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Editorial

With great pleasure we welcome readers to the September 2016 edition (citation: GSLTR 2016/3) of our ground-breaking journal and on-line database (www.gsltr.com): **Global Sports Law and Taxation Reports (GSLTR)**.

The run-up to the Summer Olympic Games, with more than 10,000 athletes competing in 28 sports from 207 countries, held from 5 to 21 August 2016 in Rio de Janeiro, Brazil, the first time ever in South America, apart from the usual concerns about the readiness of the venues and infrastructure, escalating costs and security, has been dominated by the state-sponsored doping of Russian athletes as detailed in the McLaren Report into the scandal commissioned by the World Anti-Doping Agency (WADA).

As a result of the findings of this Report, WADA called for a blanket ban to be imposed on the entire Russian Olympic Team. However, on 24 July 2016, the Executive Board of the International Olympic Committee (IOC), in the interests of justice for individual athletes, directed that the international federations (IFs) of each individual sport should decide who was clean and, therefore, able to compete, and who was ineligible, according to strict criteria laid down by the IOC, who reserved the right to review such decisions. Many commentators were of the view that the IOC, in deciding to handle the scandal in this way, was abdicating its responsibilities and bowing to political pressure from Russia. However, in the opinion of *GSLTR*, the IOC decision was a fair one, respecting the rules of natural justice and, in particular, the right of an individual to be heard and put their case, and also in line with the well-known legal principle that "it is better that a guilty person goes free and escapes justice rather than an innocent one is wrongfully found guilty and penalised".

In following the process laid down by the IOC, the CAS Ad Hoc Division (AHD) in Rio played an important role in dealing with appeals from athletes banned from competing by their IFs. In fact, 16 out of the 28 cases registered with the CAS AHD during the Rio Olympics related to such appeals. Certain IFs actually imposed blanket bans, on the basis of "collective responsibility", including the IAAF (track and field) and the IWF (weightlifting). In the event, 271 Russian athletes (70% of the original Russian Olympic Team) were allowed to compete. The whole affair was exacerbated by a spat between the IOC and WADA, the former blaming the latter for the mess and calling upon WADA to tighten up their doping controls and procedures! It will be interesting to see what changes are made by WADA to avoid doping scandals like the present one in the future!

Whilst on the subject of the 2016 Rio Summer Olympic Games, the IOC has approved five new sports to be included in the programme for the Games to be held in Tokyo in 2020. They will add 18 events to the existing programme of 28 events and will involve an additional 474 athletes and are: skateboarding; karate (surprisingly not already an Olympic sport); surfing; sports climbing; and baseball/softball, which was included in the 2008 Beijing Games. Adding these sports, although designed to attract the youth to the Olympics, seems to be a dumbing down of the Games and will add to the costs of staging them, which does not seem to be in line with the general philosophy of the IOC Olympic Agenda 2020 – a so-called "strategic roadmap for the future of the Olympic Movement" – of reducing costs.

Another item of IOC news. On the eve of the Rio Olympics, the IOC elected eight new members, including the first India IOC member, Nita Ambani. She is the owner of the Mumbai Indians' IPL Franchise and the wife of India's richest man, Mukesh Ambani, the chairman of Reliance Industries. It is interesting to note that the new IOC members did not include the new presidents of the IAAF, Sebastian Coe, and FIFA, Gianni Infantino. Normally, the IAAF and FIFA presidents are members of the IOC, as they represent major international sports federations which are part of the Olympic Movement. It would appear that the IOC, by not appointing them, wished to distance themselves from the doping and corruption scandals in the IAAF and FIFA respectively!

Following the close of the Rio Olympics on 21 August 2016, the IOC launched its "Olympic Channel" where sports fans "*can experience the Olympic Movement all year round*". For more information on programming and available platforms, access to which is free, log onto www.olympicchannelservices.com.

Also, on 7 August 2016, the President of the IPC (International Paralympic Committee) surprisingly announced that the whole of the Russian Paralympic Team had been banned from participating in the Rio Paralympic Games in September, saying that "*the anti-doping system in Russia is broken, corrupted and entirely compromised*" and that the country had prioritised "*medals over morals*". The Russian Paralympic Committee (RPC) appealed the decision to the Court of Arbitration for Sport (CAS), which held an expedited hearing in Rio and rendered its decision on 23 August 2016, upholding the blanket ban, stating that it was not disproportionate. The CAS, however, issued the following rider to its decision:

> *"In making its decision, the CAS Panel did consider the particular status of the RPC as a national governing body but did not determine the existence of, or the extent of, any natural justice rights or personality rights afforded to individual athletes following the suspension of the RPC."*

This seems, in effect, to bring the CAS decision in respect of the Russian Paralympic Team in line with the IOC decision on the Russian Olympic Team (see above). The RPC is expected to appeal the CAS decision to the Swiss Federal Supreme Court.

Another matter that should also be reported is the clearing of the FIFA President, Gianni Infantino, by the Investigatory Chamber of the FIFA Ethics Committee of any wrongdoing in relation to his expenses, recruitment and alleged sacking of whistle blowers. According to a leaked FIFA internal memo, Infantino was being investigated in relation to the following matters:

– that he left himself exposed to possible claims of conflict of interest by using private jets laid on by a World Cup bidding country;
– filled senior posts without checking the eligibility of candidates for the roles concerned;

– billed FIFA for mattresses, flowers, a tuxedo, an exercise machine and personal laundry; and
– demanded FIFA to hire an external driver, who then billed FIFA for driving Infantino's family and advisers around whilst he was abroad.

The Ethics Committee found that there had not been any conflicts of interest; nor breaches of FIFA's Ethics Code; and that the benefits enjoyed by Infantino were "*not considered improper*". The Committee also held that Infantino's "*conduct with regard to his contract with FIFA, if at all, constituted internal compliance issues rather than an ethical matter*". According to the *Oxford Dictionary*, ethics is a matter of "*right and wrong in human conduct*". So, what is the difference between "*internal compliance*" and ethics in the present context? This decision of the FIFA Ethics Committee seems to be a "white wash" of Infantino's case!

Therefore, one may reasonably ask: has anything changed at FIFA with the election of its new President, who vowed to clean up FIFA? Or, in the immortal words of the late lamented Yogi Berra, the American professional major league baseball catcher, manager and coach with the New York Yankees, who was also well known for his "yogi-isms", is it a case of "*déjà vu all over again*"?

Corruption in FIFA is also the subject of a timely article by Thilo Pachmann and Oliver Schreier, of Pachmann Attorneys, Zurich, Switzerland, entitled "The FIFA Ethics Committee as an institution for good governance" in which they reach the following conclusions:

> *"For the FIFA Ethics Committee to work properly, it must have the unconditional support of the FIFA Council and must be encouraged to investigate and take immediate action, if wrongdoings are discovered. This consequently means that the Ethics Committee, which is in charge of investigations, remains absolutely and unequivocally independent.*
>
> *Given the recent events revolving around the new President of FIFA, Gianni Infantino, it is yet unclear if this is truly the case or if FIFA will proceed to further dismantle and discourage the Ethics Committee. It would be a shame if Infantino would fall into the temptation of power. Properly working checks and balances within an organization remains the basis for any good governance. The Ethics Committee was – as it has proved to be – a very valuable instrument for the FIFA governance, and needs to be upheld."*

And, whilst on the subject of FIFA, it has been announced that the FIFA mass bribery trial is scheduled to begin in the USA in October or November 2017. The trial involves 42 individuals, including seven former football officials and an ex-marketing executive, and US$ 200 million in bribes and kickbacks! Sepp Blatter, the former FIFA President, who is also involved in current proceedings in Switzerland relating to the infamous payment of CHF 2 million that he made in 2011, whilst FIFA President, to Michel Platini, the former President of UEFA, has also announced that he is available to attend the US trial "*to defend FIFA*"! It has also been announced that the former and controversial President of FIFA, João Havelange, has died at the age of 100 on 16 August 2016!

One further news item on football. The UK media regulator, Ofcom, announced on 8 August 2016 that it was dropping its two-year investigation into whether the sale of English Premier League TV rights restricted competition in a business/economic sense. This investigation had been prompted by a complaint by Virgin Media that all 380 English Premiership games should be shown on live TV, arguing that this would limit price increases for the benefit of consumers. The basis of this argument was that, by limiting the number of matches, the League had inflated the price that broadcasters had to pay and this cost was passed on to consumers.

It will be recalled that the live domestic rights to the League for the three seasons 2016-2019 were sold for a record sum of £ 5.136 billion.

Ofcom stated that the League's intention to increase the number of its live matches from 168 to 190 beginning with the 2019-2020 season and its own research into the views of match-going and TV-watching fans justified its decision to drop the investigation.

For more information on this matter, please refer to the report of 9 August 2016 on the *GSLTR* website (http://www.gsltr.com).

A final item on football: the twenty-three year-old France midfielder, Paul Pogba re-signed for Manchester United during the summer "transfer window" for a world-record sum of £ 93.25 million! He left Manchester United in 2012 for Juventus for a fee of £ 1.5 million!

In this issue, we feature an interesting article entitled "The right of publicity: recent developments in collegiate athletics in the USA" by Prof. Paul Anderson of the National Sports Law Institute of Marquette University Law School in the United States. Although US collegiate athletics is big business, the amateur status of student athletes generally prevents them from claiming compensation for the unauthorized use of their image rights.

We also include an article by Vassil Dimitrov, a Bulgarian sports lawyer, on the controversial rules which ban third party ownership of football players' economic rights (TPOs). In his article Dimitrov discusses the pros and cons of TPO and points out that proponents of TPOs consider that they should be regulated by FIFA rather than being banned by football governing bodies worldwide.

Genevieve Gordon of Tactic Counsel Ltd contributes an article on the duty of care in sport, in which she calls for a higher standard of care to be exercised by sports governing bodies in relation to their athletes.

We also publish an article by Prof. Dr. Ian Blackshaw on the protection and exploitation of sports broadcasting rights in the UK. As he points out in the introduction to his article:

> *"Of the sports marketing mix, which includes sports sponsorship, merchandising, endorsement of products and services, and corporate hospitality, perhaps the most important and lucrative one is the sale and exploitation around the world of sports broadcasting rights, including new media rights, such as internet streaming of sports events, all of which contribute mega sums to many sports and sports events, including the Summer and Winter Olympic Games and the FIFA World Cup. Indeed, it is fair to say that, without the sums generated by sports broadcasting, such major events – and, in fact, many*

others – could not take place and consequently sport – and sports fans – would be the losers."

The issue of legal ownership and who may exploit these rights under UK law is quite complex, and Prof. Blackshaw explains in his article why this is so and how these matters may be managed, in practice, by the use of "back-to-back" and inter-related contracts, which, he points out, need to be very carefully drafted indeed.

Also in this issue, on the sports legal side, we feature an article on sports sponsorship agreements in Switzerland by Swiss lawyer Pierre Turrettini. Sports sponsorship is a very significant part of the sports marketing mix, as he mentions at the beginning of his article:

"After TV rights, sponsorship is nowadays the main source of revenues in the sports industry. According to reviews and forecasts, there will be nearly a 5% growth in sponsorship spending worldwide from US$ 57.5 billion in 2015 to US$ 60.2 billion in 2016."

And he goes on to say:

"Because sports are so popular, sponsoring companies tend to spend very generously on sponsorship in order to build their brand's value around the success of an athlete, a team, a sports organization or a competition. Bad publicity can, therefore, not be tolerated, which is why sponsoring companies should be very cautious when drafting a sponsorship agreement."

Football transfers are frequently in the sporting news, including the recent record resigning of Paul Pogba (mentioned above), and we publish an article by Jonathan Copping of the London law firm of Bolt Burdon on the FIFPro challenge to the FIFA Regulations on the Status and Transfer of Players.

We also include an article on ADR and sport in India by Param Bhalerao of Gujurat National Law University in which he describes some recent developments.

On the sports tax side, we feature by Dr. Alara Esfun Yazıcıoğlu of Price Waterhouse Coopers, Istanbul, Turkey, on the Draft Guide on the Taxation of Professional Sports Clubs and Players recently issued by the South African Revenue Service. Her verdict on the Draft Guide:

"[...] *the Draft Guide can be seen as a very promising starting point, upon which an effective fight against the current lack of clarity may be built. South Africa seems to be, once more, the pioneer of a significant development in the sports' field that has the potential of revolutionising the tax treatment of international sports events."*

We also include an article on "The Major Sporting Events (Income Tax Exemption) Regulations 2016" by Jonathan Hawkes, Taxation Consultant, Brackman Chopra LLP, audit tax and business advisory firm, London.

Finally, we publish an article by Xavier Oberson, a Swiss lawyer and also Professor of Swiss and International Tax Law at Geneva University in which he describes a new practice, in the canton of Vaud, of taxing at source artists, athletes and speakers performing in Switzerland. As he points out in his concluding remarks:

"It remains to be seen to what extent other cantonal administrations in Switzerland will follow this new practice of the canton of Vaud."

As always, we would welcome and value our readers' own 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 responded to our invitation and added value to this useful resource, and we hope that many others will do the same, for, as they say, "the more, the merrier"!

So, now read on and enjoy the September 2016 edition of GSLTR!

Dr. Rijkele Betten (*Managing Editor*)
Prof. Dr. Ian S. Blackshaw (*Consulting Editor*)

September 2016

The FIFA Ethics Committee as an institution for good governance

by Dr. Thilo Pachmann & Oliver Schreier[1]

Introduction

In the last few years, the Fédération Internationale de Football Association (FIFA) has been linked to negative headlines revolving around the corruption scandal of their top managers and scandals involving the voting for the 2022 World Cup, TV rights and World Cup tickets.

Within FIFA, the Independent Ethics Committee is entrusted with handling any cases in conjunction with the FIFA Code of Ethics (CoE) or any other FIFA rules and regulations.[2] During the summer of 2016, just before the opening ceremony of the Rio Summer Olympics, the eyes of the football world were, once again, pointed at the Ethics Committee of FIFA. Following the bold and surprising decision on 8 October 2015 to provisionally ban the acting FIFA President, Joseph S. Blatter, the UEFA President Michel Platini and the FIFA Secretary General Jérôme Valcke, the Ethics Committee had to decide on the fate of the acting president of FIFA, Gianni Infantino.

Infantino was elected into office on 26 February 2016 and was supposed to wash FIFA clean of any lingering mistrust in the association and its management. However, less than six months after having taken over the reins of FIFA, Infantino faced charges of infringements against the CoE. On 5 August 2016, the Ethics Committee, however, did not initiate proceedings against Infantino and considered it clear beforehand that he had not violated the CoE. The decision of the Committee may have exonerated the newly elected president of FIFA, but it stands in stark contrast to its past decisions against high level employees of FIFA and is highly criticized by several legal experts, including Mark Pieth[3], who openly stated to be appalled and sad about the recent decision.

It seems FIFA may have trouble learning from its mistakes in the past. What however is the role of the Ethics Committee of FIFA in this constellation? The Ethics Committee was originally established in 2006, following corruption allegations against referees. It was then restructured with the overwhelming approval at the FIFA Congress on 25 May 2012. Of the three judicial bodies of FIFA, the Ethics Committee has undergone the deepest reform to its composition and functioning.[4] The powers given to the Ethics Committee were impressive and not comparable to any other internal governance structure known under Swiss law. In the wake of the decision regarding Infantino and, taking into consideration the decisions of the reformed Ethics Committee of the last four years, it is time to give the FIFA Ethics Committee a report card.

The function of the FIFA Ethics Committee

Just as a reminder, FIFA is an association governed by Swiss law, specifically by arts. 60 et seq. of the Swiss Civil Code (SCC). The association is a corporate legal entity, which is often used for large international sports federations (e.g. the International Olympic Committee and UEFA)[5] and which grants a great deal of freedom regarding the organization of the association. Apart from the mandatory provisions of law, the association can set up their own articles of association, which serve as the main document governing the organization and the functioning of the association.[6] In the case of FIFA, these are the FIFA Statutes, the edition of April 2016. According to these, the independent Ethics Committee is composed by two chambers: the investigatory chamber and the adjudicatory chamber. The proceedings are governed by the FIFA CoE.[7]

To fully understand the legal mechanism of the Ethics Committee, the functioning of the two chambers will be briefly illustrated. The CoE provides that the investigatory chamber is in charge of preliminary and investigation proceedings. The chairman of the investigatory chamber of the Ethics Committee has the right, upon receipt of a complaint or at his own discretion and at any time, to decide to initiate preliminary investigations if there is a *prima facie* case of a breach of the CoE.[8] The investigatory chamber can, therefore, with full autonomy and without restriction, investigate potential breaches of the CoE committed by all officials and players, as well as players' agents.[9] Regarding the jurisdiction of the Ethics Committee, it must be noted that this encompasses all cases arising from the application of the CoE or any other FIFA rules and regulations and includes all persons bound by the CoE while performing their duties.[10] Even people who are not performing their duties can be investigated, if the conduct is likely to seriously damage the integrity, image or reputation of FIFA. FIFA officials therefore – in theory at least – accept being investigated by a voluntarily set up committee, even if there is no direct link between the behaviour which is being investigated and the actual work tasks.[11] This obviously goes way beyond what is legally expected from associations in the realm of corporate governance and serves to fulfil a preventive purpose.[12] Given the size and importance of FIFA, such a judicial structure is essential to enable a proper functioning of the association and a correct application of all the different regulations by stakeholders.

Once an investigation has been opened, the conduct of proceedings is taken over by the chief of the investigation,[13] who has a free use of resources while conducting her/his investigation.[14] At this stage, the investigatory chamber, furthermore, has the possibility to request the adjudicatory chamber to take provisional measures up to a maximum of 90 days, with the possibility to extend by 45 days, to either prevent interference with the establishment of the truth, or in cases in which a breach

of the CoE appears to have been committed.[15] Finally, the chief of the investigation produces a final report and informs the parties to the investigation of the conclusion which was reached. The final report may contain recommendations for the adjudicatory chamber regarding necessary measures. The investigatory chamber even has the possibility, under certain conditions, to reopen a case.[16]

Once the adjudicatory chamber receives the final report, it decides what steps to take next. It may:

1 return the report to the investigatory chamber for amendment or completion[17];
2 adjudicate the matter, in which case the party concerned is granted a right to be heard[18];
3 undertake further investigations, where the party concerned is also granted a right to be heard[19]'
4 close the case, if there is insufficient evidence to proceed[20].

If the case can be adjudicated, the chamber, following a hearing and deliberations, decides on the matter. In certain cases, the decision of the adjudicatory chamber may be appealed before the Appeal Committee. The decisions of the Appeal Committee can be subsequently appealed before the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland.[21]

The governance structure set up within FIFA is, therefore, one to be envied among associations, which do not usually implement such a comprehensive and complex judicial system. But how much bite does the Ethics Committee really have?

The Ethics Committee has teeth...

The fact that the Ethics Committee is firstly composed of two chambers and secondly can unilaterally decide to investigate cases within FIFA, are two essential reforms, which give the Ethics Committee the necessary teeth to investigate wrongdoings within the organisation and sanction the respective persons accordingly.

Other key reforms include the revision of the FIFA CoE, the revised definitions of bribery and corruption, which coincide with those of the OECD standards and the obligation to carry out integrity checks for key officials.[22]

Another important instrument of the Ethics Committee is the right to issue immediate provisional measures for a maximum period of 135 days and it has the right to pronounce sanctions provided by the FIFA Statutes themselves, the CoE and the FIFA Disciplinary Code. Testament to the self-proclaimed success of FIFA is the list of milestones achieved by the Ethics Committee from 2012 till 2016.[23] This list of accolades includes:

– the investigation proceedings and subsequent ban for life of Mohamed bin Hammam on 17 December 2012;
– the 63rd FIFA Congress in Mauritius in 2013, which led to the above mentioned reforms;
– various statements regarding the continuous investigation, adjudication and reporting of the bidding process for the 2018 and 2022 FIFA World Cups[24];
– the proceedings against Joseph Blatter and Michel Platini[25];
– the ban with immediate effect of Jérôme Valcke for 12 years; and
– the investigation and subsequent ban of Wolfgang Niersbach, former President of the German Football Association on 25 July 2016.

Interestingly, the Ethics Committee has proven to be more strict than the Court of Arbitration for Sport in the past, which generally reduced the sanctions of the Ethics Committee, even though it would also have the legal means to order harsher sanctions.[26]

The case of Blatter/Platini serves as an example of how the Ethics Committee can function to sanction even the President of the association and to cap his power. Even though this case has been thoroughly published in the media and heavily discussed among legal experts, it is worth summarizing the key points of the procedure. On 8 October 2015, Blatter and Platini were provisionally suspended for 90 days pending formal investigation proceedings regarding a payment of CHF 2 million from FIFA to Platini in February 2011. After concluding the investigation, the investigatory chamber filed its final report, which was sent to the adjudicatory chamber on 20 November 2015, which subsequently opened formal proceedings three days later. Blatter, as president of FIFA, had authorized the payment of CHF 2 million to Platini and the latter had received it. The payment did not have any legal basis in the written agreement, which was signed by both parties, so this was found to be an "offering and accepting of gifts and other benefits" pursuant to art. 20 par. 1 CoE. According to the adjudicatory chamber, both Blatter and Platini furthermore violated art. 19 par. 1, par. 2 and par. 3 CoE (Conflict of interest), art. 15 CoE (Loyalty) and art. 13 CoE (General rules of conduct). After having heard the parties on 17 and 18 December 2015, the adjudicatory chamber issued an eight-year ban for both Blatter and Platini and a fine of CHF 50,000 and 80,000 respectively. The ban was later reduced to six years by the Appeal Committee, which found there to be strong mitigating factors, which were not considered by the Ethics Committee. The decision was issued on 24 February 2016, just two days before the elections for the new FIFA President.

Platini, who had been the sure-fire successor of Blatter as President of FIFA and was hoping to execute his new office during the much anticipated 2016 EURO Cup in France, was hell-bent to clear his name. Due to the judgement issued by the Ethics Committee, this was not possible in time. The ban finally led to Gianni Infantino being elected as President of FIFA and, although Platini filed an appeal against the decision of the Appeal Committee before the CAS on 2 March 2016, the Panel of the Court of Arbitration confirmed the ban, but reduced the sanctions.[27] After the CAS decision, Platini resigned from UEFA and did not take part in an official function at the EURO 2016 in his home country, France. Blatter also challenged his six-year ban from football and had to appear before the CAS in Lausanne on 25 August 2016.[28] It will be interesting to see how the CAS decides, given the precedent set by Platini.

This case should illustrate the judicial power and the oversight which the judicial bodies, especially the Ethics Committee, can have within FIFA. The Committee can thus help clean the reputation of FIFA, which has been tainted in the last few years. Sadly, even the Ethics Committee suffers from flaws.

…which are being pulled one by one or have yet to appear

The Ethics Committee has a vast range of sanctions, with which to influence, correct or sanction the behaviour of FIFA officials.[29] At this point, it must be noted that the sanctions imposed by FIFA are not to be mistaken with the power exercised by

a public prosecutor or a national criminal court. The sanctions adopt a character which can be described as "punishment of one private person by another" based on the contractual or at least quasi-contractual acceptance of the FIFA Rules.[30] Unlike a national criminal proceeding, in which everybody is subject to a criminal investigation, a person within FIFA must be bound by the CoE on the day the infringement is committed to be investigated by the Ethics Committee.[31] This naturally limits the power to initiate investigations and procedures by the Ethics Committee.

A further issue, which has been brought forward in the CAS decision regarding Michel Platini, is that, even though the payment of CHF 2 million was issued in 2011, the Ethics Committee acted only after the Swiss prosecutor took action in 2015.[32] This clearly shows that even the strongest governance apparatus does not work if the will is lacking to investigate certain circumstances. Surely FIFA is now faced with added pressure to enforce their rules and regulations, especially their CoE, and to avoid the mistakes made in the past, but there must be a conviction and certain tenacity within the judicial bodies to investigate and sanction violations of the CoE. This is especially true in cases in which the investigation concerns a member of the FIFA Council.

Finally, the case which clearly illustrates the weaknesses of the FIFA Ethics Committee is that of Mohammed bin Hammam. Even though the Ethics Committee's milestones list various accounts regarding the Qatari construction magnate,[33] the story of Mohammed bin Hammam and FIFA is ultimately one of failure. The FIFA Ethics Committee issued a ban for life for Bin Hammam on 18 August 2011, which was confirmed by the Appeal Committee. Bin Hammam then appealed the decision before the CAS, which overturned the decision of the FIFA Appeal Committee. This, even though it specifically stated that is was more than likely that Bin Hammam was the source of the monies used for buying votes.[34] It may be true, that Bin Hammam later received his second life ban and resigned from all his positions in football, but the FIFA judicial bodies have yet to discover the actual facts surrounding the vote of the 2022 World Cup and the decision to hold the World Cup in Qatar still stands.[35] Despite the efforts of the Ethics Committee and other Committees within FIFA, it was not possible to shed light on the matter and Mohammed bin Hammam will ultimately enjoy the fact that the first World Cup will take place in Qatar, even if he was banned by FIFA.

The case of Gianni Infantino

Recent developments put into question the perceived independence and power of the Ethics Committee. The members of the Ethics Committee were elected by the member associations of FIFA, at the annual FIFA Congress. However, during the last FIFA Congress in Mexico on 13 May 2016, a resolution proposed by Infantino was passed, which allows the FIFA Council to dismiss members of the judicial bodies of FIFA and, therefore, also of the Ethics Committee. Domenico Scala[36] severely criticised this resolution, stating that a fundamental pillar of governance would be undermined if the members of the judicial bodies are dependent on the FIFA Council.[37] The Ethics Committee would have to think twice before commencing an investigation regarding a FIFA Council member if the Council would then have the power to dismiss the chief of investigation. Scala later resigned from his office as president of the FIFA Audit and Compliance Committee.

According to the former chairman of the FIFA Independent Governance Committee, Mark Pieth, the reason for the conflict between Scala and Infantino can be traced back to the new contract of Infantino, which fixed his salary at around CHF 2 million a year (while that of Blatter was twice as much). Art. 13 par. 4 CoE, however, clearly states that persons bound by the CoE may not abuse their position in any way, especially to take advantage of their position for private gains. The actions of Infantino could also be interpreted as an infraction of art. 19 par. 2 CoE, as Infantino did not avoid a conflict of interest in this matter.[38] Infantino has, through the amendment of the Statutes, proceeded to irrevocably weaken the position of the Ethics Committee. The fact that Infantino almost singlehandedly installed Ms. Fatma Samoura as FIFA Secretary General, further demonstrates the power that he wields within FIFA. Sadly, the Ethics Committee, which has achieved a considerable success, is being dismantled.

