

THE SPORTS LAW  
REVIEW

FOURTH EDITION

Editor  
András Gurovits

THE LAWREVIEWS

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# PREFACE

*The Sports Law Review*, in its fourth edition, is intended as a practical, business-focused legal guide for all relevant stakeholder groups in the area of sports, including sports business entities, sports federations, sports clubs and athletes. Its goal is to provide an analysis of recent developments and their effects on the sports law sector in 18 jurisdictions. It will serve as a guidebook for practitioners as to how a selected range of legal topics is dealt with under various national laws. The guidance given herein will, of course, not substitute for any particular local law advice that a party may have to seek in connection with sports-related operations and activities. Specific emphasis is put on the most significant developments and decisions of the past year in the relevant jurisdictions that may be of interest for an international audience.

*The Sports Law Review* recognises that sports law is not a single legal topic, but rather a field of law that is related to a wide variety of legal areas, such as contract, corporate, intellectual property, civil procedure, arbitration and criminal law. In addition, it covers the local legal frameworks that allows sports federations and sports governing bodies to set up their own internal statutes and regulations, as well as to enforce these regulations in relation to their members and other affiliated persons. While the statutory laws of a particular jurisdiction apply, as a rule, only within the borders of that jurisdiction, such statutes and regulations, if enacted by international sports governing bodies, such as FIFA, UEFA, FIS, IIHF, IAAF and WADA have a worldwide reach. Sports lawyers who intend to act internationally or globally must, therefore, be familiar with these international private norms if and to the extent that they intend to advise federations, clubs and athletes that are affiliated with such sports governing bodies. In addition, they should also be familiar with relevant practice of the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland, as far as it acts as the supreme legal body in sport-related disputes. Likewise, these practitioners should have at least a basic understanding of the Swiss rules on domestic and international arbitration as Swiss law is the *lex arbitri* in CAS arbitration.

While sports law has an important international dimension, local laws remain relevant in respect of all matters not covered by the statutes and regulations of the sports governing bodies. This growing international dimension means that athletes, sports clubs and sports federations are increasingly operating in an international environment and dealing with a variety of jurisdictions. As a result, the need for an international regulation of international sport is growing, and more and more specific legal assessments of individual aspects of local law are required, in particular in respect of local mandatory provisions that may prevail over or invalidate certain provisions of regulations enacted by sports governing bodies. The primacy of local laws is of particular importance in international employment relationships; for example, between clubs and foreign players, where the local laws of the clubs usually provide for a set

of mandatory provisions that may impede performance by the athletes of their contractually agreed rights as regards the employers should they not fulfil the employment agreement.

Each chapter of this fourth edition will start by discussing the legal framework of the relevant jurisdiction permitting sports organisations, such as sports clubs and sports governing bodies (e.g., national and international sports federations), to establish themselves and determine their organisational structure, as well as their disciplinary and other internal proceedings. The section detailing the competence and organisation of sports governing bodies will explain the degree of autonomy that sports governing bodies enjoy in the jurisdiction, particularly in terms of organisational freedoms and the right to establish an internal judiciary system to regulate a particular sport in the relevant country. The purpose of the dispute resolution system section is to outline the judiciary system for sports matters in general, including those that have been dealt with at first instance by sports governing bodies. An overview of the most relevant issues in the context of the organisation of a sports event is provided in the next section and, subsequent to that, a discussion on the commercialisation of such events and sports rights will cover the kinds of event- or sports-related rights that can be exploited, including rights relating to sponsorship, broadcasting and merchandising. This section will further analyse ownership of the relevant rights and how these rights can be transferred.

Our authors then provide sections detailing the relationships between professional sports and labour law, antitrust law and taxation in their own countries. The section devoted to specific sports issues will discuss certain acts that may qualify not only as breaches of the rules and regulations of the sports governing bodies, but also as criminal offences under local law, such as doping, betting and match-fixing.

In the final sections of each chapter, the authors provide a review of the year, outlining recent decisions of courts or arbitral tribunals in their respective jurisdictions that are of interest and relevance to practitioners and sports organisations in an international context, before they summarise their conclusions and the outlook for the coming period.

This fourth edition of *The Sports Law Review* covers 18 jurisdictions. Each chapter has been provided by renowned sports law practitioners in the relevant jurisdiction. As editor of this publication, I would like to take the opportunity to thank all of the authors for their skilful and insightful contributions to this publication. I trust that you will find this global survey informative and will avail yourselves at every opportunity of the valuable insights contained herein.

**András Gurovits**

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November 2018



# ARGENTINA

*Pablo A Palazzi, Marco Rizzo Jurado and Andrés Chomczyk*<sup>1</sup>

## I ORGANISATION OF SPORTS CLUBS AND SPORTS GOVERNING BODIES

Argentina has a long and well-known sports tradition. Attempting to write a review of the regulations of all sports in Argentina is a daunting task and would, undoubtedly, exceed the scope of this chapter. It is therefore necessary to establish an, albeit arbitrary, narrower scope.

To that end, we have made an initial distinction between team sports and individual sports. This review will focus on the former. Once this distinction is made, it is necessary to choose a subset of the existing team sports. For these purposes, we have chosen to focus on those sports where, at the national team level, Argentina is considered to be among the world's elite. This means sports for which a global competition exists and the Argentine national team has reached no less than the quarter finals in the most recent occurrence of the global competition.

Thus, this chapter will focus on the following sports: football, rugby, field hockey, basketball and volleyball.

It is worth noting, however, that the Sports Law<sup>2</sup> regulates the promotion of sporting activities throughout the country. The stated purpose of the Sports Law is to promote sports in all its forms.

The Sports Law defines a sporting institution as an association whose stated purpose is the practice, development, maintenance, organisation and representation of sport or any of its variations. The Sports Law further creates a Registry of Sporting Institutions. Registration in said registry is a requirement to participate in organised sports, both amateur and professional.

### i Organisational form

Each particular sport is regulated by its own governing body. At the national level, only in football are the individual clubs associated with the governing body. For rugby, field hockey, basketball and volleyball, clubs are associated with a regional federation or association, and the regional federations or associations are then associated with a national confederation.

This confederation issues the regulations at a national level and is then associated with the international sports governing entities.

---

1 Pablo A Palazzi is a partner, Marco Rizzo Jurado is a senior associate and Andrés Chomczyk is a semi-senior associate at Allende & Brea.

2 Law 20,655, Article 16.

Thus, football is regulated by the Association of Argentinian Football (AFA), which is further affiliated to both the South American Football Confederation and FIFA (a regional South American entity and worldwide entity, respectively). Rugby is regulated by the Argentine Rugby Union (UAR), which is further affiliated to the International Rugby Board. Hockey is regulated by the Argentine Confederation of Hockey (CAH), which is related to the International Hockey Federation. Basketball is regulated by the Argentine Confederation of Basketball (CABB), which is related to the International Basketball Federation. Finally, volleyball is regulated by the Argentine Volleyball Federation (FeVA), further related to the International Volleyball Federation.

The regulatory entities and associations, both at the regional and the national level, adopt the legal form of a not-for-profit civil association. Further, teams are also civil associations and are not to be profit-making entities. There are historical reasons why this is the case: where teams were originally formed within neighbourhood clubs, the clubs eventually adopted this organisational form, and this has been maintained over time.

Even with the advent of professionalism (within the limits that will be referred to in this chapter) and the success of Argentine players and teams at a global level, the basic entity that unifies the players is a not-for-profit entity. And it is unlikely that this will change in the near future. As mentioned, the Sports Law defines a sporting institution as an association. This would seem to exclude any type of company or corporation being considered as a sporting institution and allowed to participate in organised sports. By way of example, the AFA regulations expressly prohibit affiliated entities from being commercial entities.<sup>3</sup>

## **ii Corporate governance**

As mentioned, other than the Sports Law, which is a general law related to the promotion of sports in and of themselves, there is no unified regulation for sports entities. Having said this, there are certain general principles that apply to all clubs and institutions.

Most of these principles do not vary from general corporate governance principles for associations or other legal entities in Argentina. A description of all these principles would vastly exceed the scope of this chapter; however, these generally refer to a prudent administration of resources; accountability and transparency in the decision-making processes; and conflict of interest regulations.

However, there are certain specific requirements that are imposed by the different governing entities. In this sense, for instance, the AFA requires that the clubs affiliated to the AFA have separate accounting for professional football-related matters.

## **iii Corporate liability**

There are no specific statutory provisions for liability of managers and officers of a sports organisation. General corporate liability provisions would apply. It is worth noting that sports entities are not corporate entities (in the sense that corporate entities are commercial entities). As mentioned above, sports entities are associations that are not for profit.

In that sense, in general, there are no specific regulations relating to sports that attach liability for managers and officers for the simple fact that the individual occupies such a role.

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3 See Article 5 of the by-laws of the AFA, where the entities are mandated to not become commercial entities (*'ni convertirse en sociedades comerciales'*).

The main exception to this lack of regulation is Law 23,184, as amended (for the prevention of violence in sporting events), which establishes the liability of managers and officers, as such and not in their personal capacity, for violations to the obligations imposed under said Law.<sup>4</sup>

It is important to keep in mind that the regulatory documents of each of the sports governing entities establish that managers and officers of sports organisations may be subject to disciplinary action if they commit any of the actions described in the relevant regulations in their role as managers. As described in more detail below, the liability is not given because the individual is an officer of an entity, but the action that the individual committed is punishable because the individual is a manager.<sup>5</sup>

Likewise, managers and officers are subject to anti-doping regulations, not because of the liability of the club they represent, but a personal liability where they have to have been personally involved.<sup>6</sup>

## II THE DISPUTE RESOLUTION SYSTEM

There is no single dispute resolution system for sports. Each sport has its own dispute resolution system with its own regulations and systems of appeals. In general, most sports governing entities establish an independent dispute resolution system for disciplinary matters, where most establish a two-tiered system for disciplinary hearings and measures.

It should be noted that the references below are to the national governing body of each sport. Most regional entities have similar, if not identical, regulations. Additionally, most entities replicate, at least partially, the general disciplinary systems established by the global governing entity.

### i Access to courts

AFA regulations expressly state that the decisions issued by the Tribunal of Sports Discipline are final and unappealable, except in certain cases where the sanction is particularly burdensome.<sup>7</sup> Further, among the obligations of the AFA's member clubs is the obligation not to access judicial courts in any dispute that a member may have with the AFA.<sup>8</sup>

This being said, certain matters are referred to judicial courts, mainly relating to employment matters. Further, civil liability matters are also referred to courts and in cases where the plaintiff is a player, the action that caused the damages would exceed ordinary play and disciplinary action taken by the sport's governing entity.

For rugby,<sup>9</sup> field hockey,<sup>10</sup> basketball<sup>11</sup> and volleyball<sup>12</sup> the applicable regulations establish a two-tiered system for disciplinary measures, with an initial tribunal and an appellate tribunal. Access to courts is granted, as none of the regulations specifically prevent access to courts or establish a mechanism of access to courts.

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4 See Section III for further clarification.

5 See, for instance, AFA Regulations of Transgressions and Penalties, Chapter XVI.

6 See Section VIII.i, for more details.

7 See AFA By-laws, Article 13 and Regulations of Transgressions and Penalties, Article 40.

8 See AFA By-laws, Article 5.

9 UAR regulations of procedures, sanctions and recourses of the Argentine Rugby Union, Article 38.

10 CAH Regulations of the Disciplinary Tribunal, Articles 15 et seq.

11 CABB Penalty Code, Articles 52 et seq.

12 FeVA Procedural Code of the Disciplinary Tribunal, Articles 79 et seq.

## **ii Sports arbitration**

Given that each sport's governing entity has its own method of discipline, there are no provisions for sports arbitration for matters related to incidents at sporting events.

Further, employment matters are barred, by applicable labour regulations, from being referred to arbitration. Thus, sports matters related to employment cannot be referred to arbitration.

Finally, civil liability matters are, by their very nature, not subject to arbitration through a pre-agreed arbitration agreement.

## **iii Enforceability**

Enforceability of decisions of the governing bodies is not so much a legal issue as a factual issue. Although the governing entities have the power to suspend any entity that does not accept a disciplinary decision,<sup>13</sup> the most relevant power for enforcing decisions is the monetary power each governing body has over the clubs and entities.

Each of the sports governing bodies controls the financing of the sport and the clubs where that sport is practised. Therefore, any decision by any disciplinary tribunal that is not accepted and enacted by a club may be met with *de facto* monetary sanctions. Thus, once instances of appeal are extinguished, sports clubs and teams accept the decision issued and act in accordance with said decision.

# **III ORGANISATION OF SPORTS EVENTS**

## **i Relationship between organiser and spectator**

It is generally understood that the relationship between the organiser of a sports event and a spectator is a contractual relationship. However, this relationship is not built on a written contract, but rather an implied contract. Through this implied contract the organiser undertakes to organise a sporting event with certain characteristics (regarding participating teams, athletes, venues, timing, etc.), which the spectator accepts through the acquisition of a ticket to said event.

Thus, given the existence of an implied contract and not an actual written agreement between the organiser and each individual spectator, the contract is best understood as a consumer contract. The spectator is a consumer of an organised sports event and, therefore, spectators can avail themselves of the defences included in consumer protection regulations. Most importantly, other than the safety and security provisions that will be described later, organisers of sports events must be very clear in the promotion and publicity of the event so that the event meets the expectations created by the promotional materials. Any clear discord between the promotional materials and the actual event may give rise to responsibility for false or misleading advertising, for instance.

## **ii Relationship between organiser and athletes or clubs**

The relationship between the organiser and athletes or clubs is different. For the purposes of this particular section, we will not analyse the ordinary annual competitions of each particular sport (such as the first division football tournament or the national basketball league, to name two), but specific, one-off special events.

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13 See, for instance, AFA Regulations of Transgressions and Penalties, Article 75.

In these cases, the organiser would generally secure athlete or club participation through a specific contract detailing the obligations of either club or athlete. In the case of individual athletes, it should be noted that sometimes these contractual provisions may be considered labour provisions and subject to labour regulations. However, this has to be analysed on a case-by-case basis.

The contracts in these cases are generally thought of as service agreements or works for hire, where the club undertakes to perform a service (play a sport) for the benefit of the organiser. It is advisable that, in addition to the general contractual provisions that are usual in contracts in Argentina, certain regulations are to be included regarding publicity of the event, athlete participation in promotional materials, pre- and post-competition press events and other event-specific regulations.

### iii Liability of the organiser

The foundation of the civil liability of the organiser of a sports event can be found in a single article of a single law: Article 51 of Law 23,148 (as amended by Law 24,192) states that ‘the entities or associations participating in a sporting event are jointly and severally liable for the damage that may occur in the stadiums.’

The organiser is therefore liable not only for the safety of the athletes and spectators during an event – and further subject to the provisions of Law 23,148 (as amended by Law 24,192) – but also for general security matters, such as theft prevention, damage and accident prevention. Therefore, the organiser of a sports event may be found liable for all types of damage that may occur during the event.

In general, and other than the violation of the riot prevention regulations indicated above, the organiser of a sports event will not be directly liable for criminal acts, since criminal liability is attributable to the individual who carries out the criminal act. However, investigation of alleged offences will be either initiated *ex officio* or through a criminal complaint filed by the victim, depending on the alleged offence.

### iv Liability of the athletes

In general, the liability of athletes for damages that occurred during ordinary play conditions is limited and subject to the disciplinary actions and measures of each club and sports governing body. However, for damages that go beyond ordinary actions of play, athletes may be liable for damages.<sup>14</sup>

In the case of civil liability claims (i.e., claims for damages), it is the damaged party who must initiate and follow the case. As is usual for civil liability matters, there must be a causal link between the action of the athlete and the damage received by the other party.

There are no specific regulations regarding criminal liability matters for athletes, and thus general regulations apply. In these cases, criminal offences are generally investigated *ex officio* by the authorities. However, certain matters are dependent on private impulse, such as minor lesions. Therefore, the investigation for criminal liability of an athlete would depend on the type of alleged offence.

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14 For instance, in the case *Santiago Fabián Santero v. Juan Guillermo Lobato and others* (CNCiv, Sala I, 23 December 2003), the appellate tribunal found Mr Lobato liable for damages in favour of Mr Santero after Mr Lobato had punched Mr Santero during a rugby match with enough force to damage Mr Santero’s jaw, beyond ordinary instances of play.

## **v Liability of the spectators**

Spectators are subject to some civil and criminal liability regulations as members of an organised society. In addition, there are particular instances where actions carried out related to sports events may give rise to particular criminal liability. For instance, a spectator may be found criminally liable for the interruption, even temporary, of a sporting event carried out in a public venue; or in cases of destruction of private property in the event of a sporting event (where the criminal sanctions are greater than ordinary property damages).

It should be noted that the intervening judge may impose on the spectator the additional penalty of being banned from all sporting events or that particular stadium, or from acting as a manager, officer or even player of any given sport.

## **vi Riot prevention**

Law 23,148 (as amended by Law 24,192) is aimed at preventing violence in sporting events. The Law imposes several obligations and prohibitions to organisers of sporting events, athletes, spectators and authorities, the violation of which constitute criminal offences.

The Law is applicable in cases of a sporting event, either in the stadium or arena and the surrounding areas, before, during and after the event. For instance, among the prohibited matters is having firearms or explosives in the areas indicated during a sport event.

Certain violations may be considered criminal in nature, while others are merely misdemeanours. Among the misdemeanours are the actions that are usually considered riots and incitement to rioting. In that sense, for instance, inciting violence, throwing objects (including lit or that may cause substantial damages) or creating 'avalanches' in the bleachers and stands are considered misdemeanours and the sanction is the prohibition to access events for a given number of dates of play. However, these are not considered crimes punishable through the regular criminal justice system.

# **IV COMMERCIALISATION OF SPORTS EVENTS**

## **i Types of and ownership in rights**

The commercialisation of rights to sporting events can be divided, mostly, into official and unofficial matches and events.

First it should be noted that, as is further explained in Section V, below, in Argentina only football is a professional sport. All other sports are still considered amateur, and therefore there are fewer exploitation rights associated with such sports and they are much less lucrative.

Although each sport has its own set-up, as a general rule, the regulating entity owns rights to the sports events where the participating team is the official national team. This includes broadcasting rights, sponsoring and merchandising.

Additionally, the regulating entities own the rights of sponsoring, merchandising and broadcast of official competitions at the national level. The governing entities then execute commercialisation agreements with different entities regarding sponsoring, merchandising and broadcast rights. Particularly for broadcast rights, this generally involves long-term agreements with either networks or other entities to broadcast local and national team matches.

However, for certain global events, the organising entity may have agreements with broadcasters that are different from the 'official' broadcaster of the national team or the local tournament. This is subject to the global agreement, and said global agreement prevails.

It should be further noted that in Argentina the most pertinent of broadcast rights relates to football. Currently, the broadcast of the national first division football tournament is done jointly by Twenty-First Century Fox, Inc, through its subsidiaries, and Turner Broadcasting System Latin America, Inc, through its subsidiaries, which obtained these rights upon license from AFA and the Argentine Professional Football Superleague after the termination of the agreement with the national government for the programme *Fútbol para Todos*.

Further, Law 25,243 establishes the obligation that all football matches where the Argentine national team participates must be transmitted live through non-pay TV throughout the country. Additional regulations establish that when Argentine teams (although not the national team) reach decisive instances of regional competitions, such matches are also to be broadcast in this same manner.

Additionally, each individual team or club has sponsoring and merchandising rights and agreements regarding team branded materials. Finally, each individual athlete has the total rights to their own image, notwithstanding any right that the clubs and governing entities have to, within their own rights, broadcast or publicise images of the athlete.

## **ii Rights protection**

In general, violations of sports-related rights are mostly found in the area of merchandising. In that sense, there are two different instances that can be distinguished.

On the one hand, there are the 'generic' team merchandise products that are not intended to look like the original, being, for instance, simply jerseys that reproduce the team colours. This is mostly found for national team jerseys and the 'big' team jerseys. On the other hand, counterfeit products exist that are branded as the original product while not being original brand merchandise.

In both cases the issue deals with proprietary rights and intellectual property rights, and the measures available to the teams and sportswear manufacturers are those available under general intellectual property regulations.

Broadcast rights have rarely been violated. However, given the recent termination of the state-owned programme *Fútbol para Todos* and the return of the pay-per-view system regarding the national first division football tournament, Twenty-First Century Fox, Inc, together with Turner Broadcasting System Latin America, Inc have stated that they believe their broadcast rights will be severely infringed, particularly through the use of the internet, as a response from the public who became accustomed to the free-of-charge system run by the government in recent years; so to this end, the current licensees of broadcast rights have taken several steps to be prepared for a copyright battle in courts against potential infringers in the coming years.

## **iii Contractual provisions for exploitation of rights**

There are no mandatory contractual provisions for the exploitation of sports-related rights. The usual contractual provisions should be included, particularly regarding termination rights.

It should be remembered that the rights holders are the governing entities, which have substantial negotiating power, particularly given the importance of Argentine national teams. This makes the teams a desirable commodity for sponsors, merchandisers and broadcasters alike.

#### iv Ambush marketing

In connection with commercialisation of sports events and sponsorship rights, there is a practice globally known as ambush marketing, where advertisers work to connect their product with a particular event or team in the minds of potential customers, without having to pay sponsorship expenses for the event or team sponsorship.

Argentina has no specific regulations on ambush marketing or protection of sponsored events. In addition, there are no special statutes on unfair competition. Judicial cases on ambush marketing are scarce. The legal analysis of these types of infringements was focused on traditional trademark law. However, the application of traditional trademark law to advertising and ambush marketing has been troublesome, since this kind of advertising does not usually mention trademarks. Therefore, there is no trademark use in the sense of statute.

Argentine courts recently validated a claim on ambush marketing and ordered the defendant to immediately cease the advertising campaign being objected to and remove already published advertisements in any medium.<sup>15</sup>

In this particular case, the advertisement campaign being objected to showed Javier Mascherano, one of the major players of the Argentine soccer team in the Brazil 2014 World Cup, in a Unilever advertisement for the laundry detergent trademarked 'ALA'. The advertisement had been launched on TV and on the internet a few days before the 2014 World Cup started, portraying a child (representing Javier Mascherano) playing football with other children and wearing a t-shirt in the Argentine colours, white and light blue (at this stage, there had been no use of any AFA trademarks). Later in the video, Javier Mascherano himself appears wearing a blue t-shirt with 'No. 14' on his back (his number as a player in the 2014 Brazil World Cup), carrying a ball in his hand and entering the football field through a tunnel. Finally, an announcer's voice is heard off screen, saying: 'ALA, official sponsor of all we've learnt growing up.'

Based on consumer law and unfair competition provisions, Division III of the Federal Court on Civil and Commercial matters reversed the decision of the lower court denying the injunction filed against Unilever and ordered the defendant to immediately remove the advertising campaign using the phrase 'official sponsor of all we've learnt growing up'.

## V PROFESSIONAL SPORTS AND LABOUR LAW

Argentine elite sports have the distinction of probably being among the only sports that are, to date, mostly amateur.

Football was the only sport played professionally until the creation of a professional rugby team within the UAR for the SuperRugby championship. In general, rugby and field hockey are purely amateur sports (where the regulations of the UAR specifically prohibit professional athletes).<sup>16</sup> However, given the recent international success of Argentine teams, the sport's governing entities have created elite 'professional' teams made up of the sport's

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15 This ruling was issued in the case *Asociacion del Fútbol Argentino and others v. Unilever de Argentina SA* (Federal Court Division III, 06/10/2014). For more information on this ruling, we recommend reading the article 'Argentine court validates first claim of ambush marketing' by Pablo A Palazzi and Marco Rizzo Jurado published in the *Journal of Intellectual Property Law & Practice* (Oxford Journals) on 19 September 2014.

16 See UAR by-laws, Article 5, where it states that the member entities must 'exclusively' promote the sport between amateurs.



best players so that they may dedicate themselves full-time to the practice and training of the sport.<sup>17</sup> In these cases, the players are paid by the relevant governing entity, and not affiliated with a particular club.

### **i Mandatory provisions**

Given that football is the only professional sport at the club level, it is the only sport where the athletes are employed by the club in which they perform and, therefore, employment regulations come into play.

The employment of professional football players is regulated by Law 20,160 and further regulated by the applicable collective bargaining agreement (CBA) (currently CBA 557/2009). The applicable regulations establish that the contract may be between one and five years, with no extension provision. The relevant contract must be registered with AFA.

The contract must detail compensation items, which must include: monthly salary, bonus for official matches won, bonus for friendly matches won or tied bonus for qualification to national or international competitions. The applicable CBA sets forth the minimum amounts for each item.

Given the recent introduction of a professional rugby team by the UAR and its limited amount of professional athletes, there is no applicable CBA. As a consequence, those athletes' rights and obligations are ruled by their individual employment contracts and, also by Labour Contract Law 20,744.

### **ii Free movement of athletes**

The laws do not prevent a limit on foreign players in local professional teams. In fact, the applicable CBA to football players establishes that a maximum of four professional players per club may be foreign nationals.<sup>18</sup> There is an exception to this, which is if the foreign player performed in the club's lower divisions for a period of no less than four years prior to his or her 21st birthday (at which point he or she must sign their first contract). In this case, the player will not be considered a foreign national for the duration.

### **iii Application of employment rules of sports governing bodies**

In general, Argentine labour law is considered public policy and therefore the parties may not agree to terms contrary to the principles of the law. However, specific regulations may be included, as long as they do not violate the principles of the applicable labour regulations (the General Labour Law, Law 20,160 and the applicable CBA).

## **VI SPORTS AND ANTITRUST LAW**

There is no development of antitrust law as related to sports in Argentina. As mentioned in Section I.i, clubs and entities are civil associations and not for profit, with the exception of football. As such, there is little scope, at present, for the development of antitrust regulations related to sports.

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17 Rugby is particularly well known, having created first the High Performance Plan and now a franchise of the world's SuperRugby Los Jaguares.

18 CBA 557/2009, Article 31.

## VII SPORTS AND TAXATION

In general, Argentine-sourced income is taxable even for non-residents even for one-off events.

In this regard, gross income earned by non-resident athletes present in Argentina on a temporary basis for a period not exceeding six months in a calendar year is subject to a withholding of 24.5 per cent (32.45 per cent with grossing up). When the payment is made to an entity, the general withholding rate applicable is 31.5 per cent (45.99 per cent with grossing up).

Under double taxation treaties executed by Argentina, income derived by foreign athletes from their personal activities exercised in Argentina, or by another person or entity in respect of the activities carried out by athletes, may be taxed in Argentina in accordance with its domestic rules. Nevertheless, in most cases, the income shall not be taxable in Argentina if the visit to the country is wholly or mainly supported by public funds of the state where the athlete is a resident.

However, it should be noted that when both the club or athlete and the organising entity (the entity that makes payment to the athlete or club on its own behalf) are non-Argentine residents, there is a mechanism in place under Argentine law for payment of the tax.

Finally, the Argentine Income Tax Law (Law 20,628) provides for an exemption for income obtained by sports associations that do not have a lucrative purpose. Such exemption is extended to foreign sports associations under a reciprocity rule.

## VIII SPECIFIC SPORTS ISSUES

### i Doping

Doping, or rather, the prohibition of doping in sports, is regulated for all sports generally through Law 24,819.

The above-mentioned Law is applicable to all national sports events. International sporting events are excluded from the scope of the Law, and a specific reference is made that in international sporting events the regulations of the applicable international body or the International Olympic Committee will apply.

Doping is defined as the use of prohibited substances or methods, regardless of the medium of administration, by sportsmen and women before, during and after a competition. Doping is also considered to be the administration of the prohibited substances or methods to animals participating in a sporting event.<sup>19</sup> The Law refers to an annex that lists the prohibited substances and methods. Such list is updated from time to time. The Law states that it is applicable not only to the individual participating in sports, but also to individuals who facilitate or incite doping in others, provide prohibited substances or methods or impede anti-doping controls.

The penalties for the individual are: (1) suspension of the practice of regulated sports for between three months and two years; and (2) suspension of a minimum of two years in the case of reiterated offences, as well as disqualification or loss of points in the relevant competition. To determine whether it is a reiterated offence, violations of doping regulations abroad will be taken into account.

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<sup>19</sup> Law 24,819, Article 2.

For managers and trainers who participate or incite doping, or impede anti-doping controls, the sanction will be two years' suspension from their role. In the case of a repeat offence, the suspension may be a lifetime ban.

Additionally, managers and trainers are subject to criminal sanctions, including prison terms of between one month and three years, if they incite or participate in doping. If the substances provided for doping purposes are further recognised as illegal narcotics as per the updated listing of illegal narcotics, the prison term will be increased to between four and 15 years.<sup>20</sup>

It should further be noted that clubs and entities may also be sanctioned, and said sanction entails the suspension of participation in the National Sports Fund and the Registry of Sports Institutions.

## **ii Betting**

Organised betting on sports events is very strictly regulated in Argentina through Law 25,295, the Sports Forecast Law. The stated purpose of the Law is to generate resources to be applied to the financing, promotion, organisation, participation and development of sports and the contribution to the prevention of violence in sports.

The Law further defines sports forecasts as any game or betting instance the result of which is related (totally or partially) to a sporting event of any sort, excluding horse racing.

At a national level, betting on sports forecasts is managed and regulated by the national lottery agency. Law 25,295 specifically prohibits any sort of sports forecast contest or game that is not exploited or commercialised by the national lottery.<sup>21</sup>

In essence, therefore, all betting in sports is state regulated. Any sort of betting not regulated by the national agency would be considered illegal betting and subject to the penalties related to prohibited gambling in each relevant jurisdiction.

## **iii Manipulation**

The Sports Law establishes the fixing of matches as a criminal offence and specifically establishes that the individual that offers, gives or promises compensation to facilitate or assure the irregular result of a sporting event, or the irregular performance of a participant, shall be sanctioned with a prison term of between one month and three years. This prohibition is for throwing the match or competition; that is to say, prohibiting payment for underperformance of athletes against their own interests.

Additionally, each sport regulatory entity may have specific sanctions in its disciplinary regulations addressed to players, officers of the entities and referees and match officials both for offering and accepting payments to benefit or harm a specific team in a given event. The sports regulations address further participation in events, and any sanctions that may be imposed are in addition to the criminal sanctions imposed by the Sports Law.

In certain sports, such as football, players often receive additional compensation for successful results, for particular matches, advancing to further rounds in competitions or winning local tournaments. These are usually granted by the club or team, and are generally within the compensation scheme of the player.

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20 Said listings can be found in Law 17,818 (groups I to IV); Law 19,303 and the updated listing of the International Narcotics Control Board of the United Nations.

21 Law 25,295, Article 19.

However, there is a grey area still to be determined, which is when one team or individual offers an ‘incentive’ to players or teams to play to the best of their ability since an adverse result of the opposing team benefits the ‘offering’ individual or team. In football, said incentive payment is considered illegal and the entity that offers the payment is subject to suspension of a term of between four months and two years.<sup>22</sup>

#### **iv Grey market sales**

The only sport that has sufficient following for grey market sales to occur and potentially be worthwhile for resellers is football. None of the other sports discussed in this chapter have sufficient following for grey market sales to be an issue. Additionally, access to first division matches is neither complex nor expensive where, in most cases, a nominal amount for access to the stadium or club is paid.

Grey market sales are more frequent in football and national team matches (for all the sports mentioned). For national team matches, tickets are sold through authorised dealers and agencies. However, resale of the tickets is a widespread practice, mostly through online ‘market’ sites (similar to eBay, which has no presence in Argentina). This resale is not legal, although it is very difficult to prevent and sanction, since it is not a crime but a misdemeanour.<sup>23</sup> The sanctions are fines, which are not very significant.

### **IX AFA IN CRISIS**

The AFA has been the victim of a power struggle since Julio Grondona passed away in 2014, while also being embroiled in the FIFA corruption scandal. The AFA, after several setbacks, finally managed to elect a new president, Claudio Fabián Tapia, on 29 March 2017.

Further, the Argentinian government is investigating the AFA for alleged irregularities in the *Fútbol para Todos* programme.

### **X THE YEAR IN REVIEW**

The most relevant matter in 2018 is that the Youth Olympic Games took place in Buenos Aires from 6 to 18 October.

### **XI OUTLOOK AND CONCLUSIONS**

Argentine sports, at least those that are the focus of this chapter, are among the world’s elite. Nevertheless, the discipline of sports law has not been developed to its full potential.

This is probably owing to a combination of factors, including the amateur status of most sports, and the not-for-profit status of all clubs and governing entities. This means that the scope for sports law is narrow and limited.

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22 AFA Regulation of Transgressions and Penalties, Article 74.

23 In the city of Buenos Aires this is prohibited under Article 91 of the Contraventional Code of the City of Buenos Aires.

# AUSTRALIA

*Michael Whitbread and Matthew Whitaker*<sup>1</sup>

## I ORGANISATION OF SPORTS CLUBS AND SPORTS GOVERNING BODIES

### i Organisational form

There is no legal requirement for a sporting club (whether professional, amateur, commercial or non-profit) to become incorporated in Australia. However, many sports clubs (including non-profit amateur sports clubs) choose to incorporate, either as ‘incorporated associations’ under the applicable state or territory legislation (the Associations Incorporations Acts) or as corporations under the Corporations Act 2001 (Cth) (the Corporations Act). There are a number of advantages to incorporating a sporting club, the main being that it provides the members of the club with a degree of limited liability. Additionally, under Australian law, unincorporated amateur sporting clubs are not considered legal persons separate from their members, which means that these sporting clubs do not have capacity to enter into contracts (other than through their members).<sup>2</sup> In the past, Australian courts have often found individuals involved with unincorporated sporting clubs liable for the actions of the clubs.<sup>3</sup>

In some instances, the governing body for a sport has imposed a requirement that sporting clubs be incorporated. For example, AFL NSW/ACT, the governing body for Australian football in New South Wales and the Australian Capital Territory, recently imposed a requirement that all Australian football clubs must be incorporated as either an incorporated association or a company.<sup>4</sup>

The national governing bodies for major sporting codes in Australia are structured as public companies, limited by guarantee and registered with the Australian Securities and Investments Commission under the Corporations Act. For example, the Australian Football League (AFL), the Australian Rugby League Commission (ARLC), which owns the National Rugby League (NRL), Football Federation of Australia (FFA), Cricket Australia and the Australian Rugby Union are all registered companies limited by guarantee. Companies limited by guarantee do not have shareholders or share capital, but rather the guarantors (the members) give an undertaking to pay a fixed, small amount in the event that the company is wound up. The sporting clubs that play in these leagues are the members. Similarly, many of the professional sporting clubs that play in these leagues are registered as public companies

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1 Michael Whitbread and Matthew Whitaker are associates at Jones Day.

2 Australian courts have found contracts with unincorporated sporting clubs to be unenforceable; for example, see *Carlton Cricket and Football Social Club v. Joseph* (1970) VR 487.

3 For example, see *Carlton Cricket and Football Social Club v. Joseph* (1970) VR 487.

4 AFL NSW/ACT, ‘Incorporating Your Club’, <http://affnswact.com.au/community-football/manage-your-club/incorporating-your-club/>.

limited by guarantee, whose supporters pay an annual membership fee. For example, there were more than one million members of AFL clubs in 2018, and more than 300,000 members of NRL clubs in 2017.<sup>5</sup> Although registration as companies limited by guarantee is the most common legal structure for professional sporting clubs, other structures are also used. For example, in the NRL, there are also privately owned clubs, which are incorporated as private companies limited by shares (such as the Brisbane Broncos), and partially privatised clubs (for example, the South Sydney Rabbitohs, who are currently 75 per cent owned by Russell Crowe and other individuals, and 25 per cent owned by members through a company limited by guarantee).<sup>6</sup>

## ii Corporate governance

The Australian Sports Commission (ASC) has released a set of guidelines (the Sports Governance Principles), which, although not legally binding on professional sporting leagues or sporting clubs, are in effect mandatory, because adherence is a prerequisite to government funding. The ASC is the Australian federal government body responsible for distributing approximately A\$280 million in public funds to sports governing bodies throughout Australia each year.<sup>7</sup> The Sports Governance Principles require, among other things, that national sporting organisations be registered under the Corporations Act as companies limited by guarantee, and sets out additional requirements for board composition, roles, powers and processes, governance systems, ethical and responsible decision-making and reporting.

There are no specific statutory requirements for corporate governance of sporting clubs or leagues. Corporate governance structures for amateur sporting clubs and leagues that are incorporated associations are set by the relevant state or territory Associations Incorporation Acts. These provide rules addressing, among other things, the associations':

- a* duties to hold general meetings;
- b* financial reporting obligations;
- c* duties regarding the constitution of the management committee;
- d* constitution; and
- e* duties to notify members of decisions.

For professional sporting clubs that are registered as companies limited by guarantee or companies limited by shares, their governance structures are dictated by the Corporations Act, with powers being split between the boards and the members. Both the Associations Incorporation Acts and the Corporations Act provide rules in relation to the constitution of the sporting clubs, their reporting requirements and their management. Incorporated associations are required to establish a committee to manage their affairs, while registered companies are required to establish a board of directors.

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5 Travis King, 'Thanks a million: New membership benchmark', AFL.com.au (2 August 2018), [www.afl.com.au/news/2018-08-02/thanks-a-million-new-membership-benchmark](http://www.afl.com.au/news/2018-08-02/thanks-a-million-new-membership-benchmark); NRL, 'NRL club memberships hit record numbers' (19 June 2017), [www.nrl.com/nrl-club-memberships-hit-record-numbers/tabid/10874/newsid/109056/default.aspx](http://www.nrl.com/nrl-club-memberships-hit-record-numbers/tabid/10874/newsid/109056/default.aspx).

6 The company limited by guarantee that owns 25 per cent is the South Sydney Members Rugby League Football Club Limited.

7 ASC 2015-2016 Annual Report, Summary of Financial Outcomes, [www.ausport.gov.au/annual\\_report/chapter\\_4/summary\\_of\\_financial\\_outcomes](http://www.ausport.gov.au/annual_report/chapter_4/summary_of_financial_outcomes).

Committee members and directors are bound by duties contained in the applicable legislation, including duties:

- a* to act in good faith in the best interests of the company and for a proper purpose;<sup>8</sup>
- b* to exercise care and diligence;<sup>9</sup>
- c* to disclose conflicts between the interests of the company and personal interests;<sup>10</sup> and
- d* to prevent the company trading while insolvent (that is, when it is unable to pay its debts as and when they fall due).<sup>11</sup>

### iii Corporate liability

The Associations Incorporation Acts and Corporations Act both contain statutory provisions imposing liability upon managers and officers of sporting organisations (i.e., committee members and directors). For example, there are criminal prohibitions on officers dishonestly using their position, or information obtained by virtue of their position, to gain a financial advantage or cause detriment to their organisation.<sup>12</sup> As discussed above, the legislation also imposes duties on officers to carry out their functions for the benefit of their organisation, and the Corporations Act prohibits insolvent trading by directors. The prohibition on insolvent trading is particularly relevant for sporting clubs in Australia, who are often on the brink of insolvency. Clubs must be careful if they are operating on the assumption that either their creditors will absolve their debts, or their members or the governing body will contribute funds to bail them out.<sup>13</sup> For unincorporated associations operating as sporting clubs, Australian courts have in the past found the individuals responsible for management of the club liable for debts or an award of damages where the legal personhood of the club itself cannot be established.

Additionally, directors and officers also have obligations to ensure that their sporting club or organisation complies with its work health and safety obligations under the applicable work health and safety (WHS) laws. In most states and territories this legislation imposes a duty on directors and officers to exercise due diligence to ensure that their clubs comply with health and safety duties.<sup>14</sup>

A breach of this due diligence duty (and all health and safety duties) is a criminal offence, which can involve penalties of up to five years' imprisonment or a fine of A\$1.5 million, or both.<sup>15</sup>

For example, in 2015, the Essendon Football Club was convicted by WorkSafe Victoria, the statutory body responsible for administering Victoria's WHS laws, of failing to provide its

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8 Corporations Act 2001 (Cth) Sections 181 and 184.

9 Corporations Act 2001 (Cth) Sections 180 and 184.

10 Corporations Act 2001 (Cth) Section 191.

11 Corporations Act 2001 (Cth) Section 588G.

12 Corporations Act 2001 (Cth) Section 184.

13 In 2015, only six of 18 AFL clubs were profitable, and each club is heavily reliant on fund distributions from the AFL (see [www.theage.com.au/afl/afl-news/unprofitable-clubs-get-millions-in-aid-from-afl-20150228-13rqwm.html](http://www.theage.com.au/afl/afl-news/unprofitable-clubs-get-millions-in-aid-from-afl-20150228-13rqwm.html)).

14 For example, Work Health and Safety Act 2011 (NSW) Section 27(5); Occupational Health and Safety Act 2004 (Vic) Section 21; Work Health and Safety Act 2011 (QLD) Section 27(5); and Occupational Health and Safety Act 1984 (WA) Section 19.

15 See, for example, Occupational Health and Safety Act 2011 (NSW) Sections 31 to 33.

players with a workplace free of health risks. This prosecution followed a 'supplements saga' that saw 34 players being found guilty of using the banned peptide Thymosin beta-4. The football club was fined A\$200,000 for the breaches.

There has been increased attention on the activities of sports scientists in Australia after a number of professional sporting clubs in Australia came under scrutiny for employing sports scientists who are alleged to have facilitated the use of unlawful or banned substances.<sup>16</sup> In 2013, the Australian Senate Regional Affairs and Transport References Committee published the results of an inquiry into the 'practice of sports science in Australia'.<sup>17</sup> The publication identified three 'key governance practices' that should be established by all professional sporting clubs with the assistance and endorsement of the sports' governing bodies. These involve:

- a regular reporting of the activities of sports scientists to the CEO and board;
- b the primacy of medical advice and direction over the decisions of sports scientists, such that sports scientists must seek endorsement from club doctors where decisions affect athlete health and welfare; and
- c the importance of ensuring that while the CEO and the board are kept informed of the activities of sports scientists, the privacy of athletes and the protection of personal medical information are ensured.

## II THE DISPUTE RESOLUTION SYSTEM

### i Access to courts

In Australia, it is settled law that a sporting organisation's rules cannot completely remove the jurisdiction of the courts, because to do so would be against public policy.<sup>18</sup> However, each sporting league has established quasi-judicial tribunals that are responsible for administering and enforcing the rules of the sport, including in relation to on-field infringements. Courts will generally only be able to be called upon to resolve disputes where:

- a an issue of law arises;
- b the sporting organisation makes a decision that is outside its jurisdiction under its rules;
- c there is a breach of natural justice;
- d the sporting organisation does not comply with its own rules, which constitutes a breach of contract with its members; or
- e the sporting organisation, its members or athletes are alleged to be involved in breaches of statutory obligations or criminal laws being investigated or prosecuted by a regulator or third party.

Examples can include where a sporting participant claims that they were not dealt with in accordance with the sporting league's rules (and this constitutes a breach of contract), or where a sports tribunal fails to accord a participant procedural fairness in making its decision.

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16 For example, Stephen Dank, see 'Stephen Dank handed lifetime ban by AFL Anti-Doping Tribunal following Essendon supplements saga', ABC (26 June 2015), [www.abc.net.au/news/2015-06-26/stephen-dank-handed-lifetime-ban-from-afl-tribunal/6575962](http://www.abc.net.au/news/2015-06-26/stephen-dank-handed-lifetime-ban-from-afl-tribunal/6575962).

17 [www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Rural\\_and\\_Regional\\_Affairs\\_and\\_Transport/Completed\\_inquiries/2012-13/sportsscience/report/index](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Rural_and_Regional_Affairs_and_Transport/Completed_inquiries/2012-13/sportsscience/report/index).

18 For example, see *Stollery v. Greyhound Racing Control Board* (1972) 128 CLR 509.



In cases where the issue of procedural fairness is raised, the court will not substitute its own decision for that of the tribunal; it will instead mandate that the tribunal remake its decision such that the participants are afforded natural justice.

An example of an alleged breach of statutory obligations by a sporting organisation can be seen when Cricket Australia dismissed the head coach of the Australian cricket team, Mickey Arthur, two years before his employment contract was to expire. Mr Arthur was the first non-Australian coach of the Australian cricket team. He was dismissed abruptly and replaced by former Australian cricketer, Darren Lehman. Mr Arthur subsequently brought a claim under the anti-discrimination provisions of the Fair Work Act 2009 (Cth), which alleged, among other things, that he was subjected to discrimination owing to his South African heritage. Cricket Australia and Mr Arthur subsequently reached a confidential settlement.

## ii Sports arbitration

Most major Australian sporting leagues have established quasi-judicial tribunals, which are responsible for administering and enforcing the rules of the sport, including in relation to on-field infringements (for example, the NRL Judiciary, the AFL Match Review Panel and Tribunal and the FFA Tribunal). Additionally, collective bargaining agreements and standard players contracts often provide that it is a condition precedent to bringing court proceedings that the dispute is first referred for determination by a tribunal (for example, in standard contracts with AFL players), or that the tribunal has exclusive jurisdiction, and its determination is final and binding (for example, in standard contracts with A-League players).<sup>19</sup> However, this does not prevent recourse to the courts in the situations described above.

The appeals process for a decision depends on the rules governing a particular sporting organisation. In some cases, decisions can also be appealed to the international sporting organisation responsible for the sport, such as the International Cricket Council or FIFA. For example, these tribunals make decisions about, among other things:

- a* eligibility of players to play for a particular sporting club or nation;
- b* disputes between members of the international organisation;
- c* disputes between sporting clubs in different leagues;
- d* contractual disputes between players and sporting clubs; and
- e* sanction to players for breaking of sports' rules or doping.

If all avenues of appeal within a sporting organisation's tribunal system are exhausted, a case can usually be appealed to the Court of Arbitration for Sport (CAS) and then the Swiss Federal Tribunal for the resolution of the dispute.<sup>20</sup> A recent example can be seen in the decision of the AFL Anti-Doping Tribunal not to suspend 34 Essendon Bombers players for alleged violations of anti-doping rules. The World Anti-Doping Authority (WADA) appealed the Tribunal's decision, backed by the Australian Sports Anti-Doping Authority (ASADA), to the CAS, who suspended the 34 players for 12 months. The players then appealed to the Swiss Federal Tribunal, who upheld the CAS decision.

The CAS has an Oceanic registry based in Sydney, Australia. This registry hears a broad range of selection and doping disputes. A recent example is the dispute between Mitchell Iles,

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19 See, for example, the AFL and AFL Players' Association Collective Bargaining Agreement 2012–2016, [www.aflplayers.com.au/wp-content/uploads/2014/09/CBA-2012-2016-FINAL.pdf](http://www.aflplayers.com.au/wp-content/uploads/2014/09/CBA-2012-2016-FINAL.pdf).

20 However, like other jurisdictions, the CAS only has jurisdiction to hear a dispute if an agreement between the parties (for example, in the rules governing the sport), specifies the CAS as the avenue of appeal.

a professional trap shooter, and Shooting Australia, in relation to Mr Mitchell's non-selection for the 2016 Olympic Games. Mr Mitchell first appealed to Shooting Australia's Appeals Tribunal, where his appeal was dismissed, and he subsequently appealed to the CAS. The CAS overturned the decision of the Appeals Tribunal and remitted the matter to Shooting Australia to reconsider his non-selection, which then selected him to compete.<sup>21</sup>

### **iii Enforceability**

Decisions made by Australian courts are directly enforceable within Australia. However, decisions made by sporting organisation tribunals are not directly legally enforceable. In practice, parties must either accept a decision if they wish to continue participating in the sport or appeal the decision to a court on the grounds that the tribunal did not have jurisdiction to make the decision.

## **III ORGANISATION OF SPORTS EVENTS**

### **i Relationship between organiser, spectators, athletes and clubs**

There is no special or unique relationship under Australian law between organisers and spectators. Their relationship is governed by, among other things, consumer, contract and tort law. However, each state has implemented, to differing degrees, legislation that applies to the staging of major sporting events.<sup>22</sup> This legislation provides protections to organisers, spectators and athletes, including through provisions governing the resale of tickets for major events and the control and management of event venues during events.

The primary contractual relationship that exists between organisers and spectators is in the terms and conditions of the ticket sale. Under contract, organisers can impose terms and conditions of access to the sporting venue, such as restrictions on resale or transfer or restrictions on entry. However, ticket sales and membership conditions are also governed by the Australian Consumer Law (ACL), which contains additional protections for consumers, including protection against unfair contract terms for standard form consumer contracts. For example, a term or condition to a ticket sale that excludes all liability of the organiser for death, personal injury or loss by the consumers, or that denies refunds in all circumstances, will be held to be unfair and consequently void. Additionally, spectators are entitled to expect that organisers and clubs will comply with anti-discrimination laws.

The primary contractual relationships that exist between organisers, clubs and athletes are in the playing contracts of the athletes and the contracts between the sporting clubs and sporting leagues or organisations, including the relationship of the clubs as members of the league (as an incorporated association). This also includes the rules of the sport, which may be incorporated as a contract between the sporting organisation, clubs and athletes.

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21 CAS A1/2016 *Mitchell Iles v. Shooting Australia*.

22 For example, the Major Sporting Events Act 2009 (Vic) and the Major Events Act 2014 (Qld).

## ii Liability of the organiser, athletes and spectators

Under both common law and statute, as the occupiers of the sporting venue, organisers owe a duty of care to avoid causing harm to spectators and athletes that is 'reasonably foreseeable'. Under the civil liability legislation of each state and territory, organisers owe a duty of care to take reasonable precautions against risks of harm that are foreseeable and not insignificant.<sup>23</sup>

For example, in a well-known case before the High Court of Australia, an indoor cricketer sued the organiser after serious injury during a game, alleging that the organiser breached its duty of care by failing to provide protective eyewear, and by failing to erect a sign warning of possible hazards (although in this case, the High Court of Australia held that the organiser's duty of care did not extend to require these precautions be taken).<sup>24</sup>

Additionally, if a professional athlete causes injury to a third party, such as an opponent, both the athlete and his or her sporting club (as his or her employer) may be liable for damages. In another well-known case, a professional rugby league player for the Wests Tigers in the NRL brought proceedings against Melbourne Storm and two of its players after being seriously injured in a tackle that ended his career. The two players and Melbourne Storm (as their employer) were held to be liable for damages for the injury.<sup>25</sup>

In Australia, like many other jurisdictions, consent to minor assaults will often absolve the accused from criminal liability.<sup>26</sup> This means that although minor assaults technically occur in contact sports, there is usually no liability as it is implicit in the participation of the athletes that they have consented. However, consent is not a defence for athletes where the assault is outside the rules of the sport. For example, rugby league players have previously been convicted of assault for punching an opponent and causing a fractured jaw in one case, and biting an ear after a tackle in another case.<sup>27</sup> However, in other cases, on-field actions by athletes that could lead to a criminal conviction for assault have been met with only sanctions from the sports' governing body, rather than police prosecution. For example, there have been several high-profile instances of footballers violently punching opponents on the field that have not been prosecuted, in both the AFL and NRL and also at lower levels of the sport.<sup>28</sup> The fact that such athletes have not been charged with criminal offences is a consequence of the police's discretion in enforcing the criminal law.

## IV COMMERCIALISATION OF SPORTS EVENTS

### i Types of and ownership in rights

Broadcasting rights are arguably the most valuable and lucrative rights available to sporting organisations to gain revenue from a sporting league. For example, the AFL currently has

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23 Civil Liability Act 2002 (NSW) Section 5B; Civil Liability Act 2003 (Qld) Section 9; Civil Liability Act 1936 (SA) Section 32; Civil Liability Act 2002 (WA) Section 5B; Civil Liability Act 2002 (Tas) Section 11; and Wrongs Act 1958 (Vic) Section 48.

24 *Woods v. Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460.

25 *McCracken v. Melbourne Storm Rugby League Football Club and 2 Ors* [2005] NSWSC 107.

26 *R v. Brown* [1994] 1 AC 212.

27 *R v. Billingham* (1978) Crim LR 553; and *R v. Johnson* (1986) 8 Cr App R (S) 343.

28 For example, see the incidences described in an article published by *The Age* in July 2017 involving Barry Hall, Bachar Houli and Thomas Bugg (professional footballers) and Ali Fahour (an amateur footballer in a lower division) [www.theage.com.au/afl/afl-news/ali-fahour-incident-would-the-police-act-on-an-afl-punch-20170707-gx6yom.html](http://www.theage.com.au/afl/afl-news/ali-fahour-incident-would-the-police-act-on-an-afl-punch-20170707-gx6yom.html).

a broadcast rights agreement in place with Channel 7 (a commercial free-to-air television station), Foxtel (a subscription television station) and Telstra (a telecommunications provider) that is worth approximately A\$2.5 billion.<sup>29</sup> The ARLC currently has a broadcast rights agreement in place with Channel 9 (another commercial free-to-air station) Foxtel, News Corp Australia (a media outlet) and Telstra, which is worth approximately A\$1.8 billion.<sup>30</sup>

Additionally, Australia has enacted ‘anti-siphoning’ laws, which provide a list of events that must be made available free to the general public.<sup>31</sup> This means that in practice, subscription television providers, such as Foxtel, are prohibited from acquiring the rights to these events unless a free-to-air television channel also has the right to broadcast them. Any rights that are not acquired by free-to-air channels can then be acquired by subscription television providers. Currently, the list of ‘anti-siphoning events’ that ‘should be available to the general public’ includes the following:<sup>32</sup>

- a* each event in the Olympic Games and Commonwealth Games;
- b* each match of the AFL and NRL;
- c* each international rugby union test match and cricket match involving the Australian team; and
- d* each match of the FIFA World Cup, each match of the FIFA qualification tournament involving the Australian team and the English Football Association Cup final.

Image rights, sponsorship and merchandising are also valuable rights available to be exploited. However, the relatively small size of the Australian market, and the fact that many of Australia’s major sports are primarily, if not solely, domestic (for example, the AFL and NRL) or played at an international level but among a relatively small number of nations (for example, cricket and rugby union), mean that their value is often limited.

## **ii Rights protection**

Broadcasting, image rights, sponsorship and merchandising are primarily protected by the contractual provisions in place between the owners and licensees of these rights, but also by the statutory intellectual property rights. Primarily, this consists of ownership in:

- a* trademarks under the Trade Marks Act 1995 (Cth), in property such as club names, logos and mascots; and
- b* copyright under the Copyright Act 1968 (Cth), in property such as rulebooks, recorded images and footage of events, and photographs.

Additionally, rights owners are able to take action under the common law tort of ‘passing off’, to protect the goodwill of their brand from misrepresentation through unauthorised use. In this context, passing off occurs when one person misrepresents that their goods (for example, merchandise) are the official, sanctioned goods of the rights owner (usually the sporting organisation or sporting club), or that he or she is affiliated with the rights owner. Similarly, action can be taken against persons who engage in misleading or deceptive conduct or make false or misleading representations via the ACL. These laws can apply to examples of ambush marketing.

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29 [www.afl.com.au/news/2015-08-18/afl-on-the-verge-of-signing-new-tv-deal](http://www.afl.com.au/news/2015-08-18/afl-on-the-verge-of-signing-new-tv-deal).

30 [www.nrl.com/nrl-broadcast-rights-deal-announced/tabid/10874/newsid/91023/default.aspx](http://www.nrl.com/nrl-broadcast-rights-deal-announced/tabid/10874/newsid/91023/default.aspx).

31 Broadcasting Services Act 1992 (Cth).

32 Broadcasting Services (Events) Notice (No. 1) 2010 (Cth).

Australia also has several other legislative protections, in addition to laws protecting intellectual property rights that can be used to prevent ambush marketing at sporting events. Legislation was enacted to regulate the commercial use of images associated with the 2015 Asian Cup, the 2015 Cricket World Cup and the 2018 Commonwealth Games to restrict the ability of entities that are not official sponsors to use event images, or represent that they are associated with the event.<sup>33</sup> Similar legislation prohibits the unauthorised use of images and phrases associated with the Olympics.<sup>34</sup>

Recently, the Australian Olympic Committee (AOC) brought proceedings against Telstra in relation to alleged ambush marketing. Telstra had entered into an agreement with Channel 7 under which Telstra would sponsor Channel 7's broadcast of the Olympics and create a mobile app called 'Olympics on 7', which would allow Telstra customers to view Olympic events. Telstra's advertising campaign then promoted watching the Olympics on the Olympics on 7 app, despite the fact that it did not have any direct association with the Olympics. The AOC alleged that Telstra engaged in misleading and deceptive conduct and made false or misleading misrepresentations in representing that they were associated with the Olympics, in breach of the ACL, and engaged in an unlawful use of protected Olympic expressions for commercial purposes in breach of the Olympic Insignia Protection Act 1987 (Cth).<sup>35</sup> However, the Federal Court of Australia ruled against the AOC and held that Telstra's advertisements did not suggest to the reasonable person that Telstra was a sponsor of an Olympic body. The Court held that the legislation was not breached if the advertisements simply created uncertainty as to the nature of Telstra's association with the Olympics.<sup>36</sup> The AOC appealed the decision, which was heard in February 2017. However, in October 2017, the Full Court of the Federal Court of Australia upheld the first instance decision, and agreed that the advertisements did not suggest to a reasonable person that Telstra was a sponsor of bodies and teams associated with the Rio Olympic Games.<sup>37</sup>

## V PROFESSIONAL SPORTS AND LABOUR LAW

### i Mandatory provisions

Labour laws in Australia are largely dictated by the Fair Work Act and associated regulations and industrial instruments. The Fair Work Act sets out national employment standards that act as the minimum requirements for employers to abide by, including in relation to hours of work, annual leave, compassionate leave and notice of termination. Additionally, the Sporting Organisations Award 2010 sets out further minimum requirements in relation to employment for national, state and territory sporting organisations of coaching, clerical and administrative staff. Matters such as workers' compensation and WHS and anti-discrimination laws are addressed in state and territory legislation (which is broadly universal around Australia).

Significantly, Australian law does not recognise the concept of 'at will' employment. This means that employers are required to provide a period of notice, or payment in lieu of notice, to terminate an employment contract. Additionally, where an employer makes a decision to terminate an employee's employment, this decision can be challenged through various claims that can be made in the Fair Work Commission (an industrial tribunal) or Australian courts.

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33 Major Sporting Events (Indicia and Images) Protection Act 2014 (Cth) Section 16.

34 Olympic Insignia Protection Act 1987 (Cth).

35 *Australian Olympic Committee, Inc v. Telstra Corporation Limited* [2016] FCA 857.

36 *id.* at [94].

37 *Australian Olympic Committee, Inc v. Telstra Corporation Limited* [2017] FCAFC 165.

However, this is often not applicable to contracts between professional athletes and sporting clubs, as these are usually fixed-term contracts that terminate automatically at the expiry of the term.

In general, contracts between sporting clubs and athletes are set as standard form agreements by the sport's governing body, and are not subject to individual negotiation (with some exceptions, for example, remuneration and term). Many professional sportspersons in Australia, including players in the AFL, NRL, A-League and representative cricket, are represented by players associations that are responsible for, among other things, negotiating the terms of standard contracts and engaging in collective bargaining (not dissimilar from a workers' union).

## ii Free movement of athletes

Most major sports in Australia impose restraints of trade in their player contracts and sport's rules.<sup>38</sup> These restraints include salary caps, player draft rules, player transfer limitations and limitations on the ability of players to license their image and identity through endorsements. The common law doctrine of restraint of trade applies to such restraints. Australian courts have applied this doctrine to enforce these restraints only to the extent that it is:

- a reasonably necessary to allow the sport to protect a legitimate interest; and
- b reasonable having regard to the public interest.<sup>39</sup>

Australian athletes have used this doctrine to challenge a number of different types of restraints that appear in their contracts (as unreasonable). In *Beetson v. Humphries*, rugby league player Arthur Beetson challenged a by-law of the Australian Rugby League (ARL) that restricted him from writing newspaper columns critical of the league's referees.<sup>40</sup> In *Adamson v. New South Wales Rugby League Ltd*, 154 players who competed in the NSW rugby league challenged a rule that provided that when a player wished to change clubs, they could only do so by participating in the NSW rugby league draft.<sup>41</sup>

Australian sports also impose restrictions on the number of foreign athletes who can play in their leagues. For example, the A-League restricts each club in the league to five foreign players (at least one of whom must come from a member of the Asian Football Confederation). Further, foreign athletes will only be able to compete in Australian sporting leagues if they receive appropriate visas from the Australian Department of Immigration and Border Protection.

## VI SPORTS AND ANTITRUST LAW

The key antitrust legislation is the Competition and Consumer Act 2010 (Cth) (the CCA). The CCA contains, among other things, prohibitions against:

- a cartel conduct;
- b anticompetitive agreements between competitors;
- c exclusionary provisions in agreements; and
- d misuse of market power by a corporation with substantial market power.

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38 D Thorpe, 'The use of multiple restraints of trade in sport and the question of reasonableness', 2012, *Australian and New Zealand Sports Law Journal*, vol. 7(1).

39 See *Adamson v. New South Wales Rugby League* (1991) 31 FCR 242 per Wilcox J at 266.

40 *Beetson v. Humphries* (unreported, Supreme Court of New South Wales, Hunt J, 30 April 1980).

41 *Adamson v. New South Wales Rugby League* (1991) 31 FCR 242.

Each major domestic sporting league in Australia constitutes a monopoly (for example, the AFL and the A-League). While there have been several instances where rival leagues have emerged, including in cricket and NRL, these have ultimately been unsuccessful in establishing a foothold in the Australian market.

Arguably the most notable application of Australian antitrust laws in a sporting context involved a dispute between a media organisation, News Limited, and the predecessor to the ARLC, the ARL.<sup>42</sup> At the time, News Limited was attempting to establish a rival 'Super League' to replace the ARL. In response, the ARL sought commitment agreements and loyalty agreements requiring the current ARL clubs to commit themselves to the ARL for an extended period. News Limited alleged that these agreements contained exclusionary provisions or constituted a misuse of market power in seeking to prevent the entry of the proposed Super League into the market, in breach of Australian antitrust legislation.

A single judge of the Federal Court of Australia found that there had been no breach of the antitrust legislation. However, on appeal, the Full Federal Court reversed the decision and concluded that the agreements constituted an illegal collective boycott, and were therefore void.<sup>43</sup> A collective boycott occurs when a group of competitors agrees not to acquire goods or services from, or not to supply goods or services to, a business with whom the group is negotiating, unless the business accepts the terms and conditions offered by the group. In this case, the Full Federal Court held that there was a boycott of the Super League by the ARL and the clubs. Subsequently, the Super League and ARL merged to form the NRL, restoring the monopoly.

## VII SPORTS AND TAXATION

Under Australian taxation legislation, a sporting organisation is exempt from income tax if it meets all of the following requirements:<sup>44</sup>

- a it is a non-profit organisation;
- b it has been established for the purpose of the encouragement of a game or sport;
- c it is not a charity; and
- d it meets either the 'physical presence in Australia' test, the 'deductible gift recipient' test or the 'prescribed by law test'.<sup>45</sup>

Many professional sporting clubs meet these requirements, which are satisfied by inserting relevant clauses into the constitution of the club. For example, the Carlton Football Club's Constitution provides that 'The assets and income of the Club shall be applied solely in furtherance of the objects of the Club set forth in this Constitution and no portion shall

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42 *News Ltd v. Australian Rugby League Limited* (1996) ATPR 41-466.

43 *News Ltd v. Australian Rugby League Ltd* (No. 2) (Superleague) (1996) 64 FCR 410.

44 ATO, 'Sporting organisations', [www.ato.gov.au/Non-profit/Your-organisation/Do-you-have-to-pay-income-tax-/Types-of-income-tax-exempt-organisations/Sporting-organisations/](http://www.ato.gov.au/Non-profit/Your-organisation/Do-you-have-to-pay-income-tax-/Types-of-income-tax-exempt-organisations/Sporting-organisations/).

45 An organisation will meet the 'physical presence in Australia' test if it has a physical presence in Australia and, to the extent it has a physical presence in Australia, it pursues its objectives and incurs its expenditure principally in Australia. An organisation will meet the 'deductible gift recipient' test if it is either listed by name as a deductible gift recipient (DGR) in the legislation, or if it meets the requirements of a general DGR category set out in the legislation. An organisation will meet the 'prescribed by law' test if it is prescribed by name in income tax regulations, and it is located outside Australia and is exempt from income tax in its country of residence.

be distributed directly or indirectly to the members of the organisation except as *bona fide* compensation for services rendered or expenses incurred on behalf of the organisation', which establishes it as a non-profit organisation. The Constitution also provides that 'If a surplus remains following the winding up or dissolution of the Club, the surplus will not be paid to or distributed among members, but will be given or transferred to another corporation or club with similar objects to that of the Club'.<sup>46</sup>

For individual athletes, prize money, playing fees, sponsorships, salaries and media fees are each considered to be taxable income.

## VIII SPECIFIC SPORTS ISSUES

### i Doping

State and federal criminal laws cover conduct involving some (but not all) substances that appear on the WADA World Anti-Doping Code Prohibited List, including a large number of anabolic steroids.<sup>47</sup> These laws include the following offences associated with these substances:

- a trafficking or supplying a prohibited substance;<sup>48</sup>
- b using or administering a prohibited substance without appropriate medical or therapeutic justification;<sup>49</sup>
- c possession of a prohibited substance;<sup>50</sup> and
- d aiding, abetting or concealing any of the above offences.<sup>51</sup>

Individuals who are found guilty of the above offences can potentially face life imprisonment and fines in excess of A\$1 million (in particular, for serious trafficking offences).

It has also been suggested by some commentators that doping by professional athletes may constitute the offence of fraud, which is defined as where a person gains a financial advantage, property, services, a benefit, dishonestly or by deceit.<sup>52</sup> However, this has not been judicially established, and doping itself is not a criminal offence in Australia.

### ii Betting

Betting on sporting events is legal in every state and territory, but highly regulated.<sup>53</sup> The licensing laws vary between each state and territory jurisdiction, but each jurisdiction provides that customers must be over the age of 18 to place a bet, and that licensees must obtain

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46 Carlton Football Club Constitution, [www.carltonfc.com.au/staticfile/AFL%20Tenant/Carlton/Documents/Constitution.pdf](http://www.carltonfc.com.au/staticfile/AFL%20Tenant/Carlton/Documents/Constitution.pdf).

47 For example, see Schedule 3 of the Criminal Code Regulations 2002 (Cth); and Schedule 2 of the Drugs Misuse Regulation 1987 (Qld).

48 For example, Drug Misuse and Trafficking Act 1985 (NSW), Section 25.

49 For example, Drug Misuse and Trafficking Act 1985 (NSW), Sections 12 and 13.

50 For example, Drug Misuse and Trafficking Act 1985 (NSW), Section 10.

51 For example, Drug Misuse and Trafficking Act 1985 (NSW), Sections 19 and 20.

52 For example, see Christopher McKenzie, 'The use of criminal justice mechanisms to combat doping in sport' (July 2007), *Sports Law eJournal*, <http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1003&context=slej>.

53 For example, the Betting and Racing Act 1998 (NSW); Gambling Regulation Act 2003 (Vic); Wagering Act 1998 (Qld); Betting Control Act 1954 (WA); Authorised Betting Operations Act 2000 (SA); Gaming Control Act 1993 (Tas); Racing and Betting Act 1983 (NT); and Racing and Sports Bookmaking Act 2001 (ACT).



reasonable proof of identity from their customers. The state and territory gambling laws are supplemented by federal legislation that, among other things, has banned online ‘in-game’ betting on sports (although customers can still place in-game bets over the phone).<sup>54</sup>

In 2008, the Western Australian government attempted to implement legislative amendments that would prohibit the operation of betting exchanges, such as that operated by Betfair Pty Ltd.<sup>55</sup> Specifically, the legislation prohibited ‘out-of-state’ betting exchanges, where the operator is licensed in another jurisdiction (for example, Betfair was licensed in Tasmania), and Western Australian residents from placing wagers through such betting exchanges.

The High Court of Australia held that it was constitutionally unlawful for a state or territory government to protect local betting operators from online bookmakers that were licensed in other jurisdictions, as an impermissible restriction on free trade between the states.<sup>56</sup> As such, online betting operators licensed in one state or territory can offer wagering products to anyone in Australia. Most online operators are now licensed in the Northern Territory, owing to its lower taxation and less stringent regulation.<sup>57</sup>

In 2015, legislation was introduced to Parliament proposing a ban on gambling advertising during sports events, and the establishment of a national regulator and national self-exclusion register for people struggling with a gambling habit. This legislation, however, is not supported by the two major political parties in Australia.<sup>58</sup>

### iii Manipulation

Each state and territory has implemented, or is in the process of implementing, laws designed to prevent match fixing. For example, in New South Wales, South Australia and Victoria it is an offence to knowingly or recklessly corrupt a betting outcome of an event with the intention of obtaining a financial advantage or causing a financial advantage in relation to any betting on an event.<sup>59</sup> It is also an offence to facilitate conduct that corrupts a betting outcome of an event. In Queensland, it is an offence to engage in match-fixing conduct for the purpose of obtaining a pecuniary benefit for any person, or causing a pecuniary detriment to another person.<sup>60</sup> For each of these jurisdictions, a person found guilty of an offence is liable for imprisonment up to 10 years.

There have been several recent high-profile match-fixing incidents in Australian sport.

*a* In 2011, a professional rugby league player in the NRL was convicted of ‘conspiring to gain financial advantage for others’, namely that he intentionally gave away a penalty

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54 See the Interactive Gaming Amendment Act 1997 (Cth), which amended the Interactive Gaming Act 2001 (Cth).

55 In a betting exchange, the operator acts as the facilitator, matching the wagers of participants betting on opposing outcomes, and takes a commission of the winner’s payout.

56 *Betfair Pty Limited v. Western Australia* (2008) 234 CLR 418.

57 Many of the large corporate online bookmakers in Australia are subsidiaries of UK corporate bookmakers, licensed in Australia. This includes the three largest corporate bookmakers by turnover: Sportsbet is a subsidiary of Paddy Power, Sportingbet is a subsidiary of William Hill and Ladbrokes operates a subsidiary in Australia. Each of these is licensed in the Northern Territory.

58 See the Interactive Gaming Amendment (Sports Betting Reform) Bill 2015 (Cth); and the Senate Environment and Communications Legislation Committee inquiry report (March 2017), [www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Environment\\_and\\_Communications/SportsBetting/Report](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/SportsBetting/Report).

59 See Crimes Act 1900 (NSW) Section 193N; Criminal Law Consolidation Act 1935 (SA) Section 144H; and Crimes Act 1958 (Vic) Section 195C.

60 Criminal Code 1899 (Qld) Section 443A.

to the opposing team so that others could succeed in a 'first points scorer' bet. He was convicted prior to the introduction of specific match-fixing laws in New South Wales, but his conduct would now be caught by the prohibition against corrupting the betting outcome of an event. He was fined A\$4,000 and placed on a 12-month good behaviour bond.<sup>61</sup> He was also banned for life from the NRL.

- b* In 2016, Australian tennis player Nick Lindahl was convicted of match-fixing after deliberately losing a match at a Towoomba Futures event in 2013. He was given a 12-month good behaviour bond and fined A\$1,000. He was also subsequently banned from professional tennis by the International Tennis Federation and fined US\$35,000.

#### **iv Grey market sales**

The extent to which sporting event ticket sales in the grey market, also referred to as 'scalping', is prohibited depends on the state or territory. For example, in New South Wales ticket scalping is only prohibited in areas around particular sporting venues.<sup>62</sup> In Queensland, there are prohibitions on reselling tickets to 'major sports facility events' at a price greater than 10 per cent of the original ticket price.<sup>63</sup> Major sports facilities are listed in the regulations, and a declaration that a facility is a major sports facility may only be made with the agreement of the owner. In Victoria, if the Minister for Sport declares a particular event to be a 'major sport event', and it is a condition of sale of the ticket that the buyer is not authorised to sell or distribute it, it is an offence for the buyer to redistribute the ticket.<sup>64</sup> In South Australia, if the Minister declares an event a 'major event', ticket scalping is prohibited inside declared areas. It is also prohibited in South Australia to resell 'major event' tickets at a price that exceeds the original ticket price by more than 10 per cent.<sup>65</sup>

Additionally, the ACL contains general consumer protections that apply to ticket resellers. For example, it is prohibited for an unauthorised reseller to represent that they are authorised to sell the tickets, or to misrepresent the original face value of the ticket, and the consumer guarantee provisions ensure that tickets purchased from unauthorised resellers are valid, and for the event they are represented to be for.

Recently, the Australian Competition and Consumer Commission instituted proceedings in the Federal Court of Australia against ticket reseller Viagogo AG, alleging that, by failing to disclose substantial fees, it made false or misleading representations and engaged in misleading or deceptive conduct, regarding the price of tickets to live sporting events (among other events). For example, the total price for three Ashes 2017–18 (cricket matches) tickets increased from A\$330.15 to A\$426.82 (29 per cent increase) when the A\$91.71 booking fee and A\$4.95 handling fees were included.<sup>66</sup> The dispute was heard by the Court in late 2018, but a decision has not yet been handed down.

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61 M Whitbread, 'Fixing match-fixing in Australia – Australian sporting administrators propose stricter criminal sanctions' (October 2010) 18 SLAP 6.

62 Major Events Act 2009 (NW) Section 41.

63 Major Sports Facilities Act 2001 (Qld) Section 30C.

64 Major Sporting Events Act 2009 (Vic) Section 166.

65 Major Events Act 2013 (SA) Section 9.

66 ACCC Media Release, 'ACCC takes ticket reseller Viagogo to court' (28 August 2017), [www.accc.gov.au/media-release/accc-takes-ticket-reseller-viagogo-to-court](http://www.accc.gov.au/media-release/accc-takes-ticket-reseller-viagogo-to-court).

## IX THE YEAR IN REVIEW

### i Essendon Football Club doping saga

As discussed above, in 2016, CAS suspended 34 Essendon Football Club players for violations of anti-doping rules, and this decision was subsequently upheld by the Swiss Federal Tribunal. Subsequently, however, in late 2017, separate proceedings were commenced by a third party against the AFL, its CEO and its former chairman, alleging that they engaged in misleading and deceptive conduct in comments made to the media during the course of the ASADA investigation in 2016 and 2017.

The AFL sought a ‘mini-trial’ in early 2018 to determine three preliminary issues, including the question of whether the impugned comments were made in ‘trade or commerce’, a prerequisite element that must be determined to establish a breach of Australia’s consumer laws. However, this was opposed by the plaintiff, and in June 2018, the Court rejected the AFL’s application and found in favour of the plaintiff.<sup>67</sup>

The plaintiff has sought declarations from the Victorian Supreme Court that the AFL, its CEO and its former chairman acted unlawfully, on the basis that they attempted to ‘engineer outcomes’ before players and officials were actually interviewed by ASADA. The plaintiff has also sought an order that the three defendants publish corrective advertising in relation to their alleged conduct. A trial date has not yet been set, but it is expected that the matter will be heard in late 2018 after the conclusion of the AFL season in September.<sup>68</sup>

### ii Application of anti-discrimination laws in the AFL

In the past year, several events have occurred in relation to alleged discriminatory conduct by the AFL.

In May 2018, a former Australian footballer for the Gold Coast Suns filed a complaint with the Australian Human Rights Commission, alleging that he was subject to discrimination, vilification and harassment on racial, sexual and religious grounds by AFL staff, the Gold Coast Suns, club officials, teammates, opposition players and spectators. He alleges that the AFL did not do enough to prevent the discrimination, and has sought compensation for loss of both past and future wages, in addition to compensation for pain, suffering and humiliation.<sup>69</sup>

Additionally, in early 2017, the AFL ruled that a transgender player was ineligible for selection in the 2018 draft for the AFLW, the professional women’s AFL league. It cited the Victorian Equal Opportunity Act 2010, which provides that a person may exclude people of one sex or with a gender identity from participating in a competitive sporting activity ‘in which the strength, stamina or physique of competitors is relevant’.<sup>70</sup> In 2018, the AFL then released its gender diversity policy, in which it advised that transwomen would need

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67 ‘Court ruling on Essendon drugs saga edges AFL boss nearer to trial’ (6 June 2018), *The Age*, [www.theage.com.au/sport/afl/court-ruling-on-essendon-drugs-saga-edges-afl-boss-nearer-to-trial-20180606-p4zjr8.html](http://www.theage.com.au/sport/afl/court-ruling-on-essendon-drugs-saga-edges-afl-boss-nearer-to-trial-20180606-p4zjr8.html).

68 ‘AFL avoids Essendon doping saga court case clashing with 2018 Grand Final’, Fox Sports (29 June 2018), [www.foxsports.com.au/afl/afl-avoids-essendon-doping-saga-court-case-clashing-with-2018-grand-final/news-story/cabfad395b863be93a8e878a3980c30f](http://www.foxsports.com.au/afl/afl-avoids-essendon-doping-saga-court-case-clashing-with-2018-grand-final/news-story/cabfad395b863be93a8e878a3980c30f).

69 Ashleigh Stevenson, ‘Joel Wilkinson, former Gold Coast Suns player, takes action against AFL over alleged racial abuse, sexual harassment’, ABC (9 May 2018), [www.abc.net.au/news/2018-05-09/joel-wilkinson-action-against-afl/9742962](http://www.abc.net.au/news/2018-05-09/joel-wilkinson-action-against-afl/9742962).

70 Equal Opportunity Act 2010 (Vic), Section 72.

to maintain certain maximum levels of testosterone for at least two years to ensure that the competitive advantage of higher levels of testosterone have ‘dissipated to an acceptable degree at the time the trans or non-binary person proposes to play in the AFLW competition’.<sup>71</sup>

Subsequently, in early 2018, the AFL announced that the transgender player would be permitted to play in the state and territory women’s leagues in 2018. It also stated that it was in the process of developing a more comprehensive policy on the participation of trans and gender-diverse athletes. Because the AFL’s initial ruling only applied to the 2017 draft and the transgender player declined to nominate for the 2018 draft, the AFL’s policy moving forward is not yet clear. However, it has not ruled out the possibility of allowing her to nominate for the 2019 AFLW draft.<sup>72</sup>

### iii FFA – challenges to leadership

In the past 24 months, the FFA, the governing body for football in Australia, has been involved in an ongoing dispute with Australia’s 10 professional A-League clubs, represented by the Australian Professional Football Clubs Association (APFCA), in relation to its governance.<sup>73</sup> Currently, a 10-member Congress elects the FFA board, and has representatives from each of Australia’s eight states and territories. However, Australia’s 10 A-League clubs are represented by only one delegate, and there is no delegate that separately represents the players. The APFCA is seeking at least five additional seats (i.e., votes) in the Congress for the clubs and two separate seats for the players.<sup>74</sup> Additionally, the APFCA also threatened legal proceedings to compel the FFA to open its financial records, including in relation to its failed bid for Australia to host the 2022 World Cup.<sup>75</sup>

Pursuant to its role as the international governing body for football, FIFA had stated that should an agreement fail to be reached by 30 November 2017, it would establish a ‘normalisation committee’, which would take over governance of the sport. Although FIFA subsequently declined to establish such a committee, it did establish an eight-member congress review working group (CRWG), to prepare a report outlining changes necessary to align the FFA with FIFA’s global rules. In August 2018, the CRWG released its report, which recommended an expanded Congress and the eventual independence of the A-League from the FFA. The report’s recommendations have been endorsed by FIFA and have been broadly supported by Australian players, but have been opposed by the FFA and the ASC. In particular, the ASC has expressed a concern that the recommendations do not meet its Sports Government Principles. The matter is due for a vote by the FFA in late 2018, and

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71 Scott Spits and Martin Blake, ‘AFL settles on blood testosterone threshold for AFLW footballers’, *The Age* (31 August 2018), [www.theage.com.au/sport/afl/afl-testosterone-threshold-afl-aflw-trans-20180831-p50143.html](http://www.theage.com.au/sport/afl/afl-testosterone-threshold-afl-aflw-trans-20180831-p50143.html).

72 Melissa Coulter Ryan, ‘Hannah Mouncey withdraws AFLW draft nomination, hits out at AFL’, *The Age* (10 September 2018), [www.theage.com.au/sport/afl/hannah-mouncey-withdraws-aflw-draft-nomination-hits-out-at-afl-20180910-p502r4.html](http://www.theage.com.au/sport/afl/hannah-mouncey-withdraws-aflw-draft-nomination-hits-out-at-afl-20180910-p502r4.html).

73 The A-League is the professional soccer league for Australia and New Zealand.

74 ‘What is FIFA up to in Australia? The FFA crisis unpacked’, SBS (9 August 2017), <http://theworldgame.sbs.com.au/article/2017/08/09/what-fifa-australia-ffa-crisis-unpacked>.

75 id.

it is expected that if the recommendations are blocked, FIFA will expel the FFA board and replace them with a normalisation committee, or potentially suspend Australia's membership to FIFA.<sup>76</sup>

#### **iv NRL referees industrial action**

2018 has also seen a high-profile pay dispute in the NRL. The Professional Rugby League Match Officials (PRLMO) have been engaged in negotiations with the NRL in relation to agreement of a new enterprise bargaining agreement. This followed an increase in the salary cap for players of approximately 30 per cent, a new broadcast rights deal for the NRL worth approximately A\$2 billion and an increase in revenue for the NRL of approximately A\$530 million, without a comparable increase in remuneration for referees.

In early September 2018, on the eve of the NRL's finals schedule, the PRLMO obtained a ruling from Australia's Fair Work Commission, allowing its members to vote on whether they wish to take industrial action over the dispute through a 'protected-action ballot'. This was the first time in the NRL's history that the Fair Work Commission has been approached by a union seeking recourse.<sup>77</sup>

Pursuant to the Fair Work Act, a protected-action ballot is required to authorise industrial action, before that industrial action can be lawfully taken.<sup>78</sup> Following the ruling, the PRLMO asked its members to vote in a ballot to authorise industrial action. More than 50 per cent of the PRLMO's members voted and of those who voted, more than 50 per cent voted in favour of industrial action.<sup>79</sup> Accordingly, industrial action can now be taken by the PRLMO on three days' notice. The PRLMO has confirmed that the referees will not strike during the NRL finals series, but has not ruled out the possibility of other forms of industrial action (such as by working in non-approved clothing that carries the union's message or industrial action following the conclusion of the NRL season).<sup>80</sup>

## **X OUTLOOK AND CONCLUSIONS**

In 2018, we have continued to see prominent members of Australian sport take action to progress:

- a* equality of opportunity; and
- b* greater distribution of revenue (often through collective bargaining and industrial action).

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76 Vince Rugari, 'FFA congress showdown set for extraordinary general meeting', *Sydney Morning Herald* (7 September 2018), [www.smh.com.au/sport/soccer/sport-australia-wades-into-ffa-governance-war-20180907-p502be.html](http://www.smh.com.au/sport/soccer/sport-australia-wades-into-ffa-governance-war-20180907-p502be.html).

77 Adrian Proszenko, 'Referees threaten industrial action over pay war on the eve of finals', *Sydney Morning Herald* (5 September 2018), [www.smh.com.au/sport/nrl/referees-threaten-industrial-action-over-pay-war-on-the-eve-of-finals-20180905-p501zm.html](http://www.smh.com.au/sport/nrl/referees-threaten-industrial-action-over-pay-war-on-the-eve-of-finals-20180905-p501zm.html).

78 Fair Work Act 2009 (Cth), Section 437.

79 Adrian Proszenko, 'Top NRL referee to earn \$315k if pay demands met', *Sydney Morning Herald* (22 September 2018), [www.smh.com.au/sport/nrl/top-nrl-referee-to-earn-315k-if-pay-demands-met-20180922-p505e2.html](http://www.smh.com.au/sport/nrl/top-nrl-referee-to-earn-315k-if-pay-demands-met-20180922-p505e2.html).

80 Footnote 77.

In the Australian chapter of the third edition of the *Sports Law Review*, we discussed similar trends developing in 2017, which were apparent in:

- a* industrial action taken by the Australian men's cricket team designed to prevent Cricket Australia from replacing its revenue sharing model (and to increase the proportion of revenue paid to female athletes); and
- b* the establishment, broadcasting and success of AFLW in its first season.

In 2018, we continue to see a focus from athletes, the Australian public and sports organisations on diversity and equality in Australian sport. The first season of the AFLW has been followed by the first season of the National Rugby League Women's Premiership. Transgender athletes are positioned to compete and participate in the second season of the AFLW.

Australian sport is part of a broader public movement that acknowledges the importance of diversity and equality of opportunity. To remain relevant, our most successful sporting codes now target much broader bases.

We have also seen a continued focus on integrity in sport. Sports governing bodies are more readily prepared to take strong action to protect (or salvage) public confidence in their code. This year in Australia, this was best demonstrated by the 12-month bans that Cricket Australia imposed on the captain (Steve Smith) and vice-captain (David Warner) of the Australian men's cricket team for ball tampering (an offence that in previous international incidents has attracted less severe penalties).

# BRAZIL

*Adolpho Julio Camargo de Carvalho*<sup>1</sup>

## I ORGANISATION OF SPORTS CLUBS AND SPORTS GOVERNING BODIES

### i Organisational form

Brazilian sports clubs have been traditionally organised as associations. Initially conceived as entities merely dedicated to educational and leisure aspects that sports practice could provide to a community, sports clubs did not usually have an economic activity as a purpose (let alone as their main purpose).

Law No. 9,615 of 1998 (also known as Pelé's Law, after Brazil's most famous footballer) established that sports clubs engaging in educational, amateur sports activities (as opposed to sports activities practised by professional athletes who receive payment for their performance) should organise themselves, and be managed, in the legal form of an association.

Any sports club organised as an association must primarily focus on the development of sporting practice itself, but many activities perceived as vital to the existence of a sports club (negotiating athlete transfers, media, naming and image rights, or product licensing, to name a few) may be legally pursued by sports clubs as a secondary activity.

Sports clubs primarily acting for a profit from economic activities – that is, those employing capital, workforce (professional athletes) and equipment for the sole objective of obtaining profits from sports events – must migrate from their initial organisational legal form (association) to any of the corporate organisation forms provided by the Brazilian Civil Code (namely, general partnerships, limited partnerships, limited liability companies, joint-stock companies, or limited partnerships with share capital).

Sports clubs do not usually migrate to those specific forms of corporate organisation in Brazil, even though such migration is more in line with the purposes of professionally developed sports activities worldwide. This inertia is explained by the fact that most sports clubs engage in several sports modalities (e.g., football, volleyball, swimming) that enjoy different levels of possible commercial exploitation, which prompts sports clubs' managing officers to opt for an association as their 'umbrella' legal form of choice.

### ii Corporate governance

Under Pelé's Law, the exploitation and management of professional sports activities constitute an economic activity and are thus subject, among others, to the principles of financial and administrative transparency, sound management and accountability.

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To keep up with such principles, the by-laws of sports clubs and sports administration bodies (such as confederations at federal level, or federations at state and municipal levels, which are defined by law as 'sports organisations') must provide for dismissal of a managing officer:

- a* if the managing officer is convicted for any felony in a final judgment;
- b* if the managing officer is found guilty of mismanagement of any public funds by a final administrative decision;
- c* if the managing officer is derelict in the accounting of a sports club or organisation's accounts;
- d* if the managing officer is removed from an elected office in any sports organisation for mismanagement of its assets or for its reckless management;
- e* if the managing officer defaults on any social security or labour contributions; or
- f* if the managing officer is declared insolvent.

Upon manifest occurrence of any of the above, prompt action must be taken for removal of a managing officer, regardless of any express provision to the contrary in the by-laws of a sports club or sports organisation.

To ensure sounder governance of sports clubs and organisations, Pelé's Law sets out minimum accounting requirements for their financial statements, while also ensuring unrestricted disclosure of management-related documents and information to all members or shareholders gathered at a club or organisation's annual general meeting.

Further, any proceeds from the credits or assets held by sports clubs, sports management organisations or organised sports leagues must always revert solely to their own benefit. Clubs and organisations may not use their assets to pay up their own capital stock or else offer them as collateral to third parties unless the absolute majority of members or shareholders gathered at an annual general meeting decide otherwise and in keeping with the by-laws. If any damage is caused to a sports club or organisation's assets owing to culpable mismanagement, the managing officers will pay from their own assets. Besides, managing officers are jointly and severally liable for reckless management or any other acts that run against a sports club or organisation's by-laws.

Pelé's Law also establishes other general obligations of sports organisations taking part in any competition involving professional athletes, regardless of the legal form adopted by them. Clubs and organisations must prepare separate financial statements for each economic activity they engage in. These financial statements must separate any recreational and amateur sports activities from a club or organisation's economic activities, as prescribed by law and in the general accounting standards and principles established by the Brazilian Federal Accounting Standards Board. The financial statements must be independently audited and published on the sports club's own website and, if applicable, they must also be published on the website of the sports league or organisation to which the club is admitted.

Sports organisations that receive public funding must also submit their approved financial statements, together with the reports of independent auditors, to the Brazilian National Sports Council (CNE). Failure to do so will trigger the penalties set out in specific tax, labour and social security legislation, as well as civil and criminal liability, also rendering the managing officers of a sport management organisation, sports league, club or organisation ineligible for five to 10 years to perform any (elected or appointed) duties in any sports club or organisation, as well as in any of the organisations, companies or associations directly or indirectly linked to professional competitions of the respective sports.



Sports clubs or organisations that breach the provisions set out in Pelé's Law, as briefly discussed above, are subject to different levels of punishment, such as prompt removal of managing officers from any managerial position, or nullity of all acts taken on behalf of the sports club or organisation that may relate to the offence. Managing officers usually include the president of the sports club or organisation, as the case may be (or an agent who currently performs the presidential duties), as well as any person in a managerial position who commits an offence or fails to act to avoid the offence being committed.

## II THE DISPUTE RESOLUTION SYSTEM

### i Access to courts

Brazil's exclusive jurisdiction for resolution of sports disputes rests with the Superior Court of Sports Justice, which does not belong to the general organisation of the Brazilian judiciary branch, and is governed by its own procedural rules. Its decisions derive from the application by its judges and courts of, *inter alia*, the Code of Sports Justice, enacted by Resolution 29 of 2009 issued by the CNE, and of Pelé's Law, supplemented by its own precedents.

As such, the Brazilian judiciary branch is not deemed to be the appropriate venue for starting sports disputes: it does not have the necessary practical expertise to deal with the decision-making process that the parties would expect from a ruling on sports matters, nor does it have the adequate procedures in place for analysis of such disputes under the civil law system adopted in Brazil – hence, the judiciary plays only a residual, last-resort role in respect of sports disputes (as further discussed below).

The Superior Court of Sports Justice formally has a private and autonomous nature, but incorporates into its rulings and decisions both state and private regulatory elements as set forth by different sports leagues. This mixture of different sources of governing law is, therefore, the single most tangible sign of state intervention in institutions and sports practices with a view to ideally safeguarding compliance with constitutional principles and legal remedies in the realms of sport practice.

The Constitution of 1988, which established the Superior Court of Sports Justice, states that matters solely involving sporting practices should first be brought to the attention of the Superior Court of Sports Justice, while not denying access to the judiciary with regard to those disputes as well. Such access, however, is defined by both the Constitution and ordinary laws as being residual in nature, and must be raised by the parties only if constitutional principles are violated by the rulings of the specialised Superior Court of Sports Justice jurisdiction. In other words, the parties must have exhausted all instances of the constituted competent Superior Court of Sports Justice before taking the dispute to the judiciary.

Under this particular organisation of access to the courts, some subjects that would intuitively be placed under the radar of the Superior Court of Sports Justice, however, lie outside of it; for example, a violation of rights that can be remedied only by other courts with exclusive jurisdiction. Issues directly concerning labour relations between sports clubs and professional athletes, for example, must always be directed to specialised labour courts.

The principles that guide the decision-making process of the Superior Court of Sports Justice are the same as those generally adopted by the judiciary. As such, none of the principles of full defence, expeditiousness, adversarial proceedings, procedural economy, impartiality, independence of the judge, legality, public morality, proportionality and reasonableness are excluded.

## ii Sports arbitration

In Brazil, arbitration is mainly regulated by Federal Law No. 9,307 enacted on 23 September 1996 (as amended by Law No. 13,129 of 26 May 2015), and is usually perceived as a faster, more flexible and sophisticated method of dispute resolution than litigation before state courts. Sports arbitration in Brazil can, generally speaking, be practised by any parties that have civil capacity. The dispute to be settled by arbitration must involve only disposable rights (rights that may be transferred, such as property rights), and the content of an arbitral award must not be in conflict with good morals and public policy rules.

To submit a dispute to arbitration under Brazilian law, the parties must execute an arbitration agreement that may be in the form of either an arbitration clause or a submission agreement. The execution of such clause or agreement will create an arbitration commitment under which the parties irrevocably agree to waive their rights to refer the dispute to any ordinary jurisdiction.

The Brazilian Football Confederation (CBF) has appointed a sports arbitration court located in Brazil as the arbitration body that is competent to resolve any issues or disputes arising from sports competitions coordinated by the CBF. All clubs, athletes, referees, coaches, doctors, trainers, assistants, intermediate athletes and others involved in competitions coordinated by the CBF are obliged to make use only of the sports arbitration court to resolve any issues, litigation or disputes that may occur in any of those competitions, thus being denied access to ordinary jurisdiction. The only exceptions are those specified in the FIFA regulations.

An arbitral award produces the same effect as a decision handed down by the judiciary. Such arbitral award is enforceable in the same way as a judicial enforcement instrument. A foreign arbitral award must be recognised by the Superior Court of Justice to be enforceable in Brazil.

## III ORGANISATION OF SPORTS EVENTS

Sports law in Brazil has generally followed the same process of legal segmentation and specialisation as found in other areas of economic, social and political activities, opening up an era termed the 'Era of Statutes' conceived to address legal issues once handled through the application of general principles of civil and criminal law.

Law No. 10,671 of 15 May 2003 (the Sports Fans Act) and Pelé's Law form the legal core of the liability regime applicable to sports events, superseding the application of the Civil Code under the legal principle that a special law supersedes the adoption of general laws (*lex specialis derogat legi generali*).

In this sense, Pelé's Law equates a sports fan who attends a sports event to a consumer under a consumer relation and, as such, strict liability applies as established in Law No. 8,078 of 11 September 1990, also known as the Consumer Protection Code. Under this regime, organisers of sports events are ultimately responsible for ensuring not only that spectators and athletes alike have the necessary venue and material conditions for the organisation of a given match or sports event, but also that their safety against risks that can ultimately be traced to the organisation of the sports event itself is effectively guaranteed.

A sports event organiser is said to have strict liability because its role in the sports event itself cannot be viewed merely as a 'best efforts' obligation under the circumstances. Aside from strict liability, the managing officers of organising entities are also deemed jointly and severally liable for any damage caused to spectators attending sports events organised by them.

Sports organisations must disclose the basic guidelines of their relationship with spectators, which must contain information on access routes to the stadium and to the point of sale of tickets, the organisation's financial transparency mechanisms (including provisions regarding independent audits), and the means of communication between spectators and sports organisations. Communication between spectators and sports organisations must occur through the creation of an ombudsman department, the establishment of an advisory body composed of non-member spectators, and the recognition of member spectators whose rights are more restricted than those of other partners of the sports organisation.

Sports organisations are liable for any violation of the Sports Fans Act. Sanctions imposed on such sports organisations include: suspension from office or removal of managing officers; an organisation's disqualification for tax benefits; or six-month ineligibility for federal government funding.

Sports spectators may organise themselves into organised sports fan clubs constituted as a legal entity, which must keep a registration of all its members and managing officers. If, during a sports event, a sports fan club or any of its members or managing officers promote any kind of rioting or turmoil, encourage violence, or invade a place that is restricted to authorised people only, such sports fan club (and its members and managing officers) will be prevented from attending sports events for up to three years. Such sports fan club will also be liable for any damage caused by its members and managing officers to the sports venue, its environs, or on the way into and from the event.

#### **IV COMMERCIALISATION OF SPORTS EVENTS**

According to Law No. 12,395 of 16 March 2011, the arena rights (that is, the image rights of professional athletes during any sports event in which they participate), belong to the sports clubs and organisations, and consist of an exclusive right to negotiate, authorise or prohibit the capturing, fixing, transmission, retransmission or reproduction of images, by any means or process.

Unless there is a collective agreement to the contrary, 5 per cent of the revenues from exploitation of audiovisual sports rights are transferred to the professional athletes' unions, which will redistribute these values equally to the professional athletes who participated in the specific sports event. The costs related to arena rights do not extend to occasional reproduction of the sports event for journalistic, sporting or educational purposes only.

These rights are established by the Federal Constitution, which states that protection of an individual's participation in a collective work and the reproduction of human voices and images, including in sports activities, must be as provided by law. However, the arena rights should not be confused with image rights, given that the arena rights are owned by the sports entities, which can thus negotiate, prohibit or authorise, either for payment or free of charge, the transmission of the show or sports event in which they participate.

#### **V SPORTS LABOUR LAW**

Professional exercise of any athletic activity characterises an employment relation in Brazil, and must be recorded, as any other professional activity, in the athlete's work and social security booklet, which is a personal identification document described in Law No. 5,452 of 1 May 1943, known as the Consolidated Labour Laws (CLT), as further amended by the major labour overhaul enacted in Brazil in 2017. This employment relation is also specifically

governed by the provisions of Pelé's Law, which affords special treatment to the career of professional athletes. However, the reality in Brazil is that employment contracts satisfying CLT requirements are generally restricted to certain sports, and mostly to football players. For the vast majority of other sports, an informal hiring model still prevails, in which amateur athletes' wages are preferably paid by general sponsors (not by the sports clubs or associations in their own name).

Specifically with regard to football (by far the most popular sport in Brazil), Pelé's Law recognises the current reality of economic exploitation of football as regards other sports modalities, and establishes express, mandatory provisions for employment contracts only when such contracts are between professional sports clubs and football players.

Professional football players must execute employment contracts with sports clubs in written form, specifying the names of the respective parties and respective remuneration. These requirements do not apply to employment contracts for other sports modalities. Professional football employment contracts must also contain a specific pecuniary fine for default capped at 100 times the amount of annual remuneration owed to the football player, which must also be provided in written form or otherwise arbitrated by specialised labour courts upon the occurrence of an event of default under the employment contract.

Other aspects specifically required for professional football employment contracts are: duration (from three months to five years); registration (football employment contracts must be filed with the national football confederation); a professional athlete's minimum age of hiring (16 years is the minimum hiring age); and mandatory provisions on contract renewal. In addition, football clubs have a right of first refusal upon first renewal of a football employment contract.

When it comes to professional athletes' employment contracts, several practitioners argue that arbitration constitutes a more advantageous method of dispute resolution than the usual submission of each and every labour dispute to the Brazilian labour courts, on grounds that arbitration, being guided by the principles of expeditiousness and higher expertise, can provide faster and fairer decisions. Pelé's Law does allow interested parties in sports organisations to settle disputes by arbitration, provided that such alternative has been dealt with in a collective convention or agreement between the employer and its employees, and the arbitration is only initiated on the express consent of both parties through an arbitration clause or arbitration agreement.

## VI SPORTS AND ANTITRUST LAW

Antitrust conduct in Brazil is governed by Law No. 12,529 of 30 November 2011 (the Antitrust Law), which applies to individuals and legal entities, as well as to any associations of entities or individuals, whether *de facto* or *de jure*, incorporated or unincorporated, and even if engaged in business under the legal monopoly system, including sports organisations.

As such, sports organisations engaging in economic activities that are in conflict with the Antitrust Law may be held liable for such acts. Since they also perform an economic activity, sports federations, confederations and leagues are also subject to the Antitrust Law even when they are organised as non-profit organisations.

## VII SPORTS AND TAXATION

Sports organisations may be established as non-profit entities, which are eligible for tax immunity, or as charitable, recreational, cultural and scientific institutions or civil associations, which are exempt from tax, as long as they do not engage in professional sports. In such cases, the sports organisations must have satisfied all corresponding legal requirements.

Professional sports entities that do not fall into any of the categories mentioned above are regularly taxed as any other Brazilian entity. Thus, the exploitation and management of sports activities constitute professional economic activities, and, consequently, those entities must be organised as required by the Civil Code and are subject to the following taxes and contributions: corporate income tax, contribution on profits, social contribution, and profit participation programme contribution.

One of the most noteworthy aspects of Brazil's tax incentive system is Law No. 11,438 of 29 December 2006 (the Sports Incentive Act), as regulated by Ministry of Sports Ordinance 269 of 30 August 2018, which establishes that sports and para-sports projects, once approved by the Ministry of Sports, may receive direct investments treated as allowable expenses on the taxpayers' income tax returns.

The Sports Incentive Act establishes that corporations taxed on their book income may treat their direct contributions to approved sports projects (either in the form of a one-off donation or via sponsorship) as deductible expenses at up to 1 per cent of their income tax payable in any single fiscal year. For individual taxpayers, contributions are allowed as expenses at up to 6 per cent of their income tax payable in any single fiscal year.

Such contributions must be channelled into the development of single sports and para-sports projects, as previously approved by the Ministry of Sports and falling into at least one of the following categories: educational sports, inclusive sports and high-performance sports, organised in the form of amateur competitions. However, the law imposes two important limitations on contributions allowed as deductible for corporate or individual income tax purposes.

First, contributions to projects benefiting sports or para-sports initiatives promoted by individuals or sports organisations related in any way to the corporate or individual sponsor or donor are not allowed as tax deductible. For the tax authorities, the following are held to be related to a sponsor or donor:

- a* any legal entity in which the sponsor or donor holds a managerial position or equity interest, or in which the sponsor or donor is a partner (such limitation to apply as from 12 months before the actual contribution date);
- b* a spouse, relatives up to the third degree of kinship (including in-laws), and employees of the sponsor, donor or the owners, officers, shareholders or members of any legal entity linked to the sponsor or donor; and
- c* any entity deemed to be affiliated with, or the parent or a subsidiary of the sponsor or donor, or any entity having among its members, shareholders, directors or partners any of the above-mentioned entities.

Second, contributions cannot be deductible for corporate or individual income tax purposes if they serve for direct remuneration of professional athletes in any sport modality.

The accountability of sports projects benefiting from the tax incentive regime under the Sports Incentive Act is exercised through enforcement of the relevant standards applicable to

processing, evaluation and approval by the Ministry of Sports for the framework of each sports project under scrutiny, as well as through monitoring and tracking of the implementation of duly approved projects by the Ministry of Sports.

Ministry of Sports Ordinance 269 deals with compulsory accountability requirements for approved sports and para-sports projects. Besides the need to prove the attainment of those objectives and goals outlined in the original project, the sports organisation must submit documents, financial statements and even photographic material to evidence that all contributions received under the tax incentive programme set out in the Sports Incentive Act were invested accordingly.

If any irregularity is detected, the experts designated by the Ministry of Sports to check observance of accountability procedures may order a freeze of bank accounts held by the sports organisation or even arrange for blacklisting of the defaulting sports organisation before the integrated financial management system of the federal government.

## **VIII SPECIFIC SPORTS ISSUES**

The economic exploitation of sports activities in Brazil is governed by the principles of financial and managerial transparency, sound management, accountability of managing officers, and differentiated treatment between professional and amateur practices. Disregarding any of these principles will trigger administrative proceedings, which may ultimately result in sanctions (such as warnings, written censures, fines, suspension and disaffiliation or disassociation) being imposed on sports clubs and organisations. These sanctions apply to specific sports issues such as doping, betting and manipulation.

### **i Doping**

The Brazilian legal system incorporated, through Decree No. 6,653 of 18 November 2008, the International Convention against Doping in Sport signed in Paris on 19 October 2005 to prevent and combat doping in sports, with the ultimate aim of eradicating such practice in Brazil.

Decree No. 8,829 of 3 August 2016 approved a new administrative structure for the Ministry of Sports, which includes the Brazilian Anti-Doping Agency, whose duties encompass the promotion and coordination of anti-doping activities in professional and amateur sports, in an independent and organised manner, both within and outside organised competitions, in accordance with the rules established by the World Anti-Doping Agency, as well as with the protocols and commitments assumed by Brazil.

There are also rules issued by the Ministry of Sports, through the CNE, regulating the performance of doping tests by competent authorities during sports competitions, particularly Resolution No. 2 of 5 May 2004. Although these rules do not address the performance of doping tests by sports entities on their own athletes or any punishment on sports entities themselves for doping offences detected, the law establishes an administrative penalty on a professional athlete guilty of doping, which consists of suspension from all sporting events, in any modality, for up to 360 days (or, in case of recidivism, a lifetime ban from sports).

### **ii Betting**

In Brazil, games and bets are generally regulated by the Civil Code, and can be classified as permitted (authorised or regulated), prohibited (illegal) or tolerated (not illegal).

Permitted bets are those expressly allowed by specific laws and regulations, such as federal lotteries and horse race betting (in authorised clubs).

Prohibited bets are those generally known as 'games of chance', where chance is a decisive factor. Under Article 50 of Decree-Law No. 3,688 of 3 October 1941, such bets are misdemeanours punishable with fines and even imprisonment.

Tolerated bets are those for which results do not depend exclusively on chance, but also on the intellectual or physical skills or ability of players. They are not considered misdemeanours, but any obligations arising from them are unenforceable.

In general, sports bets in Brazil are regarded as games of chance and, as such, are not allowed unless authorised by a specific law in this regard. One of the currently authorised types of sports betting is the Federal Sports Lottery. A form of lottery run by the federal government, the Federal Sports Lottery was created by Decree-Law No. 594 of 27 May 1969, and is regulated by Decree No. 66,118 of 26 January 1970, which establishes the allocation of its revenues. The rules and regulations applicable to the Federal Sports Lottery allow the exploration of all types of games related to sports results.

There are currently two betting modalities in the Federal Sports Lottery for football, which remains the sole sports modality in Brazil that is capable of providing enough betting revenue to justify its implementation. These are 'Loteca', which is the traditional sports lottery where bettors can bet on the results of football matches, and 'Lotogol', where bettors can bet on the exact results of up to five different football matches. The revenues from such games are mainly channelled into family and juvenile welfare programmes, sports activities, and physical education and literacy programmes.

No sports betting in Brazil, as currently regulated, can pose any kind of risk to the state. Because of this, bettors can only be awarded 46 per cent of the total betting amount collected. Any other form of award disregarding this proportion between the betting amount collected and the amount awarded to bettors will not be approved or authorised under prevailing laws, and such sports betting will thus be automatically held to be an illegal game of chance (and, by extension, a misdemeanour).

### **iii Manipulation**

Any competitors, referees, inspectors, managing officers, organisers or individuals who are involved in a sports organisation or a sports event and contribute to manipulation of results will be held liable in the civil and criminal spheres for their acts and implications. Rigging of sporting event results may also be prosecuted on charges of 'loss of chance', by which the injured party may obtain recovery of damages from the offender that engaged in or was accessory to the rigging conduct.

### **iv Grey market sales**

The sale of sports events tickets through channels other than those established by the event organiser is forbidden in Brazil as it is held to be detrimental to spectators.

The Sports Fans Act establishes that practices related to grey market sales, such as selling sports event tickets for a price higher than that printed on the ticket, or providing, diverting or facilitating the distribution of tickets for a selling price above that printed on the ticket, are criminal offences. Sanctions can vary from one to four years' imprisonment plus a fine.

## **IX THE YEAR IN REVIEW**

The legal framework for sports in Brazil has recently changed by enactment of Ministry of Sports Ordinance 269, amending the Sports Incentive Act and repealing Ministry of Sports Ordinance 120 of 2009, which regulated the aforementioned law. Ordinance 269 has relaxed the procedures for submission of sports projects by sports entities to qualify for Sports Incentive Act funds, as well as the procedures applying to public and private investors in associating their image with the said initiative. As yet another significant breakthrough, Ordinance 269 introduced greater transparency and agility while also streamlining the fund management procedures to be observed by sports entities, which were even allowed to reassign excess funds from a specific, approved project to other initiatives of their own, which in turn must have been already approved for funding by the Ministry of Sports or under analysis for future approval.

A major labour overhaul took place in 2017. It is difficult for law practitioners to assess the implications of this overhaul, but a possible impact from the changes to the CLT is the creation of a category named ‘sophisticated worker’, covering those who (1) hold a university degree; and (2) receive monthly wages at least twice the amount of the social security retirement income cap (approximately 11,000 reais, as of 2018). Within this context, the provisions of an employment contract executed with such ‘sophisticated workers’ will be valid and enforceable even if they run against the legal protections and benefits generally granted to workers under the CLT (such as default submission of employment contracts to the jurisdiction of labour courts). This innovation is likely to make the negotiation of employment contracts with athletes who satisfy the two requirements mentioned above significantly more flexible.

## **X OUTLOOK AND CONCLUSIONS**

The themes discussed above are some of the most relevant concerning the application of sports law in Brazil today. Despite the expectations on how different the sports environment in Brazil would be in 2018, given that the country was to host two of the major sports events worldwide (the FIFA World Cup in 2014 and XXXI Olympic Games in 2016), much of the initial projection in terms of improvement in sports infrastructure and institutional framework did not materialise or was severely impacted by the ongoing economic crisis that has ravaged the country since 2015. Sport, as a tool of social policy utterly dependent on public investments in Brazil, has been unable to acquire centrality or priority in public spending within the context of economic and political changes that the country has been through. This is a presidential election year and, as such, naturally stirs nationwide debates over the role that sports should play in the country’s social development. Much is expected from elected authorities to address these expectations, to the satisfaction of a strained public opinion, wishful of practical improvements in this area further to the amounts invested in the major sports events hosted in 2014 and 2016.

Brazil’s next president, Jair Bolsonaro, is promising a liberal agenda, which includes (1) the privatisation of state-owned companies; and (2) implementation of important reforms, such as a broad review of the social security and tax framework. Such agenda is generally viewed positively by the market and strengthens perspectives of greater investment in the country. We would like to think that this may also generate opportunities in the sports sector.



# CANADA

*Richard H McLaren*<sup>1</sup>

## I OVERVIEW

Canadian sports law is shaped by Canada's federal system of government. The Constitution Act, 1867<sup>2</sup> gives the federal and provincial governments authority to legislate over particular subject matters. Section 92 of the Constitution Act, 1867 assigns the provinces legislative authority over matters related to property and civil rights, which encompasses most aspects of sport. However, in recent years the federal government has played an increasingly larger role in Canadian sport; though it lacks the constitutional authority to do so. As a consequence, many programmes and policies to support participation and success in Canadian sport have emerged. The federal government has relied on its jurisdiction over Canadian heritage to justify this governance role. The federal 'spending power' has also allowed the federal government to fund sports organisations and programmes even though sport is not directly part of its legislative mandate.<sup>3</sup> At the time of writing, the Federal and Alberta provincial governments have announced funding, and the city of Calgary is considering making a bid, for the IOC Winter Olympic Games in 2026. A decision on the successful bid city will be made by the IOC in 2019. Canada has been chosen to host the FIFA World Cup in 2026, together with Mexico and the United States.

Another notable feature of Canadian sports law is the cross-border nature of many of the nation's professional leagues. The Canadian Football League (CFL) is the country's only professional league made up exclusively of Canadian teams. The National Hockey League (NHL) includes seven Canadian teams.<sup>4</sup> The National Basketball Association includes one Canadian team: the Toronto Raptors. Similarly, the only Canadian team in Major League Baseball (MLB) is the Toronto Blue Jays. Each of these cross-border professional leagues must navigate the laws of both the United States and Canada.

The impact on sports law and sports doping of the legalisation of cannabis use in Canada effective from 17 October 2018 is likely to be significant. However, at the time

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2 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.

3 Jean Harvey, 'Multi-Level Governance and Sport Policy in Canada' in Lucie Thibault and Jean Harvey, eds, *Sport Policy in Canada* (Ottawa: University of Ottawa Press, 2013) 37 to 39.

4 The Edmonton Oilers, the Calgary Flames, the Vancouver Canucks, the Winnipeg Jets, the Montréal Canadiens, the Toronto Maple Leafs and the Ottawa Senators.

of writing, it is difficult to predict precisely what legislative and other initiatives will be required by sport. What can be identified is the fact that all athlete contracts and many other contractual arrangements in the sporting world will have to be revised.

## II ORGANISATION OF SPORTS CLUBS AND SPORTS GOVERNING BODIES

### i Organisational form

Sport Canada is a key actor in Canadian non-professional sport. As a branch of the federal Department of Canadian Heritage, it is responsible for promoting and supporting non-professional sport at the national level. Sport Canada provides funding to national sport organisations (NSOs) with a view to improving Canada's competitive performance at the international level and increasing opportunities for all Canadians to participate in sports. Each NSO is incorporated under the federal Canada Not-for-profit Corporations Act, SC 2009 c 23 (NFP Act) and governs the development and promotion of their respective sport across Canada.<sup>5</sup> Despite the fact that they are private independent bodies, NSOs are responsible for carrying out the federal government's sport policy objectives. Although the federal government encourages NSOs to generate revenue through membership fees and corporate sponsors, many NSOs are also reliant on funding from Sport Canada.<sup>6</sup>

Similar to NSOs, provincial sport organisations (PSOs) govern individual sports within the provinces. PSOs are funded by each provincial government's department responsible for managing sport, fitness and recreation in the province. For example, the Ministry of Tourism, Culture and Sport in Ontario formally recognises and funds PSOs that meet the mandatory requirements in Ontario's Sport Recognition Policy.<sup>7</sup> Canada's three territories – Yukon, the Northwest Territories and Nunavut – also have recognised territorial sport organisations that are funded by their respective territorial governments. Since municipalities in Canada are creations of the provinces under Section 98(2) of the Constitution Act, 1867, they play no formal role in governing sport.<sup>8</sup> However, they provide significant subsidies to local sport organisations and invest in infrastructure to facilitate recreational and competitive sport.<sup>9</sup> The city of Calgary, if it bids and wins the Winter Olympic Games, will have a significant role to play in the staging of the Winter Olympics in 2026. In contrast, the city of Vancouver in British Columbia declined to be a host city in the FIFA World Cup in North America in 2026. The three Canadian cities that will host the World Cup are Edmonton, Montreal and Toronto. Each of these three cities will have a significant legislative and financial role to play in the infrastructure and financing of their venue for the World Cup.

At the professional level, sports clubs from major Canadian cities participate in most North American professional leagues. Although there are various ownership models available to sports teams, some professional leagues restrict ownership to a particular model. For

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5 Part II of the old Canada Corporations Act, RSC 1970, c C-32 governed not-for-profit corporations in Canada until it was replaced by the NFP Act.

6 John Barnes, *Sports and the Law in Canada*, 3rd ed (Canada: Butterworths Canada Ltd, 1996) at 109 [Barnes, *Sports and the Law*].

7 Ontario, Ministry of Tourism, Culture and Sport, 'Sport Recognition Policy for Provincial Sport Organizations and Multi-Sport Organizations', online: [www.mtc.gov.on.ca/en/sport/sport/psos.shtml](http://www.mtc.gov.on.ca/en/sport/sport/psos.shtml).

8 Harvey, footnote 3 at 43.

9 Barnes, *Sports and the Law*, footnote 6 at 28.

instance, NHL teams are organised either as partnerships or private corporations to avoid regulations and disclosure requirements associated with public ownership.<sup>10</sup> The NHL ultimately prefers to work directly with identifiable major shareholders or entrepreneurs who own NHL clubs.<sup>11</sup> The ownership model of professional teams may also vary depending on the market in which they operate. For example, two CFL teams, the Saskatchewan Roughriders and the Edmonton Eskimos, have thrived under the community ownership model because this model particularly caters to their small but vibrant fan bases.<sup>12</sup>

## ii Corporate governance

In an effort to encourage good corporate governance, the federal government requires NSOs to comply with government policy to qualify for funding. NSOs must meet the requirements set out in Sport Canada's Sport Funding and Accountability Framework (SFAF) to be eligible for government funding from the Sport Support Program. The SFAF requires NSOs to comply with the 2012 Canadian Sport Policy,<sup>13</sup> a policy that emphasises a value-based sports system focused on core principles such as inclusiveness, collaboration and sustainability.<sup>14</sup> Sport Canada encourages NSOs to have governance practices that enshrine the following principles: a commitment to mission and guidance by a strategic plan; clarity of roles and responsibilities; effective financial control; a focus on human resources; and transparency and accountability for outcomes and results.<sup>15</sup>

## iii Corporate liability

Canadian law imposes a wide range of duties and liabilities on directors of NSOs. Many of these duties and liabilities are prescribed under the NFP Act, while others are established by other federal, provincial and territorial statutes.<sup>16</sup> Section 148 of the NFP Act imposes a duty of loyalty and a duty of care on corporate directors, which are measured on an objective standard. The Act also requires directors to comply with the NFP Act and its regulations, as well as the NSO's by-laws, articles, and any unanimous member agreements.<sup>17</sup> Directors may also be responsible for the financial consequences of their decisions and actions.<sup>18</sup> For example,

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10 John Barnes, *The Law of Hockey* (Markham, Ont: LexisNexis, 2010) at 280 [Barnes, *Hockey*].

11 *ibid.*

12 Curtis Rush, 'How CFL community ownership could work for Argos', the *Toronto Star* (17 September 2014), online: [www.thestar.com/sports/argos/2014/09/17/toronto\\_argonauts\\_could\\_become\\_communityoperated\\_team.html](http://www.thestar.com/sports/argos/2014/09/17/toronto_argonauts_could_become_communityoperated_team.html).

13 Sport Information Resource Centre, 'Canadian Sport Policy 2012', online: [sirc.ca/sites/default/files/content/docs/pdf/csp2012\\_en.pdf](http://sirc.ca/sites/default/files/content/docs/pdf/csp2012_en.pdf).

14 *ibid.* at 2.

15 Canada, Sport Canada, 'Pursuing Effective Governance in Canada's National Sport Community', Ottawa: November 2011, online: [www.sportlaw.ca/wp-content/uploads/2011/12/FINALGovernancePrinciplesEN.doc](http://www.sportlaw.ca/wp-content/uploads/2011/12/FINALGovernancePrinciplesEN.doc) at 3.

16 Canada, Corporations Canada, 'Not-for-Profit Corporations: The Directors' (2013), online: [www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs05004.html](http://www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs05004.html) (The Directors).

17 Canada, Industry Canada, 'Canada Not-for-profit Corporations Act: How do I get there from here?' (September 2011), online: [www.csae.com/Portals/0/Events/Canada%20NFP%20Corp%20Act%20Session%20-%20Kirby%20Eng.pdf](http://www.csae.com/Portals/0/Events/Canada%20NFP%20Corp%20Act%20Session%20-%20Kirby%20Eng.pdf) at 7.

18 'The Directors', footnote 16.

Section 145 of the NFP Act stipulates that if a director votes for a resolution authorising a payment to a member or director that is contrary to the NFP Act, they will be held jointly and severally or individually responsible for restoring the money to the corporation.

### III THE DISPUTE RESOLUTION SYSTEM

#### i Access to courts

Canadian courts are hesitant to interfere with the decisions of NSOs, as they are private, voluntary associations.<sup>19</sup> However, parties may seek remedies from the courts in limited circumstances, such as when an NSO exceeds its authority or unduly punishes a member.<sup>20</sup> Courts may also oversee disputes that involve the observance of contractual rights and the interpretation of regulations, especially if such rules require objective determinations.<sup>21</sup> Courts may evaluate the propriety of an NSO's decision-making process through their power of judicial review.

If a party to an arbitration agreement commences court proceedings with respect to a matter that it had agreed to submit to arbitration, Section 7(1) of Ontario's Arbitration Act requires that the court stay judicial proceedings. However, recourse to the courts will not be denied early on in a dispute in cases where the internal dispute resolution process can be shown to be unfair or futile.<sup>22</sup> For example, a long delay in a hearing may impose undue hardship on an athlete or a sports organisation. In urgent matters such as team selection, a court order may therefore be the only venue able to provide an appropriate remedy to the parties.<sup>23</sup>

In court proceedings, typical remedies available to athletes include damages and a declaration of legal rights. In some circumstances an injunction may be issued in order to protect proprietary interests or, for example, an athlete's opportunity to participate in a given event or league.<sup>24</sup>

#### ii Sports arbitration

Arbitration is regulated by provincial legislation. For example, the Arbitration Act, SO 1991 c 17 governs the arbitral process within Ontario. The use of arbitration in Canadian sport is contractually based.<sup>25</sup> NSOs and their athletes sign athlete agreements that include a dispute resolution clause. If an NSO receives federal government funding, a dispute resolution clause must be included in the athlete agreement. This clause specifies the steps that are involved in dispute resolution. It also states that all disputes must first use internal procedures for potential resolution, failing which arbitration external to the sport will be required.<sup>26</sup>

The Sport Dispute Resolution Centre of Canada (SDRCC) was established by the Physical Activity and Sport Act, SC 2003 c 2 as a national organisation designed to assist in

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19 Barnes, *Hockey*, footnote 10 at 97.

20 Barnes, *Sports and the Law*, footnote 6 at 68.

21 *ibid.*

22 *ibid.* at 70.

23 *ibid.*

24 Barnes, *Hockey*, footnote 10 at 99.

25 Richard H. McLaren, *Innovative Dispute Resolution: The Alternative* (Toronto: Thomson Reuters Canada Limited, 1994) (loose-leaf updated 2017, release 2017-3) at 5-114.

26 *ibid.*

resolving 'sport disputes' arising in Canadian sport. Section 10(2) of this act defines 'sport disputes' as 'disputes among sport organi[s]ations and disputes between a sport organi[s]ation and persons affiliated with it, including its members'. This definition has proven to be broad, as the SDRCC commonly hears disputes involving a variety of issues, including national team selection, harassment, eligibility, discipline, contract interpretation, doping, or decisions of NSOs that affect their members.<sup>27</sup> The SDRCC provides resolution facilitation, mediation, and arbitration services, which it provides through a roster of arbitrators and mediators.<sup>28</sup> The SDRCC's arbitral process only becomes involved in sports disputes after an NSO's internal dispute resolution process has been exhausted. Article 6.17 of the SDRCC Code grants arbitration panels the jurisdiction to review and rectify the previous decisions of NSOs.<sup>29</sup> If a dispute involves an international competition or an international level athlete, decisions of the SDRCC's Doping Tribunal may be appealed to the Court of Arbitration for Sport.<sup>30</sup> The SDRCC has proven to be an important feature of Canadian sports law as it grants NSOs a degree of accountability and leaves them free from unnecessary judicial interference.

The SDRCC only has jurisdiction over sports disputes involving NSOs. International, professional, provincial and local level disputes must be resolved through their respective dispute-resolution mechanisms. Most provinces require PSOs to have a dispute resolution policy to receive government funding. For example, Ontario's Sport Recognition Policy requires Ontario PSOs to have a dispute resolution policy that is approved by the organisation's board of directors.

### **iii Enforceability**

An arbitrator who is appointed to resolve a sports-related dispute has the authority to render a binding decision within the scope of his or her jurisdiction. Provincial and territorial arbitration statutes provide for the enforcement of domestic arbitration awards and outline the limited situations in which a court can refuse to recognise or enforce an arbitral award.<sup>31</sup>

## **IV ORGANISATION OF SPORTS EVENTS**

### **i Relationship between organiser and spectator and liability of the organiser**

Provincial legislation in Canada enshrines an occupier's duty to take reasonable care to protect the safety and security of spectators. In the Province of Ontario, Section 3 of the Occupiers' Liability Act, RSO 1990, c O.2 establishes the general duty of an occupier to 'take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises, and the property brought into the premises by those persons, are reasonably safe while on the premises'.<sup>32</sup> An occupier's duty applies to risk caused by the condition of the

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27 McLaren, footnote 19 at 5-111.

28 Parties may choose between the different processes that the SDRCC offers, but if the parties cannot agree as to the appropriate process they will be deemed to have chosen to pursue arbitration.

29 Barnes, *Hockey*, footnote 10 at 32.

30 McLaren, footnote 19 at 5-115.

31 Frank Walyn and Kayla Theeuwens, 'Enforcement of Judgments and Arbitral Awards in Canada: An Overview' (Thomson Reuters: 2017), online: [https://ca.practicallaw.thomsonreuters.com/1-619-0729?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://ca.practicallaw.thomsonreuters.com/1-619-0729?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1).

32 Similar legislation is in place in British Columbia, Alberta and Manitoba.

premises and by activities that occur on the premises.<sup>33</sup> The occupier must not deliberately create a risk or act with reckless disregard to a visitor's safety. Spectators are taken to have consented to the ordinary risks of attending a sporting event.<sup>34</sup> Other provinces have similar legislation with local variations.

An occupier can also limit the duties that it owes to spectators through posted signs, tickets, signed entry waivers, or other agreements.<sup>35</sup> Canadian law has demonstrated the importance of having carefully worded and inclusive waivers. If a waiver properly explains the circumstances of potential risks at an event and excludes liability for risks or injuries caused by negligence, Canadian courts will likely uphold the waiver and find no liability for the occupier.<sup>36</sup>

## **ii Relationship between organiser and athletes or clubs**

An athlete is taken to accept the ordinary and necessary risks incidental to a sport. However, they may sue a sporting event operator in tort for negligent administration of the event, for example.<sup>37</sup> An operator of a sport event or facility is under a duty to exercise reasonable care in supervising sport activities in order to prevent injuries and harm to participants.<sup>38</sup> The statutory duty to players requires occupiers to ensure that the conditions of the sport venue are not hazardous. Operators also owe duties to prevent crowds or collisions, to provide necessary warnings and suitable equipment and to take overall reasonable precautions to ensure activities are not unduly hazardous.<sup>39</sup>

Sports clubs operate under a duty to exercise reasonable care for the health and safety of team members and may be liable where team training staff do not provide adequate treatment of an athlete's injuries.<sup>40</sup> Clubs are usually not responsible for torts or negligent acts committed by players outside the scope of the sport business, but may be liable where security personnel use excessive force in wrongfully ejecting a ticket-holder from a venue.<sup>41</sup> In recent years, because of litigation against the CFL regarding concussions, there has been an increasing need for sporting organisations, leagues and clubs to have appropriate concussion protocols in place to ensure the safety of athletes competing under their banner or brand.

## **iii Liability of the athletes**

In Canadian criminal law, players in contact sports are taken to consent to the ordinary risks of the game, thus a body-check or blow incidental to the game will not be considered

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33 CED 4th (online), *Sports*, 'Civil Liability for Sports Injuries: Occupiers' Liability: Legislation' (VII.3(a)) at §145.

34 CED 4th (online), *Sports*, 'Civil Liability for Sports Injuries: Occupiers' Liability: Statutory Liability: Injury to Spectators' (VII.3(b)(ii)) at §150.

35 CED 4th (online), *Sports*, 'Civil Liability for Sports Injuries: Exclusion of Liability' (VII.5) at §166.

36 Dolden Wallace Follick LLP, 'Sport Liability Law: A Guide for Amateur Sports Organizations and Their Insurers' (September 2012), Dolden Wallace LLP, online: [www.dolden.com/wp-content/uploads/2016/06/151-Sport-Liability-Law-September-2012.pdf](http://www.dolden.com/wp-content/uploads/2016/06/151-Sport-Liability-Law-September-2012.pdf) at 13.

37 CED 4th (online), *Sports*, 'Civil Liability for Sports Injuries: Negligence: Operators' (VII.4(b)) at §155.  
38 *ibid.*

39 *ibid.*

40 CED 4th (online), *Sports*, 'Civil Liability for Sports Injuries: Negligence: Others' (VII.4(d)) at §163.

41 CED 4th (online), *Sports*, 'Civil Liability for Sports Injuries: Civil Assaults' (VII.2) at §144. See *Davidson v. Toronto Blue Jays Baseball Ltd*, 1999 CarswellOnt 626 [1999] OJ No 692.

an assault.<sup>42</sup> However, there are limits to a player's immunity from liability. Blows delivered with intent to cause serious injury, regardless of whether they occur in the heat of the game, do not fall within the scope of this implied consent.<sup>43</sup> Athletes in non-contact sports cannot impliedly consent to physical contact or other acts of assault.<sup>44</sup>

Athletes may also be held civilly liable for their conduct during a sporting event. For example, an athlete may be liable in negligence for failing to exercise due care to another athlete. In contact sports, an athlete's conduct will be measured against the conduct of a reasonable competitor in his or her place.<sup>45</sup> Where a player causes injury to a spectator by way of ignoring his or her personal safety, that player may be found personally liable.<sup>46</sup>

#### iv Liability of the spectators

Spectators may be held both civilly and criminally liable for their conduct while attending sports events. The police have the authority to investigate any criminal conduct *ex officio*. This notably occurred in 2016 after a spectator tossed a beer can onto the field of the Rogers Centre during an MLB playoff game between the Toronto Blue Jays and the Baltimore Orioles. The spectator pleaded guilty to mischief under C\$5,000.

#### v Riot prevention

A riot is defined by Section 64 of the Criminal Code, RSC 1985 c C-46 as 'an unlawful assembly that has begun to disturb the peace tumultuously'. In 2011, riots ensued in Vancouver, British Columbia after the Vancouver Canucks lost in the Stanley Cup finals to the Boston Bruins. In the criminal proceedings that followed, the British Columbia Provincial Court imposed short prison sentences for those who played significant roles in the riots. In doing so, the court reasoned that harsher treatment was necessary in order to denounce rioters and deter future riots.<sup>47</sup>

## V COMMERCIALISATION OF SPORTS EVENTS

For well-known Canadian athletes, their image rights can be a highly profitable commercial asset.<sup>48</sup> However, athlete agreements between NSOs and individual athletes have become progressively more restrictive of athletes' image rights in recent years.<sup>49</sup> Athlete agreements often restrict athletes from promoting themselves unless they have the permission of the NSO with whom they are affiliated. Typically, the tort of misappropriation of personality is available to Canadian athletes when their likeness is used for commercial gain without their

42 *ibid.* at §139. See *Wright v. McLean*, 1956 CarswellBC 139, 20 WWR 305.

43 *ibid.* See *Agar v. Canning*, 1965 CarswellMan 59, 54 WWR 302.

44 *ibid.* at §143. See *Roundall v. Brodie*, 1972 CarswellNB 233, 7 NBR (2d) 486.

45 CED 4th (online), *Sports*, 'Civil Liability for Sports Injuries: Negligence: Players' (VII.4(a)) at §153.

46 *ibid.* at §154. See *Payne v. Maple Leaf Gardens Ltd*, 1948 CarswellOnt 82 [1949] 1 DLR 369.

47 See *R v. Dickinson*, 2012 BCPC 40, 2012 CarswellBC 434 at paras 35–38.

48 CED 4th (online), *Sports*, 'Professional Sports: Promotion and Protection of Personality' (V.6) at §126.

49 AthletesCAN, 'The Future of Athlete Agreements in Canada' (2014), online: [https://athletescan.com/sites/default/files/images/the\\_future\\_of\\_athlete\\_agreements\\_in\\_canada\\_final\\_eng\\_1.pdf](https://athletescan.com/sites/default/files/images/the_future_of_athlete_agreements_in_canada_final_eng_1.pdf) at 13.

consent.<sup>50</sup> However, this tort is unavailable when athletes have voluntarily signed an athlete agreement that allows the NSO to appropriate their image for commercial purposes, which is often the case.

In some cases, an NSO or professional league may restrict athletes from receiving certain types of sponsorships. This may occur if the sports organisation has an exclusive sponsorship agreement with a particular company, or if sponsorship from a particular company would be detrimental to the organisation's image.<sup>51</sup> Athletes must consider these restrictions before signing any sponsorship contracts. If an athlete has existing endorsements, they also must be mindful of conflicts between sponsors when accepting new sponsorship offers. Section 7 of the Canadian Code of Advertising Standards<sup>52</sup> requires athlete testimonials or endorsements of products to be genuine and reflect the reasonably current opinion of the athlete. These messages must also be based on adequate information about or experience with the product in question.

Broadcasting rights may be held by a team, a league, or a broadcaster, or may be held jointly by a combination of each of these parties.<sup>53</sup> Exclusivity of broadcasting rights is often granted based on the broadcasting platform or territory. Broadcasting 'blackouts' are a notable feature of sports broadcasting in Canada.

## VI PROFESSIONAL SPORTS AND LABOUR LAW

### i Mandatory provisions

Professional athletes are employed under a standard player contract (SPC). The SPC is an appendix to the league's collective bargaining agreement with the players' association, which is a union under the various provincial labour codes. Players are typically able to negotiate some of the terms of their SPC with their respective teams, including their salary and timing of payments, the length of the contract, option and renewal clauses, assignment of the contract, bonuses and additional 'perks'.<sup>54</sup> Non-negotiable terms include the player's obligations, the arbitral process and endorsement restrictions. Rights that are recognised in provincial labour law will apply to the operation of American-based leagues and to franchises located in Canada.

### ii Free movement of athletes

The Competition Act, RSC 1985, c C-34 includes provisions that specifically aim to protect the freedom of employment of professional athletes. Section 48(1)(a) of the Competition Act makes it an indictable offence 'to limit unreasonably the opportunities for any other person to

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50 Craig Arsenaault, *Bargaining Power Dynamics and the Negotiation of Commercial Rights and Obligations: A Case of Athlete Agreements* (MA Thesis, Brock University Faculty of Applied Health Sciences, 2013) Brock University, online: [dr.library.brocku.ca/handle/10464/5048](http://dr.library.brocku.ca/handle/10464/5048) at 29.

51 AthletesCAN, 'Impact of a Contract', online: <https://athletescan.com/en/impact-contract>.

52 Advertising Standards Canada, 'The Canadian Code of Advertising Standards', online [www.adstandards.com/en/Standards/canCodeOfAdStandards.aspx](http://www.adstandards.com/en/Standards/canCodeOfAdStandards.aspx).

53 Laurence Dunbar et al., 'Broadcasting, media and entertainment law in Canada: overview' (Thomson Reuters: 2011), online: [https://uk.practicallaw.thomsonreuters.com/3-509-4902?source=relatedcontent&lrTS=20170615235253104&transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/3-509-4902?source=relatedcontent&lrTS=20170615235253104&transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1).

54 Gordon J Kirke and Allan Dick, 'Professional Athletes' in Jacqueline L King, ed, *Entertainment Law in Canada* (Butterworths Canada Ltd, 2000) 8.1 at 8.6-8.10.



participate, as a player or competitor, in professional sport or to impose unreasonable terms or conditions on those persons who so participate.’ Similarly, Section 48(1)(b) of the Act makes it an indictable offence ‘to limit unreasonably the opportunity for any other person to negotiate with and, if agreement is reached, to play for the team or club of his choice in a professional league’. These provisions are directed at oppressive contract provisions that aim to give a league a perpetual power of renewal over a player’s contract.<sup>55</sup>

### iii Application of employment rules of sports governing bodies

In determining whether a limitation on freedom of movement violates Section 48(1)(a) of the Competition Act, subsection (2) requires courts to consider whether the sport in question is organised on an international basis, and if so, whether any limitations should for that reason be accepted in Canada. This provision recognises that Canadian participation in a league may depend on accepting an international regulation.<sup>56</sup> It also acknowledges that the vast majority of professional franchises are located in the United States, meaning that major leagues are subject to American law.

## VII SPORTS AND ANTITRUST LAW (COMPETITION LAW)

In Canada, antitrust is regulated at the federal level by the Competition Act, which is administered by the Competition Bureau of Canada. The Act applies to professional sports leagues and contains both civil and criminal provisions. Restrictions on the sale and relocation of franchises may be reviewed under Section 79 of the Competition Act as a potential abuse of a dominant position. The Competition Bureau has acknowledged that some restrictions on competition within professional sports leagues will be inevitable if leagues are to be able to pursue legitimate business interests.<sup>57</sup> For example, professional leagues may require certain rights and powers over individual franchises, including the right to determine who can own teams and where teams can be located. This may be necessary in order to sustain the competition and rivalry that is vital to the sports industry’s commercial success.<sup>58</sup>

## VIII SPORTS AND TAXATION

Given the cross-border nature of many Canadian and US professional leagues, athletes participating in these leagues may be subject to the tax regimes of both countries. Most non-resident athletes who play for Canadian franchises will be subject to Canadian income tax on part of their salary for services that they have performed in Canada.<sup>59</sup> However, the Canada–US Income Tax Treaty prevents double-taxation of athletes who participate in a professional sports league with games that are scheduled in both countries. As a result, athletes who are not residents of Canada will only be taxed on Canadian-sourced income. Article XV

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55 CED 4th (online), *Sports*, ‘Professional Sports: The Competition Act’ (V.3) at §109.

56 Barnes, *Sports and the Law*, footnote 6 at 132.

57 Canada, Competition Bureau, Technical Backgrounder, ‘Competition Bureau Concludes Examination into National Hockey League Franchise Ownership Transfer and Relocation Policies’ (31 March 2008), online: Technical Guidance Documents [www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02640.html](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02640.html).

58 *ibid.*

59 Alan Pogroszewski and Kari Smoker, ‘Cross-Checking: An Overview of the International Tax Issues for Professional Hockey Players’, *Marquette Sports Law Review*, Volume 22, issue 1 at p. 197.

of this treaty exempts most players from US-based franchises from Canadian income tax on games that are played in Canada as long as the athlete is present in Canada for no more than 183 days in a given 12-month period.<sup>60</sup>

Individual professional athletes, such as golfers, formula one drivers and tennis players, do elect, from time to time, to become non-resident of Canada for tax purposes, preferring to locate their residency in lower tax jurisdictions, such as the Bahamas, Turks and Caicos or Monaco.

## IX SPECIFIC SPORTS ISSUES

### i Doping

Doping is not a criminal offence in Canada. However, Canadian non-professional sports organisations adhere to the international anti-doping regime established by the World Anti-Doping Code (WADC). Even though doping itself is not a criminal offence, the use, importation and sale of certain drugs included in the WADC's Prohibited List is illegal under the federal Controlled Drugs and Substances Act, SC 1996, c 19.<sup>61</sup> The mandatory provisions of the WADC are applied in Canada under the Canadian Anti-Doping Program (CADP),<sup>62</sup> which is administered by the Canadian Centre for Ethics in Sport. The CADP's stated objective is to prevent, deter and detect doping in sport.<sup>63</sup> Not all NSOs have adopted the policy, but must do so if they wish to receive federal funding and participate in the Olympic movement.<sup>64</sup> Once the CADP is adopted by an NSO, it becomes a part of the sport organisation's policy framework and is incorporated into Athlete Agreements. As part of the Athlete Agreement, the CADP binds athletes to anti-doping rules.<sup>65</sup>

The federal government of Canada has taken the necessary legislative steps to legalise the use of marijuana by all Canadians and not just for those requiring medical cannabis. The legalisation took effect on 17 October 2018. The full ramifications of this change have yet to have been realised and worked out in such contractual schemes as the WADA Prohibited List and the NSOs' codes of conduct and disciplinary policies. All such documentation will require significant revisions.

### ii Betting

Sections 201 to 206 of Canada's Criminal Code make it illegal to offer sports betting in Canada, but this criminal prohibition is subject to some notable exceptions. For example, Section 207 of the Criminal Code allows the provincial governments to provide lottery schemes to their residents. However, Section 207(4)(b) of the Criminal Code forbids provincial lotteries from offering betting on single sport events or athletic contests. Provincial lotteries may therefore only offer parlays where bettors can place bets on the outcome of

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60 *ibid.* at 201. The same approach is taken under the US tax regime for games played in the US.

61 Paul Melia, 'Is doping a criminal offence in Canada?', Canadian Centre for Ethics in Sport: Melia's Take (blog), online: <http://cces.ca/blog/is-doping-criminal-offence-canada>.

62 Canadian Centre for Ethics in Sport, '2015 Canadian Anti-Doping Program' (1 September 2017), online: [www.crdsc-sdrcc.ca/eng/documents/cces-policy-cadp-2015-v2-e.pdf](http://www.crdsc-sdrcc.ca/eng/documents/cces-policy-cadp-2015-v2-e.pdf).

63 *ibid.* at 5.

64 Rachel Corbett, Hilary A Findlay and David W Lech, *Legal Issues in Sport* (Toronto: Emond Montgomery Publications, 2008) at 74.

65 *ibid.*

two or more matches. With most online sports books hosted offshore, online sports betting operates in a legal 'grey zone' in Canada.<sup>66</sup> The authorities tend to ignore this phenomenon, and it appears that they have never successfully prosecuted a Canadian bookmaker or punter for participating in online betting.<sup>67</sup>

The June 2018 decision of the US Supreme Court striking down the federal legislation controlling gambling in the United States will undoubtedly have significant impacts on the spread of online gambling in the United States. While this development is not directly related to Canada, it will have an impact on how Canadians gamble, which will undoubtedly require some legislative adjustments in Canada. No such actions have been announced or taken as of the time of writing.

### iii Manipulation

Canada does not have laws specifically prohibiting match-fixing. Rather, match fixing may be dealt with under a number of Criminal Code provisions, including the fraud and cheating at play provisions.<sup>68</sup> However, it does not appear that a Canadian has ever been successfully prosecuted for match-fixing under these provisions.<sup>69</sup> Under the fraud provision, the highest sanction available is 14 years' imprisonment when the value of the match-fixing exceeds C\$5,000. The cheating at play provision includes a sanction of no more than two years' imprisonment.

### iv Grey market sales

The law governing sport events tickets in the grey market varies from province to province. Reselling of tickets beyond their original purchase price is legal in both Alberta and British Columbia, as neither of these provinces have legislation in place banning grey market sales.<sup>70</sup> Under the Saskatchewan Ticket Sales Act, SS 2010, c T-13.1 official merchants are forbidden from reselling tickets, while individuals may resell tickets 48 hours after the tickets are originally released. Both Manitoba and Quebec have enacted legislation that makes it illegal to resell tickets beyond their original purchase price.<sup>71</sup>

Ontario, in particular, has struggled with its approach to regulating grey market ticket sales. In 2015, the Ontario legislature amended the Ticket Speculation Act, RSO 1990, c T.7 to make it legal to resell tickets beyond their original value. According to a subsequent survey conducted by Ontario's Attorney General, these amendments were unpopular with Ontario

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66 Jamie Strashin, 'Online sports gambling thrives in Canada's legal "grey zone"', CBC Sports (2 May 2016), online: [www.cbc.ca/sports/sports-gambling-canada-1.3559733](http://www.cbc.ca/sports/sports-gambling-canada-1.3559733).

67 *ibid.*

68 International Olympic Committee and United Nations Office on Drugs and Crime, 'Criminalization Approaches to Combat Match-Fixing and Illegal/Irregular Betting: A Global Perspective' (Lausanne/Vienna: The Olympic Studies Centre, July 2013) at 60–79.

69 Vivian Wilson, 'Match-Fixing: A Crime Worthy of a Life Sentence?' (18 December 2015), The Sports Law Canary (blog), online: <https://sportslawnews.wordpress.com/2015/12/18/match-fixing-a-crime-worthy-of-a-life-sentence/>.

70 Miriam Yosowich, 'Is Ticket Scalping Legal in Canada?', FindLaw (Thomson Reuters), online: [consumers.findlaw.ca/article/is-ticket-scalping-legal-in-canada/](http://consumers.findlaw.ca/article/is-ticket-scalping-legal-in-canada/). Alberta notably repealed its Amusement Act in 2009 after finding the scalping ban included in this legislation too difficult to enforce.

71 *ibid.*

residents as they resulted in drastically increased ticket prices.<sup>72</sup> In 2018, Ontario passed legislation that would have capped the resale price of tickets to live music and sporting events at 50 per cent above face value. However, the proposed legislation has not proceeded because of the newly elected provincial government having a different legislative agenda.

## **X THE YEAR IN REVIEW**

The Ontario government recently passed ‘Rowan’s Law (Concussion Safety)’ 2018, SO 2018, c 1, legislation designed to protect amateur athletes from, and educate them about, concussions and head injuries. The Bill is named after a 17-year-old athlete who died after suffering two concussions within a week while playing rugby. All 50 states in the United States have laws outlining the management of youth concussions. Ontario is the first province in Canada to pass this type of legislation.

At the time of writing, only one provision of Rowan’s Law has been proclaimed with Royal Assent. This provision created an annual ‘Rowan’s Law Day’, meaning that on 28 September 2018, the first Rowan’s Law Day took place. The Ontario government is currently consulting with the public, as well as individuals and organisations in the Ontario sport, education, health and municipal sectors, to seek input on the details for the remaining regulations. After the draft regulations have been developed they will be made available to the public for additional feedback. The government will specifically ensure that sports organisations and school boards are able to assess the regulations before they take effect.

## **XI OUTLOOK AND CONCLUSIONS**

Canadian sport is increasingly commercialised. Commercialisation brings with it new challenges that lawyers and business stakeholders will have to face. It is hoped this chapter will serve as a starting point for those who are seeking to navigate Canadian sports law. The past decade has seen a notable increase in Canada’s profile at international sports competitions. The nation hosted the 2010 Olympic Winter Games in Vancouver and the 2015 Pan American Games in Toronto. Canada also held the 2014 U-20 Women’s World Cup and the 2015 Women’s World Cup. In addition, Canada, Mexico and the United States were successful in a joint bid to host the 2026 World Cup. Ten of these matches are expected to be held in Canada.

It appears that Canada may also seek to host the Winter Olympics again in 2026. The city of Calgary has formed a bid corporation and it has estimated that hosting the Olympics would cost the city C\$4.6 billion.<sup>73</sup> Canadians can expect to learn in the coming months as to whether Calgary will ultimately bid on the 2026 Games.

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72 Jaclyn Seidman, Connor Spelliscy and Michael Wilson, ‘Ontario Proposes New Rules for Ticket Resale’, Legislative Comment on the Ticket Speculation Act, online: [www.goodmans.ca/Doc/Ontario\\_Proposes\\_New\\_Rules\\_for\\_Ticket\\_Resale](http://www.goodmans.ca/Doc/Ontario_Proposes_New_Rules_for_Ticket_Resale).

73 Robson Fletcher, ‘\$4.6B for another Olympics in Calgary: exorbitant, miserly, or a “balanced plan”?’ (20 June 2017), CBC News, online: [www.cbc.ca/news/canada/calgary/olympic-bid-exorbitant-miserly-balanced-plan-1.4169315](http://www.cbc.ca/news/canada/calgary/olympic-bid-exorbitant-miserly-balanced-plan-1.4169315).

# ENGLAND AND WALES

*Paul Shapiro and Ben Rees*<sup>1</sup>

## I ORGANISATION OF SPORTS CLUBS AND SPORTS GOVERNING BODIES

### i Organisational form

Depending on their size, level of sophistication and aims, sports clubs and governing bodies typically take one of the following forms:

- a* unincorporated associations;
- b* companies limited by shares;
- c* companies limited by guarantee; or
- d* one of a variety of charitable or community interest vehicles.

Clubs that have taken no formal steps to incorporating will be unincorporated associations that are, therefore, not separate legal entities, and all of their contracts will need to be entered into by a member of the club (such as a member of the managing committee and as dictated by the club's constitution). A private company limited by shares is the usual form taken by professional clubs that are operating with a view to making a profit and that wish to raise finance through the issue of shares. Some Premier League football clubs have listed their shares on public markets over the years (with varying degrees of success).

### ii Corporate governance

Governance of sport in the UK has generally been left to sports governing bodies, with the state taking a hands-off approach. Sports organisations can be compelled to comply with certain corporate governance requirements as a condition of receiving public funds, such as from Sport England or UK Sport<sup>2</sup> or as a condition for participation in a competition. For example, the Premier League restricts persons from having an interest in, or having the power to influence the decision-making of, more than one club.<sup>3</sup> The Sport and Recreation Alliance also maintains a Voluntary Code of Good Governance that it encourages sports bodies to adopt.

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1 Paul Shapiro and Ben Rees are managing associates at Northridge Law LLP.

2 UK Sport and Sport England, New Code for Sports Governance, 31 October 2016 available at [www.uksport.gov.uk/news/2016/10/31/new-code-for-sports-governance-published](http://www.uksport.gov.uk/news/2016/10/31/new-code-for-sports-governance-published).

3 Premier League Rules, 2018/2019, Section I.

Beyond the above, there are no specific governance laws that apply only to sports organisations. Instead, organisations will need to comply with the applicable legal framework that is in place for its particular legal form. For example, if the organisation is incorporated as a company, it will need to comply with the Companies Act 2006.

### iii Corporate liability

The laws of England and Wales do not include any specific statutory provisions covering the liability of officers of sports clubs or governing bodies. Most sports organisations are structured as companies (see Section I.i), and the directors of such companies are subject to the same duties and liabilities as directors of companies generally.

The Companies Act 2006 codified certain common law and equitable duties of directors for the first time. It sets out the general duties of directors, which include, *inter alia*:

- a to act within their powers in accordance with the company's constitution, and to use those powers only for the purposes for which they were conferred;
- b to promote the success of the company for the benefit of its members;
- c to exercise reasonable care, skill and diligence; and
- d to avoid conflicts of interest.

A director of a sports organisation will also be subject to a wide range of further regulation and legislation, including the Insolvency Act 1986, the Company Directors' Disqualification Act 1986, the Health and Safety at Work etc. Act 1974 and the Corporate Manslaughter and Corporate Homicide Act 2007.

Failure to comply with the relevant duties or obligations can result in personal liability (both civil and criminal) being incurred by a director of a sports organisation.

## II THE DISPUTE RESOLUTION SYSTEM

The rules that govern the different sports in England and Wales typically specify the forum for disputes arising between the governing body and the participants in that sport. The rules may also specify how disputes between two participants (e.g., two clubs) are to be resolved. Where a dispute arises outside the rules of the sport, for example between a club and sponsor, the parties are free to choose how disputes between them are to be resolved.

### i Access to courts

In the absence of an agreement to arbitrate, the courts have jurisdiction over sporting disputes.

Where a party seeks to challenge a disciplinary decision, the courts do not apply a *de novo* jurisdiction, but instead conduct a 'supervisory review' whereby they seek to ensure that the 'primary decision-maker' (the disciplinary body) 'has operated within lawful limits'.<sup>4</sup>

In essence, a challenge can be raised if a governing body has made a decision or exercised its regulatory functions in a manner that:

- a is outside of its powers;
- b is procedurally unfair or contrary to natural justice;
- c takes into account irrelevant considerations or fails to take into account relevant considerations;

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<sup>4</sup> *Bradley v. Jockey Club* [2004] EWHC 2164 QB, upheld on appeal [2005] EWCA Civ 1056.

- d* has no factual basis;
- e* is contrary to legitimate expectation; or
- f* is unreasonable in the sense of being irrational, perverse, arbitrary or capricious.

## **ii Sports arbitration**

Parties are free to resolve their disputes through arbitration. The relevant legislation, the Arbitration Act 1996, provides that for an arbitration agreement to be valid, it must be in writing.

By electing to submit disputes to arbitration, the parties are precluded from bringing proceedings in the courts, save that the courts always have jurisdiction to determine appeals arising out of arbitrations (the grounds of which are limited under the Arbitration Act 1996), and that there are functions (such as compelling an individual to give evidence) that the courts can exercise in support of arbitrations.

Many sports in England and Wales require that disputes are resolved through arbitration. For example, domestic football disputes are subject to the arbitration rules provided for by the Football Association (the FA), the Premier League or the Football League.

While there is no one standard arbitral process, many sports utilise the arbitration rules of Sport Resolutions (UK), a dispute resolution service that establishes tribunals and assists in resolving sports disputes. In other cases, such as anti-doping cases or where required by a sport's international federation, the Court of Arbitration for Sport will have jurisdiction.

## **iii Enforceability**

Disciplinary sanctions, such as fines or suspensions, can be enforced by governing bodies through their rules.

In court cases, a party is able to utilise the full range of enforcement powers that are available to litigants when enforcing court orders.

Arbitral awards can be enforced through the domestic courts pursuant to Sections 42 and 66 of the Arbitration Act 1996.

# **III ORGANISATION OF SPORTS EVENTS**

## **i Relationship between organiser and spectator**

There is no proprietary or exclusive right in a sports event in the UK,<sup>5</sup> so an event owner's relationship with spectators, athletes and clubs is governed by the relevant laws, including contract, intellectual property and real property legislation.

In relation to spectators, the organiser can restrict entry to the venue, and can stipulate the conditions for access through its ticket terms and conditions. These terms must be incorporated into the contract by being brought to the spectator's attention on purchase. This is traditionally done through 'small print' on the back of the ticket. This will not always be sufficient, however, as all terms must be legible and in plain and intelligible language, and must also comply with a range of measures designed to protect consumers from unfair terms.<sup>6</sup> Typically, these terms and conditions will include restrictions such as on taking photos, on making recordings or collecting data, on the resale, transfer or use of the tickets

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<sup>5</sup> *Victoria Park Racing v. Taylor* (1937) 58 CLR.

<sup>6</sup> Consumer Rights Act 2015, Section 64.

as a promotion, and on the promotion of non-sponsors. Breach of these conditions would render the ticket void. In these cases, a spectator can then be evicted and the organiser may sue for trespass, breach of contract or both.

## ii Relationship between organiser and athletes or clubs

Where the event organiser also acts as the governing body, it will typically form one part of a pyramid structure of sport organisation and regulation, which is the traditional model adopted in the UK and throughout Europe.<sup>7</sup> This model sees tiers of governance with global organisers at the top (such as FIFA), regional bodies below them (such as UEFA), then national bodies (such as the FA), followed by clubs and players at the bottom.

Where the event organiser is separate to the governing body, such as in the Premier League or Premiership Rugby, a shareholder model is typically used. For example, each Premier League club is a shareholder of the Football Association Premier League.

In both arrangements, the event organiser can define the structure and format of the competition, along with a whole range of other measures such as commercial exploitation and distribution of revenues, through its rule book or participation agreement, which acts as a contract between the organiser and the clubs (and to which each player must also adhere).

## iii Liability of the organiser

The civil liability of organisers of sporting events falls within two principal categories.

### *Occupiers' Liability Act 1957*

The Occupiers' Liability Act 1957 enshrines in statute the duty that an occupier of premises (which includes those exercising control over the premises) owes to their 'visitors'. The duty of care is 'to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises'.<sup>8</sup>

The above is in addition to the regime pursuant to the Safety of Sports Grounds Act 1975, which imposes certain further obligations on the owners of sports grounds, such as the requirement for stadia with a capacity of over 10,000 to have a safety certificate (which imposes various obligations on the owner).

### *Negligence*

Claimants must show that they were owed a duty of care, that such duty was breached and that the breach caused the loss or damage complained of. The general duty of care owed by an occupier is the same duty as is owed by anyone to his or her 'neighbour', as enshrined in English common law.<sup>9</sup>

The extent of the duty of care attracts much judicial deliberation. This duty, and the scope of people to whom that duty is owed, is fact-specific. However, as a general principle,

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7 See Commission Staff Working Document – The EU and Sport: Background and Context – Accompanying document to the White Paper on Sport {COM(2007) 391 final}, Paragraph 3.4, for further discussion.

8 Occupiers' Liability Act 1957, Section 2(2).

9 The foundations of which are found in *Donoghue v. Stevenson* [1932] AC 562.



the duty is said to be that of taking reasonable care to avoid injury to a person. In determining what is reasonable, the courts will consider the particular circumstances, such as the sporting context in which the alleged negligence took place.

#### **iv Liability of the athletes**

Athletes and participants may be held liable in negligence in respect of damage or injury caused both to spectators or to other athletes.

As regards liability to spectators, the duty is one of reasonable care, having taken into account the sporting context. As regards other athletes, liability can arise under the torts of trespass to the person or negligence.

Trespass requires the claimant to show that the defendant intended to injure him or her. This is a high hurdle that has limited the instances where such a cause of action has been successfully alleged.

Importantly, so far as negligence is concerned, athletes are taken to have accepted the risks inherent in sport (and particularly so in sports of skill and physicality). Courts are unlikely to find negligence where the relevant sporting rules have not been breached, but it does not automatically follow that a breach of the rules will lead to a finding of civil liability.<sup>10</sup>

The damages that may be awarded in sport can be significant, particularly where a professional athlete suffers a career-ending injury. For example, in *Collett v. Smith*,<sup>11</sup> a player whose career was ended following an injury he suffered playing for Manchester United's reserve team was awarded around £4.3 million in damages.

#### **v Liability of the spectators**

Much of the statutory framework in this area is linked to prevention of football disorder or hooliganism. Pursuant to powers provided under the Football Spectators Act 1989, a football banning order can be made against a supporter. This is a civil sanction, and has the effect of banning an individual from attending football matches, both domestic and international, for a prescribed period of time. Such an order can be imposed owing to evidence of previous football violence, a previous conviction for football-related violence or during a control period (before, during and after an overseas match or tournament).

#### **vi Riot prevention**

Rioting, hooliganism and more general issues of crowd disturbance have been most commonly associated with football. These issues, which were at their peak in the 1970s and 1980s, led to the implementation of a variety of legislative measures aimed at curbing them; for example, legislation prohibiting standing at certain categories of football match (although this measure was principally introduced for safety reasons)<sup>12</sup> and prohibiting the sale (or resale) of football tickets by unauthorised persons.<sup>13</sup> Football supporters can also be the subject of banning orders pursuant to the Football Spectators Act 1989 (see Section III.v).

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10 *Condon v. Basi* [1985] 1 WLR 866.

11 *Collett v. Smith* [2008] EWHC 1962 (QB).

12 Football Spectators Act 1989, Section 11.

13 Criminal Justice and Public Order Act 1994, Section 166.

Clubs are obliged to pay for the attendance of police services at matches at their grounds.<sup>14</sup> However, the police cannot charge clubs for the cost of crowd control and public order policing outside the immediate vicinity of the club's premises and policing that is on land not owned by, or under the control of, the club.<sup>15</sup>

## IV COMMERCIALISATION OF SPORTS EVENTS

### i Types of and ownership in rights

The key sports-related rights that can be exploited are broadcasting, sponsorship, merchandising and ticketing. Additionally, sports data is now an important revenue stream.

In relation to broadcasting, a secure venue allows the event organiser to stipulate that only officially appointed licensees can broadcast from the event. The ownership of the moving images will initially sit with the producer and director, and of the sound recordings with the producer.<sup>16</sup> Copyright should be assigned to the event organiser (through the broadcaster) who will then license the rights back to the broadcaster for broadcast in a particular territory.

Broadcasting rights in many high-profile sports are sold collectively. The collective sale by the Premier League had been the subject of an investigation by Ofcom, the competition regulator, but this was dropped in August 2016. In any event, the sale of broadcasting rights should be done by way of a tender process that complies with the criteria in the *Champions League*, *Bundesliga* and *FAPL* cases.<sup>17</sup>

Sponsorship encompasses a wide variety of different rights and categories depending on the entity being sponsored. The rights holder can protect its sponsorship rights through maintaining trademark registrations for its team logo and emblems and through the tort of passing off.

### ii Rights protection

In summary, the framework for the protection and enforcement of the above-noted rights is as follows.

#### **Trademarks**

A rights holder can register its brand names, logos and other brand indicators as a national UK registered trademark with the UK Intellectual Property Office. This allows a trademark owner to enforce his or her rights in the UK where an infringer uses an identical or similar mark in the circumstances detailed in Section 10 of the Trade Marks Act 1994 (TMA).

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14 Police Act 1996, Section 25.

15 *Leeds United Football Club Ltd v. Chief Constable of West Yorkshire* [2013] EWCA Civ 115.

16 Copyright Design and Patents Act 1988 (CDPA), Section 9.

17 Commission decision of 23 July 2003, case 37398, *Joint selling of the commercial rights of the UEFA Champions League*, OJ 2003 L 291/25, Commission decision of 19 January 2005, case 37214, *Joint selling of the media rights to the German Bundesliga*, OJ 2005 L 134/46, *Re an Agreement between the FA Premier League and BSkyB* [2000] EMLR 78, Commission press release IP/06/356, 22 March 2006.

Among other criteria, a trademark must be capable of distinguishing the goods or services of one undertaking from those of another.<sup>18</sup> Therefore, it is not possible to register marks that are, *inter alia*, non-distinctive, generic or primarily descriptive.<sup>19</sup>

The EU Trade Mark Regulation<sup>20</sup> currently affords protection for European Union trademarks (previously known as Community trademarks) throughout the UK but this may change once the UK leaves the EU (see Section X).

### **Copyright and database rights**

Copyright arises automatically and can provide protection for 70 years for literary, dramatic, musical or artistic works<sup>21</sup> and 50 years for broadcasts<sup>22</sup> and sound recordings.<sup>23</sup> Not all unauthorised use of a copyrighted work will amount to infringement. For example, the ‘fair dealing’ exceptions allow copyright protected works to be used for the reporting of current events, provided sufficient acknowledgement is given.<sup>24</sup>

Neither literary nor database copyright will subsist in a fixture list, and fixture lists are not protected by the *sui generis* database right (SGDR).<sup>25</sup> However, in *Football DataCo*, the courts confirmed that the SGDR subsists in a database of live match data<sup>26</sup> if there has been a substantial investment in obtaining, verifying or presenting its contents.<sup>27</sup>

### **Image rights**

English law does not recognise a proprietary right in a person’s image<sup>28</sup> or a specific right of privacy.<sup>29</sup> There is a web of laws, however, that can be stitched together to protect an individual’s ‘image rights’. If a sportsperson’s image is used to endorse goods<sup>30</sup> or on merchandise,<sup>31</sup> without his or her authorisation, he or she could prevent further use of these items by bringing an action for the common law tort of passing off, provided he or she can demonstrate that he or she has goodwill or reputation attached to the goods or services and that damage was suffered as a result of the misrepresentation. When a sportsperson is photographed in circumstances that were obviously private<sup>32</sup> and the photograph is offensive or is not being used lawfully and fairly,<sup>33</sup> safeguards against its publication without consent

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18 TMA, Section 1.

19 TMA, Section 3(1)(b) and *Rugby Football Union and another v. Cotton Traders Ltd* [2002] All ER (D) 417 (Mar).

20 EU Trade Mark Regulation (207/2009/EC).

21 CDPA, Section 12.

22 CDPA, Section 14.

23 CDPA, Section 13A.

24 See CDPA, Section 30(2).

25 *Football DataCo Ltd v. Yahoo, Britten's Pools and others* [2010] EWHC 841 (ch).

26 *Football DataCo Ltd and others v. Stan James plc and others*; and *Football DataCo and others v. Sportradar GmbH and another* [2013] EWCA Civ 27, 6 February 2013.

27 Copyright and Rights in Databases Regulations 1997, Regulation 13.

28 *Elvis Presley Enterprises Inc v. Sid Shaw Elvisly Yours* [1999] RPC 567, Paragraph 597.

29 *Douglas v. Hello! Ltd* [2007] UKHL 21, Paragraph 293.

30 *Edmund Irvine & Tidswell Ltd v. Talksport Ltd* [2002] 2 All ER 414.

31 *Robyn Rihanna Fenty and others v. Arcadia Group Brands Ltd (t/a Topshop) and another* [2013] EWHC 2310 (Ch).

32 *Campbell v. Mirror Group Newspapers Limited* [2004] UKHL 22.

33 Data Protection Act 2018, Section 2.

can be obtained through actions for breach of confidence, misuse of private information (both when interpreted in accordance with the right to a private life)<sup>34</sup> or infringements under the Data Protection Act 2018 (DPA).<sup>35</sup>

### iii Contractual provisions for exploitation of rights

There are no mandatory statutory provisions in sponsorship agreements, and the final form of the agreement will depend on the negotiating position of the parties. Much of the contract will encompass the provisions and boilerplate typically found in any commercial contract.

The agreement should be a clear reflection of the commercial deal (i.e., what the sponsor is acquiring and the rights holder is receiving in return), and in this regard it is important to clearly state the scope of rights to be granted. For example, what rights is the sponsor acquiring? Will they be in a particular category or brand sector? Are they exclusive, and in what territories? Are there any key exclusions or matters reserved for the rights holder or its other commercial partners? On what terms can the sponsor access and commercially exploit the team or individual athletes? Will the rights holder have approval rights over merchandise produced?

Particularly relevant in individual sponsorship agreements are provisions addressing the situation where a player's conduct, while not necessarily being illegal, falls below the thresholds expected of the sponsor (morality clauses). The sponsor will want flexibility to suspend or even terminate the agreement should the player behave badly in their subjective view, whereas the player will push for a very limited termination right.

One other area that is generally heavily negotiated is the sponsor's rights in and around expiry of the deal. It is common for the sponsor to insist on having both an exclusive period to negotiate a renewal at the end of the agreement, and a right to be notified of, and to match, any *bona fide* offer from a third party.

## V PROFESSIONAL SPORTS AND LABOUR LAW

### i Mandatory provisions

Many sports, including major sports such as football, rugby and cricket, prescribe that standard form contracts are to be used to govern employment relationships between certain participants (most usually between clubs and players). These standard forms are set by the governing body following consultation with the relevant stakeholders (including the body that represents the players of that sport).

Most provisions are therefore not subject to negotiation on an individual basis. The standard contract will cover, *inter alia*, the primary obligations of the player and club, termination rights, grievance and dispute resolution procedures, and confidentiality.<sup>36</sup>

The standard terms must be used by the parties, but there is freedom to negotiate certain key terms – for example, remuneration (both as regards salary and image rights).

The parties are also free to negotiate duration. However, it should be noted that a contract of excessive duration may be held to be unenforceable. In *Proactive Sports Management Ltd v.*

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34 European Convention on Human Rights, Article 8.

35 *Douglas v. Hello! Limited & Ors* [2001] 2 WLR 992, Paragraph 55.

36 See, by way of example, the standard form contracts for both Football League and Premier League players, found at Form 19 and 20 respectively of the Premier League Handbook 2017/18 ([www.premierleague.com/publications](http://www.premierleague.com/publications)).

*Rooney and Others*,<sup>37</sup> it was held that an eight-year image rights deal entered into by Wayne Rooney (then 17 years old) was void and unenforceable as it was in unreasonable restraint of his trade.

## ii Free movement of athletes

This area is one that is likely to be affected by the decision by the UK to leave the EU; in that regard, the precise impact and changes to this area of law, will depend, *inter alia*, on the agreements arising from the Brexit negotiations. The position at the time of writing is set out in Section X.

This area is shaped by EU law and European jurisprudence, most notably the *Bosman*<sup>38</sup> and *Kolpak*<sup>39</sup> cases. In accordance with settled authority, any restriction on free movement within the EU must be justified on the basis of a legitimate objective and must be proportionate.

The English doctrine of restraint of trade has also been used in a *Bosman*-type case dating back to 1964. In *Eastham v. Newcastle United Football Club and Football Association*,<sup>40</sup> the claimant (a footballer) successfully argued that the then rules of the Football League, which required a fee to be paid to release the player's registration, notwithstanding that his contract had expired, were in restraint of trade.

As regards permission to work in the UK, nationals of the EU, European Economic Area (EEA) or Switzerland do not require a visa, while those from outside the EEA, Switzerland and certain Commonwealth countries require a visa. The visa process is administered by UK Visas and Immigration. Under the current system, applicants require a sponsor and governing body endorsement. The government delegates the responsibility for the detail as to the eligibility for sponsor and governing body endorsements to the relevant governing body. By way of example, the FA's current system<sup>41</sup> provides for automatic granting of a visa if football players have participated in a minimum percentage of competitive matches for their home country's senior international team where they were available for selection during the two years preceding the date of the application (or the preceding 12 months for players aged 21 or under). The percentage of matches required is on a sliding scale depending on the relevant national team's position in the FIFA World Rankings.<sup>42</sup> If a player does not meet the automatic criteria, an applicant club can make an application to an 'exceptions panel', which will consider, *inter alia*, the value of the transfer fee, the wages to be paid to the player and the league from which the player is joining.

## iii Application of employment rules of sports governing bodies

Subject to the requirement to use standard form contracts, and thereby the requirement to incorporate mandatory provisions, parties are free to agree the terms of employment contracts.

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37 [2011] EWCA Civ 1444, [2012] FSR 16.

38 *Union Royale Belge des Sociétés de Football Association ASBL v. Jean-Marc Bosman* (C-415/93) [1995] ECR I-4921.

39 *Deutscher Handballbund v. Kolpak* (C-438/00) [2003] ECR I-4135.

40 [1964] Ch 413.

41 [www.thefa.com/-/media/files/thefaportal/governance-docs/registrations/gbe-players-criteria-2018-2019.ashx](http://www.thefa.com/-/media/files/thefaportal/governance-docs/registrations/gbe-players-criteria-2018-2019.ashx).

42 The minimum percentage varies from 30 per cent (for national teams ranked in the top 10 in the FIFA rankings) to 75 per cent (for national teams ranked between 31 and 50 in the FIFA rankings).

## VI SPORTS AND ANTITRUST LAW

Aside from issues of free movement, the key European legislative principles in this area are Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). As with the rules regarding the free movement of persons, it is unclear at the time of writing the extent to which the EU competition law regime will apply to the UK on exiting the EU.

Article 101 TFEU prohibits agreements between undertakings, or decisions by associations of undertakings, which have as their object or effect the prevention, restriction or distortion of competition as between Member States. Article 101 is mirrored in domestic law by Chapter I of the Competition Act 1998 and, in essence, applies the Article 101 test to the UK market. Article 102 TFEU prohibits the abuse of a dominant position affecting trade between Member States. Article 102 is mirrored in domestic law by Chapter II of the Competition Act 1998, and, in essence, also applies the Article 102 test to the UK market.

The *Meca-Medina* case<sup>43</sup> is authority for the fact that sporting rules are subject to competition law scrutiny.

Breaches of the competition rules in the sporting context can be enforced, *inter alia*, by the UK's Competition and Markets Authority or privately by those affected. Drawing from *Meca-Medina* and the Commission's analysis of the application of competition law to sport found in the White Paper on Sport<sup>44</sup> and the accompanying staff working document,<sup>45</sup> the test to be applied to breaches can, in basic terms, be stated as follows: is the sports association adopting a particular rule for an 'undertaking' or 'association of undertakings'? And does the rule restrict competition (Article 101) or constitute an abuse of a dominant position (Article 102)?

Applying *Wouters*,<sup>46</sup> this will depend on the context and objectives of the rule, whether the restrictions are inherent in the pursuit of those objectives, and whether the rule is proportionate in light of those objectives. Proportionality is considered in light of whether the rule goes any further than is reasonably necessary to secure the rule's object, and whether it is applied in a transparent, objective and non-discriminatory manner:<sup>47</sup> is trade between Member States affected? And does the rule meet the conditions of Article 102?

The English common law doctrine of restraint of trade can also be used to challenge the rules of domestic sports governing bodies. In summary, the test<sup>48</sup> is as follows: the person bringing a challenge must show that the rule of a sports governing body prevents (or limits) his or her earning a living. Once established, the governing body must show that the restraint is reasonable and justified in the interests of the parties. 'Reasonable' in this context means that it is necessary and that it goes no further than reasonably necessary to achieve that aim. If this can be established, the third stage of the test is that the restraint must be reasonable in the interests of the public (not just the parties concerned). An action that restrains trade without justification is void and unenforceable.

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43 Case C-514/04 P, *Meca-Medina and Majcen v. Commission* [2006] ECR I-6991.

44 See footnote 7.

45 SEC(2007) 935.

46 *Wouters v. Algemene Raad van de Nederlandse Orde Van Advocaten* (C309/99) [2002] All ER (EC) 193.

47 SEC(2007) 935 at Paragraph 2.1.5.

48 See *Nordenfelt v. Maxim Nordenfelt* [1894] AC 535.

## VII SPORTS AND TAXATION<sup>49</sup>

For non-resident internationally mobile sportspeople, the UK tax regime is complicated. As well as being taxed on prize money and appearance fees earned in the UK (as is the case in most jurisdictions), under the UK's application of the provisions of Article 17 of the Organisation for Economic Co-operation and Development (OECD) Model Treaty, non-resident sportspeople are also taxed on a proportion of their global endorsement income. This is typically calculated by reference to their UK appearances as a proportion of global appearances during the tax year. The calculation typically has many variable factors to take into account (whether endorsements are 'linked' to the performance, whether training days should be included in the calculation, etc.) and, under the UK's self-assessment tax system, it is the sportsperson's responsibility to calculate the liability and submit his or her returns.

For team sports, where the competitors are usually 'employees', the position is clearer. It is assumed that players on teams from other countries are tax-resident in those jurisdictions, and subject to tax on their employment income in that territory. On that basis, the UK tax authorities would not typically seek to tax players employed by non-UK resident teams on their sporadic appearances in the UK, as this would not be deemed to be 'employment exercised in the UK' under Article 15 of the OECD Model Tax Treaty. The UK tax authorities have reserved the right to seek to tax a proportion of endorsement income of such players, in the same way as they seek to tax non-resident sportspeople. We understand, however, that no such enquiries have been raised to date.

Clubs competing in international events in the UK would not typically be subject to UK corporation tax as they would not create a tax presence (a permanent establishment) in the UK.<sup>50</sup>

## VIII SPECIFIC SPORTS ISSUES

### i Doping

The World Anti-Doping Agency (WADA) implements a uniform, global code that regulates drug use in sport. Now in its third iteration, the latest version of the WADA Code came into force on 1 January 2015. The major (and many minor) sports in the UK are signatories.

The national anti-doping organisation in the UK is UK Anti-Doping, a public body entrusted with results management and case presentation for most sports in the UK.

Doping, *per se*, is not a criminal offence in the UK. There are, however, a number of substances on the WADA Prohibited Substances list<sup>51</sup> that are also criminalised in the UK by virtue of the Misuse of Drugs Act 1971, including stimulants such as cocaine, narcotics such as methadone and cannabinoids.

The government has previously suggested that it will investigate the possibility of criminalising doping,<sup>52</sup> although it appears that any such developments are in their nascency.

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49 The authors extend their thanks to Peter Hackleton, a tax partner at Saffery Champness, who contributed to this Section.

50 See *Nordenfelt v. Maxim Nordenfelt* [1894] AC 535.

51 [www.wada-ama.org/sites/default/files/resources/files/wada-2015-prohibited-list-en.pdf](http://www.wada-ama.org/sites/default/files/resources/files/wada-2015-prohibited-list-en.pdf).

52 [www.bbc.co.uk/sport/0/34653817](http://www.bbc.co.uk/sport/0/34653817).

## ii Betting

Betting is governed by the Gambling Act 2005. The Gambling Act established the Gambling Commission as the domestic body with responsibility for licensing betting operators and ensuring their compliance with the Gambling Act.

The Gambling Act includes powers that provide for information sharing with sports governing bodies.<sup>53</sup> Aside from the Gambling Act, a number of information sharing agreements between sports governing bodies and betting operators are in place.

Betting, *per se*, is not illegal in England and Wales, although there are often links between betting and integrity issues (such as match-fixing).

With a view to maintaining integrity, some domestic sports governing bodies have banned betting by those involved in their sport. The precise approach and scope of such prohibitions differ for each sport, but are often widely drafted (to include not just players, but also coaches, club officials and employees) with sanctions ranging from a warning to a fine and expulsion (see, e.g., the approach taken by the FA in football<sup>54</sup> and the Rugby Football Union (RFU) in rugby union).<sup>55</sup>

## iii Manipulation

Match-fixing is not, *per se*, illegal under English law. Rather, a number of criminal offences may be applicable depending on the nature of the offence, including cheating or enabling others to cheat at gambling (Section 42 of the Gambling Act); bribing or being bribed (Sections 1 and 2 of the Bribery Act 2010); and conspiracy (Section 1 of the Criminal Law Act 1977).

There have been a number of high-profile criminal cases in this regard, particularly in relation to cricket.<sup>56</sup> Successful convictions can lead to prison terms.

Outside the criminal framework, the primary responsibility in this area vests with the sports governing bodies, which, as part of their rules, prohibit manipulation. In monitoring and enforcing their rules, these governing bodies are aided by the information-sharing provisions contained in the Gambling Act and their agreements with betting operators.

Governing bodies may provisionally suspend or ban a participant if he or she is linked to betting arrangements that may give rise to integrity issues (such as match-fixing and result manipulation). By way of example, the British Horseracing Authority (BHA) suspended jockey Kieren Fallon following the initiation of criminal proceedings by the Crown Prosecution Service and pending determination of those charges. Mr Fallon unsuccessfully challenged that provisional suspension in the High Court.<sup>57</sup> Having regard to 'the upholding of the perceptions of integrity of horse racing',<sup>58</sup> the High Court upheld the BHA's suspension. Mr Fallon was not convicted in the criminal courts, and he returned to horse racing.

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53 See, for example, the Gambling Act, Sections 30 and 88.

54 See Rule E8 of the Rules of the FA.

55 See Regulation 17 of the RFU Rules and Regulations.

56 The most high-profile case in recent times being the criminal convictions against the Pakistani cricketers Salman Butt, Mohammad Asif and Mohammad Amir relating to the bowling of no-balls in the test match against England at Lords' in 2010: *R v. Majeed, Butt, Asif & Amir Cooke J*, 3 November 2011; *R v. Amir, Butt* [2011] EWCA Crim 2914.

57 *Fallon v. British Horseracing Authority* [2006] EWHC 2030 (QB).

58 *ibid.* at Paragraph 62.



#### **iv Grey market sales**

Aside from where event-specific legislation has been passed (as was the case with the London 2012 Olympics),<sup>59</sup> football is the only sport in England where it is an offence to sell or otherwise dispose of a ticket unless you are expressly authorised to do so.<sup>60</sup> In other sports, the rights holder in question must bring an action for breach of the non-transferability provisions in the ticket terms and conditions (see Section III.i) to prevent the secondary sale of tickets.

The Consumer Rights Act 2015 includes disclosure requirements for those reselling tickets and the marketplaces where such tickets are resold. Online secondary ticket platforms must, *inter alia*, ensure that a buyer is given information regarding the seat and row number or standing area, any restriction that limits use of the ticket to particular persons (such as a youth audience) and the ticket's face value.<sup>61</sup> A new requirement to provide a unique ticket number that may help the buyer to identify the seat or standing area or its location was introduced in 2018.<sup>62</sup> These requirements give rights holders a means to identify the particular ticket being resold, which in turn assists in identifying those who are reselling tickets in breach of the ticket's terms and conditions. Further, in July 2018, a new law was introduced banning ticket touts from using automated software to buy more tickets for events than permitted.<sup>63</sup>

### **IX THE YEAR IN REVIEW**

#### **i Data protection**

The DPA received Royal Assent on 23 May 2018. The DPA overhauls and updates the previous data protection regime in the UK, which had struggled to keep pace with rapid technological growth. The DPA aims to make UK data protection laws fit for the digital age and empower people to take control of their data. It provides a comprehensive and modern framework for data protection, with stronger sanctions for malpractice and sets new standards for protecting data, in accordance with the General Data Protection Regulation (EU) 2016/679. It also provides individuals with new rights to move or delete personal data.<sup>64</sup> This new regime applies to sport like any other business, which has meant that most clubs, governing bodies and other sports organisation have needed to take action to become compliant in the past 12 months. Non-compliance can lead to large fines and also, for publicly funded sports organisations, the risk of having funding withdrawn.

#### **ii Integrity**

2018 saw a continued focus on integrity issues in sport.

In September 2018, WADA took the decision to reinstate the Russian Anti-Doping Agency (RUSADA) as compliant with the WADA Code, subject to RUSADA's compliance with post-reinstatement conditions (principally procuring the Information Management

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59 London Olympic Games and Paralympic Games Act 2006, Section 31.

60 Criminal Justice and Public Order Act 1994, Section 166.

61 Consumer Rights Act 2015, Section 90.

62 Digital Economy Act 2017, Section 105.

63 Digital Economy Act 2017, Section 106.

64 See DPA 2018 Factsheet for a general overview of this legislation available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/711162/2018-05-23\\_Factsheet\\_1\\_-\\_Act\\_overview.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/711162/2018-05-23_Factsheet_1_-_Act_overview.pdf).

System data of the former Moscow Laboratory).<sup>65</sup> In reaching the reinstatement decision, WADA considered whether RUSADA had satisfactorily complied with the two outstanding criteria for reinstatement in the agreed RUSADA Roadmap to Compliance – namely, acceptance by RUSADA of the findings of the McLaren Report and access to samples and data in the former Moscow Laboratory.<sup>66</sup> The decision reached generated opposing views and led to the resignation of Beckie Scott, Canadian Olympic champion, from the WADA body that recommended RUSADA's reinstatement, the WADA Compliance Review Committee.

In tennis, the independent review panel undertaking a review of integrity in the sport released its interim report in April 2018.<sup>67</sup> The panel's interim findings have been subject to a period of consultation, with the final report expected to be published in the coming months.

## **X OUTLOOK AND CONCLUSIONS**

On 29 March 2017, the United Kingdom gave notice to the European Council of its intention to withdraw from the European Union in accordance with Article 50 of the Lisbon Treaty. That notice triggered a two-year period for the UK and EU to negotiate and agree the terms of the UK's exit. As such, the UK is set to leave the EU by 29 March 2019 unless the European Council, in agreement with the United Kingdom, unanimously decides to extend the period. Despite lengthy and often heated negotiations between the UK government and the EU, at the time of writing many questions regarding the UK's withdrawal from the EU remain unanswered. The UK government's position is that the free movement of persons between the EU and the UK should end on Brexit. The UK government want to replace free movement with a 'mobility framework', which will allow UK and EU citizens to travel to each other's territories, and apply for study and work.<sup>68</sup> It is not envisaged that this will give sportspeople the same right of free movement as currently exists.

How Brexit will impact sport will very much depend on the terms of the UK's withdrawal from the EU. If the UK government's proposal is implemented and therefore EU nationals no longer have the right to freely move to the UK, this could leave open the possibility for the UK government to set specific entry criteria for all sportspeople (in a similar manner to the way in which non-EU nationals are currently treated – see Section V). Any new criteria are unlikely to restrict the ability of top professional clubs to attract elite, international stars with the impact more likely to be felt further down the sporting pyramid by those who have historically recruited less-established players from the EU.

Governing bodies could also consider introducing quotas based on nationality – thereby limiting the number of foreign players that can appear in matchday squads. Further, there are certain EU-specific provisions in sports rules and regulations. By way of example, UK football clubs currently benefit from an exemption in Article 19 of the FIFA Regulations on the Status and Transfer of Players, which permits them (subject to approval from FIFA) to sign players within the EU or EEA aged between 16 and 18. This has been a key recruitment

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65 [www.wada-ama.org/en/media/news/2018-09/wada-executive-committee-decides-to-reinstate-rusada-subject-to-strict-conditions](http://www.wada-ama.org/en/media/news/2018-09/wada-executive-committee-decides-to-reinstate-rusada-subject-to-strict-conditions).

66 [www.wada-ama.org/sites/default/files/2017-08-02\\_rusada\\_roadmaptoconpliance\\_en.pdf](http://www.wada-ama.org/sites/default/files/2017-08-02_rusada_roadmaptoconpliance_en.pdf).

67 <http://tennisirp.com/>.

68 The future relationship between the United Kingdom and the European Union available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/725288/The\\_future\\_relationship\\_between\\_the\\_United\\_Kingdom\\_and\\_the\\_European\\_Union.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/725288/The_future_relationship_between_the_United_Kingdom_and_the_European_Union.pdf).

strategy for many clubs in recent years. On withdrawing from the EU (and absent a change of these regulations), UK football clubs would lose the ability to sign these young players and instead would be subject to the general prohibition on the international transfer of players under 18 years old.

# FINLAND

*Pia Ek and Hilma-Karoliina Markkanen*<sup>1</sup>

## I ORGANISATION OF SPORTS CLUBS AND SPORTS GOVERNING BODIES

### i Organisational form

There are some 20,000 registered non-profit associations in Finland whose purpose is to organise sports activities.<sup>2</sup> As Finnish sport is based on the autonomy of non-profit associations, the sports clubs and federations decide autonomously on their administration and activities in accordance with their by-laws.

Generally, both non-professional and professional sports clubs are organised as non-profit associations. Hence, unpaid voluntary work is crucial for the organisation of sports in Finland. Only a few leagues, and teams participating in leagues at the highest national level, such as the ice hockey and football leagues, are organised as limited liability companies. Nevertheless, the leagues' articles of association require that the companies are tied to non-profit associations, and it is the associations (sports clubs) that hold the participating licences.

Most of the sports clubs are members of a national sports federation, while the national sports federations are members of the international sports federation for their respective sports.

Virtually all national sports federations are members of an umbrella organisation for sports in Finland, the Finnish Olympic Committee. There used to be two umbrella organisations in Finland: the Finnish Sports Confederation Valo, focusing on youth sport and sport for all, and the Finnish Olympic Committee, focusing on elite sport. These entities merged on 1 January 2017. Valo and the Finnish Olympic Committee had already shared certain operative functions and positions prior to the merger, so the impacts of this fusion have been more visible on the strategic side. Bringing both youth and elite sports under the same roof has also provided opportunities to further develop and accelerate the cooperation with both former entities' interest groups.

The anti-doping activities and advocating of ethical principles in Finnish sport are centralised under the Finnish Centre for Integrity in Sports (FINCIS), established in 2016. FINCIS's aim is to prevent, for example, match-fixing and spectator violence and it also conducts doping control and brings rule violators to justice.

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2 Government proposal 190/2014 for revision of the Sports Act.

## ii Corporate governance

As Finnish sport is organised on the principle of the autonomy of associations, there are no specific laws for good governance rules for sports organisations *per se*. However, the Associations Act (503/1989) provides for certain rules for decision-making and disqualifications.

The former Valo compiled principles for good governance as part of the European Commission's Better Boards, Stronger Sport project. After the merger, the Finnish Olympic Committee adopted and further developed these principles in its 'Social Responsibility Compass' – a governance document accepted by the Finnish Olympic Committee's board on 14 February 2017.

Given the strong autonomy of the associations, the common rules for good governance are self-regulatory by nature and are binding on the federations only if they have specifically committed to their use. However, most of the sports federations have acknowledged Valo's good governance principles in their own regulations. The Finnish Olympic Committee's agenda is to continue the governance dialogue with the federations, encourage them to adopt the Social Responsibility Compass in their activities and, in cooperation with the Federations, update the Social Responsibility Compass as necessary to reflect the reality in the field.

## iii Corporate liability

The members of the board and officers of an association are liable for damage that they cause to the association wilfully or negligently.<sup>3</sup> Board members or officers can only avoid liability by not participating in the decision-making; for example, by recusing themselves.

The members of the board and officers of an association are similarly liable for damage that they cause to a third party by violating the by-laws of the association or the Associations Act. The liability requires wilfulness or negligence.

An employee of an association is liable for damage that he or she causes because of a mistake or omission up to an amount that is deemed reasonable considering the amount of damage, the omission or mistake, the position of the employee and other relevant circumstances.<sup>4</sup> The liability for damage is, thus, slightly different from the liability of a board member or an officer. Also, if the employee is found to have been only slightly negligent, he or she shall not be liable at all, even if the employer would be found liable towards the third party.

## II THE DISPUTE RESOLUTION SYSTEM

### i Access to courts

There are no established principles in Finland regarding when the courts can examine and decide on lawsuits in relation to disciplinary measures of associations. The rule of thumb is that there has to be a legitimate need for judicial relief. In most cases the threshold is exceeded and sports-related cases can be – and have been – tried in the civil courts in Finland. Most cases have involved athletes' labour disputes or doping, and very few cases have been tried on the disciplinary measures of an association.

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3 The Associations Act (503/1989).

4 Halila and Tarasti 2011.

## **ii Sports arbitration**

The Finnish Sports Arbitration Board was founded in 1991 by Finland's sports governing bodies as an independent appellate body for sports-related decisions and disciplinary sanctions. Despite its designation as an arbitration panel, it has worked as a disciplinary committee. According to its rules, the Sports Arbitration Board can also act as an arbitration panel within its jurisdiction, should the parties in the dispute enter into an agreement on arbitration or the athlete so demand.

The rules of the Sports Arbitration Board were recently renewed, and the new rules came into force on 26 June 2017. The rules provide that the Sports Arbitration Board may handle appeals based on decisions made by associations regarding the discharge of membership from an association; limitations to member rights or disciplinary measures; or whether a decision made by an association is contrary to the by-laws of the association or the rules and regulations pertaining to competitions, although not to the rules and regulations relating to the sports discipline itself. The arbitration board may, in addition, handle appeals of an athlete for not having been selected for elite competitions (e.g., Olympics, world championships, European championships and equivalent), provided that the selection criteria clearly set by the federation or the Olympic Committee have not been followed, or if the decision is, without any acceptable reason, discriminatory on the basis of sex, age, conviction (political or religious), opinion, origin or other reason related to the athlete's person. The Sports Arbitration Board also serves as the first instance of appeal for decisions made by the Finnish anti-doping agency, FINADA, based on the anti-doping code.

The new rules provide that, if the parties so agree or the statutes of respective associations so rule, the Sport Arbitration Board may act as an arbitral tribunal in matters within its competence, and in sports-related contractual disputes and matters relating to sports organisations' business affairs. This means that, in addition to all matters within the Board's original competence, sport-related contractual disputes might also be tried in arbitration proceedings, which has not been possible before. The reform will allow, among other things, the handling of disputes related to player contracts in Sports Arbitration Board's arbitration proceedings. In principle, the arbitral tribunal consists of three arbitrators, unless the parties have agreed that only one arbitrator will decide the matter. Otherwise the procedure is governed by the Arbitration Act (967/1992).

The Sports Arbitration Board cannot handle a matter that has been decided by or is pending in civil court or arbitration. If a matter pending before the Sports Arbitration Board is brought before a civil court, the case automatically lapses at the Sports Arbitration Board.

## **iii Enforceability**

The Sports Arbitration Board is not nominated by the state or based on legislation. Thus, the enforceability of the decisions of the Sports Arbitration Board is based on the parties' engagement. The sports federations and sports clubs are bound to the jurisdiction of the Arbitration Board through their by-laws or through chaining of rules through membership, from the federations to the individual sports clubs. However, as the decisions of the Arbitration Board are merely recommendations, an association may decide not to adhere to the decision of the Board. This has happened on a few occasions in the history of the Arbitration Board. Usually, the associations, especially sports federations, have complied with the Board's decisions.

Despite the common use of the Sports Arbitration Board for resolving disputes in sports, a decision of the Sports Arbitration Board does not prevent the parties from bringing a suit in civil courts. If the Sports Arbitration Board acts as an arbitral tribunal, the enforcement of its arbitral award is decided by a competent court of first instance.

The Code of Judicial Procedure (4/1734) provides for interim relief, which can and has been applied to sports on a number of occasions.

As Finland is a party to the 1958 New York Convention, Finnish arbitral awards are internationally recognised and enforceable, and foreign arbitral awards are recognised and enforceable in Finland.

### **III ORGANISATION OF SPORTS EVENTS**

#### **i Relationship between organiser and spectator**

The relationship between organiser and spectator is a contractual relationship governed by the general principles of contract law and the Contracts Act (228/1929). Consumer protection legislation safeguards the spectators from misleading marketing and unfair contract terms. Though an organiser's options to obligate spectators are limited, the organiser may, for example, try to prevent reselling of tickets in its ticket purchase conditions. The organiser's main obligation is to organise the event in the manner in which it has been advertised, otherwise the organiser may be in breach of the contract.

The Assembly Act (530/1999) governs the organising of public events. The Law provides for certain security and other measures, such as sufficient liability insurance, which the organisers should comply with.

#### **ii Relationship between organiser and athletes or clubs**

Although the relationship between an organiser and athletes or clubs is primarily governed by the by-laws of the relevant sports association, the offset in the relationship between an organiser and an athlete or club is the freedom to contract. The athlete's or team's main obligation is usually to take part in the event and compete. Often the organiser sets certain conditions for the athlete's right to participate, which the athlete accepts by entering the event. The Competition Act (948/2011) has been applied to the right to participate in a professional sports league and has relevance when sport is practised on a professional level.

#### **iii Liability of the organiser**

An organiser's civil liability may be contractual or extra-contractual. First, the organiser has contractual liability towards the spectators. If the event is cancelled or otherwise substantially deviates from what the spectator had reason to assume, spectators may be entitled to compensation.<sup>5</sup> Secondly, an organiser also has contractual liability towards the athletes and clubs, with whom it has made entry agreements, its sponsors, other partners and the owner of the event venue.

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<sup>5</sup> Consumer Disputes Board decision No. 00/39/924, 28 August 2001. A certain amount of deviation and surprises goes with sports, but absence of an advertised athlete, for example, might lead to the contractual liability of the organiser.

An organiser's extra-contractual liability is partly governed by the Tort Liability Act (412/1974) and partly based on Finnish legal praxis. Organisers of events have a pronounced duty of care for the spectators' and athletes' safety.

Liability requires an organiser's negligence and must be evaluated on a case-by-case basis by reviewing whether the organiser has fulfilled its obligations deriving from the legislation and safety guidelines of the sports governing bodies.<sup>6,7</sup>

In principle, an organiser's liability towards the athletes is similar to that towards the spectators. However, the athletes themselves bear the risk of certain damage characteristic of the sport.

The criminal liability of an organiser can mostly be characterised as that of white-collar offences, including, *inter alia*, bribery, accounting offences, tax fraud and bankruptcy-related offences.

#### iv Liability of the athletes

The athletes' contractual liability towards an organiser is usually based on the entry agreement. An athlete is liable for the damage incurred by an organiser because of the athlete's absence from the event, unless the absence is caused by *force majeure*. The same basic contractual principle also applies when the participation obligation is provided by an agreement between the athlete and a club or a sports governing body.<sup>8</sup>

The athletes' extra-contractual liability is governed by the same sources of law as the organisers' extra-contractual liability. Negligence is evaluated in the light of the athlete's obligations resulting from legislation, club or sports governing body's general rules and sport-specific rules.<sup>9</sup>

The athletes' criminal liability is usually based on the idea of non-acceptable risk-taking. By entering into a sports event, an athlete accepts the risk of sport offences at least as far as they are not in violation of the sport's rules or the nature of the sport. These kinds of sport offences may normally fulfil the essential elements of an offence but are allowed in sport. However, any actions of an athlete that are in violation of the rules and characteristics of the sport in question, or actions that have no athletic function or temporal relation to the sport performance itself, can be considered prohibited risk-taking and fulfil the constituent elements of a criminal offence.<sup>10</sup>

Sports-related assaults<sup>11</sup> are subject to public prosecution along with most violent offences. Offences against personal reputation may also occur in sports in the form of slander.

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6 Many sports governing bodies in Finland release their own safety guidelines. Breach of these guidelines does not immediately lead to civil liability, but inside the organisation the liability is usually strict and a breach leads to internal disciplinary actions regardless of negligence.

7 Compliance with the guidelines and special legislation does not always eliminate the organiser's liability. The Court of Appeal of Rovaniemi held the organiser of an ice hockey game liable when a puck had flown over the rink and hit a spectator's head causing him a brain injury. The rink complied with Finnish Ice Hockey Association's safety guidelines, but the Court set the organiser's duty of care even higher. See Court of Appeal of Rovaniemi 13 February 2004, S 03/306 and Hahto 2004.

8 In some cases the athlete's liability is also governed by the Finnish Employment Contracts Act. These situations are covered in Section V.

9 Norros 2014.

10 Lappi-Seppälä et al. 2013, Peukunen 2014.

11 See, for example, Finnish Supreme Court rulings KKO:1996:74, 28 November 1995 and KKO:1997:129, 11 September 1997.



Defamation is a complainant offence that the injured party must report for charges to be brought.<sup>12</sup> However, the investigation of an offence may begin without contribution by the victim, as according to the Criminal Investigation Act (805/2011), the authorities are obliged to start investigations whenever there is reason to suspect that an offence has been committed.

#### **v Liability of the spectators**

As spectators usually have a contractual relationship only with the event organiser, the most interesting legal issues relate to their extra-contractual liability and criminal liability. A spectator may be held liable under the Tort Liability Act (412/1974) for the damage he or she has caused to the event organiser, another spectator or an athlete wilfully or negligently. Criminal liability of a spectator is evaluated in accordance with the general principles of criminal law. The venue of the crime does not impact the liability.

#### **vi Riot prevention**

The Assembly Act (530/1990) governs the organisation of public events. A sports event organiser shall inform the police of the event beforehand and take sufficient safety measures. The police may give the organiser more specific orders; for example, requiring the event organiser to hire community service officers to supervise public order at the event. At their discretion, the police may give backup to the organiser. The self-regulation of sports governing bodies may also include conditions relating to riot prevention or the clubs' liability for the actions of their fans.

### **IV COMMERCIALISATION OF SPORTS EVENTS**

#### **i Types of and ownership in rights**

Commercialisation of sport events and athletes by sponsoring, branding, broadcasting and spin-off merchandising can all be effectively exploited in Finland. For teams and individual athletes, building up a strong individual personal brand is essential, since marketing increasingly uses well-known entertainment and sports individuals. Finland has a functioning trademark system overlapping with the international Madrid Protocol and European Union Trademark system. By registering the athlete's name or other well-known icon, an athlete is able to maximise the possible profit from sponsorship deals and other cooperation agreements, and to license the mark for the sale of spin-off products as well.

The sale and amount of advertising space available is usually divided between the athlete's sports federation, the organiser of an elite competition or sports event and the participating athlete or team. The organiser originally possesses most of the advertising space based on a lease agreement for the event location. Grant-back clauses are, however, commonly used in the organising and marketing of sports events, in which case the organising sports federation gives the exclusive right to the organiser to organise the event on the condition that the organiser grants back the advertising rights to the federation. The competition law compliance assessment of such a grant-back depends on, among other things, the amount

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12 Defamation in sport has been handled by the Finnish Supreme Court in ruling KKO 2005:137, 19 December 2005. A driver had called another driver by derogatory names in a harness race. The Supreme Court found that a disciplinary sanction imposed on the offender by the sports governing body was not a sufficient reason to waive the punishment for defamation.

of advertising space that the condition applies to. The individual athletes dispose of the advertising space available on their sports equipment and sportswear in accordance with the rules of the relevant national or international association. A club or association usually disposes of advertising in team sports.

Marketing of certain products or services may be restricted under Finnish law, and some sports associations and clubs also have internal rules on acceptable marketing. The marketing of strong alcohol beverages and tobacco is completely prohibited in Finland and no direct or indirect marketing of such products is possible.

Among the most valuable assets related to organising sports events are the broadcasting rights. Broadcasting rights are not separately protected as an exclusive right in Finland, but they can be efficiently covered and protected by the Finnish copyright system, partially when harmonised by EU directives. Although the sports event in itself is not protected by copyright because of its lack of sufficient independence and originality as required by the Copyright Act (404/1961), the television broadcast and possible sports coverage are. As a general rule, the organising sports association usually owns the broadcasting rights to the specific events or leagues it organises.

## **ii Rights protection**

Rights related to exploitation and commercialisation of sports-related rights can be efficiently protected by intellectual property legislation, such as the Trademarks Act (7/1964), the Business Name Act (128/1979) and the Copyright Act. Whereas intellectual property laws grant protection to certain exclusive rights defined by such laws, the Unfair Business Practices Act (1061/1978) provides a wider and parallel protection compared with IP laws because its clauses are more general and have a wider scope.

A trademark, which can be a figurative mark, a word mark, a unique product package or even a slogan, can be registered for a period of 10 years in the Trademark Register kept by the Patent and Registration Office. The registration is renewable without limitations. The Copyright Act provides protection for 70 years from the death of the creator for works exceeding the originality requirements for copyright protection. Shorter protection is provided for neighbouring rights, such as those of a producer of a video recording.

## **iii Contractual provisions for exploitation of rights**

Finland is a civil law country with written laws, some governing specific legal fields and other more generally applicable rules that also apply to special areas of law. As a general rule, Finnish law does not require that statutory provisions are incorporated into agreements, especially in the case of business-to-business agreements. The case can be different for consumer agreements, as legislation aims to protect the consumer and such provisions might have to be incorporated for information purposes. Naturally it is always advisable to agree on the possibility of transferring (or not transferring) a licence and the geographical and temporal scope of any licence.

# **V PROFESSIONAL SPORTS AND LABOUR LAW**

## **i Mandatory provisions**

Essential labour regulations in Finland are the Employment Contracts Act (55/2001) and the Working Hours Act (605/1996). The characteristics of an employment agreement are that one person (the employee) carries out work for another (the employer) under the supervision

and management of the employer, from which work the direct benefit goes to the employer, and from which work the employee receives financial compensation. If these requirements are fulfilled, labour legislation sets the minimum level for the conditions of employment.

On the basis that the requirement for performing work under someone's supervision is usually absent in their relationships with their clubs, coaches or sports associations, individual athletes are usually not considered to be employees. However, it has been well established through a number of court decisions that players of team sports, when they receive remuneration for their performance, are deemed employees of their respective clubs.

Fixed-term employment contracts are only allowed on special grounds relating to the nature of the employment. Athletes are required to constantly strive to their best performance and their career peaks only last for a relatively short time. Thus, using fixed terms tied to, for example, league seasons is considered justifiable.

The termination of a fixed-term sports employment contract requires extremely weighty causes. Such a cause is at hand if the employee substantially breaches or neglects his or her obligations under the employment contract or legislation. For example, doping is usually considered a substantial breach of an athlete's or a coach's obligations and enables the employer to terminate the contract. The employer has a tortious liability for unlawful terminations.

According to the Employment Contracts Act, an employee shall be paid reasonable, normal remuneration for the work performed. Salary protection is reserved for the trade unions in the form of collective bargaining. In Finland, this possibility has been utilised by one player association<sup>13</sup> and the Federation of Professional Coaches.<sup>14</sup>

## ii Free movement of athletes

Discrimination is banned by the Constitution (731/1999), the Non-discrimination Act (1325/2014) and Employment Contracts Act (55/2001), and sports clubs or associations cannot overrule these fundamental legislative restrictions.<sup>15</sup> However, operations that first seem discriminatory may sometimes be objectively justified. For example, limiting the participation right in Finnish championships to athletes representing Finland and tying the representation right to Finnish nationality is an objectively justifiable condition, but requiring the athlete to originate from Finland would most likely be deemed prohibited discrimination. In team sports, operations that restrict the number of players from EU Member States are prohibited,<sup>16</sup> but the number of non-EU players may be limited to some extent.

## iii Application of employment rules of sports governing bodies

Athletes are often bound to the regulations of international sports governing bodies by agreement, and such an agreement can also be an employment agreement. Conditions that undermine the minimum working conditions of employees under the scope of application of Finnish labour law are nevertheless invalid.

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13 The Finnish Ice Hockey Players' Association has negotiated a collective agreement to be applied in player contracts at the highest league levels in Finland.

14 The Trade Union for the Public and Welfare Sectors and Service Sector Employers, Palta, have negotiated a collective agreement that applies to employees of sports associations (e.g., managers, secretaries, etc., positions where the employees work under the association's supervision). The Federation of Professional Coaches has joined this collective agreement and thus it is applicable to professional sports coaches.

15 Finnish Sports Arbitration Board decision No. 4/2014, 14 March 2014.

16 European Court of Justice, *Bosman C-415/93*.

## VI SPORTS AND ANTITRUST LAW

The national antitrust rules are, in essence, based on EU antitrust laws. Antitrust laws apply to the business activities of sports event organisers and sports governing bodies in the same manner as to any other businesses in Finland. The rules on dominant market position have been evaluated in a few national cases. Sports governing bodies have been found to have a dominant position when it comes to granting player or competition licences to athletes, or granting rights to organise competitions to event organisers.

An event organiser or sports governing body must comply with the Finnish Competition Act. First, the participation or organising rights and licences shall be granted on equal conditions. An equitable condition is, for example, a certain result or experience-level requirement. Second, the participation or organising right or licence cannot be tied to supplementary obligations that have no connection with the participation right or the licence itself. An obligation to acquire a certain accident insurance with the competition licence, for example, has been considered prohibited tying by the Competition Authority in decision No. 1089/61/95 of 4 March 1998.

Third, unfair conditions shall not be imposed on the participation or organising right or the licence. The decision of the Finnish Basketball Association's board to change the league rules with effect from the beginning of next season was considered an unfair condition by the Competition Authority in decision No. 511/61/94 of 5 September 1995. The transition phase was considered too short, as the change of league rules decreased the number of league games and thus had a negative impact on the income of the clubs.

## VII SPORTS AND TAXATION

As stated, Finnish sports clubs are usually established as non-profit associations and, as such, their activities are tax-free. However, if sports associations are engaged in professional sports on a larger scale, their actions, at least in relation to professional sports, may not be considered a public utility, and such activities may become taxable as business income.<sup>17</sup>

Individual athletes are usually taxed under the Income Tax Act (1535/1992). Athletes may, however, consolidate part of their income from sports in special funds governed by sports associations. In such cases, the athletes may withdraw monies from the funds for the purposes of paying their sports-related expenses tax free, and only pay tax on the remaining monies later on when withdrawn as income.

The administration of an individual top athlete's activities and contracts may be easier to arrange in the form of a limited liability company, but this involves the risk that income of the athlete steered through such a company may still be taxed as if the company did not exist. If the business actions are large-scale enough and the activities include a real business risk, the income can be considered as income of the company and taxed accordingly.<sup>18</sup>

Double taxation problems of athletes and taxable sports clubs when they participate in sports events abroad are acknowledged in Finnish tax legislation and in the taxation treaties that Finland has concluded. Double taxation is usually eliminated by deducting the tax paid abroad from the tax payable in Finland (the credit method). However, the fee is still taken

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17 See the Finnish Tax Administration guide to non-profit foundations and associations of public utility No. 384/349/2007, 30 April 2007.

18 Supreme Administrative Court ruling KHO 2010 T 103.

into account when counting the annual gross income of an athlete or club, and affects its progression rate.<sup>19</sup> Some of the tax treaties Finland has concluded follow the exemption method: income from a foreign sports event is not taken into account in the Finnish taxation at all.<sup>20</sup>

## VIII SPECIFIC SPORTS ISSUES

### i Doping

A doping offence, an aggravated doping offence and a petty doping offence are criminalised in the Criminal Code (39/1889). The essential elements of a doping offence are that a person unlawfully prepares or attempts to prepare a doping substance, imports or attempts to import it or sells, conveys, gives to another or otherwise disseminates or attempts to disseminate it. A person who keeps in his or her possession a doping substance with the probable intent to disseminate it unlawfully can also be sentenced for a doping offence. The sentence for a doping offence is a fine or imprisonment for, at most, two years.

If the offence involves considerable amounts of doping substances, criminal organisation, considerable financial benefits are obtained or the substance is disseminated to minors, a doping offence may be considered as aggravated, with a sentence of imprisonment for at least four months and, at most, four years. If the offence is altogether petty, the sentence may simply be a fine.

### ii Betting

The organising and advertising of betting on sporting events is strictly prohibited in Finland, except for by Veikkaus Oy under the Lotteries Act (1047/2001).<sup>21</sup> Veikkaus Oy has a statutory obligation to prevent abuse or crimes as well as the harmful social and health effects of gambling and betting. The legitimacy of the Finnish monopoly system was assessed in judgment C-124/97 of the European Court of Justice, in which the Court found that the monopoly system can be justified, among others, by crime prevention and the prevention of the harmful effects related to gambling and betting.

The prohibition of the organising and advertising of betting and gambling applies both to offline and online environments. Unauthorised organising and advertising is monitored by the National Police Board, which may issue an injunction and fine an organiser or advertiser who fails to observe such an injunction. Unauthorised organising and advertising are also punishable under the Criminal Code.

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19 If Finland has not concluded a tax treaty with the country where the event is being held, the credit method is applied based on the Act on the Elimination of International Double Taxation (1552/1995, 18 December 1995).

20 See Finnish Tax Administrations guide to artists and athletes performing abroad: [www.vero.fi/fi-FI/Henkiloasiakkaat/Suomesta\\_ulkomaille/Toihin\\_ulkomaille/Ulkomailla\\_esiintyvat\\_taitelijat\\_ja\\_urh\(9590\)](http://www.vero.fi/fi-FI/Henkiloasiakkaat/Suomesta_ulkomaille/Toihin_ulkomaille/Ulkomailla_esiintyvat_taitelijat_ja_urh(9590)), last visited 11 October 2018.

21 The three organisations that were previously given a mandate to organise betting, Fintoto Oy, Veikkaus Oy and Finland's Slot Machine Association, were merged into one new company, Veikkaus Oy, on 1 January 2017.

### iii Manipulation

Manipulation of game results and the criminalisation of such behaviour has been discussed in Finland, but no separate penal provision has been enacted. However, a penalty may be imposed for such behaviour based on fraud in accordance with the Criminal Code. It has been argued and assessed that the criminalisation of, *inter alia*, fraud protects sports-related interests fairly well without the need for any specific penal provision.

The essential element of fraud is the will to obtain unlawful financial benefit, or deceiving or taking advantage of someone's error, to harm another. Causing economic loss is also one of the key elements of the provision, so for this reason the fraud provision may not be applicable in all cases; for example, in the case of match-fixing where no economical loss is caused. The sentence for fraud varies from fines to imprisonment for up to two years.

There have been a couple of match-fixing cases in Finland in recent years involving football<sup>22</sup> and Finnish baseball,<sup>23</sup> in which the offenders were sentenced for aggravated fraud. Offenders have also been sentenced for bribery and money laundering in connection with match-fixing.

### iv Grey market sales

Grey market sales of sports and other event tickets is still a relatively small-scale business in Finland, and it has not been seen as a major problem so far. Official ticket sellers have tried to prevent grey marketing by, for example, printing a prohibition against reselling the tickets on the tickets themselves. Thus, reselling the ticket would be considered a contractual breach. Ticket quotas per customer and designating tickets for specified customers have also been used to prevent grey market sales.

## IX THE YEAR IN REVIEW

Traditionally, sport has been defined mainly by its physical and competitive elements. For example, in accordance with the traditional view, the European Court of Justice has lately stated that duplicate bridge is not a 'sport' for the purposes of the EU VAT Directive and cannot therefore be exempt as such when considering the exemptions for tax liability. The Court stated in October 2017 that, in the context of VAT exemptions, which are to be interpreted strictly, the interpretation of the concept of 'sport' appearing in the Directive is limited to activities satisfying the ordinary meaning of that concept, which are characterised by a not negligible physical element. According to the Court, the fact that an activity promotes physical and mental health is not, of itself, a sufficient element for it to be concluded that that activity is covered by the concept of 'sport' within the meaning of that same provision.<sup>24</sup>

However, despite the Court's decision, the concept of sport may cover a myriad of other sports, such as snooker or chess. E-sports, in particular, are growing in popularity in Nordic countries as part of the phenomenon of digitalisation. In Finland, the Finnish Esports Federation (SEUL) works as the umbrella organisation for Finnish competitive electronic

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22 Helsinki Court of Appeal decision No. 333, 6 February 2003 (R01/2825).

23 Rovaniemi Court of Appeal decision No. 237, 22 March 2012 (R11/734).

24 European Court of Justice, *the English Bridge Union Limited v. Commissioners for Her Majesty's Revenue & Customs*, case C-90/16.

gaming. SEUL has successfully lobbied for e-sports and the Finnish Defence Forces have recognised e-sports as sports and allows esports athletes to have their military service at their Sports School.

Moreover, the Central Tax Board has acknowledged e-sports as sports in the context of income taxes in Finland.<sup>25</sup> The Board stated that, in accordance with the Income Tax Act, the income of an applicant who is a video game player may also be treated as sports income. Thus, esports athletes may also consolidate part of their income from sports in special funds governed by sports associations, and in such cases, withdraw monies from the funds for the purposes of paying their sports-related expenses tax free.<sup>26</sup>

Another important topic is the balancing of efficient doping testing and the right to respect the athlete's privacy. The decision of the European Court of Human Rights concerning the requirement for a targeted group of sports professionals to notify their whereabouts for the purposes of unannounced anti-doping tests has also been discussed in Finland. Since the requirement for notification is not found to be a violation of Article 8 of the European Convention on Human Rights (the right to respect for private and family life, and home), the case is of particular importance within the field of anti-doping and the need for unannounced testing as part of ensuring the health of sports professionals.<sup>27</sup> Moreover, in the field of anti-doping, the FINCIS recently opened a new ILMO service that can be used to report suspected doping, competition manipulation and spectator safety violations. Anyone can report suspect behaviour. According to the FINCIS, reports help protect athletes and sports in general and ensure that all athletes are equal and safe.

## X OUTLOOK AND CONCLUSIONS

For about two decades now, there has been discussion about the increase in the regulatory burden of sports in Finland. Given the recent developments within Finnish sports, the awareness of laws affecting sports is likely to increase. Although the organisation of sports in Finland has evolved over the decades, the combining of sports for all and elites sport under one parent organisation is likely to lead to changes in the way that sports are administered. Finland, as so many other countries, will be looking at new developments in the fight against match-fixing and spectator violence.

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25 KVL:2017/16.

26 Rantala Tapio 2017.

27 ECHR 18 January 2018, *Fédération Nationale des Syndicats Sportifs and Others v. France*.

# FRANCE

*Romain Soiron and Aude Benichou*<sup>1</sup>

## I ORGANISATION OF SPORTS CLUBS AND SPORTS GOVERNING BODIES

The highest governing body of sport in France is the French Ministry of Sports, which is authorised to grant to the federation of any sport discipline the right to organise and regulate such sport, through a delegation of public service. This delegation of public service is granted to the federation for a period of four years and is indefinitely renewable. For instance, since 1985, the French Football Federation (FFF) has been granted such delegation by the Ministry of Sports.

A federation is authorised, but not required, to create a professional league in order to manage the professional tournaments, as well as non-professional leagues or committees to manage all the other tournaments at a local level.

Sports clubs willing to participate in competitions organised by the federation or its decentralised bodies must be affiliated to the federation overseeing these competitions.

The sports clubs, the federation and its decentralised bodies are required to be non-profit organisations governed by the French law of 1 July 1901<sup>2</sup> and its decree of 16 August 1901.

That being said, clubs that participate in events generating revenues greater than €1.2 million annually, or that employ athletes receiving a total income exceeding €800,000 are required to create, in addition to the non-profit organisation, a commercial corporation, which will manage its commercial activities.<sup>3</sup> In accordance with Article L.122-2 of the French Sports Code, the 'sport corporation' must take one of the following legal forms: (1) Limited Liability Company with a sole member, called single owner limited liability sport company (EUSRL), (2) limited liability company with a sports object (SAOS), (3) professional sports limited company (SASP), (4) limited liability company, (5) limited company (SA) or (6) simplified joint-stock company.<sup>4</sup>

The federation and the professional league must comply with standard by-laws imposed by the lawmaker. In particular, it requires the federation and the professional leagues to adopt a set of disciplinary and anti-doping regulations.

In addition, some of the sports corporations (i.e., SAOS, EUSRL and SASP) are under the obligation to comply with standard by-laws setting out various rules regarding shareholders and corporate governance.

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1 Romain Soiron is a partner and Aude Benichou is an associate at Joffe & Associés.

2 Law of 1 July 1901 on the contract of association.

3 Articles L.122-1 and R.122-1 of the French Sports Code.

4 To our knowledge, the most common structure for sport companies used in 2017 was the SAOS.



It must be stressed that in accordance with Article L.122-7 of the French Sports Code, an individual is prohibited from (1) managing two sports companies participating in the same discipline, and (2) controlling or having a major influence (within the meaning of the French Commercial Code) over two sports companies of the same discipline (male and female activities being construed as two different disciplines).

## II THE DISPUTE RESOLUTION SYSTEM

### i Access to courts

Articles R.131-3 and R.132-7 of the French Sports Code set out the disciplinary proceedings to be implemented by sports federations in order to settle disputes involving clubs and players.

Disciplinary proceedings must comply with the principle of fair trial as set out in the French Constitution and in Article 6 of the European Convention on Human Rights. Consequently, all sports federations must respect the parties' fundamental rights, and, in particular:

- a* the right to a decision in the first instance and to an appeal;
- b* the right to an impartial court (members of a disciplinary body who have a personal interest in a specific case may not take part in deliberations, and members of the disciplinary body may not try the same case in first instance and on appeal);
- c* the right to be judged within a reasonable period;
- d* the right to a public trial; and
- e* the respect of the rights of defence (providing for a reasonable amount of time to prepare the defence, right to be assisted by a lawyer, etc.).

The French Sports Code also provides for an alternative dispute resolution process before the French National Olympic and Sports Committee (CNOSF).<sup>5</sup> This dispute resolution process is known as 'conciliation'. The use of such proceeding depends on the common will of the parties involved (except in some cases where the conciliation before the CNOSF is mandatory prior to suing before civil or administrative courts).

French civil courts remain accessible to the litigants pursuant to the traditional rules of civil procedure, and administrative courts retain jurisdiction over disputes relating to sports federations or to the application of their by-laws and regulations.

On the international level, certain international federations prohibit the right to seek remedies through state courts in the context of international disputes.

### ii Sports arbitration

An Arbitration Chamber for Sports (CAS) was created in 2007 within the CNOSF. Article 2.II.B.1 of CNOSF's statutes provides that the CAS may resolve a dispute 'through conciliation or through arbitration'.

Article 19 of the internal regulation of the CNOSF sets out the conditions under which the parties can submit a case before the CAS. First, an arbitration clause may be included in the parties' agreement whereby the parties expressly consent to the submission

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<sup>5</sup> Articles L.141-1 et seq. of the French Sports Code.

of their dispute to the CAS. In the alternative, and once the litigation arises, the parties may subsequently agree to submit the case to the CAS, even if no arbitration clause was included in the agreement.

The jurisdiction of the CAS is, however, limited, as all disputes relating to a regulated sport and involving the exercise of public service prerogatives have to be brought before the administrative courts. The CAS therefore mainly retains jurisdiction over purely economic disputes, such as sponsoring or broadcasting agreements disputes, transfer fee disputes or disputes among athletes, clubs and sports federations.

Unlike in a conciliation proceeding, the CAS makes a final, binding and unappealable ruling, which is enforceable by law.

There are also independent institutions, such as the Court of Arbitration for Sport (TAS), which is an international arbitration body based in Lausanne with jurisdiction over disputes involving arbitration clauses calling for the TAS's jurisdiction, and over appeals of decisions issued by international sports federations.

### **iii Enforceability**

Decisions issued by the French civil or administrative courts or arbitral rulings issued by the CAS are directly enforceable within the French jurisdiction. The parties are bound by those decisions with no need for additional formalities.

To enforce an international decision in France (i.e., a decision issued by a court from another country), the decision has to be recognised by the *exequatur* proceeding.<sup>6</sup> This proceeding includes a high-level review by the French judge who will examine whether the foreign judge had jurisdiction over the matter.<sup>7</sup> To pass this test, the dispute must present a serious link with the foreign state or must have been validly chosen by the parties. Within the *exequatur* proceeding, the judge also examines whether the proceedings have been conducted 'properly' (for instance, that the respect of the right of defence was insured). Finally, the judge has to verify whether the decision complies with the French international public policy rules. That said, some regulations of French federations specifically provide that international decisions with effects on national tournaments may be enforced directly without any *exequatur* proceedings before a French court.

## **III ORGANISATION OF SPORTS EVENTS**

### **i Relationship between organiser and spectator**

The organiser and the spectator are bound by a contract through the sale of a ticket.

The general terms and conditions governing the sale of tickets must comply with French consumer rules and regulations – when the buyer is considered to be a 'consumer'.

The General Direction for Fair Trading, Consumer Affairs and Fraud Control (DGCCRF) conducted a major investigation in 2016 in order to enforce the French consumer laws regarding online and in situ ticketing. The investigation revealed several significant breaches.<sup>8</sup> Many organisers failed to provide the appropriate information to consumers, in particular, regarding the right of withdrawal. Indeed, French consumer laws impose a 'withdrawal period' for online sales during which the consumer may return the

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6 French Supreme Court, 7 January 1964.

7 French Supreme Court, 6 February 1985.

8 DGCCRF Press Release, 1 July 2016.

purchased item and be reimbursed. Although this withdrawal period does not apply to sport ticketing,<sup>9</sup> the seller is nonetheless under an affirmative duty to inform buyers that they have no right of withdrawal, which the DGCCRF investigation has shown was not implemented by the sellers.

In addition, the investigation revealed clauses relating to the non-reimbursement in case of postponement of a sports event. This type of clause may be considered unfair because of the absence of compensation for the damage suffered in the event of a change of date, schedule or place.

## **ii Relationship between organiser and athletes or clubs**

A club seeking to participate in a competition organised by the federation must be affiliated to such federation. This authorisation of affiliation granted by the federation allows the club to participate in competitions, but also imposes the obligation to comply with the federation's rules and regulations.

These regulations contain sporting rules (e.g., the rules of the game, the format and functioning of the competition) and disciplinary rules (e.g., sanctions against players or clubs), as well as rules protecting the commercial interests of the competition (e.g., sponsors' brands display obligations).

It is worth noting that the French Sports Code also requires the subscription of an insurance policy by the federation,<sup>10</sup> which covers damage suffered by the clubs and players taking part in the competition.

## **iii Liability**

According to French law, a person committing a 'fault' resulting in damage to another person may be held civilly liable.

With respect to an organiser, such fault may occur, for instance, in the event of:

- a* failure to keep the sports facilities safe and secure (organisers being bound by a general safety obligation);
- b* negligence of inspection or maintenance; or
- c* inappropriate or excessive risk created by the organisation.

With respect to an athlete's liability, a fault committed by a player against another player during the event is subject to a restrictive interpretation because of the inherent risk stemming from the exercise of the sport. According to this 'risk acceptance' theory, a player who wishes to be exonerated must demonstrate that the fault was committed in accordance with the spirit of the game, and that the potential injury was accepted by the injured player.

Regarding the liability to spectators, the organiser can be held liable for injuries caused during sports events owing to security and safety regulation breaches. It must also be stressed that the lawmaker created specific offences applicable to behaviour of spectators during sports events in a sports arena, such as:

- a* forcible or illegal introduction of alcoholic beverages;<sup>11</sup>
- b* encouragement of other spectators to hatred or to the commission of violence;<sup>12</sup>

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9 Article L.221-28 of the French Consumer Code.

10 Articles L.321-1 et seq. of the French Sports Code.

11 Article L.332-3 of the French Sports Code.

12 Article L.332-6 of the French Sports Code.

- c display of insignia, signs or symbols promoting racial or xenophobic ideology;<sup>13</sup>
- d possession or use of rockets, artifices or projectiles;<sup>14</sup> and
- e disturbance of a competition or the endangerment of people's safety, by penetrating the competition area of a sports arena.<sup>15</sup>

#### iv Riot prevention

Under the impulse of international and European bodies, French legislation has attempted to prevent riots during sports events. Sports events organisers have the duty to provide security services and obtain if necessary the support of the state police.<sup>16</sup> In order to avoid the introduction of dangerous objects inside the sports arena, French public authorities and organisers may perform physical pat-downs with the spectator's consent. If the spectator does not consent, the security services may deny access to the arena to such spectator.

French public authorities can also take several repressive measures against supporters, such as a temporary stadium ban or dissolution of supporters' associations in case of a risk of serious disturbance to the public order.<sup>17</sup>

Since 2007,<sup>18</sup> persons prohibited from stadiums are listed in a National Stadium Bans Register. This register contains the identities of the persons banned by judicial or administrative decision. The data are retained for five years from the expiry of the most recent measure pronounced.

## IV COMMERCIALISATION OF SPORTS EVENTS

The originality of the French system resides in Article L.333-1, Paragraph 1 of the French Sports Code, which states that 'sports federations and organisers of sports events mentioned in Article L.331-5 are the owners of the exploitation right of the sports events or competitions that they organise'. This 'organiser's right' is a *sui generis* right that can be compared to a copyright as the underlying concept is similar: a person creating an original work holds the rights to its creation in order to be compensated and to prevent the unauthorised use of its creation.

The French Sports Code does not provide an exhaustive list of the 'exploitation rights' that are within the organiser's portfolio. Some of the rights are specifically referred to in such Code (e.g., audiovisual rights, betting rights). The jurisprudence has then interpreted the notion of exploitation rights so as to include ticketing, photography of the competitions (including before the kick-off and after the end of the match – for example, during a moment of silence before the kick-off), the date and reference to a competition and, in a very general statement, 'any form of economic activity the aim of which is to generate a profit and that would not exist if the sports event referred to did not exist'.<sup>19</sup>

This 'organiser's right' set out by law is the most efficient legal weapon and the most commonly used before courts by organisers in order to protect their rights.

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13 Article L.332-7 of the French Sports Code.

14 Article L.332-8 of the French Sports Code.

15 Article L.332-10 of the French Sports Code.

16 Article L.331-4-1 of the French Sports Code.

17 Article L.332-11 to L332-18 of the French Sports Code.

18 Decree, 28 August 2007.

19 French Supreme Court, 20 May 2014.

The commercialised rights by the federations are subject to limitations – mainly linked to competition law and right to information (‘news access’), as set out in the European Union regulations. For instance, the French Sports Code<sup>20</sup> provides that events of major importance listed by decree should be broadcast on national free television. In addition, radio broadcast rights cannot be marketed because of the right to information. Any radio journalist can make comments on a sports competition without having to get an approval from the organiser.

A French particularity should be underlined. Federations may assign to clubs, free of charge, the audiovisual exploitation rights related to the competitions organised by the professional league; such rights being, in such a case, marketed on an exclusive basis by the professional league on behalf of the clubs. For now, this option is only used in the football field: in 2004, the FFF granted ownership of the audiovisual exploitation rights to clubs and the French Professional Football League (LFP).<sup>21</sup> The French specificity is that when audiovisual rights are assigned by the federation to the clubs (i.e., for now, only in football), certain rules apply. Indeed, the Sports Code provides a legal framework to the marketing of audiovisual rights by the league who markets the rights (the LFP). For instance, the audiovisual rights must be marketed through a bidding process, which shall be non-discriminatory and transparent. The LFP must provide in its offer the qualitative (television exposure, audience, etc.) and quantitative (amount offered) criteria on which it relies. The agreement between the LFP and broadcasters cannot last more than four years.

## V PROFESSIONAL SPORTS AND LABOUR LAW

### i Mandatory provisions

French labour law, combined with collective bargain agreements, set forth the applicable rules to professional athletes’ employment contracts.

However, a law that came into force on 27 November 2015<sup>22</sup> sets out specific mandatory provisions for employment contracts of professional athletes, coaches, judges and referees. Indeed, those professionals are solely entitled to conclude a fixed-term contract with their sports federation for a term of no less than 12 months (duration of a sports season) and no more than five years.<sup>23</sup> An exception is allowed for employment contracts for less than 12 months in the case of replacement during an ongoing season. The maximum duration includes the renewal of the contract or the conclusion of a new contract with the same employer.

Those fixed-term contracts also have to comply with other provisions. For instance, contracts must provide all the mandatory information listed in Article L.222-2-5 of the French Sports Code and the termination clause cannot be unilateral.<sup>24</sup>

### ii Free movement of athletes

Freedom of movement and of residence is a fundamental right in EU primary law, as set out in the European Union Treaty, the Treaty on the Functioning of the European Union

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20 Article L.333-9 of the French Sports Code.

21 Article R.333-2 of the French Sports Code.

22 Law No. 2015-1541 (protecting high-level and professional athletes and securing their judicial and social rights).

23 Article L.222-2-4 of the French Sports Code.

24 Article L.222-2-7 of the French Sports Code.

(TFEU) and the EU Charter of Fundamental Rights. The European Union legal system is incorporated into the Member State legal system, which means that European Union laws apply and have a direct effect on Member States. Thus, Member States are not allowed to enact legislative measures restricting freedom of movement and of residence.

The EU Court of Justice applied the freedom of movement principle to an athlete in the important *Bosman* case.<sup>25</sup> All regulations of sport federal entities trying to impose quotas on national teams or clubs are disputed because of such principle.

### iii Employment rules of sports governing bodies

Sports governing bodies have to apply French employment rules and regulations. Because of its protective role, French employment regulations are considered public policy rules – which means that they cannot be derogated from. As a consequence, a sport federation, association or corporation may not include in their employment contracts provisions that are inconsistent with French employment regulations, except if those provisions improve the employee's rights.

Most sport federations make employment contracts templates available to their affiliates. Generally, employment contracts must be approved by the relevant governing body.

## VI SPORTS AND ANTITRUST LAW

Sport is not only a game, but is also a highly profitable economic activity, which implies the application of antitrust law. Moreover, given that each professional sport is governed by a federation, the latter is naturally in a position of monopoly. Hence, several antitrust law issues are applicable to sports organisations. French legal requirements regarding competition law are set out in the French Commercial Code<sup>26</sup> and in the TFEU.<sup>27</sup>

Two significant illustrations of application of competition law to sports should be mentioned. In the *Adidas* case,<sup>28</sup> the LFP and Adidas were found liable for having entered into an exclusive agreement, owing, in particular, to the fact that the French league had not marketed the rights through a call for tender and the duration of the agreement was excessively long (five years). The court decided it was contrary to competition laws.

A recent case also illustrated the complex issue of competition law in the commercialisation of broadcasting rights<sup>29</sup> (in such case, the French Competition Authority decided that the practices of the Professional Rugby League were not contrary to competition laws because the audiovisual rights for rugby's second division competition were not considered 'premium rights', likely to have effects on the audiovisual exploitation market). The process of sale of the rights and the duration of the broadcasting rights proposed must notably be analysed very carefully from an antitrust law perspective.

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25 EU Court of Justice, 15 December 1995, *Bosman*.

26 Articles L.420-1 and L.420-2 of the French Commercial Code.

27 Articles 101 and 102 of the TFEU.

28 Decision 97-D-71 of 7 October 1997 of the French Competition Authority.

29 Decision 16-D-04 of 23 March 2016 of the French Competition Authority relating to practices of Rugby Championship audiovisual rights marketing.

## VII SPORTS AND TAXATION

For French individual residents, personal income tax is a general and progressive tax based on the tax household's overall income. The rate of income tax currently ranges from zero per cent to 45 per cent, depending on the annual income.

For non-French individual residents, personal income tax may also potentially apply. Although French tax residents are taxed on their worldwide income, non-French residents are only taxed on their French sources of income, derived from professional activities, whether salaried or not, performed in France. Two types of income could be taxable in France as a result of a professional activity of a non-resident:

- a* professional profits: profits derived from non-commercial activities carried on in France by persons not domiciled in France are taxed according to the rules laid down for profits of the same kind received by persons domiciled in France; and
- b* wages and salaries paid in France to non-residents are subject to a 15 per cent withholding tax (increased to 75 per cent if paid to an athlete domiciled in a non-cooperative state or territory).

## VIII SPECIFIC SPORTS ISSUES

### **i Doping**

In 1965, France was one of the first countries to adopt an anti-doping legislation.<sup>30</sup> Since then, French legislation has significantly increased and most of the applicable provisions are now codified in the French Sports Code.

Through its anti-doping regulations, France has always made prevention and medical follow-up of athletes a priority. Sports federations play a major role in the application of those rules and can impose disciplinary and administrative sanctions. The French Anti-Doping Agency was created in 2006, and was given many prerogatives, especially in the field of control, analysis and disciplinary proceedings.

Prohibited substances are listed by decree, which follows a list provided by the World Anti-Doping Agency. The use, offer, provision or administration of prohibited substances can lead to administrative, disciplinary and criminal sanctions (up to seven years of imprisonment and a €150,000 fine).<sup>31</sup> An athlete's refusal to submit to anti-doping control may also lead to criminal prosecution.<sup>32</sup>

### **ii Betting**

The French regulatory framework on betting varies depending on whether the betting is 'online' or 'offline'.

Since 1933, the French public company La Française des Jeux has held a monopoly over the organisation and exploitation of sports betting and lotteries. This monopoly has been challenged multiple times, in particular by online betting operators.

Under the pressure of the European Commission, the French lawmaker amended its regulations with the law of 12 May 2010,<sup>33</sup> which liberalised the online gambling market.

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30 Law No. 65-412 of 1 June 1965 aiming to repress the use of stimulants during sports competitions.

31 Article L.232-26 of the French Sports Code.

32 Article L.232-25 of the French Sports Code.

33 Law No. 2010-476 of 12 May 2010 on the liberalisation of online gambling.

In accordance with this law, any operator offering online betting in France must be authorised by the French Online Gambling Regulatory Authority (ARJEL). The statute does not authorise all forms of bets – for instance, betting exchange or spread betting are prohibited. Moreover, sports bets are limited to the sports events set out in a limited list provided by ARJEL.<sup>34</sup> Friendly national team events are excluded from this list,<sup>35</sup> except in certain circumstances.<sup>36</sup>

In addition, according to the French Sports Code, the above-mentioned ‘organiser’s right’ on its competition includes the right to authorise bets on its competitions.<sup>37</sup> Consequently, once certain online operators have been approved by ARJEL, they may enter into agreements with sports event organisers for the organisation of bets on this competition. Such agreements generally include compensation provisions, in which the betting operator is compensated at approximately 1 per cent of the amount engaged in gambling.<sup>38</sup> The agreement also provides for contractual obligations for the operator relating to anti-fraud detection and prevention. Further, in order to prevent conflicts of interest, the French Sports Code requires organisers to issue and impose regulations preventing players and related parties from betting on competitions in which they participate.

It must be stressed that the French online betting sector is highly regulated.

### iii Manipulation

The French Sports Code and the French Criminal Code do not specifically address match-fixing. However, several provisions of the French Criminal Code incriminate acts of corruption committed by civil servants within their public office<sup>39</sup> and by persons outside public functions.<sup>40</sup>

Most importantly, the law of 1 February 2012,<sup>41</sup> codified in French Criminal Code Articles 445-1-1 et seq., created the new offence of ‘betting fraud’, which criminalises the act of offering donations, gifts or other advantages to a person involved in a gambling activity in order to induce a positive act or omission modifying the normal course of the sports event. Such illegal activity may lead to a sentence of up to five years’ imprisonment and a fine of €500,000 (or up to twice the profits generated).<sup>42</sup>

### iv Grey market sales

The law of 12 March 2012<sup>43</sup> created the new offence of illegal resale of tickets to cultural or sports events. The new Article 313-6-2 of the French Criminal Code criminalises the regular and permanent resale of those tickets outside the channels usually established by the

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34 List on the website: [www.arjel.fr](http://www.arjel.fr).

35 Decision ARJEL No. 2015-043, 16 July 2015.

36 Decision ARJEL, No. 2010-050, 26 May 2011.

37 Article L.333-1-1 of the French Sports Code.

38 Dalloz, ‘Dictionnaire permanent de droit du sport’, *Paris Sportif*, No. 40.

39 Article 432-11 of the French Criminal Code.

40 Article 445-1 of the French Criminal Code.

41 Law No. 2012-158 of 1 February 2012 aiming to reinforce sports ethics and sportspeople’s rights.

42 Article 445-2-1 of the French Criminal Code.

43 Law No. 2012-348 of 12 March 2012 aiming to facilitate the organisation of sport and cultural events.



sports event organiser. Moreover, pursuant to Article L.333-1 of the French Sports Code, the organiser has the right to prohibit any resale of ticket, which means that any resale of tickets without the prior approval of the organiser may also lead to civil sanctions.

For instance, in a dispute initiated by the FFF (it being noted that other organisers such as the French Rugby Federation and the LFP did the same), French courts ordered the company Viagogo to cease the illegal resale of online tickets to sports events and held it liable to pay damages to the FFF.<sup>44</sup>

## **IX THE YEAR IN REVIEW**

On 1 March 2017, the French parliament enacted a law regarding sports,<sup>45</sup> which aims to preserve the ethics of sports and to strengthen the regulation and transparency of professional sport. Among its provisions, this law introduces the opportunity for clubs to be exonerated from social contributions and taxes with respect to the exploitation of the collective image of their players, under terms and conditions to be further specified by a decree. Such decree was enacted on 1 August 2018, which sets out the categories of revenues that can give rise to such an exonerated payment: sponsorship, advertising and commercialisation of derived products (to the exclusion of public subsidies, audiovisual rights and ticketing revenues).

This law also aims to promote the development and visibility of women's sports with the creation of a permanent conference whose mission is to develop women's sports practices. France's growing interest in women's sports should be underlined. It is with this goal in mind that the FFF was successful in securing the hosting of the 2019 FIFA Women's World Cup in France.

In the recent past, French lawmakers have also decided to approach the touchy subject of e-sports regulation. On 7 September 2016, the parliament first recognised the existence of such sport and started providing a framework for it by creating a decree to regulate the status of e-sports professional players. Such decree was enacted on 9 May 2017, and it aligns the tax and social security system for e-sports with that of traditional sports, in particular by creating the status of salaried professional player.

## **X OUTLOOK AND CONCLUSIONS**

French sports law is one of the most mature and well-established sports laws in Europe and worldwide. The legal protection accorded to the rights of organisers and its extensive application by the courts have contributed to a fast-growing and quality-oriented industry.

Some questions, in particular regarding new technologies, remain unanswered. The position of French courts is most certainly moving in the right direction, but with new technologies, and, more generally, the digitalisation of the media, sports rights business models require improved legal protection.

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44 Decision first instance court, 20 May 2014.

45 Law No. 2017-261 of 1 March 2017 aiming to preserve the ethics of sport, strengthen the regulation and transparency of professional sport and improve the competitiveness of clubs.

# GERMANY

*Alexander Engelhard*<sup>1</sup>

## I ORGANISATION OF SPORTS CLUBS AND SPORTS GOVERNING BODIES

### i Organisational form

Sports clubs and sports governing bodies in Germany are traditionally organised in the form of (registered, non-profit) associations according to Section 21 et seq. of the German Civil Code (BGB).

For an entity to qualify as an association, the following requirements need to be fulfilled:<sup>2</sup>

- a* at the time of its foundation, the entity must be a voluntary organisation of at least seven persons;<sup>3</sup>
- b* it must have a certain purpose that is not only temporary and is independent from any change of members of the association;
- c* it must have a corporate structure and a name; and
- d* it must be registered in a register of associations at the local court.

If the above-mentioned requirements are met, an association has legal personality, meaning it can acquire rights and obligations under the law.<sup>4</sup>

Entities involved in sports choose to organise in the form of an association for various reasons: the possibility to organise as an association is generally independent from the number of members.<sup>5</sup> Financial risks for members are limited, since association members typically are not liable for debts accrued by an association.<sup>6</sup> Moreover, association members are generally equal and have the same voting rights in an association's general assembly, which is the prime decision-making body of the association.<sup>7</sup>

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1 Alexander Engelhard is a senior associate at Arnecke Sibeth Dabelstein. The author would like to thank Dr Dirk-Reiner Martens for his valuable contribution and guidance in co-authoring the original edition of this chapter.

2 Haas/Martens, *Sportrecht – Eine Einführung in die Praxis*, Schulthess 2011, p. 22.

3 Section 56 BGB.

4 Palandt, *Bürgerliches Gesetzbuch: BGB*, Section 21(1).

5 However, according to Section 73 BGB, the local court has to revoke the legal personality of an association if the number of members drops below three.

6 Exceptions apply in situations in which a member mixes funds of the association with his or her own funds and if the association is used in bad faith to escape personal liability. For more details, see Heermann, *Haftung im Sport*, Boorberg 2008, p. 95. See also Section I.iii.

7 Section 32 BGB, according to which the affairs of the association, to the extent that they are not decided by the board or another organ of the association, are dealt with in a meeting of the members (i.e., the

Under German law, associations enjoy a wide degree of autonomy to regulate their own affairs, including the right to draw up internal regulations and set up an internal dispute resolution mechanism.<sup>8</sup> If organised as non-profit associations according to Section 51 of the German Internal Revenue Code (AO), associations enjoy certain tax benefits. To be recognised as non-profit associations, organisations can still engage in secondary commercial activities (renting a stadium, selling tickets to a sport event, etc.) the financial return of which must be used to fund their non-profit activities.<sup>9</sup> However, if an association through sponsorship and merchandising generates a profit, it will regularly transfer its commercial activities onto a separate (commercial) legal entity.<sup>10</sup>

Because of the above, the German Football Association (DFB) in 1998 allowed the clubs of the German Bundesliga to spin-off their professional football departments as commercial companies.<sup>11</sup> Most clubs in the Bundesliga have made use of this possibility and have transformed their professional football departments into stock corporations (e.g., FC Bayern Munich (not listed)), limited liability companies (e.g., Bayer 04 Leverkusen Fußball GmbH) or partnerships limited by shares with a limited liability company as general partner (e.g., Borussia Dortmund GmbH & Co KGaA (listed)).<sup>12</sup>

## ii Corporate governance

The corporate governance of sport organisations in Germany is not subject to any sport-specific national laws, but is upheld through the interaction of civil, public and criminal laws as well as certain corporate governance guidelines of sport organisations such as the German Olympic Sports Confederation (DOSB).<sup>13</sup>

The relevant civil laws include provisions on the internal structure of associations,<sup>14</sup> their liability and that of their representatives.<sup>15</sup> Public laws provide for rules demanding the selfless activity of associations, the use of funds only for statutory purposes and not for the

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general assembly).

8 Article 9 of the Basic Law for the Federal Republic of Germany provides for the freedom of association.

9 See Haas/Martens (footnote 2), p. 34.

10 For more details see Lentze/Stopper, *Handbuch Fußball-Recht*, Erich Schmidt Verlag 2018, p. 971 et seq.

11 However, at the same time, provisions were put in place that required the majority of voting rights within such companies (i.e., >50 per cent) to be controlled by their parent member associations. For further information about the 50 + 1 rule, see Keidel/Engelhard, 'Football club ownership in Germany – Less Romantic than You Might Think', *LawInSport.com*, 20 July 2015, [www.lawinsport.com/articles/item/football-club-ownership-in-germany-less-romantic-than-you-might-think](http://www.lawinsport.com/articles/item/football-club-ownership-in-germany-less-romantic-than-you-might-think); Rogers, 'The Billionaires Are Coming for German Soccer', *Bloomberg*, 22 March 2018, [www.bloomberg.com/news/articles/2018-03-22/billionaires-find-their-first-opening-to-german-soccer](http://www.bloomberg.com/news/articles/2018-03-22/billionaires-find-their-first-opening-to-german-soccer) (last visited on 3 October 2018).

12 For a recent assessment of the topic, see Punte, 'Die Kapitalgesellschaft als (zwingende) Rechtsform in deutschen Profifußball', *SpuRt* 2/2017, p. 46.

13 The DOSB is the non-governmental umbrella organisation of German sport. It was founded in 2006 as a result of a merger of the German Sports Confederation and the National Olympic Committee for Germany. The DOSB has 98 member organisations, including 16 regional sports confederations, 63 national (sport-governing) federations and 20 sport associations with particular tasks. For more information, see [www.dosb.de](http://www.dosb.de) (last visited on 3 September 2018).

14 For example, Sections 26 and 32 BGB.

15 See Section I.iii.

benefit of an association's officials, or that upon dissolution, the assets of an association may not be transferred to one of the association's officials but will have to be used for a specified common public interest.<sup>16</sup> Relevant criminal matters include:<sup>17</sup>

- a* insolvency offences: Section 283 et seq. of the Criminal Code (StGB) and Section 15a of the German Insolvency Code;
- b* misrepresentation offences: for example, Section 399 of the Stock Companies Act or Section 82 of the Limited Liability Company Act;
- c* breach of fiduciary trust: Section 266 StGB;
- d* commercial bribery: Sections 299 and 300 StGB;
- e* public bribery: Section 331 et seq. StGB;
- f* tax fraud: Section 370 AO; and
- g* illegal gambling: Section 284 StGB.<sup>18</sup>

Beyond the (general) legal framework set out above, the DOSB has passed the DOSB Good Governance Codex, the DOSB Code of Ethics and the DOSB Code of Conduct for Integrity in Federation Work.<sup>19</sup> The DOSB Good Governance Codex contains binding rules on issues such as conflicts of interest and transparency, and is applicable to the DOSB organs.<sup>20</sup> Compliance is supervised by the Good Governance Commissioner, who draws up an annual good governance report that is published on the DOSB website. The DOSB Code of Ethics claims to define the overall conduct and dealings within German sport and towards third parties. It is binding for volunteers, employees and members of the DOSB.<sup>21</sup> Finally, the DOSB Code of Conduct for Integrity in Federation Work contains guidelines for the conduct of DOSB employees and volunteers in business dealings, including provisions on gifts, invitations, donations or the handling of public subsidies.

### iii Corporate liability

Associations are legally represented by their boards. If a board member, while acting for an association, causes damage to a third party, the association is liable for that damage according to Section 31 BGB.<sup>22</sup> This liability towards third parties cannot be ruled out in the statutes of an association.<sup>23</sup> Moreover, the German Federal Court of Justice (BGH) has extended the liability of associations to acts committed by managers and officials who are not board members (or who are not authorised to act on behalf of an association) as long as they had a meaningful and independent role within an association.<sup>24</sup>

<sup>16</sup> Section 51 et seq. AO.

<sup>17</sup> For more details, see Fritzweiler/Pfister/Summerer, *Praxishandbuch Sportrecht*, third edition 2014, p. 841 et seq.

<sup>18</sup> See Section VIII.ii.

<sup>19</sup> The current editions of the DOSB governance regulations are available at [www.dosb.de/ueber-uns/good-governance/](http://www.dosb.de/ueber-uns/good-governance/) (last visited on 3 September 2018).

<sup>20</sup> In the preamble to the Codex, the DOSB suggests that its member associations implement similar regulations concerning the good governance of their respective organisations.

<sup>21</sup> When compared with other ethics regulations in sport (e.g., the FIFA Code of Ethics), it can be seen to contain hardly any concrete and enforceable rules of conduct, but rather touches mostly on soft issues such as tolerance, sustainability and participation.

<sup>22</sup> For more details see Heermann (footnote 6), p. 67.

<sup>23</sup> id., p. 77.

<sup>24</sup> id., p. 67; BGH, judgment of 30 October 1967 – VII ZR82/65.

The liability of an association does not supersede the liability of an individual committing an act that causes damage:<sup>25</sup> the association and the individual will be jointly liable for that damage.<sup>26</sup> According to the general rules of German contract and tort law such individual will be liable, *inter alia*, with regard to the failure to pay social security contributions or to timely file for the opening of insolvency proceedings.<sup>27</sup> Considering the far-reaching scenarios of individual liability in the sport association context, managers and officials should consider taking out directors and officers liability (D&O) insurance.<sup>28</sup>

## II THE DISPUTE RESOLUTION SYSTEM

### i Access to courts

As in many other legal systems, under German law, sports governing bodies are prohibited from preventing an athlete, club or other sports stakeholder from challenging a decision of such sports governing body before a state court or arbitral tribunal.<sup>29</sup> However, the rules and regulations of a sports governing body may prevent direct appeals against first instance decisions before a state court or arbitral tribunal if the sports governing body has an internal appeals body that may rectify the first instance decision. In practice, internal challenges against first instance decisions by sport organisations are hugely important, not least because of the enormous number of first instance decisions produced by sports governing bodies each year.<sup>30</sup>

As a result of the above, an athlete or club intending to appeal a decision of a sports governing body before a state court or arbitral tribunal must in general exhaust all (internal) legal remedies available to it prior to the appeal. Sports governing bodies are allowed to set reasonable time limits regarding an internal appeal that, if not observed by the appellant, may lead to the appealed decision becoming final and binding.<sup>31</sup> Only under rare circumstances may internal remedies be disregarded if an internal appeal would be unreasonable or a mere formality. This would be the case if the appeals body of a sports governing body declares that it will dismiss the appeal before the appeal proceedings have even started, if the appellant's right to be heard is violated or if the appeal body is constituted in an improper way.<sup>32</sup>

25 *id.*, p. 82.

26 Regarding the internal relationship between an association and an individual who committed the act in question, the association will be able to recoup damages from the individual according to Section 840(2) BGB. However, Section 31a BGB contains a liability privilege for an official towards the association and its members if an official earns less than €720 per year. In such a case, an official will only be liable if he or she acted intentionally or with gross negligence. See also the Higher Regional Court (OLG) of Nuremberg, order of 13 November 2015 – 12 W 1845/15.

27 For further examples, see Heermann (footnote 6), p. 83 et seq.

28 D&O liability insurance provides coverage to managers and officials to protect them from claims that may arise from the decisions and actions they take within the scope of their regular duties. Intentional and grossly negligent (illegal) acts are typically not covered under D&O policies.

29 See Haas/Martens (footnote 2), p. 119. Any provision to the contrary in the rules and regulations of a sports governing body would be invalid.

30 Hilpert, *Sportrecht und Sportrechtsprechung im In- und Ausland*, De Gruyter 2007, p. 19. In German football alone, an estimated 400,000 first instance proceedings are conducted annually.

31 See Haas/Martens (footnote 2), p. 121.

32 *id.*, p. 121.

Once all (internal) legal remedies are exhausted, the question of whether a decision can be appealed before a state court depends on whether the parties have concluded a valid arbitration agreement. In cases where an arbitration agreement does not exist or is invalid, or where a dispute is not arbitrable, an appeal may be brought before a state court.<sup>33</sup>

The scope of review conducted by a state court will typically encompass the following aspects:<sup>34</sup>

- a* Was the athlete, club or other sports stakeholder covered by the scope of the governing body's jurisdiction and sanctioning regime?
- b* Was there a sufficient legal basis for the decision contained in the rules and regulations of the sports governing body?<sup>35</sup>
- c* Were the procedural rules of the sports governing body respected?
- d* Were fundamental procedural rights observed?
- e* Was the decision legal in view of higher-ranking legal principles?
- f* Did the decision-making body establish accurately the facts that form the basis of the decision?
- g* Was the decision legal in the sense that it was neither arbitrary nor unjust?

If the sports governing body in question can be considered a monopoly, the court will also assess whether the rules and regulations of the sports governing body itself are substantively adequate.<sup>36</sup>

Typical requests for relief brought before a state court include:<sup>37</sup>

- a* annulment of a disciplinary sanction;
- b* annulment of a sporting result;
- c* admission of an athlete or club into an association; and
- d* (preliminary) admission of an athlete into a competition.<sup>38</sup>

## ii Sports arbitration

The legal framework applicable to arbitration proceedings conducted in Germany is set out in Section 1025 et seq. of the Code of Civil Procedure (ZPO).

33 Regarding the requirements for a valid arbitration agreement and the question of arbitrability, see Section II.ii.

34 See Fritzweiler/Pfister/Summerer (footnote 17), p. 276 et seq.

35 See, for instance, *NJW-Aktuell* 42/2016, p. 12. In 2016, the BGH held that the Regional Football Association of Northern Germany was not allowed to order the relegation of the club SV Wilhelmshaven, as there was no sufficient basis for such disciplinary sanction in the rules and regulations of the governing body, despite the fact that the club had violated the FIFA Regulations on the Status and Transfer of Players. For a critical analysis of the decision, turn to Orth, 'Die Fußballwelt nach Wilhelmshaven', *SpuRt* 2017, p. 9.

36 *id.*, p. 280. Recently confirmed by the Regional Court (LG) of Dortmund, judgment of 5 April 2017 – 3 O 108/17.

37 *id.*, p. 265.

38 A good example is the case of German triple jumper Charles Friedek, whose request for a (preliminary) nomination to participate in the 2008 Olympic Games was turned down by the Regional and the Higher Regional Court in Frankfurt (OLG Frankfurt, judgment of 30 July 2008 – 4 W 58/08, *NJW* 2008, 2925). On 13 October 2015, the BGH held that Friedek was entitled to damages from the DOSB for not nominating him for the Games although he had fulfilled the nomination criteria. The case was referred back to the previous instance for it to decide the amount of damages to be paid (BGH, judgment of 13 October 2015 – II ZR 23/14). In 2016, the parties concluded a settlement agreement.

Section 1031 ZPO provides that the parties need to agree to arbitration in writing, either in a document signed by both parties or by making reference in a contract to a document containing an arbitration clause.<sup>39</sup> The arbitration agreement must be sufficiently clear as to the scope of disputes that shall be submitted to arbitration.

An arbitration clause may also be contained in the statutes of an association.<sup>40</sup> One of the issues in this regard is that the arbitration agreement contained in the statutes of an association is usually not entered into voluntarily by the athletes or clubs affected by it. The argument was raised in the fiercely debated case of German speed skater Claudia Pechstein, who was seeking damages before a German state court against the International Skating Union (ISU) after she had been banned for doping by the governing body and had lost subsequent proceedings before the Court of Arbitration for Sport (CAS) in Lausanne and the Swiss Federal Tribunal. In 2016, the BGH confirmed that in sports matters, the need for international uniformity of decisions trumps the requirement of a 'voluntary' arbitration agreement.<sup>41</sup>

Sports disputes are arbitrable according to Section 1030 ZPO as long as they concern pecuniary matters.<sup>42</sup> Labour law-related disputes, for instance between a player and his or her club, are generally not arbitrable under German law.<sup>43</sup> Because the relationship between athletes in non-team sports and sports governing bodies rarely qualifies as an employment relationship, disputes between athletes and sports governing bodies are usually arbitrable.

A sports governing body is generally prohibited from excluding the right of an athlete or club to (also) seek preliminary measures before a state court.<sup>44</sup> Only in those cases where the arbitral tribunal can provide the same degree of legal protection (with regard to preliminary measures) as a state court may the arbitral rules prohibit resort to a state court for preliminary measures. This is the case, for instance, with regard to the German Court of Arbitration for Sport (DIS-Sport), a division of the German Institution for Arbitration (DIS), which has a roster of arbitrators on call any day of the week.<sup>45</sup>

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39 Section 1031 ZPO also provides that an arbitration agreement in which a consumer is involved must be contained in a record or document signed by the parties. This is the case if the arbitration agreement relates to neither a commercial nor self-employed activity of the athlete.

40 Section 1066 ZPO; see also Musielak/Voit, ZPO, 12th edition 2015, Paragraph 7. The arbitration clause must be contained in the statutes (and not in other (lower-ranking) regulations) of the association. Non-members are generally not bound by the arbitration clause in the statutes even if the association and the non-member conclude a contract that refers to the arbitration clause in the statutes.

41 BGH, judgment of 7 June 2016 – KZR 6/15. For a summary of the proceedings, see Martens/Engelhard, 'Is the Pechstein Saga Coming to an End? German Federal Court of Justice Ruling on Claudia Pechstein v International Skating Union', June 2016, *Business Law International*, Volume 18, No. 1, January 2017. Ms Pechstein has lodged a constitutional complaint against the BGH decision before the German Federal Constitutional Court.

42 The term 'pecuniary matter' must be interpreted in a wider sense, and also includes claims for admission into a competition if the monetary interests of the athlete or club are also affected. Antitrust issues are also arbitrable.

43 Sections 4 and 101 of the Labour Court Act.

44 See Haas/Martens (footnote 2), p. 133.

45 *id.*, p. 134.

The DIS-Sport,<sup>46</sup> which is the most important sports arbitral tribunal in Germany, was founded in 2008. It is based on a joint initiative of the German National Anti-Doping Agency (NADA) and the DIS. Disputes before the DIS-Sport include:

- a* breaches of anti-doping rules;
- b* disputes arising in the context of sports events;
- c* transfer disputes;
- d* disputes regarding licensing and sponsoring agreements; and
- e* membership disputes.

The DIS-Sport may decide cases as a first instance tribunal or on appeal against a previous decision by a sports governing body, provided that the association has implemented a corresponding arbitration clause in its statutes.<sup>47</sup> In disputes regarding a breach of anti-doping rules, the DIS-Sport Arbitration Rules provide for a review of an arbitral award by the CAS.

### **iii Enforceability**

An arbitral award has the same effect as a final and binding judgment by a state court, and enforcement requires the arbitral award to be declared enforceable by a state court.<sup>48</sup> The recognition and enforcement of foreign arbitral awards is governed by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. It is worth mentioning that disciplinary (doping) decisions of an arbitral tribunal are generally 'self-enforcing', in that the sports governing body has the power to ensure that banned athletes are prevented from competing.

Arbitral awards may be challenged by means of an annulment claim.<sup>49</sup> The reasons for annulment according to Section 1059 ZPO are limited primarily to procedural issues. An appeal that the award is 'wrong' will not be heard.

## **III ORGANISATION OF SPORTS EVENTS**

### **i Relationship between organiser and spectator**

The legal relationship between the organiser and the spectator is not subject to any sport-specific national laws, but rather to the law of the land, and is primarily defined by the ticketing contract concluded between the parties.<sup>50</sup> Apart from the general rights and obligations of the parties (the ticket holder being entitled to enter the venue and to follow the sports event from his or her assigned seat; the event organiser being entitled to receive the purchase price for the ticket), the ticketing contract will contain certain terms and

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46 The DIS-Sport is currently recognised by 50 German sports governing bodies, including the German Basketball Federation and the German Athletics Federation. For further information about the DIS-Sport, see the DIS website: [www.dis-arb.de/em/57/content/about-the-dis-id46](http://www.dis-arb.de/em/57/content/about-the-dis-id46) (last visited on 3 September 2018); and the information provided by the National Anti-Doping Agency at [www.nada.de/fileadmin/user\\_upload/nada/Recht/Sportgerichtsbarkeit/Verbandsgerichtsbarkeit\\_und\\_Sportschiedsgerichtsbarkeit.pdf](http://www.nada.de/fileadmin/user_upload/nada/Recht/Sportgerichtsbarkeit/Verbandsgerichtsbarkeit_und_Sportschiedsgerichtsbarkeit.pdf) (last visited on 28 September 2018).

47 Section 1 DIS-Sport Arbitration Rules.

48 Sections 1055 and 1060 ZPO.

49 See Haas/Martens (footnote 2), p. 123.

50 For further details regarding ticketing, see Lentze/Stopper (footnote 10), p. 1141 ff.



conditions. The exact content of the terms and conditions will depend on the type of ticket that is purchased (e.g., a match-day or season ticket), but will usually include limitations on ticket transfers, liability and security, as well as filming and photography.

To validly include the organiser's terms and conditions in the ticketing contract, they must be brought to the attention of the purchaser before the ticket is bought.<sup>51</sup> Thus, printing the terms and conditions on the back of the ticket does not suffice if the ticket is handed out to the purchaser only after the ticketing contract is concluded. As a rule, a clearly visible notice about the terms and conditions at the place of purchase is required, or if the ticket is purchased online, the customer must agree to the terms and conditions prior to making the purchase.<sup>52</sup>

For security reasons, in order to ensure a widespread supply of tickets, and to prevent black-market trading and ticket speculations, organisers will regularly include a clause in the ticketing terms and conditions that allows ticket purchases for private use only.<sup>53</sup>

Regarding liability, the organiser will usually include a clause in the ticketing terms and conditions that will limit its liability and that of its legal representatives or agents to damages caused by intent or gross negligence.<sup>54</sup> However, damages caused to life, physical integrity or health, and those under product liability law or owing to fraudulent misrepresentation, will remain unaffected. Furthermore, the spectator will usually be prohibited from bringing fireworks, bottles, cans, intoxicants or pets into the stadium.<sup>55</sup>

Finally, the organiser will also stipulate in the ticketing terms and conditions that the use of cameras and other picture and film recording devices (e.g., smartphones) for commercial purposes is prohibited. At the same time, a spectator will consent to the free use of his or her image and voice in any type of media (e.g., for photographs, live broadcasts or other recordings by the organiser (or its agent) created in connection with the event).

## ii Relationship between organiser and athletes or clubs

In Germany, the legal relationship between the organiser and the athlete or club is not subject to any sport-specific national laws. It can either be defined by membership (if the organiser is an association of which the athlete or club is a direct member), or through a licence or another private agreement between the parties.

Because professional athletes or clubs are often not direct members of the organiser (if indirect members, a mere reference to the rules and regulations of a higher ranking governing body can be problematic),<sup>56</sup> the athlete or club must submit to the rules and regulations of the organiser either by applying for and receiving a licence to participate in a certain competition or by concluding a participation agreement with the organiser.<sup>57</sup> The BGH has decided that Section 305 et seq. BGB, which regulates the inclusion of terms and conditions

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51 Section 305 BGB.

52 See Lentze/Stopper (footnote 10), p. 1160.

53 For details see Section VIII.iv.

54 In the case of a negligent breach of a principal obligation under the ticketing contract, liability will usually be limited to foreseeable damage, while in the case of a negligent breach of a secondary or collateral obligation, liability will be excluded entirely.

55 See also Section III.v.

56 Unlike Swiss law, German law generally prohibits 'dynamic' referencing to future editions of the rules and regulations of another (higher-ranking) sports governing body. See Haas/Martens (footnote 2), p. 70.

57 *id.*, p. 66 et seq.

into private agreements, do not apply to agreements by which an athlete submits to the rules and regulations of a sports association.<sup>58</sup> It is sufficient that the applicable rules and regulations are provided to the athlete upon request.<sup>59</sup>

As an example, German Olympic athletes ahead of the 2016 Rio Olympic Games had to sign the DOSB athlete's agreement<sup>60</sup> as well as the International Olympic Committee entry form and eligibility conditions that, *inter alia*, also contained an arbitration agreement in favour of CAS.

Professional clubs usually submit to the regulations and the disciplinary powers of a sports governing body (e.g., a league) by concluding a licensing agreement with the governing body. Typical licensing criteria will include sporting, legal, personnel and administrative, infrastructure and security, and media and financial aspects.<sup>61</sup>

### iii Liability of the organiser

An organiser may be liable not only towards its contractual partners (including athletes and spectators) but also towards third parties under the general rules of German civil law. The relevant statutory provisions, the application of which may be influenced by disclaimers contained in athlete agreements, ticketing terms and conditions or other types of agreements, relate to, *inter alia*,<sup>62</sup> Section 280 et seq. BGB (damages for breach of contract) and Section 823 et seq. BGB (damages for unlawful conduct).<sup>63</sup>

Besides claiming damages (which are generally restricted to compensation without the possibility of claiming punitive damages),<sup>64</sup> an injured person may also seek injunctive relief against a continued violation of his or her rights.<sup>65</sup>

The most relevant criminal provisions applicable to organisers include Section 223 et seq. StGB (causing bodily harm) and Section 229 StGB (involuntary or negligent bodily harm); and Section 212 StGB (manslaughter) and Section 222 StGB (involuntary or negligent manslaughter).<sup>66</sup>

58 BGH, judgment of 28 November 1994 – II ZR 11/94.

59 If the rules are changed by the organiser during the duration of the contract, the athlete has the right to withdraw from the contract if the rule change appears inappropriate and unacceptable. See Haas/Martens (footnote 2), p. 75.

60 The DOSB athlete's agreement for the 2016 Rio Olympic Games contained, *inter alia*, the following obligations for athletes: (a) recognition of the World Anti-Doping Code, the National Anti-Doping Code, the Olympic Charter and other regulations and fundamental documents; (b) acknowledgement of team orders and the DOSB's sole responsibility to nominate athletes; (c) acceptance of the DOSB dress code and the obligation to wear sponsor-related attire without changing or blocking any of the sponsors' logos subject to a contractual penalty; and (d) acknowledgement of the rules on advertisements in the Olympic Charter and the prohibition of any form of advertising during the Games. The DOSB athlete's agreement for the 2016 Rio Olympic Games is available at [https://cdn.dosb.de/alter\\_Datenbestand/Bilder\\_allgemein/Veranstaltungen/Rio\\_2016/RIO\\_2016\\_Athletenvereinbarung\\_beschlossen\\_am\\_12.04.2016.pdf](https://cdn.dosb.de/alter_Datenbestand/Bilder_allgemein/Veranstaltungen/Rio_2016/RIO_2016_Athletenvereinbarung_beschlossen_am_12.04.2016.pdf) (last visited on 28 September 2018).

61 For more information on club licensing in the Bundesliga, see Lentze/Stopper (footnote 10), p. 863 et seq.

62 For more details on the civil liability of the organiser, see Heermann, p. 154 et seq.

63 For a recent assessment of the validity of disclaimers, see Jakob/Roebig, 'Wirksamkeit von Haftungsausschlussklauseln in Individuallizenzen', *SpuRt* 5/2017, p. 184.

64 Section 249 BGB.

65 See Heermann (footnote 6), p. 53.

66 District Court (AG) Garmisch-Partenkirchen, judgment of 1 December 2009 – 3 Cs 11 Js 24093/08 (Zugspitz-Lauf). In this case, the court found that the organiser of an extreme run up Germany's highest

The criminal offences set out in Sections 223 and 229 StGB usually require a complaint by the victim for the prosecution to be initiated. However, the prosecution service may also initiate an investigation *ex officio* when there is sufficient public interest in the prosecution.

#### **iv Liability of the athletes**

The explanations and provisions set out in Section III.iii regarding the liability of the organiser also apply with regard to the liability of athletes, particularly Section 823(1) BGB (also Section 280 BGB in the context of a contractual agreement) as well as Sections 223 and 229 StGB. From a civil and criminal law perspective, athletes must respect a general duty of care when practising their sport, be it in a competition or in training.

A definition of the duty of care to be observed in an individual case will be based on the rules of the game of the respective sport.<sup>67</sup> Courts will use the rules of the game as a foundation when assessing whether a certain conduct was illegal and culpable. If an athlete complies with the rules of the game of his or her sport but nevertheless injures another athlete, the athlete will usually not be liable for any damage caused. In addition, in cases of only a slight violation of the rules of the game, liability will most often be denied. Courts will assess whether, in that particular moment, the athlete could have reasonably avoided the danger created for another athlete or third party. With regard to high-risk sports, such as boxing or other combat sports, liability is regularly denied not only in cases of compliance with the rules of the game but even in cases of slight negligence.<sup>68</sup> This far-reaching exemption from liability is justified by the fact that the injured person in general agrees to the dangers and injuries caused by that particular sport, or that the injured person acted at his or her own risk.

In cases where an athlete is liable and has to pay compensation, he or she must restore the position that would exist if the circumstance obliging him or her to pay damages had not occurred.<sup>69</sup> This may include lost earnings and a moderate compensation for immaterial damages (i.e., pain and suffering). When allocating the amount of compensation, any contributory negligence of the injured person will have to be taken into account.

#### **v Liability of the spectators**

The relevant statutory provisions concerning the liability of spectators can also be found in Section 823(1) BGB (as well as in Section 280 BGB if the spectator violates obligations under the ticketing contract), and Sections 223 and 229 StGB. If spectators invade the field of play, throw objects at athletes or physically assault athletes, they are generally liable and will have to pay compensation for damages caused according to Sections 280 BGB or 823(1) BGB, or both. A spectator cannot rely on the specific nature of sport in arguing that his or her conduct was not illegal or culpable, because spectators must behave in a way that does

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mountain, Zugspitze, was not guilty of negligent manslaughter, although two of the participants had died of hypothermia during the race. The judge justified the acquittal by stating that the organiser had informed the participants about the weather on the Zugspitze and that the participants had put themselves at risk.

67 See Haas/Martens (footnote 2), p. 179. Where the sport does not provide for rules regarding on-field conduct, the duty of care is defined by comparing the conduct in question with that applied by a conscientious and considerate athlete.

68 *id.*, p. 183.

69 Section 249 BGB.

not increase risks for athletes in addition to those inherent to the sport itself.<sup>70</sup> The liability of spectators also extends to violations of property rights, personality rights and other rights protected under Section 823(1) BGB.

If a particular perpetrator cannot be identified from a specific group of spectators, Section 830(1) BGB provides that each of the persons involved will be liable for the damage caused.<sup>71</sup> A form of joint liability can even be found in criminal law, in Section 231 StGB, which allows punishment of a person for taking part in a brawl or an attack committed against one person by more than one person if the death of a person or his or her grievous bodily harm (Section 226 StGB) is caused by that brawl or attack. Violations of Section 231 StGB will be prosecuted *ex officio*.

## vi Riot prevention

German law does not provide for any sport-specific national laws to prevent riots. The topic is generally dealt with under German public law, in particular, police law. In this context, in 2016, ahead of a Bundesliga match between rival clubs SV Darmstadt 98 and Eintracht Frankfurt, an order by the public authorities in Darmstadt, which banned fans of the opposing team from entering certain parts of the city on game day was annulled by the public court in Darmstadt for being too vague and disproportionate.<sup>72</sup>

There has been a debate in Germany about whether professional football clubs or the League should be held liable for the costs of police operations in connection with Bundesliga games. The debate was caused by a change in the state law of Bremen, according to which costs for police operations can be claimed from the person or entity (e.g., an event organiser) in whose interest the operation took place.<sup>73</sup> The change in the law has been criticised for several different legal and practical reasons.<sup>74</sup> In 2017, the Local Administrative Court in Bremen (VG Bremen) had avoided ruling on the legality of the new law by finding that a notice on costs, sent by the City of Bremen to the League in the amount of €425,718 for its police operation regarding the match between the rival clubs Werder Bremen and Hamburger SV, was unlawful merely because the costs were not predictable for the organiser as a result of an undefined fee calculation method. The judgment was overturned on appeal by the Higher Administrative Court of Bremen (OVG Bremen), which held that the notice on costs was indeed valid.<sup>75</sup>

In football, the rules and regulations of the DFB show a twofold approach: the DFB obliges Bundesliga clubs to employ fan commissioners<sup>76</sup> and subsidises several fan projects. On the other hand, Section 9a of the DFB Legal and Procedural Rules provides for the strict

70 See Heermann (footnote 6), p. 225.

71 *id.*, p. 225.

72 Local Administrative Court (VG) of Darmstadt, order of 28 April 2016 – 3 L 642/16.

73 Section 4 Fees and Contributions Act (Bremen).

74 For more information, see Böhm, 'Polizeikosten bei Fußballspielen', *NJW* 2015, p. 3000; Klein, 'Fußballveranstaltungen und Polizeikosten – Die Verfassungsmäßigkeit einer kostenrechtlichen lex-Fußball in Bremen', *DVBf* 5/2015, p. 275.

75 OVG Bremen, judgment of 05 February 2018 – 2 LC 139/17, overturned VG Bremen, judgment of 17 May 2017 – 2 K 1191/16; for more information see Weill, 'Die DFL als "Veranstalterin" und Schuldnerin von Verwaltungsgebühren im deutschen Profifußball', *NVwZ* 2018, p. 846. The matter has been appealed before the Federal Administrative Court.

76 Section 5(1)(i) League Statute.

liability of clubs for the behaviour of their supporters and spectators.<sup>77</sup> The rules go as far as to provide that the home club and the away club are responsible for incidents of any kind in the stadium area before, during and after the game.

Under German law, clubs that are subject to a financial sanction on the basis of Section 9a of the DFB Disciplinary Code because of rioting spectators are able to take recourse against such spectators. The BGH held that spectators have a legal obligation not to interfere in the course of a sporting event. If, for example, a spectator violates such obligation by throwing a firecracker into the stands injuring several people, that spectator is liable for the damage caused, including a foreseeable financial sanction imposed on the responsible club pursuant to the applicable disciplinary regulations.<sup>78</sup> It must clearly be proven that a spectator is guilty of the alleged misconduct; more precisely, the club cannot take recourse against a spectator if it is not entirely clear that such spectator committed the offence in question.<sup>79</sup>

Finally, the DFB also provides Guideline for the Consistent Application of Stadium Bans.<sup>80</sup> In this regard, the German Constitutional Court recently confirmed that a club may impose a nationwide stadium ban against a rioting spectator on the basis of objective facts, if there is a risk that the respective person may engage in misconduct again in the future.<sup>81</sup>

## IV COMMERCIALISATION OF SPORTS EVENTS

### i Types of and ownership in rights

German law does not recognise a specific sports organiser right *per se*.<sup>82</sup> It also does not recognise genuine broadcasting, sponsorship or merchandising rights. The question of whether, in what form and to what extent such rights exist, and to whom they belong, let alone how they might be transferred, is extremely difficult to answer. In the end, an organiser will have to rely on several different laws and rights to protect its event and investments.

Of central importance is the ‘house right’ set out in Sections 858 and 903 BGB.<sup>83</sup> Usually, the organiser of a sporting event is able to exercise the house right regarding the venue where the event is held, either because it owns the venue (e.g., a stadium or an arena) or because the venue owner has transferred the house right to the organiser for the time of the

77 For more information, see Haslinger, *Zuschauerausschreitungen und Verbandssanktionen im Fußball*, Nomos 2010.

78 BGH, judgment of 22 September 2016 – VII ZR 14/16 overturning OLG Cologne, judgment of 17 December 2015 – 7 U 54/15. The case was referred back to the previous instance, which decided in 2017 that the damages to be paid by the spectator needed to correlate with his actual causal contribution to the financial sanction of the sports governing body against the club (OLG Cologne, judgment of 9 March 2017 – 7 U 54/15). For a detailed analysis, turn to Scheuch, ‘Regress gegen einzelne Störer nach Verurteilung zu einer Verbandsgesamtstrafe’, *SpuRt* 4/2017, p. 137.

79 LG Karlsruhe, judgment of 29 May 2012 – 8 O 78/12.

80 Richtlinien zur einheitlichen Behandlung von Stadionverboten, see [www.dfb.de/verbandsservice/pinnwand/stadionverbots-richtlinien/](http://www.dfb.de/verbandsservice/pinnwand/stadionverbots-richtlinien/) (last visited on 3 October 2018).

81 OLG Frankfurt am Main, judgment of 7 September 2017 – 1 U 175/16; for more information, see Staake, ‘Stadionverbote und Grundrechtsschutz’, *SpuRt* 2018, p. 138; Constitutional Court, judgment of 11 April 2018 – 1 – BvR 3080/09.

82 For more information, see the legal opinion of Hilty/Henning-Bodewig, *Leistungsschutzrechte zugunsten von Sportveranstaltern?*, Boorberg 2007. For a more recent assessment on the implementation of a sports organiser’s right, see Heermann, ‘Neues zum Leistungsschutzrecht für Sportveranstalter’, *GRUR* 2015, p. 232.

83 See also Sections 859, 862 and 1004 BGB.

event. The house right allows the organiser to exclude unauthorised persons or media from the venue or to allow entry subject to specific contractual conditions. Other important rights derive from copyright law, competition law, trademark law and tort law.

With regard to transfer rights in team sports, these mainly derive from an existing employment relationship of a player and his or her club, and the protection of this contractual relationship under the law and relevant regulations of sports governing bodies.<sup>84</sup>

## ii Rights protection

The difficulty of the protection of rights of a sports organiser under German law can be explained using the example of broadcasting rights.<sup>85</sup> In view of the absence of a genuine broadcasting right, the protection thereof derives from the house right, as well as copyright law, competition law and tort law principles.

### *House right*

This right allows the organiser to regulate access to a venue in relation to spectators and third parties (including radio and TV broadcasters).<sup>86</sup> In a broadcasting deal, the organiser will waive its house right in relation to the broadcaster for the latter to produce a live feed from the sporting event in return for a fee paid by the broadcaster to the organiser. However, property rights cannot sufficiently prevent unauthorised filming of a sporting event from outside the venue (e.g., a high building next to the stadium or a drone).

### *Copyright law*

Sporting events under German law are generally not protected by copyright law because they are not considered personal intellectual creations (Section 2(2) of the Copyright Act (UrhG)). In addition, organisers and athletes are not protected by copyright law (Sections 73 and 81 UrhG are not applicable). Athletes are not considered theatrical performers. Rarely are they protected by the right to control their own image, because they are public figures in the sense of Sections 22 and 23 of the Art Copyright Act. Section 94 UrhG protects at least the (host) broadcaster once it delivers or has delivered the pictures of a sporting event.<sup>87</sup> Section 87(1) UrhG protects the TV channel that is airing the broadcast.<sup>88</sup>

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84 For example, Article 13 et seq. FIFA Regulations on the Status and Transfer of Players.

85 For more information on German law regarding broadcasting rights, see Lentze/Stopper (footnote 10), p. 51 et seq.

86 BGH, judgment of 8 November 2005 – KZR 37/03, NJW 2006, p. 377 (*Hörfunkrechte*). In 2017, the Higher Regional Court of Munich held that the Bavarian Football Association was allowed to exclude third parties from filming amateur football matches, or admitting them subject to payment of a fee, based on the house right (OLG Munich, judgment of 23 March 2017 – U 3702/16 Kart). For an analysis of the decision, turn to Reinholz, ‘Münchner “Bewegtbildurteil”’: Kein Fall Hartplatzhelden II’, *Causa Sport*, 2/2017, p. 138

87 See Lentze/Stopper (footnote 10), p. 56.

88 *id.*

### ***Competition law***

The Act against Unfair Competition (UWG) prohibits certain trade practices that are considered unfair, such as exploiting or taking credit for somebody else's work. The BGH has considered that Section 3 UWG could prevent third parties from unauthorised filming and broadcasting of a sporting event.<sup>89</sup>

### ***Tort law***

Finally, it has also been suggested that the organiser of a sporting event who has made a considerable investment in order to hold a sporting event, or an athlete who has invested a lot in training, enjoy protection under Section 823(1) BGB against the unpaid exploitation of their investment.<sup>90</sup>

### **iii Contractual provisions for exploitation of rights**

Contracts in the field of sport rights are manifold. It is indispensable for a sports rights holder to stipulate the rights that are transferred to a licensee diligently. At the same time, it is essential to also properly structure and manage all rights contracts in order to avoid conflicting rights deals and tap the full commercial potential of the rights holder.

As to the content of sports rights contracts, parties are generally free to agree upon the relevant rights and obligations. Limits to the parties' contractual freedom are merely provided by certain legal prohibitions (Section 134 BGB) or public policy (Section 138 BGB).

Taking broadcasting as an example, the main obligation of an organiser will be to grant complete access to the venue to the broadcaster for all contractual purposes. In return, the licensee (i.e., the broadcaster) will pay a licensing fee. Other relevant items in a broadcasting agreement will deal, *inter alia*, with:

- a* exclusivity;
- b* sub-licensing;
- c* territory;
- d* production;
- e* duty to broadcast;
- f* contract duration and termination; and
- g* warranty and indemnification.<sup>91</sup>

Statutory provisions that need to be observed in sports broadcasting contracts include those of German and European antitrust law, especially Article 101 of the Treaty on the Functioning of the European Union (TFEU). In today's converged media landscape, broadcasting rights and other media rights will usually be split up into different rights packages to meet antitrust

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89 BGH, judgment of 28 October 2008 – I ZR 60/09, *GRUR* 2011, p. 426 (Hartplatzhelden.de).

90 See Lentze/Stopper (footnote 10), p. 68.

91 Schwartmann, *Praxishandbuch Medien-, IT- und Urheberrecht*, CF Müller 2011, p. 426 et seq.; see also Lentze/Stopper (footnote 10), p. 80 et seq. or Fritzweiler/Pfister/Summerer (footnote 17), p. 455 et seq.

obligations.<sup>92</sup> Other relevant norms include the right to produce short news extracts<sup>93</sup> in Section 5 of the Interstate Broadcasting Treaty (RStV) or Section 4 RStV regarding ‘listed events’.<sup>94</sup>

## V PROFESSIONAL SPORTS AND LABOUR LAW

### i Mandatory provisions

Employment relationships in sport are subject to the general rules of German labour law, including the following noteworthy provisions.

- a Section 611 BGB, Articles 1 and 2 of the Basic Law for the Federal Republic of Germany: the athlete has a right to play and train according to the terms of his or her employment contract. Degradation of a first team player to the reserves or to a separate training group is most likely unlawful unless provided otherwise in the contract.<sup>95</sup>
- b Section 616 BGB: the athlete can claim his or her salary, although temporarily unfit to play because of injury. Details are set out in the Continued Remuneration Act.
- c Section 1 Federal Holiday Act: the athlete has a right to at least 24 business days of paid leave during the calendar year.<sup>96</sup>
- d Section 14 et seq. of the Act on Part-Time Work and Fixed-Term Employment Contracts (TzBfG): according to Section 14(1) TzBfG, fixed-term contracts are only permissible if justified by an objective reason; otherwise, fixed-term contracts are only acceptable for up to two years. A fixed-term contract may not be renewed more than three times. However, athletes’ and coaches’ contracts can be fixed-term because of the specificities of sport, including the necessity for clubs to restructure a team after each season. Accordingly, a controversial decision by the Labour Court of Mainz that a

92 For more information, see *id.*, p. 414 et seq.; also the Federal Cartel Office, decision of 12 January 2012 – B 6-114/10. For an assessment of the latest Bundesliga TV rights deal, see Keidel/Engelhard, ‘How the Bundesliga’s new “no single buyer” rule has increased the broadcasting revenue for German football’, *LawInSport.com*, 14 October 2016, available at [www.lawinsport.com/articles/item/how-the-bundesliga-s-new-no-single-buyer-rule-has-increased-the-broadcasting-revenue-for-german-football](http://www.lawinsport.com/articles/item/how-the-bundesliga-s-new-no-single-buyer-rule-has-increased-the-broadcasting-revenue-for-german-football) (last visited on 3 September 2018).

93 For more information, see Soldner/Engelhard, ‘Kehrtwende im Recht zur Kurzberichterstattung? – Die Rechtsprechung des BVerfG auf dem Prüfstand’, *Kommunikation und Recht*, p. 488.

94 Listed events are major sport events that need to be broadcast on free TV. In Germany, the list includes:

- a the Summer and the Winter Olympic Games;
- b the games of the German national team at the FIFA World Cup and the UEFA EURO;
- c the semi-finals and final of the FIFA World Cup and the UEFA EURO, irrespective of the participation of the German national team;
- d the semi-finals and final of the DFB Cup;
- e home and away games of the German national football team; and
- f the finals of the European club competitions (i.e., UEFA Champions League and UEFA Europa League) if a German team is playing.

95 See Labour Court (ArbG) of Mannheim, judgment of 28 August 2013 – 10 Ga 3/13.

96 Regarding the time when an athlete is able to take leave, the template DFB player contract provides that leave shall only be taken during the period in which no competitive matches are taking place, and shall always require the club’s prior express approval. An English version of the template employment contract for footballers provided by the DFB can be found at [www.dfb.de/fileadmin/\\_dfbdam/31698-Mustervertrag\\_Vertragsspieler\\_englisch\\_\\_07.2014\\_.pdf](http://www.dfb.de/fileadmin/_dfbdam/31698-Mustervertrag_Vertragsspieler_englisch__07.2014_.pdf) (last visited on 28 September 2018).



36-year-old goalkeeper should be reinstated permanently with his former club after the court had found that the specificity of sport was insufficient to justify the fixed-term contract with the player, was overturned on appeal in 2016 and confirmed by the Federal Labour Court in 2018.<sup>97</sup>

- e Section 15 TzBfG: under German law, (justified) fixed-term contracts are valid for a duration of up to five years.<sup>98</sup> This also applies to fixed-term contracts with unilateral extension options, which are generally legal under German law. While a labour court in Ulm held in 2008 that a unilateral extension option in a player contract was invalid because it would constitute an excessive commitment for the player,<sup>99</sup> the Federal Labour Court in 2013 held that a four-year fixed-term contract of a youth player with a one-year unilateral extension option was valid under German law.<sup>100</sup>
- f Section 626 BGB: a party to an employment contract (permanent or fixed-term) may terminate said contract unilaterally (without a required notice period) if there is a compelling reason, meaning that the party terminating the contract cannot reasonably be expected to continue the employment relationship.
- g Tax and social security law provisions: the employer is obliged to withhold and pay income tax as well as social security contributions for his or her employees.

## ii Free movement of athletes

After the *Bosman* decision of 1995,<sup>101</sup> and in light of the freedom of movement for workers stipulated in Article 45 TFEU (ex Article 39), German football has abandoned rules that used to limit the number of foreign EU players able to appear in Bundesliga matches. Since then, foreign EU players as well as players from other UEFA member associations can be transferred and fielded without limitation. However, Section 5 No. 4 of the Bundesliga Club Licensing Regulations requires that clubs have at least 12 German nationals on the squad. Because the overall squad size is not limited, the rule appears to comply with Article 45 TFEU.<sup>102</sup> Moreover, Section 5b of the Player Licensing Regulations obliges Bundesliga clubs to have eight locally trained players<sup>103</sup> on their squad, of which four must be directly trained by the respective club. Because the local player rule fosters youth development and applies irrespectively of the nationality of locally trained players, it is also deemed compatible with European law.<sup>104</sup>

97 Regional Labour Court of Rheinland-Pfalz, judgment of 17 February 2016 – 4 Sa 202/15; confirmed by Federal Labour Court, judgment of 16 January 2018 – 7 AZR 312/16; for an assessment, turn to Fritschi, 'Befristung eines Arbeitsvertrages im Profiteamsport aus Sicht der Verbandsautonomie und des Europarechts', *SpuRt* 3/2017, p. 90.

98 Section 15(4) TzBfG.

99 ArbG Ulm, judgment of 14 November 2008 – 3 Ca 244/08.

100 Federal Labour Court, judgment of 25 April 2013, 8 AZR 453/12.

101 Court of Justice of the European Union (CJEU), judgment of 15 December 1995 – C-415/93 (*Bosman*).

102 See Fritzweiler/Pfister/Summerer (footnote 17), p. 729.

103 Locally trained players are either trained 'by the club' or 'by the federation'. A player trained 'by the club' is a player who, in three seasons or years between the ages of 15 and 21, was eligible to play for the club. A player trained 'by the federation' is a player who, in three seasons or years between the ages of 15 and 21, was eligible to play for a club affiliated to the DFB.

104 See Fritzweiler/Pfister/Summerer (footnote 17), p. 729. See also Streinz, '6+5'-Regel oder Homegrown-Regel – was ist mit dem EG Recht vereinbar?', *SpuRt* 2008, p. 224.

Other German league sports, including basketball and handball, have also dropped foreign player rules, while the clubs of the professional ice hockey league, DEL, have agreed not to register more than nine foreign players per season. The German Basketball League has introduced a domestic player rule that every team needs to have at least six German players on their squad.<sup>105</sup>

### iii Application of employment rules of sports governing bodies

German law generally allows that employment-related provisions in the statutes or regulations of (international) sports governing bodies be incorporated into employment agreements with athletes.

In football player contracts, for instance, the parties will make reference to the statutes, rules and regulations of the DFB, and will accept to submit to the decisions and the jurisdiction of the DFB and the League. Furthermore, players are also asked to acknowledge as binding the anti-doping regulations issued by the DFB, UEFA and FIFA as well as the World Anti-Doping Agency and NADA Codes.

It should be noted that in those sports in which a player must obtain a playing licence in order to participate in league competition, the revocation of said licence does not *per se* affect the validity of the employment contract.<sup>106</sup>

## VI SPORTS AND ANTITRUST LAW

Besides the relevance of antitrust law regarding broadcasting rights (see Section IV.iii), antitrust law plays an increasingly important role in sport in general.<sup>107</sup>

The purpose of German and European antitrust law is to protect competition against market restrictions caused by undertakings or associations of undertakings (including sports governing bodies). It does so by prohibiting the abuse of a dominant market position (Section 18 et seq. of the Competition Act and Article 102 TFEU) and prohibiting restrictive behaviour between undertakings (Section 1 Competition Act; Article 101 TFEU). Infringements of antitrust laws can lead to fines and compensation claims. In addition, the Federal Cartel Office or the European Commission may prohibit the conclusion of a respective agreement altogether. Finally, agreements or statutes infringing antitrust law are also invalid according to Article 101(2) TFEU and Section 134 BGB.<sup>108</sup>

The Higher Regional Court in Frankfurt (OLG Frankfurt) confirmed again in 2016 that the conduct of sports governing bodies falls within the scope of Article 101(1) TFEU if it does relate to an economic activity and not merely to the practice of sport. If such

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105 See Fritzweiler/Pfister/Summerer (footnote 17), p. 729. For a recent assessment of the local player rule applied in lower-tier basketball in Germany, see Engelhard, 'Es gibt Argumente für beide Seiten – Zum möglichen Rechtsstreit zwischen der 2. Basketball Bundesliga und den Wiha Panthers Schwenningen', Interview in *BIG – Basketball in Germany / Das Magazin*, No. 65, 2017, p. 87.

106 See Fritzweiler/Pfister/Summerer (footnote 17), p. 302.

107 For an overview of antitrust law issues regarding sport in Germany, see Stancke, 'Pechstein und der aktuelle Stand des Sportkartellrechts', *SpuRt* 2015, p. 46; Stopper, 'Sportkartellrecht im Wirtschaftskartellrecht', *SpuRt* 5/2018, p. 190

108 id. (Stancke), p. 46.

conduct has a restrictive effect in a specific market, the question is whether it is necessary and proportionate, and, in particular, whether it is appropriate for the purpose of protecting the integrity and functioning of the respective sporting competition.<sup>109</sup>

In the much debated decision of the Higher Regional Court of Munich in the *Pechstein* case,<sup>110</sup> the judges had held that the arbitration agreement between Pechstein and the ISU was invalid because the ISU – having a monopoly on the market for speed skating competitions – had abused its market power by requiring the athlete to consent to an arbitration agreement in favour of the CAS, because the latter operated on a closed list of arbitrators appointed by the International Council of Arbitration for Sport (ICAS), a body dominated by representatives of sports associations.<sup>111</sup> In 2016, the decision was ultimately overturned by the BGH, which found that the CAS was a ‘genuine’ court of arbitration and that the CAS Code contained sufficient guarantees for preserving the rights of athletes even if arbitrators had to be selected by the parties from a closed list prepared by the ICAS.<sup>112</sup> According to the BGH, the influence of sports federations did not reach a degree that the federations had a controlling influence over the composition of the list of arbitrators. Also, according to the BGH the list of arbitrators did include a sufficient number of neutral persons who were independent. Finally, the Court held that sports federations and athletes were generally not in opposing ‘camps’ guided by opposing interests in the fight against doping in sport.<sup>113</sup>

Antitrust law has been applied increasingly in sports disputes in Germany, including a case between handball clubs and the International Handball Federation and the German Handball Federation over player release rules, or the dispute between basketball clubs and the International Basketball Federation (FIBA) and FIBA Europe over sanctions in connection with the participation of clubs in the Euroleague.<sup>114</sup>

In 2017, the Regional Court of Düsseldorf (LG Düsseldorf) found that sanctions imposed against two amateur bridge players by the World Bridge Federation and the German Bridge Federation were invalid because they violated German antitrust law.<sup>115</sup> On appeal, the Higher Regional Court of Düsseldorf (OLG Düsseldorf) upheld the ruling on the invalidity of the sanction but refrained from assessing the case based on antitrust law, circumventing the question of whether antitrust law was applicable in a case of amateur players.<sup>116</sup>

109 OLG Frankfurt, judgment of 2 February 2016 – 11 U 70/15 (Kart).

110 OLG Munich, judgment of 15 January 2015 – U 1110/14 Kart; *SchiedsVZ* 2015, p. 40.

111 *id.*, p. 44. Regarding the criticism raised against CAS, see Duve/Troshchenovych, ‘Seven steps to reforming the Court of Arbitration for Sport’, *World Sports Law Report*, Vol. 13, Issue 4, April 2015. The Court’s approach to assess the arbitration agreement in light of antitrust law had been criticised for different reasons. See, for instance, Duve/Rösch, ‘Ist das deutsche Kartellrecht mehr wert als alle Olympiasiege?’, *SchiedsVZ* 2015, p. 69.

112 BGH, judgment of 7 June 2016 – KZR 6/15. See also Martens/Engelhard, footnote 41. For a more critical assessment, turn to Rombach, Federal Supreme Court of Justice (BGH): ‘Pechstein v. International Skating Union’, English translation, *SchiedsVZ* 2016, p. 268.

113 The CAS was described as an ‘independent and neutral institution’ also by the OLG Frankfurt, judgment of 21 December 2017 (11 U 26/17 (Kart)).

114 See, for instance, LG Dortmund, judgment of 14 May 2014 – 8 O 46/13; OLG Düsseldorf, judgment of 15 July 2015 – VI-U (KART) 13/14; LG Munich, 1 HK O 8126/16. Also, antitrust law was applied by the OLG Frankfurt in a case concerning the DFB Player Agent Regulations, judgment of 2 June 2016, 11 U 70/15 (Kart).

115 LG Düsseldorf, judgment of 28 March 2017, 31 O 448/14.

116 OLG Düsseldorf, judgment of 15 November 2017, VI-U (Kart) 8/17; see also Lorenz, ‘Rückzug des Kartellrechts aus dem Sport? Der Fall Hustenzeichen bei Bridge-Turnier’, *SpuRt* 3/2018, p. 131.

## VII SPORTS AND TAXATION

Athletes residing in Germany (Section 8 AO) and those who have a usual residence in Germany (i.e., more than six months in the year, with short-term interruptions not being considered) (Section 9 AO) are subject to pay income tax according to Section 1(1) of the Income Tax Code (EStG). The different categories of income mentioned in Section 2(1) EStG and Sections 13 to 24 EStG are divided into different sources, including:

- a commercial income (Section 15 EStG);
- b self-employed income (Section 18 EStG);
- c income from employment (Section 19 EStG); and
- d other income (Section 22 EStG).

The taxable income from each of the above-mentioned sources is subject to different rules that will determine when, how and to what extent income tax is to be paid.<sup>117</sup>

Athletes residing in Germany and those who have a usual residence in Germany are subject to tax on their worldwide income. Double taxation of income earned abroad (e.g., by taking part in a competition in a foreign country) that is also subject to tax in the respective country is usually avoided on the basis of Section 34c EStG or a double taxation treaty.<sup>118</sup>

The taxation of sports governing bodies and sports clubs depends on their legal status and form (i.e., whether they are organised as registered, non-profit associations or as commercial companies).<sup>119</sup>

Foreign athletes and clubs who do not reside in Germany are subject to tax, only with regard to income that has a special domestic connection to Germany (Section 49 EStG). In that case, entities making payments to foreign athletes or clubs may have to withhold tax according to Sections 50 and 50a EStG.<sup>120</sup>

## VIII SPECIFIC SPORTS ISSUES

### i Doping

Until recently, Germany did not have any specific anti-doping criminal laws, with the exception of Sections 6a and 95 of the Medicinal Products Act, which prohibit distributing, prescribing or administering medicinal products to others for the purpose of doping as well as the purchase or possession of doping substances in quantities above a certain amount. Other criminal laws that apply to scenarios involving doping include Sections 212 StGB (manslaughter), 223 and 229 StGB (causing bodily harm, negligent bodily harm), Section 263 StGB (fraud) and Section 29 Narcotics Act (illegal handling of narcotics).

Based on the above legal framework there had been hardly any criminal proceedings concerned with doping in Germany in the past. One of the more famous cases involved

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117 For more information, see Fritzsche/Pfister/Summerer (footnote 17), p. 916.

118 See Adolphsen/Nolte/Lehner/Gerlinger, *Sportrecht in der Praxis*, Kohlhammer 2011, p. 505 et seq.

119 id.; see also Section I.i. For a summary of recent decisions concerning the taxation of intermediaries and agents, see Nücken, 'Leistungen von Spielervetmittlern (erneut) auf dem Prüfstand', *SpuRt* 1/2017, p. 19.

120 See Adolphsen/Nolte/Lehner/Gerlinger (footnote 118), p. 517 et seq.

German cyclist Jan Ullrich, who was subject to a criminal investigation between 2006 and 2008 after he had obtained and used doping substances from Spanish sports medic, Eufemiano Fuentes.<sup>121</sup>

Because the above-mentioned legal framework supposedly failed to properly tackle the issue of doping in sport (mainly because the undertaking of doping as such was not subject to criminal liability), the government, in 2016, implemented a new Anti-Doping Act (AntiDopG).<sup>122</sup> The law, which consolidates the above-mentioned provisions from different codifications, provides for prison terms for elite athletes (amateur athletes will not be affected),<sup>123</sup> coaches, officials and doctors who are caught, *inter alia*, using, administering or being in possession of doping substances.<sup>124</sup> Culprits could be imprisoned for up to three years. An offender who endangers a large number of people or who exposes someone to the risk of serious injury or death may face a prison term of up to 10 years.<sup>125</sup>

The new law has been heavily criticised by legal scholars, athletes and anti-doping experts alike.<sup>126</sup> In 2017, the BGH confirmed a prison sentence of one year based on the new AntiDopG imposed against a bodybuilder for the unlawful possession of doping substances.<sup>127</sup>

## ii Betting

According to Section 284 StGB, providing unlicensed gambling and betting services is a criminal offence in Germany that can be sanctioned with a prison sentence of up to five years. Section 285 StGB provides that a person participating in unlicensed gambling shall be liable to imprisonment for up to six months or subject to a fine.<sup>128</sup>

In the past, Germany had implemented a state monopoly on gambling through the Interstate Treaty on Gambling. However, in 2010, the Court of Justice of the European Union (CJEU) decided that this state monopoly on gambling violated European law and thus needed to be reformed.<sup>129</sup> The shortcomings of the existing system should have been resolved by the First Amendment to the Interstate Treaty on Gambling in 2012, which abolished the old state monopoly and replaced it with a new licensing system for private gambling and betting providers. Licences should have been granted to a maximum of 20

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121 The investigation was mainly concerned with the question of whether Ullrich acted fraudulently in relation to his former employer, Team Telekom, by engaging in doping despite an express provision in his employment contract not to do so. However, because the prosecution was not able to establish that Ullrich's employer was truly unaware of his conduct and because the parties had reached a settlement in a parallel civil proceeding, the case was abandoned pursuant to Section 153a of the Criminal Procedural Code before it went to trial. Ullrich also had to make a substantial payment to end the criminal proceeding.

122 AntiDopG, in force since 1 January 2016, available at [www.gesetze-im-internet.de/bundesrecht/antidopg/gesamt.pdf](http://www.gesetze-im-internet.de/bundesrecht/antidopg/gesamt.pdf) (last visited on 25 September 2017).

123 Section 4(7) AntiDopG.

124 Section 4(1) and (2) AntiDopG.

125 Section 4(4) AntiDopG.

126 Steiner, 'Deutschland als Antidopingstaat', *ZRP* 2015, p. 51; Matthias Jahn, 'Noch mehr Risiken als Nebenwirkungen – der Anti-Doping-Gesetzentwurf der Bundesregierung aus Sicht des Strafrechts', *SpuRt* 2015, p. 149.

127 BGH, judgment of 5 December 2017 – 4 StR 389/17.

128 See AG Munich, judgment of 26 September 2014 – 1115 Cs 254 Js 176411/13, in which the Court held that participation in gambling licensed in another EU country (without being licensed in Germany) is illegal.

129 CJEU, judgments of 8 September 2010 – C-409/06, C-316/07, C-46/08.

private gambling and betting providers for an experimental phase of seven years.<sup>130</sup> Under the amended Treaty, online gambling remains illegal in Germany.<sup>131</sup> At the same time, in 2015, the Higher Administrative Court of Hessen decided that the new licensing system was illegal for being non-transparent and undemocratic.<sup>132</sup> In February 2016, the CJEU ruled that a sports betting operator in Germany could not be charged under Section 284 StGB for providing customers with the opportunity to use a betting machine or computer offering bets by an Austrian betting provider without a German betting licence.<sup>133</sup> In April 2016, a local administrative court in Hessen decided that there was no justification for the limitation to merely 20 licences, ordering that a sports betting provider should be granted a licence irrespective of the fact that already 20 licensees had been selected at the time.<sup>134</sup> In May 2017 the Higher Administrative Court of Hessen (VGH Kassel) decided that the state was not entitled to crack down on a Maltese sports betting provider for not having obtained a licence in Germany. On the contrary, the Court held that the Maltese company was allowed to offer its services in the state without having a German licence.<sup>135</sup>

The Second Amendment to the Interstate Treaty on Gambling, which had been adopted in November 2017, ultimately failed to enter into force as the states were unable to agree on its ratification.

### iii Manipulation

Up until recently German law did not provide for a sport-specific criminal provision outlawing match-fixing. Instead, match-fixing was punished under Section 263 StGB dealing with fraud, according to which a person committing fraud shall be liable to imprisonment for up to 10 years.<sup>136</sup>

Section 263 StGB was applied in the famous *Hoyzer* case in 2005, which involved the German referee Robert Hoyzer who confessed to fixing and betting on matches in the second Bundesliga, the DFB Cup (DFB Pokal) and the Regional League.<sup>137</sup> The Court's arguments used in the *Hoyzer* case had been applied and developed further in subsequent match-fixing cases.<sup>138</sup>

However, the previous legal framework did not address match-fixing if it was not related to betting (e.g., for sporting purposes only).<sup>139</sup> This is why, after signing the Council of Europe Convention on the Manipulation of Sports Competitions,<sup>140</sup> in 2017 the German

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130 The single-handed approach by the state, Schleswig-Holstein, which issued temporary licences to several private gambling and betting providers, was stopped in 2013. Those providers that were able to obtain a licence were allowed to use it for a grace period in Schleswig-Holstein only.

131 Section 4(4) First Amendment to the Interstate Treaty on Gambling.

132 Higher Administrative Court (VGH) of Hessen, judgment of 16 October 2015 – 8 B 1028/15.

133 CJEU, judgment of 4 February 2016, C-336/14.

134 VG Wiesbaden, judgment of 15 April 2016 – 5 K 1431/14 WI.

135 VGH Kassel, judgment of 29 May 2017 – 8 B 2744/16.

136 Section 263(3) StGB. Section 263 StGB defines fraud as causing or maintaining an error or distorting or suppressing true facts with the intention to obtain for oneself or a third person an unlawful material benefit by damaging the assets of another person.

137 BGH, judgment of 15 December 2006 – 5 StR 181/06.

138 BGH, judgment of 20 December 2012 – 4 StR 55/12.

139 See Fritzweiler/Pfister/Summerer (footnote 17), p. 841.

140 More information is provided on the Council of Europe website: [www.coe.int/en/web/conventions/full-list/-/conventions/treaty/215](http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/215) (last visited on 28 September 2018).

government implemented two new draft criminal provisions specifically dealing with the manipulation of sports competitions. Section 265c StGB defines sports betting fraud as an agreement to manipulate a sporting competition on which bets have been placed. Section 265d StGB applies to the manipulation of ‘high-class’ professional sporting competitions, even if a connection to betting cannot be established. Both criminal provisions stipulate a prison sentence of up to three years, in very serious cases of up to five years.<sup>141</sup>

#### iv Grey market sales

As mentioned in Section III.i, ticketing terms and conditions will usually contain a clause that allows a ticket purchase for private use only. As a result, the purchase of tickets for the purpose of commercial resale (i.e., with profit) are prohibited unless there is prior consent by the organiser.<sup>142</sup> Likewise, organisers tend to prohibit the unauthorised commercial use of tickets for advertisement purposes, as giveaways or as a part of hospitality or travel packages. If the organiser establishes that a purchase or resale of tickets occurred for commercial purposes without the consent of the organiser, it may refuse the ticket holder from entering the sporting venue and may even claim a contractual penalty.<sup>143</sup>

At the same time, sports governing bodies and clubs have created a secondary ticket market to allow ticket holders to transfer tickets they no longer need. The Higher Regional Court of Hamburg pointed out in a recent decision that clubs have to make sure that their justification to restrict ticket transfers (e.g., security reasons; guaranteeing a widespread supply of tickets; preserving a socially balanced pricing structure) must not be undermined by the clubs’ intention to earn money on the secondary ticket market by participating in the sale of tickets far above face value.<sup>144</sup>

## IX THE YEAR IN REVIEW

This past year has been another exciting year for sports law in Germany with several noteworthy decisions in sports-related cases, the most relevant of which have been set out in this chapter.

The ‘notorious’ *Pechstein* case has not made any progress recently. Ms Pechstein’s constitutional appeal is still pending before the German Constitutional Court; however, before rendering a decision, the Court will have to look closely at a recent judgment of

141 For more information, see Stam, ‘Die Straftatbestände des Sportwettbetrugs (Section 265c StGB) und der Manipulation von berufssportlichen Wettbewerben (Section 265d StGB)’, *NZWiSt* 2018, 41; Keidel, ‘A Guide to Germany’s new criminal law against betting fraud and match-fixing in sports’, *LawinSport.com*, available at [www.lawinsport.com/articles/item/a-guide-to-germany-s-new-criminal-law-against-betting-fraud-and-match-fixing-in-sports](http://www.lawinsport.com/articles/item/a-guide-to-germany-s-new-criminal-law-against-betting-fraud-and-match-fixing-in-sports) (last visited on 3 September 2018). For an assessment of the potential liability of clubs, see Kubiciel, ‘Neue Haftungsrisiken für Vereine: die Straftatbestände gegen Sportwettbetrug und Spielmanipulation’, *SpuRt* 5/2017, p. 188.

142 BGH, judgment of 11 September 2008 – I ZR 74/06, *NJW* 2009, 1504 ([bundesligakarten.de](http://bundesligakarten.de)); see also LG Munich I, judgment of 2 August 2017 – 37 O 17726/16 and Wilkens/Müller, ‘Rechtsnatur und Weiterveräußerbarkeit von Eintrittskarten’, *SpuRt* 2018, 46 (differences between Sections 807 and 808 BGB).

143 AG Hamburg, judgment of 8 October 2014 – 23 a C 90/14. See also OLG Munich, judgment of 20 September 2018 – no reference provided – <https://beck-online.beck.de/Dokument?vpath=bibdata%2Freddok%2Fbecklink%2F2010984.htm&pos=1&hlwords=on> (last visited on 3 October 2018).

144 OLG Hamburg, judgment of 13 June 2013 – 3 U 31/10. A legal analysis of the case is provided in *MMR* 2014, p. 595.

the European Court of Human Rights, which – to a large extent – dismissed a complaint filed by Ms Pechstein against Switzerland concerning the lawfulness of the proceedings before the CAS.<sup>145</sup>

Noteworthy are the developments in the field of riot prevention, where the OVG Bremen held that a notice on costs for police operations sent by the City of Bremen to the League was valid. The case is currently pending before the Federal Administrative Court. Further, the German Constitutional Court confirmed that a club may impose a nationwide stadium ban against a rioting spectator on the basis of objective facts, if there is a risk that the respective person may engage in misconduct again in the future.

Finally, the first conviction upheld by the BGH based on the newly enacted AntiDopG deserves special mention.<sup>146</sup>

## **X OUTLOOK AND CONCLUSIONS**

The new year will undoubtedly be an interesting year for sports law in Germany again with an expected new decision on the state law of Bremen concerning costs for police operations in connection with big events and, perhaps, a decision by the German Constitutional Court on the constitutional appeal by Ms Pechstein. The fact that Germany has recently been awarded the UEFA EURO 2024 may also lead to noteworthy developments and sports-related decisions at a national level.

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<sup>145</sup> ECHR, No. 40575/10 and 67474/10, judgment of 2 October 2018. The ECHR held that CAS should have allowed a public hearing of Ms Pechstein's case considering that the athlete had requested one and that there was no particular reason to deny it.

<sup>146</sup> See footnote 127.



# HUNGARY

*Péter Rippel-Szabó*<sup>1</sup>

## I ORGANISATION OF SPORTS CLUBS AND SPORTS GOVERNING BODIES

### i Organisational form

The Sports Act<sup>2</sup> regulates in which legal forms sports may be performed and organised in Hungary. Non-professional clubs may be:

- a* sports clubs;
- b* sports foundations; or
- c* sports schools.

Professional sports clubs may only be either limited liability companies or companies limited by non-publicly traded shares.

Similar to other European jurisdictions, sports in Hungary are organised on the basis of the 'single place principle' (i.e., there may only be one sports federation for a given sport). The national sports federations govern the sport concerned. The Sports Act sets out the prerequisites for a federation to be qualified as a sports federation (such as the minimum number of members, organisation of competitions and membership of the International Olympic Committee or Sportaccord). Membership in sports federations is restricted to the above-mentioned sports entities only. If they acknowledge the statutes of the sports federation as binding they are automatically admitted to the sports federation as members.

The Sports Act recognises spare time sports federations, sports federations for disabled people, and sports federations of student and university sports as special types of sports governing bodies. The Hungarian Olympic Committee is the public body responsible for all matters related to the Olympic movement in Hungary.<sup>3</sup>

### ii Corporate governance

The Sports Act sets forth in detail the requirements sports federations need to comply with. There are specific rules in relation to the organisation, powers and quorum of the sports

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2 Act I of 2004 on Sport.

3 In addition to the Hungarian Olympic Committee, there are three further public bodies: the Hungarian Paralympic Committee, the National Federation of Competitive Sports and the National Student and Free Time Federation.

federation's general meetings or the local bodies. Each sports federation must adopt specific governing regulations (e.g., on organisation and safety of sporting events, disciplinary proceedings and anti-doping, as well as strategy and development).

The Department of Public Prosecution exercises statutory supervision over the operation of sports federations. In case of financial mismanagement, upon the request of the prosecution, the court may suspend the board of the sports federation and appoint an independent officer. If standard operations cannot be restored the prosecution may initiate liquidation of the sports federation.

Under the Sports Act, a sports organisation may only be granted public funds if it does not have any overdue public debts, its financial operations comply with the laws, and it has properly accounted for the public funds it was granted earlier. There are further cases also when a sports organisation may not be granted any public funds (e.g., in the case of liquidation or bankruptcy).

### iii Corporate liability

The general rules of the Civil Code<sup>4</sup> apply to the liability of managers and officers of sports organisations.

The sports organisation is liable for the damage caused to a third person by the executive officer acting in his or her capacity as the sports organisation's executive officer. The executive officer is liable jointly and severally with the company, if he or she caused damage deliberately.

If there is no contractual relationship between the sports organisation and the third party, the injured third party is entitled to full damages, if it is able to prove that:

- a* the other party unlawfully caused the damage;
- b* the injured party incurred damage;
- c* the other party's unlawful act or omission caused the damage incurred by the injured party; and
- d* the other party is not able to excuse itself by proving that it proceeded as generally expected under the given circumstances (i.e., acted according to the applicable standard of conduct in the particular situation).

If there is a contractual relationship between the sports organisation and the third party, the injured third party is entitled to damages if it is able to prove that:

- a* the sports organisation unlawfully caused the damage;
- b* as the injured party it incurred damage;
- c* the sports organisation's unlawful act or omission caused the damage incurred by it; and
- d* the sports organisation is not able to prove that:
  - the circumstances causing the damage were beyond his or her control;
  - such circumstances could not be foreseen by him or her upon the conclusion of the contract; and
  - he or she could not have been expected to prevent such circumstances or the damage.

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<sup>4</sup> Act V of 2013 on the Civil Code.

In a deliberate case, the sports organisation is liable for the full amount of damage caused. In the case of negligence, the sports organisation is liable for the damage caused in the subject matter of the contract, and can only be liable for further losses and lost profit, if the injured party proves that such further losses and lost profit were foreseeable by the other party upon the conclusion of the contract.

If the executive officer has a service contract with the sports organisation he or she can be liable towards the sports organisation, if the same conditions for damages are met as set out above in the case of the sports organisation's liability. If the executive officer performs his or her tasks based on an employment contract, the Labour Code<sup>5</sup> applies to his or her liability. The executive officer as an executive employee is liable for the full damage he or she caused by unlawfully breaching his or her obligations under the employment contract, provided that he or she did not proceed as was generally expected in the given situation. The sports organisation as employer must prove the breach of obligation, the damage and the causal link. The executive officer is not liable for the damage that:

- a* he or she could not foresee upon causing the damage;
- b* was caused by conduct attributable to the employer; or
- c* was caused by the employer not fulfilling its obligation concerning mitigation of the damage.

Finally, the Civil Code also provides certain rules on executive officers' liability in the case of termination of clubs.

## **II THE DISPUTE RESOLUTION SYSTEM**

### **i Access to courts**

The Sports Act expressly mentions the following cases when decisions of sports federations may be challenged before court or arbitral tribunals:

- a* if the sports federation does not grant, or revokes, the competition licence of athletes (ineligibility decision);
- b* in the case of transfer disputes;
- c* in the case of certain disciplinary decisions rendered by the sports federations; and
- d* if the club is not granted a licence to the competition organised by the sports federation.

Clubs and sports federations may provide in their statutes that their members shall have recourse to arbitral tribunals in disputes among themselves. Professional sports clubs, which may only be either limited liability companies or companies limited by non-publicly traded shares, may also provide in their deed of foundation or articles of association that 'corporate law-related disputes' shall be decided by arbitral tribunals.<sup>6</sup>

Under the general rules of the Civil Code, a member of the legal person may have recourse to the court in order to ask the court to repeal the decision rendered by the members or organs of the legal person if the decision is unlawful or violates the deed of foundation. In each of the above cases, the person concerned may ask the court or arbitral tribunal to repeal the decision of the sports organisation within 30 days of obtaining knowledge of the

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<sup>5</sup> Act I of 2012 on the Labour Code.

<sup>6</sup> A corporate law-related dispute may be a dispute between the shareholders of the company, such as initiating court supervision of the decision rendered by the general meeting.

decision, subject to a one-year preclusion term. Initiating court proceedings does not delay the enforcement of the decision; however, the court may decide on the suspension of the enforcement if there are justified grounds upon the plaintiff's request. If the decision violates the law or the statutes or articles of association, the court repeals it and, if necessary, orders the rendering of a new decision.

## **ii Sports arbitration**

The Sports Act regulates the Permanent Court of Arbitration for Sport (PCAS), which operates within the Hungarian Olympic Committee.

Upon the parties' mutual submission statement, the PCAS has jurisdiction in sports-related disputes between sports federations and members, between sports federations and athletes and sports practitioners, between sports organisations and athletes and sports practitioners, as well as between the Hungarian Olympic Committee and its members. In these disputes the PCAS convenes a hearing within 30 days of the arbitral tribunal being set up, and issues its decision within 15 days of the hearing.

By force of the Sports Act (i.e., without a mutual submission statement), the party concerned may have recourse to the PCAS regarding ineligibility cases, transfer disputes, disciplinary decisions and licensing cases as mentioned above, in Section II.i. In these disputes, the chairperson of the PCAS appoints an arbitral tribunal within eight days of receipt of the statement of claim. The arbitral tribunal holds a hearing within 15 days of its appointment, and within 15 days of the hearing either repeals or reverses the sports federation's decision or rejects the statement of claim. It is worth noting that in these cases, unlike in proceedings before ordinary courts, the PCAS may not only repeal or uphold the sports federation's decision, but may also reverse it. Further details of the PCAS proceedings are set out in its arbitration procedural rules. In these cases, only the PCAS had exclusive jurisdiction until 31 December 2016. Since 1 January 2017, however, the party concerned may also have recourse to any other court of arbitration. In practice, such court of arbitration should be the Permanent Court of Arbitration attached to the Hungarian Chamber of Commerce (PCA HCC). In cases of disputes between sports clubs, however, the PCAS has exclusive jurisdiction as of 31 July 2018 (i.e., the sports clubs concerned may not agree on the jurisdiction of any other court of arbitration).

If there is a dispute that is not covered by the Sports Act as described above, the parties may only have recourse to arbitration if:

- a* one of the parties is engaged in economic activity and the dispute is connected to this activity;
- b* the parties may freely dispose of the subject matter of the dispute; and
- c* the parties have contractually agreed on the arbitration.

It is not necessary that the parties have expressly agreed on the arbitration clause in writing. It is also sufficient if one of the parties brings the dispute to a court of arbitration, and the other party does not contest the jurisdiction of the court of arbitration.

Both the PCAS and the PCA HCC may render interim measures if their application is justified.

It is important to note that employment-related disputes may not be brought to courts of arbitration (i.e., only the ordinary courts may decide any disputes of professional athletes with their clubs arising out of the employment relationship).

### **iii Enforceability**

An award has the same power and may be enforced as the final and binding judgment of ordinary courts. Enforcement of awards may only be refused if the subject matter of the dispute may not be subject to arbitration, or if the award violates the public policy of Hungary. Decisions of sports governing bodies are enforced internally or, if necessary, via the public enforcement system as judgements and awards.

## **III ORGANISATION OF SPORTS EVENTS**

### **i Relationship between organiser and spectator**

Upon purchasing a ticket, the spectator enters into a contract with the organiser of the sporting event.

Pursuant to the Sports Act, the organiser is obliged to display the rules of attendance at the entrances of sports venues in a prominent location, which shall also be summarised as the terms and conditions (T&Cs) on the ticket. Upon its own discretion, the organiser can decide to implement a system verifying the spectator's identity upon entry into the venue, in which case further specific rules apply.

### **ii Relationship between organiser and athletes or clubs**

In the case of competitions organised by sports federations, the competition rules usually set out that participation in competitions is mandatory. The competition rules are binding on athletes and clubs. According to the Sports Act, clubs shall recognise the statutes and consequently any other internal regulations of the sports federation as binding upon admission to the relevant sports federation. In the case of athletes, the Sports Act provides that they shall adhere to the domestic and international regulations of the sport. Further, upon obtaining their first competition licence, athletes declare that they recognise the rules of the given sport as binding. In the case of competitions organised by persons other than sports federations, the provisions of the participation agreement prevail.

### **iii Liability of the organiser**

The Sports Act expressly provides that the organiser is liable for the proper organisation of the sporting event. The liability of the organiser commences upon the arrival of the participants of the sporting event at the venue, and ends when they leave it. In the case of sports entailing increased risks, as well as martial arts sports, the Sports Act sets out further liability provisions. The organiser is obliged to initiate any measures with the competent authorities that may contribute to the safety of spectators and the prevention of violations. In certain cases, organisers need to have liability insurance.

If the organiser fails to comply with the above provisions, the sports federation may apply various legal measures, such as fines or decrease of funding. Anyone who suffers damage in contract or in tort because of the organiser's conduct may claim damages from the organiser, based on the general rules of civil law.

In the case of a criminal offence by the organiser, either the injured person or the authorities *ex officio*, depending on the nature of the criminal offence, may initiate criminal proceedings and establish criminal liability. In specific cases, the police may impose administrative fines on the organiser.

**iv Liability of the athletes**

The Sports Act does not provide any specific provisions on the civil or criminal liability of athletes. Therefore, the general rules of civil and criminal law liability apply. If the damage has been caused upon the consent of the injured party, civil or criminal law liability of the aggrieving party may not be established. The application of these general legal principles can help to consider the specificity of sports in the case of accidents or injuries caused or suffered during sporting activity.

**v Liability of the spectators**

The Sports Act expressly states that spectators must obey the safety rules specified by the organiser. Spectators may not conduct themselves in a way that would disturb or frustrate the sporting event, or infringe the personal rights or property of other participants. If spectators fail to comply with these provisions, they may be held liable based on general rules of civil law. Spectators may be prohibited from attending sporting events owing to a criminal offence committed in connection with a sporting event.

**vi Riot prevention**

The Sports Act contains detailed provisions aimed at preventing riots at sporting events, such as travel and separation of spectators, involvement of police or classification of events from a safety and risk point of view. Further, Government Decree No. 54/2004 on the safety of sporting events, which applies to first division clubs and national matches of football, handball, basketball, water polo and ice hockey, sets out specific rules on riot prevention and collaboration of organisers and the police. With certain exceptions, the organiser shall pay the costs of police involvement.

**IV COMMERCIALISATION OF SPORTS EVENTS**

**i Types of and ownership in rights**

The Sports Act expressly sets out the sports-related rights that can be exploited, and defines who owns them. The rights can be divided into three main categories as set out in the following table:

Sports-related right	Rights holder
Event right (i.e., announcement, organisation and conducting of sporting events (championships)), including the licensing of online betting rights, plus rights related to competitions (matches) of national teams	Sports federation (and clubs in special cases regarding the licensing of online betting rights)
Pecuniary rights related to the athlete's sporting activity (such as likeness, name, logo, goodwill and other intangible assets of athletes)	Athlete, or in the case of a membership or contract with a club, the club where the athlete's pecuniary rights are automatically transferred to the club
Commercial licensing, transmission, broadcasting and recording of sporting activity and sports competitions via TV, radio and other electronic means (e.g., internet)	Athlete, or in the case of a membership or contract with a club, the club where the athlete's pecuniary rights are automatically transferred to the club

No transfer of title to the above-mentioned rights is possible. Therefore, licensing is the common practice for concluding various agreements on the use of sports rights.

## ii Rights protection

Rights holders may in practice rely on different forms of legal protection as follows.

### *Media rights*

In terms of the broadcasting, recording and transmission of sporting events, the right holders can rely on copyright protection. The sports performance itself is not protected by copyright, but parts of its broadcast and the signal of a broadcast are. Remedies based on the ownership or exclusive use of the venue in combination with T&Cs when purchasing tickets could physically exclude access of infringers to the sporting venue. The event right is a *sui generis* and enforceable proprietary right against any infringer. Significance of infringement of broadcasting rights has not been important in practice so far as the most popular Hungarian sports can be viewed on free TV or are freely available online.<sup>7</sup>

### *Personal rights*

Athletes, clubs and federations can rely on trademark, copyright, passing off and personal rights protection if their images, logos or other pecuniary or personal rights are infringed.

### *Online betting rights*

The licensing of online betting rights is part of the event right, and federations and clubs may likely invoke and enforce this right against online betting service providers if they offer bets online on matches of federations and clubs without their consent.<sup>8</sup>

The Sports Act or other laws do not provide specific sports-related enforcement procedures in the case of infringement. Therefore, stakeholders must enforce their rights before a court or an arbitral tribunal. If the rights holder concerned claims for damages in tort, it must prove that:

- a it has incurred damage owing to the infringer's activity;
- b the infringer acted in bad faith; and
- c there is a relation of cause and effect.

## iii Contractual provisions for exploitation of rights

The Sports Act provides an express definition for sponsorship and merchandising agreements. The use of the name or likeness of athletes by any sports organisation is subject to the athlete's prior written consent. In practice, sponsorship and merchandising agreements deal with the scope of image transfer or logos to be licensed, meet and greet and other obligations in relation to public conduct in addition to the usual exclusivity provisions.

The Sports Act expressly regulates the joint selling of media rights. Sports federations, on behalf of clubs and athletes, are entitled to commercially exploit the media rights to competitions organised by them for a definite period and to enter into an agreement or

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7 If there was an infringement of exclusive broadcasting rights, one possible solution to prevent it could be to obtain server blocking (as in the United Kingdom); however, this must still be tested under Hungarian law. Effectively targeting the advertising revenues of illegal streaming sites would make their business model untenable. The *sui generis* event right could prove effective in practice in order to combat any misuses, although it is yet to be tested before the courts.

8 No public court decision has been made so far as to whether any federation has invoked this right against online betting service providers.

agreements on their exploitation. In return for authorising the sports federations to preserve the right to exploit the media rights, the Sports Act obliges the sports federations to pay athletes and clubs appropriate consideration. The amount of this consideration must be determined in advance and equal to the market value of broadcasting rights. Subsequent distribution of money generated through joint exploitation of media rights must be based on criteria set forth by the Sports Act. In practice, most relevant contractual issues of media rights agreements grant exclusivity to the licensee (rights, term, platform and territory), access to venue, quality, provision, distribution and ownership of the signal, content and related copyright, dissemination and sublicensing of the created content, marketing of sporting venues, selection methods of the matches by the broadcaster, and consideration mechanisms for granting the rights.

In practice it is important that all agreements on exploitation of rights properly consider the internal relations of sports stakeholders within the sports pyramid in order to avoid any conflict between the various licensing agreements.

## **V PROFESSIONAL SPORTS AND LABOUR LAW**

### **i Mandatory provisions**

The Sports Act sets out certain mandatory provisions that apply in the case of professional athlete employment agreements. Professional athletes may conclude employment agreements with professional clubs only unless the internal regulations of the sports federation concerned provides otherwise.

Employment agreements will only be valid if they provide for the scope and remuneration of work, manner of working, work and rest time, and the provision of annual leave. There are further requirements in the Sports Act (e.g., employment agreements may be concluded for a definite period only, probation is not allowed, and professional athletes may only enter into other contracts upon the club's prior consent). Any other agreements concluded with athletes in addition to employment agreements that remunerate them for their sporting activity are null and void. In terms of salary protection, the general provisions of the Labour Code apply.

### **ii Free movement of athletes**

The Sports Act introduces the term of player right (i.e., the right to use the athlete's physical and psychological ability for sporting activity). Upon concluding an employment agreement with a club, the player right of the athlete will automatically be transferred to the club for the period of the term of the employment agreement. If the employment agreement is lawfully terminated, or expires, the athlete's player right will automatically return to the athlete. The player right may not be alienated or encumbered. Any arrangement violating these rules is null and void.<sup>9</sup>

### **iii Application of employment rules of sports governing bodies**

The Labour Code does not exclude the possibility that employment-related provisions of sports governing bodies may be incorporated into employment agreements with athletes. For example, the Hungarian Football Federation expects clubs and players to apply a sample

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<sup>9</sup> The same rules apply to amateur players.



agreement that is provided in the transfer regulations. Limits of such employment-related rules are the mandatory provisions of the Labour Code. Compliance of the employment rules of sports governing bodies may be established on a case-by-case basis.

## **VI SPORTS AND ANTITRUST LAW**

Although market behaviour (e.g., the joint selling of media rights) of Hungarian sports federations has not been subject to any antitrust procedure to date, the Hungarian Competition Authority has constantly held in its relevant decisions that any association may be deemed to be an association of undertakings if it engages in economic activity. Consequently, this view can also be applied to sports federations when they engage in economic activity by jointly exploiting the media rights that result from the decision of their members (i.e., the clubs) as undertakings.

Because of the single place principle, as outlined in Section I.i, above, a sports federation is in a monopoly on the relevant product market of exploitation of (event, media or online betting) sports rights for there is no other undertaking from which these rights can be licensed. Therefore, sports federations might be able to abuse their dominance against content distributors, online betting service providers or other third parties.

Considering that antitrust law fully applies to the sport sector, especially in the case of joint exploitation of media rights, sports federations should consider the requirements of antitrust laws, including the relevant case law of the European Commission, and should endeavour that their practice does not qualify as infringement of antitrust law or such practice is duly justified.

## **VII SPORTS AND TAXATION**

In 2011, Hungary adopted a comprehensive and unique state funding scheme that operates to date. In essence, any organisation can freely decide to pay a certain percentage of its public tax to a sports organisation and it therefore will be entitled to a tax reduction. The funding scheme focuses on the five most popular team sports in Hungary, namely: football, handball, basketball, ice hockey and water polo. In order to receive funding under the scheme, clubs have to design an annual strategy that includes initiatives for the public, such as providing sports equipment to grassroots or developing sports infrastructures, or covering costs of participating at sports competitions. If the strategy is approved by the competent sports federation or public body, the club can receive the funding. The sports federations and public bodies have strong monitoring and control mechanisms to ensure the proper implementation of clubs' programmes. Before implementation, the scheme was reported to and approved by the European Commission.<sup>10</sup>

Regarding the taxation of athletes, coaches and further sports professionals, they can pay their taxes according to the simplified contribution to public revenues if certain preconditions (e.g., thresholds concerning the salary) are met as set out in the Act on the simplified contribution to public revenues.<sup>11</sup>

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10 The relevant press release of the European Commission can be accessed here: [http://europa.eu/rapid/press-release\\_IP-11-1322\\_en.htm](http://europa.eu/rapid/press-release_IP-11-1322_en.htm) (last accessed on 2 October 2018).

11 Act CXX of 2005 on the simplified contribution to public revenues.

## VIII SPECIFIC SPORTS ISSUES

### i Doping

Doping is not a criminal offence in Hungary. However, according to the Criminal Code,<sup>12</sup> the production, circulation and ordering of prohibited substances suitable for increasing sports performance are criminal offences. Further, it is also a criminal offence if a person over the age of 18 persuades or assists a person under the age of 18 to use prohibited substances suitable for increasing sports performance.

### ii Betting

Betting on sports events is a common and permitted practice in Hungary.

As explained in Section IV.i, above, the Sports Act expressly provides that the licensing of online betting rights is a sports-related right. For example, both the Hungarian Football Federation and the Hungarian Handball Federation entered into an agreement with Szerencsejáték Zrt<sup>13</sup> on the exploitation of the sports betting rights of matches organised by them.

The Sports Act sets out that 12 per cent of gaming tax from draw gambling games must be spent on supporting sport across all disciplines. Further, 50 per cent of the gaming tax from fixed-odds betting, as well as the gaming tax from TOTÓ<sup>14</sup> and remote gambling, must be spent on supporting football via the Hungarian Football Federation.

Regarding cross-border online betting, under the Gambling Operations Act,<sup>15</sup> remote (i.e., online) sports betting is a non-liberalised activity that may only be organised by a fully state-owned company, Szerencsejáték Zrt. The Hungarian tax authority, as the competent public body, may block any non-authorized online betting site. This legal framework is heavily challenged by online operators having their registered seat in other Member States of the European Union before the courts as being incompatible with the Treaty on the Functioning of the European Union.

### iii Manipulation

Match-fixing is a criminal offence. Pursuant to the Criminal Code, whoever makes an arrangement as a result of which the result of a match or competition organised by a sports federation will not occur according to the competition rules, and the principle of fair play, will be penalised by imprisonment for up to three years. A penalty of imprisonment for one to five years may be imposed if the match fixing is committed in a criminal association or on a commercial basis.

### iv Grey market sales

The sale of sports events tickets in the grey market is not explicitly illegal in Hungary. It is common practice that spectators may only buy tickets upon showing an identity card and their name will be printed on the ticket. Also, selling of tickets at the venue is rather restricted and spectators usually buy the ticket online where the number of tickets available for one

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12 Act C of 2012 on the Criminal Code.

13 Szerencsejáték Zrt. is a 100 per cent state-owned gambling operator in Hungary.

14 TOTÓ is a pari-mutuel sports betting in which the bettor bets on results of matches played by football clubs (Section 37(10) of the Gambling Operations Act).

15 Act XXXIV of 1991 on gambling operations.

person is limited. In these cases, the organisers may identify the spectators at the entrance, and entry can be denied. Sold-out matches are rarities (except certain matches of the national teams); therefore, the significance of grey market sales is low.

## **IX THE YEAR IN REVIEW**

The most significant recent change in sports law dates back to 1 January 2017, when the public financing of sport was completely restructured. As a result, the Ministry responsible for sport has the power and competence to decide on funding, and to supervise how the provided funds are spent, whereas the Hungarian Olympic Committee that was formerly responsible for public financing was deprived of its powers and now focuses solely on the support of the Olympic movement.

## **X OUTLOOK AND CONCLUSIONS**

The legal framework for sporting activity is clear and straightforward in Hungary. The Sports Act regulates all the important aspects of sporting activity in a practical manner. The government of Hungary will adopt the Digital Sports Strategy of Hungary in 2018, which aims to build on the increasing significance of big data for the benefit of amateur and professional sport, especially grassroots sport. Interesting developments in the near future could concern how the future of online sports betting will evolve, and whether foreign-based operators can enter the Hungarian market lawfully. Further, Hungary is no exception to the quickly spreading worldwide e-sports phenomenon. Setting up the appropriate legal and business framework is one of the key challenges Hungarian e-sports stakeholders will face in the very near future.

# ITALY

*Edoardo Revello, Marco Vittorio Tieghi, Antonio Rocca and Federico Venturi Ferriolo<sup>1</sup>*

## I ORGANISATION OF SPORTS CLUBS AND SPORTS GOVERNING BODIES

### i Organisational form

The Italian Olympic Committee is the highest authority of the Italian sports system, defined as the Confederation of National Sports Federations and Associated Sports Disciplines (CONI).<sup>2</sup> CONI is committed to organising, overseeing and promoting national sport, representing the Italian sports movement during the Olympic Games.

The National Sports Federations (FSNs) and the Associated Sports Disciplines (DSAs) are non-profit associations with legal personality regulated under private laws with their own regulations and statutes in compliance with the provisions of the affiliated International Sports Federations, the Olympic Charter and the directives issued by the International Olympic Committee and CONI.<sup>3</sup> The FSNs and DSAs must obtain the recognition by CONI to manage – on an exclusive basis – a sport in Italy and represent it abroad.

The main characters of the Italian sports industry are the associations and companies, both professional and amateur, in addition to the athletes, managers, coaches, athletic trainers and sporting doctors.

### ii Corporate governance

After the enactment of Law No. 190 of 6 November 2012 (the Anti-Corruption Law), in 2013, CONI introduced the Code of Sporting Conduct, setting out the fundamental, mandatory and binding duties of loyalty, fairness and probity that must be met by each operator in the Italian sports industry.<sup>4</sup> In order to ensure the above duties, CONI introduced the figure of the ‘guarantor’ that reports any cases of suspected violation to the competent bodies for disciplinary matters. In 2014, CONI reformed the Italian sports justice system, by modifying

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2 Established by Law No. 426 of 16 February 1942 as a private body. With the ‘Melandri Decree’ (Legislative Decree No. 242 of 23 July 1999), CONI became a public entity, but is incorporated under private laws. With the issuing of the ‘Pescante Decree’ (Legislative Decree No. 15/2004), CONI became a ‘confederation’.

3 Article 20 of the CONI Statute.

4 According to Legislative Decree No. 231 of 8 June 2001, sports clubs shall adopt an internal code of conduct that defines the rights, duties and responsibilities of each member.

the Sports Justice Code,<sup>5</sup> adopting a comprehensive regulation of sports procedures with the introduction of two new bodies: the General Public Prosecutor's Office and the Sports Supreme Court.

### **iii Corporate liability**

Sports companies and associations are liable for the offences committed by those who represent them, as their directors, unless they can prove they have taken all possible precautions to avoid such offences.<sup>6</sup> For the purpose of setting up this responsibility, the highest body of sports justice stated the following: 'The Sports Justice Code punishes, ... by way of strict liability, the company with which the subject considered the author of the unlawful sporting conduct, is registered, regardless of the fact that this offence is the result of behaviours involving the same company.'

The company's strict liability shall be recognised 'even when the unlawful conduct committed by one of its members is counterproductive to the fate of the company, such as when a member is held responsible for contributing to altering the outcome of a match to the detriment of their own team'.<sup>7</sup>

## **II THE DISPUTE RESOLUTION SYSTEM**

### **i Access to courts**

Italian access to sports justice takes place through the affiliation process: the act of affiliation allows the option to resort and subject a person or an entity to sports courts. In essence, the sporting justice obligation stems from the provision of Article 2 of Decree No. 220 of 19 August 2003,<sup>8</sup> which governs the independence of the Italian sports legal system. Briefly, sports judges (under the CONI, federations and associations umbrella) are competent for the following issues: (1) the observance and application of the regulatory, organisational and statutory provisions of the national sports system and its articulations in order to guarantee the correct performance of sports activities; and (2) all matters related to disciplinary sporting sanctions.

Upon exhaustion of internal sports remedies – and without prejudice to the jurisdiction of the ordinary judge for economic disputes between companies, associations and athletes – any other matter relating to acts issued by CONI or any national federations that is not dedicated to the above-mentioned sports judges, shall be referred to the exclusive jurisdiction of the administrative judge. In the case of non-compliance (i.e., should an affiliate refer an issue to the ordinary courts), the affiliate might be seriously sanctioned, or banned, from the

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5 Adopted by the National Council on 11 June 2014 with Resolution No. 1510-1511.

6 See Article 4 of the Justice Regulations of the Italian Federation of Equestrian Sports; see also Article 44 of the Sports Justice Code of the Italian Basketball Federation.

7 See CONI Sports Supreme Court, United Sections, decision No. 58 of 24 November 2015.

8 Available at [www.parlamento.it/parlam/leggi/decreti/03220d.htm](http://www.parlamento.it/parlam/leggi/decreti/03220d.htm).

sport association concerned. The relationship between the ordinary and the sporting justice system has always been a vexed question<sup>9</sup> and one that was recently questioned in a judicial order of the Regional Administrative Court of Lazio (TAR Lazio).<sup>10</sup>

Nevertheless, the ability to resort to sports judicial proceedings is specifically regulated by CONI's Sports Justice Code,<sup>11</sup> which establishes sports judges in each federation, namely the national sports judge, the local sports judges, the Sport Court of Appeal, the Federal Tribunal and the Federal Court of Appeals.<sup>12</sup>

## ii Sports arbitration

In consideration of the constitutional principle of prohibition of special jurisdiction, in Italy, arbitration is seen as an adequate vehicle to preserve the independence of the sports system<sup>13</sup> and ensure compliance with the regulations and principles of the federations. Arbitration is generally applied to resolve disputes in connection with economic rights and labour relationships. To this extent, it is explicitly mentioned in Article 4 of Law No. 91 of 2 March 1981<sup>14</sup> that an arbitration clause shall be inserted in employment contracts, requiring that the disputes shall be brought before a panel constituted according to the applicable collective bargaining agreement. The functioning of such arbitration before the football leagues is regulated by specific procedural rules that are attached to the relevant collective bargaining agreement. For the sake of clarity, all professional players, coaches or trainers have their own collective bargaining agreement of reference and relevant competent arbitration panel. The latter renders awards directly enforceable through the competent league and federation.

## iii Enforceability

Arbitral awards have contractual power between the parties and can be directly enforced only within the federation, otherwise they should be lodged with a special procedure before the ordinary court, pursuant to Articles 566 and 808 of the Italian Civil Procedural Code, in order to become final and binding.

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9 A Benincampi, 'La Giustizia Sportiva e Gli Spettri Del Passato: Dubbi Di Costituzionalità e Timide Prospettive', *Olympialex Review* No. 1, July 2018, [www.olympialex.com](http://www.olympialex.com).

10 TAR Lazio, Section 1 *ter*, 11 October 2017, No. 10171. On the one hand, the possibility to resort to a specialised judge may ensure a higher and more accurate degree of expertise in the resolution of the dispute; but on the other hand, it clashes with the constitutional principle of the right of defence, pursuant to Article 24 of the Italian Constitution.

11 See [www.coni.it/images/DEF\\_11.06.2014\\_CODICE DELLA GIUSTIZIA SPORTIVA\\_.pdf](http://www.coni.it/images/DEF_11.06.2014_CODICE DELLA GIUSTIZIA SPORTIVA_.pdf).

12 Article 3 of the CONI Sports Justice Code.

13 L Fumagalli, 'La risoluzione delle controversie sportive. Metodi giurisdizionali, arbitrali ed alternativi di composizione', *Riv. Dir. Sport.*, 1999, p. 254 et seq.

14 Law on the sports employment relationship between clubs and professional athletes, available at [www.scuoladellosport.coni.it/images/documenti/Normativa\\_Sport/Professionalismo/Legge\\_23\\_marzo\\_1981\\_n.91.pdf](http://www.scuoladellosport.coni.it/images/documenti/Normativa_Sport/Professionalismo/Legge_23_marzo_1981_n.91.pdf).

### III ORGANISATION OF SPORTS EVENTS

#### i Relationship between organiser and spectator

Italian law<sup>15</sup> regulates a tripartite relationship in connection with sporting events, composed of the organiser, the athletes (amateur or professional) and the public. The organiser can be identified as a business entrepreneur, pursuant to Article 2195 of the Italian Civil Code. The organiser's main goal is the management of the entire event, which is legally considered an economic activity, and should entail the following features: (1) a lease agreement or ownership of the premises in which the event is held; (2) presence of a public performance with an uncertain outcome; and (3) differences of juridical relationships depending on whether the event is indoor or outdoor.

#### ii Relationship between organiser and athletes or clubs

The leagues<sup>16</sup> (i.e., the organisers) are associations that represent and protect the interests of the affiliated sports companies. The latter are assisted in the stipulation of the standard labour agreements between athletes and professional and amateur clubs. In addition, the leagues also advise on issues related to corporate organisation, communication and administrative management, as well as centralised marketing activities aimed at selling the sporting product.

#### iii Liability of the organiser

Organisers can be persons (rarely), entities (in the form of stock or limited companies), non-recognised associations or committees that 'assume all liabilities (civil, criminal and administrative) within the country's legal system and promote the gathering of one or more athletes with the aim of achieving a result in one or more sporting activities regardless of the public dimension of the show'. Generally, organisers are subject to a 'civil liability' pursuant to Article 2043 of the Italian Civil Code. Such liability is connected to the main obligation of the organiser promoting the competition, ensuring the power of control and direction. The organiser's main obligation is to monitor the event, whether it is a single competition or a tournament. Further, the organiser has the obligation to guarantee the presence of the police at the event and ensure: (1) the suitability and safety of the location and facilities, including the technical means in use, whether or not supplied by the organiser; and (2) the athletes' aptitude to participate in the competition, both in terms of experience and psychophysical conditions.

#### iv Liability of the athletes

Each athlete assumes the conscious risk of exposing him or herself to events that may cause him or her damage (i.e., the 'allowed risk'). The Civil Supreme Court has ruled that

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15 See Law of 13 December 1989, amended by Decree-Law of 8 February 2007; Law of 13 December 1989, amended by Law No. 217/2010; 'Mancino Law' No. 205/1993; Decree-Law No. 28 of 24 February 2003; Law No. 88/2003; Decree-Law No. 162 of 17 August 2005; Law No. 168 of 17 August 2005; Law No. 210 of 17 October 2005; Law No. 41 of 4 April 2007; Decree-Law No. 8 of 8 February 2007; Legislative decree on public security (12 November 2010); Law No. 217/2010.

16 Taking into consideration the football panorama, the leagues expressly recognised by the Statute of the Italian Football Association (FIGC) are the following: Serie A National Professional League, Serie B National Professional League, Italian Professional Football League (better known as Lega Pro) and the National Amateur League.

compliance with the rules governing each sporting discipline is the fundamental principle in order for sporting conduct not to be punished. Therefore, to be exempt from criminal sanctions, any detrimental sporting conduct must be committed in compliance with the sports person's duty of loyalty.<sup>17</sup>

#### v Liability of the spectators

The Sports Supreme Court, in its decision No. 42 of 3 September 2015, established that clubs are also liable – by way of strict liability – for the conduct of their spectators. The Sports Supreme Court has specified that it is necessary to guarantee a broad interpretation of the concept of spectator, thus including all those who operate in a 'supportive environment' to the team. Clubs are also liable for the presence of discriminatory banners (even when banners discriminate between different regional traditions) within the stadium.<sup>18</sup>

#### vi Riot prevention

The Italian parliament began developing legislation to strengthen the fight against hooliganism in 1989 by enacting Law No. 401 of 13 December 1989.<sup>19</sup> One of the most important implementations was the 'prohibition of access to sporting events' (DASPO),<sup>20</sup> which is a measure of prevention, restrictive on personal freedom, to tackle the growing phenomenon of violence in football stadiums; subsequently, also extended to other sports. The DASPO measure can be issued to spectators found guilty of violent acts during, *inter alia*, sporting events, by the Commissioner (chief of police) or by a judge at the end of proceedings. If issued by the Commissioner, it applies as an administrative measure entailing the prohibition of access to areas, or areas adjacent to, where sporting events are taking place, for a period of between one and five years. If issued by a judge, it has a stronger limitation on freedom of movement and has also recently been compared to the anti-mafia administrative orders.<sup>21</sup>

## IV COMMERCIALISATION OF SPORTS EVENTS

### i Types of and ownership in rights

#### *Broadcasting rights*

The new law regulating the ownership of broadcasting rights on sports events and related marketing was passed in the form of dedicated legislation: Law No. 106 of 19 July 2007, which defined the aims, principles and criteria of the new discipline, directing the government

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17 See Civil Supreme Court, Section V, 28 March 2017, No. 33275; Civil Supreme Court, Section III, 26 January 2016, No. 1322; Civil Supreme Court, Section III, 08 August 2002, No. 12012; Civil Supreme Court, Section III, 30 March 2011, No. 7247; Penal Supreme Court, Section V, 13 March 2017, No. 11991; Penal Supreme Court, Section IV, 26 November 2015, No. 9559; Penal Supreme Court, Section V, 21 September 2005, No. 45210; Penal Supreme Court, Section V, 20 January 2005, No. 19473; Penal Supreme Court, Section V, 2 June 2000, No. 8910.

18 See, for example, Articles 11 and 12 of the Sports Justice Code of the FIGC.

19 Available at [www.scuoladelloSPORT.coni.it/images/documenti/Normativa\\_Sport/GiustiziaSportiva/Legge\\_13\\_dicembre\\_1989\\_n.401.pdf](http://www.scuoladelloSPORT.coni.it/images/documenti/Normativa_Sport/GiustiziaSportiva/Legge_13_dicembre_1989_n.401.pdf).

20 *Divieto di accesso alle manifestazioni sportive*, established by Article 6(c)(1) of Law No. 401/89.

21 See decision of the Italian Criminal Supreme Court No. 24819/16.



to issue a legislative decree defining and setting the new regulations.<sup>22</sup> The Italian government accomplished the task with the Melandri Decree (Legislative Decree No. 9 of 9 January 2008), which has introduced the concept of joint ownership of the right to broadcast the sports events by the competition organiser (i.e., the league) and the event organiser (i.e., a club).<sup>23</sup> In concrete terms, the Melandri reform assigned to the league the leading role of exclusive licensor of the audiovisual rights.<sup>24</sup>

Pursuant to Article 25 of the Decree, the allocation of resources among the parties in each competition is carried out in such a way as to guarantee the equal allocation of a prevalent share insured by the assignment of broadcasting rights. In this regard, Law No. 205 of 27 December 2017 (the Budget Law 2017) changed the allocation of the resources, ensuring greater economic stability.<sup>25</sup>

## ii Rights protection

The protection reserved for images is derived from the joint provisions of Article 10 of the Italian Civil Code and from the Italian Copyright Law.<sup>26</sup> The Civil Code establishes that if an image is displayed or published except when consented by law (or such display causes prejudice to the reputation of the person concerned), the judicial authorities may order the abuse to cease and award compensation for damages. In addition, Article 96 of the Copyright Law states that a person's likeness shall not be displayed, sold or reproduced without the individual's consent, which can, however, be subsequently withdrawn at any time.<sup>27</sup>

In relation to registered trademarks and club symbols, these are protected under Articles 2569 and 2574 of the Civil Code, and Article 23 of Legislative Decree No. 30/2005, in order to avoid unfair competition. In the case of infringement, the judicial authorities may injunct against further infringements and award compensation for damages.

## iii Contractual provisions for exploitation of rights

### *Image rights*

The consent to the use of an athlete's image can be expressed in their contract; however, remaining separate from it. In addition, the consent can be subsequently withdrawn at any time without incurring any contractual liability.<sup>28</sup>

The right to use an athlete's image may be licensed and assigned. Some limitations may exist to such right, as, for example, in football: outside of football activity, the exploitation

22 L Ferrari, 'The Ownership of Broadcasting Rights: From Individual to Collective Selling', in: Blackshaw/Cornelius/Siekmann (editors), *TV Rights and Sport: Legal Aspects*, TMC Asser Press, 2009, p. 399 et seq.

23 The Decree deals with professional tournaments organised for team sports (e.g., football or basketball). In cases of amateur team sports, the competition organiser may license the broadcasting rights.

24 The event organiser, on the other hand, maintains the exclusive ownership on 'library rights' (i.e., audiovisual recordings of matches that took place at least eight days previously) (Articles 3 and 4 of the Melandri Decree).

25 As regards football: 50 per cent of the sale of TV rights is divided in equal parts among all the participants in the Serie A Championship; 30 per cent on the basis of the results achieved; and 20 per cent on the basis of the number of supporters of each team.

26 Law No. 633 of 22 April 1941, available at [www.interlex.it/testi/l41\\_633.htm](http://www.interlex.it/testi/l41_633.htm).

27 Article 97 of the Italian Copyright Law lists exceptional circumstances from the consent, when the use is justified by the fame of or the public office covered by the person, for judicial or police requirements or for scientific, educational or cultural purposes.

28 See Civil Supreme Court, Section I of 29 January 2016, No. 1748.

of image rights is freely negotiable by each player (observing some limitations related to the club's sponsorship agreements), while, with respect to football activity and related activities (as the club's representation), clubs can sign promotional and advertising agreements with third parties. Part of the profits are allocated to the players according to minimum percentages under the Convention in force on the regulation of advertising and promotional activities, unless negotiated individually.<sup>29</sup>

### ***Sponsorship agreements***

The sponsorship agreement is not a typified contract, since it is not expressly regulated by the Italian Civil Code. Therefore, the related discipline is reconstructed using the general rules and principles on contracts. In the sports system, according to the specific relationship between the sponsor and the sponsee, there can be the following general categories: naming sponsor,<sup>30</sup> official sponsor, official supplier<sup>31</sup> and technical sponsor.<sup>32</sup>

### ***Merchandising agreements***

Merchandising agreements, given their specificity and structure, are protected in Italy by the Code of Industrial Property,<sup>33</sup> the Italian Civil Code (with the provisions on counterfeiting and unfair competition)<sup>34</sup> and the Italian Penal Code (with the provisions on counterfeiting crime and trademark usurpation).<sup>35</sup> The Italian Financial Guard has enhanced its checks in cooperation with the sports institutions in order to limit the sale of counterfeited products to the public.<sup>36</sup>

## **V PROFESSIONAL SPORTS AND LABOUR LAW**

### **i Mandatory provisions**

Under Italian law, the sports employment relationship between clubs and professional athletes is regulated by Law No. 91 of 23 March 1981. Such mandatory labour law states the definition of professionals, which includes athletes, coaches, sporting directors and athletic trainers, who perform sporting activities under remuneration on an ongoing basis within the disciplines governed by CONI, as well as the qualifying intervention carried out by the

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29 The Convention was executed, alongside the first collective bargaining agreement, between the players' union and the Italian professional football leagues in 1981, subsequently amended in 1984 and 1987.

30 For example, as of season 2018/2019, the Italian football second division league, Serie B, has been renamed Serie BTK as result of a commercial partnership with Indian tyre manufacturing company BKT.

31 For example, the agreement between the Italian internet provider, Aruba.it, and Racing Ducati SuperBike Team has led to an immersive cooperation by providing marketing and communication activities further to a traditional title sponsorship.

32 For a list of the jersey kits of Serie A clubs for the 2018/2019 season see [www.footyheadlines.com/2018/05/all-18-19-serie-a-kits.html](http://www.footyheadlines.com/2018/05/all-18-19-serie-a-kits.html).

33 Legislative Decree No. 30 of 10 February 2005 and subsequent amendments.

34 Articles 2598, 2599 and 2600.

35 Articles 473, 474, 474 *bis*, 474 *ter*, 474 *quater*, 517, 517 *ter* and 517 *quinques*.

36 On 5, 6 and 7 May 2018, Serie A and Serie B football clubs participated in the 'Day of Legality', aimed at drawing the public's attention to the fight against counterfeiting products. Such initiative has been promoted by the Italian Patent and Trademark Office of the Ministry of Economic Development.

FSNs. Indeed, the federations that have obtained the qualification of professional sporting federation are the following: the Italian Football Federation (FIGC), the Italian Cycling Federation, the Italian Golf Federation and the Italian Basketball Federation.

Professional athletes' performances are regulated by employment contracts through direct recruitment. Such contracts must be drafted in writing in the standard form set out in the collective bargaining agreement and filed within the respective federation (Article 4 of Law No. 91/81). Any departure from the standard form will be deemed null and void. The term of employment in professional contracts can be up to a maximum of five years (Article 5 of Law No. 91/81).<sup>37</sup> An arbitration clause must be included in the contract with respect to the interpretation, execution and any dispute resolution related to the employment agreements. Further, the employment contracts shall not include provisions that could in any manner limit the freedom of work and movement of professional athletes. It is also possible to have a self-employment contract, subject to the fulfilment of one of the following conditions: (1) the sporting performance is related to only one sporting event; (2) the athlete is not contractually bound concerning the frequency of training; or (3) the sporting performance does not exceed eight hours a week; five days each month; or 30 days each year.<sup>38</sup>

Any professional player is covered by a mandatory retirement and disability insurance as per Law No. 366 of 14 June 1973. The social security contributions are calculated with regard to the player's annual gross salary and distributed in the following proportions: (1) two-thirds shall be payable by the registering club; and (2) one-third shall be payable by the player. In any event, the contributions shall be payable in their entirety by the club, which may then withhold the corresponding amount from the player's salary.

## ii Free movement of athletes

EU law applies to both professional and amateur athletes with respect to their right of free movement, by prohibiting any discrimination based on nationality, or any obstacle that may hinder such right.

With specific regard to football, the FIGC has adopted the 'locally trained rule', which imposes clubs to have a certain number of home-grown athletes, according to UEFA indications. Accordingly, the squad list of any first division club (National Professional League Serie A), must adhere to some specific criteria.<sup>39</sup>

## VI SPORTS AND ANTITRUST LAW

The operators of the Italian sports industry, such as clubs and consumers, must comply with antitrust rules. In this regard, the Italian Competition Authority has recently launched two investigative proceedings (PS11232\_PS11233) for alleged unfair commercial practices

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37 Within the Italian Football Federation, minors (i.e., those under the age of 18) can sign a professional contract for a maximum of three years.

38 Article 2 of Law No. 91/1981.

39 Available at [www.legaseria.it/uploads/default/attachments/documentazione/documentazione\\_m/639/files/allegati/649/cu\\_83\\_-\\_tetto\\_alle\\_rose.pdf](http://www.legaseria.it/uploads/default/attachments/documentazione/documentazione_m/639/files/allegati/649/cu_83_-_tetto_alle_rose.pdf). In addition, with respect to a cap on the number of foreign players (in particular, non-EU players) permitted, the FIGC provides, under its rules and regulations, procedures and restrictions that a non-EU player may face when transferring to Italy.

and potential violations of consumer rights, provided for in Articles 21, 24 and 25 of the Consumer Code, against Sky Italia Srl and Perform Group, better known as DAZN, for the commercialisation of football match packages for the 2018/2019 season.

The Competition Authority has also reopened an investigation (No. A378E) against the Italian Federation of Equestrian Sports, in order to verify their failure to comply with commitments made in 2011, pursuant to Law No. 287/90. The assessment will determine the violation of Articles 101 or 102, or both, of the Treaty on the Functioning of the European Union (TFEU), carried out by means of conduct aimed at preventing the performance of amateur equestrian events and competitions by competing sports organisations.<sup>40</sup>

Lastly, the sanction of over €3 million imposed by the Competition Authority on the FIGC in proceeding No. I812 for the violation of Article 101 TFEU, deriving from unjustified restrictions (not imposed by FIFA and UEFA) on access to certain qualified professionals within football clubs; in particular, to sports directors, scouts and match analysts, ‘in the absence of any specific legislation and, indeed, in a regulatory framework for the liberalisation of economic activities’.<sup>41</sup>

## VII SPORTS AND TAXATION

### i Professional athletes

Any remuneration paid by a club to a professional player (Italian or foreign) for their sporting performance is to be considered employment income and taxed accordingly under Article 49 of the Italian Tax Code (TUIR).<sup>42</sup> The club acts as withholding agent. The remuneration of a professional player can consist of both a fixed and a variable amount. According to Article 51.6 TUIR, the variable amount – also known as a bonus – is also considered employment equivalent to 50 per cent of the relative amount. In addition, the benefits (such as housing or car) are also employment income (Article 51.3 TUIR).

### ii Tax regime of income of professional athletes’ image rights

Income connected to the sale or assignment of professional athletes’ image rights, if the remuneration is due to the player who directly grants the use of his or her image to the club (in particular, whether or not it is related to a sporting performance or it refers to the exploitation of his or her personal image) is also considered as employment income.

Remuneration due to the player who grants the sponsor the use of his or her image is considered: (1) self-employment income, if promotional activities are exercised on a permanent and professional basis;<sup>43</sup> or (2) ‘other income’, if promotional activities are not exercised on a permanent and professional basis.

### iii The substitute tax regime for newly Italian tax residents

Article 1.152-159 of the Budget Law 2017 introduced a new special tax regime for individuals moving tax residence to Italy, providing for a substitute tax on foreign-source income equal to

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40 See [www.agcm.it/media/dettaglio?id=c6793666-b0f9-47f0-b3ab-2f66841b3a9d](http://www.agcm.it/media/dettaglio?id=c6793666-b0f9-47f0-b3ab-2f66841b3a9d).

41 See [www.agcm.it/media/dettaglio?id=281793cd-85a7-4103-9747-c44957097229](http://www.agcm.it/media/dettaglio?id=281793cd-85a7-4103-9747-c44957097229).

42 See Presidential Decree No. 917 of 22 December 1986.

43 Article 54.1 *quater* TUIR.

€100,000.<sup>44</sup> The regime applies on an optional basis and for its application it requires details of: (1) the actual transfer of the tax residence in Italy, and (2) the foreign fiscal residence prior to the transfer in at least nine of the ten tax periods preceding the start of the option period. Particularly in relation to superstar players with significant amounts of foreign income, this substitute tax regime could become very attractive.

#### **iv Amateur athletes**

The income of amateur athletes is subject to preferential income tax treatment. The Budget Law 2017 introduced important innovations in this respect: no imposition for income below €10,000 per year, increasing the previous annual threshold of €7,500. Any income above €10,000 is subject to a tax rate of 23 per cent.

### **VIII SPECIFIC SPORTS ISSUES**

#### **i Doping**

Anti-doping in Italy runs on a double track: the disciplinary and the criminal one. From a sporting perspective, doping conduct falls within the relevant sports association jurisdiction with the application of the specific association's anti-doping regulations and the World Anti-Doping Agency rules and principles at an international level. Moreover, under Italian law, doping is also considered a criminal offence and punished pursuant to Law No. 376 of 14 December 2000<sup>45</sup> with severe penalties including imprisonment.

#### **ii Betting**

Law Decree No. 87 of 12 July 2018 (the Dignity Decree)<sup>46</sup> has been enacted recently to fight gambling addiction, including in sporting and cultural events, by banning: (1) the advertising of gambling and betting related to services and products, and (2) betting and gambling providers from advertising via the media (including TV, radio, the internet and social media platforms) and on billboards.<sup>47</sup> Unlawful sponsorship and advertising may give rise to fines to the advertising contractors, calculated as the higher of 5 per cent of the value of the deal or a lump-sum of €50,000.<sup>48</sup> The Italian Communications Regulatory Authority is in charge of monitoring compliance with the new legislation and has the power to sanction those in breach. All sums raised from administrative fines will be allocated to fund the expenses of the Italian Ministry of Health.

#### **iii Manipulation**

Match-fixing is considered a criminal offence and is regulated by Law No. 401/1989, specifying that it concerns match-fixing offering a benefit to the participant with the specific

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44 M Tenore, 'The substitute tax regime for newly Italian tax residents. Foreign players moving the tax residence to Italy may now achieve substantial tax reductions on their foreign-source income', in EPFL Legal Newsletter No. 4, April 2017.

45 See [www.salute.gov.it/imgs/C\\_17\\_normativa\\_652\\_allegato.pdf](http://www.salute.gov.it/imgs/C_17_normativa_652_allegato.pdf).

46 [www.gazzettaufficiale.it/eli/id/2018/07/13/18G00112/sg](http://www.gazzettaufficiale.it/eli/id/2018/07/13/18G00112/sg).

47 Article 9, Paragraph 1 Dignity Decree.

48 Article 9, Paragraph 5 Dignity Decree does not apply to existing sponsorship agreements, which are permitted to run until their contracted expiry or 14 July 2019.

intention of manipulating the competition result even if the offer is not accepted (Article 1).<sup>49</sup> The aim of such provision is to guarantee fair play while tackling illegal sports betting, which has often been linked to criminal organisations. In addition to the consideration of match-fixing as a criminal offence, match-fixing is regulated by the CONI Sports Justice Code as a disciplinary violation.

#### **iv Grey market sales**

One of the most relevant grey market sales issues in Italy concerns 'secondary ticketing'. Such phenomenon is punished by Law No. 232/2016, which empowers the Italian Communications Regulatory Authority to monitor the secondary market sale of events' ticketing. Offenders may be sanctioned with fines of up to €180,000.

### **IX THE YEAR IN REVIEW**

In a landmark decision, on 4 October 2018,<sup>50</sup> the Italian Council of Ministers reserved to the jurisdiction of the TAR Lazio disputes concerning the admission and exclusion from professional competitions of companies or professional sports associations, thus excluding the jurisdiction of the sports justice bodies.

Article 1,373 of Budget Law 2017 enacted a new regulatory scheme for sports agents, requiring them to be registered with CONI, which will establish a national register for professional sports as of 2019. The new law reintroduces a mandatory exam divided into two tests: one under the supervision of CONI and a second to be taken before the respective national federation under which the sports agent intends to operate.<sup>51</sup>

Tar Lazio has confirmed the competence of the Italian Historical Automoto Club to organise tourist events without the prior approval of the Automobile Club of Italy,<sup>52</sup> which is a national sports federation recognised by CONI with respect to sport automotive activity.

The Italian Supreme Court<sup>53</sup> assessed the criminal liability of the manager of a football pitch for failing to provide the appropriate maintenance of the pitch. The Supreme Court stated that it is not the referee's responsibility to guarantee the safety of the football field, but only to verify its practicability for the match.

### **X OUTLOOK AND CONCLUSIONS**

The Italian sports industry shall face significant reforms in the following months considering, for example, the direct involvement of the government as regards the revision of competence for the sports justice bodies and the new regulations on sports agents' activity. Further, given the insolvency procedures affecting professional football clubs every season, a new set of financial rules could be enacted as integration of the existing domestic licence system or the UEFA financial fair play regulations. The intention is to guarantee more stability and

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49 Manipulation of results is punished with imprisonment of between one month and one year and a fine of between €238 and €1,032.

50 Available at [www.governo.it/articolo/comunicato-stampa-del-consiglio-dei-ministri-n-22/10078](http://www.governo.it/articolo/comunicato-stampa-del-consiglio-dei-ministri-n-22/10078).

51 Italian football agents that passed the previous FIFA exam before the 2015 'deregulation' can register without passing such exam.

52 Decision of 25 January 2018.

53 Italian Supreme Court, Section IV, decision of 31 January 2018 to 28 February 2018, No. 4160.

transparency, while the candidature jointly filed by Milan and Cortina for hosting the 2026 Winter Olympic Games aims at giving new momentum for the entire Italian industry (also in terms of investment and infrastructure).

# KENYA

*John Morris Ohaga and Franklin Cheluget Kosgei*<sup>1</sup>

## I ORGANISATION OF SPORTS CLUBS AND SPORTS GOVERNING BODIES

### i Sports Kenya

The Sports Act establishes a body known as Sports Kenya.<sup>2</sup> It is established as a body corporate with perpetual succession and a common seal and in its corporate name be capable of suing and being sued, taking, purchasing or otherwise acquiring, holding and disposing of movable and immovable property, borrowing money and doing or performing any other things or acts for the proper performance of its functions under the Sports Act that may be lawfully done or performed by a body corporate.

The Sports Act gives it a number of functions, the main function being to promote, coordinate and implement grassroots, national and international sports programmes for Kenyans, in collaboration with the relevant sports organisations, and facilitate the active participation of Kenyans in regional, continental and international sports, including in sports administration.<sup>3</sup> The Sports Act spells out a number of functions expected of it, so it is by no means limited to the main function alone.<sup>4</sup>

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1 John Morris Ohaga is managing partner and Franklin Cheluget Kosgei is a legal trainee at TripleOKlaw Advocates, LLP.

2 Section 3 of the Sports Act, No. 25 of 2013.

3 Section 4 of the Sports Act.

4 The Sports Act spells out other functions. Those functions are to:

- (a) *Promote, coordinate and implement grassroots, national and international sports programs for Kenyans, in liaison with the relevant sports organisations and facilitate the active participation of Kenyans in regional, continental and international sports, including in sports administration;*
- (b) *Manage and maintain the sports facilities specified in the First Schedule and any other facilities which the Cabinet Secretary may, by notice in the Gazette, declare to be sports facilities for the purposes of this Act;*
- (c) *Establish, manage, develop and maintain the sports facilities, including convention centers, indoor sporting and recreational facilities for the purposes of this Act;*
- (d) *Adopt, develop, plan, set stadia standards and licence and regularly inspect stadia for sporting and recreational use;*
- (e) *Establish and maintain a sports museum;*
- (f) *Participate in the promotion of sports tourism;*
- (g) *Provide the necessary amenities or facilities for persons using the services or facilities provided by Sports Kenya;*
- (h) *Operate sports facilities on public grounds in such manner as it deems necessary;*



## ii Powers of Sports Kenya

Different from its functions, the Sports Act donates powers to Sports Kenya. It is given the powers to:<sup>5</sup>

- a* erect buildings and structures and carry out works necessary or desirable for the purposes of Sports Kenya;
- b* appoint agents and attorneys;
- c* engage persons to perform services for Sports Kenya;
- d* obtain commercial sponsorship for Sports Kenya and participate in marketing arrangements involving endorsement by Sports Kenya of products and services associated with sports;
- e* provide, whether by sale or otherwise, any article or thing bearing a mark, symbol or writing that is associated with Sports Kenya;
- f* regulate the provision of services and use of the facilities of Sports Kenya;
- g* act as an agent for any person engaged, whether within Kenya or elsewhere, in the performance of services, or the provision of facilities, of a kind similar or complementary to those performed or provided by Sports Kenya;
- h* undertake the construction or execution of any works on land vested in Sports Kenya; and
- i* make regulations, as stipulated in the Sports Act, with the approval of the Cabinet Secretary.

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- (i)* Collaborate with county governments, learning institutions and other stakeholders concerned with sports and recreation, in the search, identification and development of sporting talent, provision of sports equipment, facilities and technical training;
  - (j)* Identify and recommend talents in sports to national sports organisations;
  - (k)* Inculcate the sense of patriotism and national pride through sports and recreation, create awareness on matters of national interest through sporting events, create awareness on the benefits of regular participation in sports for healthy living and provide advisory and counselling services to athletes;
  - (l)* Determine the national colours to be used in national and international competitions, in consultation with the relevant national sports organisations;
  - (m)* Facilitate the preparation and participation of Kenyan teams in various international events and the hosting of similar events in the country and recommend members of steering committees for international sports competitions, in consultation with the relevant national sports organisations;
  - (n)* Recommend to the relevant authorities issuance of work permits and visas to foreign athletes and technical sports personnel, in consultation with the relevant national sports organisations;
  - (o)* Approve, at the request of the respective national sports organisations, the clearance of foreign sports technical personnel before engagement by national sports organisations and other sporting bodies;
  - (p)* Organise and coordinate training, conduct research, maintain a resource centre and provide and engage consultancy services for sports development programmes, in consultation with the respective national sports organisations;
  - (q)* With the approval of the Cabinet Secretary, prescribe charges or fees in respect of:
    - i* Access to, or use of, any of the resources or facilities of Sports Kenya;
    - ii* The provision of programmes, services, information or advice by Sports Kenya; and
    - iii* The admission of persons to events and activities organised by Sports Kenya;
  - (r)* Recommend, in liaison with the relevant sports organisations, tax exemption for sports persons; and
  - (s)* Perform such other functions related to the implementation of this act as may be directed by the cabinet secretary.

5 Section 5 of the Sports Act.

### **iii Requirements of constitutions of Kenyan sports organisations**

In terms of corporate governance, the Second Schedule to the Sports Act provides for matters to be provided for in the constitution of sports organisations.

It requires that the constitution of a body seeking registration as a sports organisation shall provide that elections of officials and athletes' representatives at the national, branch and sub-branch levels shall be done directly by club representatives or club members and that only citizens of Kenya shall be eligible for election as the chairperson, secretary or treasurer of a body at the national level. It further requires that contemplated elections shall be held at regular intervals after a period of between two and four years, and persons elected as officials thereof shall consequently hold office in such a manner that the chairperson, or any other official, holds office for a term not exceeding four years, but is eligible for re-election for one more term.

It also requires that the elections shall be held in accordance with the general principles for the electoral system as stipulated in Article 81 of the Constitution.<sup>6</sup> The Constitution should also provide for the subscription to anti-doping policies and rules that conform with the World Anti-Doping Agency Code and compliance with the requirements set out in an anti-doping policy and rules of the National Anti-Doping Organization; and subscription to Court of Arbitration for Sports policies and rules that conform with requirements set out in the Sports Disputes Tribunal policy and rules for sports disputes resolution.

Officials at national, branch and sub-branch levels should be elected directly and only registered club members are entitled to vote at those elections. Constitutions should also provide that the selection of the Kenyan team and the technical personnel shall be done in good time and transparently using fair criteria, and that the criteria for authorisation and registration of sportspersons and sportspersons' representatives shall be codified, transparent and fair.

### **iv Confederation of African Football**

The Confederation of African Football Statute governs football in Kenya and Africa in general. It stipulates the objectives and principles of the Confederation of African Football (CAF).<sup>7</sup>

The objectives of CAF are the following:

- a* To promote and develop the game of football and increase its popularity in Africa, while considering its global, educational, cultural and humanitarian impact by implementing youth and development programmes.

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6 Article 81 of the Constitution of Kenya, 2010 spells out the general principles for the electoral system. Pursuant to Article 81, the electoral system shall comply with the following principles:

- a* freedom of citizens to exercise their political rights under Article 38;
- b* not more than two-thirds of the members of elective public bodies shall be of the same gender;
- c* fair representation of persons with disabilities;
- d* universal suffrage based on the aspiration for fair representation and equality of vote; and
- e* free and fair elections that are:
  - by secret ballot;
  - free from violence, intimidation, improper influence or corruption;
  - conducted by an independent body;
  - transparent; and
  - administered in an impartial, neutral, efficient, accurate and accountable manner.

7 Article 2 of the Confederation of African Football Statute.

- b* To promote the development of women's football and ensure the full participation of women at all levels of football governance.
- c* To organise its own continental competitions and any other intercontinental and/or international competitions assigned by FIFA.
- d* To draw up regulations and adopt provisions governing its activities, and to ensure those are respected.
- e* To manage all forms of football by means of adopting and implementing the necessary or appropriate measures to prevent any infringements of the statutes, rules and regulations as well as any decisions or directives of FIFA and CAF; inclusive of the provisions of the laws of the game.
- f* To prevent practices or procedures that may jeopardise the integrity of the players, the game, or its competitions; or give rise to any form of abuse of the game of football.
- g* To maintain relations with FIFA, the International Olympic Committee, international sport organisations, as well as with other continental football confederations and zonal unions.
- h* To promote football free from discrimination against any country, person or group of persons, be it the grounds of ethnicity, gender, language, religion, politics or any other reason.
- i* To encourage national associations and public authorities to do their utmost to work towards the professional and social recycling of footballers.
- j* To fight against doping, and to take the necessary measures to combat the use of prohibited substances in order to protect the health of footballers and the credibility of the competitions.
- k* To promote friendly relations between national associations, zonal unions, clubs, officials and players.
- l* To ensure the independence of the management of African football, and avoid any form of political interference.
- m* To adhere to the fundamental principles of the Olympic Movement and to undertake:
  - the promotion of peace, solidarity, fraternity and unity among footballers, officials and clubs; both in Africa and worldwide;
  - to support the measures undertaken by the African Union and by other non-governmental organisations in favour of the youth, development of sport, culture and education; and
  - to partake in the fight against scourges ravaging or posing a threat to the continent and humanity; in cooperation with the United Nations, the African Union, and other specialised organisations.

All football clubs are required to comply with the CAF licensing requirements before receiving their certificates. According to CAF, licensing is a certificate confirming the fulfilment of all the mandatory minimum requirements by the licensee in order to activate the admission procedure for CAF inter-club licensed competitions.

Some of the requirements that the clubs must comply with before receiving the certificate include submitting their logo, official nickname, club motto, history of the club, samples of home and away kit and physical address of the club. They should also have a postal address, website and official digital platforms.

Clubs' home grounds must be all green grass or artificial turf with proper marking. The stadiums should also have an internal perimeter fence to prevent unauthorised people from accessing the pitch. The stadiums should have a seating arrangement to separate home and away fans, the same as separate changing rooms for home and away teams and match officials.

Financially, clubs must submit a budget for the whole season, the source of their funds and a bank statement for the previous 12 months. The clubs will also be required to have youth teams and professional players who have written contracts, and all the players, including the youth teams, must be registered with the local federation – in this case the Football Kenya Federation (FKF). The senior team members must have jersey numbers that should not be changed for the entire season.

The Kenyan Premier League Limited (KPL) and National Super League clubs will have to employ a chief executive officer. The KPL sides should have a coach who has attained a CAF level B licence, while the FKF coach should have a CAF level C licence holder with well-constructed contracts.

#### **v Objectives of the licensing**

The licensing seeks to achieve clearly outlined objectives towards a well-developed system of administration, both at the club and federation level with a general target of raising the profile of the game, including:

- a* the promoting and improving of the quality and the level of all football aspects in Africa;
- b* ensuring that the clubs have the appropriate infrastructure, knowledge and application in respect of management and organisation;
- c* adapting and improving the clubs' sporting infrastructure;
- d* improving the economic and financial capacity of the clubs, through proper corporate governance and control;
- e* ensuring and guaranteeing the continuity of the international competitions of clubs during the season; and
- f* allowing the parallel development and comparison between clubs by ensuring the necessary compliance in terms of financial, sporting, legal, administrative and infrastructure criteria.

#### **vi Office of the Registrar of Sports**

The Sports Act also establishes the Office of the Sports Registrar, which is established as an office within the Public Service.<sup>8</sup> It mandates the Public Service Commissions to appoint the Registrar who should be in charge of the Office of the Sports Registrar, responsible for matters relating to the licensing of professional sports and professional sports persons in accordance with the provisions of the Sports Act and responsible for the arbitration of registration disputes between sports organisations.

The Registrar is also responsible for the registration and regulation of sports organisations and multi-sports bodies representing sports organisations at national level, in accordance with the provisions of the Sports Act, responsible for matters relating to the licensing of professional sports and professional sports persons in accordance with the provisions of this Act and responsible for the arbitration of registration disputes between sports organisations.

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<sup>8</sup> Section 45 of the Sports Act.

The Registrar is required to keep and maintain a register of the registered sports organisations and such other particulars relating to the registered sports organisations as may be prescribed. He or she is charged with the mandate of issuing licences for professional sports in accordance with the regulations and the requirements that the Cabinet Secretary may prescribe and any other relevant law.

### **vii Registration of sports organisations**

The Sports Act prohibits any body or organisation from operating as a sports organisation unless it is registered under the Sports Act. The Registrar registers sports organisations as either a sports club, a county sports association or a national sports organisation.

All national sports organisations registered under the Sports Act are open to the public in their leadership, activities and membership. The certificate of registration issued under the section is deemed conclusive evidence of authority to operate throughout the country as may be specified in the certificate of registration; and may contain such terms and conditions as the Registrar may prescribe.

## **II THE DISPUTE RESOLUTION SYSTEM**

### **i Sports Dispute Tribunal**

The Sports Act establishes the Sports Dispute Tribunal (the Tribunal).<sup>9</sup> It stipulates that the Tribunal shall consist of members appointed by the Judicial Service Commission in consultation with the national sports organisations. The members will include a chairperson who shall be a person who is qualified to be appointed as a judge of the High Court,<sup>10</sup> at least two members who shall be advocates of the High Court of Kenya with at least seven years' experience and have experience in legal matters relating to sports or have been involved in sport in any capacity, and at least two and not more than six other persons who have experience in sport, in any capacity, of at least 10 years.

The Sports Act also spells out the Tribunal's jurisdiction.<sup>11</sup> Its jurisdiction is that it shall determine appeals against decisions made by national sports organisations or umbrella national sports organisations, whose rules specifically allow for appeals to be made to the Tribunal in relation to that issue.<sup>12</sup> The Tribunal further has the jurisdiction to hear appeals from decisions of the Registrar under the Sports Act.

The Anti-Doping Act also lays down the jurisdiction of the Tribunal over anti-doping matters referred to it.<sup>13</sup> It donates to the Tribunal jurisdiction to hear and determine all cases on anti-doping rule violations on the part of athletes and athlete support personnel and matters of compliance of sports organisations. It stipulates that the Tribunal shall be guided by the World Anti-Doping Code (the Code),<sup>14</sup> the various international standards established

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9 Section 55 of the Sports Act.

10 The author of this chapter, John Morris Ohaga, currently sits as the chair of the Tribunal.

11 Section 58 of the Sports Act.

12 Such appeals would include appeals against disciplinary decisions; appeals against not being selected for a Kenyan team or squad; other sports-related disputes that all parties to the dispute agree to refer to the Tribunal and that the Tribunal agrees to hear.

13 Section 31 of the Anti-Doping Act, No. 5 of 2016.

14 Pursuant to Section 2 on Interpretation, the World Anti-Doping Code has been adopted by sports organisations, international sports federations and national anti-doping organisations to regulate doping in sport.

under the Code, the 2005 UNESCO Convention Against Doping in Sports, the Sports Act and the Anti-Doping Agency of Kenya's (the Agency) Anti-Doping Rules, among other legal sources.

The Tribunal is to establish its own procedures.<sup>15</sup>

Disputes involving national and county level athletes, athlete support personnel, sports federations, sports organisations, professional athletes and professional sports persons are resolved by the Tribunal both at the first instance and at appeal, each consisting of three members appointed by the chairperson of the Tribunal.<sup>16</sup>

Save as otherwise provided for under Article 4.4.7 of the Code on Therapeutic Use Exemptions,<sup>17</sup> disputes involving international level athletes are resolved by the Tribunal at the first instance with an appeal to the Court of Arbitration for Sport. In all disputes, there is a right of appeal within 30 working days of the date of communication of the Tribunal's decision by the accused, the Agency, the national anti-doping organisation of the person's country of residence, the World Anti-Doping Agency, the International Paralympic Committee International Sports Federation, the International Olympic Committee and any other international sports body.

For the avoidance of doubt, the Anti-Doping Act clearly spells out that the Tribunal shall not have jurisdiction over national crimes related to doping as they relate to recreational athletes and other persons, entities or organisations.<sup>18</sup>

The law avails an avenue of appeal from the Tribunal to the Court of Arbitration for Sport.<sup>19</sup> The Agency may lodge an appeal against a decision of the World Anti-Doping Agency or an International Federation to the Court of Arbitration for Sport in accordance with Article 4.4 of the Code. It also provides that an international-level athlete, an athlete's support personnel, the Agency, an international federation or the World Anti-Doping Agency may appeal against a decision of the Tribunal to the Court of Arbitration for Sport in accordance with Article 13 of the Code.

## **ii Specific internal dispute resolution mechanisms: Kenya Premier League**

The Kenyan Premier League has a disciplinary body called the Independent Disciplinary and Complaints Committee (IDCC). The IDCC is the tribunal for resolving disputes in the game of football managed under the auspices of the KPL. The IDCC is guided by Article 1.1 of the Rules of Kenyan Football Rules, which states that the FKF consists of branches and clubs approved by the executive committee.

All branches and clubs must apply and adhere to the laws of the game and rules approved by the FKF and international football authorities such as the Council for East and Central Africa Football Associations, CAF and FIFA. Consequently, the rules of law applied in deliberations of the IDCC consist of laws of the game as approved by FIFA, the rules of Kenyan football, the policy decisions made by the KPL, the FIFA Disciplinary Code, other FIFA Rules and Regulations, the decisions of the Court of Arbitration for Sports (CAS) case

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15 Section 31(3) of the Anti-Doping Act.

16 Section 31(4) of the Anti-Doping Act.

17 If the medication an athlete is required to take to treat an illness or condition happens to fall under the Prohibited List, a therapeutic use exemption may give that athlete the authorisation to take the necessary medicine.

18 Section 31(7) of the Anti-Doping Act.

19 Section 32 of the Anti-Doping Act.

law from the IDCC and other jurisdictions, the laws of Kenya, the rules of natural justice and other documentation in so far as such documentation adds relevant value to the particular circumstances of a given case.

Where there is a discrepancy or conflict in any of the above, the FIFA Disciplinary Code, other FIFA rules and regulations and decisions of the CAS have precedence.

### III PROFESSIONAL SPORTS AND LABOUR LAW

An employee is defined to mean a person employed for wages or a salary.<sup>20</sup> Athletes and sportspersons who fit this criterion are employed for wages or salary.<sup>21</sup> The Employment Act also applies to all persons employed by any employer under a contract of service.<sup>22</sup> Persons who would fall under this category include persons employed by sports clubs.

The Act lays down general principles of mandatory application, including in employment of athletes.<sup>23</sup> These principles include prohibition against forced labour, discrimination in employment and sexual harassment.<sup>24</sup> The law also requires that all contracts of service be in accordance with the Act.<sup>25</sup> It recognises both oral and written contracts as valid contracts of service.<sup>26</sup> It requires, however, that a contract of service for a period or a number of working days that amount in the aggregate to the equivalent of three months or more, or that provide for the performance of any specified work that could not reasonably be expected to be completed within a period or a number of working days amounting in the aggregate to the equivalent of three months, shall be in writing.<sup>27</sup>

It lays strict requirements as to the contents of the contracts. In particular, it demands that a written contract of service shall state the name, age, permanent address and sex of the employee. The contract should also state the name of the employer; the job description of the employment; the date of commencement of the employment; the form and duration of the contract.<sup>28</sup>

Contracts should also spell out the place of work; the hours of work; the remuneration, scale or rate of remuneration, the method of calculating that remuneration and details of any other benefits; the intervals at which remuneration is paid; and the date on which the employee's period of continuous employment began, taking into account any employment with a previous employer that counts towards that period; and any other prescribed matter.<sup>29</sup>

The Act lays down strict requirements as to payment, disposal and recovery of wages, allowances to employees.<sup>30</sup> An employer is obliged to pay the entire amount of the wages earned by or payable to an employee in respect of work done by the employee in pursuance of a contract of service directly, in the currency of Kenya in cash; into an account at a bank, or building society, designated by the employee; by cheque, postal order or money order

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20 The law in Kenya defines an employee to mean and include an apprentice and indentured learner.

21 Section 2 of the Employment Act, Chapter 226.

22 Section 3 of the Employment Act 2007.

23 Part II of the Employment Act.

24 Sections 4, 5 and 6 of the Employment Act.

25 Section 7 of the Employment Act.

26 Section 8 of the Employment Act.

27 Section 9 of the Employment Act.

28 Section 10 of the Employment Act.

29 *id.*

30 Section 17 of the Employment Act.

in favour of the employee; or in the absence of an employee, to a person other than the employee, if the person is duly authorised by the employee in writing to receive the wages on the employee's behalf.<sup>31</sup>

As to when wages or salaries are due, the Act stipulates that where a contract of service entered into under which a task or piece-work is to be performed by an employee, the employee shall be entitled when the task has not been completed, at the option of his or her employer, to be paid by his or her employer at the end of the day in proportion to the amount of the task that has been performed, or to complete the task on the following day, in which case he or she shall be entitled to be paid on completion of the task.<sup>32</sup>

In the alternative, the employee is entitled, in the case of piece-work, to be paid by his or her employer at the end of each month in proportion to the amount of work that he or she has performed during the month, or on completion of the work, whichever date is the earlier.<sup>33</sup>

Subject to the above, however, wages or salaries shall be deemed to be due in the case of a casual employee, at the end of the day; in the case of an employee employed for a period of more than a day but not exceeding one month, at the end of that period; in the case of an employee employed for a period exceeding one month, at the end of each month or part thereof; in the case of an employee employed for an indefinite period or on a journey, at the expiry of each month or of such period, whichever date is the earlier, and on the completion of the journey, respectively.<sup>34</sup>

Termination has proven to be the most contentious issue in terms of the relationship between employees and employers in sports. In light of this, the Employment Act has very elaborate provisions to govern termination and dismissal. Its provisions on the requirement of a termination notice prior to termination of the employment, or in the alternative payment in lieu of the notice, are very relevant.<sup>35</sup> Where an employee gives notice of termination of employment and the employer waives the whole or any part of the notice, the employer shall pay the employee remuneration equivalent to the period of notice not served by the employee, as the case may be, unless the employer and the employee agree otherwise.<sup>36</sup>

The Act further makes guidelines prohibiting termination of employment on account of redundancy unless certain specific grounds spelled out in the Act are met.<sup>37</sup> It also places an obligation of employers issuing notification and hearing before termination on grounds of misconduct.<sup>38</sup>

The Employment Act is also big on provisions of summary dismissal and unfair termination since they form the bulk of the employment disputes that end up in court and the Sports Dispute Tribunal. On summary dismissal, the Employment Act anticipates that it takes place when an employer terminates the employment of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term. As a general rule, no employer has the right to terminate a contract of service without notice or with less notice than that to which the employee is entitled

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31 Section 17(1)(a) to (d) of the Employment Act.

32 Section 18(1)(a) of the Employment Act.

33 Section 18(1)(b) of the Employment Act.

34 Section 18(2) of the Employment Act.

35 Sections 35 and 36 of the Employment Act.

36 Section 38 of the Employment Act.

37 Section 40 of the Employment Act.

38 Section 41 of the Employment Act.



by any statutory provision or contractual term.<sup>39</sup> Nevertheless, subject to the provisions of the Employment Act, it allows an employer to dismiss an employee summarily when the employee has by his or her conduct indicated that he or she has fundamentally breached his or her obligations arising under the contract of service.

In an attempt to clarify, it lays down matters that may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause. Some of these matters include:<sup>40</sup>

- a* without leave or other lawful cause, an employee absents him or herself from the place appointed for the performance of his or her work;
- b* during working hours, by becoming or being intoxicated, an employee renders him or herself unwilling or incapable to perform his or her work properly;
- c* an employee wilfully neglects to perform any work that it was his or her duty to perform, or if he or she carelessly and improperly performs any work that from its nature it was his or her duty, under his or her contract, to have performed carefully and properly;
- d* an employee uses abusive or insulting language, or behaves in a manner insulting, to his or her employer or to a person placed in authority over him or her by the employer;
- e* an employee knowingly fails or refuses to obey a lawful and proper command that it was within the scope of his or her duty to obey, issued by his or her employer or a person placed in authority over him or her by the employer;
- f* in the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognisable offence punishable by imprisonment and is not within 14 days either released on bail or on bond or otherwise lawfully set at liberty; or
- g* an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his or her employer or the employer's property.

On unfair termination, the Act is explicit that no employer shall terminate the employment of an employee unfairly.<sup>41</sup> It spells out a criterion of what the employer must prove to satisfy that the termination effected was not unfair.<sup>42</sup> It requires the employer to prove that:

- a* the reason for the termination is valid;
- b* the reason for the termination is a fair reason related to the employee's conduct, capacity or compatibility; or based on the operational requirements of the employer; and
- c* the employment was terminated in accordance with fair procedure.

The Act further codifies what when done cannot be a ground for dismissal or for the imposition of a disciplinary penalty.<sup>43</sup> These include a female employee's pregnancy, or any reason connected with her pregnancy; the going on leave of an employee, or the proposal of an employee to take, any leave to which he or she was entitled under the law or a contract; an employee's membership or proposed membership of a trade union; the participation or proposed participation of an employee in the activities of a trade union outside working hours or, with the consent of the employer, within working hours; an employee's seeking of office as, or acting or having acted in the capacity of, an officer of a trade union or a workers'

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39 Section 44(1) of the Employment Act.

40 Section 44(4) of the Employment Act.

41 Section 45(1) of the Employment Act.

42 Section 45(2) of the Employment Act.

43 Section 46 of the Employment Act.

representative; an employee's refusal or proposed refusal to join or withdraw from a trade union; an employee's race, colour, tribe, sex, religion, political opinion or affiliation, national extraction, nationality, social origin, marital status, HIV status or disability; an employee's initiation or proposed initiation of a complaint or other legal proceedings against his or her employer, except where the complaint is shown to be irresponsible and without foundation; or an employee's participation in a lawful strike.

The Act also makes provisions for foreign contracts of services.<sup>44</sup> It lays down requirements of the contract before it is attested to by the parties.<sup>45</sup> It requires that a foreign contract of service shall not be attested unless the labour officer is satisfied that:

- a* the consent of the employee to the contract has been obtained;
- b* the contract is free of any fraud, coercion or undue influence, and any mistake of fact or misrepresentation that might have induced the employee to enter into the contract;
- c* the contract is in the prescribed form; that the terms and conditions of employment contained in the contract comply with the provisions of the Act and have been understood by the employee;
- d* the employee is medically fit for the performance of his or her duties under the contract; and
- e* the employee is not bound to serve under any other contract of service during the period provided in the foreign contract.

#### IV SPORTS AND TAXATION

Sportspersons are not exempt from paying taxes in Kenya. Subject to, and in accordance with, the Income Tax Act, a tax to be known as income tax is charged for each year of income upon all the income of a person, whether resident or non-resident, which accrued in or was derived from Kenya. It is noteworthy that one of the functions of Sports Kenya under the Sports Act is to recommend, in conjunction with the relevant sports organisations, tax exemption for sportspersons.<sup>46</sup>

Where sports income is earned overseas by a sportsperson who is a resident of Kenya for tax purposes, such income is considered to have accrued in or to have been derived from Kenya and is therefore taxable in Kenya. However, the tax paid overseas is offset against the tax computed locally on the income earned overseas as provided under Section 39(2) of the Income Tax Act. The sportsperson is, however, required to furnish evidence of tax paid overseas in order to be allowed to offset it against tax computed locally.

Where the sportspersons use their earnings to pay sports managers and agents who are non-residents, they should deduct withholding tax at the rate of 20 per cent of the gross amount payable and pay the balance to the manager or agent. Such withholding tax is payable to the Commissioner of Domestic Taxes Department by the 20th of the month following the month of payment.

Local organisers of sporting events are also required to deduct 20 per cent withholding tax on any payment made to non-resident sportspersons and sports managers and agents.

It is instructive to underline that the tax only applies to Kenyan residents for tax purposes. The Income Tax Act defines a person who is a resident in Kenya for tax purposes

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44 Part XI of the Employment Act.

45 Section 84 of the Employment Act.

46 Section 4(r) of the Sports Act.

when applied in relation to an individual means that the person has a permanent home in Kenya and was present in Kenya for any period in a particular year of income under consideration; or that a person who has no permanent home in Kenya but was present in Kenya for a period or periods amounting in the aggregate to 183 days or more in that year of income; or was present in Kenya in that year of income and in each of the two preceding years of income for periods averaging more than 122 days in each year of income.<sup>47</sup>

On the issue of double taxation, Kenya has double taxation treaties with several countries, which protect residents earning income from these countries from double taxation. The Kenyan government has concluded double taxation agreements (DTAs) with a number of countries and is currently expanding its treaty network. DTAs are important since they help to alleviate double taxation where business is conducted in different tax jurisdictions and also assist tax administrations in preventing fiscal evasion.

Under the Income Tax Act, the Minister may from time to time by notice declare that arrangements, specified in the notice and being arrangements that have been made with the government of any country with a view to affording relief from double taxation in relation to income tax and other taxes of a similar character imposed by the laws of the country.<sup>48</sup>

For countries with which Kenya does not have double taxation treaties, the law provides for special relief by the Minister of Finance, which allows the residents to offset taxes paid in other countries.<sup>49</sup>

## **i DTAs in Kenya**

### ***Ratified and in force***

The following DTAs have been ratified and are therefore in force. The Legal Notices contain the full text of the conventions.

<b>Double taxation agreements</b>	<b>Legal Notices</b>
Zambia – 27.8.1968	Legal Notice No. 10/1970
Norway – 13.12.1972	Legal Notice No. 6/1973
Denmark – 13.12.1972	Legal Notice No. 5/1973
Sweden – 28.6.1973	Legal Notice No. 14/1973
UK – 31.7.1973	Legal Notice No. 253/1977
Germany – 17.5.1977	Legal Notice No. 20/1980
Canada – 27.4.1983	Legal Notice No. 111/1987
India – 12.4.1985	Legal Notice No. 61/1989

### ***Signed but not in force***

The following DTAs have been signed but have not been ratified by all the contracting states and are therefore in not in force:

- a* Italy – 15 October 1979; and
- b* Tanzania and Uganda – 31 March 1999 Legal Notice No. 45/1999 (renegotiated by East African Community states on 23 November 2005 in Arusha, Tanzania).

<sup>47</sup> Section 2 of the Income Tax Act.

<sup>48</sup> Section 41(1) of the Income Tax Act.

<sup>49</sup> Section 42 of the Income Tax Act.

### ***Draft agreements under negotiation***

The following DTAs are at different stages of negotiation:

- a* Tanzania and Uganda (renegotiated 23 November 2005);
- b* France (second round negotiations, Nairobi, 3 February 2006);
- c* Thailand (first round negotiations, Bangkok, 7 July 2006); and
- d* India (review first round, New Delhi, 14 July 2006).

For those that are in force, but under review, the existing DTAs continue to operate until the review is complete. This will be intimated through a Legal Notice revoking the existing one.

### ***Draft agreements for negotiation***

The following draft DTAs are under discussion by the Task Force on Double Taxation and Investment Agreements under the chair of the Ministry of Finance:

- a* Seychelles;
- b* Nigeria;
- c* South Africa;
- d* Mauritius;
- e* Finland;
- f* Russia;
- g* the United Arab Emirates; and
- h* Iran.

## **V SPECIFIC SPORTS ISSUES**

### **i Doping**

The Anti-Doping Act establishes the Agency.<sup>50</sup> The Agency is a body corporate with perpetual succession and a common seal, which is capable, in its corporate name, of suing and being sued; owning, taking, purchasing or otherwise acquiring, holding, charging and disposing of movable or immovable property. It is also granted the authority of receiving and borrowing money, entering into contracts and doing or performing all such other acts that may lawfully be done or performed by a body corporate.

The Agency is the only organisation permitted to carry out anti-doping activities in Kenya and its authority is recognised by all national federations in Kenya.<sup>51</sup> The Agency is the successor in title to the Anti-doping Agency established under the Anti-doping Agency of Kenya Order 2015, which ceased to have effect immediately upon the commencement of the Anti-Doping Act.<sup>52</sup> The headquarters of the Agency are in Nairobi.

The main function of the Agency is to promote participation in sport, free from doping in order to protect the health and well-being of competitors and the rights of all persons who take part in sport.<sup>53</sup> Its function is also to create awareness in order to discourage the practice of doping in sport among the public and the sporting community in particular. It also develops a national strategy to address doping in sport in collaboration with the Ministry

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50 Section 5 of the Anti-Doping Act.

51 Section 5(2A) of the Anti-Doping Act.

52 Section 5(3) of the Anti-Doping Act.

53 Section 7(a) of the Anti-Doping Act.

of Sports, implement the Code and associated international standards, periodically gazette international standards and use World Anti-Doping Agency accredited laboratories for analysis of samples and other required specimens.<sup>54</sup>

It also implements anti-doping activities in the country including the testing of collected samples in all sports, sport federations and sport organisations and undertakes, coordinates or arranges for research to be undertaken in the field of performance-enhancing substances and methods and doping practices in sport. As its mandate, it also promotes and implements the application of various guidelines and international standards in matters related to anti-doping.

It is noteworthy that in the performance of its functions, the Agency is required to address the needs of minors, take into account the needs of persons with disabilities or other persons with special needs, and ensure that the rights of everyone involved in the doping control procedures are respected.

The Agency is granted all the powers necessary for the proper performance of its functions under Section 8 of the Anti-Doping Act.

## ii Betting

Betting in Kenya is regulated by the Betting, Lotteries and Gaming Act.<sup>55</sup> It is an Act of Parliament to provide for the control and licensing of betting and gaming premises; for the imposition and recovery of a tax on betting and gaming and for the authorising of public lotteries.

The Betting, Lotteries and Gaming Act establishes the body to be known as the Betting Control and Licensing Board<sup>56</sup> and stipulates that the Board shall have power to issue licences and permits in accordance with the Act and any regulations made thereunder; during the subsistence of a licence or permit, to vary, or for good cause to suspend or cancel it and to inquire into complaints against licensees or permit-holders.<sup>57</sup>

Part 3 of the Act governs the control and licensing of betting under which it provides for offences in betting and gaming. Some of the offences it creates include the prohibition against unlicensed bookmaking,<sup>58</sup> betting by means of unlicensed totalisator,<sup>59</sup> offences relating to pool betting schemes,<sup>60</sup> prohibition against touting,<sup>61</sup> prohibition against

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54 Section 7(b) to (v) lays out the functions of the Agency. The Anti-Doping Act does not specifically state that the first function is the main function, however. It only lists them all out without giving any preference as to priority. The first function is, however, arguably the main function since it seems to summarise the overall role of the Agency.

55 Betting, Lotteries and Gaming Act, Chapter 131 of the Laws of Kenya.

56 Section 3 of the Betting, Lotteries and Gaming Act.

57 Section 4 of the Betting, Lotteries and Gaming Act.

58 Section 15 of the Betting, Lotteries and Gaming Act.

59 Section 16 of the Betting, Lotteries and Gaming Act.

60 Section 21 of the Betting, Lotteries and Gaming Act.

61 Section 24 of the Betting, Lotteries and Gaming Act.

advertising of betting,<sup>62</sup> prohibition against liquor on licensed premises,<sup>63</sup> prohibition against playing games of chance on licensed premises,<sup>64</sup> betting with young persons as an offence<sup>65</sup> and betting in public places as an offence.<sup>66</sup>

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62 Section 25 of the Betting, Lotteries and Gaming Act. This prohibition is, however, qualified, and limited to circumstances that the Act spells out. It states:

*A person who, in connection with any licensed betting premises, licensed bookmaking or licensed pool betting scheme, without the approval of the Board –*

- (a) holds himself out by advertisement or notice or public placard as willing to bet with members of the public; or*
- (b) displays any written or printed placard or notice relating to betting in any shape or form, so as to be visible in a public street or place; or*
- (c) prints or publishes, or causes to be printed or published, any advertisement or other notice, shall be guilty of an offence and liable to a fine not exceeding three thousand shillings or to imprisonment for a term not exceeding three months or to both; but nothing in this section shall prohibit the printing, reproduction and publication of circulars giving information relating to betting on an intended horse race or other race in Kenya or elsewhere, if the circulars are issued by a person granted a licence under this Part.*

63 Section 26 of the Betting, Lotteries and Gaming Act.

64 Section 27 of the Betting, Lotteries and Gaming Act.

65 Section 28 of the Betting, Lotteries and Gaming Act.

66 Section 29 of the Betting, Lotteries and Gaming Act.

# NEW ZEALAND

*Aaron Lloyd*<sup>1</sup>

## I OVERVIEW

New Zealand competes on the international sporting stage, belying its modest population of approximately 4.9 million.<sup>2</sup> Rugby Union plays a strong part in New Zealand's sporting identity. The All Blacks were inaugural winners of the Rugby World Cup in 1987, and following victory in 2015, became the first team to win three world championships, and to defend back-to-back titles. New Zealand's national men's and women's Rugby Sevens teams have won multiple world championships, and the Black Ferns (the women's national 15-a-side team) won its fifth World Cup at the 2017 World Rugby Women's World Cup held in Ireland.

Rugby Union is not the only sport in which New Zealand excels. At the 2016 Rio Olympics New Zealand finished 14th overall in terms of total medals, and 19th in terms of medal type.<sup>3</sup> New Zealand has also enjoyed success belying its modest size in yachting (particularly the America's Cup, which it most recently won in 2017), rowing, cycling and athletics. The national women's netball team and national men's rugby league team have been crowned world champions, and its national men's cricket team, the Black Caps, recently finished runner-up to Australia in the 2015 Cricket World Cup. NBA star Stephen Adams has become New Zealand's highest paid sportsperson, edging Premier League footballer Winston Reid. The appointment of young motor racing driver, Brendon Hartley, to the Torro Rosso Formula 1 team in 2017 echoes not only historical success in that sport (past drivers include Bruce McLaren, Chris Amon, Jack Brabham and Denny Hulme), but also contemporaries of Hartley (such as Earl Bamber with whom Hartley won the Le Mans 24 Hour in 2017, Scott Dixon (IndyCar) and Hayden Paddon (WRC)).

In sports administration, New Zealand also contributes significantly on the international stage. A number of leading officials and administrators in rugby, cricket, netball, athletics, sailing and rowing come from New Zealand. In addition, pioneering sports lawyer David Howman, the founding director-general of the World Anti-Doping Agency (WADA), and Maria Clarke (a key participant in the recent overhaul of governance at the IAAF) are both 'Kiwis'.

As sport has become more commercial, the law across the globe has developed accordingly. New Zealand law is no different, especially as it has taken a leading role in some of the most commercially successful global sports such as rugby, cricket and the America's Cup.

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2 [www.stats.govt.nz/tools\\_and\\_services/population\\_clock.aspx](http://www.stats.govt.nz/tools_and_services/population_clock.aspx).

3 [www.rio2016.com/en/medal-count-country?rank=total](http://www.rio2016.com/en/medal-count-country?rank=total).

In this chapter, we look at the sports law landscape in New Zealand, and how sports administrators and legal practitioners might engage with the legal system in the sporting environment.

## **II ORGANISATION OF SPORTS CLUBS AND SPORTS GOVERNING BODIES**

### **i Organisational form**

A range of legal entities are used by sports clubs, national sporting organisations (NSOs), and professional sports organisations and teams in New Zealand.

The most common legal entity in sport in New Zealand is the incorporated society. An incorporated society is a membership-based organisation provided for under the Incorporated Societies Act 1908. An incorporated society has its own legal identity, separate from its members, and the group must exist for some lawful purpose other than making a profit. The incorporated society must have in place rules that govern the operation of the entity. Decisions of an incorporated society may be amenable to judicial review in the court system, given that the actions of an incorporated society are undertaken pursuant to statutory powers provided for in the Incorporated Societies Act. Examples of sporting organisations incorporated in this manner include New Zealand Cricket, New Zealand Rugby and its member unions,<sup>4</sup> and New Zealand Netball. In addition, players' associations have also traditionally been formed as incorporated societies in New Zealand, often registering as a union under New Zealand employment law. Examples of this include the New Zealand Rugby Players Association (NZRPA),<sup>5</sup> the New Zealand Cricket Players Association<sup>6</sup> and the New Zealand Netball Players Association.<sup>7</sup>

Historically, many sporting organisations have, in addition to being formed as an incorporated society, sought registration as a charity (currently under the Charities Act 2005). However, to obtain charitable status certain requirements need to be met, including the requirement that the organisation benefit the community as a whole (thereby excluding sporting organisations that are focused on elite level sport).<sup>8</sup> Reform of this area of the law has been under discussion for some time, although concrete legal reform has failed to materialise. A change in government in late 2017 means the scope of future reform is now unclear. However, change is likely at some stage, and care should be taken to ensure compliance with current and future legal requirements in this area.

The limited liability company is a commonly used legal entity under New Zealand law (currently provided for by the Companies Act 1993). Less common in sport than the incorporated society (particularly with community or amateur sports organisations), the company nevertheless has significant benefits as a legal entity, particularly for sporting entities wishing to engage in trade with any desire to make a profit. The use of the company is often combined with partnership (or limited partnership) arrangements, particularly in the

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4 [www.nzru.co.nz/about-us/our-members](http://www.nzru.co.nz/about-us/our-members).

5 [www.nzrpa.co.nz](http://www.nzrpa.co.nz).

6 [www.nzcpa.co.nz](http://www.nzcpa.co.nz).

7 [www.nznpa.co.nz](http://www.nznpa.co.nz).

8 [www.charities.govt.nz/apply-for-registration/charitable-purpose/sport-and-recreation](http://www.charities.govt.nz/apply-for-registration/charitable-purpose/sport-and-recreation).



‘franchise’ sporting sector. Examples of such an approach can be seen in professional rugby, where the Super Rugby franchises in New Zealand (Blues, Chiefs, Hurricanes, Crusaders and Highlanders) are all structured utilising company or partnership structures, or both.

## **ii Corporate governance**

The Incorporated Societies Act and the Companies Act both prescribe procedural and organisational requirements for incorporated societies and companies, although New Zealand law is not particularly prescriptive regarding its governance requirements. For example, New Zealand registered companies can, as a matter of law, have sole directors. While some sectors have in place additional governance and regulatory requirements (most notably the finance sector), there is no law in New Zealand providing for mandatory governance arrangements in the sporting context.

There is, however, a push in New Zealand to see ‘best practice’ and ‘good governance’ models put in place in sporting organisations. This is driven largely by government policy and funding organisations, such as Sport New Zealand.<sup>9</sup> Sport New Zealand has worked extensively to produce a range of resources for sports organisations in relation to matters of governance. Some resources, such as its Nine Steps to Effective Corporate Governance, provide broad guidance as to best practice for sports organisations’ governance and management.<sup>10</sup> In addition, specialist resources focus on areas such as health and safety,<sup>11</sup> event risk management<sup>12</sup> and sports integrity topics such as match-fixing.<sup>13</sup> Sport New Zealand has also produced a template set of rules to establish a framework for sporting organisations set up as incorporated societies. In some cases, Sport New Zealand insist on sports organisations adopting best practices before government funding or assistance will be provided, at both the community and elite or high-performance levels (through Sport New Zealand’s related organisation, High Performance Sport New Zealand).

## **iii Corporate liability**

Directors and officers of sports organisations carry potential liability under general New Zealand law such as the Companies Act and the Crimes Act 1963. With the exception of recent amendments to the Crimes Act to confirm match-fixing or manipulation as a criminal offence, there are very few, if any, sporting-related offences under the general law. As a rule, sporting rules and regulations are a matter of private law rather than public law.

The area of health and safety is, however, an area worthy of specific mention. 2015 saw the passage through Parliament of the Health and Safety at Work Act 2015. This was the biggest reform of health and safety law in New Zealand in more than 20 years. It followed not only the Pike River Mine Disaster of 2010, but also the recognition of New Zealand’s generally poor health and safety record in the workplace compared with similar countries in the Organisation for Economic Co-operation and Development. This was observed by the Independent Taskforce on Workplace Health and Safety, which was put in place by the

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9 [www.sportnz.org.nz/managing-sport/search](http://www.sportnz.org.nz/managing-sport/search).

10 [www.sportnz.org.nz/assets/Uploads/attachments/managing-sport/strong-organisations/Nine-Steps-to-Effective-Governance-Building-High-Performing-Organisations.pdf](http://www.sportnz.org.nz/assets/Uploads/attachments/managing-sport/strong-organisations/Nine-Steps-to-Effective-Governance-Building-High-Performing-Organisations.pdf).

11 [www.sportnz.org.nz/managing-sport/search-for-a-resource/guides/health-and-safety-reforms-update-feb-2015](http://www.sportnz.org.nz/managing-sport/search-for-a-resource/guides/health-and-safety-reforms-update-feb-2015).

12 [www.sportnz.org.nz/managing-sport/search-for-a-resource/guides/risk-management-for-events](http://www.sportnz.org.nz/managing-sport/search-for-a-resource/guides/risk-management-for-events).

13 [www.sportnz.org.nz/managing-sport/search?c=16](http://www.sportnz.org.nz/managing-sport/search?c=16).

government in June 2012 to report to the Minister of Labour on whether New Zealand's workplace health and safety system was fit for purpose. Its report to the Minister in April 2013 made it clear that it was not, and this led to legislative reform and the establishment of an independent regulator, WorkSafe New Zealand (which received an increase in funding).<sup>14</sup>

Directors and officers of entities owing duties under the Health and Safety at Work Act have specific duties of due diligence in relation to health and safety matters. These duties, new to New Zealand law, require directors and officers to take significant proactive steps to ensure health and safety is properly considered and implemented by their organisations. Significantly, a failure to comply with these obligations (as with other obligations under the Act) can result in individual criminal liability, and penalties including fines, imprisonment, or both. Under the legislation, it is illegal to put in place insurance or any other form of indemnity for fines, meaning that directors and officers will be personally liable for any fines should they commit a breach. Individuals can be fined up to NZ\$600,000 or face up to five years' imprisonment.

### **III THE DISPUTE RESOLUTION SYSTEM**

#### **i Access to courts**

New Zealand operates a parliamentary system in the Westminster tradition, with three divided branches of government (the Parliament, the executive and the judiciary). Unlike the United States, Canada and Australia, New Zealand has no written constitution. However, the Constitution Act 1986 does record many of New Zealand's constitutional arrangements.

New Zealand has a hierarchical and specialist court system. The main law courts are the District Court and the High Court, which have both criminal and civil law jurisdiction. In addition, the Environment and Employment courts sit with specialist jurisdiction. The Court of Appeal (which hears appeals from the High Court and the specialist courts, and some appeals from the District Court) sits as a superior appeal court. The final appeal court in New Zealand is the Supreme Court, which was established in 2004 to replace appeals to the Judicial Committee of the Privy Council based in London. In addition to the courts, there are various administrative tribunals under New Zealand law, including the Disputes Tribunal (which generally hears civil claims of less than NZ\$15,000) and the Employment Relations Authority (a first instance tribunal for the hearing of employment-related claims).

Sports disputes can, and do, end up before any of New Zealand's courts or tribunals. Employment disputes may be heard in the Employment Relations Authority or the Employment Court. Matters related to planning and resource consents may be heard by the Environment Court (usually after first instance planning decisions or hearings at local government level). Commercial disputes alleging breach of contract, negligence or claims in equity will often be advanced in the District Court or High Court. One recent example is the High Court litigation between media outlets TVNZ and NZME, and pay-tv broadcaster Sky TV, with respect to 'fair use' by the media outlets of Sky TV's licensed sports content.<sup>15</sup>

Pure sports matters, however, such as selection disputes, doping or other integrity-related matters, or matters involving on-field or on-court disciplinary matters, are rarely heard in the court system, with such matters being heard within the sport's own disciplinary tribunals,

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14 [hstaskforce.govt.nz/index.asp](http://hstaskforce.govt.nz/index.asp); [www.business.govt.nz/worksafe](http://www.business.govt.nz/worksafe).

15 [www.nbr.co.nz/article/mediaworks-fairfax-settle-sky-tv-over-copyright-dispute-b-211691](http://www.nbr.co.nz/article/mediaworks-fairfax-settle-sky-tv-over-copyright-dispute-b-211691).

or through the Sports Tribunal of New Zealand (the Tribunal), a statutory body set up to determine sports disputes. Notable exceptions usually take the form of applications to the High Court for the judicial review of decisions made by sporting bodies. Examples of such actions from the sports of rugby and horse racing include *Finnigan v. NZ Rugby Football Union Inc* [1985] 2 NZLR 159 and *Cropp v. A Judicial Committee and ANOR* SC 68/2007.

## ii The Sports Tribunal of New Zealand

The Tribunal was established in 2003 to hear and determine ‘certain’ disputes in sport. Its membership is composed of lawyers, doctors, former athletes and other notable individuals with experience in the sports industry. Its chair is required to be a lawyer (of senior standing), and is currently the former president of the Court of Appeal, Sir Bruce Robertson.

The Tribunal operates pursuant to the Sports Anti-Doping Act 2006, and hears and determines:

- a anti-doping violations;
- b appeals against decisions made by an NSO or the New Zealand Olympic Committee (NZOC) if the rules of the NSO or the NZOC allow for an appeal to the Tribunal;
- c other ‘sports-related’ disputes that the parties agree to have referred to the Tribunal; and
- d matters referred to the Tribunal by the Board of Sport New Zealand.

The Tribunal is government funded, and maintains a register of sports lawyers willing to assist athletes and sports organisations in disputes before the Tribunal on a pro bono or reduced-fee basis.<sup>16</sup>

Almost all sporting codes that are a signatory to the WADA Code submit the hearing of their anti-doping matters to the Tribunal. The most notable exception, at least in the New Zealand context, is rugby, which has its own anti-doping hearings consistent with the Code.

The Tribunal is seen as an alternative to the Court of Arbitration for Sport (CAS) for the resolution of sports disputes in New Zealand. That said, CAS is still utilised, either as an alternative to the New Zealand court system or the Tribunal, or on appeal from decisions of the Tribunal.

## IV ORGANISATION OF SPORTS EVENTS

### i Contractual relationships

Contract law provides the legal foundation for many of the relationships present in relation to the conduct of sports events. The common law of contract (borrowing heavily from the United Kingdom and other Commonwealth jurisdictions) is supplemented by a range of statutes, including the Contract and Commercial Law Act 2017, the Consumer Guarantees Act 1993 and the Fair Trading Act 1986. In some cases, entities may have procedural requirements that must be met for entry into contracts: for example, for incorporated societies, a requirement to use a ‘common seal’.

### ii Accident compensation scheme

A significant feature of the New Zealand legal landscape is the accident compensation scheme (currently governed by the Accident Compensation Act 2001). The scheme, introduced in

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<sup>16</sup> See generally [www.sportstribunal.org.nz](http://www.sportstribunal.org.nz).

the 1970s, provides for a state-funded compensation and medical treatment scheme for all persons in New Zealand who suffer 'injury by accident'. A consequence of the scheme is that it generally bars legal action for personal injury.

The scheme has been eroded over time, and there are some exceptions to the bar against suing for personal injury. However, in general terms the prohibition remains, and this makes New Zealand quite unlike any other major legal jurisdiction in that people injured in accidents cannot sue those responsible.

This is significant in both event organiser and spectator relationships, and between event organisers or clubs and athletes participating in their events.

### **iii Potential liability for event organisers**

Notwithstanding the existence of the accident compensation scheme, significant risk of personal and corporate liability stills exists under New Zealand law for event organisers. The risk of claims for alleged breaches of contract or for acts of negligence causing non-injury-related losses remains, and disputes in such regard are often proceeded with before the courts or using forms of alternative dispute resolution.

In addition, criminal liability can attach to the operation of an event should such an event breach the regulatory requirements for permits or consents, create risk of reckless endangerment, or otherwise promote, encourage or cause illegal activity (such as a breach of transport laws).

Finally, as noted above, reform in the health and safety area creates an increased and significant risk for event organisers should they fail to undertake appropriate due diligence, planning or execution of an event from a health and safety perspective.

## **V COMMERCIALISATION OF SPORTS EVENTS**

### **i Increasing value of 'sports rights'**

Sport as a business is about the 'commercialisation' of sporting 'products' and 'rights' by sports organisations and those associated with them. As in other jurisdictions, New Zealand law allows for a range of participants in the sports sector to commercialise and profit from their sporting activity, depending upon the role they play.

Broadcast rights remain among the most valuable of sporting rights present in the New Zealand market, depending on the popularity of the sport. Rugby, cricket, netball and rugby league all have significant broadcast deals in place, allowing pay-tv broadcaster Sky TV to broadcast those sports in New Zealand, and for offshore broadcasters to broadcast New Zealand sporting content abroad. Unlike Australia, New Zealand has no legislation in place requiring sport to be made available on free-to-air television. In practice, state-owned broadcaster Television New Zealand, and private free-to-air broadcaster MediaWorks (which operates TV3), provide some free-to-air sports broadcasting. In addition, Prime TV (a free-to-air TV channel owned and operated by Sky TV) offers free-to-air coverage of sports, often as delayed coverage of events that Sky TV holds the principal broadcasting rights to.

The entry into the market of over-the-top broadcasting of sport in New Zealand has been a major disruptor in sports broadcasting in recent years. This started with some major sports broadcasting content, such as live English Premier League Football (EPL) and USPGA Golf, being only available in this format. Alternative products, such as club-specific broadcast content (with respect to the EPL, club TV channels such as MUTV, LFCTV and Chelsea TV), were picked up by the historical football broadcaster Sky TV, but this resulted in delayed

rather than live coverage, and only on the pay-tv platform. Sommet Sports TV (SSTV) entered the New Zealand broadcast market for a brief period of time, with a free-to-air sports television service. SSTV's content drew largely on minority sports (e.g., the Australian Football League, surfing, bull-riding) or on alternative content for more mainstream sports (e.g., the German Bundesliga in football, the Caribbean Premier League in cricket). However, SSTV went into liquidation in December 2014 and ceased broadcasting.

As the delivery market for sports broadcasting has matured in the past two to three years, there was an initial swing back toward the main players (and in particular Sky TV) obtaining broadcast rights, although this has, in part, involved those traditional players developing their own over the top or internet-based delivery platforms. The requirement for innovation to continue is highlighted by the publicly observed decline in Sky TV's subscription numbers throughout 2016 and 2017, with some media reporting value of up to NZ\$300 million wiped from Sky TV's market listing, and further losses for the business likely as subscriber numbers continue to decline.<sup>17</sup> In 2017, developments in this area continued, with Sky TV losing out on rights to broadcast the next Rugby World Cup, Formula 1, the Heineken Cup (rugby) and the English Premier League (football), to local telecommunications company Spark.<sup>18</sup>

Outside broadcast rights, image rights, merchandising and sponsorship remain significant commercial commodities, although overall value is often limited by the relatively small nature of the New Zealand sporting market. Some New Zealand sporting brands, such as the All Blacks (rugby) and Team New Zealand (yachting), have significant global value, as evidenced by New Zealand Rugby's global sponsorship arrangements with adidas and with insurance giant AIG and Team New Zealand's association with Emirates Airline. In 2016, New Zealand Rugby ceased its commercial relationship with Coca-Cola Amatil New Zealand Limited (the local Coca-Cola affiliate) in favour of a relationship with Gatorade.<sup>19</sup> While this may look like swapping one multinational beverage sponsor for another, the manner in which the Gatorade sponsorship was launched (with the All Blacks being 'welcomed' to 'the family', which included such international sports stars as Usain Bolt and Lionel Messi) indicated the increasing value of the All Blacks brand in overseas sporting markets.

At the athlete level, individual contractual arrangements for the use of image rights or for sponsorship are common. However, it is important to ensure that individual contractual arrangements do not interfere or conflict with overarching arrangements entered into by a club or NSO. In some sports, rules provide for dealing with such conflicts, and the employment arrangements between New Zealand Rugby (NZR) and its players (represented by the NZRPA) is a good example of athletes permitted to personally endorse non-competing products or services to those that sponsor NZR.

## **ii Rights protection**

New Zealand has strong laws relating to copyright, trademarks and other intellectual property, providing rights holders with significant legal protection against improper use. New Zealand law recognises automatic copyright protection for the creator of original works. In addition, application can be made for intellectual property protection for a range of other forms of

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17 [www.stuff.co.nz/business/industries/79689666/big-drop-in-sky-subscribers](http://www.stuff.co.nz/business/industries/79689666/big-drop-in-sky-subscribers); [www.stuff.co.nz/business/industries/96015124/sky-tv-loses-33880-satellite-subscribers](http://www.stuff.co.nz/business/industries/96015124/sky-tv-loses-33880-satellite-subscribers).

18 [www.nzherald.co.nz/business/news/article.cfm?c\\_id=3&objectid=12148307](http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=12148307).

19 [www.stuff.co.nz/sport/rugby/76092140/all-blacks-sports-drink-of-choice-changes-to-gatorade-as-cocacola-link-ends](http://www.stuff.co.nz/sport/rugby/76092140/all-blacks-sports-drink-of-choice-changes-to-gatorade-as-cocacola-link-ends).

intellectual property, including trademarks. While New Zealand law does not prohibit parallel importing of merchandise, the New Zealand Customs Service (the government agency responsible for policing New Zealand's borders) is tasked with intercepting and holding pirated and counterfeit goods, and interfaces with commercial entities with respect to this.

A significant development in New Zealand's rights protection landscape was the passage of the Major Events Management Act 2007 (MEMA). MEMA allows events designated as 'major events' to have special rights protections put in place to preserve the economic value for sponsors and commercial partners involved in the events. MEMA creates criminal offences for those who use protected words and emblems without authorisation, and creates clean zones around event venues where commercial entities that are not formally associated with the event cannot advertise. MEMA is a major tool for the avoidance of ambush marketing and for the protection of sports events' economic rights.<sup>20</sup> Events that have operated with MEMA protection in New Zealand include the 2010 Rowing World Championships, Rugby World Cup 2011, FIFA U-17 World Cup 2015, International Cricket Council Cricket World Cup 2015 and the Rugby League World Cup 2017.

## **VI PROFESSIONAL SPORTS AND LABOUR LAW**

### **i Mandatory provisions**

Professional athletes are generally engaged as either 'employees' or as 'independent contractors' depending on the nature and extent of the relationship between the athlete and his or her sport.

Employment arrangements are governed by the Employment Relations Act 2000, and related statutes including the Human Rights Act 1993, the Health and Safety at Work Act and the Holidays Act 1993.

Employment law in New Zealand prescribes minimum entitlements for employees, including minimum hourly wage rates (currently NZ\$16.50), the requirement to provide holidays and to pay additional remuneration to employees who are required to work on those holidays, and the documentation of employment terms and conditions in writing. In addition, New Zealand is not an 'at will' employment jurisdiction. Accordingly, unless an employee is engaged on a valid fixed-term employment arrangement, his or her employment may only be terminated for cause or in the case of redundancy or medical incapacity, and only after the employer follows a fair process (which requires employers to provide sufficient information relating to any decision that might affect the future employment of the employee to him or her ahead of any decision about his or her employment being made, and allowing him or her an opportunity to comment on the same to the employer).

Whether someone is an employee or an independent contractor is a significant matter under New Zealand employment law. With only limited exceptions (the motion picture film industry being the principal example), whether someone is an employee or a contractor will not turn on how they choose to describe the relationship, but whether in fact their relationship is one or the other. If an employing sports organisation gets this wrong, and engages employees as independent contractors, there can be significant consequences if

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20 See generally [www.majorevents.govt.nz/major-events-management-act-2007](http://www.majorevents.govt.nz/major-events-management-act-2007).

that position is successfully challenged (including the requirement to provide minimum employment entitlements that may not have been provided to a contractor, and the payment of unpaid income taxes).

In practice, athletes in New Zealand operate as both employees or independent contractors depending on the sport and the nature of the engagement. Professional rugby players, for example, are employees, while professional cricketers operate on an independent contractor model. Such arrangements are yet to be subject to any significant scrutiny by the courts, and notwithstanding the difference, both rugby and cricket employ a collective approach to bargaining of terms of engagement for the players through their respective player associations.

## **ii Free movement of athletes**

It is common practice in New Zealand sporting leagues, and for New Zealand-based teams in Australian-run leagues, to place limitations on the number of foreign athletes allowed to compete in the competition. Examples include rugby's Super Rugby competition, netball's ANZ Premiership Competition (and the former Trans-Tasman Netball League) and the Australian NBL basketball league. However, New Zealand does have, in the form of the Human Rights Act, a law clearly prohibiting discrimination in an employment context on the basis of race and ethnic or national origins, meaning that such practices could be open to potential legal challenge.<sup>21</sup>

The use of 'restraint of trade' clauses in employment arrangements is permitted under New Zealand law where the restriction is necessary to protect the legitimate economic interests of an employing party. This can, and is, used to justify restrictions on the absolute free movement of athletes between respective employers for the duration of an athlete's engagement. In addition, the use of fixed-term employment agreements where both the athlete and the sporting organisation are bound to honour the agreement for its duration can have the same effect. However, there is neither a culture of athlete drafting, nor of transfer fees, in the New Zealand sporting landscape such as exists in many offshore jurisdictions. In practice, transfer fees may arise out of the operation of private law arrangements put in place by international governing bodies. World Rugby's provisions requiring compensation payments between unions transferring professional players is one example.<sup>22</sup> Another case where this might arise is where clubs agree a release fee to compensate a club where an athlete is leaving before the end of his or her contract term, particularly where the transfer is cross-competition (e.g., Rugby League to Rugby Union).

## **VII SPORTS AND TAXATION**

New Zealand has a variety of different taxation rules that are relevant to sporting organisations and athletes that carry out activities in New Zealand. Sporting organisations and athletes that are New Zealand tax residents will generally be required to pay New Zealand income tax on their worldwide income. An individual that is either present for more than 183 days in a

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21 Section 21, Human Rights Act.

22 World Rugby Handbook 2016, Regulation 4.

12-month period, or has a 'permanent place of abode' in New Zealand, will be tax resident in New Zealand. Sporting organisations will be tax resident where they are incorporated, have a head office or are centrally managed in New Zealand.

The rate of income tax applicable will depend on the particular characteristics of the sporting organisation or athlete. For most incorporated sporting organisations, a 28 per cent tax rate will apply. However, sporting organisations that are charities or non-profit bodies established to promote amateur sport may be tax exempt. Athletes are taxed at graduated income tax rates of between 10.5 and 33 per cent.

A New Zealand tax resident athlete could be either an employee or an independent contractor for tax purposes (or in some cases both). Where the athlete is an employee, their employer will be required to deduct any tax on any employment income they derive at source under New Zealand's pay-as-you-earn (PAYE) system. An independent contractor athlete will generally be required to pay tax on their income themselves, and must file an individual tax return each year.

Non-resident sporting organisations and athletes will generally only pay New Zealand tax on income that is deemed to have a New Zealand source. In most cases, the New Zealand party that makes payments to the non-resident organisation or athlete will be required to deduct the applicable tax out of payments to the non-resident sporting organisation or athlete at source under the PAYE rules. The applicable deduction rate will generally be 20 per cent and the deducted tax will generally be treated as a final tax from the perspective of the non-resident.

Most tax treaties entered into by the New Zealand government include Article 17 of the Organisation for Economic Co-operation and Development Model Tax Convention, which allows income from the activities of entertainers and sportspersons to be taxed in the country in which those activities are performed. A limited number of tax treaties include provisions that prevent Article 17 from applying to certain sporting events (e.g., league competitions in New Zealand's tax treaty with Australia). As a result of the complex nature of taxation laws, and the additional complications created by sport often being cross-border, it is strongly advised that specialist taxation advice is sought when structuring sports arrangements in or connected to New Zealand.

## **VIII SPECIFIC SPORTS ISSUES**

### **i Doping**

Sports doping is not a criminal offence in New Zealand, although some of the substances used to dope might be regulated or prohibited under medicines or narcotics legislation. Relevant legislation includes the Medicines Act 1981 and the Misuse of Drugs Act 1971. New Zealand is a signatory to the WADA Code, and has a national anti-doping organisation in the form of Drug Free Sport New Zealand (DFSNZ).<sup>23</sup> As noted earlier, proceedings against athletes and others for anti-doping rule violations are generally heard by the Tribunal, although some sports retain the operation of their own anti-doping tribunals.

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23 See [drugfreesport.org.nz](http://drugfreesport.org.nz).



## **ii Betting**

New Zealand has a legal but highly regulated betting market. The New Zealand Racing Board (NZRB) is a statutory body (state-controlled) that regulates the racing industry, and manages all legal gambling on racing and sport.<sup>24</sup> Betting is permitted on a range of sports, and legislation requires the NZRB to make payments to NSOs with respect to gambling on their sport (irrespective of whether the gambling is on New Zealand or foreign examples of the sport). This is a major source of funding for a number of New Zealand sports.

## **iii Manipulation**

In 2014, Parliament passed an amendment to the Crimes Act confirming that any manipulation of the outcome of a sports event or any part of a sports event with the intent to influence a betting outcome would amount to a breach of the crime of obtaining by deception.

The Crimes Act (Match-Fixing) Amendment Act 2014 inserted a new Section 240A to the Crimes Act to specifically include instances of match- or spot-fixing in a sporting event as falling within the crime of obtaining by deception (Section 240) where the person involved intended to influence a betting outcome. The amendment does not, therefore, capture instances of match- or spot-fixing that are unrelated to gambling, and instead motivated by another purpose, or where the intent to influence a betting outcome cannot be made out. Anyone convicted under the law is liable to a term of imprisonment of up to seven years. As of the time of writing, no prosecutions have yet been taken under this legislation.

# **IX THE YEAR IN REVIEW**

## **i Anti-doping**

The Tribunal, which hears the majority of New Zealand's anti-doping cases, reported 19 anti-doping decisions in the year to publication, up from eight in the previous year, and four the previous year to that.<sup>25</sup> A significant reason for the increase in anti-doping violations is the increase in non-analytical investigations, conducted by DFSNZ, in conjunction with government agencies Medsafe and Customs.

Of the 19 cases, 10 of them were as a result of such action, with nine of them resulting from one investigation (a combined Medsafe, Customs and police investigation into the website 'clenbuterol.co.nz', which resulted in the operator of the website being jailed, and information in relation to athletes passed on to DFSNZ). The remaining case involved the interception of erythropoietin by Customs.

Of the remaining nine cases, two related to a Rugby League athlete who breached a previous anti-doping ban; one for the athlete and one for his coach who was found to have encouraged his ban. A third proceeding in relation to an administrator who was alleged to have also encouraged the breach was dismissed. The remaining six cases were all analytical findings, for the substances terbutaline, higenamine, GW1516, testosterone and dimethylpentylamine. Of the 19 cases, six were in Rugby League, two each in cycling, basketball, ice hockey and cricket, and one each in powerlifting, athletics, hockey and muaythai (a form of martial art). The final case involved a minor, and so no details regarding the sport are recorded.

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24 See [www.nzracingboard.co.nz](http://www.nzracingboard.co.nz).

25 See [www.sportstribunal.org.nz/decisions/all-decisions/search](http://www.sportstribunal.org.nz/decisions/all-decisions/search).

The obvious trend is the increase in non-analytical prosecutions. The use of supplements without proper checking, and the use of medication without considering alternatives, also remains an issue for athletes.

In addition to the Tribunal's decision, one decision was also delivered by the CAS in 2018, being the case referred to last year involving cyclist Karl Murray. Murray had received a regional ban in New Caledonia in 2014 following a positive anti-doping test. That ban was recognised by the Union Cycliste Internationale and became a global ban as a result. It was alleged in 2016 by DFSNZ that Murray had violated that ban by coaching athletes. Murray was initially successful in proceedings before the Tribunal, but DFSNZ appealed to CAS and CAS upheld part of the appeal, finding Murray had breached his ban, but not overturning the Tribunal's decision that Murray was not liable for 'tampering' as a result of misleading DFSNZ. The end result, therefore, was that Murray had to re-start his New Caledonian ban. However, while the parties awaited the CAS decision, Murray tested positive for the prohibited substance clenbuterol. Murray alleged that there had been discrepancies in the testing process, but the Tribunal ruled against Murray, and he was sanctioned for an anti-doping rule violation. After unsuccessful challenges to jurisdiction (Murray claimed he was not a member of Cycling NZ at the time of the test, but that argument was rejected by the Tribunal), and further argument as to whether the New Caledonian ban counted as a first anti-doping rule violation under the WADA Code (it did, notwithstanding the argument that it was not a Code-compliant regime at the time), Murray was issued with an eight-year suspension.

Finally, it is worth noting that, in addition to the 20 cases noted above, a further 11 anti-doping cases were heard by the New Zealand Rugby Anti-Doping Judicial Committee, which retains jurisdiction to hear WADA Code violations in rugby, separate from the Tribunal. Of these 11 cases, 10 arose from the clenbuterol.co.nz investigation referred to above. The remaining violation was by a female provincial rugby player who took an amphetamine substance to stay awake while driving home, having been told by her travel companion that it was Ritalin and it would help her stay awake.<sup>26</sup>

## **ii Other Tribunal disputes**

In addition to the anti-doping cases noted above, the Tribunal heard five other cases of significance in the year to publication. The case of Sloan Frost followed earlier proceedings in the Tribunal in 2017, relating to results and the process of appeals conducted by Motorcycling NZ in relation to the Superbike series, which Mr Frost was a competitor in. The Tribunal found in favour of Frost in part, and further remitted matters back to Motorcycling NZ for them to deal with. The Tribunal records only one selection dispute decision for the 2018 Commonwealth Games, being the case of Jason Christie, in cycling. Mr Christie failed to overturn his non-selection for the Games. Other selection disputes heard by the Tribunal included the cases of Laurel Hubbard in weightlifting (a failed attempt to require weightlifting to send Ms Hubbard to a pre-Commonwealth Games event), Mitsuko Nam in roller skating (a successful appeal against non-selection for the 2018 World Artistic Skating Championships) and Andi Liu in fencing (a failed appeal against non-selection for the 2018 Commonwealth Senior Fencing Championships).

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26 <http://nzrugby.co.nz/what-we-do/regulations/anti-doping>.

## **X OUTLOOK AND CONCLUSIONS**

As in recent years, we remain convinced that integrity breaches remain the key risk for sports organisations in New Zealand, and around the world. The potential for a doping, match-fixing or some other corruption scandal to embroil an athlete or a sports organisation must remain of significant concern not only for athletes, but just as importantly sports administrators and governors. If such a scandal does arise, it has the very real potential to cause irreparable reputational and financial harm to sports organisations and to the individuals involved. The integrity scandals surrounding rugby in 2016 and again in 2017 are evidence of both the damage that such matters can cause, but also the need to have defensible practices in place when athletes go 'off-piste'. New Zealand Rugby is to be commended for the work done in 2017 that now sees it out of the headlines.

The government continues to struggle with the appropriate level of intervention in this area, and nothing of significance has been advanced by way of proposed policy change or legislative reform during 2017 and 2018. The relatively recent criminalisation of match-fixing is likely to be followed by the strengthening of criminal laws in relation to doping. Further, any cases of sports corruption (whether flowing from the recent FIFA scandal or in relation to other sports) are likely to be closely investigated and prosecuted under existing anti-bribery and corruption laws, given the importance of sport in terms of New Zealand's economy and global image. However, a key question remains at present as to who would investigate and prosecute such matters. Currently New Zealand has no overarching sport integrity body, resourced and tasked with investigating matters of sports corruption other than the DFSNZ, which has as its ambit only anti-doping. This is something that is likely to be addressed in some way in the near future.

As sport becomes more valuable, commercial disputes are likely to increase, whether in relation to the disrupting and evolving the broadcast market, or in relation to sponsorship or other commercial activity. Athlete power is also growing, and the development of athlete unions beyond the traditional powerhouses of cricket, rugby and netball remains a possibility.

However, the hot topic of the moment remains integrity in sport. It is a topic that is as broad as it is significant, and this is expected to be the touchstone for many of the leading developments in sports law and administration for the near future.

# POLAND

*Piotr Dynowski, Piotr Zawadzki and Michał Sałajczyk<sup>1</sup>*

## I ORGANISATION OF SPORTS CLUBS AND SPORTS GOVERNING BODIES

### i Organisational form

#### *Sports clubs*

Sport activity in Poland can be conducted in particular in the form of a sports club. After years of intense regulation of sports inherited from the communist times, the new Act on Sports<sup>2</sup> adopted in 2010 is based on the principle of autonomy of sports. Thus, the law does not specify any mandatory organisational forms in which sports clubs can operate, the governmental regulation of sports is very minimal, and the majority of issues are left to self-regulation by sports associations, international sports federations and the International Olympic Committee. The only requirement provided in the Act on Sports is that sports clubs should have legal personality.<sup>3</sup> Thus, in practice, sports clubs can operate only in the form of a shareholding company or an association.

Students' sports clubs are a special kind of sports club established by students, parents and teachers in accordance with the rules provided in the Act on Associations. Students' sports clubs only require entry in the relevant register kept by the mayor of the locality where the club's registered office is located.

#### *Sports associations*

At least three sports clubs are required to establish a sports association in the form of an association or a union of associations.

#### *Polish sports associations*

In order to hold and conduct competitions in a given sports discipline, a Polish sports association should be established. Sports associations, sports clubs or other legal entities whose statutes or articles of association foresee conducting activities in the given sports discipline may be members of a Polish sports association.

Establishing a Polish sports association requires the consent of the Minister of Sport. A relevant application should be accompanied by:

- a a draft statute of the association;

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2 Act of 25 June 2010 on Sports (uniform text OJ 2018, item 1263, as amended).

3 Article 3(2) of the Act on Sports.

- b* a detailed description of the sports discipline in which the association plans to hold competitions and information on rules of competition and an explanation of the competition system (e.g., cup, league, etc.); and
- c* certification of membership in the international sports federation active in Olympic or Paralympic sports, or otherwise acknowledged by the International Olympic Committee.<sup>4</sup> The Minister of Sport maintains a list of Polish sports associations, which is available on the ministry's website. Polish sports associations are also required to register in the National Court Register.

Polish sports associations have the exclusive right to:

- a* organise and hold competitions for the title of Champion of Poland or Polish Cup in their respective sports discipline;
- b* set up and enforce sport, organisational and disciplinary rules of competitions organised and held by them with the exception of rules on doping;
- c* appoint a national team for Olympic or Paralympic games, world championships or European championships; and
- d* represent their sports discipline in international sports organisations.

In sports where competition is organised in the form of a league, a Polish sports association may establish a professional league. If more than half of the sports clubs playing in the top class league competition are operating in the form of a joint-stock company, a Polish sports association is obliged to establish a professional league. In team sports, only sports clubs operating in the form of a limited liability company or joint-stock company are allowed to play in the league. A professional league should be managed by a separate legal entity in the form of a shareholding company. The operating rules of the professional league should be agreed in an agreement between the league managing entity and the relevant Polish sports association. Such agreement is also subject to approval by the Minister of Sport.

### ***Polish Olympic Committee***

The Polish Olympic Committee is a union of associations comprising Polish sports associations and all other entities active in the national Olympic movement. It is considered an NGO that independently sets and realises the aims of the Olympic movement. It cooperates with the Minister of Sport and opines on all bills related to the Olympic movement.

### **ii Corporate governance**

There are no specific regulations in Poland with regard to corporate governance of sports clubs, and thus standard rules on corporate governance apply, depending on the legal form the sports club has adopted (an association or a shareholding company). The only requirement provided in the Act on Sports is that organised sports activities in a sports association or a sports club participating in competitions held by a Polish sports association may only be conducted by a coach or a sports instructor. The Act on Sports provides minimum criteria for being appointed a coach or a sports instructor.<sup>5</sup>

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4 Article 11(2) of the Act on Sports.

5 Article 41 of the Act on Sports.

The term of office of the officers of a Polish sports association cannot exceed four years. The function of a president of a Polish sports association can be exercised by the same person for a maximum of two consecutive terms of office.

If, on the day of appointment as the officer of a Polish sports association, the person appointed meets any of the following conditions, he or she is obliged to cease that activity, sell shares or stocks, terminate the contract, resign or quit the entity within 30 days of appointment, or the person shall be dismissed:<sup>6</sup>

- a* conducted business activity related to the statutory aims of the association;
- b* held shares or stocks in a company conducting business activity related to the statutory aims of the association;
- c* was a partner or held shares in a partnership conducting business activity related to the statutory aims of the association, or was a close relation to such person;
- d* worked for a ministry in support of the Minister of Sport;
- e* was a coach of the national team or a member of training staff of the national team in the same sports discipline; or
- f* was a member of the board, proxy or attorney-in-fact of the entity that provides services, supplies or construction works to the association, including financial or in-kind sponsorship.

An annual financial report of the Polish sports association should be examined and approved by an independent auditor. The annual financial report and report of the managing board of the Polish sports association are subject to review and approval by the general meeting of the members or delegates of the Polish sports association. Once approved, they should be sent within 30 days to the Minister of Sport to be published in the Public Information Bulletin.

Polish sports associations are supervised by the Minister of Sport who can demand copies of all the resolutions of the associations and written explanations concerning activities of the associations, as well as to conduct inspections of the associations.

The statute of a Polish sports association, and every subsequent change to it, requires approval by the Minister of Sport. Upon a motion of the Minister, a court may suspend the authorities of a Polish sports association and appoint a curator, or dissolve the association in the case of grave or persistent violations of law or its statutes by the association.

### **iii Corporate liability**

There are no specific statutory corporate liability regulations in Poland applicable only to sports clubs. Thus, sports clubs, including their managers and officers, are subject to standard rules on corporate liability as set out in the Civil Code or the Commercial Companies Code and other acts, depending on the legal form the sports club has adopted (an association or a shareholding company). There may also be additional rules on corporate liability provided in the internal regulations of the relevant Polish sports associations or international sports federations.

The Act on Safety of Mass Events<sup>7</sup> provides for liability of an organiser of a mass event with an entry fee for damages, including damage or destruction of property incurred

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6 Article 9 of the Act on Sports.

7 Act of 20 March 2009 on Safety of Mass Events (uniform text OJ 2017, item 1160, as amended).

by the police, military police, municipal or city guards, the State Fire Service or other fire protection units and health service in connection with their activities at a place and during the mass event.

## II THE DISPUTE RESOLUTION SYSTEM

### i Access to courts

It is a constitutional principle that no person or entity can be deprived of access to a state court. Hence any decision of a sports governing body may always be challenged by way of an appeal to a court; however, the nature, the scope or conditions for such a complaint may vary.

In the case of disciplinary sanctions (including doping matters) and ineligibility decisions, Polish athletes, as well as other persons involved in professional sports (members of sports associations, referees, coaches, managers, etc., as well as, to some extent, supporters and, indirectly, clubs) may challenge decisions of the sports associations in appeals to the Court of Arbitration for Sport at the Polish Olympic Committee (CASPOC). The rulings of CASPOC can only be challenged by a cassation appeal filed with the Polish Supreme Court, but only in cases of gross violations of law by the sport authorities, or where the judgment of CASPOC is obviously unjust.

Also, under certain conditions, Polish law allows appeals against the final arbitration awards (for further details, see Section II.ii, below).

### ii Sports arbitration

Disputes between athletes and sports associations and/or clubs, in particular arising from contractual or coaching contracts, transfers, managerial or advertising agreements, etc., may be brought before the state courts, but most often they are settled in arbitration (often provided for in the internal regulations of the relevant sports associations). Arbitration courts (in particular CASPOC) are also involved in disciplinary and ineligibility procedures. CASPOC has also jurisdiction in appeal proceedings against the decisions of sports associations in disciplinary matters if the internal regulations or statutes of the relevant Polish sports association or other sports organisation do not provide otherwise. CASPOC is a permanent arbitration court composed of 24 arbitrators appointed by the managing board of the Polish Olympic Committee for a four-year term.

Practically all matters relating to sports may be brought to arbitration. Rare exceptions cover criminal cases, exclusively reserved to the criminal courts. Conducting criminal, civil or administrative proceedings, however, does not exclude conducting disciplinary proceedings in relation to the same acts.

The only formal requirement for a valid arbitration agreement (or arbitration clause) is that it must be concluded in writing. However, it is also recommended that it precisely indicates the nature and the scope of the matter and the competent court, or at least the basic rules of formation thereof in the case of *ad hoc* arbitration (including the number of arbitrators and the appointment procedures), as well as reference to the applicable rules (both procedural and substantive). In practice, the permanent arbitration courts (and the rules they apply) are the first choice.

The arbitration courts have competence to render interim measures, such as interim injunctions, which can be granted on the request of a party. However, the enforcement of an interim measure requires approval of the state court (i.e., the enforceability clause (see subsection iii, below)).

The final arbitration award may be challenged and, as a consequence, revoked if there was no arbitration clause or the clause was invalid, a party was not duly notified of the appointment of the arbitrator or the arbitration proceedings, or otherwise deprived of the ability to defend its rights or owing to other, mainly formal, defects of the award.

### **iii Enforceability**

Any decision of the sports governing body that does not require compulsory enforcement, is, as a rule, directly enforceable (legally effective), unless the decision is challenged before competent bodies, including state courts.

If, however, the decision requires compulsory enforcement (e.g., taking away property, seizure of objects, etc.), such decision requires obtaining an enforceability clause, that is, a formal confirmation granted by the state court based on certain formal prerequisites, such as the existence of a relevant ruling or award and lapse of deadlines for challenging thereof (the court does not refer to the merits of the case when dealing with the enforceability clause request). Any person or entity may also agree (in notarial need form) to the future enforcement even in the absence of the court ruling or arbitration award, subject only to the enforceability clause.

Compulsory enforcement is only available through a bailiff (i.e., a sports governing body must not enforce its decisions itself).

Once the final and non-appealable decision or award is issued and the enforceability clause is granted, the enforcement may only be challenged in exceptional instances, including the expiry of the enforced commitment (e.g., waiver, its earlier fulfilment or statutory changes). In the case of a decision or award being issued as a result of a crime (e.g., bribery or forgery of documents), Polish law also provides certain, extraordinary measures to challenge the final decisions or awards, and so their enforceability.

## **III ORGANISATION OF SPORTS EVENTS**

### **i Relationship between organiser and spectator**

By participating in a sports event, the spectator enters into an agreement with the event organiser. The mutual obligations of the parties are derived from the explicit terms of such agreement, as well as the general terms and conditions of such event and any applicable national legislation (especially the Civil Code and the Act on Safety of Mass Events). In most cases, the spectator acts as a consumer, therefore certain consumer protection regulations would also apply to the contractual relationship with the organiser.

The organisers commonly include the following terms within the terms and conditions of the event:

- a* the prohibition to sell tickets to third parties;
- b* the spectator's consent to use his or her image recorded during the event;
- c* rules concerning spectators taking photographs or recording videos during the event; and
- d* objects that are not allowed in the event venue.

Provisions concerning most of these matters are also present in national legislation, but are often expanded in terms and conditions of events. For example, while the organiser is allowed to record the event (including the images of spectators) under the Act on Safety of Mass



Events, the footage may only be used for safety purposes. Because of this, organisers tend to require a broader consent from the spectators, which allows them to also use the footage for promotional purposes.

## ii Relationship between organiser and athletes or clubs

The entities that participate in professional sports competitions, such as sports clubs, need to be members of Polish sports associations. The latter are exclusively authorised by the Act on Sports to hold competitions for the titles of Champion of Poland, as well as Polish Cup and to establish professional leagues.<sup>8</sup>

The Act on Sports also grants the Polish sports associations the exclusive authority to lay down competition rules and appoint the national team, among others.<sup>9</sup> Sports clubs are subject to these rules owing to their membership in a relevant Polish sports association. Polish sports associations are also bound by regulations of the international governing bodies of specific sports (such as UEFA or FIFA for football). Athletes are associated in their sports clubs, and thus obliged to follow the internal regulations of the clubs and the relevant sports associations, as well as the rules issued by the international sports federations.

Internal regulations of sports associations also include disciplinary measures to ensure that their members comply with them. Such regulations have to comply with applicable national legislation, especially the Act on Sports.

## iii Liability of the organiser

An important distinction should be made in relation to the Act on Safety of Mass Events. The organiser of the competition (such as a football league) is not considered to be the organiser of each specific event (such as a single football match). In the case of football matches, only the hosting club would be considered the organiser and be responsible for the safety of the event.

In most cases, sports events are considered mass events under the Act on Safety of Mass Events. Its provisions impose certain obligations on the organisers of the events, including the obligation to ensure spectators' safety (i.e., by providing access to medical assistance and security services).

The organiser may be liable towards spectators and athletes, as well as third parties, under the general rules of civil law. This may include either contractual liability (liability for improper performance of the agreement between the organiser and a specific person)<sup>10</sup> or tortious liability (the duty to redress damage incurred).<sup>11</sup> For events where an admission fee is collected, the organiser is obliged to hold civil liability insurance.

Natural persons acting on behalf of the organiser may also face criminal liability (e.g., for inflicting bodily harm – although in certain situations it is allowed, for the security service, to use means of physical coercion during mass events). In Polish criminal law, only natural persons may be liable for committing a crime.<sup>12</sup> Depending on the nature of a specific offence, criminal proceedings may: (1) be started *ex officio*, (2) require the aggrieved party

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8 The professional league is required to be administered by a separate legal entity.

9 Articles 13 and 15 of the Act on Sports.

10 Article 471 of the Civil Code.

11 Article 415 of the Civil Code.

12 For certain crimes, including the crime of organising a mass event without holding a relevant permit or against its terms, the organiser may, however, face secondary liability in the form of a significant fine under the Act on Liability of Collective Subjects for Acts Prohibited under Punishment.

to file a motion for prosecution (which is then conducted by the public prosecutor or the police), or (3) require filing a private claim, where the aggrieved party acts on his or her own before the court, usually without the public prosecutor's involvement. The last procedure is used in cases of causing minor bodily harm, which may be a common cause of liability in relation to sports events.

#### **iv Liability of the athletes**

Inflicting damage to another athlete, a spectator or to property may be the basis of an athlete's civil or criminal liability. Although there are no provisions of national legislation specifically addressing athletes' liability, certain conditions may apply:

- a* according to established court practice, an athlete may not be criminally liable for causing harm to another athlete if such harm was inflicted in the course of a sports competition. The limitation of liability is not absolute, however – for example, it is established that actions that are against the rules of a sport do not qualify for limitation of liability;
- b* in relation to athletes' civil liability towards each other, arbitration clauses are often in place, so that disputes are resolved before arbitration courts of sports associations, not before regular courts;
- c* in addition to civil, administrative or criminal sanctions, an athlete may also face disciplinary liability for his or her acts.<sup>13</sup> An agreement between a sports club and an athlete may also include stipulated damages payable to the club for certain wrongdoings of the athlete; and
- d* certain legal provisions govern the liability of athletes for doping.<sup>14</sup>

With these exceptions, athletes are liable for their actions towards third parties (including spectators) under the general rules of civil and criminal law. In practice, this would mainly cover civil law duty to redress inflicted damage. For criminal liability, depending on the nature of a specific offence, criminal proceedings may: (1) be started *ex officio*, (2) require the aggrieved party to file a motion for prosecution (which is then conducted by the public prosecutor or the police), or (3) require filing a private accusation, where the aggrieved party acts on his or her own before the court, usually without the public prosecutor's involvement.

#### **v Liability of the spectators**

The law provides specific means aimed to protect participants of mass events. There are certain crimes and misdemeanours that may be only committed during a mass event, such as failure to follow orders issued by a safety officer, hindering identification of a person (e.g., by covering one's face) or forcing one's way into the place where a sports competition is held. Most of them are adjudicated in expedited procedures.

In cases of conviction for a mass event-related crime or misdemeanour, the court is allowed to impose an additional penal measure of a temporary prohibition to participate in mass events (applicable to all mass events or specific ones). As a separate measure, organisers

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13 Article 45b(4) of the Act on Sports.

14 See Section VIII.i for details.

of football matches are also allowed to charge persons who violate the terms of the event venue or mass event safety rules with a 'club ban'. The club ban prohibits access to all events in which the organiser's football team participates.

In addition, spectators are also liable for their conduct under the general rules of civil and criminal law, such as a civil law duty to redress damage inflicted. For criminal liability, depending on the nature of a specific offence, criminal proceedings may: (1) be started *ex officio*; (2) require the aggrieved party to file a motion for prosecution (which is then conducted by the public prosecutor or the police); or (3) require filing a private accusation, where the aggrieved party acts on his or her own before the court, usually without the public prosecutor's involvement.

## **vi Riot prevention**

The provisions of the Act on Safety of Mass Events apply to most sports events intended for 1,000 spectators or more (or 300 spectators or more for events held in sports halls).<sup>15</sup> The Act is intended to ensure safety of spectators, and it imposes several obligations on the organiser of the event to achieve that goal, including:

- a* the obligation to obtain a permit to organise a mass event. A permit is issued by the mayor of the locality where the event is to be held. An application for a permit is required to provide information on safety of the event, such as emergency exit routes of the venue;
- b* the right (and in some cases – the obligation) to record the event for safety purposes;
- c* the obligation of the security service of the event to deny access to the event to persons who are demonstrably under the influence of alcohol or drugs, who are aggressive or who are subject to a disqualification from participation in mass events (a penal measure that may be imposed by a court for committing certain crimes); and
- d* certain additional obligations imposed on the organiser if a mass event is declared to be 'high risk', such as the obligation to employ additional security officers and the prohibition to sell alcohol on the premises of such events.

## **IV COMMERCIALISATION OF SPORTS EVENTS**

### **i Types of and ownership in rights**

A bundle of sport-related rights may be commercialised in Poland, including the rights to sports events' broadcasts, images of the athletes, copyrights to a variety of works of authorship (films, music, photos, jingles, apps, etc.) or logos (trademarks), in particular in relation to merchandise.

The rights to broadcasts primarily belong to broadcasting organisations, although the recording of an event requires consent of the club, event organiser or a sports association, and is carried out under conditions agreed therewith. Exclusive rights to broadcast competitions in such popular and profitable sports as football, volleyball or basketball, are subject to tenders organised by the relevant Polish sports associations or entities managing the respective leagues.

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15 Certain sports events are outside the scope of the Act on Safety of Mass events regardless of the number of spectators. This applies in particular to events with participation of minors or disabled athletes, as well as physical recreation events with free admission.

Images primarily belong to the respective natural persons (and, as such, are inalienable and non-transferable), but may be the subject of licence agreements between athletes and clubs, sports associations or sponsors allowing for their further exploitation. In addition, Polish law provides that an image of an athlete – member of a Polish national or Olympic team – in the Polish national team kit may be used by virtue of law by the relevant Polish sports association or, respectively, by the Polish Olympic Committee.

Other rights, such as copyrights or trademarks may be held by the sponsors, clubs or sports associations.

Rights owners may license their rights (allowing use thereof for a specific time and, usually, with some further limitations) or transfer (assign) them to the purchasers.

## **ii Rights protection**

Where there is controversy over the use of rights under a concluded contract, the basic framework for the resolution thereof will be the contract, as such and, in particular, dispute resolution rules (if any) contained therein, including the arbitration clause. In the case of other issues, in particular third parties' infringements, the law of torts and, sometimes, criminal regulations will apply to protect and enforce the rights. If the latter is the case, the state courts and other authorities, including the police or a public prosecutor, may be involved.

Effective protection of rights may sometimes be burdensome, especially if the respective contracts lack clarity (e.g., on the agreed scope or the limits of the permitted use, or the remuneration).

In case of third-party infringements, typically the effectiveness of the protection may be weakened owing to their large scale; for example, in the case of internet sales of counterfeit products. Luckily, significant improvements have been made in that field in recent years, also owing to the greater detection of crimes and torts, and much better cooperation between rights' holders and competent authorities (police, courts, custom authorities).

## **iii Contractual provisions for exploitation of rights**

Contracts for exploitation of rights must, in the first place, precisely reflect the agreed scope, including time frames, of the permitted use. In addition, if it covers transfer or license of copyrights, it must precisely define fields of use (fields of exploitation) (i.e., permitted ways of using the works, such as copying, distribution, dissemination in the internet, broadcasting). In the absence of precisely listed fields of use, including overly broad and vague clauses (e.g., transferring 'all copyrights') the copyrights transfer or license is legally ineffective.

Also, no rights can be assumed on the part of the licensee or buyer; that is, unless a certain right is explicitly granted, it will remain with the licensor or transferor (for example, a TV broadcasting right does not automatically allow distribution on the internet). Contracts should also precisely define any further specific rules or limitations (including time frames and geographical limits).

# **V PROFESSIONAL SPORTS AND LABOUR LAW**

## **i Mandatory provisions**

As Poland currently follows the autonomy of sports principle in relation to regulating the sports sector, the mandatory provisions on relations between athletes and sports clubs are minimal, and there are no mandatory provisions providing that an athlete has to be an

employee of a sports club. In practice, the majority of athletes in Poland, at least in the more profitable sports disciplines, are independent contractors having a service contract with the sports club rather than an employment contract.

The Act on Sports provides only for mandatory insurance against the consequences of accidents for athletes participating in competitions organised by Polish sports associations and members of national teams. In the former case, the obligation is on the sports club, whereas in the latter, it is on the respective Polish sports association.

In 2016, the Polish Supreme Court issued an important judgment<sup>16</sup> dealing with the issue of whether a footballer acting under an exclusive 'agreement for playing professional football' with a football club can be deemed an individual entrepreneur (sole trader), or merely a service provider. The Supreme Court concluded that where the remuneration is fixed (i.e., not dependent on the player's results), and the player is obliged to follow the club's instructions as to the time, place and activities performed (i.e., where the club takes the operational risk), such a footballer is just a service provider acting under a service agreement, and not a genuine businessperson or sole trader. As a consequence, it is the football club's responsibility to calculate the social contributions and pay them on behalf of the footballer.

## **ii Free movement of athletes**

There are no specific statutory regulations in Poland that would regulate free movement of athletes. In the case of athletes holding EU or EEA citizenship, the basic principles of EU law (i.e., free movement of people and non-discrimination) would apply. In the case of athletes having an employment contract, they are treated the same way as any other category of employee. In the case of athletes not holding EU or EEA citizenship, the standard regulations on legalisation of their stay in Poland, employment of foreigners and working permits would apply.

The detailed rules on transfers of athletes and engaging foreign athletes are usually provided in the internal regulations of the relevant Polish sports associations<sup>17</sup> and international sports federations.<sup>18</sup>

Some Polish sports associations regulate the allowed quotas of foreign athletes in a sports club.<sup>19</sup>

## **iii Application of employment rules of sports governing bodies**

Further specific rules concerning contracts with athletes in the given sports discipline may be provided in the internal regulations of the relevant Polish sports associations<sup>20</sup> and international sports federations.<sup>21</sup>

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16 Judgment of the Polish Supreme Court of 16 February 2016 (File No. I UK 77/15).

17 See, for example, Resolution of the Management Board of the Polish Football Association No. VIII/124 of 14 July 2015 on the status of athletes and rules of changing club membership.

18 See, for example, FIFA Regulations on the Status and Transfer of Players.

19 For example, the rules of the Polish Football Association require that each team of each football club needs to have at least eight players holding Polish citizenship authorised to take part in the competition.

20 See, for example, Resolution of the Management Board of the Polish Football Association No. III/54 of 27 March 2015 on minimum requirements for standard contracts with athletes in the professional football sector.

21 See, for example, footnote 18.

## VI SPORTS AND ANTITRUST LAW

Antitrust laws are also applicable to the sports sector and issues such as state aid, abuse of dominant position or agreements restricting competition are also valid issues in this sector. The Polish Office of Competition and Consumer Protection (UOKiK) is currently particularly active in relation to vertical agreements, for example, with respect to distribution of sports equipment.<sup>22</sup>

In the past, UOKiK also conducted an investigation into an alleged dominance position on the Polish sports press market (2015), and issued a decision in relation to anticompetitive agreements concluded by the Polish Football Association and Canal+ Cyfrowy sp z o.o. for licensing media rights to Polish Premiership broadcasts.

## VII SPORTS AND TAXATION

Athletes' earnings are subject to personal income tax. The specific rules on taxation (such as tax rates) may vary depending, in particular, on whether the athlete's earnings are paid under an employment contract or a civil law contract or whether the athlete is self-employed (acts as a sole trader).

Professional sports clubs are usually incorporated as limited liability companies or joint-stock companies. These are subject to corporate income tax.

As a general rule, Polish tax liability applies to persons who have their usual place of residence in Poland (which is understood as the place where a person's 'centre of economic and personal interests' is located, or where such person stays for more than 183 days per year), regardless of where their income is generated (unlimited tax liability).

If a person does not have a place of residence within the territory of Poland, he or she is subject to tax liability only for the income (revenue) earned within this territory (limited tax liability). As a general rule, fees for services in the field of sports activity, performed by natural persons residing abroad and organised through the intermediation of natural or legal persons conducting activity in the field of sports events in Poland, are collected in the form of a lump sum of 20 per cent of revenue. These general rules only apply unless double taxation avoidance agreements to which Poland is a party provide otherwise.

In principle, entities subject to corporate income tax are taxed in Poland if their registered office or management is located there. Foreign sports clubs are subject to limited tax liability, unless an appropriate double taxation avoidance agreement provides otherwise.

Poland is a party to over 90 international agreements for the avoidance of double taxation. These may amend the general rules provided above – for example, the income earned in Poland by foreign entities may be completely exempt from income tax in Poland or a tax credit method may be applicable.

## VIII SPECIFIC SPORTS ISSUES

### i Doping

Doping is not a criminal offence that may be committed by an athlete him or herself. Criminal sanctions may be imposed on a person who administers a prohibited substance to an athlete

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22 See, for example, decision DOK-1/2016 of UOKiK of December 2016 concerning practices restricting competition in relation to ski equipment.

(without his or her knowledge) or (regardless of the actual knowledge) to a minor. Making available or trading certain forbidden substances is also sanctioned. Of course, the exclusion of the criminal responsibility of the athletes themselves does not exclude disciplinary sanctions or contractual sanctions (e.g., under sponsorship contracts) that may be imposed on them.

Disciplinary rules on doping are set out by the Polish Anti-Doping Agency (POLADA), which cooperates with the relevant international agencies to the extent necessary. Doping-related disciplinary proceedings are brought before the relevant bodies of sports associations, decisions of which may be appealed to CASPOC, and subsequently to the Supreme Court (for further details, see Section II, above). Criminal cases are always brought before the state criminal courts, which may impose fines (depending on the gravity of the case, but also the perpetrator's income), restriction of liberty (social works) and even imprisonment for up to three years.

## **ii Betting**

In general, Polish gambling regulations are considered to be some of the strictest in Europe.

Accepting bets on sports events is allowed, but requires obtaining a prior betting permit issued by the Minister of Finance. A permit may be issued either for land-based or online betting. There are several requirements that must be met in order to conduct betting operations, including the obligation to submit detailed data on planned operations, draft terms and conditions of the service, technical documentation of the betting website, documents proving the legality of funds used, and so on. Betting operators are obliged to pay gambling tax, which is 12 per cent of the total sum of all stakes paid in. Conducting sports betting also requires executing agreements with the relevant sports associations for the use of their results.

Organising betting without a valid permit is a fiscal crime, punishable by a large fine or imprisonment for up to three years, or both. In addition, it is also subject to an administrative fine, which is five times the government fee for issuing a betting permit.<sup>23</sup>

Participating in offshore betting while located in Poland is prohibited and constitutes a fiscal crime. As an additional measure to fight against offshore gambling, regulations introduced in 2017 have established a 'blacklisting' mechanism – blocking access to websites that provide unlicensed gambling services. Such websites are listed in a register maintained by the government. Polish internet service providers are obliged to reroute customers who try to access the blacklisted websites, and payment service providers may not render their services towards such websites.

## **iii Manipulation**

Bribery aimed at match-fixing is a crime and may even result in imprisonment for up to 10 years in the most severe cases. It is also an offence to participate in bets where the participant is aware of the manipulation. The other relevant crime is referring to connections or the ability to informally influence certain persons within the sports association or other bodies aimed at fixing the outcome of the game. However, a potentially responsible person may avoid being punished if he or she notifies the competent authorities about the manipulation and discloses all the relevant facts before the competent authority itself learns about them.

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23 The fee varies depending on the number of websites or betting shops used. For online betting using a single website, in 2018 the permit fee is 402,660 zloty.

#### **iv Grey market sales**

The sale of sports events tickets in the grey market is an offence, but only if the tickets are sold or offered for prices exceeding their nominal value in the official distribution network.

Enforcing these rules may be burdensome. It usually consists of controlling a significant number of sellers, in particular on social media or online sales platforms and requires cooperation with their administrators. In practice, event organisers try counteracting this by means of various registration requirements imposed on purchasers or other means aimed at verifying the identity of the purchaser or event participant.

### **IX THE YEAR IN REVIEW**

The issue of sports clubs' liability for the actions of their supporters, and sanctioning clubs for riots incited by their supporters with having to play with no spectators, still remains high on the agenda in Poland. However, the Ministry of the Interior and Administration have started working on a new bill to help counteract riots while protecting other supporters from the consequences of hooligans' actions. This picked up more pace when, in May 2018, the final match of the Polish national football premier league was interrupted by the aggressive behaviour of some of Lech Poznań's supporters. Lech Poznań were consequently declared to lose the match by walkover (as a result, Legia Warsaw won the league for the third year in a row).

### **X OUTLOOK AND CONCLUSIONS**

Since 2017, Polish sport has faced significant changes to its anti-doping system, including the introduction of a new set of rules strengthening the status of anti-doping controllers and allowing the newly established POLADA to closely cooperate with other state authorities in fighting doping. The two basic programmes launched by POLADA include the organised anti-doping controls and the information and educational programme. The first one includes organised anti-doping controls accompanying sports events as well as training camps. The educational programme aims to make people aware of the risks and consequences of doping and has been directed towards three groups of recipients (professionals (i.e., professional athletes, trainers and medical personnel), young athletes and students of secondary and upper secondary schools).

In 2018, there has also been further rapid development of the e-sports market in Poland. After mental skill games, including e-sports, became officially recognised as a form of sports, further professionalisation of the e-sports market has continued, including: the establishment of professional e-sports leagues and the emergence of professional e-sports management companies; an increasing number of professional sponsorship deals; increasing prizes in various e-sports competitions (e.g., for the ESL Polish Championships in 2018 the main prize is 120,000 zloty); and stadium events attracting thousands of spectators. Also, all the major sports betting operators in Poland have added e-sports betting to their offer.



# PORTUGAL

*Luís Soares de Sousa*<sup>1</sup>

## I ORGANISATION OF SPORTS CLUBS AND SPORTS GOVERNING BODIES

### i Organisational form

Portuguese sports clubs can generally adopt two different legal forms: sports companies or private non-profit associations.

Sports companies are governed by Decree-Law No. 10/2013 of 25 January, as amended, which sets forth the framework for sports clubs wishing to participate in professional sports competitions. Sports clubs that do not participate in professional sports competitions may choose to incorporate a sports company and, in this case, the sports companies' regime shall be applicable.

Sports companies may be public limited sports companies or single-member private limited liability companies. These types of companies are subject to the general rules applicable to public limited companies and to single-member private limited liability companies established by the Portuguese Companies Code in addition to the specific rules foreseen in the above-mentioned legislation.

On the other hand, sports clubs adopting the legal form of a non-profit private association can only participate in non-professional competitions.

Sports federations are regulated by Decree-Law No. 248-B/2008 of 31 December, as amended, assuming the legal form of non-profit private associations and obtaining a sports public utility status. Sports federations may be multisport or single-sport federations.

### ii Corporate governance

There are general rules against corruption and anti-sporting conduct that are applicable to sports organisations.

Sports companies are also subject to specific governance rules, notably:

- a* minimum share capital amounts;
- b* incompatibility rules for the appointment of directors, including managing directors;
- c* a special authorisation is required for the sale of real estate;
- d* a limitation on the exercise of voting rights; and
- e* limitations regarding share ownership on sports companies applicable to certain public entities.

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<sup>1</sup> Luís Soares de Sousa is a partner at Cuatrecasas. The author would like to acknowledge, with thanks, the assistance of the following colleagues: Telma Carvalho, Sónia Queiróz Vaz, Tiago Gonçalves Marques, Rui Vaz Pereira, Ana Costa Teixeira and Rita Caçador.

Moreover, the Companies Code and the Securities Code are also applicable to sports companies.

For sports federations, there is also a specific set of rules regarding the individuals that may be appointed to the social bodies of federations, including a list of incompatibilities and limitations to the reappointment of individuals to federations' social bodies.

### **iii Corporate liability**

Law No. 50/2007 of 31 August, as amended, provides a specific criminal regime applicable to all sports entities, including sports organisations, aimed at sanctioning anti-sporting behaviours such as corruption, traffic of influence and criminal association.

In addition to the criminal regime, sports federations must, *inter alia*, include in their disciplinary regulations rules regarding the conduct of sports agents, as well as the penalties applicable to any violation of such duties.

Besides such rules, the general liability rules foreseen in the Civil Code and the Companies Code are also applicable.

## **II THE DISPUTE RESOLUTION SYSTEM**

### **i Access to courts**

Athletes and clubs may challenge before the justice counsel of each sports federation any disciplinary decisions regarding issues arising from the execution of technical and disciplinary rules directly related to sporting competition.

Disputes arising from the acts and omissions of the bodies of sports federations and professional sports leagues within the exercise of their public powers are subject to the administrative litigation legal provisions applicable to state courts, with any sporting effects lawfully produced in the meantime under the most recent decision of the competent sport governing body being duly safeguarded.

However, according to the Basic Law of Physical Activity and Sports (Law No. 5/2007 of 16 January), a club, athlete or sports stakeholder may not challenge before a state court a sports governing body's decision if such decision is of a purely sporting nature, that is, if it is based upon the disciplinary or technical rules arising from the execution of the rules of the game, the sports regulations and the rules on the organisation of sports events.

Disciplinary decisions ruling upon the violation of sports ethics, violence, doping, corruption, racism and xenophobia are not considered issues of a purely sporting nature.

### **ii Sports arbitration**

Disputes arising from acts and omissions of sports federations, professional leagues and other sports governing bodies executed in the exercise of their regulation, organisation, direction and disciplinary powers, as well as appeals from decisions of disciplinary bodies of sports federations or the Portuguese Anti-Doping Agency regarding the infringement of anti-doping provisions, are subject to the compulsory arbitration of the Portuguese Court of Arbitration for Sport, which was created by Law No. 74/2013 of 6 September and started operating on 1 October 2015.

The Court of Arbitration for Sport may rule upon any other disputes that do not fall within the scope of compulsory arbitration but that are directly or indirectly related to sports and that, under the Voluntary Arbitration Law (approved by Law No. 63/2011 of 14 December), may be subject to an arbitral award. Disputes arising from employment

contracts between clubs and athletes, especially regarding the lawfulness of dismissal, may also be brought before the Court of Arbitration for Sport on a voluntary basis. The Court of Arbitration for Sport may also rule upon injunctions required by the parties.

The arbitration agreement must be made in writing, and must govern rights of a patrimonial nature or rights that do not have such nature insofar as the parties may settle upon those rights.

The Court of Arbitration for Sport's activity has been increasing owing to disputes between sports clubs, sports companies, players, TV sports commentators (which may now be liable if commentating on behalf of a club) and sports managers, and the relevant sports federations, namely within football. The Court has been mainly ruling upon disciplinary issues, but it has increasingly been ruling upon other matters, such as doping and electoral issues.

### **iii Enforceability**

An arbitral award may be enforced, and such enforcement can be challenged under the same terms as a decision of a state court.

## **III ORGANISATION OF SPORTS EVENTS**

### **i Relationship between organiser and spectator**

According to Law No. 39/2009 of 30 July, as amended, which provides the legal framework governing against violence, racism, xenophobia and intolerance at sports events, sports federations of the respective sports disciplines, professional leagues of clubs and local associations can organise sports competitions. Moreover, promoters of sports events that are local associations, sports clubs, sports companies and professional leagues or federations may also act as organisers of sports competitions.

Additionally, pursuant to the above-mentioned Law, a specific set of information must be printed on sports tickets by sports events organisers. Violation of this obligation triggers the suspension of the sports event.

Further, according to the Basic Law of Physical Activity and Sports, the spectator, as a consumer, shall be protected by Law No. 24/96 of 31 July (Consumer Protection Act).

According to the Consumer Protection Act, the organiser is legally obliged, upon the conclusion of the contract, to give the spectator several pieces of data and information in a clear, consistent and evidence-based manner. The relationship between the organiser and the spectator shall be guided by the principles of equal treatment, loyalty and good faith, granting the consumer a special right regarding the protection of his or her economic position.

The only provision in the Portuguese sports legal framework concerning the contractual relationship between organisers and spectators aims to protect the right of spectators as consumers to prior information as to the amount payable at sports events throughout the season.

In addition, the applicable legislation sets forth the conditions governing the access to and presence of spectators in enclosed sports locations.

### **ii Relationship between organiser and athletes or clubs**

Pursuant to the Basic Law of Physical Activity and Sports, sports federations are responsible for organising and regulating professional sports competitions; assuming the applicable legal

and statutory control and supervision functions; and defining the financing rules as well as access organisation requirements applicable to sports competitions. As per the Law, sports federations may delegate the above-mentioned powers to professional leagues.

Currently, the only professional league in Portugal is the National Football League, which acts as organiser of professional football competitions. The relationship between the National Football League and the participating athletes and clubs is regulated by the Competitions Regulation, which sets forth, *inter alia*:

- a* the requirements for participating in professional competitions;
- b* the requirements applicable to sports venues;
- c* the rights and obligations of athletes and clubs; and
- d* the requirements for the broadcasting of sports events.

### **iii Liability of the organiser**

Under the Portuguese sports legal framework, the government is responsible for policing the areas outside enclosed sports locations, thus ensuring the safety of sports events. The organiser is responsible for policing the inside areas, but can request the policing of such areas to be conducted by the government. According to the Civil Code, the government and the organiser are jointly and severally liable for any acts or omissions, even if committed without fault.

Regarding criminal liability, Law No. 39/2009 foresees a series of administrative offences applicable to organisers, promoters and owners of sports events that are related to the violation or breach of the duties legally assigned to such entities. Administrative fines resulting from such administrative offences can amount to €200,000. This type of liability does not require a specific request from a person who has been damaged. The Criminal Code does not foresee any special crimes related to sports.

### **iv Liability of the athletes**

Athletes (also known as sportspersons) can be held liable for damages caused to other sportspersons. However, a distinction must be drawn according to the type of sport in question.

In sports played side by side, where athletes use the same place and space for the practice of the sport (such as cycling or skiing), there are two potential regimes applicable under the Civil Code. The first is the regime of non-contractual civil liability, where the athlete can be held liable for acts or omissions practised with fault or negligence. As a consequence, compensation shall be paid for the caused losses. The second is the regime of civil liability foreseen for the practice of a dangerous activity, which implies payment of compensation for arising losses, except in cases where the athlete is proved to have acted with the due care required.

In sports where the athlete competes against other athletes (i.e., player against player), the regime of non-contractual civil liability is generally applicable, although sometimes it is held that such liability can be excluded with the consent of the injured party, as provided in both the Civil and Criminal Codes. For example, in combat sports, it can be considered that there is tacit consent on the part of the injured party provided that the rules of the respective sport are adhered to. The injurer does not act intentionally, and therefore there is no criminal liability.

Regarding team sports such as football, it can be questioned whether there is tacit consent when injuries are severe. As per Portuguese jurisprudence, in the case of severe injuries, it is considered that liability arises from such acts, as these are against the generally accepted rules of moral and social conduct.

Regarding criminal liability, aside from the provisions of the Criminal Code, there is no specific framework that is applicable to athletes.

#### **v Liability of the spectators**

Law No. 39/2009 sets forth a sanctioning regime applicable to spectators of sports events (whether groups of fans or single parties) that outlines several crimes, administrative offences and disciplinary measures. With regard to criminal liability, the crimes the Law foresees include:

- a* qualified damage to public transport, facilities or equipment used by the public, as well as any other assets;
- b* participation in riots during travel to or from sports events;
- c* throwing of liquid products;
- d* invasion of sports event areas; and
- e* rioting.

All of the above are punishable with imprisonment or a fine. An ancillary penalty of restriction of access to sports venues can also be applicable. Further, when crimes are committed against sportspersons, sports coaches, referees and others sports agents, the penalties are increased.

All of these crimes are public crimes (i.e., they do not depend on the filing of a criminal complaint by the damaged person).

There is no specific regime regarding civil liability; therefore, the Civil Code is applicable.

#### **vi Riot prevention**

Law No. 39/2009 sets forth a series of duties applicable to sports events organisers, and promoters and owners of sports venues regarding the adoption of measures to prevent and sanction unsporting behaviours, such as violence, racism, xenophobia and any form of discrimination. As per the above-referred Law, the crime of participation in a riot is punishable with imprisonment of up to three years or with the payment of a fine.

Pursuant to Decree-Law No. 216/2012 of 9 October, as amended, regarding the System of Policing of Sports Events at Sports Venues and Coverage of Costs from General Policing of Sports Events, the costs of policing sports events shall be covered by the respective promoters or organisers. Pursuant to this Decree-Law, in some cases the state co-funds the policing of sports events.

## **IV COMMERCIALISATION OF SPORTS EVENTS**

### **i Types of and ownership in rights**

Broadcasting, sponsorship, image rights and other personality rights (such as the right to a name), merchandising and trademarks are the main sports-related rights that can be exploited in Portugal.

Although there may be some particularities depending on the type of sport in question, usually the above-mentioned rights are owned by sports clubs or by sportspersons, or both. These rights can be transferred or licensed through a written agreement entered into between the respective parties.

## **ii Rights protection**

The Television and Audio-visual On-Demand Services Law (Law No. 27/2007 of 30 July), the Copyright and Related Rights Code (Decree-Law No. 63/85 of 14 March), the Civil Code (Decree-Law No. 47344 of 25 November 1966), the Industrial Property Code (Decree-Law No. 143/2008 of 25 July) and the Constitution of the Portuguese Republic constitute the main legal framework for the protection and enforcement of sports-related rights, and provide the rules and measures for such protection.

The main practical issues that rights holders may deal with when seeking protection of their rights are: entering into agreements that are required to adequately protect their rights and, when applicable, registering the rights before the competent entities; evidencing the ownership of rights and any infringement of such rights; and proving, with a reasonable degree of certainty, the damages suffered in consequence of such infringement.

## **iii Contractual provisions for exploitation of rights**

There are mandatory statutory provisions that must be included in contracts, namely, and without limitation:

- a* its term;
- b* the territory involved;
- c* a list of the rights assigned or licensed, or both;
- d* in the case of licensing, the conditions for the use of the rights;
- e* the price; and
- f* in the case of licensing, whether a licence is exclusive.

Although not mandatory, it is both common and highly advisable to incorporate in agreements a clear object of use, terms and conditions of termination (including in cases of breach) and consequences of termination (namely, regarding the exploitation of rights), jurisdiction and the applicable law.

# **V PROFESSIONAL SPORTS AND LABOUR LAW**

## **i Mandatory provisions**

Law No. 54/2017 of 14 July on athletes' employment contracts, sports training contracts and agents' contracts was recently adopted, repealing Law No. 28/98 of 26 June.

Employment contracts for athletes must be in written form, in triplicate and are always fixed term, for a minimum of one sports season to a maximum of five sports seasons (for contracts entered into by minors, the maximum is three sports seasons).

A collective bargaining agreement for professional football players sets forth a mandatory minimum monthly salary for the different football divisions. A club and athlete may agree upon an increase or decrease in salary depending on whether the club is promoted to a higher division or drops to a lower division.

Athletes' employment contracts may be terminated in the following situations:

- a* expiry of the contract;
- b* agreement to the termination;

- c* termination for cause (by the club or by the athlete);
- d* termination during a trial period; and
- e* collective dismissal.

Law No. 54/2017 has specifically provided for the 'termination clauses', under which the parties agree that the athlete may unilaterally and without cause terminate the employment contract, insofar as he or she pays a previously agreed compensation. If the athlete terminates his or her employment contract without cause, a presumption has been set forth that his or her new club had an intervention in such termination; failure to rebut the presumption determines the joint liability of the athlete and his or her new club to pay compensation to the former club.

Pursuant to said Law, in the case of termination without cause, the athlete is no longer entitled to reinstatement in the former club.

Finally, Law No. 54/2017 sets up a legal framework for agents' contracts, which (1) may not be entered into by minors, (2) have a maximum duration of two years (renewable by decision of both parties) and, (3) if entered into by an athlete, the agent's remuneration shall be capped at 10 per cent of the net salary of the athlete.

## **ii Free movement of athletes**

According to the applicable legislation, athletes may not be denied registration with any sports federation if such athletes fulfil the requirements that are deemed necessary by such federation. In addition, under Portuguese labour legislation, the access of a job candidate or an employee to any type of professional activity or training to gain access to such activity may not be limited based on nationality.

However, in football, for instance, clubs must have at least eight home-grown players in their team, such players being those who, between the ages of 15 and 21, were registered with the Portuguese Football Federation for at least three sporting seasons.

## **iii Application of employment rules of sports governing bodies**

Employment-related provisions in the statutes or regulations of (international) sports governing bodies may be incorporated into the employment contracts of athletes insofar as such provisions do not collide with mandatory legal provisions.

Legal provisions regarding employment contracts, namely those under the Labour Code, are subsidiarily applicable to the employment relations between clubs and athletes.

## **VI SPORTS AND ANTITRUST LAW**

In Portugal, there is no specific legislation regarding competition in the sports sector. Therefore, the Competition Act enacted by Law No. 19/2012 of 8 May, and the EU competition and antitrust regulations are applicable.

In general terms, in Portugal, all agreements, collective decisions and recommendations, as well as concerted practices or decisions by associations of undertakings that aim to prevent, restrict or distort competition, or that achieve the prevention, restriction or distortion of competition, are prohibited. For that reason, undertakings must determine their market behaviour independently. Where there is evidence of coordination or collusion, the existence of anticompetitive practices is likely and must be corrected.

The provisions of the Competition Act are enforced by the Portuguese Competition Authority.

## VII SPORTS AND TAXATION

Until 2007, a special regime for personal income tax (PIT) purposes applied to Portuguese tax-resident contracted athletes, sports players and referees under which said taxpayers were entitled to opt (other than in respect of advertising-related income) for the taxation of their net income at progressive tax rates (thereby benefiting from an unlimited deduction of insurance contributions), or for a reduced autonomous and flat taxation applicable to their gross income.

This special tax regime is no longer available to Portuguese tax-resident contracted athletes, sports players and referees, regardless of the national or international nature of the underlying sports event; such taxpayers do, however, benefit from some specific provisions.

Portuguese tax-resident sportspersons who are contracted or self-employed may deduct, up to a maximum limit of €2,144.50 on the amount of the income they have received, their contributions to life, personal illness and accident insurance policies, as well as to insurance schemes that guarantee (once the individual reaches the age of 55) a pension upon retirement, disability or death. The underlying policy must not guarantee any return of capital and no payment can be made in the insured's lifetime during the initial five-year period.

Moreover, under certain conditions, no PIT applies to allowances granted to high-performance athletes and their coaches by the Portuguese Olympic and Paralympic Committee and by sports federations benefiting from having 'public utility' status; training allowances, such as those recognised by a joint decision of the Finance and Sports Ministers and granted by sports federations benefiting from the 'public utility' status to non-professional sportspersons (including athletes, judges and referees) to a maximum limit of €2,375; and prizes granted as recognition for high-value and high-merit competitive sports events under the applicable laws (such as the Olympic, Paralympic and Deaflympic Games, World and European championships and the Universiade).

For non-resident contracted sportspersons, PIT is withheld at a final rate of 25 per cent on the gross payment of Category A income if their activities are personally exercised in Portugal, irrespective of whether the payer is established in Portugal or the income accrues to a person other than the relevant athlete. The same 25 per cent final withholding tax rate applies to (non-resident) self-employed sportspersons in consideration of sporting activities.

Where sports-related services are rendered by using a rent-a-star company, no PIT applies to the payments made to the company. However, fees for sports-related services paid to a non-resident entity controlled by sportspersons are taxed as business profits, and are subject to corporate income tax (CIT) if they are attributable to a Portuguese permanent establishment. In other cases, such fees paid for services supplied or used in Portugal are subject to a final 25 per cent withholding tax, unless an applicable double tax treaty provides otherwise.

Within an international context, it is worth noting that Portugal tends to follow closely the Organisation for Economic Co-operation and Development Model Tax Convention on Income and on Capital, having made no reservation to Article 17 or observation on its commentaries. On that basis, the general rule that it is possible, without any limitation in Portugal, to tax the activities of sportspersons therein exercised, irrespective of whether such income accrues to the athlete him or herself or to another person, should apply.

Notwithstanding the above, on a case-by-case basis, the government tends to grant tax exemptions to high-exposure international sports events. One example can be found



in the general PIT and CIT exemptions granted to the organiser and participating clubs, players and technical teams of the 2013–14 UEFA Champions League and 2013–14 UEFA Women's Champions League.

## VIII SPECIFIC SPORTS ISSUES

### i Doping

Law No. 38/2012 of 28 August, as amended, establishes the Portuguese Legal Regime of Anti-Doping in Sports, according to which violations of anti-doping rules may entail the following.

#### *Criminal offences*

The trafficking or attempted trafficking of prohibited substances or methods may be subject to imprisonment for a term ranging between six months and five years. Additionally, the administration or attempted administration of prohibited substances or methods may be subject to imprisonment for a term ranging between six months and three years, unless such administration is authorised for therapeutic purposes.

The above imprisonment penalties may be increased to the double of their minimum and maximum limits in the following cases: the victim is particularly vulnerable because of his or her age, disability or illness; the author of the act acted through misleading or intimidating the victim; or the author of the act has prevailed on the victim through a relationship of hierarchical, economic or professional dependency.

#### *Administrative offences*

The provisions concerning administrative offences have undergone recent amendments, by virtue of Law No. 93/2015 of 13 August, which transposed the World Anti-Doping Code rules into Portuguese law. Currently, they consist of the following.

Conduct that subverts the doping control process is considered to be an administrative offence subject to fines of up to approximately €10,000.

The possession of any prohibited substance or method by an athlete, or by a support staff member connected to the athlete, competition or training place, is also considered to be an administrative offence unless the athlete establishes that such possession is consistent with the therapeutic use exemption or gives another justifiable reason.

Moreover, assisting, encouraging, aiding, abetting, conspiring, covering up or any other type of intentional complicity involving (1) an anti-doping rule violation, (2) any attempted anti-doping rule violation, or (3) the violation of the prohibition of participating in a sports competition during the suspension period, by another person, constitutes an administrative offence.

In addition, association in a professional or sport-related capacity with a support staff member who (1) is serving a suspension period, (2) has been convicted in a criminal or disciplinary proceeding to have engaged in conduct equivalent to an anti-doping rules violation, or (3) is acting on behalf of or as an intermediary of any of the individuals described above, is considered to be an administrative offence.

Teams, clubs or sports public limited companies that breach anti-doping rules and that participate in official sports competitions may also be subject to fines.

### ***Disciplinary penalties***

Doping is considered to be a disciplinary offence subject to a suspension period of up to 25 years, depending on the circumstances.

### ***Sports penalties***

An anti-doping rule violation may lead to the disqualification of the athlete's individual results with all attending consequences, including the athlete's forfeiture of all medals, points and prizes.

#### **ii Betting**

The Portuguese legal framework applicable to betting is regulated by Decree-Law 422/89 of 2 December, as amended, which sets out general provisions and principles related to the gaming industry, including rules for casinos and gambling houses.

Moreover, Decree-Law No. 84/85 of 28 March, as amended, establishes the regime for lotteries and lotto, granting the exclusive right to organise and operate the same to Lisbon Holy House of Mercy,<sup>2</sup> a non-profit making organisation operating under the control of the government.

According to Decree-Laws Nos. 67/2015 and 68/2015, both of 29 April, Lisbon Holy House of Mercy also has the exclusive right to the exploitation and operation of betting on sports events and horse races on a territorial basis.

In relation to online gambling and betting on sports events, Decree-Law No. 66/2015 of 29 April, foresees that the right to exploit such activities is reserved to the government. The government can, however, grant online gambling and betting licences to public limited liability companies with a registered office in an EU or European Economic Area Member State, if certain conditions are met.

#### **iii Manipulation**

Law No. 50/2007 of 31 August, as amended, foresees that corruption, illicit use of connections and criminal conspiracy that aims to manipulate the results of sports events are considered criminal offences subject to up to five years' imprisonment, a term that is extended in the case of sports leaders, referees and managers.

This Law also sets forth ancillary penalties, such as suspension from sports competitions for up to three years, privation of the right to receive public subventions and a prohibition on performing sporting duties for a period of up to five years.

Moreover, on 7 August 2015, Portugal ratified the Council of Europe Convention on the Manipulation of Sports Competitions, which commits Member States and sports organisations to raise their efforts in the fight against corruption, match-fixing, illegal betting operations and other kinds of malpractice in sports competitions.

#### **iv Grey market sales**

According to Decree-Law No. 28/84 of 20 January, as amended, grey market sales may be considered to be a criminal offence subject to imprisonment for a term ranging between six months and three years and a fine of not less than 100 days in cases where tickets for an event are sold at a higher price than the price fixed by the event organiser.

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2 Santa Casa da Misericórdia de Lisboa.

## **IX THE YEAR IN REVIEW**

During 2018, there has been a notable increase in sports or sports-related disputes, especially employment, disciplinary and criminal matters, such as termination of employment contracts by the employees owing to physical and psychological violence against them from the club and the supporters, violent behaviour of supporters leading to matches played behind closed doors, bribery and match-fixing.

The Court of Arbitration for Sport's activity has also increased, with six procedures initiated in 2015, 31 in 2016, 76 in 2017 and 66 in the first three quarters of 2018.

## **X OUTLOOK AND CONCLUSIONS**

Since April 2017, the government has been preparing a proposal for enacting a new law in relation to violence in sports and, in May 2018, announced the creation of the National Authority Against Violence in Sports (the Authority). On 3 October 2018, the Authority was created (Decree No. 10/2018 of 3 October) and its main purpose is to prevent and supervise the enforceability of the legal regime applicable to violence, racism, xenophobia and intolerance in sports events. The Authority's main functions are to:

- a* perform all registrations legally required in relation to the legal regime, as well as to supervise, control and sanction any acts deriving therefrom together with the competent security forces;
- b* apply the fines and ancillary penalties set forth in the legal regime applicable to violence, racism, xenophobia and intolerance in sports events;
- c* promote activities related to the creation of a good sports environment based on the highest ethical values and moral principles;
- d* issue technical and scientific opinions, recommendations and warnings regarding the prevention and combat of violence, racism, xenophobia and intolerance in sports events; and
- e* study and propose administrative and legislative measures that are adequate to the prevention and combat of violence, racism, xenophobia and intolerance in sports events.

# SPAIN

*Jordi López Batet and Yago Vázquez Moraga<sup>1</sup>*

## I ORGANISATION OF SPORTS CLUBS AND SPORTS GOVERNING BODIES

The Spanish sports model is basically structured on Act 10/1990 on Sport, and developed by various other regulations that deal with the institutions involved in sports, as well as the organisation, governance and development of sports.

However, owing to the particular construction of the state, not only the regulations enacted by the Spanish parliament (such as Act 10/1990) need to be taken into account in this respect: while Spain is a single sovereign state, it is composed of 17 regions or autonomous communities that are vested with a fair amount of autonomy and with competencies to rule on very diverse issues, among them, sports. Therefore, some particularities may be found in specific territories as a result of the powers granted to regions to rule on sports matters.

### i Organisational form

From an organisational perspective, Act 10/1990 and the relevant provisions developing it mainly govern the following kinds of sports entities.

#### *Clubs*

Clubs are sports associations composed of natural or legal persons that are devoted to the promotion of one or several sports modalities, their practice by relevant associates and participation in sports activities and competitions.

Clubs that participate in official professional sports competitions of national scope shall take the legal form of a sports limited liability company (SAD). These companies have a special regime established in Act 10/1990, Royal Decree 1251/1999 on Sports Limited Liability Companies and the Companies Act (Royal Legislative Decree 1/2010).

#### *Federations*

Federations are private entities with legal personality that, *inter alia*, are responsible for the organisation of sports events and competitions, promote sport and exercise the disciplinary powers within their material scope. Federations develop their own private competencies but also carry out, by delegation, public functions of an administrative nature. Depending on their territorial scope, these federations can be national or regional. Regional federations are part of their overall national federation, but have their own specific rules and regulations.

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<sup>1</sup> Jordi López Batet is the managing partner and Yago Vázquez Moraga is a partner at Pintó Ruiz & Del Valle.

### **Leagues**

Leagues are sports associations exclusively and compulsorily composed of sports clubs that take part in official competitions of a professional nature and national scope. They have legal personality and independent autonomy for their internal organisation, even when they are part of their corresponding federation.

### **Governing bodies**

The National Sports Council, which sits at the top of the sports organisational pyramid, is the governmental authority overseeing and ruling general sports activities in Spain.

In addition to the ordinary organisational structure outlined above, Spain has a National Olympic Committee and a National Paralympic Committee.

### **ii Corporate governance**

Good governance issues are gathered under both the legal regulations and the internal rules of sports entities.

Concerns about good governance in sport even come under the Spanish Criminal Code, which foresees a specific offence of corruption for managers, employees and collaborators of sports entities as well as referees and athletes for conduct aimed at predetermining or altering, in a deliberate and fraudulent manner, the result of a sports competition of special sporting or economic relevance. Act 19/2013 on transparency, access to public information and good governance also applies to the sport market. On the basis of this Act, some sports entities are obliged to make public information about their functions, regulations and organisational structure, including an updated organigram of the organs they are composed of and the profile of persons belonging to them.

Another relevant piece of legislation regarding corporate transparency is the bundle of rules contained in Royal Decree 1251/1999 on Sports Limited Liability Companies with regard to restrictions on the ownership of shares in these companies and these companies' duties of information. For example, the acquisition of over 25 per cent of the share capital of a company must be authorised by the National Sports Council; professional clubs and SADs cannot participate in the share capital of another SAD taking part in the same competition; and those parties that own 5 per cent or more of the share capital of a SAD cannot hold, directly or indirectly, a participation of 5 per cent or more in the share capital of another SAD, and the financial information of these SADs is to be communicated to the National Sports Council.

A number of internal regulations of sports entities also deal with good governance issues. Those of the Spanish football league, La Liga, may be the most complete and exhaustive, with a focus especially on the aim of the economic control and balance of clubs and SADs.

### **iii Corporate liability**

The general principle of *neminem laedere* is applicable regarding the liability of managers and officers of sports organisations.

In addition, some sports regulations also specifically refer to such liability. For instance, Act 10/1990 expressly establishes that in cases of wilful intent or gross negligence, managers of clubs will be held liable towards associates, the club or third parties. The general regime of liability of SAD directors is stipulated in the Companies Act, and is quite strict.

Managers and officers are not only subject to civil liability, but also to the relevant disciplinary measures, including those arising out of the legal provisions mainly set out in Act 10/1990 and Royal Decree 1591/1992 approving the Sports Discipline Regulations, but also those that specifically arise out of the internal regulations of sports entities.

## II THE DISPUTE RESOLUTION SYSTEM

The Spanish sports dispute resolution system is interconnected, involving not only the ordinary courts, but also the dispute resolution bodies of federations and leagues and arbitration.

### i Access to courts

Athletes, clubs and other sports stakeholders may have access to the courts when the circumstances so enable, whether at first instance (e.g., access to the labour courts in employment matters, or to the relevant ordinary courts in purely civil or commercial disputes) or with the intent to challenge certain decisions previously taken by sports or administrative bodies on organisational, disciplinary or other issues. Apart from the ordinary courts, of special note in this respect is the Sport Administrative Court, which deals with various sports-related issues, even if it has limited *ratione materiae* scope.

### ii Sports arbitration

The rules regarding arbitration in Spain are outlined in Act 60/2003 on arbitration, which permits any and all controversies on subjects that are within the free disposition of the parties to be resolved by arbitrators. A wide range of sports conflicts may be thus brought to the knowledge and decision of arbitrators.

The submission of a dispute to arbitration will require that the parties have agreed on a valid arbitration clause in writing, with no specific formalities in this respect beyond their clear will to bring disputes that may arise between them to arbitration.

Apart from the rules foreseen in Act 60/2003 dealing with general issues (regarding the arbitration clause, the arbitrators, their competence, the basic procedural issues, and the award, its execution and annulment), the specific provisions of an arbitration court administering the procedure shall also be observed (*ad hoc* arbitration in sports is not common in Spain). The Spanish Court of Arbitration for Sport created under the auspices of the Spanish National Olympic Committee, and the Arbitration Tribunal for Football created under La Liga, are two of the arbitral courts to which sports disputes may be brought, provided that the nature of the relevant dispute may be allocated within their relevant material scope.

### iii Enforceability

The enforcement of arbitral awards shall be conducted through ordinary courts in accordance with the provisions specifically foreseen in Act 60/2003 and in Procedural Act 1/2000. The enforcement of arbitral awards can only be challenged on the basis of very restricted grounds foreseen in the above-mentioned Acts (basically, the fulfilment of the award's decision and the cessation of the statute of limitations of the execution).

The internal regulations of sports federation bodies foresee measures that foster the compliance of parties with any decisions.

### III ORGANISATION OF SPORTS EVENTS

In Spain, the key element in events organisation is the compulsory adherence of all members and participants to the rules of their corresponding sports bodies. The federations and leagues normally undertake the organisation of sports competitions.

#### i Relationship between organiser and spectator

Sports organisers are free to establish the terms and conditions that spectators shall fulfil when attending a sports event. However, in any case, sports organisers shall abide by the mandatory provisions of Act 19/2007 against violence, racism, xenophobia and intolerance in sport events and Royal Decree 203/2010 approving the regulations on the same subject.

#### ii Relationship between organiser and athletes or clubs

The organiser ensures the terms of the participation of athletes in competitions by means of sports licences. Upon the signature of the relevant labour agreement, athletes request through their club that the relevant federation issues sports licences that will allow them to participate in the corresponding official competition. When a federation grants a licence, all the relevant sports regulations at the national and international level become binding on the athlete, and he or she thus becomes subject to the organic and disciplinary authority of the organiser.

#### iii Liability of the organiser

Article 5 of Act 19/2007 establishes the economic and administrative liability of organisers of sports events for all damages that may take place owing to their lack of diligence or prevention of damage or public disorder. This liability is independent of and without prejudice to any other criminal or disciplinary liability.

#### iv Liability of the athletes

Owing to the specific characteristics of sport, as a general rule athletes are not liable for damages (e.g., injuries) that they may cause during the performance of a sports activity. In particular, it is understood that athletes assume the risk that is inherent in the sports activity. However, the theory of the assumption of risk only applies to damages caused within the ordinary limits of a sport activity (i.e., behaviours in line with the relevant standards of conduct). Therefore, when an athlete's behaviour goes beyond those limits, he or she can be liable for the damages he or she has caused. In addition, under some circumstances, an athlete can also be found guilty of a criminal offence when he or she had the clear intention to hurt or damage a third party (*animus laedendi*).

#### v Liability of the spectators

Spectators that breach the regulations under Act 19/2007 can be administratively sanctioned by the competent disciplinary body (not only with economic fines but also, *inter alia*, with a prohibition of access to sports venues). Spectators can also incur civil liability for any damages that, through their fault or negligence, are caused to third parties. Further, spectators can also be found guilty of criminal offences they may commit during a sports event, not only in sports venues, but also in their surrounding areas.

## **vi Riot prevention**

Pursuant to Article 27 of Organic Act 4/2015 for the protection of public safety and Article 35 of Royal Decree 203/2010, the public security forces are responsible for security and public order during sports events. Neither clubs nor organisers have to pay a financial contribution towards this public service. However, Act 19/2007 and Royal Decree 203/2010 establish certain measures that clubs and organisers shall implement in sports venues aimed at preventing not only riots, but also any kind of violence, racism, xenophobia and intolerance therein. In this regard, organisers are responsible for the implementation of the necessary measures to prevent riots and for guaranteeing that the spectators meet the conditions of entrance to a sports venue. For this purpose, clubs are obliged to arrange the necessary private security in sports venues and to implement all the means necessary to accomplish the security measures imposed by law. In particular, clubs and organisers shall implement, *inter alia*, a computerised system of access control, turnstiles, security equipment and video surveillance. In addition, all sports venues must have a control room where a security coordinator will manage the security measures in place during a sports event, and will coordinate all the security bodies involved (private security, police, firefighters, emergency services, sanitary services, etc.).

## **IV COMMERCIALISATION OF SPORTS EVENTS**

### **i Types of and ownership in rights**

The main sports-related rights exploited in Spain are athletes' image rights, the broadcasting rights of sports competitions and the intellectual property (IP) rights held by clubs and organisers.

The right to self-image, guaranteed by Article 18 of the Spanish Constitution and developed by Organic Act 1/1982 on the protection of honour, intimacy and self-image, enables athletes (those who practise individual sports and those who render their sporting services in collective sports) to exploit their image and to assign it to third parties.

Each sports competition exploits its own broadcasting rights. The ownership of the sports broadcasting rights will ultimately depend on the competition at stake. However, as a general rule, these broadcasting rights belong to the clubs participating in the sports competition or to the organiser of the competition, or to both. In this respect, it is particularly noteworthy that the government enacted Royal Decree-Law 5/2015 on urgent measures in connection with the commercialisation of rights to operate the audiovisual content of professional football competitions, by virtue of which it has established rules for the exploitation of the broadcasting rights of the national professional football leagues (first and second division), the Spanish Cup and the Spanish Super Cup, including the distribution of revenues among clubs and SADs (depending on some legal criteria).

Clubs and organisers can also hold IP rights that are exploited through the merchandising activity of their brands and symbols, either personally or through a licence to third parties, based on private law rules.

### **ii Rights protection**

The protection and enforcement of sports-related rights depend on the type of right involved in each specific case.

With regard to athletes' image rights, their defence can be enforced before the ordinary courts through proceedings based on the principles of preference and preliminary hearings



or, if applicable, through a relevant claim before the Constitutional Court. In particular, the right to self-image is covered by the civil protection procedure established in Act 1/1982, which provides legal safeguards against illegal exploitation of the self-image right. Spanish jurisprudence has made important contributions to the development of this right.

IP rights are protected through the specific mechanisms envisaged in Act 17/2001 on trademarks that include, *inter alia*, cessation of actions, removal of effects and compensation for damages in the case of a breach of any IP rights.

The tools and mechanisms foreseen in Act 34/1988 on general advertising and in Act 3/1991 on unfair competition should also be considered with regard to protection of this kind of right.

### **iii Contractual provisions for exploitation of rights**

In accordance with Spanish law, sponsorship, merchandising and image rights contracts are not expressly ruled by any specific regulation; thus, the parties can freely determine their content with the sole limitations arising out of law.

Nevertheless, it should be emphasised that a number of provisions typically arise in these contracts, such as the relevant licensing of trademarks and other distinctive signs, non-compete and exclusivity clauses, first refusal clauses and provisions regarding the assignment of IP rights. In this regard, it is worth noting that the Spanish regulations prohibit the sponsorship of sports events by alcoholic drinks and tobacco brands. The exact definition of the scope of the exploitation and assignment of such rights is also of utmost importance, as is the self-reservation of rights, as the case may be.

The sale of broadcasting rights may be carried out on an exclusive or non-exclusive exploitation basis in accordance with the legal provisions in force. It is mandatory that the duration of the assignment of rights does not exceed three years. In addition, pursuant to Act 7/2010 on audiovisual communication, the exclusive assignment of the television broadcasting rights of sports competitions cannot restrict citizens' rights to information. For this purpose, the broadcasters that hold the exclusive rights with regard to an event of 'general interest for society' must allow other broadcasters to broadcast 'brief information summaries' (of less than 90 seconds) to be used only in general information programmes in which the logo or trademark of the organiser and the brand of the main sponsor of the event shall appear.

## **V PROFESSIONAL SPORTS AND LABOUR LAW**

Professional athletes have a 'special labour relationship' with their employers that is ruled in accordance with Royal Decree 1006/1985, given the special features of the kind of services to be rendered and the qualities of the persons rendering these services.

### **i Mandatory provisions**

Royal Decree 1006/1985 applies on a compulsory basis to sports contracts, while the general regulations on employment in Spain (especially the Workers Statute) will only apply on a subsidiary basis.

The special relationship of athletes with their employers is of a temporary nature, and salaries are, as a general rule, fixed in the relevant collective bargaining or labour agreement, or in both, apart from in the contract.

The labour relationship may end because of any of the general causes of termination of labour contracts (e.g., expiry of term, by mutual agreement), even if there is a special regime of unilateral termination of the contract by the athlete in exchange for the payment of compensation to the club, which will be the compensation fixed for this purpose in the labour agreement or, in the absence of a provision of this kind in the contract, the compensation established by the labour courts.

## **ii Free movement of athletes**

The free movement of athletes from EU Member States is guaranteed in the same general terms applicable in all EU countries. However, in some sports there are some direct or indirect restrictions on the number of non-EU athletes that can take part in competitions (*inter alia*, football and basketball). The same happens with minors.

## **iii Application of employment rules of sports governing bodies**

Labour agreements may contain provisions that the parties freely agree (including those potentially already included in the regulations of the sports governing bodies), provided that these do not contravene compulsory laws, in which case they would be deemed null and void.

## **VI SPORTS AND ANTITRUST LAW**

In Spain, competition law issues are increasingly prevalent in the field of sport. Instances of state aid to clubs, the *a priori* economic control rules imposed on clubs by some professional leagues and the conditions of access to professions (e.g., in the case of licences for football coaches) have led to legal discussions concerning their potential restriction of competition.

The intervention of antitrust law measures in sport is not new in Spain. However, situations encountered in the past (such as in matters related to the freedom of movement of athletes or broadcasting rights distribution) have been resolved, and new issues have developed. While we are probably not in a position to state that a genuinely separate and autonomous competition sports law exists in Spain, it is undeniable that in recent years, the competition rules have come into play and the authorities are involved more and more in the day-to-day activity of sports, and that the authorities take antitrust principles into consideration in their resolution of conflicts. The professionalisation of sport in Spain has had a great deal to do with this.

## **VII SPORTS AND TAXATION**

The main particularities of the tax regime for athletes and professional clubs in Spain may be briefly summarised as follows.

Athletes who are tax residents in Spain shall pay personal income tax (PIT) on their worldwide incomes. The PIT tax rate is progressive, and can reach up to 48 per cent depending on the athlete's territory of residence in Spain. The PIT rules do not foresee a special tax regime for these athletes (this used to apply in the past).

Athletes who have transferred their image rights to a third party and who have a working relationship with a club that has obtained their image rights as part of such relationship are also taxed PIT on the payments made by the club to third parties for the image rights. This special rule does not apply if the salary represents at least 85 per cent of the total amount paid by the club to the athlete.

Athletes who are not tax-resident in Spain and foreign clubs that obtain income related to their participation in events in Spain can be subject to non-resident income tax in Spain in relation to their participation in events held in Spain. Double tax treaties (if any) will have to be considered in this respect.

SADs are subject to corporate income tax at a general tax rate of 25 per cent.

## VIII SPECIFIC SPORTS ISSUES

### i Doping

Besides the administrative sanctions established by Organic Act 3/2013 on the protection of the health of athletes and the fight against doping in sport by those who infringe its provisions, under Spanish law, those who, without therapeutic justification, prescribe, provide, dispense, supply or facilitate banned or prohibited pharmacological substances or other prohibited methods to athletes in order to enhance physical capabilities or modify the results of a given sports competition commit a criminal offence (Article 362 *quinquies* of the Criminal Code).

Therefore, the Criminal Code punishes doping in sport, but it does not criminally sanction the use of doping substances by athletes, only its provision or supply to the latter. The criminal sanctions established by the Criminal Code include the imprisonment of the offender for a period of between six months and two years, a fine equivalent to six up to 18 months' salary, and a special disqualification for the exercise of his or her profession or of holding a public service position.

### ii Betting

Act 13/2011 on the regulation of gambling and rules regarding sports betting, which are permitted activities in Spain, provides a general legal framework for online national gambling activities in Spain. However, it should be taken into account that the 'autonomous communities', in light of the provisions set out in Section I, are competent to regulate gambling within their respective regions, so their regulations must be considered as well.

In particular, Act 13/2011 regulates national gambling performed through electronic, interactive and technological means, which include the internet, television, mobile phones, landlines and any other interactive communication systems. Betting operators must obtain the corresponding licence prior to carrying out any betting activities. Further, Act 13/2011 prohibits the advertisement, sponsorship or endorsement of gambling activities, as well as the advertisement or promotion of gambling operators that do not hold the appropriate licences. The provisions of Act 13/2011 are also applicable to cross-border gaming activities. In this regard, remote betting operators must obtain an administrative authorisation or licence granted by the relevant Spanish authority prior to carrying out their business in Spain.

### iii Manipulation

As mentioned above, the Criminal Code envisages corruption offences for collusion between individuals, including a specific modality in relation to professional sports competitions. In this regard, Article 286 *bis* of the Criminal Code sanctions match-fixing and, in this regard, sanctions club directors, managers, employees and those who collaborate with sports entities, whatever their legal form, as well as athletes and referees, in relation to conduct aimed at deliberately and fraudulently attempting to alter the results of a professional sports match, game or sporting competition. The sanction foreseen for such conduct includes imprisonment

of between six months and four years, a special disqualification banning practising in the industry or commerce for a term of between one and six years, and a fine of up to three times the value of the gains obtained by the illicit activity.

As the Criminal Code refers only to the intention to alter results, it is currently not absolutely clear if this can be applied to actions intended to alter the development of an event that can have no impact on the final results.

Finally, it should be noted that a criminal offence will be committed through the mere intent of match-fixing; therefore, it is not required that the effective benefit or advantage intended actually occurs.

#### **iv Grey market sales**

Article 67.2 of Royal Decree 2816/1982 approving the General Police Regulations on Public Entertainment and Leisure Activities stipulates that the resale of tickets is prohibited. Notwithstanding this, and bearing in mind that the Regulations only prohibit the resale of tickets on the street (and not, e.g., resale through the internet), it is not clear whether the resale of tickets outside those channels established by the organiser of the sports event is prohibited by law.

However, regarding the sale of tickets to a sports event, most organisers impose a general prohibition on purchasers on reselling tickets, thus establishing the conventional prohibition of such resale as valid.

## **IX THE YEAR IN REVIEW**

The following recent decisions of the Spanish courts and authorities on sports-related issues are worth mentioning:

- a* A judgment of the Supreme Court of 7 March 2018 confirmed a judgment of Zaragoza's High Court that dismissed an appeal filed by a spectator injured by a ball hit during a Real Zaragoza football match. The spectator claimed the damages arising out of such injury against the club, but the Supreme Court understood that the spectator, by attending the game, assumed the risk inherent to the sporting event, including, in this case, the possibility of being accidentally impacted by a ball. Further, the Court also rejected the club's liability for not placing nets behind the goal since it considered that this measure is not taken in favour of the spectators (to the contrary, it hinders their vision) but owing to reasons of public order.
- b* A judgment of the National High Court of 21 June 2017 partially admitted the claim filed by a French Taekwondo athlete and granted him €30,000 as compensation for the denial of his participation in Spanish competitions. In 2013, the National Sports Council approved the modifications to the regulations of the Spanish Taekwondo Federation that prevented foreigners from participating in Spanish championships. As a consequence, the athlete, despite having lived in Spain for 10 years, was not admitted to participate in the Spanish tournaments and had to move to France. This rejection was further annulled in 2014 by the National High Court since it considered that there were no grounds for the foreigners' prohibition. In 2015, the athlete claimed €100,000 from the state as compensation for the damages caused by the prohibition and the National High Court finally decided to partially grant his claim, as explained above.
- c* By means of a judicial decision (auto) dated 23 April 2018, the Supreme Court raised an unconstitutionality issue before the Constitutional Court at the request of

the Spanish Football League with regard to Article 19.4 of Law 7/2010 on General Audiovisual Communication for its possible contradiction with the constitutional right to property and freedom of business. Said Article stipulates, in favour of radio broadcasters, free access to the stadiums and venues for broadcasting sporting events without further compensation than the costs generated by the clubs for such access (i.e., the maintenance of the broadcasting cabins). The Supreme Court, after assessing the arguments of La Liga, is hesitant about the constitutionality of this Article as it may prevent the organisers, who are the owners of the audiovisual rights, from acquiring commercial gain from these rights, as well as considering that the broadcasters receive economic income from, *inter alia*, advertising. The issue is still in process and to be decided by the Spanish Constitutional Court.

- d* A judgment of the Constitutional Court of 12 April 2018 partially admitted an unconstitutionality appeal filed by the government of Catalunya against Article 32 of the Act on Sport (as amended by Act 15/2014), which provided for a single sporting licence for participating in competitions. This Article established that a licence obtained from a regional federation entitled the athlete to participate in any competition of the sport at hand in Spain, irrespective of the specific territory in which it took place. However, the Constitutional Court understood that with this system, the state is invading interests that are strictly regional and exceeding its competencies, and declared that said provision shall only be valid with regard to competitions of national scope. Therefore, licences issued by regional federations will not entitle athletes to participate in regional competitions within Spain.

## X OUTLOOK AND CONCLUSIONS

The sports law system in Spain is well developed, but it is still growing and being perfected in line with the relatively rapid conversion of sports into a business.

Spain has moved from amateurism in sports to professionalism over the past 25 years and, as usually happens, the law follows the reality. This has meant that a significant number of changes have taken place in recent years to address problems that were unknown decades ago. The tendency in the Spanish system is to continue to evolve to an even greater extent with the aim of harmonising legislation, as far as possible, with the new trends in international sports law. Spain has come a long way (especially in matters related to doping, bankruptcy, distribution of broadcasting rights, financial control and the coordinated fight against match-fixing), but new challenges are still pending and will require the Spanish legislators' and sports institutions' intervention in the near future.

# SWEDEN

*Karl Ole Möller*<sup>1</sup>

## I ORGANISATION OF SPORTS CLUBS AND SPORTS GOVERNING BODIES

### i Organisational form

Almost 3.5 million of Sweden's 9 million inhabitants are members of a sports club (as competitors, leaders, trainers, coaches, supporters, etc.). Some 2.4 million of these compete regularly. For historical reasons, voluntary non-profit associations play a major role in Sweden. The right to participate in clubs and societies is guaranteed by the Swedish Constitution. Sport in Sweden is historically organised as an independent voluntary movement (generally known as the 'Scandinavian' or 'Nordic' model). A long experience of collaboration with central government and local authorities has led to the sports movement being entrusted with the task of organising sport in Sweden with the help of financial support from the state and local authorities.<sup>2</sup>

Local sports clubs are the foundation of the sports movement in Sweden. There are more than 20,000 local sports clubs in Sweden registered as non-profit associations with the purpose of organising sport activities, having elite sports and sport-for-all under the same umbrella. A non-profit association becomes a legal entity from the moment it is set up. For a non-profit association to exist in the legal sense, it is necessary for a number of individuals to have entered into an agreement to act jointly in organised form to meet a common, non-profit purpose (organising sport activities). The actual agreement must be legalised in the form of statutes. A non-profit association cannot engage in commercial activities in order to enrich its members, but only in support of the non-commercial purpose. Sports clubs are thus governed by their statutes, which require democratic forms such as annual general meetings, executive committees, etc. A sports club is 'owned' by its individual members, who determine, at the sports club's annual meeting, what activities the club shall do and how the club is to allot its financial resources, etc. The basic principle is that each member has one vote.

The Swedish Sports Confederation is an umbrella organisation consisting of 71 special sports federations and 21 district sports federations, which organises more than 250 different sports and 20,000 sports clubs, who are all members of the Confederation. Membership is only admitted to non-profit associations. Legally, the Swedish Sports Confederation is

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1 Karl Ole Möller is a partner at Advokatfirman Nordia. The information contained in this chapter is accurate as of November 2017.

2 The Swedish Sport Confederation – Sport in Sweden, available at [www.rf.se](http://www.rf.se).

itself a non-profit association that is regulated by the statutes agreed by its members.<sup>3</sup> The Confederation has the task of supporting its member federations and, in an official capacity, representing the whole Swedish sports movement in contacts with the authorities, politicians, and so on.

The sports clubs hold participating licences to take part in and compete in sports activities arranged by their respective special sport federation. The clubs are, however, allowed to transfer these rights to a wholly or partly owned limited liability company under certain conditions; for instance, that the sports club hold the majority of the votes at the general meeting of the limited liability company (the '51 per cent rule') and that the limited liability company is prohibited from transferring the sporting rights to a third party.<sup>4</sup> Many sports clubs with elite professional sport activities, such as the top-level clubs in football and ice hockey, have used this opportunity to have their elite teams in a separate legal entity, which may attract financial investors from private business. So far, only one of these limited liability companies, AIK Fotboll, has listed its shares on the public market.

The supreme authority of Swedish sports in all Olympic matters is the Swedish Olympic Committee (SOC). It comprises 35 national Olympic sports federations (about half of the special sports federations mentioned above) as well as 12 federations of sports recognised by the International Olympic Committee. The main responsibility for developing individual sports rest with the appropriate special sports federations, but the SOC aims to strengthen the work of these federations.

## **ii Corporate governance**

Swedish law does not provide for specific corporate governance rules for sports clubs or sport governing bodies. Sports in Sweden have historically received substantial state support, but the governance of sports has been semi-autonomous of the state and therefore self-regulation, rather than regulation by the state, has been the norm. However, in recent years, sport governance in Sweden has been subject to the effects of professionalisation, commercialisation and globalisation, as in the rest of the world. Therefore, sport governance in Sweden (including corporate governance) will most probably be going through a period of transformation. If the organisation is incorporated as a limited liability company, it will need to comply with the Swedish Companies Act. Listed limited liability companies are also subject to specific rules and recommendations on corporate governance, such as the Swedish Corporate Governance Code.<sup>5</sup> The Code may also be applied voluntarily by non-listed companies.

## **iii Corporate liability**

Swedish law does not provide any specific statutory provisions for liability of managers and officers of sport clubs or sport governing bodies. Most sports organisations are structured as non-profit associations and, in some cases, as limited liability companies. The board is responsible for the organisation and management of the organisation's business. The board shall continually assess the financial situation of the organisation and ensure that the organisation of the association or company is structured in such a way that the accounting,

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3 The statutes of the Swedish Sport Confederation 2013, available at [www.rf.se](http://www.rf.se).

4 Chapter 11, Section 3 of the Swedish Sport Confederation's statutes.

5 The Swedish Corporate Governance Code, available at [www.corporategovernanceboard.se](http://www.corporategovernanceboard.se).

the management of assets and the financial situation of the organisation in other respects are monitored in a safe manner. The board is also the organisation's organ, which represents the organisation officially and has the power to sign on behalf of the organisation.

A member of the board or an officer of a non-profit association may be liable for damages that he or she causes the organisation (or its members or shareholders) intentionally or negligently in the performance of his or her duties. The general rules of the Swedish Companies Act (2005:551) apply for those sports clubs that are organised as limited liability companies. Pursuant to the Companies Act,<sup>6</sup> an incorporator, a member of a board of directors or a managing director may be liable for damages that he or she causes the company (or a shareholder) intentionally or negligently in the performance of his or her duties. The board members are primarily responsible for the acts and omissions within the scope of the board's area of responsibility. The members of the board may be liable for acts taken by an officer of the organisation within the day-to-day management if they have neglected their duty to supervise. The level of care expected of the board members depends on various factors such as the type of business, the allocation of work between the board members and the qualifications and experience of the board member in question. Generally, board members are required to keep themselves informed of the association's financial situation and make decisions based upon sufficient information. They shall also respond to warning signals, such as liquidity problems. Board members are often entitled to rely upon information assembled by officers and others, provided that they have no reasons to suspect that the information is incorrect.

A member of the board and an officer of an organisation are similarly liable for damages that he or she intentionally or negligently causes a third party by violating the statutes of the association or the provisions in the Companies Act. A board member may also be subject to a wide range of further provisions in specific legislation, for instance, related to bookkeeping, annual accounts, tax payments, environmental matters, etc. Board members and officers of an organisation may also incur criminal liability under certain provisions of the Companies Act and for a number of offences under the Swedish Criminal Code, such as credit fraud, embezzlement, breach of trust and bribery.

Insurance policies against liability exposure for board members and officers may be obtained in Sweden and are quite common. The coverage, limit and premium of the insurance policies may differ between different insurers and most insurance policies are usually 'claims made' policies.

## II THE DISPUTE RESOLUTION SYSTEM

### i Access to courts

There are no established principles in Sweden regarding when the public courts can examine and decide on lawsuits in relation to decisions of sport governing bodies, for instance, decisions on disciplinary sanctions, etc. Generally, the public courts are restrictive with challenging decisions from sport governing bodies related to the specific rules of the sport and there are very few legal cases on this issue.<sup>7</sup> However, a public court can set aside a decision from a sports governing body if the decision involves at least some financial consequences for the athlete or if the decision is based on obvious unreasonable circumstances, such as

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6 Chapter 29, Section 1 of the Swedish Companies Act.

7 For instance, NJA 1990 p. 687, NJA 1998 p. 717, NJA 2001 p. 511 and RH 1997:111.



discrimination because of race or religion. In the absence of an agreement to arbitrate, the public courts have jurisdiction over all disputes outside the specific rules of the sport, such as employment law disputes or disputes related to commercial agreements, such as sponsorship agreements, venue agreements or merchandising agreements.

As will be further outlined, arbitration outside the public court system is the preferred method of dispute resolution in the Swedish sports sector. A public court may not, over an objection of a party, rule on an issue that, pursuant to an arbitration agreement, shall be decided by arbitrators. A party must invoke an arbitration agreement on the first occasion that a party pleads its case on the merits in the court. In such a case, the court will dismiss the legal proceedings, unless the arbitration agreement is invalid.<sup>8</sup>

## ii Sports arbitration

Disputes concerning matters in respect of which the parties have an unrestricted right of disposal may, by an agreement, be referred to arbitration. Such an arbitration agreement may relate to future disputes pertaining to a legal relationship specified in the agreement. The dispute may also concern the existence of a particular fact.<sup>9</sup> As mentioned above, a public court may not, over an objection of a party, rule on an issue that, pursuant to an arbitration agreement, shall be decided by arbitrators.<sup>10</sup>

The use of arbitration is very common in the Swedish sports sector. By the Swedish Sports Confederation's statutes, the sports federations, clubs and athletes are bound to resolve their disputes by arbitration and disputes may not be arisen in an ordinary court. Each special sports federation has its own arbitration board, with the Supreme Sports Tribunal as the final instance.<sup>11</sup> The Supreme Sports Tribunal deals with appeals against sport-related decisions and disciplinary sanctions handed down by the special sports federations. The Supreme Sports Tribunal also serves as the second instance of appeal for decisions made by the Doping Panel based on the Regulations for Anti-Doping.

During the pendency of a dispute before arbitrators or prior thereto, a state court may, irrespective of the arbitration agreement, issue such decisions in respect of security measures as the court has jurisdiction to issue.<sup>12</sup>

An arbitral award can only be declared invalid or wholly or partly set aside by a public court under certain specific conditions.<sup>13</sup>

## iii Enforceability

As stated above, a Swedish civil court may not, over an objection of a party, rule on an issue that, pursuant to an arbitration agreement, shall be decided by arbitrators.

A Swedish arbitration award is enforceable as a court judgment after a decision of the Swedish Enforcement Service.<sup>14</sup> Swedish arbitration awards can be challenged on certain

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8 Section 4 of the Arbitration Act; Chapter 10, Section 17a of the Swedish Code of Judicial Procedure.

9 See the Swedish Arbitration Act (1999:116).

10 Section 4 of the Arbitration Act; Chapter 10, Section 17a of the Swedish Code of Judicial Procedure.

11 Chapter 2, Section 8 of the Swedish Sports Confederation's statutes.

12 Section 4 of the Arbitration Act.

13 Sections 34–36 of the Arbitration Act.

14 Chapter 3, Section 15 of the Swedish Enforcement Code (1981:755).

formal grounds only<sup>15</sup> (e.g., if it includes determination of an issue that, in accordance with Swedish law, may not be decided by arbitrators, or if the award is clearly incompatible with the basic principles of the Swedish legal system).

In accordance with the 1958 New York Convention, to which Sweden is a party, arbitral awards are recognised and enforceable in most countries. Foreign arbitration awards may be enforced in Sweden upon application to the Svea Court of Appeal. Enforcement may only be denied on the basis of certain formal grounds. Where the Court of Appeal grants the application, the award shall be enforced as a final judgment.<sup>16</sup>

### III ORGANISATION OF SPORTS EVENTS

#### i Relationship between organiser and spectator

The sale of a ticket to a sports event is a legal contract between the spectator and the sports event organiser. This contractual relationship is governed by the Contracts Act and the general principles of contract law. It is important that the ticket terms and conditions are brought to the attention of the spectator at the time he or she is purchasing the ticket. Access may be granted to the spectator on certain specified terms and conditions, which are usually reflected on the ticket itself, by notices placed at and outside the venue, or if the ticket is purchased on internet, with clear notice to the purchaser that specific ticket conditions apply, which should be listed in full on the website. For major sports events, it is often necessary and desirable for an event organiser to impose specific terms and conditions of entry, such as the possibility to refuse access to the event for security reasons, imposing restrictions on resale of the ticket, taking film or recording footage of the event, restricting access to the event to certain specified areas of the venue, and specifying the ticket holder is over a certain age. The purchase of the ticket will be deemed to be an acceptance of these terms and conditions, so that a contract will exist between the event organiser and the purchaser of the ticket. Breach of these terms and conditions would render the ticket void and the event organiser will usually reserve the right to eject from the venue any person who fails to comply with the ticketing conditions or who represents a security risk, nuisance or annoyance to the staging of the event.

The event organiser's main obligation is to organise and stage the event. If the event is cancelled or postponed prior to the start of the event, the spectator shall normally be entitled to a refund in the amount of the face value of the ticket or be able to attend the event at the rearranged date.

#### ii Relationship between organiser and athletes or clubs

The legal relationship between the event organiser and the athletes or clubs is primarily governed by the statutes of the relevant special sports federations and general principles of contract law and the Contracts Act. In large sporting events the relationship may also be subject to rules and regulations imposed by international governing bodies. The contracting issues may be very complex in large-scale sport events, for instance, international sport events, where the event organiser is contracting with a number of participating athletes, clubs, teams or representative bodies.

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15 Sections 33–34 of the Arbitration Act.

16 Sections 54–59 of the Arbitration Act.

The primary obligations on the part of the event organiser will usually include the organising and staging of the sport event in a professional manner and in accordance with the standards expected for such an event and to provide a suitable and safe venue for the event. The primary obligations on the part of the athlete and clubs will usually include participation in the event in accordance with the terms and conditions of the participation contract, the event or tournament rules, the rules and regulations of governing bodies (such as rules regarding doping and disciplinary infringements) and the laws of the game.

### iii Liability

#### *Liability of the organiser*

An event organiser's civil liability is governed by the Swedish Tort Liability Act (1972:207) and Swedish case law.<sup>17</sup> Under Swedish law, damage in non-contractual liability normally covers personal injury and loss of or damage to property. Compensation for pure financial loss is excluded, except in case of criminal behaviour.<sup>18</sup>

Liability for damages arises only when the event organiser acts intentionally or negligently. If a claim is made as a result of an incident, an event organiser that has taken all reasonable steps to manage the risks at the event would be more likely to successfully defend a claim or minimise the amount of damages awarded against the event organiser. The event organiser shall take all reasonable steps to prevent incidents from occurring at the sport event. If the event organiser had done what could be considered reasonable in the circumstances, a court would probably find that there was no negligence on the part of the event organiser.

An event organiser may be liable to compensate injury caused by an employee in the course of his or her employment.<sup>19</sup> It is a general principle of Swedish tort law that damages can be reduced if the plaintiff has contributed, by fault or negligence, to the injury sustained.<sup>20</sup> Damages are assessed on the basis of the injury suffered by the plaintiff. Damages are awarded only for injury actually sustained. However, there are no formal limitations as to the level of damages. Punitive or exemplary damages are not available under Swedish law.

An event organiser that acts as an employer will also be subject to various statutory duties imposed by legislation to ensure the health, safety and welfare of its employees.<sup>21</sup> Individuals acting for an event organiser may also incur criminal liability for a number of offences under the Swedish Criminal Code, such as credit fraud, embezzlement, breach of trust and bribery. Authorities will generally have to investigate criminal matters *ex officio*.

#### *Liability of the athletes*

The statutes of the Swedish Sport Confederation include, *inter alia*, provisions regarding dispute resolution with sanctions that can be imposed on member organisations and individuals (including athletes). Athletes bind themselves contractually to comply with the

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17 Only a few relevant cases have been decided by the Swedish Supreme Court so far, all related to failure to secure a safe venue (NJA 1950 p. 550, NJA 1959 p. 280 and NJA 1993 p. 149).

18 Pursuant to Chapter 1, Section 2 of the Swedish Tort Liability Act (1972:207), pure financial loss means economic injury arising without any person having concurrently sustained loss of life, personal injury, or loss of or damage to property.

19 Chapter 3, Section 1 of the Tort Liability Act.

20 Chapter 6, Section 1 of the Tort Liability Act.

21 See, for example, the Swedish Work Environment Act (1977:1160).

rules of their club, their district and national federations, the Swedish Sport Federation and the corresponding international rules, for instance, the new World Anti-Doping Agency (WADA) Code.

An athlete's civil liability is governed by the Tort Liability Act and Swedish case law. Liability for damages arises only when the athlete acts intentionally or negligently. Athletes may be held liable for damage or injury caused to other athletes, spectators, etc.

Athletes have normally accepted the risks inherent in the specific sport, *violenti non fit iniura*. In some sports, violence is a natural part of the exercise. However, violence between athletes may constitute a criminal case even in sports where more violence than normal remains allowed (e.g., ice hockey and boxing). The question of civil and criminal liability for athletes has been dealt with by Swedish public courts in several cases.<sup>22</sup> Some of the actions that are happening in the context of sporting activities can by juridical argumentation be given criminal liability. Other actions can be significantly more difficult to call criminal liability. If a clear distinction cannot be found, an assessment of each sport itself needs to be done. As long as the athlete adheres to the relevant sporting rules, his or her actions will most likely not incur any civil or criminal liability. However, violence that takes place in a different part of the playing field than the game will meet with a greater risk of prosecution and conviction.<sup>23</sup> In a much-debated court case in 2017, a Swedish professional hockey player was convicted for assault after he struck an opposing player across the neck with his hockey stick during a game in 2015. Offences against personal reputation may also occur. In a defamation case in 2017, the former head coach of the Swedish national athletics team was sentenced by a district court for gross slander for having insinuated that professional football player Zlatan Ibrahimovic had used illegal substances during his time playing for Juventus. Sports-related violence is subject to public prosecution. Authorities will generally have to investigate criminal matters *ex officio*.

### ***Liability of the spectators***

A spectator's civil liability is governed by the Tort Liability Act and Swedish case law. A spectator may be held liable in respect of damage to property or personal injury caused to the event organiser, other spectators or athletes. Liability for damages arises only when the spectator acts intentionally or negligently. Spectators may also incur criminal liability for a number of offences under the Criminal Code.

### **iv Riot prevention**

Following tragic incidents related to hooliganism at Swedish football grounds, legislation was introduced in 2005 relating to the access to sport events.<sup>24</sup> According to the Act, an individual may be prohibited to enter a venue where a sport event is going to be held. A banning order from a public prosecutor can be made against, for instance, a violent supporter,<sup>25</sup> for up to three years. Such an order can be imposed owing to the individual's previous violence at sport events, previous convictions for sports-related violence, etc. Anyone breaking the banning order will be sentenced to a fine or maximum of two years' imprisonment. In March 2017,

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22 For instance, NJA 1951 p. 79, NJA 1957 C 676, NJA 1974 p. 585, NJA 1993 p. 149, RH 2011:62 and RH 2012:56.

23 NJA 1957 C 676 and RH 2011:62.

24 Act (2005:321) on denial of access to sport events.

25 Sections 1–3 of the Act (2005:321) on denial of access to sport events.

new anti-hooligan legislation was introduced for a ban against covering one's face at sporting events. The new rules mean that, with some exceptions, people inside an arena who cover their face in a way that prevents identification may be sentenced to a fine or maximum of six months' imprisonment. Currently, only clubs organised as limited liability companies have to make a financial contribution for measures taken by the police to prevent riots at sports events, which has been much debated within the Swedish football sector.

## IV COMMERCIALISATION OF SPORTS EVENTS

### i Types of and ownership in rights

Swedish law does not recognise independent proprietary rights to an event *per se*. The idea or concept for a sport event is not protectable under Swedish intellectual property laws. However, the sport event organiser can usually protect the sport event and the commercial rights to the event through a combination of real property law, contractual provisions, intellectual property law and tort law. The event organiser often controls access to the venue in which the event is going to be held. The event organiser may restrict third-party access to the venue and ensure, through various agreements, that the spectators, athletes and others admitted to the event are not entitled to benefit commercially from their attendance. The control over the venue is based on the laws of real property, contract and tort law. Tort law generally makes a trespasser of anyone who enters onto the land without permission, or enters with permission but then violates the terms and conditions of that permission. The event organiser can also protect and commercially exploit the various commercial rights in the event through agreements regarding the entry to the event (ticketing), sponsorship, broadcasting, merchandising, catering, hospitality, etc. Broadcasting agreements are regarded as the most valuable source of revenue to the sport event organisers and the development of the internet and other media as additional broadcasting mediums will have an impact on the business of broadcasting in the coming years.

### ii Rights protection

Rights related to exploitation and commercialising of sports-related rights can be protected through a variety of intellectual property rights listed below.

#### *Copyright and database rights*

In Sweden, no particular form of copyright covers sports events specifically and an athlete's performance during a sports event would not be protectable in itself, but the provisions of the Act on Copyright in Literary and Artistic Works (1960:729) (the Copyright Act) can anyway successfully be applied to the sports industry. The Copyright Act protects the expression of an original work, such as literary, dramatic, musical, artistic works, broadcasts and sound recordings, with a protection ranging from 50 to 70 years.<sup>26</sup> The protection will arise automatically on the expression of the work. The compilation and use of sports databases for commercial reasons may also be protectable under the Copyright Act under certain conditions (such as substantial investment in the obtaining, verifying or presentation of the contents of the database). As mentioned, an athlete's performance during a sports event

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26 See Chapters 4 and 5 of the Swedish Copyright Act.

would not be protectable in itself, but any recording (sound recordings, visual recordings and audiovisual recordings), broadcast and footage of that performance may be protectable under the Copyright Act.

### ***Trademarks***

A trademark (a mark that denotes the nature or origin of goods or services) can be registered for a period of 10 years in the Trademark Register kept by the Swedish Patent and Registration Office and can be renewed (each time for a period of 10 years from the expiry of the previous registration period).<sup>27</sup> The owner of the mark can bring an action against anyone making unauthorised use of the mark. A name or logotype that is subject to trademark protection grants exclusive rights to the proprietor and prevents all third parties from unauthorised use of the name, or any sign confusingly similar with that name, within the course of trade. A trademark may consist of words (e.g., the name of a well-known athlete), signatures, symbols, emblems, numerals, patterns or the shape of goods or their packaging, provided that the signs are distinctive.<sup>28</sup> The trademark registration is territorial in nature (i.e., enforceable in Sweden) and may be infringed by conduct that takes place in Sweden, but it will not be infringed by conduct that takes place in a foreign jurisdiction, unless it has also been registered in that jurisdiction's trademark registry (or as an EU trademark).

### ***Image rights or rights of publicity***

Swedish law recognises an independent right to protect a recognised athlete's personal name or picture against exploitation in commercial contexts by the Act (1978:800) on Names and Images in Advertising (the Names Act). The Act gives fundamental protection against tradesmen's use of well-known athlete's name in marketing without the explicit permission from the athlete.<sup>29</sup> Nevertheless, many recognised professional athletes in Sweden choose to protect their names as trademarks in accordance with the Trade Marks Act. The Names Act may be applied on most types of trademark use as well. The two Acts are therefore applicable in many corresponding situations.

### **iii Contractual provisions for exploitation of rights**

The sports industry is massive and fast-growing, both abroad and in Sweden. As a general rule, Swedish law does not require that any mandatory statutory provisions are to be incorporated into commercial agreements regarding the exploitation of sport-related rights or apply under such contracts. As mentioned in Section IV.i, sport events will usually require several different agreements, such as broadcasting contracts, sponsorship contracts, ticketing contracts and merchandising contracts. Sometimes such contracts can be very short and simple, depending on the size of the sport event and the extent and value of the commercial rights packages offered to, for instance, a sponsor. However, large-scale sport events usually include a complex collection of rights and obligations, and the contracts tend to be comprehensive and detailed. Key deal terms for these contracts will usually be the term and duration of the contract, the territory in which the sponsor can exploit the sponsorship rights, the nature and scope of the sponsor's rights (such as exclusive or non-exclusive rights to naming and title rights, official

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27 Chapter 2, Section 32-33 of Swedish Trade Marks Act (2010:1877).

28 Chapter 1, Section 4 of the Swedish Trade Marks Act.

29 Section 1 of the Names Act.

supplier rights, advertising rights or presentation rights), the use of trademarks or logos, the remuneration to be paid for the rights and warranties from the parties (e.g., that the event organiser owns or controls all rights in and to the sports event).

## V PROFESSIONAL SPORTS AND LABOUR LAW

### i Mandatory provisions

Swedish employment law is generally applicable to the relationship between clubs and athletes within all sports.<sup>30</sup> Whether an athlete is considered as an employee or not, is determined on principles according to Swedish employment law and not on the sporting definition of amateur or professional, although the definitions of an employee and a professional athlete often overlap.<sup>31</sup> The characteristics of an employment agreement are that one person (the employee) carries out work for another (the employer) under the supervision and management of the employer from which the direct benefit goes to the employer; and from which the employee receives financial compensation. If these requirements are fulfilled, the labour legislation sets the minimum level for the conditions of employment. It has been well established that athletes in the most commercialised team sports (e.g., football and ice hockey) are regarded as employees. On the other hand, individual athletes (such as tennis players, golfers, track and field athletes) who perform sports activities for a sports club are usually not considered to be employees of the club, especially if they perform their activities through wholly owned legal entities, such as limited liability companies.

According to Swedish employment law, the general rule regarding form of employment is an indefinite employment, although, temporary employments up to a fixed term of two years are accepted.<sup>32</sup> However, exceptions from the temporary employment rule are possible, by agreeing on permission for longer temporary employment in a collective bargaining agreement, such as the collective bargaining agreements currently existing in elite football and ice hockey.<sup>33</sup> The collective bargaining agreement for football allows temporary employment for up to five years, while in ice hockey the general principle is one or two years at a time.

The general principle regarding temporary employment states that the contract may only be terminated upon expiry of the contract or by mutual agreement. Most athletes have a temporary employment without any provision regarding premature termination. This means that the parties cannot terminate the contract (or the athlete switch club) before the fixed date, unless a material violation of the contract has occurred<sup>34</sup> or if the parties mutually agree to terminate the contract. According to Swedish employment law, it is possible to terminate the employment relationship with immediate effect if the employee has grossly violated his

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30 For instance, the Swedish Employment Protection Act (1982:80), which is to a large extent compulsory to the benefit of the employee. It is, however, possible for the parties on the labour market to deviate from parts of the Employment Protection Act by way of a collective bargaining agreement.

31 Johan Lindholm, 'Idrottsjuridik', *Norstedts Juridik* AB 2014, pp. 142–143.

32 Section 5 of the Employment Protection Act.

33 Collective Bargaining Agreement for Football Players (2016) and General Employment Terms and Conditions for Ice Hockey Players in SHL (2013).

34 AD 1976 No. 52, AD 1979 No. 152 and AD 1991 No. 81.

or her liabilities according to the contract (i.e., ground for dismissal, e.g., if the athlete has committed a serious doping offence) or if the sports club materially has violated its liabilities according to the contract (e.g., by violating its payment obligations towards the athlete).

There are no mandatory provisions in Swedish law with regard to salary protection for employed athletes. Salary and other employment benefits are subject to individual negotiations between the sports club and the athlete.

## ii Free movement of athletes

Sweden is a member of the EU and, as such, subject to the EU rules regarding the free movement of labour, cross-border competition and discrimination. After the *Bosman* case of 1995,<sup>35</sup> sports were recognised as an employment market in Sweden, where athletes were entitled to a more far-reaching employment law protection. Thus, one consequence of the *Bosman* case has been that Swedish sport clubs and associations have adjusted their internal rules and regulation to comply with EU law. In team sports, operations that restrict the number of players from EU Member States are prohibited, but the number of non-EU players may be limited to some extent. The Swedish Football Association has adopted rules whereby the 'home-grown' rule is introduced.<sup>36</sup> A 'home-grown' player has been registered for a Swedish football club for at least three years from the ages of 12 to 21 years. This specific rule applies to the elite divisions within Swedish football, meaning that at least half of the players noted in the football club's player list are required to be home-grown players.

## iii Application of employment rules of sports governing bodies

Swedish athletes are often bound by regulations of (international) sports governing bodies by agreement or in their employment agreements. Such regulations would, however, be considered invalid and unenforceable if such regulations violate mandatory provisions in Swedish employment law. Subject to the requirement to incorporate mandatory provisions, the parties are free to decide upon the terms of employment agreements.

## VI SPORTS AND ANTITRUST LAW

The competition law regime has at EU level, for a long time, been applied to different sports contracts and agreements. During the 1990s, the *Bosman* ruling on transfer rights for football players was in focus. Since then, issues such as TV rights to football broadcasts have been tried several times. Swedish sports currently have a considerable economic dimension, in addition to the social dimension and public health considerations. Clubs and sport governing bodies, to the extent that they engage in economic activity, must respect the rules of the Competition Act (2008:579). The Competition Act applies to the business activities of sports event organisers and sports governing bodies when they hold a dominant position in relation to the business activities in question.

In Sweden, the first competition law case regarding sports contracts and agreements was tried in 2012. In 2011, the Swedish Competition Authority (SCA) adopted a much-debated decision against the Swedish Automobile Sports Federation, Svenska Bilsportförbundet (SBF). The decision concerned SBF's statutory rules, which contained duty of loyalty clauses

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35 ECJ, judgment of 15 December 1995 – C-415/93 (*Bosman*).

36 The Swedish FA's representation conditions 2016.



preventing licensed drivers and stewards from participating in races other than those organised by SBF or its member clubs. The SCA found that these duty of loyalty clauses amounted to an illegal restriction of competition that could not be objectively justified and ordered SBF to change its rules. The intention was to make it possible for drivers and officials to participate in competitions organised by independent operators. SBF chose to appeal the decision, after which the Swedish Market Court in 2012 sided with the SCA and stated that notwithstanding the specific nature of the sport, the rules were neither considered as being necessary nor proportionate in order to achieve their legitimate objectives.<sup>37</sup> The Market Court's judgment received much attention in the media where the Swedish Sports Confederation primarily strongly disputed that competition law could be applied. The Market Court's ruling shows, as was already established at the EU level, that no sector is free from competition law review. This case may be followed by other cases where the conduct of sports clubs will be challenged from a competition law perspective.

## VII SPORTS AND TAXATION

The general Swedish tax rules, for example, the Income Tax Act (1999:1229), apply to athletes, sports clubs and sport governing bodies. As far as national income tax is concerned, Swedish legal entities are subject to an unlimited tax liability (22 per cent). Most Swedish sports clubs, however, are non-profit associations and, as such, most of their activities are tax-free. A non-profit association cannot engage in commercial activities in order to enrich its members, but only in support of a non-commercial purpose. A non-profit association can therefore, under certain circumstances, enjoy relief on payment of income tax and it is therefore only liable for taxation on income from business relating to real property and business activities. Consequently, such an association enjoys exemption from taxation on regular income from capital and capital gains, membership dues, contributions to the public service activities, donations and testamentary dispositions, while income from real property and business activities is in principle liable to taxation.<sup>38</sup> Tax-privileged non-profit associations that pay taxable remuneration and benefits to its employees (e.g., its athletes, trainers) shall, like other employers, pay social security contributions on the remuneration and the benefits.

Individual athletes living in Sweden permanently are taxed under the Income Tax Act for all income received. Taxable income includes cash payments or other forms of remuneration for sporting activities that are performed in Sweden or abroad. A non-resident athlete who derives taxable income from Sweden must, as a rule, also pay tax in his or her country of residence. The same double taxation problems occur when Swedish athletes and taxable sports clubs participate in sports events abroad. To avoid double taxation of the same income, Sweden has entered into double taxation treaties with other countries. In some cases, the provisions of the double taxation treaty can mean that special income tax does not need to be paid. Double taxation is usually eliminated by deducting the tax paid abroad when counting the annual gross income of an athlete or club.

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37 Case MD 2012:16.

38 See the Swedish Tax Agency's guide SKV 324 regarding tax rules for non-profit associations of public utility, March 2016.

Payment of remuneration to non-resident athletes and others may be made on particularly favourable tax terms for a limited period of time in accordance with the rules of the Act on Special Income Tax for Non-resident Artists and Others (SFS 1991:591, A-SINK).<sup>39</sup>

## VIII SPECIFIC SPORTS ISSUES

### i Doping

The Doping Act (1991:1969) covers certain specific doping substances that are criminalised: synthetic anabolic steroids, testosterone, growth hormones, and chemical substances, which enhance the production or release of testosterone and its derivatives or of growth hormones. These substances may not be imported, transferred, manufactured, acquired for transferal purposes, offered for sale, held or used. Anyone wilfully breaking the Act will be sentenced to a maximum of two years' imprisonment. If a violation is considered to be a misdemeanour, a fine or a sentence of maximum six months' imprisonment will be imposed. However, if a violation is considered to be serious, a sentence of minimum six months and maximum six years' imprisonment is imposed for a serious felony. When judging the seriousness of the crime, it shall be heeded whether it has formed a part of activities carried out on a large scale or commercially and comprising a particularly large amount of doping preparations, or otherwise been of an especially dangerous or ruthless nature.

The anti-doping programme within the Swedish sports movement is led and coordinated by the Swedish Sports Confederation and its Doping Commission.<sup>40</sup> In 2004 the Swedish Sports Confederation implemented the WADA uniform and global World Anti-Doping Code in its own Regulations for Anti-Doping. The Regulations for Anti-Doping generally apply to all athletes under the Swedish Sports Confederation who engage in competitive sports. All positive doping results are investigated by the Doping Commission, which decides if the matter should be reported for disciplinary action. The primary instance of decision on disciplinary actions for all sports is the Doping Panel of the Sports Confederation. The decision may be appealed to the Swedish Supreme Sports Tribunal.

### ii Betting

Betting on sports events in Sweden is regulated in the Lotteries Act (1994:1000). The Swedish Gambling Authority has overall responsibility for licensing and supervision within the field of gambling and monitors compliance with the Lotteries Act. Organising and advertising of betting on sport events is strictly prohibited in Sweden, except for two selected companies. The first, ATG, runs the horse racing industry in the country. The second, Svenska Spel, is owned by the state and controls all other sports gambling, as well as the country's lotteries, casinos and most forms of online gambling. These companies have a statutory obligation to prevent abuse or crime, as well as harmful social and health effects of gambling and betting. In order to uphold the Swedish gambling regime, the Lotteries Act contains a prohibition on promoting participation in lotteries arranged outside Sweden and unlawful lotteries. The prohibition of participation in foreign or unlawful lotteries covers such activities as selling

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39 See the Swedish Tax Agency's guide SKV 520B regarding payment of remuneration to non-resident artists, athletes and others, October 2015.

40 Chapter 13 of the Swedish Sports Confederation's statutes.

lottery tickets, receiving stakes or passing on prizes and advertising. A fine or a maximum of two years' imprisonment may be imposed on persons who unlawfully arrange a lottery or promote participation in gaming arranged outside Sweden. Foreign companies, along with private Swedish companies, have long tried to gain a foothold on the Swedish sportsbook industry. Unibet, Sweden's largest private sportsbook operator has been battling against Svenska Spel's monopoly for many years, but success does not appear to be imminent.

### iii Manipulation

Swedish sporting associations, the gambling industry, the justice system and the media have paid increasing attention to match-fixing in recent years, mainly within football. The number of cases is growing and the consequences are serious. Individual teams and athletes are the primary victims of manipulated matches, but, in the long run, they can also damage the credibility of the sports movement, cause losses to gambling companies and their customers, and contribute to diminished societal trust in general.

The Swedish National Council for Crime Prevention (Brå) produced a report in 2015 on match-fixing in Sweden. The report includes suggestions for a number of measures that Swedish sport governing bodies, the police, Svenska Spel and the government ought to take in order to prevent crimes of this nature. Match-fixing and other manipulation of sports activities has so far no specific and separate penal provision in the Criminal Code. However, penalty may be imposed for fraud, under which a person committing fraud shall be liable to imprisonment of up to two years, and in particularly serious cases up to six years.<sup>41</sup> A penalty may also be imposed for corruption (bribery) in connection with match-fixing and other manipulation of sports activities. The sentence for bribery varies from fines to imprisonment of up to two years, and in particularly serious cases up to six years.<sup>42</sup>

In 2015, the Swedish Sports Confederation adopted a general code to fight the manipulation of sporting competitions.<sup>43</sup> According to the code, it is prohibited to wilfully or negligently take part in betting and manipulation of sports activities in the ways described in the code. The code applies to all members of the Swedish Sports Confederation (such as sports federations, clubs or individual athletes who participate in sport activities under the auspices of a federation or a club). Sanctions may be imposed in the form of a temporary ban for individuals for up to 10 years, fines (for sports federations and clubs) and cancellation of results achieved in competitions, etc.

In 2015, a court of appeal in Sweden rendered Sweden's first landmark decision in match fixing and found six people, including three former footballers, guilty of taking bribes to manipulate the outcome of a football match in Division 1, the third level of the Swedish football league system. The Swedish Supreme Court denied leave to appeal. In 2017, a football match in Allsvenskan, the highest level of the Swedish football league system, had to be postponed owing to suspected match-fixing.

The Swedish Sports Confederation has recently proposed to the government that a specific criminal provision with regard to the manipulation of sports activities shall be introduced in the Lotteries Act.<sup>44</sup>

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41 Chapter 9, Sections 1–3 of the Swedish Criminal Code.

42 Chapter 10, Section 5(a-c) of the Swedish Criminal Code.

43 The Swedish Sports Confederation's Regulations on prohibited betting and manipulation of sports activities (match fixing).

44 [www.rf.se/Allanyheter/2016/Skarptlagmotmatchfixing?](http://www.rf.se/Allanyheter/2016/Skarptlagmotmatchfixing?)

#### **iv Grey market sales**

In Sweden, there are, at present, no laws against ticket touting, and it is very common at online outlets and has been much debated in Sweden. Ticket resale by scalpers above face value is, however, still legal in Sweden regardless of limitations imposed by the event organiser. Official ticket sellers have tried to prevent grey marketing by including a prohibition against reselling the tickets in its sale agreements or on the tickets themselves. Thus, reselling the ticket would be considered a contractual breach. Also, ticket quotas per customer and designating tickets for specified customers who can identify themselves have been used to prevent grey market sales.

### **IX THE YEAR IN REVIEW**

Pressure continues on the Swedish sport governing bodies, police and the government to fight against the manipulation of sports competitions. Integrity is critical for sport and match-fixing strikes at the very heart of it. The Swedish Sports Confederation and the Swedish Football Association have recently required betting companies involved in online betting to cooperate with the sports governing bodies in order to investigate match-fixing. Furthermore, the sports federations of all the Nordic countries decided in September 2017 to set up a joint task force to review the possibility of having a ban in one country extended to include a ban on participation in the same sport in any of the other Nordic countries. The joint task force will also review the possibilities of developing unified reporting systems between the countries. In 2017, the fallout from the infamous Russian doping scandal continues unabated and the Swedish Sports Confederation and its Doping Commission are among the 17 national anti-doping organisations that have called for Russia to be banned from the 2018 Winter Olympics in South Korea. The e-sports industry is quickly growing to overtake conventional sports for popularity and viewership and the Nordic countries are in an excellent position to dominate this new arena in the near future. The Nordic region's reputation for producing some of the world's best-selling games is based on a huge gaming community. Sweden has more professional eSport players than any other country, closely followed by Denmark, Finland and Norway. However, the Swedish eSports Association has not yet been successful in becoming a member of the Swedish Sports Confederation.

### **X OUTLOOK AND CONCLUSIONS**

The sports sector is continuing to grow rapidly in Sweden and the awareness of laws affecting sports and the sports industry has therefore increased. It can be assumed that antitrust laws will continue to influence the way sport is organised in Sweden, since the professionalisation, commercialisation and globalisation of the sports sector is growing, both abroad and in Sweden, and the economic and financial interests is becoming more complex. The introduction of the new European data protection rules (GDPR) in 2018 will also give rise to legal implications for big data, sports analytics and player metrics. Sports organisations in Sweden (particularly sports governing bodies and clubs) that monitor their athletes must be acquainted and compliant with the new GDPR in order to avoid hefty sanctions under the new data protection rules. The e-sports industry will continue its rapid growth and e-sports stakeholders will have the opportunity to learn lessons from traditional sport in relation to regulatory and governance perspective as well as from certain commercial aspects.

# SWITZERLAND

*András Gurovits and Victor Stancescu*<sup>1</sup>

## I ORGANISATION OF SPORTS CLUBS AND SPORTS GOVERNING BODIES

The Swiss Constitution (BV) protects the principle of freedom of association under which every person has the right to form, join or belong to an association and to participate in the activities of such association.<sup>2</sup> In addition, the BV protects economic freedom, which includes, in particular, the freedom to choose an occupation and the freedom to pursue a private economic activity.<sup>3</sup> These constitutional provisions form the basis of the liberty to set up legal entities in various forms, including associations and share corporations, which are the most commonly used forms of entities in the area of sport. The Swiss Civil Code (ZGB) and the Swiss Code of Obligations (OR) provide a more detailed legal framework for associations and share corporations.

Within the boundaries of the mandatory statutory legislation, parties are free to determine at their discretion all relevant aspects of the organisation and management of a legal entity such as its structure and internal judiciary system. In particular, the statutory framework for associations provided in the ZGB is very liberal, providing not more than 23 articles of rather generic content.<sup>4</sup> This ensures a very friendly environment for sports governing bodies, which make full use of this freedom to enact comprehensive statutes and regulations that fit their organisations' specific goals and needs.

### i Organisational form

The ZGB and the OR provide the basic statutory framework permitting the establishment of associations, share corporations and limited liability companies.<sup>5</sup>

In contrast to the corporate world, where businesses operate as share corporations or limited liability companies, most sports federations domiciled in Switzerland (e.g., FIFA, UEFA, the International Handball Federation, the International Cycling Union and the World Rowing Federation) are organised as associations. They are established and managed by

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1 András Gurovits is a partner and Victor Stancescu is an associate at Niederer Kraft Frey Ltd.

2 Article 23 BV.

3 Article 27 BV.

4 Articles 60–79 ZGB; Heini/Scherrer, in Basler Kommentar, Zivilgesetzbuch I, 5th ed. (BSK ZGB I-Heini/Scherrer), preliminary notes to Articles 60 to 79, Paragraph 10 et seq. and Article 64, Paragraph 4; Arthur Meier-Hayoz, Peter Forstmoser, *Schweizerisches Gesellschaftsrecht mit Einbezug des künftigen Rechnungslegungsrechts und der Aktienrechtsreform*, 11th ed., Berne 2012, p. 675.

5 In particular for associations, Article 60 et seq. ZGB; for share corporations, Article 620 et seq. OR; and for limited liability companies, Article 772 et seq. OR.

their members, and have neither any defined share capital nor, as a consequence, shareholders. Sports federations organised as associations have a participatory nature. They do not have a defined company capital and quota or shares that can be held by owners. In addition, the decision-making process follows the per capita principle (i.e., each member has, as a rule, one vote in members' meetings).<sup>6</sup> However, this principle is not mandatory and it is permissible to deviate from it if there are valid reasons.<sup>7</sup> According to the statutes of the Swiss Ice Hockey Federation, each first division club has three votes, while the second division clubs have only two votes in the National League assembly. Allocation of voting power according to size or sporting performance, or both, of a stakeholder has become an increasingly important topic in national and international sports federations.

In contrast to associations, share corporations and, in some limited cases limited liability companies, are the forms used for professional sports teams, and in particular for football<sup>8</sup> and ice hockey teams.<sup>9</sup> These types of entities have a capitalistic structure and provide a defined company capital divided into specific quota, usually shares, held by the company's owners (i.e., the shareholders). In principle, the more stock a shareholder holds, the stronger his or her influence will be on the decision-making process at the shareholder level (i.e., at shareholders' assemblies). Share corporations are often used in Switzerland to operate a sport club's professional team (e.g., in football or ice hockey). The junior teams and, if any, the recreational teams remain part of the club (or association) that maintains a close contractual relationship to the share corporation operating the professional team. According to a more recent trend, sports clubs hold a group of separate legal entities to which certain business areas or outsourced.<sup>10</sup>

Despite the above differences, share corporations and associations have various important aspects in common. Both types of organisations are legal entities with their own legal identity and company name;<sup>11</sup> have different decision-making and management bodies; and have their own personnel performing the required strategic, operational and administrative functions.

## ii Corporate governance

The members of associations established under Swiss law enjoy wide discretion in terms of structuring and administering an entity, for instance in respect of establishing its internal governance, the rights and obligations of the members as well as the judiciary instances.<sup>12</sup> It is because of this fundamental liberty that the form of association is very often chosen not only for (non-professional) sports clubs, but also for national and international sports federations. According to a review undertaken by the Swiss Federal Office of Sport in 2017, more than 19,000 sports clubs forming part (through their relevant national federations)

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6 Article 64 ZGB in conjunction with Article 67 ZGB.

7 Meier-Hayoz, Forstmoser, footnote 4, p. 677.

8 For example, FC Basel 1893 AG, Grasshopper Fussball AG.

9 For example, EHC Kloten Sport AG.

10 For example, EVZ Sport AG, EVZ Holding AG, EVZ Management AG, EVZ Gastro AG, EVZ Nachwuchs AG; The Hockey Academy AG.

11 Article 52 et seq. ZGB.

12 BSK ZGB I-Heini/Scherrer, footnote 4, preliminary notes to Articles 60 to 79, Paragraph 10 et seq.; Meier-Hayoz, Forstmoser, footnote 4, p. 675.

of Swiss Olympics were organised as associations.<sup>13</sup> The form of association is chosen for small sports clubs with less than 100 members (68 per cent of all sports associations) as well as for large clubs with more than 300 members (8 per cent of all sports associations).<sup>14</sup> Once an association is operating a trading, manufacturing or other type of commercial business, it is obliged to enter it in the commercial register.<sup>15</sup> This duty typically applies to national and international sports governing bodies that generate material income through the commercialisation of the sports events organised under their auspices.<sup>16</sup> The obligation of an association to register itself in the commercial register also triggers a duty to keep accounts in compliance with the statutory requirements on commercial accounting and financial reporting.<sup>17</sup>

In light of the economic and (sport) political power of major sports bodies (such as FIFA, UEFA or the IOC), corporate governance within, and organisation of, such sports bodies has also become a topic of scrutiny by the legislator.

### iii Corporate liability

The rules on the corporate liability of sports organisations as well as their managers and directors are set out in the OR (in respect of share corporations and limited liability companies) and the ZGB (in respect of associations).

In respect of the corporate liability of associations, the relevant statutory framework is rather simple. It provides that persons acting on behalf of an association bind it by concluding legal acts as well as by other actions, and that an association's managers may become personally liable for their wrongful acts.<sup>18</sup>

The liability of managers and directors of a share corporation is subject to comprehensive statutory regulation pursuant to the OR.<sup>19</sup> Managers and directors of a share corporation can be held liable in relation to the company, the shareholders and, under certain conditions, the company's creditors for any loss or damage arising from any intentional or negligent breach of their duties.<sup>20</sup>

A legal entity and its managers and directors can also become liable for criminal acts in accordance with the Swiss Penal Code (StGB). If a criminal act has been committed by or in a company during the exercise of a commercial activity, and if it is not possible to attribute this act to a specific natural person within the company owing to its inadequate organisation, the act will be attributed to the company, which shall be sanctioned accordingly.<sup>21</sup> On the other hand, if the wrongdoer can be identified, he or she will be sanctioned.

For some specific offences (e.g., criminal organisation, financing of terrorism, money laundering, bribery of Swiss and foreign public officials), the company will be subject to

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13 Markus Lamprecht, Rahel Bürgi, Angela Gebert, Hanspeter Stamm, 'Sportvereine in der Schweiz, Bundesamt für Sport BASPO', Magglingen 2017, p. 7.

14 *ibid.*, p. 8.

15 Article 61, