunications giants found its way onto the pitch and resulted in the WICB excluding seven players from the upcoming tour, who had signed personal endorsements with CWC.[19] The issue only became somewhat resolved after the creation of a collective bargaining agreement and memorandum of understanding was signed between the parties in 2006, which permitted the player's the right to maximize their income through endorsements, with provisions to protect the WICB and their commercial partners from being ambushed.[20]

More than a decade on and the ambush battles between the telecommunications giants continue, albeit on differing scales. The Inter-Secondary Schools Boys and Girls Championships in Jamaica is one of the most well attended and viewed events by sports fans in Jamaica, providing the platform for the discovery of superstar track and field athletes, such as Usain Bolt. In 2015, after the men's 200 metre track final, Calabar High School athlete, Michael O'Hara, took off his body suit to reveal a red and green undershirt with the words "Be Extraordinary", the very recognisable brand slogan for Digicel, which was a non-sponsor and competitor of the tournament sponsor, LIME (a CWC subsidiary).[21] With that single act, Digicel had associated itself with the popularity of the championship, the success of the athletes and ensured a viewership of tens of thousands, with an event that is widely adored amongst the track and field loving nation.

Conclusion

The Caribbean experience in combatting "ambush marketing" is similar to that of many other countries. The main difference is that the majority of these Caribbean economies are beginning to diversify into the very lucrative market of sports tourism. As such, they will be very eager to put in place whatever necessary legislative provisions are required to provide title sponsors of major sporting events with the comfort of hosting a tournament in their backyards.

To the traditionalists, who fear a loss of the Caribbean sporting experience that they grew up loving, the stark reality is that large professional sporting events cannot take place without the infusion of sponsorship investment and, when businesses sponsor an event, they want to be assured that the organizers protect their exclusivity, so they get maximum value for their investment.

The restrictions from anti-ambush marketing ad hoc legislation and ticketing terms and conditions, are a necessary evil in a competitive market, where an island, like Bermuda, comes up against metropolitan cities, like San Francisco and Chicago, in its successful bid to host the 35th America's Cup tournaments.

It is likely that anti-ambush marketing legislation will become, more and more, a recognisable feature of sporting tournaments in the Caribbean, as the islands vie to stay competitive. At the time of writing, many such islands have been ravaged by an unforgiving hurricane season and will, therefore, require any and every advantage for their heavily tourism-dependent economies.

16 P. Kitchin, *Sponsorship Management in Cricket: A Case Study of the Stanford Super Series, the West Indian Cricket Board and Digicel* Conference Paper, September 2009, p. 12.

17 Griffith, op. *cit.*

18 *Ibid.*

19 James, *op. cit.*, p. 14.

20 *Ibid.*

21 A. Markoff, "The growing threat of ambush marketing", in: *Cayman Islands Journal*, 6 May 2015, available at www.journal.ky/2015/05/06/the-growing-threat-of-ambush-marketing (accessed 5 December 2017).

Bulgaria:
Fighting match-fixing in football

Some recent cases and developments

BY VASSIL DIMITROV[1]

Introduction

To fight match-fixing in sport requires the criminalisation of the acts that are harmful towards the social relations associated with sporting competitions governed by the respective sports federations. Crimes against sport threaten not only the normal and lawful conduct of the sporting competitions, but also reveal a high degree of social danger, which threatens the integrity of sporting events and violates the fundamental principles of sports law: the prohibition of any unsporting advantage and also the principle of fair play.

These crimes cause significant damage to the sports federations, their members, the clubs and also the players. Match-fixing has become one of the main issues which has placed a black stain on modern football. It is often linked with illegal betting activities and organised criminal groups for manipulating the development and the outcome of football matches.

The low rate of these crimes in Bulgaria does not mean that the State authorities should neglect the match-fixing problem. There is significant international cooperation regarding sports-related crimes within the Council of Europe and within the European Union (EU). Art. 165 of the Treaty on the Functioning of the European Union (TFEU) indicates that one of the main objectives of the Union is as follows:

"developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports".

The EU aims to achieve this goal in the following way:

"by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen".[2]

Legislative framework: sporting crimes in Bulgaria

Several Member States of the EU have established legislation, which protects the social relations in the field of sport by prohibiting the various ways of match-fixing and bribery in sport.

In Bulgaria, in 2011, an amendment to the Bulgarian Criminal Code introduced a new chapter 8a, entitled "Crimes against sport". The Bulgarian system of sports-related crimes includes sports' fraud – art. 307b of the Criminal Code (CC); and so-called active and passive bribery in sport – art. 307c CC.

In 2016, the Bulgarian courts have had to apply these provisions on several occasions.

Sports fraud

Sports fraud is the persuasion of another individual in order to take action towards the manipulation of the development or the result of a sporting event.[3] The crime bears this name because the behaviour of the person, who is illegally persuaded to carry out the unlawful act, compromises the lawful conduct and the integrity of the sporting competition, which deceives not only the sports federation governing the event, but also the other participants in it acting in good faith.

Acts punishable under art. 307b CC are only those which do not constitute a graver crime. In those cases where the conduct under art. 307b CC meets the conditions envisaged for a graver crime (some instances of coercion, severe bodily injury, fraud, and the like), the offender shall be punished for the more serious crime. The subsidiary character of art. 307b CC determines its limited applicability in practice.

Active bribery in sport

Bribery is the most common crime used for manipulating football matches according to the study from 2012 ordered

1 Sports lawyer, Sofia, Bulgaria. Contact information: e-mail vassil.dimitrov@outlook.com; website http://dimitrovsportslaw.com (accessed 4 December 2017).

2 Consolidated version of the Treaty on the Functioning of the European Union, available at http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12008E165&from=EN (accessed 4 December 2017).

3 Art. 307b (new – SG No. 60/2011): *"Whoever, by using violence, deception, intimidation or other unlawful means, persuades another person to influence the development or outcome of a sporting event, administered by a sports organization, shall be punishable by imprisonment from one to six years and a fine amounting from one thousand to ten thousand levs, if the act does not constitute more serious crime."*

by the European Commission.[4] The majority of the crimes committed in various European countries, including Bulgaria, are to be classified as some form of bribery.

Art. 307c of the Bulgarian CC envisages a punishment from one to six years' imprisonment together with a fine from five to fifteen thousand BGN[5] for the commission of active or passive bribery in sport.[6] The crime bribery in sport disrupts the social relations, which ensure the lawful conduct of sporting competitions. Furthermore, this crime damages the lawful implementation of the rights and obligations of the officials within the organisation, which governs the sporting competition, and also the behaviour of the participants, who are acting in good faith.

The object of the active bribery in sport according to art. 307c, par. 1 CC, is a gift or any other material benefit, without any legal basis. The crime under art. 307c, par. 1 CC, can be committed via promise, offer or by means of giving the actual benefit. Active bribery in sport is committed only through action.

The offender under art. 307c, par. 1 CC, always acts with an intent towards committing this crime. The offender aims to motivate the receiver of the benefit to influence the development or the result of the sporting event. The perpetrator is aware of the unlawfulness of his motivating or rewarding behaviour and wants the receiver to illegally influence the competition.

Passive bribery in sport

The crime of passive bribery in sport is regulated by art. 307c, par. 2 CC.

The object of the passive bribery is the same as the active bribery in sport. There are many similarities between the two types of bribery. The object of the passive bribery is a benefit, which is acquired by the receiver without any legal justification. The act, by which the passive bribery is committed, is the simple acceptance of the benefit without any legal basis for it. Along with this act, passive bribery in sport could be committed via means of the request or the acceptance of an offer or promise for a bribe. The crime, under art. 307c, par. 2 CC, is formal in all possible acts listed under this provision except for the actual acceptance of the benefit. The result of the crime consists in the enrichment of the receiver of the bribe. Like the active bribery in sport, passive bribery may only be committed through action and is an intentional crime.

There are several aggravated circumstances, which are prerequisite for more severe punishment of the perpetrator of active or passive bribery. The complete list of aggravated circumstances is stipulated under art. 307d CC.[7]

The case involving the U-19 Bulgarian national players

In 2016, the Bulgarian courts had to adjudicate on two cases of attempted active bribery in sport. The very first decision regarding an attempt to bribe Bulgarian football players was rendered on 7 April 2016 by the Botevgrad regional court.[8] The regional court found the three defendants guilty of attempting to bribe two players from the Bulgarian U-19 national team. According to the decision of the regional court, the crime was committed under the conditions envisaged under art. 307d, par. 2, item 4, in conjunction with art. 307c, par. 1, CC.

The court ascertained that, on 16 July 2014 in the city of Pravets, the three accused individuals offered the sum of € 10,000 to each of the two Bulgarian U-19 national players and wanted the players to influence the result of the upcoming match (19 July 2014) from the UEFA U-19 European Championship between Bulgaria and Germany, held in Hungary.

The court established that, in exchange for the offered sums, the two players were expected to manipulate the above-mentioned football match in a way that resulted

4 European Commission, *Match-fixing in sport. A mapping of criminal law provisions in EU,* 27, March 2012, p. 114. The report contains an official English translation of the provisions of the Bulgarian Criminal Code related to sports crimes, p. 67-68. Available at http://ec.europa.eu/assets/eac/sport/library/studies/study-sports-fraud-final-version_en.pdf (accessed 4 December 2017).

5 1 Bulgarian Lev (BGN) = 0.5113.

6 Art. 307c (new – SG No. 60/2011): *"(1) Whoever promises, offers or gives another person a benefit which is not due in order to influence or because the person has influenced the development or outcome of a sporting event, administered by a sports organization, shall be punishable by imprisonment from one to six years and a fine amounting from five thousand to fifteen thousand levs.*
(2) The punishment under para 1 shall also be imposed on a person who asks for or accepts any benefit which is not due or accepts an offer or promise for a benefit in order to influence or because the person has influenced the development or outcome of a sporting event, as well as to a person with whose consent the benefit has been offered, promised or given to a third party."

7 Art. 307d (new – SG No. 60/2011): *"(1) The punishment shall be imprisonment from two to eight years and a fine amounting from ten thousand to twenty thousand levs in those cases where the act under Art. 307b and 307c has been committed:*
1. in regard to a participant in a sports competition under 18 years of age;
2. in regard to two or more participants in a sports competition;
3. in regard to or by a person who is a member of a managing or control body of a sports organization, a referee, delegate or another person during or on occasion of performance of their official duties or functions;
4. repeatedly.
(2) The punishment shall be imprisonment from three to ten years and a fine amounting from fifteen thousand to thirty thousand levs, in those cases where the act under Art. 307b or Art. 307c:
1. has been committed by a person acting on behalf of or pursuant to a decision of an organized criminal group; 2. has been committed under the terms of dangerous recidivism;
3. is a particularly serious case;
4. refers to a sports competition included in a gambling game with betting on the development or outcome of sporting events."

8 Decision dated 7 April 2016 for criminal case No. 298/2015, Botevgrad regional court.

in the scoring of three or more goals during the game. The players refused to participate in any activity related to match-fixing and reported the situation to their coach and the police. During the court proceedings, it was also established that the match in question was part of gambling games organised by both bookmakers and betting exchanges, fulfilling the condition for application of the aggravated circumstance under art. 307d, par. 2, item 4, CC.

The punishment imposed on each of the three accused individuals was one year's imprisonment; the serving of which was suspended for a probationary period of three years. Additionally, each of them were to pay a fine in the amount of BGN 1,000. One of the defendants filed an appeal against the decision of the regional court. The proceedings for this appeal, based on the claim that the grounds of the sentence were not properly communicated to the appellant, are still pending before the Sofia district court.9

The case involving the U-19 Beroe Stara Zagora players

On 14 April 2016, just a week after the first decision for active bribery in Bulgarian football, the Stara Zagora regional court issued its ruling in a similar case.10 The accused was convicted for a crime against sport, pursuant to art. 307d, par. 1 items 1 and 2, in conjunction with art. 307c, par. 1, CC. The offender was sentenced to two years' imprisonment, the serving of which was suspended for a probationary period of three years. The court also imposed a fine in the amount of BGN 10,000 on the perpetrator.

The court established that, on 11 July 2013, the offender initiated meetings with players of the U-19 team of PFC Beroe, Stara Zagora. He offered three Beroe U-19 players sums between € 500 and € 1,000 per match, in order to manipulate the results of future games with their participation. Two of the victims of the crime were under the age of 18 at the time of the attempted bribery. Despite the explicit refusal of the players to participate in any match-fixing activity, the offender proceeded to contact the coach of the PFC Beroe U-19 team. On 29 July 2013, the offender promised the coach the sum of € 3,000, in order to participate in the manipulation of football matches, but the coach declined that offer.

The offender appealed against the sentence of the regional court to the district court, which confirmed that the ruling of the regional court was duly rendered in accordance with the law and facts of the case.11 The district court established that there are merits for increasing the punishment for the crime, in view of the fact that there are several aggravating circumstances: for instance, the crime was committed against more than two participants in the same sporting event, and two of them were under the age of 18. However, the district court applied the principle of prohibition of reformatio in peius, meaning that the position of the person appealing against a sentence cannot be worsened, unless there is a protest against that sentence filed by the prosecutor. The lack of protest by the prosecutor, during the first time the district court ruled on the matter,12 meant that there was no possibility for increasing the punishment adjudicated with the decision. The decision of the district court, which confirmed the regional court's ruling, is final and is not subject to any subsequent appeal or protest.

Conclusions

The fight against match-fixing is, without doubt, one of the priorities for safeguarding the integrity of football worldwide.

The recent cases of attempted bribery in Bulgarian football show that the legislator had every right to include provisions prohibiting such perpetrations with the amendment of the Criminal Code in 2011.

However, the lack of protest filed by the prosecutor during the first trial in the case involving the Beroe U-19 players left the district court with no possibility of increasing the punishment rendered in the original ruling, which was suspended under the conditions of art. 66 CC. This article allows judges to suspend the serving of the punishment when the perpetrator has not been sentenced before and the punishment is imprisonment of up to three years.

In addition to that, the judges must also determine whether the objectives of the punishment could be satisfied without the offender effectively serving the punishment – by a means of probationary period, for example.

It is highly debatable that crimes which fulfil the conditions for more than one aggravated circumstance – committed against many individuals and against underage players – merit only the imposition of a suspended sentence. The fact that the offender was not sentenced before, should not automatically outweigh the fact that the crime was committed towards more than one player under the age of 18.

The Bulgarian jurisprudence related to sports crimes is still too modest to determine any consistent trends; but, in any event, imposing more severe punishments could lead to the prevention of such crimes, especially in cases of manipulation of matches which are part of gambling games organised by bookmakers, and also in those instances where more than one aggravated circumstance applies.

The right balance, when applying the criteria for imposing suspended sentences for match-fixing in football, could prove to be the biggest challenge facing Bulgarian judges when ruling on similar cases in the future!

9 Provisional ruling dated 17 November 2016 for appellate criminal case No. 727/2016, Sofia district court.

10 Decision No. 78 dated 14 April 2016 for criminal case No. 8/2016, Stara Zagora regional court.

11 Decision No. 94 dated 14 July 2016 for appellate criminal case No. 1155/2016, Stara Zagora district court.

12 Both the regional and the district court ruled twice in the matter, which prolonged the proceedings considerably.

Increased transparency as a tool to pursue institutional independence

Legal foundations of international sports federations and the Court of Arbitration for Sport

BY JUAN DE DIOS CRESPO PÉREZ AND PAOLO TORCHETTI[1]

Introduction

In 1983, the International Olympic Committee (IOC) ratified the Statutes of the Court of Arbitration for Sport (CAS) with came into force as from 30 June 1984. In its first year of operation, 1984, two procedures were initiated.[2] Since then, the CAS has developed into what is colloquially known as the "supreme court of sport" which is evident in the figures that 599 procedures across all sports were opened in 2016.[3]

As the CAS case load has grown, so too has the complexity of the legal landscape underpinning the open system of the international sport world pyramid. One of the more vital issues that the CAS has had to deal with, during this period of growth, is that of institutional independence from some of the larger international sports federations (IFs) that have supported the centrality of the CAS in the sports law world, such as the IOC and the Fédération Internationale de Football Association (FIFA). In this regard, scholars, academics and practitioners have criticised the CAS for its lack of independence from an institutional perspective. The issue of independence has again reared its head as the Pechstein series of cases have raised some of the same arguments that have been articulated over the course of the past 30 years or so.

As a result, the authors of this article will address the issue of transparency as a tool for the CAS to pursue increased perceived institutional independence. The authors put forth the thesis that the CAS legal foundation and its place in the international sport world pyramid require absolute transparency in CAS appeal proceedings. The CAS hears appeals of decisions of IFs. According to Swiss civil and taxation law, IFs carry out public interest work that is akin to governmental pursuits which engage issues of public policy. As the CAS hears disputes within this legal framework, transparency of the CAS is necessary in order to instill public confidence in this quasi-judicial system similar to state courts. As an aside, it will be noted that the CAS system of arbitration is on a voluntary basis, where stakeholders must agree to submit to CAS jurisdiction and that reform may be a matter of self-preservation. It is for these reasons that increased CAS transparency is necessary, particularly when the CAS is reviewing the decisions of IFs. The CAS will only benefit from the perception that it is an independent institution fostering greater public confidence.[4]

It is from this perspective that the authors will propose certain amendments to the Code of Sports-related arbitration (the CAS Code) for the purpose of increasing transparency. These recommendations involve the composition of CAS arbitration panels and the disclosure of links to IFs; the publication of CAS awards; and the holding of certain types of hearings on a public basis.

Parenthetically, in order to demonstrate that transparency is necessary due to the legal nature of IFs, it is necessary to point out that the legitimacy of public institutions is contingent on the perception that such an institution is acting in accordance with sound fundamental legal principles. An increase in transparency will only increase the trust in a public institution for obvious

1 Of Ruiz-Huerta & Crespo, sports lawyers, Valencia, Spain. The authors may be contacted by e-mail at jddcrespo@ruizcrespo.com and ptorchetti@ruizcrespo.com.

2 Court of Arbitration for Sport, *Statistics*, available at www.tas-cas.org/fileadmin/user_upload/CAS_statistics_2016_.pdf (accessed 4 December 2017).

3 *Ibid.*

4 Much of the criticism relating to the independence of the CAS and its lack of transparency has focused on its potential institutional links with IFs, sources of funding and the composition of the International Council of Arbitration for Sport (the ICAS), the body charged with the administration of the CAS. Although some of those macro-institutional issues relate to the greater issue of independence as it manifests itself through transparency, the work of the ICAS is not the focus of this article but will be referred to tangentially. The focus of this article is to look at the legal foundations of IFs and how CAS arbitrations proceedings can increase transparency via changes to the details of the rules of the CAS Code.

reasons. The need for transparency in the CAS lies in its place as the gate-keeper of decisions of the IF. It is beyond the scope of this article to develop in detail the idea that public perception, trust and transparency are linked. This connection appears obvious; however it is necessary to point this out in this limited manner.

Ultimately, the key point to retain is that IFs pursue a public interest function; the CAS is the gatekeeper of the decisions of those organizations; and as the rights guaranteed to the parties to an arbitration proceeding must be protected akin to a state court, it follows that similar processes must be implemented in the CAS Code.

The place of CAS in the international sports pyramid

A larger proportion of the CAS work involves the review of decisions of IFs. In these types of cases, the IF is often a respondent in the CAS appeal proceeding. The involvement of an IF in a CAS proceeding necessarily raises public policy issues, as the overarching purpose and intent of IFs are to support and promote the development and administration of a particular sport.[5]

For a variety of tax and privacy law reasons, many IFs have chosen to establish their seat of operations in Switzerland as an "*association*." There is an inherent public policy aspect to these types of "*associations*" due to their legal foundation and the objectives they pursue. Art. 60 of the Swiss Civil Code (SCC) identifies associations as entities with "*political, religious, scientific, cultural, charitable, social or other non-commercial purpose*".[6] This implies that associations are quasi-charitable in nature. Swiss associations are also limited, in that the Swiss Federal Tribunal (SFT) has determined that associations can pursue any purpose that is not contrary to law or morality.[7] This is the fundamental legal form of most IFs established in Switzerland.

Relevant to this discussion is that IFs also receive special taxation status. The IOC received a Swiss federal tax exemption in 2000 by mutual agreement. This tax exemption now applies to all IFs as of 2008 via the Host State Act (HSA). The HSA requires that IFs ensure that "*its purposes are not for profit and are of international utility*"[8] and that it "*carries out activities in the sphere of international relations*".[9] This is an inherent characteristic of an association performing a public purpose which is also recognized by the Swiss Federal Act on the Promotion of Sport and Exercise (SFAPSE), which was enacted "[i]*n the interest of the physical fitness and health of the population, holistic education and social cohesion*".[10] These two Swiss pieces of Federal Law are examples of how associations, and more specifically IFs, carry out public interest work.

It must also be noted that many IFs established as associations under Swiss law receive "charitable organization" taxation status. Generally speaking, charitable organizations must have a real activity in the pursuit of public service and/or pursue public utility goals.[11] Goals of "public service" are identified as activities that are linked with works that are usually performed by the state. Goals of "public utility" should objectively be in the public interest or must be subjectively selfless. Associations operating as charitable organizations in Swiss law must pursue these public purposes, in order to receive preferential taxation status. This Federal Swiss tax exemption for IFs implies that the Swiss taxation system is subsidizing the purposes and works of IFs as the Swiss public purse is foregoing incoming revenue for the sake of IFs pursuing what is viewed to be positive public work.[12] It is these features of IFs established in Switzerland pursuant to Swiss law that demonstrate that such organizations carry out work in the public interest.

Finally, a distinction must be drawn between the CAS ordinary and appeal procedures. The CAS Code allows for disputes "*relating to sport or matters of pecuniary or other interests relating to the practice or the development of sport and may include, more generally, any activity or matter related or connected to sport*". In this sense, ordinary arbitration procedures usually involve contractual disputes of a pecuniary nature between private parties, such as sporting clubs, athletes and agents where the contract includes a valid arbitration clause. The SFT has drawn the same distinction:[13]

"To that extent, the dispute submitted to the CAS with regard to the international contract involved had all the

5 For the sake of parsimony, we will consider IFs within the international context; however, these principles equally apply to national associations.

6 SCC art. 60(1).

7 ATF 97 II 333, JdT 1972 I 1648.

8 HSA art. 6(b).

9 HSA art. 6(c).

10 SFAPSE art. 1(1).

11 See Luc Hafner and Adrien Tharin, *Law and Practice of Charitable Giving in Switzerland*, available at www.altenburger.ch/uploads/tx_altenburgerteam/AT_2012_Law_and_Practice_of_Charitable_Giving_in_Switzerland.pdf (accessed 4 December 2017).

12 The taxation of IFs as associations is a complex area. Generally speaking, associations are allowed to pursue for profit activities and do not receive tax exemptions on income earned from "*for profit*" activities where the exemption is applicable to the work of an association that is attributable to the charitable activity. What is defined as "*for profit*" is a disputed area of the law (i.e. income generated by FIFA from the World Cup and disbursements to national associations for the purposes of development). Funds must be allocated exclusively to the pursuit of the public service or public utility goals to be eligible for this exemption on that income. If other goals pursued in parallel, partial exemption may be granted. For the purposes of this piece it is important to note that this special status afforded to IFs demonstrates that they carry out work that is for the public interest. Again, for a comprehensive view see Luc Hafner and Adrien Tharin, L*aw and Practice of Charitable Giving in Switzerland*, available at www.altenburger.ch/uploads/tx_altenburgerteam/AT_2012_Law_and_Practice_of_Charitable_Giving_in_Switzerland.pdf (accessed 4 December 2017).

13 ATF 4A_506/2007 at 3.2; see ATF 133 III 235 at 4.3.2.2.

characteristics of an ordinary commercial arbitration, except for the sport framework involved. The dispute opposed two parties on equal footing, which sought to have it adjudicated in arbitration and were fully aware of the financial issues involved; from that point of view, their situation was quite different from that of the simple professional sportsman opposed to a powerful international federation."

Although increased transparency in all types of CAS cases may be a desired result, these types of arbitrations do not raise the same public policy concerns as cases involving IFs that seek to regulate a sport, particularly those involving issues that relate to athlete's rights. For this reason, the authors distinguish the necessity of full transparency between the two different types of cases.

FIFA as a public institution

In addition to these features of Swiss law, particular IF rules must be looked at in identifying this public purpose. Specifically, the CAS has recognized that IFs retain "*the right of a Swiss association to regulate and determine its own affairs is considered essential for the association*".[14]

FIFA is no different, as it is established under art. 60 of the SCC.[15] Therefore, FIFA is subject to the same regime described above. Moreover, the FIFA Statutes particularly recognize, as its purpose, goals in the public interest that usually governmental organizations are devoted to pursuing, including:

- to promote football globally in "*light of its unifying, educational, cultural and humanitarian values, particularly through youth and development programmes*"[16];
- to promote integrity, ethics and fair play with a view to preventing corruption, doping or match manipulation that may jeopardize integrity[17];
- the promotion of human rights[18] and the elimination of discrimination and gender inequality[19]; and
- the promotion of friendly relations in society for humanitarian objectives.[20]

Not only do these stated objectives pursue the public interest, but FIFA, in its Financial Report 2016, specifically recognizes that it is a "*non-profit organisation*".[21] There are particular accounting and taxation rules that apply to different income streams as they are allocated to different purposes carried out by FIFA. For the purposes of this article, it is important to note FIFA's status as a charitable association.

This legal regime with respect to FIFA, and as applicable to similarly-established IFs, supports the view that such organizations are the "*world governing body*" of their respective sports. Such a perspective, in carrying out a public function, requires that CAS arbitrations involving the review of their decisions requires increased transparency as these are not private decisions involving private actors but quasi-governmental bodies.

CAS arbitration is voluntary

The incidence that CAS arbitration requires the acquiescence of stakeholders is not only an additional reason to increase its transparency, but also a challenge to this pursuit, which will be discussed in the conclusion. Simply put, the CAS is a private arbitration body established pursuant to the Swiss Federal Code on Private International Law (PILA). At the heart of the system is the principle of voluntariness, where disputes can only be heard where the parties have expressly agreed to submit to its jurisdiction via a valid arbitration agreement "*if it complies with the requirements of the law chosen by the parties or the law governing the object of the dispute*".[22] This principle is directly reflected in the CAS Code itself, as both ordinary and appeal procedures must be referred to the CAS through an arbitration clause in the subject contract or the relevant sports' association regulations, respectively.[23]

A good example demonstrating the necessity of an overt acceptance of CAS jurisdiction is within the licensing system for club competition in European football. The UEFA Financial Fair Play regulations delegate the licensing function to national football associations, or, in certain situations, to the leagues. The decisions of national licensing organizations can only be appealed to the CAS if those national regulations explicitly confer appeal jurisdiction over such decisions to the CAS. The CAS has ruled that licensing regulations of the Real Federación Española de Fútbol (RFEF) and the Federazione Italiana Giuoco Calcio (FIGC) do not allow for the appeals of FFP licensing decisions of the Second Instance Licensing Committee of Spain[24] and of the Alta Corte di Giustizia Sportiva in Italy[25], respectively. Those decisions reject the notion that a general recognition of the CAS in FIGC and RFEF statutes is sufficient to confer jurisdiction, where the specific licensing regulations do not allow for this appeal route. Conversely, the CAS has consistently ruled that decisions of the Romanian

14 CAS 2014/A/3828 *Indian Hockey Federation (IHF) v. International Hockey Federation (FIH) & Hockey India.*

15 FIFA Statutes, art. 1(1).

16 FIFA Statutes, art. 2(a).

17 FIFA Statutes, art. 2(g).

18 FIFA Statutes, art. 3.

19 FIFA Statutes, art. 4.

20 FIFA Statutes, art. 5.

21 FIFA *Financial Report 2016,* 67th FIFA Congress in Bahrain, 11 May 2017, p. 50.

22 PILA, art. 178(2).

23 The CAS Code, art. R27(1).

24 CAS 2013/A/3199 *Rayo Vallecano de Madrid SAD v. RFEF.*

25 CAS 2014/A/3629 *Parma FC v. FIGC & Torino FC.*

licensing authority can be appealed to the CAS, because the appeal clause in those regulations specifically allow and recognize the CAS as the appeal court of those decisions.[26]

Although the issue of voluntariness is a complex one, particularly for athletes, as the Pechstein series of decisions examine issues of duress and pressure, in the end the entire sports arbitration system and its submission to the CAS relies on the acceptance of the system from all stakeholders. If large portions of the legal sporting community are calling for reforms to the CAS Code increasing transparency, perhaps it would be in the best interests of CAS, from a self-preservation perspective, for the ICAS to take concrete action on these issues.

Conclusion: recommended amendments to the CAS Code to increase transparency

The need for transparency in CAS proceedings, particularly in appeal proceedings involving the review of decisions of IFs, is clear. Transparency, however, exists on a continuum. Naturally state courts the world over publicize their judgments; open the court files and evidence to the public via the public registry system; and their hearings are open to the public. As the IFs pursue a public interest function, the CAS is the gatekeeper of the decisions of those organizations and the rights guaranteed to the parties to an arbitration proceeding must be protected akin to a state court, it follows that similar processes must be implemented in the CAS Code. Two amendments to the CAS Code would increase transparency immediately:

- disclosure of arbitrators' links to IFs; and
- the publicity of CAS court files and publication of CAS awards.

Pursuant to the CAS Code, where a panel of three arbitrators will hear the case, each party has the opportunity to appoint one arbitrator and the CAS will appoint the president. Where the case will be heard by one arbitrator, if the parties do not agree, the sole arbitrator will be appointed by the CAS. The members of the open list of CAS arbitrators are appointed by the ICAS.27 No less than twelve members of the ICAS are composed of persons appointed by IFs28 and of the twenty ICAS members only four positions are "with a view to safeguarding the interests of the athletes".29

The deck of cards is heavily stacked in favour of the open list of arbitrators to represent the IF perspective. Whether this affects the impartiality of an individual arbitrator on any particular case is irrelevant. The rules regarding the composition of the open list leave it open for members of the sporting legal community to deduce that it is possible that the interests of the IFs are well represented on any particular panel.

Moreover, the CAS Code and how it is applied in practice on a day to day basis does not adequately address this issue. In all cases "[e]*very arbitrator shall be and remain impartial and independent of the parties and shall immediately disclose any circumstances which may affect her/his independence with respect to any of the parties*".[30] Although "[a]*n arbitrator may be challenged if the circumstances give rise to legitimate doubts over her/his independence or over her/his impartiality*",[31] it is difficult to carry out a challenge due to the lack of knowledge available to the legal community regarding the potential links of arbitrators to IFs. Many arbitrators have been supported in their appointment as an arbitrator by either their national associations or an IF. Some arbitrators are even retained by an IF or a national association, at the same time that they sit as an arbitrator. Understandably, these engagements are a matter of solicitor-client privilege; however, the possibility that an arbitrator has links to an IF again allows the public to question whether or not the arbitrator will have a pro-IF view.

The SFT has stated that the rights guaranteed to parties to an arbitration proceeding must be protected akin to a state court. More specifically, it has been expressed that "[l]*ike a State court, an Arbitral Tribunal must present sufficient guarantees of independence and impartiality*"[32] and that "[t]*o decide whether or not an Arbitral Tribunal presents such guaranties, one should refer to the constitutional principles developed with regard to State courts*".[33] The SFT has also mentioned that a closed list of arbitrators does "*not justify as such to apply less demanding standards to sport arbitration than in commercial arbitration*".[34]

What is of utmost importance in this line of jurisprudence is that the SFT has specifically noted that it is not the actual independence that is questionable but the appearance of impropriety. There is an objective element to this notion where "*it is enough for the circumstances to give the appearance of prevention and that they may suggest partiality of the magistrate*";[35] however, the mere "*individual impression*" of one party to the proceeding is not conclusive.[36] Independence can be raised on a subjective basis as well where "[a] *suspicion is legitimate even if it is based only on appearances, provided they arise from circumstances examined*

26 CAS 2013/A/3194 S.C. F.C. *Universitatea Cluj S.A. v. RFF & RPFL.*

27 The CAS Code S(3).

28 The CAS Code S(4)(a) to (c).

29 The CAS Code S(4)(d).

30 The CAS Code R33(1).

31 The CAS Code R34(1).

32 ATF 4A_506/2007 at 3.1.1; ATF 125 I 389 at 4a; 119 II 271 at 3b.

33 ATF 4A_506/2007 at 3.1.1; ATF 125 I 389 at 4a; 118 II 359 at 3c, p. 361.

34 ATF 4A_506/2007 at 3.1.1.

35 ATF 4A_506/2007 at 3.1.1.

36 ATF 128 V 82 at 2a, p. 84.

objectively".[37] In practice, the IBA Guidelines on Conflicts of Interest in International Arbitration may be used.

The practical problem, however, is that if an arbitrator has substantial links to an IF, he or she is not required to disclose them. Working for a federation in and of itself in an athlete's rights' case may pose a perception problem, whether or not the case involves that particular IF as it is the perception that undermines public trust in quasi-judicial institutions. The current system and lack of knowledge of which arbitrators are retained by which IF does not adequately address this issue.

As a result, the authors of this article recommend that, to increase public trust in the CAS via increased transparency, one of the two following proposals ought to be adopted:

- all arbitrators are prohibited from acting within or for any IF or national association at any level during their tenure as an arbitrator; or
- all arbitrators must disclose all links and retainer agreements to all IFs or associations and this must be a matter of public record.

Both of these solutions pursue the necessity of transparency; however, with some challenges. The first solution in the legal sport community may be difficult to achieve given the interconnectedness of the community. The second may violate solicitor-client privilege. Moreover, to have arbitrators exclusively work for the CAS may increase the cost of arbitration due to the necessity of having full time arbitrators with only one engagement at a time. If the CAS open list of arbitrators is to resemble a state court then the ICAS has some difficult choices to make.

Secondly, for the CAS to pursue transparency, the ICAS ought to consider the publicity of CAS court files and the publication of all CAS awards. Currently, there is no system in place for a member of the public to access the content of court files, such as the briefs filed with the CAS and the evidence relied upon. With respect to the publication of CAS awards, appeal decisions shall be released to the public "*unless both parties agree that they should remain confidential*".[38]

The justification for these amendments relies on the same reasoning that is applied above in relation to transparency regarding the process of appointment and impartiality of arbitrators. As the IFs pursue a public interest function, the CAS is the gatekeeper of the decisions of those organizations and the rights guaranteed to the parties to an arbitration proceeding must be protected akin to a state court, it follows that similar processes must be implemented in the CAS Code.

The implementation of these publicity proposals presents two specific challenges within the context of the CAS. Firstly, the CAS is a system of private arbitration. Cases involving pecuniary claims without the involvement of IFs do not present the same public interest issues as appeal procedures reviewing the decisions of IFs. Perhaps it follows that ordinary arbitration procedures involving such claims are not required to be publicized on the basis of transparency. The publication of all ordinary procedure awards, however, could be justified on the basis that the full body of jurisprudence could be available to all practitioners. This could lead to the by-product of ameliorating the overall quality of the legal work before the CAS. In addition, this would reduce the advantage that some practitioners enjoy with increased access to unpublished decisions, particularly where a lawyer practising before the CAS works at the same law firm that retains a CAS arbitrator.

The second challenge is that the CAS system of arbitration is completely voluntary, as explained at the outset. The publication of awards and the disclosure of all court files would require the consent of all stakeholders and require major modifications to not only the CAS Code but perhaps to the procedural regulations of the IFs. For a true change, all IFs and national associations would have to agree to this concept.

Despite these challenges, the authors of this article contend that the pursuit of absolute transparency in CAS appeal proceedings is necessary. The public interest functions pursued by IFs, where the CAS is the gatekeeper of the decisions of those organizations, from a policy perspective ought to supersede any competing interests. It is possible that such changes would require a paradigm shift in mentality on behalf of IFs to accept such a system. Considering that IFs are the "world governing body" of their respective sports and pursue the public interest, the authors of this article are hopeful that they would be magnanimous in their approach and agree to complete transparency in CAS proceedings.

37 ATF 129 III 445 at 3.3.3 p. 454; 128 V 82 at 2a, p. 83.

38 The CAS Code R59(6).