The actions of Infantino led to an investigation being initiated by the Ethics Committee. Infantino was facing various allegations, which included excessive charges of FIFA for personal expenses; his refusal to sign the contract specifying his employment relationship with FIFA; the use of aircraft paid by Russia and Qatar; and accepting flights with a private jet for a personal visit with Pope Francis in Rome. It is important to note that this last airplane was owned by a Russian oligarch and Gazprom-manager.[39] The upcoming FIFA World Cups will take place in Russia in 2018 and in Qatar in 2022 and FIFA has not yet decided on the FIFA contributions to the respective countries. This is certainly an indication of a conflict of interest worth investigating. The allegations against the FIFA President included the infraction of art. 13 (general rules of conduct); art. 15 (Loyalty); art. 19 (Conflicts of interest); and art. 20 (Offering and accepting gifts) of the FIFA CoE.

The Ethics Committee has, however, concluded the investigation and has completely exonerated the current FIFA President. It was concluded that the flights did not represent ethics violations and the benefits enjoyed were in no way improper.[40] Regarding the flights from Russia and Qatar, the Ethics Committee held that it is justified for important people like Putin and the Emir to set their time-tables and carry the costs of this inconvenience. The question remains, however, if the Ethics Committee truly investigated the matter as an independent entity, or if the first signs of dismantling are already visible.[41]

Conclusion

The reforms set in motion by the FIFA Independent Governance Committee and other actors, which strive to build up and secure the independence and proper functioning of the judicial bodies, has yielded an impressive success in the past. The FIFA Ethics Committee has proved that it has the tools to investigate and sanction severe violations of the FIFA Code of Ethics and is still engaged in doing so. Even though the introduction of such a powerful Ethics Committee was an experiment to improve the governance of FIFA, it proved to be essential for good governance within the association and especially important, considering the string of controversies surrounding FIFA.

For the FIFA Ethics Committee to work properly, it must have the unconditional support of the FIFA Council and must be encouraged to investigate and take immediate action, if wrongdoings are discovered. This consequently means that the

Ethics Committee, which is in charge of investigations, remains absolutely and unequivocally independent.

Given the recent events revolving around the new President of FIFA, Gianni Infantino, it is yet unclear if this is truly the case or if FIFA will proceed to further dismantle and discourage the Ethics Committee. It would be a shame if Infantino would fall into the temptation of power. Properly working checks and balances within an organization remains the basis for any good governance. The Ethics Committee was – as it has proved to be – a very valuable instrument for the FIFA governance, and needs to be upheld.

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

[2] Art. 27 par. 1 of the *FIFA Code of Ethics* (2002 edition).

[3] Professor Mark Pieth is a renowned professor of Criminal Law and Criminology at the University of Basel, Switzerland, and chaired the Independent Governance Committee, which was in charge of FIFA's governance reform process, which took place from 2011 to 2013. He also drew up a report regarding FIFA: "Governing FIFA, Concept Paper and Report", 19 September 2011, which sets up recommendations, several of which were implemented by FIFA. See FIFA, "The Reform Process – Chronology", available at www.fifa.com/governance/news/y=2016/m=1/news=the-reform-process-chronology-2756734.html (accessed on 15 August 2016).

[4] Art. 52 par. 1 FIFA Statutes (April 2016 edition). The other two Committees of the judicial body are the Disciplinary Committee and the Appeal Committee (art. 61 par. 1 FIFA CoE and art. 62 par. 3 FIFA CoE). See also 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. 102.

[5] See i.e. art. 1 of the UEFA Statutes (2014 edition).

[6] Art. 63 par. 1 and par. 2 SCC.

[7] Art. 54 par. 1 FIFA Statutes (April 2016 edition).

[8] Art. 61 par. 1 CoE and art. 62 par. 3 CoE. In this respect it is not even necessary that grounds for the initiation of investigation proceedings must be given and it is not possible to contest the decision to initiate proceedings (art. 61 par. 1 CoE and art. 62 par. 3 CoE). See further 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. 110 et seq.

[9] Art. 2 CoE. The CoE focuses on general conduct within association football that has little or no connection with action on the field of play (art. 1 CoE). Conduct with a connection with action on the field of play is mainly governed by the FIFA Disciplinary Code (art. 2 FIFA Disciplinary Code, 2011 Edition).

[10] Art. 27 par. 1 and par. 2 CoE. Art. 2 FIFA Statutes (April 2016 edition) states that the persons covered by the CoE are all officials and players as well as match and players' agents who are bound by the CoE on the day the infringement is committed.

[11] So even if the plane ride from Gianni Infantino to Rome with a private jet had allegedly taken place solely in a personal context and not while performing his duties, the Ethics Committee would still have had the authority to investigate that incident. The only condition is, that this action has to be likely to seriously damage the integrity, image or reputation of FIFA. In the wake of the multitude of negative headlines, this can certainly be viewed as a given.

[12] See further 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 et seq. According to Ongaro and Cavaliero, the scope of action of the judicial bodies of FIFA is immense and covers a number of different situations.

[13] The chief of the investigation can be the chairman of the investigatory chamber or any member of the chamber (art. 65 CoE).

[14] The primary means of investigation are written inquiries and written or oral questioning of parties and witnesses. However, any further investigative measure relevant to the case may be used and even third parties may be engaged to fulfil investigative duties. In case a person bound by the CoE fails to cooperate in establishing the facts, disciplinary measures can be imposed (art. 66 par. 1, par. 3 and par. 4 CoE).

[15] Art. 83 par. 1 and art. 85 par. 1 CoE. This was the case with Joseph Blatter and Michel Platini.

[16] The chamber may decide this unilaterally or as a result of a request (art. 82 par. 1 and par. 2 CoE).

[17] Art. 69 par. 3 CoE.

[18] The right to be heard includes the right to respond to the investigation report (art. 70 par. 2 CoE); the right of admission of further evidence, if presented in a substantiated motion (art. 70 par. 2 CoE); and the right of hearing the oral statements, whereby this requires a reasoned request (art. 74 par. 2 CoE).

[19] See preceding footnote.

[20] Art. 69 par. 2 CoE.

[21] Arts. 76-81 CoE.

[22] See FIFA, "The Reform Process – Chronology", available at www.fifa.com/governance/news/y=2016/m=1/news=the-reform-process-chronology-2756734.html (accessed on 15 August 2016).

[23] See FIFA, "Ethics Committee milestones (2012-2016)", available at http://resources.fifa.com/mm/document/affederation/committees/02/74/19/72/fifaethicscommitteemilestones_en_11082016_neutral.pdf (accessed on 15 August 2016).

[24] The relevant statements were made on 8 October 2013, 2 June 2014, 11 June 2014, 21 July 2014, 5 September 2014, 24 September 2014, 13 November 2014, 18 November 2014, 19 December 2014 and 24 February 2015.

[25] The ban was later reduced by the FIFA Appeal Committee to six years and by the CAS to four years.

[26] So called "*de novo*" rule pursuant to art. 57 CAS Code.

[27] The ban for Platini was shortened from six to four years and the fine was reduced from CHF 80,000 to CHF 60,000. The Panel found, that the Ethics and Appeal Committees had wrongly sanctioned Platini for the violation of art. 13 and 15 CoE. These articles represent general rules, which are not applied if a violation of the articles 19 and 20 CoE (special rules) has been established. See Media Release of the CAS, "Football – FIFA, The Court of Arbitration for Sport (CAS) Lowers the suspension of Michel Platini to 4 years", available at www.tas-cas.org/fileadmin/user_upload/Media_release_4474_final_eng.pdf (accessed on 15 August 2016).

[28] "Sepp Blatter to challenge six-year ban from football at Cas on 25 August", in: *The Guardian*, 8 July 2016, available at www.theguardian.com/football/2016/jul/08/sepp-blater-to-challenge-six-year-ban-from-football-at-court-of-arbitration-for-sport-25-august-fifa (accessed on 15 August 2016).

[29] Art. 6 CoE states that the following sanctions can be applied: warning; reprimand; fine; return of awards; match suspension; ban from dressing rooms and/or substitutes' bench; ban on entering a stadium; ban on taking part in any football-related activity and social work, The Ethics Committee may also pronounce sanctions described in the FIFA Disciplinary Code and the FIFA Statutes (art. 5 CoE).

[30] 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.

[31] A precondition therefore is that the person is considered an official or a player according to the definitions in the FIFA Statutes (April 2016 edition). Any board member (including the members of the Council), committee member, referee and assistant referee, coach, trainer and any other person responsible for technical, medical and administrative matters in FIFA, a confederation, a member association, a league or a club as well as all other persons obliged to comply with the FIFA Statutes (except players and intermediaries) are considered as officials. Furthermore, any football player licensed by an association is also considered bound.

[32] See Media Release of the CAS, "Football – FIFA, The Court of Arbitration for Sport (CAS)

Lowers the suspension of Michel Platini to 4 years", available at www.tas-cas.org/fileadmin/user_upload/Media_release_4474_final_eng.pdf (accessed on 15 August 2016).

[33] See FIFA, "Ethics Committee milestones (2012-2016)", available at http://resources.fifa.com/mm/document/affederation/committees/02/74/19/72/fifaethicscommitteemilestones_en_11082016_neutral.pdf (accessed on 15 August 2016).

[34] See the decision of the Court of Arbitration for Sport, CAS 2011/A/2625 *Mohamed bin Hammam v. FIFA*, recital 195, p. 52 et seq.

[35] This, despite allegations of slave labour and bribery charges and the extreme climate in Qatar. In the meantime, Infantino has confirmed Qatar as the location for the 2022 FIFA World Cup.

[36] Mr. Scala was the former president of the FIFA Audit and Compliance Committee and was a strong supporter of the new reforms introduced in FIFA.

[37] Prof. Dr. Ian Blackshaw, "FIFA: Independent audit committee president resigns", available at www.sportsandtaxation.com/2016/05/fifa-independent-audit-committee-president-resigns (accessed on 15 August 2016).

[38] According to art. 19 par. 2 CoE, conflicts of interests arise if a person has, or appears to have, private or personal interests that detract from their ability to perform their duties with integrity in an independent and purposeful manner. This certainly seems to be the case.

[39] See Arthur Rutishauser, "Showdown bei der FIFA", in: Sonntagszeitung, available at www.sonntagszeitung.ch/read/sz_17_07_2016/wirtschaft/Showdown-bei-der-Fifa-69087 (accessed on 15 August 2016).

[40] "Fifa president Gianni Infantino cleared of possible ethics violations", in: *The Guardian*, 5 August 2016, available at www.theguardian.com/football/2016/aug/05/gianni-infantino-cleared-ethics-violations-fifa (accessed on 15 August 2016).

[41] See remarks on the Infantino case in this month's Editorial.

The right of publicity: recent developments in collegiate athletics in the USA

by Prof. Paul Anderson[1]

Introduction

Collegiate athletics in the United States is big business. In 2016, the National Collegiate Athletic Association (NCAA) signed a deal with CBS/Turner through 2032 extending their original 14 year US$ 10.8 billion deal an additional 8 years for US$ 8.8 billion. Although virtually all of this money goes back to collegiate conferences and member schools, critics and the general public often see things very differently. They see that colleges who make it to the Final Four of the (NCAA) men's basketball tournament can expect to receive an US$ 8-9 million payout and schools, who participate in the College Football Playoff (revenues that are not received or controlled by the NCAA), can expect to receive upwards of US$ 6 million from their conference. They also see that top collegiate coaches, like Alabama football coach Nick Saban, make upwards of US$ 7 million a year, and Kentucky basketball coach, John Calipari, receives almost US$ 6.5 million per year. Within this climate of money, many perceive that collegiate athletes, particularly male student athletes in football and basketball, do not receive their fair share, as NCAA rules limit the amount of compensation that they can receive in exchange for their participation in collegiate sport.

The purpose of this article is not to enter into the debate about whether these particular[2]student athletes should receive more compensation for their athletic participation; instead, it will focus on new claims, in particular, claims for violations of the right of publicity.

Initially, it bears noting that, while student athletes at major colleges in the United States can seemingly *only* receive compensation in the form of their athletic scholarship, the value of that scholarship is often misunderstood. NCAA rules now allow student athletes to receive scholarship aid up to the cost of attendance at the school they attend. This cost is established by the particular university and includes tuition, room and board, fees and other expenses that some academic scholarships would not include. For example, at Marquette University, the expected undergraduate cost for tuition and fees is approximately US$ 37,000, while the full cost of attendance is US$ 51,000.

In addition, many groups have estimated the actual value of the benefits that student athletes receive above the scholarship, benefits from special tutoring, travel and meals, coaching and other services that other students do not receive. For example, the University of Wisconsin Madison maintains a normal tuition cost of about US$ 10,000 for instate residents, matched by a US$ 25,000 cost of attendance. However, according to the Athletic and Academic Spending Database maintained by the Knight Commission on Intercollegiate Athletics, the University of Wisconsin spent US$ 152,000 on each student athlete related to their athletic participation, and US$ 273,000 per each football player as of 2014.[3] These numbers are bound to be much higher for 2016.

Still, many believe that student athletes are exploited, and should receive more compensation for their participation in collegiate athletics. While the focus in much of the literature is on antitrust and other claims brought against compensation restrictions, new challenges have been brought against restrictions on athlete's ability to exploit their name and likeness for their financial benefit. Although these claims are related to compensation, they focus on completely separate legal rights; in this case, the right of publicity.

The right of publicity: definition and case law

In American jurisprudence, the right of publicity is the right of any person to control the commercial use of his or her identity. This right does not arise under federal law; instead, more than 30 states have recognized the right by common law or included it in their state statutes. The right of publicity protects the individual by giving that person a right to control and profit from the use of their name and other characteristics of their identity (*i.e.* their nickname, likeness, portrait, performance (under certain circumstances), biographical facts, symbolic representations, *etc.*) from commercial misappropriation.

The right is not absolute. For example, an athlete cannot use this right to prevent his name or picture from appearing in the newspaper. Newspaper reproductions of this type are protected as free speech under the First Amendment to the US Constitution. In addition, although most of the cases protect celebrities, including athletes, the right of publicity extends to everyone.

A key case that set the stage for the crea-

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[1] Director Sports Law Program and National Sports Law Institute Marquette University Law School, United States.

[2] For years, courts have noted that student athletes who receive athletic scholarships are already compensated for their participation, mainly in the workers compensation context.

[3] Knight Commission on Intercollegiate Athletics, Athletic & Academic Spending Database for NCAA Division I, available at http://spendingdatabase.knightcommission.org/fbs/big-ten.

tion of the right of publicity involved David O'Brien, a famous football player in the 1930s at Texas Christian University (TCU), and then as a professional with the Philadelphia Eagles. O'Brien sued Pabst Brewing Company for using his photo on Pabst's 1939 beer advertising calendar, because he was active in a group urging teens not to drink and had refused opportunities to endorse beer.[4] The Fifth Circuit Court dismissed his claim, because it found that he could not be harmed by more publicity; however, the dissent said the time was ripe to recognize a legal claim for the uncompensated use of the identity of a professional athlete to help sell a product.

Twelve years later, the phrase was coined in 1953 in a case involving parties within the sports industry, *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc*.[5] Haelan Laboratories entered into a contract with certain baseball players that provided Haelan with the exclusive right to use the players' photographs on baseball cards sold in packets of gum; in other words, the players agreed not to grant any other gum manufacturer the right to use their pictures. Topps Chewing Gum then entered into a similar agreement with the players, who allowed it to use their pictures on its own cards. Haelan sued Topps, claiming that it illegally induced the players into breaching their contracts with Haelan. The case focused on what rights the players had in their own identity and picture and whether they could actually assign these rights. For the first time, the court recognized a property right in the publicity value of an individual's identity, as it found that "*in addition to and independent of that right of privacy* [...] *a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture*".[6] This right then provided the players with a right to grant a company the exclusive right to publish their picture.

In another important case in 1979, football star Elroy "Crazylegs" Hirsch sued a company that marketed a moisturizing shaving gel for women, under the name of "Crazylegs", without asking Hirsch for permission.[7] A well-known college and professional football player, Hirsch was known by the nickname "Crazylegs" at least since the 1940s. As courts would do in other jurisdictions, the Wisconsin court for the first time recognized a cause of action for the right of publicity, finding that recognizing the value in one's name (or nickname) "*is supported by public policy considerations, such as the interest in controlling the effect on one's reputation of commercial uses of one's personality and the prevention of unjust enrichment of those who appropriate the publicity value of another's identity*".[8]

Although well established at the professional sports level, a potential cause of action for the right of publicity for collegiate athletes is less clear. Until the past decade, no courts had attempted to resolve the issue of whether collegiate athletes might be able to bring a cause of action claiming a violation of the right of publicity. The recent focus on the right of publicity perhaps stems from the famous antitrust litigation against the NCAA by former UCLA basketball start Ed O'Bannon. His initial lawsuit back in 2009, coupled with litigation initiated by former Arizona State quarterback Sam Keller, involved both antitrust and right of publicity claims.[9] The antitrust dispute has continued into 2016 as part of the *O'Bannon* litigation, but the right of publicity portion of the dispute took another path.

The initial right of publicity litigation within collegiate athletics related to the use of players' names and likenesses within video games. In 2011, the Supreme Court of the United States held that, in general, video games are protected by the First Amendment because they "*communicate ideas – and even social messages – through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player's interaction with the virtual world)*".[10] Although the Brown court overturned a California law imposing restrictions on the content of such games, the holding supporting First Amendment protection for these games seemed to pave the way for video game manufacturers to be insulated from lawsuits over their content.

Soon after this decision, one of the first courts to analyze a collegiate athlete's right of publicity claim was the United States Court of Appeals for the Third Circuit in *Hart v. Elec. Arts Inc*.[11] Ryan Hart was a quarterback at Rutgers University. He sued EA Sports claiming that its use of his likeness and biographical information in the NCAA Football video game was a violation of his right of publicity. EA argued that, because users of the video game could create their own avatars and create their own individual player, the use of Hart and other player's information was transformative and so protected by the First Amendment. Remanding the case for further proceedings, the court disagreed, finding that the games at issue did not significantly alter the player's identifiable characteristics within the game, and so Hart's claim for a potential right of publicity continued.

Two months later, in July 2013, the United States Court of Appeals for the Ninth Circuit reached two decisions related to the use of athletes' names and likenesses within video games. In the first decision, former professional football player Jim Brown, brought a false endorsement claim against EA Sports, arguing that its use of his likeness within the Madden NFL series of football games misled consumers into thinking that he endorsed or was in some other way a sponsor of the video game.[12] The court disagreed and followed the Supreme Court finding in this case that "*the Madden NFL video games are entitled to the same First Amendment protection as great literature, plays, or books*"[13] and so Brown's claims were dismissed.

At this point, it seemed possible that video games received such strong protection under the First Amendment that any claims about a violation of rights associated with them might fail. However, on the same day as the *Brown* decision, the Ninth Circuit reached a decision in the litigation brought by collegiate athletes.

Sam Keller led a lawsuit that sued the NCAA and EA Sports, claiming that the use of his image and likeness in the NCAA Football video game violated his right of publicity.[14] Acknowledging that

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4 *O'Brien v. Pabst Sales, Co*., 124 F.2d 167 (5th Cir. 1941).
5 *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc*., 202 F.2d 866 (2nd Cir. 1953).
6 *Id*. at 868.
7 *Hirsch v. S.C. Johnson & Son, Inc*., 90 Wis.2d 379 (Wis. 1979).
8 *Id*. at 391.
9 *Keller v. Electronic Arts*, Inc., Cv-09-1967 (N. D. Cal. 2009); *O'Bannon v. NCAA*, CV 09-3329 (N.D. Cal. 2009).
10 *Brown v. Entertainment Merchants Ass'n*, 131 S.Ct. 2729, 2733 (2011).
11 *Hart v. Elec. Arts. Inc.*, 717 F.3d 141 (3rd Cir. 2013), cert. denied, 135 S. Ct. 43 (2014).
12 *Brown v. Elec. Arts, Inc.*, 724 F.3d 1235 (9th Cir. 2013).
13 *Id*. at 1247.
14 *Keller v. Electronic Arts, Inc*., 724 F.3d 1268 (9th Cir. 2013).

video games are protected under the First Amendment, and similar to the Third Circuit in *Hart,* the court found that the game did not allow a user to transform the player in any way necessary for constitutional protection, instead the player was engaging in the same activity for which they are known in real life – playing football. The context is realistic in that the game depicts actual football stadiums, and Keller is represented in the game as the starting quarterback at Arizona State, exactly what he was in real life. Therefore, the court rejected EA Sports claim that its use of Keller and other players' images and likenesses in the video game were protected by the First Amendment. A year later, EA Sports settled the lawsuit paying the players US$ 40 million; and the NCAA similarly settled for US$ 20 million. The NCAA has since ended any relationship with EA Sports creating videogames for NCAA competitions; as a result, the extent of the right of publicity that current players may possess in this context remains to be seen.

Outside of the video game context, in the past two years, collegiate athletes have brought claims for violations of their right of publicity in other contexts. In the spring of 2015, members of Catholic University's basketball team sued a media company that stored and licensed photographs of collegiate athletes and competitions online.[15] The NCAA owned the copyright in all of the photographs hosted on the website. As a result, the court found that the Copyright Act preempted the plaintiff's presumed right of publicity claims, because they could not show any use of their likenesses beyond the sale of the copyrighted works.

A few months later, in the summer of 2015, former football and basketball players sued various athletic conferences, networks, and licensors, claiming that their various uses of these players' likenesses and images violated their right of publicity under Tennessee law.[16] Although the court recognized that Tennessee does have a statutory right of publicity, it would not support the players' claims for a right of publicity in sports' broadcasts. Important to its analysis was the fact that "*under NCAA rules, other than the requirement that an athlete be a student, there can be no more basic eligibility rule for amateurism than that the athlete not be paid for playing his or her sport*".[17] Because the athletes claimed that the harm they suffered was related to their inability to be paid for the use of their image or likeness, the court found they could not have suffered harm here because collegiate athletes cannot be paid.

The final case involving the right of publicity and collegiate athletes came down at the end of the summer in 2015. In this case, a former college football player from the University of Texas at El Paso (UTEP) sued an online photo store that hosted pictures of UTEP student athletes, claiming that its sale of pictures of him violated his right of publicity.[18] Finding that Lightbourne signed a student athlete image authorization form each year that he played, and that signing this form was not mandatory or a condition on whether he would be allowed to participate in athletics, the court dismissed his right of publicity claim.

Conclusion

Overall, the courts have been consistent and found that student athletes do not possess a right of publicity in photographs (*Maloney & Lightbourne)*, or broadcasts (*Marshall*), the litigation over the use of images and likenesses in videogames was settled, and the actual video games have long since been discontinued. In fact, the specific NCAA rules litigated over in most of these cases no longer exist within the NCAA manual. Whether a future student athlete will again seek to bring similar right of publicity claims remains to be seen; however, such claimants, and lawyers who might seek to champion their cause, should be careful, as courts continue to uphold the NCAA's version of collegiate athletics characterized by the amateur student-athletes who participate.

What is known as the NCAA's amateurism defense is based in its principle of amateurism, which states that "[s]*tudent-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived*".[19] This principle then is buttressed by NCAA rules that limit compensation that student-athletes can receive, now expanded to scholarship aid up to the full cost of attendance at most universities. This notion of amateurism, of course, is not grounded in any sense of being unpaid labor as, even though the scholarship that they receive has been found to be a form of pay in the workers compensation arena, student athletes have not been found to be employees by any court; instead, NCAA and conference rules limit the types of pay student athletes can receive beyond the athletic scholarship and financial aid.

As far back as 1984, the United States Supreme Court noted that "[i]*n order to preserve the character and quality of the product of college sports, "athletes must not be paid*"."[20] Since then, virtually every court has drawn on this Supreme Court language and upheld NCAA restrictions on athletes receiving compensation; most recently, in cases involving antitrust challenges to scholarship limitations,[21] and minimum wage claims brought by student athletes.[22]

In fact, even within the *O'Bannon v. NCAA* antitrust litigation (mentioned above) amateurism has been upheld. Although the district court initially struck down NCAA rules limiting scholarship aid to student athletes (rules that actually no longer exist), and the appellate court found that such NCAA rules should be subject to antitrust scrutiny, the appellate court also admonished the district court for creating a way to pay student athletes noting that "*not paying student-athletes is precisely what makes them amateurs*".[23]

Perhaps then it is not surprising that the *Marshall* court grounded its decision finding that student athletes do not possess a right of publicity within the same amateurism framework. As all of these courts have recognized, if student athletes can someday receive payment directly related to their athletic participation and performance above and beyond the scholarship aid they already receive, the amateur model, that is the foundation of NCAA collegiate athletics within the United States, will crumble.

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15 Maloney v. T3Media, Inc., 94 F.Supp.3d 1128 (C.D. Cal. 2015).
16 Marshall v. ESPN Inc., 111 F.Supp.3d 815 (M.D. Tenn. 2015).
17 *Id*. at 834.
18 Lightbourne v. Printroom Inc., 122 F. Supp.3d 942 (C.D. Cal. 2015).
19 NCAA, 2015-2016 NCAA Division I Manual, art. 2, 2.9.
20 *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 102 (1984).
21 *Agnew v. NCAA*, 683 F.3d 328 (7th Cir. 2012).
22 *Berger v. NCAA*, 2016 U.S. Dist. Lexis 18194, 26 Wage & Hour Cas. 2d (BNA) 38 (Dist. Ind. 2016).
23 *O'Bannon v. NCAA*, 802 F.3d 1049, 1076 (9th Cir. 2016).

South Africa:

Draft Guide on the Taxation of Professional Sports Clubs and Players issued

A very promising starting point in the path of restoring clarity!

by Dr. Alara Efsun Yazıcıoğlu, LL.M.[1]

Introduction

On 27 May 2016, the South African Revenue Service (SARS) published a *Draft Guide on the Taxation of Professional Sports Clubs and Players* (the Draft Guide)[2] and invited the interested parties to submit their comments on it until 30 December 2016.[3]

SARS expressly underlined that the Draft Guide is merely a "general guide", *i.e*. it cannot be considered as an "*official publication*"[4], a "*practice generally prevailing*"[5] or a "*binding general ruling*"[6]. The Draft Guide should, therefore, be considered as a brief summary of the applicable legislation.

This article aims to describe how the Draft Guide may be transformed into a revolutionary tool for taxation purposes. To this end, first the contents of the Draft Guide are described. Then, a suggestion regarding the issues covered by the Draft Guide is made. Finally, the main reasons for which such an amendment would constitute an important milestone in taxation of international sports events are laid out.

The contents of the Draft Guide

The Draft Guide elucidates income tax and value added tax (VAT) aspects of the South African tax system with regard to different types of income generated by *professional*[7] sports clubs and sportspersons. It mainly focuses on players and clubs residing in South Africa. The tax implications for non-resident professional sports clubs and sportspersons are described in an extremely concise manner.[8]

Sports clubs and sportspersons residing in South Africa

Regarding professional sports clubs, the Draft Guide examines, by means of detailed explanations and illustrative examples, income tax and VAT implications of the following receipts and accruals: transfer fees; sign-on fees; sponsorships (including sponsorships in kind); prizes; ticket sales; sale of merchandise and other sundry items; insurance premiums (relating to, for example, sportspersons, training kits, equipment and facilities) paid by clubs; and fringe benefits that clubs may provide to their players with (such as residential accommodation and use of a club-owned vehicle).

Concerning professional sportspersons, the Draft Guide analyses taxation modalities of the following receipts and accruals: player salaries and other remuneration; transfer fees; player signing-on fees; image rights payments; sponsorships; prizes (either received directly or indirectly[9]); indemnification payments; bonus payments; income derived from benefit matches; allowances; advances and reimbursements (namely travelling allowance, reimbursements and accommodation); fringe benefits (such as medical expenses, uniforms, transfer costs and personal use of business cellular phones and computers); pension fund contributions, retirement annuity fund contributions and other deductions for players (like agents' commissions).

The Draft Guide also briefly describes the implications of Skills Development Levy (SDL); Unemployment Insurance Fund (UIF) contributions; and donations received by clubs and sportspersons.

Non-resident sports clubs and sportspersons

As already mentioned, tax implications for non-resident sports clubs and sportspersons are summarized in a highly brief manner. The section[10] of the Draft Guide relating to taxation of non-residents mainly concentrates on the taxation of sportspersons. Only very general VAT information is provided with regard to sports clubs.

The explanations made by the Draft Guide can be summarized as follows.

– Non-resident sportspersons are subject to a 15% withholding tax on their gross income[11] derived from any "*specified activity*"[12]. The tax is a final tax, which must be withheld and remitted to SARS by any South African resident who is liable to pay a non resident sportsperson.
– Sportspersons who are employees of a resident South African employer and sportspersons who are physically present in South Africa for more than 183

days in aggregate in any 12-month period commencing or ending during the year of assessment are not subject to withholding tax.
– VAT registration threshold is currently R 1 million. Non-resident sports clubs and independent sportspersons must register for VAT purposes only if they carry on the enterprise activity continuously or regularly – wholly or partly – in South Africa. Sportspersons employed by a sports club are not under the obligation to register for VAT.
– For more information, the Office of Non-Resident Entertainers and Sportspersons may be contacted.

The suggestion

In its current version, the Draft Guide provides minimum information on tax rules and regulations applicable to non residents. If the same level of details and precision as the explanations provided for *resident* sports clubs and sportspersons may also be reached for *non resident* sports clubs and sportspersons, the Draft Guide may transform itself into a truly exceptional tool.

A further step that may be taken is the publication of a general explanatory guide on the domestic tax law rules applicable to all *non-resident taxpayers* deriving income from international sports events taking place in the South African territory. As a matter of fact, a large number of taxpayers (such as rights holders of the sports events[13], broadcasters and hospitality providers) are remunerated for the services rendered/rights granted during an international sports event. Despite the fact that the income obtained by non resident sportspersons and sports clubs receives the almost exclusive attention of academicians, problems caused by the current tax rules and regulations are far from being limited to these two categories of taxpayers.

If adopted, such explanatory guides will have the merit of clarifying the tax treatment that a taxpayer taking part in an international sports event (as a sportsperson or as another professional) will be subject to, and thereby will be extremely useful in practice.

Rationale behind the suggestion

Lack of clarity: the main problem of taxation of international sports events

Lack of clarity, which translates into uncertainty from a taxpayer's point of view, constitutes one of the most significant challenges in the taxation of international sports events field. Unlike other taxpayers, taxpayers participating in an international sports event cannot rely on clearly established and precise tax rules. This section of the article briefly summarises the reasons supporting this observation.

Two different categories of international sports events should be distinguished for the purposes of this analysis:

1 sports events *benefitting from specific tax exemption regulations* (the so called "mega" or "large-scale" sporting events, such as the Olympic Games and the FIFA World Cup); and
2 sports events that *do not benefit from such exemptions*.

International sports events benefitting from specific tax exemption regulations

Specific tax exemption regulations are enacted for one unique event by the Host State[14]. They provide for tax exemptions (income tax, VAT and customs and excise duties) applicable to non resident taxpayers deriving income from the international sports event concerned. The obligation to enact such Regulations is imposed upon the Host State by the Host State Contract, respectively the Host City Contract, which is a non negotiable contract signed between the Host State and the rights holder of the sports event at the end of the bidding process[15].

Exemption regulations are generally enacted for large scale and mega sporting events.[16] As indicated by its name, a "mega" sporting event is a large or great sporting event.[17] While a clear cut definition of mega sporting events does not exist; as per the literature, such events may be distinguished from other sporting events by means of the following *cumulative* criteria:

1 number of participating athletes;
2 attendance at the event;
3 television viewership of the event;
4 the international significance of the event; and (v)
5 the long term consequences for the cities that stage the short term event.[18]

Only three events, namely the Olympic Games (summer and winter); the FIFA World Cup; and the final game of the UEFA Champions League, are considered to be "mega" events in the literature.

Other events that are distinguishable from the majority of sports events by exactly the same criteria are considered as "large scale" events. As it can be deduced, there is a fine line between large scale and mega sporting events. Although the former is considered to be less significant than the latter, this general assumption is subject to controversy.[19] This aspect will not be developed further, since it is not relevant for the purposes of this article.

Despite benefitting from specific tax exemption regulations, large scale and mega sporting events are still prone to a significant lack of clarity in the area of taxation for two main reasons:

1 lack of *international* practice; and
2 lack of *national* practice.

No effort to develop a certain international standard on tax exemption regulations has been made so far. Accordingly, there is not a generally recognized model or practice on that matter. As a natural result, although tax exemption regulations may have some similar traits, they vary to a great extent from country to country and respectively from sports event to sports event. This, in turn, causes a lack of *international* practice on which taxpayers deriving income from international sports events can rely upon. From a taxpayer's point of view, each new event requires a new information gathering process on regulations that have never been applied before.[20]

Lack of *national* practice presents itself in regard to:

1 the very existence of exemption regulations; and
2 the interpretation and modalities of the application of exemption regulations.

First, it may not be certain whether a Host State will effectively enact specific tax exemptions. Since the exemptions are one off, like the sports event itself; in some cases, it may even be unclear whether the same sports event taking place in the same country a couple of years later will benefit from similar tax exemptions or not. This, for example, was the case of the 2013 UEFA Champions League final that took place at the Wembley Stadium in London two years after another Champions League final[21] that was held at the same

stadium and which benefited from tax exemptions. In fact, the right to host the 2013 UEFA Champions League final was granted to the United Kingdom by UEFA *without a prior negotiation regarding tax exemptions*. No specific problems arose in that particular case, as the United Kingdom government finally enacted a similar exemption to the one granted in 2011, even if it was not legally obliged to do so.

Comparable situations are likely to occur on a frequent basis, as each specific tax regulation provides for one off exemptions, the exact scope of which is determined on the basis of negotiations conducted with the sport's governing body concerned (i.e. the rights holder of the event). For instance, the same State may grant a tax exemption for non resident sportspersons for one sports event and may not do so for another similar event held in its territory; simply because of the fact that such an obligation was not contained in the Host State contract, respectively the Host City contract, signed for the latter event. Subsequently, persons envisaging to engage in professional activities related to international sports events may not rely on established *national* practices on the *very existence of tax exemptions*.

Second, in cases where specific tax exemption regulations are effectively enacted, their exact scope cannot be precisely determined until the taxation occurs. Despite the fact that governments give guarantees to organizing sports' governing bodies and amend their domestic laws accordingly, the ambit of the exemptions depends heavily on the local authorities' interpretation and the domestic law of the State concerned. Moreover, since the relevant regulations are specifically prepared for a particular event, it is, once again, impossible to rely on a developed *national* practice on the *interpretation and modalities of application of such regulations*.

The uncertainty linked to the interpretation and modalities of application of tax exemption regulations is mostly due to vague rules enacted by Host States. For example, China's tax exemption rule for athletes participating in the 2008 Beijing Olympics consisted of one sentence: "[t]*he income of reward in the 29th Olympic Games and other matches of athletes shall be exempt from individual income tax according to existing laws and regulations*".[22] Another ambiguous regulation example can be found in regulations enacted by South Africa for the purposes of the 2010 FIFA World Cup. Income earned by "*members of a team*" during the World Cup was not tax exempt.[23] Although sportspersons clearly fell in the scope of this notion, tax treatment of technical staff (such as coaches, medical staff, trainers etc.) remained rather unclear.[24]

International sports events that do not benefit from specific tax exemption regulations

A similar level of uncertainty[25] also exists for international sports events that *do not benefit from specific tax exemptions*. In cases where no specific tax exemption regulations are enacted, the ordinary tax regime, as provided by the domestic law of the Host State, applies. Even though there is a large network of double tax treaties[26], which are commonly based on the OECD Model Convention[27], the Host State's national legislation and the interpretation of the applicable double tax treaty's provisions by that State play a key role in the taxation of the income derived by the taxpayers concerned.

This implies that taxpayers are subject to domestic laws and regulations, diverging from country to country. In other words, they are taxed in accordance with national tax law rules of the Host State(s) that they cannot possibly be aware of. Although the same obstacle is present for all taxpayers embarking on a professional activity in a foreign State, the problem is much more acute for taxpayers deriving income from international sports events, since the activity is short term and the taxpayers concerned, generally, participate in a number of events per year.

This lack of clarity translates into an extremely cumbersome procedure (both on a financial and on a psychological level) for the taxpayers generating income from international sports events on a regular basis (i.e. taxpayers who participate in a number of events annually).

In order to ensure to be compliant with the applicable rules in each different Host State, the taxpayers should seek assistance from local tax professionals.[28] To render this service, a tax professional active in the Residence State[29] generally has to have recourse to a tax professional of the Host State, since the knowledge of the Host State(s)'s domestic law(s) is a prerequisite. This implies that the taxpayer needs to consult with several tax professionals, which will inevitably give rise to a considerable financial burden.

More importantly, not being able directly to receive information from the competent authorities of the Host State and to check the applicable tax legislation personally – when needed – constitutes a significant psychological concern, especially due to one of the main principles of law: "[i]*gnorantia iuris neminem excusat*"[30].

Well-established national practices: a viable solution

The current lack of clarity may be overcome effectively by well established *national* practices. Instituting a solution on an international level, which is acceptable by all States that may potentially host an international sports event in the future, may be extremely laborious. More importantly, the adoption of such a solution and its implementation in all relevant States may take several decades, especially considering that there is not a current discussion on an international level on this point.

By enacting a variety of instruments on a domestic level, States may eliminate the lack of clarity, to a great extent, for the purposes of the international sports events they will be hosting. These instruments will produce two main effects:

1 they will constitute the basis of a *national practice* that will be built gradually; and
2 they will allow all interested parties to be *informed* of the tax consequences of their professional activities linked to an international sports event taking place in a particular State.

It is clear that, to produce that second effect, all instruments should be accessible and comprehendible by the taxpayers. This implies that all such documents should be published in English and made available online. Also, a written language that is understandable by the taxpayers must be used in their redaction. In other words, technical jargon needs to be avoided.

The suggested instruments are the following:

1 general explanatory report on the relevant domestic tax law rules;
2 "International Sports Events Tax Exemptions Act" and "International Sports Events Taxation Act".

The instruments concerned may be adopted in an *alternative* or *cumulative* manner, depending on the tax policy followed by the State concerned.

Explanatory reports, a promising starting point

Explanatory reports elucidating the tax rules and regulations of the Host State that are applicable to non resident taxpayers (like the South African Draft Guide with the suggested amendment), would constitute a milestone in the path of restoring clarity by means of well established *national* practices.

Such an endeavour will allow all interested parties to be able to get the information – directly and online – regarding the tax treatment of their professional activities in the Host State. Thereupon, both the financial and the psychological burden on the taxpayers would be eliminated – to a great extent.

To fulfill that purpose, explanatory reports should cover all categories of taxpayers concerned. A great number of non resident taxpayers are deriving income from an international sports event. Rights holders, event managers, architects and construction companies, broadcasters, subcontractors, sportspersons, entertainers, referees, technical sports staff, employees of the event organizers are merely some examples. To eliminate the uncertainty regarding the tax treatment, Explanatory Reports should cover tax rules and regulations applicable to all these different groups.

Also, explanatory reports should contain detailed rules and explanations comprising all relevant aspects of the national tax law. The part of the South African Draft Guide on resident sports clubs and sportspersons constitutes a great illustration of the level of precision required.

One further step to restore clarity: "International Sports Events Tax Exemptions Acts" and "International Sports Events Taxation Acts"

Explanatory reports are a promising *starting point*. However, steps, again on a national level, that may further eliminate the lack of clarity do exist. Host States may opt for enacting "International Sports Events Tax Exemptions Acts" and/or "International Sports Events Taxation Acts".

States that prefer to provide tax exemptions for *all or some* of the international sports events that will be held in their territory, may enact "*International Sports Events Tax Exemptions Acts*" (Exemption Act).[31] The Exemption Act will be applicable to all international sports events falling within its scope of application[32] and taking place in the territory of the State in question. For example, the scope of the Exemption Act concerned may be limited to mega sporting events hosted by the State concerned. Temporal scope of application of an Exemption Act is of the utmost importance. To ensure that the desired effect can be produced, the application of such Acts should not be limited in time.

The enactment of an Exemption Act will eliminate the lack of *national* practice regarding the very existence of specific tax exemption regulations. As a matter of fact, once the Exemption Act is adopted, both the sports events and the categories of taxpayers entitled to benefit from tax exemptions will be established with certainty. Concerning the interpretation and modalities of exemption regulations, a steady national practice will form over the years. To speed up that process, an Exemption Act may be accompanied with guidelines, explanatory reports or similar documents, providing further guidance.

Taxation of the international sports events that are not covered by an Exemption Act[33] may be regulated by an "*International Sports Events Taxation Act*" (Taxation Act) encompassing all relevant tax law aspects of international sports events taking place in the territory of the State concerned. A Taxation Act will have the merit of compiling all the relevant rules and regulations that may be applied to non resident taxpayers. Despite being akin to Explanatory Guides developed above, a Taxation Act will constitute a more binding instrument. They may also allow the Host State to revisit its rules and regulations during the enactment process. Like an Exemption Act, a Taxation Act may be accompanied with guidelines or other similar documents for further guidance.

While enacting an Exemption Act or a Taxation Act, it would be highly beneficial for the State concerned to attenuate heavy tax burdens as well as excessive administrative burdens[34] – if any – as much as possible. It is an established fact that both types of burden represent a serious obstacle for international sports events. Eliminating them, to a certain extent, will certainly render the State in question more attractive for sports' governing bodies organising their events.

As a matter of fact, adoption of an Exemption Act and a Taxation Act will increase not only the clarity in this particular field of international tax law, but also the appeal of the States concerned as Host States of international sports events. The importance of such instruments may be demonstrated by an example from the same country (South Africa) on a different legal aspect of international sports events: protection of trademarks. South Africa is the first country to have created special rights that can be invoked for any "*major sports event*".[35] Alec Erwin (the South African Trade and Industry Minister at the time when the Merchandise Marks Amendment Act was voted[36]) stated that the Act concerned was "*vital*" to protect South Africa's small but growing position in the world sports' and entertainment market.[37] The Amendment Act can indeed be seen as one of the factors that persuaded FIFA to award the 2010 FIFA World Cup to South Africa.[38]

Conclusion

The South African Draft Guide may pave the way for the restoration of clarity in the field of taxation of international sports events. Undoubtedly, the current version of the Draft Guide is far from constituting one of the instruments suggested in this article. However, should the Draft Guide be extended to encompass a detailed information on taxation of *non resident* sports clubs and sportspersons, it may form a "*beta version*"[39] of explanatory reports, developed in the previous section of this article.

It is possible, therefore, to state that the Draft Guide can be seen as a very promising starting point, upon which an effective fight against the current lack of clarity may be built. South Africa seems to be, once more, the pioneer of a significant development in the sports' field that has the potential of revolutionising the tax treatment of international sports events.

However, this remains to be seen, when the final version of the Draft Guide is published, which is likely to be in 2017!

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[2] The Draft Guide is available online at www.sars.gov.za/AllDocs/LegalDoclib/Drafts/LAPD-LPrep-Draft-2016-43%20-%20Draft%20Guide%20on%20the%20Taxation%20of%20Professional%20Sports%20Clubs%20and%20Players.pdf (accessed on 15 August 2016).

[3] Comments may be submitted by e-mail to policycomments@sars.gov.za.

[4] An official publication is defined as "[…] *a binding general ruling, interpretation note, practice note or public notice issued by a senior SARS official or the Commissioner*" in (Chapter 1) Section 1 of Tax Administration Act 28 of 2011.

[5] A practice generally prevailing is defined as "[…] *a practice set out in an official publication regarding the application or interpretation of a tax Act*" in (Chapter 2) Section 5 (1) of Tax Administration Act 28 of 2011.

[6] A binding general ruling is defined as "[…] *a written statement issued by a senior SARS official under section 89 regarding the interpretation of a tax Act or the application of a tax Act to the stated facts and circumstances*" in (Chapter 7) Section 75 of Tax Administration Act 28 of 2011.

[7] The Draft Guide explicitly excludes amateur players and clubs from its scope (the Draft Guide, Preface, p. i).

[8] Approximately one page out of 59 pages refers to non-resident sports clubs and sportspersons.

[9] The Draft Guide distinguishes between two types of indirect accruals:
1 the prize is paid to the club for its benefit but is subsequently distributed to the player(s); and
2 the prize is paid to the club for the benefit of the player(s) (the Draft Guide, p. 33).

[10] Section 10 (the Draft Guide, p. 58-59).

[11] See page 2 of the Draft Guide regarding gross income.

[12] "*Specified activity*" is defined as "*any personal activity exercised in the Republic or to be exercised by a person as an entertainer or sportsperson, whether alone or with any other person or persons*" in the South African legislation (the Draft Guide, p. 58).

[13] Rights holders of sports events are generally sports governing bodies (mainly federations and confederations).

[14] Host State can be defined as the State in the territory of which an international sports event takes place.

[15] Bidding process can be defined as the procedure put in place by the rights holder of the event to choose the Host State.

[16] Large scale and mega sporting events are international sports events by definition.

[17] Wolfgang Maennig and Andrew Zimbalist, "What is a mega sporting event?", in: Wolfgang Maennig and Andrew Zimbalist (eds), *International Handbook on the Economics of Mega Sporting Events* (Edward Elgar Publishing Limited, 2012), p. 9.

[18] *Ibid*, p. 9-12.

[19] For more information on this point, see Dennis Coates, "Not so mega events", in: Wolfgang Maennig and Andrew Zimbalist (eds), *International Handbook on the Economics of Mega Sporting Events* (Edward Elgar Publishing Limited, 2012), p. 401ff.

[20] An exception to this general assumption can be seen in the Regulations enacted for the 2011 and 2013 London UEFA Champions League finals. However, as a general rule, mega sporting events do not take place twice in the same country in such a short time frame. Accordingly, this example should remain as a rare occurrence.

[21] The 2011 Champions League final.

[22] Circular of State Administration of Taxation and General Administration of Customs on Issues Relating to 29th Olympics Taxation Policy, CS [2003] No. 10, Clause 2 (3).

[23] § 9 (2) of the Schedule I of South African Revenue Laws Amendment Act No. 20, 2006.

[24] For more information on this point, see Craig West, *The Taxation of International (non-resident) Sportspersons in South Africa* (University of Capetown, 2009), p. 41.

[25] Again from a taxpayer point of view.

[26] Double tax treaty can be defined as an agreement between two (or more) countries for the avoidance of double taxation.

[27] OECD Model Tax Convention on Income and on Capital is the most frequently used Model Treaty.

[28] Although the taxpayers may opt for researching the applicable tax law provisions themselves, this will reveal to be a rather difficult and risky strategy.

[29] Residence State can be defined as the State of which the taxpayer is a resident for tax purposes as per the applicable domestic legislation.

[30] Can be translated as: "[i]*gnorance of the law affords no excuse*".

[31] It must be underlined that the adoption of such an Act will not result in an overall tax exemption of the income concerned per se. In fact, the taxpayers covered by the personal scope of application of an Exemption Act will still be subject to tax in their Residence State, in accordance with the applicable domestic law of this latter State. It must however be noted that an overall tax exemption may occur in cases where the income concerned is also tax exempt in the Residence State, as per the applicable national law. Such an outcome is highly undesirable and may be prevented either by adoption of relevant provisions by Residence States or a specific clause added in Exemption Acts of Host States, which provides for a source taxation in cases where the domestic law of the taxpayer's Residence State also exempts the income concerned.

[32] International sports events falling within the scope of application of the Act concerned may be:
1 enumerated in an exhaustive manner in the Act;
2 determined by means of a number of criteria that are enumerated in the Act and submitted to the approval of the competent authority as designated in the Act; or
3 determined by a combination of the first two methods.

[33] This may be due to the fact that:
1 the scope of application of the Exemption Act is limited to some events; or
2 the State concerned does not provide any tax exemptions to international sports events (and thereby an Exemption Act is not adopted at all).

[34] Extra administrative burdens incumbent upon non residents constitute a frequent practice that is usually justified by States' need to exercise effective fiscal control over taxpayers. (For more information on this point, see Martina Aigner, "Administrative Burdens for Non-Resident Artistes and Sportsmen in the light of Non discrimination Clauses", in: Walter Loukota and Markus Stefaner (eds), *Taxation of Artistes and Sportsmen in International Tax Law* (Linde Verlag, 2007), p. 420).

[35] The rights were adopted with The Merchandise Marks Amendment Act 2002 (Alex Kelham, "Tackling Ambush Marketing of the Olympic Games and Paralympic Games – London 2012: A Case Study, in: Adam Lewis and Jonathan Taylor (eds), *Sport: Law and Practice*, 2nd edition (Tottel Publishing, 2008), p. 1396).

[36] More specifically, November 2002.

[37] Simon Gardiner John O'Leary, RogerWelch, Simon Boyes and Urvasi Naidoo, *Sports Law*, 4th edition (Routledge, 2012), p. 340.

[38] Kelham, *op. cit*. in footnote 35, p. 1396.

[39] Beta version can be defined as an early version of a project that contains most of the main features, but is not yet complete. The Draft Guide will constitute such a version since its personal scope of application is limited to resident sports clubs and sportspersons. On the other hand, the personal scope of application of explanatory reports as suggested by this article comprises all non resident taxpayers deriving an income from an international sports event.

Third party ownership of football players' economic rights

Introduction of the global ban against third party ownership as from 1 May 2015

by Vassil Dimitrov[1]

Introduction

Third party ownership of players' economic rights ("TPO") has been the subject of many discussions over recent years. The controversial practice, which can be described as a legal agreement in which a third party (other than the player himself or his club) provides the club with financial resources in order to obtain a percentage of the player's future transfer fees, is seen by many as a transaction which is "against the spirit of the game". The term "future transfer fee" corresponds to the sum which will be paid by a football club for the signing of a player, who is still under contract with another club.

TPO as a practice in modern football originated from the separation between player's registration – his "federative rights" (often referred as the right of transfer), which arise only with the existence of an employment relationship between club and player, and the "economic rights" derived from the federative rights. Economic rights represent the financial value of the federative rights. Only economic rights are subject to TPO.[2]

The investors in TPO agreements could not only be individual businessmen, but also football agencies, sports-management agencies, investment funds, or other companies with interests in acquiring the economic rights of players. The most recent revision of the Regulations on the Status and Transfer of Players (RSTP)[3] includes a specific provision, which defines a "*third party*" as "*a party other than the two clubs transferring a player from one to the other, or any previous club, with which the player has been registered*". It is important to note that third party ownership should not be confused, under any circumstances, with co-ownership in which two football clubs jointly own the rights of a player, although the player can only be registered to play for one of these clubs.

Court of Arbitration for Sport

One particular arbitral award from the Court of Arbitration for Sport (CAS) jurisprudence answers many questions regarding the definition of players' economic rights, which are seen as different from the right of registration of a specific player to be part of the squad of a football club.[4] According to the arbitration panel, the "*player's economic rights*" should be legally distinguished from the "*registration*" of the player.[5] The registration of a player:

> *"serves the administrative purpose of certifying him within the federative system that solely that club is entitled to field that player during a given period",*

whereas:

> *"a club holding an employment contract with a player may assign with the player's consent the contract rights to another club in exchange for a given sum of money or other consideration, and those contract rights are the so-called "economic rights to the performances of a player"."*

The arbitration panel indicated that the transactions regarding economic rights of players are only possible under the condition that the player has a valid contract with a club. Even though this decision does not concern directly the subject on third party ownership of these economic rights, it certainly explains important terms on the issue. Furthermore, the panel clarified important questions regarding the nature of the so called "federative rights".

The CAS panel was against the idea that "federative rights" could be used to describe a situation in which a club is in a position to bind and control the player's employment status and behaviour without the explicit consent of the player, solely on the basis of the federation's regulations. CAS holds the view that:

> *"sports rules of this kind are contrary to universal basic principles of labour law and are thus unenforceable on grounds of public policy. In other terms, in the Panel's view, the player's consent is always indispensable whenever clubs effect transactions involving his employment and/or his transfer".*[6]

In another CAS award, the arbitration panel decided that the existence of a TPO agreement or any other internal agreement with a third party does not constitute a reason for the transfer agreement to be considered invalid.[7]

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1 Sports Lawyer, Sofia, Bulgaria.
2 KPMG, *Project Third Party Ownership*, August 2013, p. 11.
3 FIFA Regulations on the Status and Transfer of Players 2015.
4 CAS 2004/A/635 *RCD Espanyol de Barcelona SAD v. Club Atlético Velez Sarsfield*.
5 *Ibid*., Merits – Para 28.
6 *Ibid*., Merits – Para 32.
7 CAS 2008/A/1482 *Genoa Cricket and Football Club S.p.A. v. Club Deportivo Maldonado* – Merits Para 30.

FIFA

Third party ownership has been debated at various levels within the football community. FIFA has organised meetings at the international level, which took place under the direction of bodies, such as the Football Committee, the Committee for Club Football and the Players' Status Committee. At the 64th FIFA Congress, the Chairman of the Dispute Resolution Chamber, Geoff Thompson, presented the delegates with an update regarding FIFA's intentions to address TPO on the basis of sound understanding of its characteristics and the review of all possible options for future regulatory approach.

Art. 18bis of the FIFA Regulations on the Status and Transfer of Players (RSTP) prohibits a practice closely connected with TPO, but different in nature. The provision states that:

> *"no club shall enter into a contract which enables the counter club/counter clubs, and vice versa, or any third party to acquire the ability to influence in employment and transfer-related matters its independence, its policies or the performance of its teams."*

This article bans the "third party influence" which could be explained as any kind of contract-originated interference which would result in an entity that operates outside the structures of football to affect the decision making of a club or prevent such club from pursuing its own interests regarding the transfer of players. Clubs that allow such third party influence are subject to sanctions imposed by FIFA's Disciplinary Committee. Art. 18bis does not forbid the actual purchase of players' economic rights, but prevents third parties from exerting control over the transfer and employment policy of football clubs.

It is important to consider that the provisions of art. 18bis, in accordance with art. 1 para. 3.a. of the RSTP, are binding on national associations, which are obliged to include them without any modification in their regulations. For instance, the Bulgarian Football Union (BFU) included a word for word translation of art. 18bis in its regulations. Some national football associations, such as the English Football Association, the French Football Federation and the Polish Football Association, had rules explicitly against third party investment in players' economic rights even before FIFA took any steps to address this matter worldwide.[8]

FIFA aimed to collect further information regarding the existing practices among football clubs across the world and also to compare the approach of national associations towards third party influence and TPO. To achieve this goal, FIFA sent a questionnaire, together with Circular letter No. 1335.[9] The survey was performed by the International Centre for Sports Studies (CIES). The football associations of Norway, Croatia and Panama, which were the only ones to keep an official register for all TPO agreements at the time, reported back that 20%, 12% and 0.01% of their respective registered players were part of TPO contracts. The Danish association stated that between 15 and 20 players were involved in TPO of their economic rights, while the Japanese association claimed that only Brazilian players were under such deals within the country.

FIFA obtained information from another study by the CIES Football Observatory, which reports that 15% of the interviewed players' agents in the big five European football markets (England, Spain, Italy, Germany and France) owned shares of players' economic rights during their professional careers as agents.[10] These figures were unexpected at the time, because the majority of experts believed that TPO agreements were common only within the South American market. Several well-known agents, such as Mino Raiola, Juan Figer, Pini Zahavi and Jorge Mendes, have reported that they had an influential role in the market of acquiring players' economic rights.

Perhaps one of the most famous TPO cases involved Argentine players Carlos Tevez and Javier Mascherano. In 2004, Kia Joorabchian purchased a 51% controlling stake in the Brazilian club Corinthians using his company Media Sports Investments (MSI). Joorabchian later registered both Argentine players with the club, whose economic rights were owned by MSI in cooperation with other companies. Subsequently, the players were transferred to the English club West Ham United F.C., where they played an important role in the club's successful fight for survival in the English Premier League during the 2006-2007 season. West Ham United F.C was fined £ 5.5 million for breach of the regulations against third party influence. Sheffield United F.C., who suffered relegation due to Tevez' goal against Manchester United on the final day of the season, were compensated with £ 20 million by West Ham United. Joorabchian was involved in several other high profile TPO deals regarding players, such as Jô and Ramirez (whose player rights were shared between Joorabchian and his business partner Pini Zahavi). While under contract with Santos, 5% of Neymar Jr.'s economic rights were purchased by a company called TEISA in December 2010.

Another source of information about the scale of TPO agreements is the Annual Reports of FC Porto, which contain information about the status of the club's players. In 2009, FC Porto only owned 100% of the economic rights of five members of their 27 playing squad, whereas in June 2011, the club owned 100% of just three players' economic rights from the 19 they had registered.[11] In 2007, the Portuguese club paid £ 4 million from Anderson's transfer fee to agent Jorge Mendes for his share in Anderson's economic rights when the player was transferred to Manchester United FC.

In 2013, a TPO survey commissioned by the European Clubs Association (ECA) was made by KPMG.[12] The survey provided information about the state of the TPO market across Europe and Latin America. The report presents a detailed overview of the most common types of TPO agreements – the financial agreement – in which a club sells part of the economic rights of a specific player for a fixed sum. The other type of TPO is the investment agreement in which, during the acquisition of a player by his new club, an investor purchases part of his economic rights. Although the investor shares the risk with the football club, it is common practice that the third party requires a minimum return of investment regardless of whether the player was actually transferred elsewhere during the term of the TPO contract.

The data shows that the estimated market share of players under TPO in Portugal is between 24.6% and 30% of the total value

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8 *EPFL Sports Law Bulletin No. 10*, 2012, p. 26.

9 Circular letter No. 1335, FIFA mandated a second survey with Circular letter No. 1373 about the economic aspects of TPO.

10 CIES Football Observatory, *Football agents in the biggest five European football markets – An empirical research report*, February 2012, p. 77.

11 *EPFL Sports Law Bulletin No. 10*, 2012, p. 28, 46.

12 KPMG, *Project Third Party Ownership*, August 2013, p. 5.

of players in the country.[13] It is interesting to note that the market share of players under TPO agreements in Eastern Europe is bigger than Portugal and Spain's combined estimated market shares. Eastern European players, who signed TPO deals, represent between 40% and 50% of the total market value in these countries' top divisions; whereas these figures in Spain vary between 5.1% and 8%. There is a general upward trend in the TPO agreements in countries from the Eastern European region, namely Bosnia-Herzegovina, Croatia, Macedonia, Serbia, Albania, Bulgaria, Romania, Hungary, Slovenia and Montenegro. The reasons for this increase could be explained with the difficult financial situation among clubs from these countries in recent years.

In view of this continuous increase of TPO deals, it is understandable that the Bulgarian Football Union and the Serbian Football Union, along with the English FA and the French Football Federation, expressed strong opinion against TPO in their respective responses to the CIES survey, mandated by FIFA with Circular No.1335, and wanted TPO to be prohibited in the regulations of all FIFA members.

Bulgaria

Although no TPO contracts are publically available in Bulgaria at the present time, in 2014 several media sources and interviews with the President of PFC Levski Sofia suggested that the club had sold the economic rights of Garry Rodrigues to an investment fund called Promoesport, which works in close connection with Gimnàstic de Tarragona. According to the Spanish media, Promoesport transferred the player from Gimnàstic to Elche CF on loan, with a buy-out clause, but retained 30% of his economic rights upon future transfer.[14]

The Bulgarian legislation contains various provisions regarding rights of eligibility and also about transfer rights. The Law for the Physical Education and Sport[15] governs the eligibility to participate in organised professional sports competitions in Bulgaria. Art. 35b defines the eligibility to play as "*the combination of the athlete's right to participate in the training and competition activity of a sports club, and related to this participation rights*". The eligibility to play for the club may be transferred to another club or loaned for temporal usage by another club, but only with the consent of the player. Art. 11.5 of the Implementing regulation of the Law for Physical Education and Sport states that the players are entitled to play only for the club they are registered with.

Bulgarian law describes another important category of rights, namely transfer rights. According to art. 35c, transfer rights are "*the combination of the right to negotiate a change of club affiliation of an athlete and the right to get a transfer price*". The transfer rights are owned only by the club in which a player is under an employment contract. As far as the theory goes, the combination of "the right to eligibility" and "the transfer rights" represent the "federative rights" of a player. Economic rights are linked to federative rights, and can be defined as the expected financial revenue derived from the federative bond between club and player. Players' economic rights do not have a separate legal definition under Bulgarian law.

The BFU governs the right of eligibility and the transfer rights in its regulations. Art. 3 of BFU Regulations on the Status of Football Players[16] corresponds with the definition given in art. 35b of the Law of Physical Education and Sport. Art. 6 states that the rights of eligibility are valid only for the current football season or a specific part of it. The registration governed by the BFU is the act, which constitutes the right of eligibility for a player to represent a specific football club – art. 7. Art. 11 of the BFU's Contract and Players' Transfer Regulations[17] gives the same notion of the term "transfer rights" like the Law of Physical Education and Sport. As stated above, art. 12 of these BFU regulations presents an exact translation of art. 18bis RSTP, which prohibits the third party influence in football. Any violation is punishable in accordance with BFU's Disciplinary Regulations.

Conclusion

Despite the controversial nature of TPO, the football authorities in Portugal and Spain voiced strong disapproval in view of the potential prohibition of TPO. The Spanish Football League shares the opinion that TPO generates significant external funding for clubs, which could not otherwise afford the services of high class players, in order to be competitive against the richest clubs in the world. The Spanish and Portuguese football associations express the view that the financial stability of their member clubs is of high importance and third party investments could only benefit the situation of the clubs, which will share both the risk and the reward of any specific transfer agreement with another business partner.

The defenders of TPO also argue that the limitation and prohibition of TPO could possibly breach rules established by European competition law. The proponents of TPO believe that the practice should be regulated by FIFA rather than being banned by football governing bodies worldwide.

Prominent opponents of TPO agreements include UEFA and also the International Federation of Professional Footballers (FIFPro). FIFPro argues that the drawbacks of the TPO system far outweigh any benefits for the clubs and the players. The risk of jeopardising the integrity of football is the main point of FIFPro's disapproval of TPO. The scenario in which the same investor owns shares of players' economic rights, who compete against each other in the same competition, is not to be underestimated. The public perception of football competitions in which the viewers doubt the sporting legitimacy of the results on the basis of internal and private TPO agreements could be damaging to football across the globe. Furthermore, part of the revenue generated by players' transfers will be drawn away from the football industry and will give substantial leverage to companies outside football. This could be detrimental for the financial situation of clubs in the long run. They will become dependent on the power of third parties.

Another reason in favour of the ban against TPO could be seen in the attempt by FIFA to preserve contractual stability in football. Footballers should not be forced to breach their contracts or to agree to a transfer just because an investor wants

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[13] The market value is based on research by the German website www.transfermarkt.de and concerns players who are under contract with clubs of the top division of their respective countries.

[14] www.elchediario.com/display.aspx?id=13013, accessed on 4 May 2016.

[15] Official English translation of the Law is published on the site of the Ministry of Physical Education and Sport: http://mpes.government.bg/Pages/Documents/Law/default.aspx, accessed on 4 May 2016.

[16] BFU Regulations on the Status of Football Players, September 2015.

[17] BFU Contract and Players' Transfer Regulations, June 2014.

to profit from their move to another club within a specific time period.

After reviewing the data collected from two separate surveys on the subject of TPO, FIFA subsequently decided to impose a worldwide ban against TPO. FIFA informed all national associations with Circular letter No. 1464 that TPO will no longer be allowed and there will be a specific article 18ter in RSTP. Art. 18bis will continue to govern third party influence.

The new provision of art. 18ter states that:

> *"No club or player shall enter into an agreement with a third party whereby a third party is being entitled to participate, either in full or in part, in compensation payable in relation to the future transfer of a player from one club to another, or is being assigned any rights in relation to a future transfer or transfer compensation."*

The new rule came into force on 1 May 2015, and is binding on all national associations. RSTP allows a transition period for existing TPO agreements. They will remain valid until their respective expiration dates. However, their renewal is prohibited according to art. 18ter. Any TPO contracts, which were signed between 1 January 2015 and 30 April 2015, shall have limited duration, namely a maximum of one year. FIFA's approach towards the gradual removal of TPO from football was commended by the European Parliament in a declaration of November 2015.[18]

All football clubs are obliged to disclose in full all their existing TPO agreements until April 2015, including details about the third parties involved in them. Belgian club FC Seraing was one of the first to get punished in accordance with the new provision in September 2015. In recent months, several clubs were found guilty by FIFA's Disciplinary Committee for breaching the new rules regarding TPO. Brazilian club Santos FC; Spanish side Sevilla FC; Sint-Truidense V.V. from Belgium; and Netherlands' club F.C. Twente, were fined CHF 75,000, CHF 55,000, CHF 60,000 and CHF 185,000, respectively[19]. The violations were connected with third party influence and also failing to declare relevant information about existing TPO deals to be recorded in FIFA's Transfer Matching System (art. 18ter para 5).

Perhaps the most worrying issue about TPO is the prospect of clubs and investors finding new ways to bypass the FIFA regulations. The case with third parties obtaining shares in low division clubs (like Promoesport in Gimnàstic de Tarragona) in order to purchase economic rights of players using the club and immediately transferring the players to another club is a practice which should be investigated closely in view of the new rules against third party ownership.

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[18] European Parliament, Written declaration 0066/2015 submitted under Rule 136 of the Rules of Procedure on the ban on third-party ownership of players in European sport, 11 November 2015.

[19] www.fifa.com/governance/news/y=2016/m=3/news=several-clubs-sanctioned-for-breach-of-third-party-influence-third-par-2772984.html, accessed on 5 May 2016.

Extending the duty of care beyond the immediate: the pressure is on!

by Genevieve Gordon[1]

Introduction

More can be made of the general legal principle of "duty of care" within sport. Stakeholders within the sports industry place such demands on athletes, at varying levels of their careers, that the legal profession should be prepared to redefine and adjust the well-trodden path of the duty of care and extend its welfare concept to within sport preparation for transition.

Participation in sport and recreation always involves some level of risk that is not necessarily physical in this day and age. There is no single sport situation where there is zero physical or mental risk. The current viewing of the Rio Olympics is proof of this statement. All the athletes, without exception, put their hearts and souls into their sport and trying to win a medal. Some are used to the limelight and others are propelled into it, albeit temporarily, by their wonderful achievements and individual successes. But how do they cope with the undulating pressure of their chosen pathway; what is in place to help these athletes, those we, as a nation, so gallantly pin our hopes on and so readily tut-tut when they do not perform to our expectations, let alone their own?

The purpose of this article is to examine, in introductory form, what a duty of care entails and to provide some considerations for the sporting community to ponder.

The legal principle

The concept of the duty of care is one lawyers and the legally trained know well. In its simplest form, the legal principle of a duty of care is encapsulated in the tort of negligence.

The basis of the tort of negligence is a claim that the defendant failed to observe the necessary standard of care owed to the claimant and that this negligent act caused the claimant's injuries. The victim can then claim for compensation for the injuries suffered as a result of the negligence where a duty of care is recognised by the court.

The duty of care, in the traditional sense, has been written about by many eminent academics, lawyers and others. However, what if we take that duty and extend it to consider athletes from a post-sport point of view. What if we place a duty on sports organisations and governing bodies to consider the welfare of athletes during their sporting life?

If an individual brings a legal action, the courts apply the following criteria to determine if an organization, or indeed an individual, would be held responsible:

– reasonable foreseeability of injury or harm;
– proximity;
– fair, just and reasonable to impose a duty of care.

Whilst the claimant would have to show:

– they were owed a duty of care;
– the defendant breached the duty;
– the plaintiff suffered damage as a result of the breach.

Within this well-trodden principle, it is well established that the duty of care owed is higher when children and young people are involved in an incident, which has undoubtedly impacted on the sports offerings through both public and private channels.

The case of *Jolley v. London Borough of Sutton [2000]*[2] is an appropriate starting point for the duty of care being extended where children are involved.

Two 14-year-old boys were injured on an abandoned boat on Council land. The boat should have been removed two years previously. The Court of Appeal held that there was no liability, since the circumstances in which the injuries had occurred were unforeseeable; however, the then House of Lords overturned this decision and held that, as long as the boat created a foreseeable risk of injury, then the precise circumstances in which the injury occurred were not material in imposing liability. Of course, we know now through case law and legislation, if a child is known to have a learning difficulty or is known to have a medical condition, which makes them more vulnerable, the duty of care owed increases once again.

The duty of care in a sporting context

A duty of care can manifest itself in a legal duty to ensure safety whereby there is a strict definition. This principle has manifested itself in the world of sport.

The courts in *Condon v. Basi*[3] and *Caldwell v. Maguire*[4] held that the breach of the duty of care should be determined objectively. By many, this is viewed as the common sense position.[5] All participants must be deemed to consent to playing the same game according to the same standard of care. An objectively determined standard allows all participants to play the game according to the same playing and legal rules, based on the group's expectations of what is acceptable conduct in the particular sport that is being played. For example, those who play rugby accept that a high tackle is dangerous and, subsequently,

1 Of Tactic Counsel Ltd.
2 3 All ER 409.
3 [1985] 1 WLR 866.
4 [2001] EWCA Civ 1054.
5 S. Gardiner and others, *Sports Law*, 3rd edition (Cavendish Publishing Limited, 2006).

World Rugby added the dangerous tackle rule[6] in February 2011. Implementing this rule, World Rugby stated that referees and citing commissioners should make their decision based on an objective assessment considering the whole tackle.

A duty of care does not need to stop on the pitch, the stadium or risk, immediately associated to primary and secondary victims. In essence, a duty of care means that a sports body needs to take such reasonable measures in the circumstances to ensure individuals will be safe to participate in an activity to which they are invited or permitted to participate. If there is a formal relationship, such as a club and a club member, a duty of care so exists.

Traditionally, a legal duty of care amounts to risk and the overriding question is: have those involved taken reasonable steps to prevent foreseeable risk?

Since *Caldwell*, the concept of playing culture is now applied, although there are two distinct theories of liability. Either you apply the theory that sport should not be treated differently to any other activity; or you can take the view that this standard is simply too high, too easily breached and thus too inhibiting when playing sport.[7] Reckless disregard is perhaps a better standard, which has also been considered in a number of cases in judging participator violence.

Fashionable obligations

The more fashionable concept for a duty of care centres around the moral duty to ensure welfare to athletes and it is this that holds the pivotal point for discussion in this article.

Do we extend the notion of a duty of care from a moral standpoint? This is true when you consider that some firms are voted to be the best in the world to work for consistently by employees. In today's employee competitive world, it is important for organisations to differentiate between how to get an employee, keep an employee, and invest in an employee to the extent that they return.

According to Rebecca Lowe, human resources manager at Electric Word Plc (2014), the company which owns Sports Business International, places great importance on giving staff the ability to change job and company, with the hope that they will return because they realise how well Electric Word looks after their employees. Now that is not the suggestion for athletes – to change sports and come back to a sport that treats them nicely. It is merely the idea that the custodians of sport consider the welfare of their athletes with a more business-centric application of duty of care where there is an understanding that a contented employee is a worthwhile employee.

The moral duty of care is more correctly a responsibility for safety and welfare. The sports industry, or more specifically the sports' governing bodies, have a responsibility to all athletes, regardless of age and whether they are acting "*in loco parentis*".

Can we tackle the concept of additional care by imposing reasonable measures? Indeed, is it appropriate for sporting bodies with responsibility to have reasonable measures imposed upon them beyond childhood care?

The Child Protection in Sport Unit has established the *Standards for Safeguarding and Protecting Children and Young People in Sport* (2003) to identify what a sports organisation should reasonably undertake in relation to child protection.

The Standards require sports organisations (national governing bodies and county sports partnerships) to have in place:

– child protection policies;
– procedures and systems;
– prevention;
– codes of practice and behaviour;
– equity;
– communication;
– education and training;
– access to advice and support;
– implementation plan.

If we were to extend the original measures in line with the definition of integrity and the fashion to be ethically and morally sound, we could add, again in simple form:

– transition welfare ;
– non-sport opportunity awareness;
– exit pathway programme.

Responsible support

Do we have a duty of care over psychological stress? Psychological stress is defined as a relationship between person and environment that taxes their resources and endangers their well-being. Perhaps the more pertinent question should therefore be: do national governing bodies contribute to a situation of psychological stress for athletes?

Sports governing bodies, clubs and associations may find there is an onus on them to have support networks available to at-risk athletes.[8] From an employment law perspective, employers have a duty to their employees and must ensure that suitable steps are taken to minimise work place stress wherever possible and sport should not be any different.

Stress and depression is obviously not confined to the sporting industry; however, high profile cases like that of Freddie Flintoff, the ex-England cricketer, and the plight of Ricky Hatton, the boxer, do help highlight the associated problems. Knowing athletes are struggling with more than physical pain gives clubs and governing bodies the opportunity to review their practices and procedures to see what more can be done.

Younger athletes are potentially more at risk of pressure-related illness although this does not discount mature athletes. An element of the blame for added pressure could lie at the door of our hyper-connected society. Recent research suggests it may be occurring at a younger age too with young people taking the time to manipulate their social media feeds to show false "likes" and "favourites". Round the clock media attention and the ever-increasing commercialism of sport, often driven by national governing bodies to bring more money into their sport, only serve to add to the pressure of being an athlete in the modern era.

Earlier in 2013, a study at the University of Leeds looked at 167 junior football players in eight academies and centres of excellence across England. The study concluded that up to a quarter occasionally reported "burnout" while one per cent admitted burnout was happening on a reg-

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6 Law 10.4(e).

7 See A. Felix, "The Standard of Care in Sport", in: *Sport and the Law Journal* 32 (1996).

8 Ashley Wootton, "Stress in sport - is enough being done to help athletes?" (Sportspro mediacom, 4 December 2013), available at www.sportspromedia.com/guest_blog/stress_in_sport_is_enough_being_done_to_help_athletes, accessed 15 August 2016.

ular basis. The author of the research said the stress of trying to meet extreme expectations of coaches, team members and parents meant that these young footballers were at risk of burnout before school leaving age. For the benefit of elite sport, Dr. Andrew Hill's study[9] did identify that athletes with high levels of self-perfectionism were "significantly less vulnerable".

Pressures that are autonomous to sport include competition from other players; pressures from managers; coaches and undoubtedly owners; long tours away from home; a need to balance home life with work life; fan expectation; performance stress; and, of course, the stress and pressure athletes place on themselves to be the very best.

A number of high profile athletes have attested to the stress of staying at the top of their game, achieving great things and the continuing expectation and intrusion into their post-sport lives.

Transition

What can the law do for athletes that want to speak out prior to retirement whilst they are still an asset to their sport?

Should a duty of care extend to transition because of the autonomous nature of sport? Do we have a situation within sport where this principle should be extended to consider athletes and their transition period, but, *in situ*, so supporting the life of the athlete during the time they are active rather than just picking up the mantle once the athlete has decided to retire? Beyond transition consideration should be given to whether the issues faced by the retired athlete can be traced back to their sport and governing body, meaning that sport has contributed to an illness giving rise to a causal link of sorts?

It is important that we do not expect national governing bodies to act over and above an appropriate extension of duty of care and, therefore, detract from their fundamental purpose of being the custodians of their sport. The purpose is not to expose the NGBs and other stakeholders to onerous obligations. The purpose is to suggest an opportunity to promote external independent opportunities within an athlete's career to aid them in, arguably, their most difficult time of competitive sport, retirement.

The Scandinavian sports model[10] alludes to the fact that sport can consider the longevity of an athlete, rather than the supposition that age is a barrier to sport, inferring, therefore, that sport needs to be more youth-centric and thus in line with policies that protect children, young and vulnerable adults.

The dual careers discussion, along with the recent *Integrity Guidelines for Directors and Leaders of Sporting Organisations* eloquently expresses the view of the EU Commission and other countries to provide educational opportunities to young sports people.

Although not relating to the subject being deliberated, a case that has identified and highlighted the process of a young footballer's thoughts on education is *Hamed v. Mills & Tottenham Hotspur FC*.[11] At paragraph 18:

> *"The Claimant was born on 19 December 1988. As a boy, his focus was more on sport than on his academic studies* [...]*"*

There is no doubt that the sports industry has progressed beyond the YTS days of football in the 1980's; however, there is a mark over how much resource is put into the educational life of an athlete making the opportunity of a dual career or post-sport retirement career more of an option.

Hickey and Kelly's paper of 2006[12] discusses the nature of identity in athletes and the relationship between the growth of an identity past athlete status. Hickey and Kelly identify through the AFL's study "Getting the Balance Right: professionalism, performance, prudentialism and playstations in the life of AFL footballers" that professional athletes need to create a professional identity that has many facets including:

> *"*[...] *emerging ideas that a professional leads a balanced life, and has a prudent orientation to the future, to life after football. Second the idea that this "professional identity" is not natural, and must be developed through a range of "professional development" activities (a common link to all other "professions").*"[13]

Consideration of variance determined by standard

The normal application of the duty of care in sport has been confused when considering the variable standard of care in different standards for different leagues since Condon where it was concluded that a higher degree of care was required of a player in a first division or national league game than of a player in a local league football match. Undoubtedly, this would have led to a variable difference in the law (see *Nettleship v. Weston*[14]). Concern was abated in *Elliot v. Saunders and Liverpool FC*[15] where it was determined that all participants ought to be judged by the same basic standard of the ordinary, reasonably competent participant in the particular activity.

Are these decisions, therefore, applicable to the notion of an extension?

Is it acceptable, say, to consider that athletes should receive more assistance once they are on an elite pathway? Is it acceptable to impose a duty on national governing bodies that demands they set a portion of their funds aside to promote post-sport careers? How many companies outside of sport really allocate considerable funds to the well-being of their employees with a view to their life progression? Can we expect all sports custodians to be as forward thinking as that of Electric Word Plc?

The turning tide

Following on from the government sup-

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9 Dr. A. Hill, "Perfectionism and Burnout in Junior Soccer Players: A Test of the 2 x 2 Model of Dispositional Perfectionism", in: *Journal of Sport and Exercise Psychology*, 2013, 35 (1), available at www.humankinetics.com/acucustom/sitename/Documents/DocumentItem/03_Hill_JSEP_2012_0094_18-29.pdf, accessed 31 August 2016.

10 The aim of providing a duty of care to athletes and sports participants at all levels of completion with the aim of ensuring that as many as possible play sport for as long as possible and in the most supportive and safest of environments.

11 [2015] EWHC 298 (QB) Mr. Justice Hickinbottom Approved Judgement.

12 Christopher Hickey and Peter Kelly, "Preparing to *not* to be a footballer: higher education and professional sport", in: *Sport, Education and Society*, 2008 13(4), p. 477-494, available at http://dro.deakin.edu.au/eserv/DU:30018009/hickey-preparingtobea-2008.pdf, accessed 31 August 2016.

13 http://dro.deakin.edu.au/eserv/DU:30018009/hickey-preparingtobea-2008.pdf, accessed 31 August 2016.

14 [1976] 2 QB 691.

15 (1994) unreported.

port shown at London 2012 and continued support resulted in the 2015 release of the UK government's "Sporting Future: A New Strategy for an Active Nation Report". This report has combined the requirements for health and well-being, increased participation in sport and strengthening the nations sporting performance and shows signs of progression.

Further, it was announced this year that UK sports bodies and organisations wishing to receive funding will have to adhere to a new *Code of Governance* to help ensure that the highest levels of transparency, ethical standards and leadership are present across sport in the United Kingdom.

As a result of the publicly-funded sports sector, it is deemed appropriate that stakeholders can see what is expected and there is a higher level of accountability from governing bodies in a number of key areas.

The main elements in the charter that will form the basis of this Code are:

– transparency;
– tntegrity;
– financial probity;
– leadership and decision–making;
– membership;
– independence of thought;
– diversity;
– culture.

Duty of care could easily be drafted into the notion of integrity. After all, it makes ethical and moral sense to support and care for those that you benefit from. If the outcome is favourable to athletes, the now well-publicised Department of Culture, Media and Sport's Duty of Care Review being led by the Paralympic athlete, Baroness Tanni-Grey Thompson, we should see some maneuverability in the realms of conscious support for athletes during their careers and in preparation for transition and eventual retirement.

One of the aims of the review is to establish a duty of care to athletes and participants in line with the moral duty of care discussed above. It remains to be seen how much of the review will focus on career and the purported life-after-career support.

But, where will this truly leave athletes in a transitional or established period of their careers?

Ultimately, can we go right back to the beginning and take the rather generalised approach of the neighbour principle?[16] Instead of sports participants taking all reasonable care, the sports stakeholders should take all reasonable care, from a subjective standpoint, to avoid causing foreseeable injury, or perhaps better phrased as harm, to the foreseeable co-participants, the athletes.

The identified lacunae have an opportunity of being corrected with an extension to the principle of the duty of care and can, efficiently and effectively, sustain athletes throughout their careers and beyond if, and only if, appropriate policies are put in place by national governing bodies and truly independent organisations to provide support to athletes in these often stressful positions.

Policies should focus on the notion of being mentally fit and the responsibility of sports stakeholders to conscientiously support and protect the health and well-being of athletes for the long term; of which an athlete and their sport can be proud!

[16] [1932] AC 562.

UK sports broadcasting rights: protecting and exploiting them

by Prof. Dr. Ian Blackshaw[1]

Introductory remarks

Sport is now big business globally, accounting for more than 3% of world trade. And, in the European Union (EU), with a population of 508 million, the sports industry is now worth 3.7% of the combined GNP of the existing 28 (soon to be 27 after UK recently voted to leave) member states. There is, therefore, a lot to play for, from both a sporting and a financial point of view. Indeed, as the former UK Sports Minister, Richard Caborn, who initiated the EU "White Paper" on Sport during the UK Presidency of the EU in the second half of 2005, has pointed out: "[t]*he commercialisation of sport, especially football, has moved at a pace that no one could have envisaged*". And, it may be added, continues to do so! Sport is now a product in its own right.

The rise of sport as a global industry is largely the result over the years of the marketing of sports, sports persons and events, originally in the United States of America (USA), and subsequently in Europe and elsewhere. This has led to the establishment of a world-wide discrete sports marketing industry, due to the vision and pioneering work of Mark McCormack in the USA, through his company, IMG (International Management Group); and in Europe, by Horst Dassler, of the German sports goods manufacturer Adidas, through his Swiss company ISL (International Sport Leisure and Culture), which he founded. Sadly, neither of these pioneers is alive today to see the extent to which sports marketing has grown and enjoy the full fruits of their work.

Of the sports marketing mix, which includes sports sponsorship, merchandising, endorsement of products and services, and corporate hospitality, perhaps the most important and lucrative one is the sale and exploitation around the world of sports broadcasting rights, including new media rights, such as internet streaming of sports events, all of which contribute mega sums to many sports and sports events, including the Summer and Winter Olympic Games and the FIFA World Cup. Indeed, it is fair to say that, without the sums generated by sports broadcasting, such major events – and, in fact, many others – could not take place and consequently sport – and sports fans – would be the losers.[2]

The importance of sports broadcasting rights

In this respect, the commercialisation of sports broadcasting rights may be considered as the "oxygen of sport". There is a symbiotic relationship between sport and TV broadcasting. Indeed, according to David Griffith-Jones, QC: "*This marriage between sport and television is one made in heaven.*"[3] And according to Richard Parrish: "*The broadcasting sector and sport have* [...] *revolutionised each other.*"[4] And the significance of new technology – especially broadband and quicker access to the internet – in the development and financial importance of sports broadcasting rights cannot be over emphasised as Richard Verow, Clive Lawrence and Peter McCormick rightly point out:

> *"In many ways, the rise of new platforms for the dissemination of media products and the inevitable rise of sport as the global media property it now is have been intertwined. Just as the formation of the FA Premier League and the rise of satellite pay television through BSkyB seemed inextricably linked, so when new platforms, such as the proliferation of digital television channels or the exploitation for broadcast or quasi broadcast purposes of internet and mobile telephony platforms, come to the fore, their usual test bed in terms of content is in sport. It seems that only sport has the pulling power nationally and internationally to justify the sort of investments needed to bring new media platforms to market, and maybe sport is alone considered sufficiently popular for the uptake by new customers properly to reflect the potential of the medium rather count simply as a commentary on the first content offered through it."*[5]

For example, the English FA Premier League – the world's most popular and most financially successful football league – have recently sold their UK live rights to their matches for the three seasons beginning in 2016 for a record sum of £ 5.136 billion. With the sale of additional rights, including new media and overseas rights, the total sum involved is some £ 8.3 billion. Again, the lion's share of these rights has been sold to the satellite broadcaster, BSkyB, to be shown as part of its Sky Sports package on a subscription basis. BSkyB is owned by the Australian media magnate, Rupert Murdoch, through his group News International, who, incidentally, considers "*sports as a battering ram and a lead offering*" in all his pay television operations around the world.[6] In other words, as a means to selling other Sky pay-tv packages.

It is interesting to note that BSkyB has held the live rights to broadcast Premiership football in England since 1992. Ac-

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1 International sports lawyer, academic, author and member of CAS. He may be contacted by e-mail at ian.blackshaw@orange.fr.

2 See Ian Blackshaw, *Sports Marketing Agreements: Legal, Fiscal and Practical Aspects* (TMC Asser Press, The Hague, The Netherlands 2012).

3 D. Griffith-Jones, *Law and the Business of Sport* (Butterworth and Co, London 1997), at p. 289.

4 Richard Parrish, *Sports law and policy in the European Union* (Manchester University Press, Manchester and New York 2003).

5 Richard Verow, Clive Lawrence and Peter McCormick, *Sports Business*, Second Edition (Jordan Publishing Limited, Bristol 2005) at p. 321.

6 Address at the AGM of News Corporation on 15 October 1996 in Adelaide, Australia.

cording to Peter Scudamore, the Chief Executive of the English Premier League, these rights are now more valuable and "[...] *for the first time these are platform-neutral rights available for exploitation on wider technology*". These broadcast rights fees are very impressive and there will be even more TV money for the twenty English Premier League football clubs to share amongst themselves accordingly.

It should also be mentioned that, on 6 November 2015, it was announced that Sky, the UK pay-tv broadcaster, has secured additional TV rights to the English FA Premier League. For the three seasons, 2016-2017 to 2018-2019, Sky has been granted the near-live extended TV highlights of association football's most popular and lucrative league.

Under the new deal, Sky will be able to show extended highlights of 212 Premier League matches that are not shown live on television and, for the first time, fans will also be able to view these highlights on demand. In other words, on "catch-up".

The new deal is in addition to Sky's newly-acquired mobile "clips" from all 380 Premier League matches, as well as the live rights they already hold to 126 matches. These live rights are shared with BT Sport.

No figure has been disclosed for these Sky new TV rights!

This has been hailed by Sky Sports managing director, Barnet Francis, as providing fans with more ways of watching extended highlights of the League on TV. But, the question has to be asked whether, from a competition law point of view, too much sports broadcasting power is being concentrated into too few hands!

The English Football League has signed several broadcast rights deals with Sky Sports and Channel 5 to show its major competitions.

It may be added that the exploitation of broadcasting rights in football has become so valuable and important that many leading football clubs, such as the English club Manchester United, operate their own television channels for the benefit of their fans and also their commercial sponsors, made possible with the advent of digital TV.

The International Olympic Committee (IOC), for instance, has sold the broadcast rights for the 2008 Beijing Summer Olympic Games, the 2012 London Olympic Games and the 2016 Brazil Summer Games for stratospheric sums too![7] In fact, the TV rights money for the 2016 Games through world-wide deals made by the IOC with broadcasters has increased by 52%. For example, the American channel NBC has paid some US$ 7.65 billion for the three Olympic Games cycles until 2032. TV rights now account for 70% of the income generated by the Olympics.[8] And the upward trend in the sale of broadcast rights for major world sports events, such as the FIFA World Cup, seems unstoppable.

Among the legal issues to be addressed when dealing with sports broadcasting rights is their ownership and protection and also their commercial exploitation. This article will look at the position on these matters in the United Kingdom, including the impact of EU competition law.

Ownership and protection of sports broadcasting rights in the UK

Broadcasting rights take many forms, live, delayed, highlights, clips and radio; and it has been well said that their ownership is a vexed question and one that is not capable of a brief or simple answer.[9]

There is no statutory definition of broadcasting rights; neither is there any English Court decision dealing with the matter.

However, there is an Australian High Court decision, namely, *Victoria Park Racing and Recreation Grounds Company Ltd v. Taylor and others*[10], on the subject, albeit that it concerns radio and not TV broadcasts. This decision is of persuasive authority in the United Kingdom and could be relied on if the matter were to be considered by the UK courts. In any case, it is taken to be and accepted as the law in England.

In the Australian case, the first defendant owned the land near Victoria Park racecourse. He erected an elevated platform on his land from which he could view not only the horse races, but also Victoria Park's notice boards which displayed all the data and other information relating to the races. The second defendant broadcast radio commentaries on the races and descriptions of what could be viewed from the first defendant's platform. The owner of the racecourse sought an injunction against the broadcasts on the grounds that the defendants' actions deterred would-be spectators from attending with a consequent loss of gate money. In the judgement at first instance, the Judge held that :

> *"The defendant does no wrong to the plaintiff by looking at what takes place on the plaintiff's land. Further, he does no wrong to the plaintiff by describing to other persons, to as wide an audience as he can obtain, what takes place on the plaintiff's ground."*

On appeal, the Court stated :

> *"It has been argued by the expenditure of money the plaintiff has created a spectacle and that it therefore has what is described as a quasi-property in the spectacle which the law will protect. The vagueness of this proposition is apparent on its face. What it really means is that there is some prinicple (apart from contract or confidential relationship) which prevents people in some circumstances from opening their eyes and seeing something and then describing what they see. The court has not been referred to any authority in English law which supports that general contention that if a person chooses to organise an entertainment or do anything else which other persons are able to see, he has a right to obtain from the court an order that they shall not describe to anybody what they see [...] the mere fact that damage results to a plaintiff from such a description cannot be relied upon as a cause of action. I find difficulty in attaching any precise meaning to the phrase "property in a spectacle". A "spectacle" cannot be "owned" in any sense of that word."*

Likewise, in line with the Victoria Park case, aerial photography of a landowner's

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7 In 2016, the IOC launched its own television channel, the IOC Olympic Channel, which offers Olympic sports twenty-four hours a day, aimed at reaching the widest possible audience. Broadcast sponsorships and advertising opportunities will be offered first to the IOC's "Worldwide Partners".

8 See www.totalsportek.com/money/olympics-2016-tv-rights-deals-worldwide-increased-52, posted on 31 March 2016.

9 See the chapter on the United Kingdom by Adrian Barr-Smith in: Ian Blackshaw, Steve Cornelius and Robert Siekmann (editors), *TV Rights and Sport – Legal Aspects* (TMC Asser Press, The Hague, The Netherlands 2009), at p-p. 549-550.

10 [1937] 58 CLR 479, HC of Australia.

property by another is not prohibited by law.[11] As the Judge stated in this case:

> *"There is no law against taking a photograph, and the mere taking of a photograph cannot turn an act which is not a trespass into the plaintiff's airspace into one that is a trespass."*

On the other hand, in the USA, another common law jurisdiction, quasi-proprietary rights in sporting events are legally recognised in accordance with the doctrine of "commercial misappropriation".[12]

Notwithstanding the above general legal principles, it can be argued that the ownership of sports broadcasting rights may vest in some or all of the venue owner, the "home" team, the "away" team or the competition/event organiser. In other words, broadcasting rights are controlled by the party holding "the keys of the door".

However, see the case of *British Broadcasting Corporation v. Talksport Ltd*[13]. In that case, the BBC sought an injunction to restrain a rival broadcaster talkSPORT from creating an audio commentary derived from viewing pictures of the EURO 2000 football championship in Belgium on television. In order to appear more authentic, the radio commentary included some stock crowd noise and the BBC argued that talkSPORT was, therefore, passing off its "live broadcast" from Belgium. Although the BBC was accredited by the organiser to make the exclusive live radio broadcast from the event, it failed to persuade the court that it was entitled to an injunction or that the activities of talkSPORT were tortious or otherwise intrinsically unlawful. This case illustrates that, on occasions, even controlling the "keys of the door" will not alone guarantee exclusivity in the absence of a legally recognised property right in the event itself.

The event organiser and/or the promoter clearly owns the event, but ownership per se does not extend to the broadcasting rights, unless underpinned in various ways, basically, such as the control of the venue rights and restrictions on spectators. The "broadcasting rights" are created and reinforced by the law of contract. The fact that these rights are the creature of contract means that they can be devolved by contract. So, for example, the owner of a stadium/arena who licenses the use of it to the promoter/organiser of the sporting event for that purpose may grant to the latter "the exclusive broadcasting rights", defined as the right to film and record pictures and sound of the event and to transmit live signals or recordings of the same. The owner of the stadium/arena may also expressly agree not to broadcast the event and/or, if he retains the control of access or ticket sales, may agree to restrict spectators from broadcasting the event.

But what is the legal position of the participants in sporting events, the players and officials, and also the spectators who attend them? Players do not enjoy "performers' rights" under section 180 of the UK Copyright Designs and Patents Act 1988. Most players and officials are employed. In many such cases, their contracts of employment will require them to play in televised events and will provide that such performances and/or public training may be filmed and televised as their employers may agree. In addition, players and officials may be required to give certain interviews. Spectators also agree to be filmed by attending the event, expressly under conditions stipulated in their tickets or impliedly by attending an event knowing in advance that it is being televised. As such, neither players, officials nor spectators may be able to claim any broadcast rights in the sports event concerned.

As Adrian Barr-Smith points out, the ownership of sports broadcasting rights is more complicated where teams or clubs are participating in a league or other competition.[14] In such cases, it may be argued that the goodwill in the sports event is owned by the organiser, either alone or jointly with the participating teams. In view of the decision in the *Victoria Park* case, it does not follow that the owner of the event concerned automatically owns the broadcasting rights.

This is an issue faced by the international sports bodies. For example, to clarify the position, UEFA has included the following provision in its Statutes :

> *"UEFA and the member associations shall have the exclusive rights to broadcast and use, as well as authorise or broadcast and use, by picture, sound or other carriers of any kind (including data carriers which have yet to be developed), matches which come within their jurisdiction, either live or recorded, in whole or as excerpts."*[15]

There are similar claims made in the Olympic Charter, which provides in art. 7 (2) as follows:

> *"The Olympic Games are the exclusive property of the IOC which owns all rights relating thereto, in particular, and without limitation, all rights relating to (i) the organisation, exploitation and marketing of the Olympic Games, (ii) authorizing the capture of still and moving images of the Olympic Games for use by the media, (iii) registration of audio-visual recordings of the Olympic Games, and (iv) the broadcasting, transmission, retransmission, reproduction, display, dissemination, making available or otherwise communicating to the public, by any means now known or to be developed in the future, works or signals embodying audio-visual registrations or recordings of the Olympic Games."*

And also in the FIFA Statutes, which provides in art. 74 as follows:

> *"1FIFA, its Members and the Confederations are the original owners of all of the rights emanating from competitions and other events coming under their respective jurisdiction, without any restrictions as to content, time, place and law. These rights include, among others, every kind of financial rights, audiovisual and radio recording, reproduction and broadcasting rights, multimedia rights, marketing and promotional rights and incorporeal rights such as emblems and rights arising under copyright law.*
>
> *2 The Executive Committee shall decide how and to what extent these rights are utilised and draw up special regulations to this end. The Executive Committee shall alone decide whether these rights shall be utilised exclusively, or jointly with a third party or entirely through a third party."*

Further, art. 75 of the Statutes provides as follows:

> *"1 FIFA, its Members and the Confederations are exclusively responsible*

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[11] See *Bernstein of Leigh (Baron) v. Skyviews and General Ltd* [1997] 2 All ER 902.

[12] *Pittsburg Athletic Co et al. v. KQV Broadcasting Co*. [1937] 24 F. Supp. 490.

[13] [2000] TLR 401.

[14] See Ian Blackshaw, Steve Cornelius and Robert Siekmann (editors), *TV Rights and Sport – Legal Aspects* (TMC Asser Press, The Hague, The Netherlands 2009), p. 554.

[15] Art. 48.1.

for authorising the distribution of image and sound and other data carriers of football matches and events coming under their respective jurisdiction, without any restrictions as to content, time, place and technical and legal aspects.

2 The Executive Committee shall issue special regulations to this end."

Commercial exploitation of sports broadcasting rights in the UK

Introductory

Generally speaking, sports broadcasting rights are sold on a collective basis and this raises legal issue at the national and the European levels.

Whilst the legal treatment of sports TV rights varies from country to country, in the European Union there is some degree of harmonisation. This is the consequence of the inexorable rise of EU competition law generally and its particular application to the sporting world, which has produced something of an overarching, unifying and harmonising factor in the field of sports broadcasting in those countries, which are members of the EU or the EEA (the European Economic Area), in which the EU competition rules generally apply. But it should be noted generally that, in the brave new world of Europe, there is a growing move towards competition issues in the EU being handled by the national competition authorities in preference to those at the EU level pursuant to the so-called "subsidiarity" principle, whereby matters, wherever possible, are handled at the local rather than at the European level.

UK

In July 1999, the Director General of Fair Trading (DGFT) brought a case against the English FA Premier League, BSkyB and the BBC. In that case, the DGFT claimed that the exclusive agreement between those parties amounted to a restriction on the supply of services under the Restrictive Trade Practices Act 1976 (the RTP Act) and was, therefore, contrary to the public interest. The DGFT argued that the collective sale by the Premier League of their broadcasting rights constituted a cartel, which would not be acceptable in any other industry. In response, the Premier League contended that individual sales of broadcasting rights by clubs would be contrary to the interests of football and would lead to chaos and aversely affect club competitions. The Restrictive Trade Practices Court found that collective selling of broadcasting rights by the Premier League was not contrary to the public interest, because the clubs would lose income; there would also be reduced competition between broadcasters; and the Premier League would not be able to divide television revenues equally between the member clubs in order to preserve the competitive balance.[16]

EU

The Premier League's broadcasting rights were subsequently the subject of an investigation by the European Commission into the collective manner in which the League sold these rights to the competition following a notification made to the European Commission in June 2002 by the League of certain of its broadcasting agreements with BSkyB. The Commission decided that it could not grant an exemption and issued a "Statement of Objections" in December 2002, setting out the Commission's competition concerns. Although the League disagreed with the majority of the Commission's findings, both sides recognised the value of reaching a settlement of the case. This was reached in March 2006, when the Commission announced that it had received from the League a package of "commitments" thus allowing the Commission to close its file on the case.[17] Amongst others, that no single buyer, whether acting alone or in concert with others, can acquire more than five of the six live television rights' packages. The League also undertook to ensure that its live audio-visual packages would be "technologically neutral" regarding the "platforms" on which those rights could be exploited. In other words, any broadcaster, whether involved in television, television over the internet, mobile or any other technology, could bid for and win these rights. In addition to the commitments on the process by which the League sells its broadcast rights ("unbundling" of them and tendering), the League also undertook, in addition to the six live audiovisual packages mentioned above, to provide certain rights packages as follows:

– two technologically neutral "near live" packages of 121 matches each, comprising those matches not shown live each season, to be broadcast a matter of hours after the ends of those matches;
– a near-live package to be exploited on the internet comprising clips of all matches played, to be made available from midnight on the day of the relevant game;
– a "mobile clips" package containing short extracts of all matches played;
– a number of radio rights packages;
– a highlights package for exploitation on free-to-air television.

The League has also agreed to allow its member clubs to exploit certain television, internet and mobile rights on a "deferred basis". In other words, after a time holdback which is deemed sufficient to protect the value of the equivalent centrally-sold package.

Although the Commission regards the collective selling of broadcast rights as anti-competitive, the Commission accepts that such selling can provide benefits to consumers, media operators and the clubs themselves in so far as it is necessary to ensure that income from the sale of the media rights is redistributed in a way that maintains a competitive balance between teams and thus promotes an interesting competition. However, the Commission must be convinced that the benefits from collective selling of the rights outweigh the negative effects on competition, particularly in the broadcast markets in which the rights are exploited.

European Champions League

The leading 2003 Decision of the Commission involving the collective selling of the broadcasting rights to the UEFA European Champions League[18], which has been used as kind of "template" in subsequent sports broadcasting cases at the national level, and also the unresolved legal questions regarding the matter of the so-called "organisational solidarity" in sport – considered to be legally and politically sensitive – are of crucial importance and worthy of further critical analysis and study.

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[16] See *An Agreement between the FA Premier League and BSkyB* [2000] EMLR 78.

[17] These commitments were made under art. 9 of Regulation 1/2003/EC, by which parties to a competition investigation could make binding concessions satisfying the Commission's competition concerns, but without the necessity of a decision on the legality or otherwise of the parties' behaviour.

[18] Dec. 2003/778. OJ 2003 L 291/25-55.

Following this Decision, the Commission requires the following conditions to be satisfied:

– an open tender;
– an "unbundling" of the offer allowing more than a single buyer;
– no excessive exclusivity (a term of three years being regarded as a general norm); and
– no automatic renewal (regarded as a disguised extension of the term of the exclusivity).[19]

The Commission's aims in relation to opening up competition within the single EU market in the field of sports broadcasting rights may be summarised in the following remarks made, in the context of the 2005 Commission Decision in the German Bundesliga case,[20] by the EU Competition Commissioner, Neelie Kroes,[21]:

> *"The decision benefits both football fans and the game. Fans benefit from new products and greater choice. Leagues and clubs benefit from the increased coverage of their games. Readily available premium content such as top football boosts innovation and growth in the media and information technology sectors. Moreover, open markets and access to content are an essential safeguard against media concentration."*[22]

"Brexit"

A word or two on a recent important development, commonly known as "Brexit", follows.

On 23 June 2016, in an "in-out" referendum, the United Kingdom in a shock result voted to leave the European Union. Under art. 50 of the EU Treaty, once the UK officially notifies the Commission of this decision, there will be a minimum period of two years for the UK to negotiate the terms of its withdrawal from the EU.

Depending upon the new relationship between the UK and the EU, even if the UK does not agree to abide by the EU competition rules in the future, which, in the opinion of the author of this article, seems unlikely as the UK wishes to maintain a trading relationship with the EU, the competition law principles under the UK Competition Act of 1998 are modelled on those of the EU as enshrined in art. 101 and 102 of the EU Treaty.[23] Thus, as far as the commercialisation and regulation of sports broadcasting and media rights under competition law, as discussed in this article, are concerned, the basic EU legal position will remain the same in the UK following its eventual withdrawal from the EU. In fact, EU competition law is crucially important to the interpretation and application of the UK competition rules.

Concluding remarks

Sports broadcasting and media rights have been well described as being "the oxygen of sport".

Indeed, without the mega sums paid by broadcasters for these rights, major international sporting events could not be organised and held, much to the disappointment of athletes and fans alike.

The issue of legal ownership and who may exploit these rights is, to some extent, problematic, but is overcome by the use of "back-to-back" and inter-related contracts, which need to be very carefully drafted.

In fact, precision is the name of the game in all cases.[24]

The subject of sports broadcasting and media rights not only provides interesting but also challenging work for sports lawyers and "Brexit" will add another dimension to the process!

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[19] Speech entitled 'Commercialising Sport: Understanding the TV Rights Debate' delivered in Barcelona by Herbert Ungerer, of the EU Competition Directorate General, on 2 October, 2003, in which, *inter alia*, Ungerer argued that "there must be a clear separation between sports regulation and the commercialisation of sport." And added: "TV is of high significance for football clubs, 30-70% of football clubs' revenue come from TV, and this explains why sometimes our efforts [the Commission] to bring joint selling into line with Competition law requirements meet a certain anxiety – even bitterness – on the side of some leagues, and are initially misunderstood."

[20] OJ 2004 C 299/13.

[21] COMP/C.2/37.214.

[22] IP/05/62, 19 January, 2005.

[23] See chapters I and II respectively of the UK Competition Act 1998.

[24] See further on this subject chapters 13 and 14 on "Sports TV Agreements" and "Sports New Media Rights Agreements" respectively at p. 285-378 (both inclusive) of *Sports Marketing Agreements: Legal, Fiscal and Practical Aspects* (TMC Asser Press, The Hague, The Netherlands 2012).

New practice of the canton of Vaud on the taxation at source of artists, athletes and speakers performing in Switzerland

by Xavier Oberson[1]

Introductory remarks

Switzerland levies, since decades, a withholding tax at source on artists, athletes and speakers performing in Switzerland. The tax is levied both at the federal and cantonal levels and is aimed at organisers of shows and demonstrations.

In general, the Swiss rules follow the regime of art. 17 of the OECD Model Tax Convention on Income and on Capital.

In practice, the costs of the performance are deductible, but the precise amount of these costs is subject to controversy. However, contrary to the OECD model, the tax is also levied on speakers and, therefore, this rule is not applicable when there is a double taxation treaty based on the OECD Model Tax Convention on Income and on Capital with the residence country of the speaker. The taxation at source on artists and athletes has always raised some specific issues, such as the definition of artists and athletes; the amount of deductible costs for the performance; the link between the income and performance (in particular, in the case of sponsoring or merchandising, *etc.*); and also the system of a computation of the tax.[2]

It is interesting to describe, in a short summary, the recent new practice of the canton of Vaud in an administrative Circular on the withholding tax dated December 2013 (the "Circular"), which aimed at organizers of shows and demonstrations participating in the organization of such events in the canton of Vaud's territory in which artists, athletes and speakers ("AAS"), with no domicile in Switzerland, perform. Indeed, in this new Circular, the administration of the canton of Vaud suggests a new method of computation of the tax which could be quite interesting in practice and, in a way, outsourcing the computation and exact determination of the net performance income to the organiser of the event, taking account notably of the development of the business in this area. This is particularly the case for artists which are under contract with a big music organiser.

This article will, therefore, give a short description of the essential elements of this new practice.

Essential elements

Preliminary remarks

The Circular is based on art. 92 par. 1 of the Federal law on direct federal tax (hereafter "LIFD")[3]. According to this legal provision, AAS that are domiciled outside Switzerland must pay a tax on their personal income in Switzerland (economic link according to art. 5 par. 1 let. a LIFD). This kind of tax is in accordance with double tax treaties (namely art. 15 and 17 of OECD Model Tax Convention on Income and on Capital).

The withholding tax provided at art. 92 par. 1 LIFD does not appear from the precise wording of this provision, but from the systematic interpretation of the law.

Art. 92 par. 4 LIFD makes the organiser of the event in Switzerland jointly liable for the tax payment. This could lead one to think that the tax should mainly be paid by the AAS.

However, this is a false interpretation, as the law provides a withholding tax collected from the debtor of the income, the employer[4]. The tax subject, namely the person who is obliged by the law to pay a certain tax, in this case, the AAS, is different from the one who ultimately bears the tax.

The difficulty of this distinction and the important number of participants in an event made the adoption of the Circular necessary.

It should be noted that the Circular is an administrative order, which is not to be considered as a rule of law, but as a rule of interpretation that does not bind the judge[5]. In addition, the Circular is valid under federal and cantonal law, provided that the canton of Vaud has a legal provision similar to the federal one, namely art. 139 of the direct tax of the canton of Vaud[6].

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1 Attorney-at-Law and Professor at the University of Geneva. The author wishes to thank Federico Abrar who has helped in the preparation of this article.

2 See among others D. Molenaar, *The Taxation of International Performing Artistes* (IBFD, Amsterdam 2005); K. Tetlak, *Taxation of International Sportsmen* (IBFD, Amsterdam 2014).

3 RS 642.11; Loi fédérale du 14 décembre 1990 sur l'impôt fédéral direct, "LIFD".

4 X. Oberson, *Problèmes récents posés par l'imposition des artistes et sportifs non-résidents* (Mélanges Ryser, 2005), p. 167ss.

5 T. Tanquerel, *Manuel de droit administratif* (2011), p. 111, § 335.

6 RS 642.11; hereafter "LI/VD".

<table>
<tr><td>Circular,
numbers 8.2 to 8.3.7</td><td colspan="2">method A:
organizer – AAS</td><td>method B:
organizer – production company – AAS</td></tr>
<tr><td>taxable benefit</td><td colspan="2">Benefit directly paid to the AAS by the organizer.</td><td>Attested salary paid to the AAS.</td></tr>
<tr><td rowspan="3">remarks</td><td colspan="2">Not all benefits are subject to the TAAS.</td><td rowspan="3">No difficulties: the taxable benefit appears on an individual loan certificate submitted by the production company.</td></tr>
<tr><td>benefits subject to the TAAS</td><td>benefits not subject to the TAAS</td></tr>
<tr><td>– benefits in kind
– artist fees and indemnities
– salaries and bonuses
– payments credited to third parties (namely AAS representative/ manager).</td><td>– availability of the infrastructures linked to the event
– copyright fees, royalties, etc.</td></tr>
<tr><td>tax deductions</td><td colspan="2">Acquisition costs are deductible.
Rate of 20% of the gross benefits subject to TAAS.
Not less than CHF 800 per artist and per contract.
Higher effective costs admitted if proved.</td><td>No admitted tax deductions.</td></tr>
<tr><td rowspan="2">average daily income</td><td colspan="3">In order to establish the tax rate, the average daily income must first be determined. This income corresponds to the AAS net taxable benefits, divided into the number of days of performance on the territory of the canton de Vaud.
One day is considered as 24 hours.</td></tr>
<tr><td colspan="2">If incomes are awarded to a group of artists, the average daily income shall be divided into the number of involved persons.</td><td>If incomes are awarded to a group of artists, no supplementary division needs to be made, as the loan certificate provided by the production company is an individual document.</td></tr>
<tr><td>tax rate (including federal, cantonal and communal direct taxes)</td><td colspan="3">10% for average daily incomes up to CHF 200.
15% for average daily incomes up to CHF 1,000.
20% for average daily incomes up to CHF 3,000.
25% for average daily incomes higher than CHF 3,000.</td></tr>
</table>

Table 1. Methods of calculation of TAAS.

Aim and legal basis

The Circular aims at clearing the situation of the withholding tax on AAS ("TAAS") and, by doing so, to answer questions such as who is the tax subject; who has to pay the tax; to what extent; etc. The aim of the tax is to ensure its collection.

The Circular is based on double tax treaties, art. 92 LIFD, art. 7 on the ordinance of 19 October 1993 on withholding tax in the frame of the direct federal tax[7], art. 139 LI/VD and art. 11 of cantonal regulation of 2 December 2002 on withholding tax[8].

Definition of AAS (Circular, p. 6, number 5)

An AAS is:

– a Swiss or foreign person;
– who is a foreign resident;
– who participates in the canton of Vaud in shows, demonstrations, events and other productions of an artistic, theatrical, musical or athletic nature.

People who do not entertain the public or who do not appear in front of the public are not considered as an AAS.

Definition of an organiser (Circular, p. 6, number 6)

An organiser is a natural or legal person thanks to whom the event took place.

[7] RS 642.118.2; "OIS".
[8] RS 641.11.1; "RIS/VD".

It should be noted that the organizer could be different from the third person who organised the activities of the AAS (namely the representative or the manager of the AAS).

Tax obligations of the organiser (Circular, p. 6, number 7)

The AAS and the representative/manager are responsible for the collection and the payment of the tax. The organiser is jointly responsible.

In practice, the representative/manager and the organiser levy the withholding tax; pay the tax to the tax administration; submit a recapitulative list to the tax administration; and submit to the AAS an individual assignment concerning the tax.

Calculation of the TAAS (Circular, p. 7 f., number 8)

Two methods of calculation are possible:

1 the AAS (or its representative/manager) negotiates directly with the organiser (method A in table 1);
2 the organiser buys a show to a production company (method B in table 1).

Documents to be completed by the organiser (Circular, p. 12 f., number 9)

The organiser must complete two statements:

– a recapitulative list, aimed at tax authorities; and
– an individual statement, aimed at every single involved AAS.

It should only be added that a commission of 3% is offered to the organiser if he pays the tax within a period of 30 days after the event (Circular, p. 12, number 9.2). If the tax is paid afterwards, no commission is offered and default interests are charged.

Concluding remarks

This new practice of the canton of Vaud has the advantage of taking into account the major developments in the area of sport and music.

In particular, it opens the possibility to transfer to the music organiser, under which an artist is under contract, the responsibility to compute precisely the assessments and the net amount of income which will then be attributed to the artist. This system allows to take into account, effectively, the cost that can be attributable to the performance.

Other classical issues, such as characterisation issues (sponsoring, merchandising), of course, remain open, but more clarification can be found under the recent OECD Commentary on art. 17 of the OECD model double taxation convention.

It remains to be seen to what extent other cantonal administrations in Switzerland will follow this new practice of the canton of Vaud.

Sports sponsorship agreements in Switzerland

by Piere Turrettini[1]

Introductory remarks

After TV rights, sponsorship is nowadays the main source of revenues in the sports industry. According to reviews and forecasts, there will be nearly a 5% growth in sponsorship spending worldwide from US$ 57.5 billion in 2015 to US$ 60.2 billion in 2016.[2] Because sports are so popular, sponsoring companies tend to spend very generously on sponsorship in order to build their brand's value around the success of an athlete, a team, a sports organization or a competition. Bad publicity can, therefore, not be tolerated, which is why sponsoring companies should be very cautious when drafting a sponsorship agreement.

As of today, many international sports organisations and athletes, notably tennis and golf players and Formula 1 drivers, are based in Switzerland and, therefore, Swiss law will often apply to their sports sponsorship agreements. Consequently, understanding how Swiss law can influence a contract can help foreign international sponsors and their lawyers better protect themselves under a sponsorship agreement. This article is thus directed at non-Swiss lawyers and will give an overview of the Swiss legal framework on the main issues of sports sponsorship agreements, including general limitations, obligations of the parties, termination of the agreement and damages.

Definition and legal nature of the sponsorship agreement

Sponsorship is not defined in the Swiss Code of Obligations (SCO), which governs contract law in Switzerland; however it is defined in the Federal Act on Radio and Television (art. 2 letter o) as follows:

> *"*[S]*ponsorship means the participation of a natural or legal person in the direct or indirect financing of a programme, with a view to promoting their own name, their own trade mark or their own image."*

The Swiss Supreme Court also developed its definition which, to a certain extent, mimics the one quoted above[3].

As opposed to sale or service contracts for instance, Swiss law does not specifically regulate sponsorship agreements. It is thus generally recognised that a sponsorship agreement is an unnamed and mixed duration contract *sui generis*.[4] This means that such a contract may include elements of differents contracts, like the license contract, the employment contract or the service contract.[5] Like any contract *sui generis*, it is not an easy task to determine which rules of law apply to the provisions of the agreement, so such analysis must, therefore, be made on a case by case basis.

General limitations

Before dealing with the content of a sponsorship agreement, it is important to discuss the general limitations a sponsorship company may face when sponsoring an athlete or sports organization. In particular, specific regulations to take into account in Switzerland include the Federal Act on Alcohol ("AA"), the Ordinance for tobacco products and products containing tobacco substitutes intended to be smoked ("OT"), the Federal Act on Radio and Television ("ART") and the Federal Act against Unfair Competition ("AUC").

For example, the AA bans the advertising of distilled beverages at places of sport and sporting events as well as on the radio and television[6]. When dealing with a tobacco company, one should know that there is a ban on the advertising of tobacco products, especially when directed at young people aged under 18 years old, in particular, during sporting events that age group typically visits.[7] The ART also prohibits the advertising of tobacco products on television and radio.[8] With all of this said, it should be stressed that the broadcasting of sporting events sponsored by an alcohol or tobacco brand, in general, should not be concerned by the above regulations.[9]

Finally, we also have to deal with the well-known issue of "ambush marketing". The AUC can help a sponsor of an important competition taking place in Switzerland fight "ambush marketing" activities. According to art. 3 let. a AUC, giving inaccurate or fallacious information about itself, its company or its products constitutes an unfair practice. Anyone found guilty of such a practice may be given a custodial sentence up to three years or fined a monetary penalty.[10]

Obligations of the sponsoree

In a relationship between a sponsor and a sponsoree, the latter will usually have more obligations than the former. This is primarly because the sponsor and sponsoree's images become closely tied and widely noticeable in such an agreement. Thus, for the sponsor's interests, the sponsoree cannot act in contradiction with the values of the sponsor. Generally, the obligations of the sponsoree will often be seen as very burdensome (especially for an athlete) but they are fundamental and necessary for the sponsor.

As a practical application, we will here take the example of a sponsored athlete; but it must be kept in mind that most of the below obligations may also be applicable to sponsorship agreements with teams or sports organisations.

Posting of the brand on clothes, material or social networks

The main obligation of a sponsored ath-

lete will usually be to post the brand of the sponsoring company on their clothes and/or material (provided by the company or not).[11] Sponsors request such an obligation when the athlete is practising their professional sport or even sometimes when they appear in public events.[12] Today, an athlete may also be requested to promote the brand on their different social medias' profile with text, pictures or videos with a specific timing and to act responsibly on their social medias' profile.

In any case, the requirements of the sponsor (where the brand appears, when, how many times, *etc.*) must be precisely specified in the sponsorship agreement. This will avoid any misunderstandings or disputes in this regard.

Some Swiss authors are of the opinion that this kind of obligation shall be treated as the agricultural lease.[13] An agricultural lease is a contract whereby the lessor undertakes to grant the lessee the use of a productive object or the right to the benefit of its fruits or proceeds in exchange for rent.[14] Relating this idea to sponsorship contracts, the sponsoree (*i.e.* the lessor) grants the sponsor the right to appear on, and benefit from, a space visible to a large audience (*i.e*. clothes, social network profile, *etc.*).

If this theory is retained, the rules of warranty for defects should be applicable by analogy in case of violation of the specific obligations dealt with here by the sponsoree.[15] The sponsoring company could then, under certain conditions, request damages or a proportionate reduction of the fees paid to the sponsoree because the productive object has defects (for instance, the sponsor's brand is not visible on TV due to the sponsoree's mistakes).[16]

Image rights

The sponsoring company will always be interested in acquiring the right to use the name, the image, the signature or any other sign of distinction ("image rights") of the athlete.[17] However, such use is rarely unlimited; in practice, the sponsoree will want to restrict the use of the image rights to specific territories while the sponsor will try to restrict the sponsoree from concluding similar sponsorship agreements with direct or indirect competitors (exclusivity clause).

Such details about image rights generally fall within the scope of the licence agreement.[18] Like the sponsorship agreement, the licence agreement is not regulated by Swiss law and is considered as an unnamed *sui generis* duration contract. Thus, the legal provisions of the lease agreement and the agricultural lease[20] as well as the general provisions on contract law in the SCO[21] will generally be applicable to a dispute related to this obligation.[22]

Obligations to compete and observe the sporting rules

The obligations to compete and observe the sporting rules are fundamental for the sponsor. This is because the sponsoring company principally builds its brand's value through the sponsoree's regular participation in competitions. As a consequence, the sponsoree will be asked to train appropriately and do his or her best to participate in as many important competitions as possible.[23]

In this context, the sponsor may want to add a clause prohibiting the athlete to practise certain types of activities or sports creating a danger like off-piste skiing, diving or horse riding, in order to ensure the participation of the sponsoree in competitions.[24] This kind of obligation could be considered illegal, as it may violate the legal personality of the sponsoree granted by art. 27 of the Swiss Civil Code (SCC). As an example, the Court of Arbitration for Sport, based in Lausanne, decided long ago that a sponsorship agreement could not prohibit the sponsoree to practise another sport (in this case bobsleighing) as long as it does not harm the sponsor.[25] This principle was also recognised by the Swiss Federal Supreme Court for employees in general.[26] Therefore, the advice here is to be careful when drafting sponsorship agreements not to restrict the athlete's freedom unnecessarily.

Finally, it goes without saying that the sponsored athlete must comply with all sporting rules, including the World Anti-Doping Code. Nowadays though, on top of requiring compliance with sporting regulations, the sponsor may also request the sponsoree not to be involved in any criminal activity. The reasoning is quite clear: a doping offence or criminal conduct can be very prejudicial for the image of both parties. Therefore, because of the severe negative effect such actions can have on a sponsor, in case of non-compliance with this important obligation, the sponsor should be allowed to terminate the agreement for just cause, sometimes even if the sponsorship agreement does not contain a specific clause in this regard.[27]

Public relations and communication

The athlete may be asked to participate with the sponsoring company's public relations department during, or outside of, competitions.[28] This is a typical obligation, which usually helps a sponsoring company to gain recognition and a better reputation if the athlete is famous. In this context, the sponsoree will be asked to act in an exemplary manner and to promote the interests of the sponsoring company. This, of course, implies not to criticise the sponsor and its products and may also mean that the conduct of the sponsoree outside of competition must be ethical or moral.

In principle, these obligations fall under the application of the service contract[29] which requires diligence and fidelity – but not a specific result – from the sponsoree.[30] A sponsoring company could, however, not impose too many obligations on the sponsoree for fear of violating the sponsoree's legal personality.[31]

Obligations of the sponsor

The principal obligation of the sponsor is to compensate the sponsoree. This very often arises through a financial contribution but, in some circumstances, a sponsor will also support the sponsoree by providing him with equipment and sports gear (for free or as a loan), logistical support or various other services (*e.g*. accommodation).

While the sponsoree would like to receive the compensation immediately after signing the sponsorship agreement, the sponsor will try to impose regular payments until the expiry of the contract, or even after its termination, in order to ensure that the sponsoree complies with all the contractual obligations until the end of the relationship.

As part of this give and take, the sponsoree will also make sure that he or she is rewarded appropriately for good sporting performances during the length of the agreement.

Last but not least, it is important for both

parties that any tax issues regarding payments are discussed and written in the agreement. Under Swiss law, the value added tax is not always due. It depends on the existence of services of the sponsoree in favor of the sponsor or not; the value added tax is due when concrete services are made by the sponsoree[32] and, therefore, the sponsoree has to take this into consideration when negotiating the compensation.

Termination

The sponsorship agreement is, in principle, a duration contract.[33] The parties may decide to provide an automatic extension under certain circumstances (for instance, specific sporting performance by an athlete) or an option granting to one of the parties the ability to extend the agreement, but, in general, the parties know in advance when the contract will expire and the contract is meant to last.

Careful parties will agree in the contract the circumstances allowing a termination of the relationship before the expiry of the contract. Such circumstances could be, for instance, the continous bad performance or serious injury of an athlete or some specific immoral behavior of one party.

That said, sponsorship agreements may be silent on this issue. Under Swiss law, this does not preclude a party from terminating the agreement with immediate effect in particular situations. Swiss jurisprudence indeed recognizes the termination of duration contracts with immediate effect because of the existence of "*circumstances making that the continuation of the contractual relationship cannot be reasonably required in the light of the principle of good faith*"[34], meaning that such agreements can be terminated at any time for just cause.[35]

The particular circumstances of the situation will then need to be examined objectively, in order to determine if the purpose of the contract can still be performed and if the relationship of trust has disappeared.[36] Key aspects to consider under this analysis are :

1 the importance of the personal element (*intuitu personae*);
2 the existence of a particular trust relationship arising from common interests; and
3 the duration of the contract (the shorter the duration, the harder for a party to justify just cause)[37].

For instance, doping, serious breaches of the duty of diligence and fidelity, or a breach of the non-competition clause, may give reasons for the non-defaulting party to terminate the agreement before its expiry.[38] Just cause can obviously also be attributed to an objective reason, such as the death of the sponsored athlete or the cancellation of a competition. [39]

That being said, and because the sponsorship agreement is a *sui generis* contract, a court may not always apply the abovementioned rules and instead, choose to apply the specific legal provisions of a similar type of contract, such as an agency or simple partnership contract.[40]

One can see that, when the agreement is silent on the termination issue, the situation is not clear whether just cause exists and circumstances will, therefore, be examined carefully by the party who wants to terminate the agreement before taking action too quickly.

Finally, a party may also terminate the sponsorship agreement if the other party is in default of performing a specific contractual obligation.[41] For a party to justly terminate the contract, the obligation must not have been performed yet without valid reasons[42] and must have been due based on a time limit agreed upon by the parties or set by one party.[43] If so, the non-defaulting party is entitled to set a last appropriate time limit for subsequent performance or to request the court to set such time limit.[44] If the performance has still not been rendered by the end of that time limit[45] or under the circumstances described in art. 108 SCO,[46] the non-defaulting party can terminate the agreement.

Damages

A party (often the sponsor) may not be satisfied with the other party's performance of the contract. In such a case and especially if the trust between them is broken, the dissatisfied party may want to take action to obtain specific performance or damages, if any. As a last resort, the dissatisfied party could decide to terminate the agreement.

In the event of non-performance or bad performance of the contract, art. 97 ff. SCO could apply (except where other legal provisions of the SCO may be pertinent)[47], which would allow the claimant to request the performance of the agreed obligations plus damages for the delay, for damages only due to the default, or for the cancellation of the contract[48].

Even though the fault of the defaulting party is presumed,[49] the claimant will need to show evidence of the claimed damages.[50] This task may be very difficult for a sponsor dissatisfied with the off-the-field misconduct of a sponsored athlete. A sponsor would indeed have to show the decrease of its sales and the specific link between such decrease and the conduct of the sponsoree. If possible, a sponsor must, therefore, better provide clear mechanisms of indemnifications (with monetary fines) in the contract for the bad performance of the sponsoree.

The last type of action a party can take for the non-performance of the contract by the other party is to terminate the agreement. The termination would have an effect *ex tunc*, which means that the non-defaulting party can refuse the services promised and be reimbursed what that party has already paid.[51] In addition, the non-defaulting party may claim damages for the lapse of the contract.[52] The general idea is to place the non-defaulting party in a situation as if the contract never existed (negative damages).

This mechanism is not similar to the termination for just cause mentioned in the section "Termination" above. Indeed, such termination has an effect *ex nunc*, which is to say that the past contractual relationship would not be affected, only the future.[53] In this case, damages may also be due to the non-defaulting party, depending on the existence or not of fault by the other party.[54] In the case of a fault, the non-defaulting party will be put in the situation as if the contract was duly performed (positive damages).[55] Again, proving damages will not be easy for the non-defaulting party.

Concluding remarks

As indicated in my introductory remarks, sports sponsorship is nowadays an important business and great tool of advertising for companies. The more important it becomes, the more necessary it seems to involve well-informed lawyers for drafting and negotiating a sponsorship agreement.

As we have seen, Swiss law does not regu-

late specifically sports sponsorship agreements and Swiss jurisprudence is deficient on the subject. Sponsors and athletes or sports organisatons have both a better interest to submit their dispute to (confidential) arbitration or to settle it. This is certainly the reason why jurisprudence concerning sports sponsorship agreements is rare and cannot help the parties very much.

Parties have, therefore, a lot of freedom to design sponsorship agreements covering their special needs. For lawyers, this is an opportunity to design "state of the art" agreements protecting the interests of their clients. Providing specific answers in the agreement to situations, like the recent doping and FIFA scandals, will be a "must" for parties who will not regret, when the issue arises, having hired a lawyer for drafting the corresponding agreement.

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[1] Swiss lawyer, e-mail p.turrettini@hotmail.com.

[2] www.sponsorship.com/iegsr/2016/01/05/New-Year-To-Be-One-Of-Growth.aspx and www.ecofoot.fr/croissance-marche-sponsoring-555.

[3] Swiss Federal decision dated 8 May 2006 (2A.166/2005): "[A] *company practices sponsorship when it pays money, grants benefits in cash or other advantages in kind to promote the activity of persons, groups or organization in the fields of sport, culture, social activities, ecology or other fields of equal importance from a socio-political point of view, while pursuing at the same time marketing objectives and public relations in its own interest. In this context, the sponsor contribution is not a gift but represents the counterperformance corresponding to the performance made by the person rewarded in the form of advertising and image, for instance by naming the sponsor in a list of sponsors.*"

[4] Stephan Netzle, "Der Sportler – Subjekt oder Objekt? Überlegungen zur Verwendung des Sports in der Werbung", in: Revue de droit suisse, 2006, p. 62; Thomas Hauser, *Der Sponsoring-Vertrag im schweizerischen Recht*, p. 281 ff.; Jean-Marc Rapp, "Quelques aspects juridiques du sponsoring en droit suisse", in: *Revue suisse du droit des affaires*, 1991, p. 199.

[5] Patrick Vogler, in: *Prinzipien des Vertragsrechts*, Peter Böhringer, Roger Müller, Peter Münch and Alex Waltenspühl (2015), p. 235-236; Christoph Müller, *Contrats de droit suisse*, PdS – *Précis de droit Stämpfli* (2012), p. 658 ; Piermarco Zen-Ruffinen, *Droit du Sport* (2002), p. 315, N 917; Court of Arbitration for Sport, 91/45 W. / X. SA, award dated 31 March 1992.

[6] Art. 42b par. 3 let. a and d AA and Art. 10 par. 1 let. b ART. We should point out that it relates only to ethyl alcohol and does in general not affect beers and wines (art. 2 par. 1 and 2 AA), which seems obvious considering the large number of beer companies sponsoring sporting events.

[7] Art. 18 OT.

[8] Art. 10 par. 1 let. a ART. It is to be noted that a more restrictive legislation on tobacco products will be voted by the Swiss Parliament by the end of 2016. The entry into force of the new act is estimated in 2018 (www.bag.admin.ch/themen/drogen/00041/14741/index.html?lang=fr).

[9] Zen-Ruffinen, p. 319, N 927.

[10] Art. 23 AUC.

[11] Zen-Ruffinen, p. 321, N 930.

[12] Zen-Ruffinen, p. 321, N 931.

[13] Hauser, p. 266-267 ; RAPP, p. 149.

[14] Art. 275 SCO.

[15] Henry Peter, in: *Recueil de contrats commerciaux*, Sylvain Marchand, Christine Chappuis, Laurent Hirsch (2013), p. 814.

[16] Art. 259a par. 1 and 288 par. 1 SCO.

[17] Zen-Ruffinen, p. 321, N 934.

[18] Netzle, p. 136.

[19] Pierre Tercier and Pascal G. Favre, *Les contrats spéciaux* (2009), p. 1198, N 7961; ATF 92 II 299 par. 3a.

[20] See the section "Posting of the brand on clothes, material or social networks" above.

[21] See the section "Damages" below.

[22] Tercier and Favre, p. 1198, N 7961 and p. 1205, N 7994 ff.; Thomas Probst, "Le contrat de licence", in: *La pratique contractuelle 3*, Symposium en droit des contrats (2012), p. 122; art. 97 ff. SCO.

[23] Peter, in: *Recueil de contrats commerciaux*, p. 813.

[24] Madalina Diaconu, *Droit économique et sport, Aspects suisses et internationaux* (2015), p. 84.

[25] Arbitrage TAS 91/45 W. / X. SA, Award dated 31 March 1992, par. 34.

[26] ATF 122 II 268 par. 3.

[27] Peter, in: *Recueil de contrats commerciaux*, p. 814.

[28] Zen-Ruffinen, p. 321, N 933.

[29] Art. 394 ff. SCO.

[30] Art. 398 par. 2 SCO ; Peter, in: *Recueil de contrats commerciaux*, p. 815.

[31] Art. 27 SCC ; Hauser, p. 135 ff. ; Philipp Engel, *Sponsoring im Sport, Vertragsrechtliche Aspekte*, 2009, p. 213 ff..

[32] Arnaud Cywie, TVA *et sponsoring* (2014), p. 28 ff..

[33] Zen-Ruffinen, p. 326, N 952.

[34] ATF 92 II 299, par. 3b.

[35] Netzle, p. 62; Hauser, p. 312; Rapp, p. 197 and 199; Engel, p. 56 ff. and 242 ff.; Henry Peter, *Le sponsoring sportif,* Chapitres choisis du droit du sport, Etudes et recherches du GISS (1993), p.140.

[36] Peter, in: *Recueil de contrats commerciaux,* p. 819.

[37] Zen-Ruffinen, p. 335-336, N 982.

[38] Zen-Ruffinen, p. 336, N 983.

[39] Netzle, p. 71; Zen-Ruffinen, p. 336-337, N 984.

[40] Zen-Ruffinen, p. 332-333, N 975; Peter, in: *Recueil de contrats commerciaux,* p. 819.

[41] Zen-Ruffinen, p. 338, N 989.

[42] Art. 82, 83 and 91 SCO.

[43] Art. 102 SCO.

[44] Art. 107 par. 1 SCO.

[45] Art. 107 par. 2 SCO.

[46] According to art. 108 SCO, no time limit need be set :
1 where it is evident from the conduct of the party that a time limit would serve no purpose ;
2 where performance has become pointless to the creditor as a result of the debitor's default, or
3 where the contract makes it clear that the parties intended that performance take place at or before a precise point in time.

[47] See for instance the section "Posting of the brand on clothes, material or social networks" above..

[48] Art. 107 par. 2 SCO; Zen-Ruffinen, p. 329, N 965.

[49] Art. 97 SCO.

[50] Art. 8 SCC.

[51] Art. 109 par. 1 SCO; Zen-Ruffinen, p. 339, N 991.

[52] Art. 109 par. 2 SCO.

[53] Zen-Ruffinen, p. 334, N 978.

[54] Zen-Ruffinen, p. 337, N 986.

[55] Zen-Ruffinen, p. 337, N 987.

United Kingdom:

Commentary and observations on "The Major Sporting Events (Income Tax Exemption) Regulations 2016"

by Jonathan Hawkes[1]

Introduction

The Autumn Statement delivered by the Chancellor of the Exchequer (UK Finance Minister) to Parliament on 25 November 2015 included an announcement that the United Kingdom government would exempt non-resident competitors in the 2016 London Anniversary Games and the 2017 World Athletics Championships, which are also to be held in the United Kingdom.

It was further announced that 2016 would be the last year in respect of which an exemption will be granted to the London Anniversary Games.

Interestingly, and as appears to be increasingly the case, the bidding process for the 2017 World Athletics Championships included a proviso that the granting of a tax exemption would be a condition of the UK's bid for the Championships.

Following on from this announcement, The Major Sporting Events (Income Tax Exemption) Regulations 2016 were passed, coming into force on 19 July 2016. These Regulations provide that for both events UK tax will not be charged and there will be a tax exemption available from two days before until two days after each of the London Anniversary Games (22 to 23 July 2016) and the 2017 World Athletics Championships. There are two events which make up the Championships: the Independent Automotive Aftermarket Federation World Championships (14 to 23 July 2017); and the International Paralympic Committee Athletics World Championships (4 to 13 August 2017). These periods of exemption are referred to as the Games Period and the Championships Period respectively.

So for the 2016 London Anniversary Games the tax exemption Games Period was 20 July to 25 July 2016 and for the 2017 World Athletics Championships the tax exemption Championships Period will be 12 July 2017 to 15 August 2017.

Exemptions

The Major Sporting Events (Income Tax Exemption) Regulations 2016 provide that the usual UK withholding tax rules requiring the payer, who makes a payment to the sportsperson, to withhold 20% of the gross payment are dis-applied in respect of any UK income that is subject to the tax exemption.

The exempting legislation is set out in the same terms for both events and the exemption only applies to a duly accredited competitor, i.e. a competitor accredited to compete by an appropriate athletics body as detailed in the legislation or by an official event organiser. The competitor must be non-UK resident for the appropriate UK tax year; being the year ended 5 April 2017 (2016-2017) for the 2016 London Anniversary Games; and the year ended 5 April 2018 (2017-1818) for the 2017 World Athletics Championships.

In terms of what is exempted from UK tax, this is either any employment or trading income that arises in respect of "[...] a London Anniversary Games activity [...] or [...]. *a World Athletics Championships activity*". These activities are further defined as actually competing at the event itself or "[...] *any activity that is performed during the Games Period/the Championships Period the main purpose of which is to support or promote the London Anniversary Games/either or both of the events making up the World Athletics Championships.*"

The domestic tax legislation of the United Kingdom allows for the taxation of non-UK resident sportspeople, together with others in the entertainment industries, such as pop music performers and actors, in regard to their activities that are performed in the UK. This is in accordance with and broadly follows art. 17 of the OECD Model.

The UK's double taxation agreements similarly contain the familiar artistes and athletes article that allow for the State, in which the sporting activity is performed, to still levy tax on the non-resident and which dis-applies the usual tax exemptions that are contained in the business profits and employment articles.

In the case of employees, the UK taxing provisions are in Section 27 of the Income Tax (Earnings and Pensions) Act 2003. For self-employment income, the

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enabling legislation is in Sections 13 and 14 of the Income Tax (Trading and Other Income) Act 2005.

Section 13 introduces a requirement that a "relevant activity" is performed in the UK and, if it is not otherwise the case, a fiction is imposed that the sportsperson is to be treated for UK tax purposes as carrying on a trade in the UK. It does not matter who the payment or transfer is made to, as Section 13 effectively deems it to be made to the sportsperson.

Section 14 allows for regulations to be passed, which can make provision generally for giving effect to Section 13. This section also allows for regulations to be passed which can, *inter alia*, provide for the deduction of expenses. Such regulations can furthermore provide that any liability to UK income tax that would otherwise arise is not to arise.

Legislation governing withholding taxes in respect of non-UK resident entertainers is in Sections 965 to 970 of the Income Tax Act 2007 and, again, provides for regulations to be made, which can effectively negate or override the basic requirement imposed upon a payer to deduct basic rate tax (20%) from the gross sum paid to the sportsperson.

Thus, it will be apparent that the UK tax legislation has always contained a "built in" mechanism allowing for regulations, such as The Major Sporting Events (Income Tax Exemption) Regulations 2016, to be passed on an *ad hoc*, as and when they were required, basis.

The passing of such regulations had become increasingly common in respect of athletics and, as previously noted, in the case of the 2017 World Athletics Championships, guaranteeing a tax exemption was a requirement of the bidding process that the UK had to undertake in order to secure the award of the Championships.

Whilst it is only speculation on the part of the author of this article, it is interesting to note that it is only certain major sporting events, such as the 2012 London Olympics or the Champions League Finals of 2011 and 2013, which had historically attracted these *ad hoc* UK tax exemptions. UK tax policies in this area would appear to have been developed on a reactive basis with tax exemptions being granted as a reaction to, and as a result of a growing realisation of, the fact that events or star performers were not coming to the UK, because of the perceived adverse UK taxation regime of non-UK resident sportspersons.

There are a number of examples of this. In 2010, Wembley Stadium was unsuccessful in its bid to stage the Champions League Final, as it was unable to provide assurances of an income tax concession for the players of the finalists, this being a UEFA requirement. The same year, Usain Bolt elected not to run in the Diamond League event in London and, in 2012, Rafael Nadal chose not to play at Queen's Club and explicitly gave the reason as being the tax he suffered on his endorsements income.

UK tax policy in this area of exempting certain UK sporting events from UK taxation was formalised in the Finance Act 2014. Section 48 of that Act providing that:

> *"Where a major sporting event is to be held in the United Kingdom, the Treasury may make regulations providing for exemption from income tax and corporation tax in relation to the event."*

As the Explanatory Notes to the Finance Bill clarified:

> *"The Government's policy is to grant certain tax exemptions for sporting events if the event is:*
>
> – *world-class,*
> – *internationally mobile, and*
> – *where exemption by the host country is a requirement of a bid to host the event."*

In addition to this, tax exemptions in respect of the London Anniversary Games for years up to 2016 were considered appropriate to preserve the legacy of the 2012 London Olympic and Paralympic Games.

The legislative mechanism for such tax exemptions has also been made simpler with an exemption no longer needing to be a part of the annual Finance Bill and Finance Act. Instead, it is now possible for a tax exemption to be passed by regulation at any time, but still with the requirement that any such exempting regulating be placed before and approved by the UK Parliament.

Government policy seems to have been a pragmatic reaction to the commercial realities of global sports and their organisation. Some UK sporting events are so prestigious and established that a tax break to encourage the participation of overseas sportspersons is not necessary. Allied to this, the event is linked to a UK venue and so the risk of the event being held elsewhere in the world rather than the UK does not exist. The Wimbledon Lawn Tennis Championships are one such obvious example.

Legislation and regulations were effected in the UK as long ago as 1987 to impose the requirement of a tax withholding upon persons making payments to non-resident sportspeople and entertainers. The Income Tax (Entertainers and Sportsmen) Regulations 1987 – Statutory Instrument 1987/530 – are still in force and make it a requirement for the "payer" to deduct tax at the basic rate (currently 20%) from payments that are made to non-UK resident sportspeople. The payer provides the sportsperson with a Tax Deduction Certificate showing the gross payment and the UK tax deducted and accounts to the UK tax authorities, HM Revenue and Customs (HMRC), via quarterly returns detailing payments made and tax deducted, with the tax deducted being paid over to HMRC.

Readers will appreciate that the withholding tax deduction system introduced in 1987 is a mechanism for collection of tax, but it is important to appreciate that the tax withheld by the payer does not equate to the final UK tax liability of the non-resident sportsperson.

Whilst the HMRC announcement in respect of The Major Sporting Events (Income Tax Exemption) Regulations 2016 advised that "[...] *visiting entertainers and sportspeople are required to pay any further tax due to HMRC via the Self-Assessment system. They can also request repayments of tax this way, should too much have been withheld* [...]" it is not the case that filing a UK Tax Return under the self-assessment system is not the only mechanism that is available to the non-resident sportsperson, in order to establish their UK taxation liability and to enable the correct amount of UK tax to be paid.

When the UK introduced the system of withholding tax on payments made to non-resident sportspeople and entertainers and passed the 1987 Regulations, these provided for the non-resident to make an application to (now) HMRC seeking tax to be deducted on a reduced basis rather than 20% of the gross payment. It will be ap-

preciated that, whilst UK tax rates are progressive and rise to 45% for income over £ 150,000, the withholding rate of 20% is on the gross payment made to the non-resident sportsperson and takes no account of expenses incurred by the non-resident.

To deal with these applications a specialist unit was established which still operates today, the Foreign Entertainers Unit (FEU) of HMRC. Further details of FEU and including the mechanism for making applications for tax to be deducted on a reduced basis are available on the UK Government website at www.gov.uk/guidance/pay-tax-in-the-uk-as-a-foreign-performer.

However, and as this published guidance makes clear, it may be the case that the non-resident sportsperson will have uncertain UK earnings. This could be, for example, because the ultimate payment that will be made to the sportsperson will be dependent upon the outcome of a performance, for example, their final position in a tournament. In such a case, it may not be possible for a Reduced Tax Payment Application to be made.

It is important to appreciate that the increasing perception of the UK as an "unfriendly" tax jurisdiction did not arise as a reaction to the existence of a withholding tax, as this is present in most major jurisdictions where sportspeople compete, but rather the Inland Revenue/HMRC's views as to what could be included within the ambit of UK taxation and what income was covered by the 1987 Regulations.

The FEU considered that UK's position should be that the UK claims taxing rights over an element of sponsorship and similar non-performance/success related income, i.e. income other than appearance money and prize money paid by the event organizer or promoter in respect of the event in the UK and based on the sportspersons actual participation in the event.

A simplistic formula was developed that taxed such "indirect" income on a day count formula and HMRC published guidance to this effect. *The amount of any sponsorship or endorsement income that is liable to UK tax is calculated using a ratio of UK performance days to worldwide performance days*.

This calculation has now been finessed and it is now possible for the sportsperson to adopt the above performance days' basis or, as an alternative, a basis which factors in both performance days and training days.

HMRC's published guidance now provides that:

"You will be taxed on a fair proportion of your earnings from worldwide activities based on time spent in the UK. A share of endorsement or sponsorship income, for example is chargeable to UK tax. Exactly how much of your income you are liable to pay UK tax on will depend on the precise wording of the contract and how much time you spend performing and training in the UK. The calculation you use must be approved by HMRC and supported by evidence.

HMRC recommends using either the Relevant Performance Days (RPD) or Relevant Performance and Training Days (RPTD) method. If you use a different method of calculation, provide your reasons for using the alternative method and supporting evidence.

Using RPD to calculate the amount of endorsement income liable for UK tax

1 Add together all RPD worldwide and in the UK.
2 Divide UK RPD by worldwide RPD.
3 Multiply your income from endorsement by the result.

Using RPTD to calculate the amount of endorsement income liable for UK tax

1 Add together all relevant training and performance days (RPTD) worldwide and in the UK (UK RPTD)
2 Divide UK RPTD by worldwide RPTD
3 Multiply your income from endorsement by the result

Definition of relevant performance days (RPD)

Activity in private will not be counted as a performance day but it may be a training day.

Activity in public will not be counted as a training day but it may be a performance day.

A day on which you compete and train can only be counted once and will always be regarded as a performance day.

A relevant performance day is any day on which you:

– take part in a competition
– practise your given sport in public (for example a tennis player practising on an open court where the public can watch)
– undertake a public event for your sponsors (for example taking part in a photo session wearing or using your sponsor's kit)

Definition of relevant training days (RTD)

A relevant training day is any day on which you spend 3 or more hours in physical sporting or training activity, which contributes towards performance of your sport. Training must include physical activity and each session should last 1 hour or more to count towards the 3 hour requirement. A training session may be:

– directly practising the sport you are endorsed for
– an activity designed to maintain general fitness (for example spending time in a gym or other general fitness training such as road running or jogging)

Do not include time spent:

– travelling when no training is done
– injured when training is not possible
– resting or on holiday
– doing non-physical training, such as sports psychology or physiotherapy

Supporting evidence

Provide records, completed at the time, that clearly identify the type, length and place where the training or competition took place, such as copies of:

– competition agreements
– training diaries
– practise and competition schedules
– a daily log of training
– other daily records"

See HMRC website at www.gov.uk/guidance/pay-tax-in-the-uk-as-a-foreign-performer.

Notwithstanding this later finessing, the "day count" approach highlights the nub of the problem and explains the issue from the standpoint of the sportsperson. This is,

in particular, true for the sporting superstars who, as readers will be aware, can earn significant sums from promotional and sponsorship income far in excess of their sports-related "performance" earnings. For these superstars, and following the position for all sportspersons that was adopted by the FEU, the more days the sportsperson spent in the UK, the greater the percentage of their total endorsement and sponsorship income that would be subject to UK taxation.

The position adopted by HMRC was not universally accepted and was eventually challenged by the tennis player Andre Agassi. The appeals that Agassi made related to the 1998-1999 UK tax year (6 April 1998 to 5 April 1999) and concerned sponsorship payments received by Agassi's US corporation and that were paid by two sporting equipment goods manufacturers, Nike Inc. and Head Sport AG. The litigation progressed to the highest Court in the UK (then) the House of Lords and, following a Hearing Date of 23 March 2006, a decision was given by Their Lordships on 17 May 2006 (*Agassi v. Robinson (Her Majesty's Inspector of Taxes) [2006] UKHL 23)*.

Whilst a great deal of commentary in the professional press at the time of the Agassi litigation spilled over into the poplar press, in this writer's opinion, it all rather missed the point. In their decision in the Agassi case, the highest UK Court (as was the House of Lords at that time, now the Supreme Court) determined that the UK withholding tax rules applied where a payment was made by a non-UK resident entity, in the Agassi case, Nike and Head, to a non-UK resident entity; Agassi Enterprises Inc.

This decision overturned the arguments put forward on behalf of Agassi; and that had been successful in the lower Courts; that there was a presumption of territoriality implicit in all UK tax law. This was held by the House of Lords not to be the case and it was decided that the appropriate UK legislation was not restricted to UK resident payers only. The fact that the payers of sponsorship and endorsement fees (Nike and Head) were non-UK resident and that they were making payments to a non-resident (Agassi Enterprises) did not matter. They were still obliged to deduct income tax from the payments that they made to Agassi Enterprises Inc. and, as a non-resident sportsman, Agassi was obliged to report these sums on his UK Tax Return and suffer personal UK income tax.

As Lord Scott of Foscote stated in his judgement in the House of Lords:

> *"To imply into [the withholding tax legislation] a limitation by reference to the foreign status of the payer would, in my opinion, be impermissible. The whole point of [the withholding tax legislation] is to subject foreign entertainers or sportsmen to a charge to tax on profits on gains obtained in connection with their commercial activities in the United Kingdom. Payments to foreign companies controlled by them are to be treated as payments to them. The infrequent or sporadic nature of their commercial activities and presence in the United Kingdom and the difficulty of collecting from them the [UK] tax on their profits and gains from those activities was one of the reasons why the new collection regime was introduced under the 1988 Act. To read into the statutory provisions a limitation preventing the collection regime from applying where the payer is a foreign entity with no UK presence and thereby relieving the foreign entertainer/sportsman from the charge to tax cannot, in my opinion, possibly be justified on the basis of a presumed legislative intention. I would hold that on the true construction of these sections the territorial limitation cannot be implied and that the statutory language should be given its natural meaning."*

This then was, if you will excuse the pun, the real game changer. The fact that, regardless of the residence status of the entities entering into sponsorship and other agreements with the sportsperson/their corporate vehicle, such income was taxable in the UK on the sportsperson personally meant that suddenly the UK tax "take" was much higher.

Allied to this there was a further problem that personal UK tax rates were, in some cases, significantly higher at (recently) 50% and now 45% than taxes that were charged in other jurisdictions. Even if the sportsperson were based in their domestic jurisdiction, and were not resident in a tax haven, then UK taxes could still represent a real cost of competing in the UK. This is because UK tax suffered at (say) 50% or 45% might exceed domestic taxes imposed on the same income with any unrelieved surplus UK tax potentially unavailable as a foreign tax credit against the sportsperson's "home" tax filing.

Conclusion

It is against this background that the UK has gradually shifted its position in regard to the taxation of non-resident sportspersons appearing in the UK. As noted above, this was initially by way of various *ad hoc* tax exemptions passed on an "as and when required" basis and which culminated in a formulated and cohesive policy as set out in the 2014 Finance Act.

What remains to be seen is how the FEU will interpret The Major Sporting Events (Income Tax Exemption) Regulations 2016.

It will be noted, and as detailed earlier in this article, that the UK tax exemptions are given for a defined period of time and in respect of actually competing at the event itself or "[...] *any activity that is performed during the Games Period/the Championships Period the main purpose of which is to support or promote the London Anniversary Games/either or both of the events making up the World Athletics Championships*."

On a simple reading, it could be suggested that, as these Regulations explicitly exclude Section 966 of the Income Tax Act 2007 (the UK withholding tax provisions), then all income will be excluded from UK taxation. However, it is here that the possible interpretation of HMRC FEU will need to be considered. It is suggested that, whilst any income relating to an appearance at the Games or the Championships should not be subject to UK tax, this is not because of the exclusion of withholding tax. It will be appreciated that withholding tax is simply a mechanism imposed on a payer to collect tax, but it does not necessarily reflect or equate to the UK tax liability of the sportspersons themselves.

Instead, it is considered that there is a different analysis as to why sportspersons should not suffer UK tax on any income arising during either the Games period or the Championships period.

In this analysis, and here an element of circularity has to be accepted, as a starting point, sportspersons will have to have been physically present in the UK in order to be competing etc. in the Games or the Championships. If they were not physically present, then any sponsorship or endorsement or similar income arising during that time could not fall within the UK tax net, because, and as has been set out

above, UK taxation only arises by virtue of the sportsperson having a UK performance or training day. Thus taxable UK income relating to sponsorship etc. can only arise due to sportspersons performing either a Games activity or a Championships activity in the UK.

The Major Sporting Events (Income Tax Exemption) Regulations 2016 refer to the performance of an activity and "*any income arising from the activity.*" Given that the UK legislation imposes a fiction that the non-resident sportsperson is engaged in a UK trade, then this trade is only in existence when they are physically in the UK.

That being the case, if the reason for the sportsperson being physically present in the UK is to perform a Games or a Championships activity, then all of the income of the deemed UK trade of the sportsperson that arises during the Games or the Championships period must surely be considered as "[...] *any income arising from the activity* [...]."

Putting it another way, if sportspersons were not physically present in the UK, and they are only going to have been in the UK to compete in or promote the Games/Championships, then their sponsorship or endorsement or similar income would not, indeed could not, be considered as UK income. This is for the simple fact that, if non-UK sportspersons remain outside the UK, then they cannot be considered, during that period of time when they remain non-UK resident, as undertaking their deemed UK trade.

Therefore, it is considered that all income of non-UK sportspersons of whatever nature which arises during either of the Games Period or the Championships Period clearly and demonstrably *only* arises as a direct consequence of their participation in the Games or the Championships.

It is for this reason that it is suggested that sportspersons who compete in either or both of the Games and the Championships will enjoy an exemption from UK tax; and not only on their appearance fees, prize monies *etc*., but also on their sponsorship or endorsement or similar income for the Games Period and the Championships Period respectively.

Challenging times for football's transfer system

by Jonathan Copping[1]

Introduction

The value of the agreements transferring the services of footballers between clubs has increased season upon season. In August 2016, the transfer of French midfielder Paul Pogba from Italian club Juventus to English club Manchester United for fee of £ 89 million (€ 105 million) became a new world record. The ever increasing size of transfer agreements is down to the vast swathes of money that flows into football from the sale of broadcasting rights, commercial sponsorship deals and ticket sales.

However, at the very heart of the football industry is the fact that football clubs trade and train players with a view to performing well enough in competitive matches, in order to be able to maintain a viable business. FIFA's Regulations on the Status and Transfer of Players ("RSTP") provide the regulatory basis for the transfer market and, in turn, set out regulations as to how players and clubs can terminate a player's contract.

The purpose of this article is to analyse both the RSTP and the EU competition law complaint lodged by FIFPro (the global players' union) at the EU Commission. When football transfers take place, they are determined on the economic value of the player's labour and do not take into account the human being involved in the transfer. This can be particularly troublesome to footballers when they wish to terminate a contract.

The RSTP

So what exactly do the current RSTP state?

Section IV of the RSTP is titled "*Maintenance of contractual stability between professionals and clubs*" and specifically deals with terminating contracts, including the restrictions on terminating contracts and the consequences for terminating a contract in certain circumstances.

Art. 14 of the RSTP states that:

> *"A contract may be terminated by either party without consequences of any kind (either payment of compensation or imposition of sporting sanctions) where there is just cause."*

FIFA's rules and regulations do not define exactly what "*just cause*" is; however, they do state that each Association (the governing body of football within a particular country or territory), shall include in its own regulations appropriate means to protect contractual stability, paying due respect to mandatory national law and collective bargaining agreements.

In England and Wales, there is no statutory definition of the term "*just cause*", although employers are required to terminate a contract in accordance with one of the five statutory reasons for dismissal; otherwise, they risk the possibility of a claim for unfair dismissal being brought against them in accordance with the Employment Rights Act 1996.

By way of good practice, the contract between the player and the club should expressly set out the circumstances that would be giving rise to the contract being terminated for "*just cause*" reasons. In practical terms, art. 14 is likely to give the club more protection than the player.

Art. 15 of the RSTP covers terminating contracts in accordance with a sporting cause. Broadly, the article allows a player to terminate their contract prematurely on the ground of sporting cause, if the player has, in the course of a season, appeared in less than ten per cent of the official matches in which the club has been involved. There is rather a sizeable caveat, which is, that players may only exercise their right in accordance with art. 15, within 15 days following the last official match of the season of the club with which they are registered. One of the key problems with art. 15 is, that players may have to wait close to a whole year before being able to terminate their contracts for sporting cause, during which time the player's development could be hindered and opportunities to move to other clubs could pass by. Another issue is that clubs change their managers with ever more increasing frequency. It is possible that a player, who may have played under a previous manager, would find himself not playing under a new manager and be forced to wait a substantial period of time before unilaterally terminating their contract.

Art. 16 of the RSTP states that a contract cannot be unilaterally terminated during the course of a season. Whilst this provides some degree of certainty to the professional in terms of a guaranteed salary, it also presents difficulties for the player in the event that they wished to move between leagues that run at different times of the year. It is also arguably a breach of EU competition law, as discussed further below.

Art. 17 of the RSTP is a key article that needs a detailed review. Art. 17 covers the consequences of terminating a contract without just cause.

Where a party terminates a contract without just cause, that party shall pay compensation. The compensation shall be calculated by considering "*the law of the county concerned, the specificity of sport, and any other objective criteria*". It goes on to further state that consideration should also be given to the remuneration and other benefits due to the player under the existing contract and/or the new con-

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tract; the time remaining on the existing contract up to a maximum of five years; the fees and expenses paid or incurred by the former club (amortised over the terms of the contract); and whether the contract falls within a protected period. Particularly interesting is that, in the event that the professional is required to pay compensation, both the professional and the new club shall be jointly and severally liable for its payment.

The protected period is defined in the RSTP as"

> *"a period of three entire seasons or three years, whichever comes first, following the entry into force of a contract, where such contract is concluded prior to the 28th birthday of the professional, or two entire seasons or two years, whichever comes first, following the entry into force of a contract, where such contract is concluded after the 28th birthday of the professional".*

Save for the very top of the professional game where long term contracts are entered into, the vast majority of contracts will be within the protected period. The protected period is also reset when a contract is renewed, extending the period of the previous contract, between the club and the professional.

Making the new club jointly and severally liable for the payment of the compensation could be particularly troublesome for the player. It has the ability to lead to scenarios where the new club cannot sign the player because of the potential to be jointly and severally liable for compensation to the previous club. This would be particularly pertinent where the new club did not have the same resources as the old club. For instance, if the player was playing abroad in a lucrative league, but wanted to move to a club in a league closer to their home and, in willing to move to closer to home, would end up accepting a contract on significantly reduced terms.

In addition to being required to pay compensation, sporting sanctions can also be imposed on the player for breaching the contract during the protected period. Art. 17 (3) states that the player shall be subject to a four-month restriction on playing in official matches and, where there are aggravating circumstances, the restriction shall last six months. The restrictions shall only last during the playing season, so the off season doesn't count towards the four or six months. If the player is an established member of the representative team of the association they are eligible to represent, then the player can compete for the representative team, if that team is playing in a final competition of an international tournament.

Consequently, the player cannot play in any "friendlies" for the representative team and it must also be taken into consideration the actual prospect of a player being selected by the representative team, if say, for example, the player had not played in a competitive match for three months. The greater difficulty posed to a player by art. 17(3) is that a four or six month restriction from playing in official matches, is likely to lead to the player being unable to earn an income to meet the compensation payment.

Art. 17(4) sets out the sporting sanctions that shall be imposed on clubs that not only breach a contract during a protected period, but also induce a breach of contract during the protected period. The RSTP state that there is a presumption that any club, which signs a player after that player has terminated their contract without just cause, has induced the professional to commit the breach. The club has to provide evidence to the contrary. The sporting sanction imposed on the club is a ban on registering any new players, either nationally or internationally, for two entire and consecutive registration periods.

Matuzalem case

The case of Matuzalem Francelino da Silva ("Matuzalem") highlights the rigidness with art. 17 of the RSTP. On 26 June 2004, Ukrainian side, Shakhtar Donetsk ("Shakhtar"), paid the Italian side, Brescia, € 8 million for Matuzalem, who signed a five-year contract with Shakhtar in the process. The contract ran from 1 July 2004 to 1 July 2009. The transfer fee at the time was a record for Ukrainian football. Matuzalem went on to become the captain of Shakhtar and was voted their player of the season for the 2006 -2007 season.

On 2 July 2007 (the day after the end of the protected period), Matuzalem notified Shakhtar that he was unilaterally terminating his contract. Shakhtar disputed that Matuzalem could unilaterally terminate his contract in the circumstances that he did and notified him that they deemed his employment contract still to be in force.

Two days later, Matuzalem signed a three year contract with Spanish side, Real Zaragoza. Shakhtar commenced proceedings with the FIFA Dispute Resolution Chamber ("DRC"), the adjudicative body that deals with both arbitration and dispute resolution issues, before an independent chairman. Shakhtar sought the sum of € 25 million, being the buy-out clause in Matuzalem's contract. Matuzalem and Real Zaragoza disputed the claim and stated that the correct compensation was the sum of € 3.2 million. It is noteworthy that throughout the proceedings, both Matuzalem and Real Zaragoza acknowledged that Shakhtar were due some compensation, therefore rendering the whole proceedings to be based on the issue of quantum rather than liability. FIFA did not award Shakhtar the value of the buyout clause and instead ordered that Matuzalem and Real Zaragoza pay compensation of € 6.8 million plus interest at 5% from July 2007. The figure was comprised of € 3.2 million in non-amortized purchase costs; € 2.4 million relating to the outstanding value of the playing contract; and € 1.2 million in respect of sporting and commercial losses.

Shakhtar appealed the DRC's decision to the Court of Arbitration for Sport ("CAS"). Shakhtar's appeal was based on the contractual buy-out clause of € 25 million. In Matuzalem's and Real Zaragoza's joint answer, they sought that the compensation payable ought to be fixed at € 2,363,760, or alternatively, if CAS rejected that argument, the correct level of compensation should be € 3.2 million.

CAS ruled that a buy-out clause in a player's contract is not determinative of the amount the player should pay to the club in the event that the player unilaterally terminates the employment contract and also that the inclusion of a buy-out clause moves away from the quantification of compensation in accordance with the factors set out in art. 17. Nevertheless, CAS ordered Matuzalem and Real Zaragoza to pay an increased sum of € 11.8 million plus interest at 5% from July 2007. To arrive at the figure it did, CAS calculated that SS Lazio, the Italian club, who loaned Matuzalem from Real Zaragoza in July 2007, had an option to buy clause inserted into the contract, for a value of € 13 million plus VAT (or € 14 million plus VAT if SS Lazio reached the UEFA Champions League in the 2008-2009 season). CAS also added the yearly wages that Matuzalem would have earned at SS Lazio

over the three year contract to arrive at a figure of € 21,336,800. Dividing that figure by three (i.e. the number of seasons), CAS determined, would show the value of Matuzalem's services on a yearly basis – € 7,112,267. CAS did a similar calculation on the basis that SS Lazio didn't take up the option agreement and Matuzalem stayed at Real Zaragoza, i.e. total value of € 19,640,000, equating to a yearly value of € 6,546,667.

CAS acknowledged that Matuzalem only had two years left on his Shakhtar contract and therefore the value of his services were worth between € 13,093,334 (Real Zaragoza) and € 14,224,534 (SS Lazio). CAS deducted the sum of € 2.4 million (representing what Shakhtar would have been contractually obliged to pay Matuzalem for the remainder of his contract) and deducted the amount of salary that Shakhtar saved. CAS arrived at an interim value of the services of between € 10,693,334 (Real Zaragoza) and € 11,824,534 (SS Lazio). CAS took the mean figure € 11,258,934 and added an additional indemnity of € 600,000 to reflect that Matuzalem unilaterally terminated his contract shortly before the start of the season, he was the captain of Shakhtar and had in the previous season been voted the best player. The € 600,000 equated to six months of Matuzalem's salary whilst at Shakhtar.

It is important to note that the sum ordered to be paid was approximately ten times Matuzalem's annual salary. The earning potential of a footballer can in certain circumstances be attributed to a very short period of time. It is difficult to think of many other professions where an employee would be required (and could afford) to pay their former employer ten times their former salary in compensation. It is appreciated that in nearly all professions an employee's labour contract is not traded as a commodity, as occurs in football, but the gargantuan compensation payment was unlikely to be able to be met by an individual.

The player and the club could not afford to pay the order of CAS and the order was appealed to the Swiss Federal Supreme Court. The appeal was unsuccessful.

As neither the player nor the club had paid the CAS order, Shakhtar commenced disciplinary proceedings through FIFA against the player and the club. On 31 August 2010, the player was banned from all football activities. The FIFA decision was appealed by both the player and the club to CAS and was rejected by CAS.

Finally, and in an unprecedented move for a footballer, Matuzalem appealed the second CAS decision to the Swiss Federal Supreme Court ("Supreme Court"). In accordance with art. 190(2)(e) of the Swiss Private International Law Act ("PILA") an arbitral award may be set aside in the event that it is incompatible with Swiss public policy. After a long run of legal defeats, Matuzalem eventually came out on the winning side, when the Supreme Court ruled that the decision of a sporting organisation must be line with the fundamental values of Switzerland. Whilst the Supreme Court acknowledged that an individual can restrict his own rights by entering into a contract (or more pertinently in this case entering into a contract that incorporates statutes of a sporting association), the restriction of rights cannot be so excessive that it annuls that person's economic freedom. In deciding whether a restriction of rights is so excessive that it annuls that person's economic freedom, the Supreme Court stated that, if the fate of one of the parties to the contract is left to the discretion of the other party, or if it eliminates economic freedom entirely or to an extent that the contracting party's livelihood is threatened, then the restriction is excessive. The Supreme Court ruled that the worldwide ban of Matuzalem for an unlimited period of time because of an inability to pay sum of money that was ten times his annual wage was in breach of substantive public policy. The Supreme Court, therefore, set aside the second CAS decision; however, it should be noted that the first CAS decision relating to the payment of € 11,858,934 was not set aside.

Using the Matuzalem case as an example, FIFPro have stated that the application of the so-called principle of "expectation interest" in order to calculate the compensation that is payable where a party terminates a contract in accordance of art. 17 is a major problem. The issue is that the party unilaterally terminating the contract will be required to compensate the other party by putting them in the same position as if the contract had been performed in full. This is how fundamental contractual law principles work, in relation to breach of contract, However, in circumstances where the party unilaterally terminating the contract is essentially the economic value of the original contract, by way of their footballing ability, that party is almost certainly not going to be in a financial position to pay the level of compensation awarded. The subsequent imposition of a worldwide ban against a player for failing to pay such compensation is completely at odds with assisting the player to pay the financial damages.

Another issue with the calculation of damages in accordance with a unilateral termination of art. 17 is that, in working out compensation, only the market value of the player is taken into consideration. The player's economic value, derived from their current or future footballing ability, as traded and sought after on the football transfer market, is taken into account, but the player as a human being is not taken into account. Although the player may be remunerated reasonably well, their ability to pay compensation equivalent to the size of their market value is likely to be slim.

FIFPro's EU competition law complaint

Having analysed the RSTP and provided an example of tangible consequences of the RSTP, through studying the case of Matuzalem, the next question to pose is, what EU competition law does FIFPro's complaint state that the RSTP fails to comply with?

Well, the answer is art. 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU"). Art. 101 broadly prohibits agreements, decisions or concerted practices that prevent, restrict or distort competition within the internal market, and, in particular, that have the effect of limiting or controlling production, markets, technical development or investment.

Art. 102 prohibits the abuse of a dominant position, including any abuse that directly or indirectly imposes unfair trading conditions.

It is difficult to argue against the fact that FIFA is in a dominant position in relation to football, as there is no other governing body involved in football that has the same power to implement the laws and rules of the game of football.

On the issue of whether by virtue of the RSTP, FIFA have prevented, restricted or distorted competition within the Member States of the EU, there is a substantial argument to say that the RSTP have, be-

cause art. 17 limits the ability of footballers to unilaterally terminate their contracts and, therefore, provides clubs with the option of limiting markets, technical development and sources of supply. Should a player unilaterally terminate their contract, then, in accordance with art. 17(1), the player and new club would be jointly liable for any compensation. That is likely to limit the player's potential new clubs to only those that can afford to pay substantial compensation. If a player wanted to unilaterally terminate their contract, to move closer to home (whether that be in the same or a different country) then, if the new club closer to the player's home was not financially well off, they would make a decision not to sign the player. That would limit the player's freedom to move between clubs and it is arguable that this is in breach of both art. 101 and 102 of TFEU.

The imposition of a sporting sanction for a unilateral breach of contract within the protected period of the RSTP, (as set out in art. 17(3)) is also arguably in breach of art. 101, as it has the effect of preventing technical development of the player and can limit the availability of players.

Another example of how the RSTP is arguably in breach of the art. 101 and 102 is to look at an elite club with exceptional resources. In such circumstances, there is the potential for that club to acquire high numbers of players. However, only eleven players can play for a club at any one time and, therefore, if the club refuses to sell the player (because it may want to retain the player with a view to playing them in the future), the player is then left in the situation of facing the consequences of paying compensation and a sporting sanction – further limiting technical development.

As a result of the football transfer system, a player's labour becomes a commodity, meaning that only certain clubs have the ability to purchase elite players. Such a system restricts competition in the market to a small number of clubs and has the knock on effect of increasing the value of all players, because the clubs that cannot purchase the elite players have a smaller labour market available to them. It is hard to see how such a system is not in breach of art. 101.

Conclusion

The European Commission has yet to release its decision on FIFPro's complaint and it will be particularly interesting to see exactly how the Commission will deal with it!

The introduction of the RSTP was with the aim of creating contractual stability between players and clubs; however, it is clear that it is an unbalanced system that places the clubs in stronger positions than the players, which is arguably not in compliance with art. 101 and 102 of the TFEU.

There are a number of solutions for making the transfer system more balanced and flexible for players; these include reducing the fees spent on the transfer of players and the maximum length of a contract.

Should transfer fees be reduced or abolished, it would create more freedom for players; increase competition between all the clubs; and, hopefully, improve the enjoyment of football for the fans.

India:
ADR and sport

by Param Bhalerao[1]

Introductory remarks

In 2011, under the directions of the International Olympic Committee, the Indian Olympic Association established the Indian Court of Arbitration for Sport ("ICAS"). This was a major positive step in the jurisprudence of sports disputes in India.

The ICAS was to be composed of eight panelists, who would adjudicate on the disputes that were referred to it by the parties. Dr. AR. Lakshmanan, a former Supreme Court Judge and former Law Commission chairman, was appointed as the Chairman, and the other members included M.R. Culla and retired judges, Justices R.S. Sodhi, B.A. Khan, Usha Mehra, Lokeshwar Prasad and S.N. Sapra.[2] In accordance with the Indian Olympic Association, the ICAS was to resolve all sports disputes arising in India. The disputes were to be resolved in accordance with the rules and regulations of the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland.

Although Dr. AR Lakshmanan gave his consent to head the panel, there is no clarity as to whether the body was properly established and is functional. There is no information regarding any hearings conducted by the ICAS. Besides the generalized statement of following the rules and regulations of the CAS, there is no proper formulation of rules and regulations for India. This is essential, as unlike the Indian Olympic Association has claimed, the ICAS cannot have automatic territorial jurisdiction over all matters arising in India. Disputes relating to matters, such as doping in sport, cannot be adjudicated on by the ICAS in India, as the same come under the exclusive jurisdiction of the National Anti-Doping Authority (NADA) of India. Besides, criminal matters cannot be submitted to arbitration.[3] Hence, the issue of arbitrability of match fixing and spot fixing in sports, where convictions are attempted under Section 415 (cheating) of the Indian Penal Code.[4]

The non-functioning of the panel is clearly seen from the fact that a recent dispute involving an Indian swimmer was not referred to the ICAS, but to the Alternative Hearing Centre ("AHC") of the CAS in Abu Dhabi.

CAS

Recently, the relevance of CAS as a global forum of dispute resolution in sports was realized in the case of four athletes, Ashwini A.C., Sini Jose, Priyanka Panwar and Tiana Mary Thomas. These athletes, who represented India at the Commonwealth Games and the Asian Games were suspended for a period of one year by the National Anti-Doping Disciplinary Panel ("NAADP") for steroid violations in December 2011.[5] During the appeal before NAADP, the World Anti-Doping Agency ("WADA") cited several rulings of the CAS, while arguing for a more stringent punishment.[6] Further, in case of an unsatisfactory ruling, either party can appeal to CAS.[7] Thus, it is seen in practice that CAS is being approached at an appeal stage when the dissatisfied party has exhausted remedies available at the national level.[8]

Enforcement in India of foreign arbitral awards

The enforceability of foreign arbitral awards, such as those of CAS, has recently undergone positive developments with the Arbitration and Conciliation Amendment Act, 2015. Part I of this Act is now not applicable to foreign seated arbitrations. Prior to the amendment, Part I of the Arbitration and Conciliation Act allowed national courts in India to claim jurisdiction over challenges to a foreign award and allow courts to make findings under its own legal system as to illegality of the underlying contract, the extent of such illegality and whether it can be enforced under the legal regime of the country.[9]

Now, a single application for enforcement of a foreign arbitral award would undergo a two-stage process. In the first stage, the enforceability of the award, having regard to the requirements of the Act (New York Convention of 1958), would be determined. Foreign arbitral awards, if valid, are treated on a par with a decree passed by an Indian civil court and they are enforceable by Indian courts having jurisdiction, as if the decree had been passed by

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8 Devyani Jain, "Judicial Trend Of Intervention In Sports Arbitration And Its Future In India", in: *Indian Journal of Arbitration Law, Volume I, Issue I*.

9 Koji Takahashi, "Arbitral & Judicial Decisions: Jurisdiction to Set Aside A Foreign Arbitral Award, In Particular An Award Based On An Illegal Contract: A Reflection On The Indian Supreme Court's Decision In Venture Global Engineering", 19 AM. REV. INT'L ARB. 173, available at www1.doshisha.ac.jp/~tradelaw/PublishedWorks/SettingAsideForeignAward.pdf, accessed 2 September 2016.

such courts.[10] Once the court decides that the foreign award is enforceable, it shall proceed to take further steps for execution of the same, the process of which is identical to the process of execution of a domestic award.[11]

Other sports ADR possibilities in India

In addition to the current scenario, certain steps for the alternative resolution of disputes arising in sport have been proposed in India. The first is through the Draft National Sports Development Bill, 2013 ("Bill"). This Bill has not yet been enacted; however, it suggests a good model for resolution of sports disputes.

The Bill has been formulated to provide for the promotion and development of sports and welfare measures for sportspersons, promotion of ethical practices in sport, including elimination of doping practices, fraud of age and sexual harassment of women in sport, constituting and establishing bodies to deal with sports disputes, ethics, elections and athletes representation and for matters connected therewith or incidental thereto.

The Bill envisages the establishment of a Sport Dispute Settlement and Appellate Tribunal ("Tribunal"). The Central Government is empowered to establish an Appellate Sports Tribunal and can prescribe the composition of the Tribunal and its benches; the selection of the members of the Tribunal; the jurisdictional limits of the Tribunal; and other administrative matters with respect to the Tribunal. A Selection Committee, consisting of the Chief Justice of India (or his nominee judge-chairperson), the Secretary of the Department of Sports, the President of the National Olympic Committee (or his nominee), shall provide a list of recommendations to the Central Government for the selection of the Tribunal.

The Bill places a bar on the jurisdiction of the Tribunal in certain cases. There is a bar in matters or disputes over which the Court for Arbitration of Sport (CAS) has exclusive jurisdiction. This includes events organized by international federations, such as the Olympic Games, Commonwealth Games, Asian Games. This has been done in order to prevent a conflict between the jurisdiction of the CAS and the Tribunal, which can unnecessarily prolong proceedings and make them more expensive. Another bar on the jurisdiction of the Tribunal is in disputes related to doping. The anti-doping panels constituted by the National Doping Agency already has exclusive jurisdiction in this regard.

However, an important issue that arises with respect to the Tribunal is that the parties to the dispute do not have the power to select the adjudicators. Thus, the question arises is this process an alternative governmental forum, or can this process still qualify as an arbitration? It depends on the answer to the following question: is consent of the parties to the process more important to the qualification of "arbitration" than the option for a party (here the investor) to nominate the decision-makers?

We can find an answer to this by analyzing the European Union Commission Proposal for the creation of an "Investment Court System".

Art. 1(2) of the New York Convention specifically envisages the role of arbitral institutions in the nomination of arbitrators. In 2010-2011, some arbitrators suggested that institutions, and no longer parties to a dispute, nominate arbitrators. In this context, it was stated that no right exists to name one's arbitrator. The Iran-US Claims Tribunal appears to provide a precedent as well. Investors did not nominate the decision-makers, called "judges", but the process relied on the UNCITRAL arbitration rules. Inconsistent decisions were rendered early on, namely in The Netherlands and the USA, regarding the issue of whether the Tribunal's decisions could be enforced under the New York Convention, because of the lack of "*an agreement in writing*". However, investment treaties have resolved this obstacle by including deemed consent and the EU TTIP proposal, as well as agreements with Vietnam and Canada, have followed suit.[12]

Similarly, in the present case of the Tribunal in India, the Selection Committee of the Tribunal can be considered similar to an institution that is nominating the arbitrators. Thus, if the parties had the freedom to opt for proceedings under the Tribunal via an agreement, the same would qualify as an arbitration. However, a closer look reveals that the parties do not have any actual freedom to opt for proceedings under the Tribunal via an agreement. The aggrieved party does not really have a choice for the forum, as the Bill provides for a bar on the jurisdiction of civil courts to entertain any suit which the Appellate Tribunal has the power to determine.[13] Hence, it is proposed as the main forum for sports disputes rather than an alternative forum for arbitration. Thus, whether the Tribunal qualifies as a forum for alternative dispute resolution, is a question that shall be answered only when the Bill is passed after any necessary amendments.

Cricket disputes

The Lodha Committee Report provides a detailed proposal for the formation of a body, regulations, functioning, for the resolution of cricket-related disputes.

The Lodha Committee Report proposes the formation of an ombudsman for the resolution of disputes arising in relation to cricket and the Board of Cricket Control India (BCCI). The ombudsman shall be appointed each year at the annual general meeting of the BCCI. With the intention of making the ombudsman an independent body that resolves disputes fairly, the committee has directed that the ombudsman shall be a retired judge of the Supreme Court or a retired Chief Justice of a High Court. The ombudsman's appointment is valid for one year, after which the ombudsman may be re-elected. The same person may serve as ombudsman for a maximum of three terms. This is to ensure complete independence in the process of the resolution of disputes.

The ombudsman has jurisdiction over disputes of the following nature:

Member, association and franchisee disputes

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[10] Section 49, Arbitration and Conciliation Amendment Act, 2015.

[11] Nishith Desai Associates, "International Commercial Arbitration: Law and Recent Developments in India", March 2016, avaialble at http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/International_Commercial_Arbitration.pdf, accessed 2 September 2016.

[12] Céline Lévesque, "The European Union Commission Proposal for the Creation of an "Investment Court System": The Q and A that the Commission Won't Be Issuing", 6 April 2016, Kluwer Arbitration Blog, available at http://kluwerarbitrationblog.com/2016/04/06/the-european-union-commission-proposal-for-the-creation-of-an-investment-court-system-the-q-and-a-that-the-commission-wont-be-issuing, accessed 2 September 2016.

[13] Section 32, Draft National Sports Development Bill 2013.

The BCCI and its members play a crucial role in the governance of the cricketing zones in various States, the Indian Premier League and its franchisees (teams, such as Rising Pune Supergiants, Mumbai Indians) and the Cricket Players' Associations. Any disputes arising between or among the BCCI, its members, or the various bodies it governs, shall fall under the jurisdiction of the ombudsman.

The disputes would automatically be referred to the ombudsman. The procedure followed would be submission of arguments by both the parties, followed by a hearing. Principles of natural justice would be the governing laws to be followed in the resolution of the dispute. The ombudsman also has the power to conduct enquiries while adjudicating the dispute.

Detriment caused by member or administrator

Acts of any member or administrator of the BCCI, which may be considered to be acts of indiscipline or misconduct, are to be referred to the ombudsman. Such acts also include those which may be detrimental to the interests of the BCCI or the game of cricket, which may endanger the harmony or affect the reputation of BCCI, and also neglect or refusal to comply with the rules and regulations of the BCCI.

A "show cause notice" is first issued by the Apex Council to such accused members on receipt of a complaint. The matter is not taken cognizance of *suo moto*. On receiving the notice, members are expected to provide explanations for the accusations. If the Apex Council does not find the explanations to be satisfactory, the matter is referred to the ombudsman. It is important to note that the preliminary hearing to admit the matter is conducted by a body that is part of the BCCI, and the dispute is resolved by the independent body.

Upon referral to the ombudsman, the parties are given an opportunity for a hearing, after which the ombudsman issues an appropriate order.

Misconduct or breach by others

This gives the ombudsman jurisdiction over any player, umpire, team official, selector, or any person associated with the BCCI, who is found to have committed any act of indiscipline, misconduct, violation of rules and regulations. However, the matter is not automatically received by the ombudsman. A complaint may first be filed with the Apex Council, or the Apex Council may take *suo moto* cognizance of such misconduct or breach by its own motion. Such cognizance may be taken even on the basis of any report that has published the news of the misconduct or breach, and has been circulated.

Upon receiving the complaint, the Apex Council has to refer it to the CEO of the BCCI within 48 (forty-eight) hours for a preliminary enquiry. It is the responsibility of the CEO to call for explanations from the accused persons. The CEO then has to prepare a report and submit it back to the Apex Council. The time limit from the date of reference to the Apex Council to the submission of the report back to the Apex Council is 15 (fifteen) days. Thus, the CEO has a minimum of 13 (thirteen) days to conduct the enquiry and submit the report.

The Apex Council, after receiving the report, submits it to the ombudsman. The ombudsman then calls for all particulars that may be necessary. The actual cognizance of the matter is taken by the ombudsman who has the power to admit the matter or drop the charges, depending on whether a *prima facie* case has been made. Thus, the job of the Apex Council and the CEO is simply to collect relevant evidence which may help the ombudsman to decide whether a *prima facie* case exists.

If a *prima facie* case is found, the ombudsman is to deal with the matter as expeditiously as possible. A reasonable opportunity of hearing is provided to the parties. The parties are to make their submissions, on the basis of which the ombudsman issues its order. If any party fails to appear or make submissions, the ombudsman has the power to issue an *ex parte* order.

It is pertinent to note that, although the matter is being adjudicated by an independent body, the relevant evidence on the basis of which a *prima facie* case may be admitted is being collected by bodies that are a part of the BCCI. Thus, the practical and legal effectiveness of this is questionable.

By the public against the BCCI

Any grievances by the public in relation to ticketing facilities, access and facilities at stadiums, may be brought before the ombudsman in the form of a complaint. This is an important power given to the ombudsman, as it takes away a substantial amount of small-cause disputes that would normally fall under the jurisdiction of the civil courts. It is an important and one of the most substantial steps forward towards development of alternative dispute resolution in relation to cricket and sport in general.

The procedure for the adjudication of the dispute is the same as that followed in case of breach or misconduct by others, as stated above under "Misconduct or breach by others". It is concerning, however, that, even in matters which are directly involving the public, it is the BCCI bodies (Apex Council, CEO) that are going to gather the relevant facts and evidence that may be used to construct a *prima facie* case. It is important to have complete independence of all the bodies from the main body for effective dispute resolution. The public should be allowed to make their own case before the ombudsman and submit all evidence directly, without the need for the middle bodies that process the disputes.

The ombudsman is free to decide the place of dispute resolution. The penalties that can be imposed by the ombudsman are in accordance with those provided in the "Regulation for Players, Team Officials, Administrators, Managers and Match Officials of the BCCI".

The decision of the ombudsman is final and binding on the parties. Every decision comes into force as and when the same is pronounced and delivered by the ombudsman.

All persons who are associated with the BCCI, such as administrators, players, match officials, team officials, selectors, if found guilty, shall be expelled by the BCCI. Such persons will have to forfeit all their rights and privileges. They shall not be eligible to hold any position or office, or be a part of any committee in the BCCI, at any time in the future. However, this rule is not applicable to members and franchisees. Once expelled, the members and franchisees may re-apply to the Board after the expiry of three years from the date of expulsion. This is subject to the approval of three quarters of the BCCI General Body members that are present and voting.

There is a provision for interim suspension

of the concerned member, player, administrator, match official, team official, any other member associated with the BCCI, when an inquiry is pending on receipt of a complaint against them. The suspension is granted by the Apex Council, and remains in force until final adjudication of the matter. However, the suspension shall cease if the adjudication is not completed within six months of receiving the complaint.

Concluding remarks

In conclusion, we can say that, as a concept, the ICAS was a step towards developing a niche area of law and efficiently resolving disputes at the earliest possible instance without recourse to a long-winded and expensive litigation process. However, steps had to be taken to bring such institutions into fruition.

As the CAS has promoted the AHC in Abu Dhabi, which has been set up in association with the Judicial Department of Abu Dhabi, similar steps are required to be taken to promote the Indian Court of Arbitration for Sport. It is believed that, if proper steps had been taken to promote and further the cause of sports arbitration within India, then such a specialised tribunal would go a long way towards effectively and efficiently resolving sports disputes.

In all sports disputes, it is important to realise that the career-span of most athletes is extremely limited. Achievement of sporting excellence holds primacy of place for every athlete. Getting entangled in the long-winded procedural court process would not serve any useful purpose for athletes. Therefore, time bound alternative dispute resolution is one of the key mechanisms whereby sports disputes can be effectively resolved.

Thus, it is now necessary to implement the Bill, the Lodha Committee Report, and the ICAS immediately, for the benefit of the alternative resolution of sports disputes in India.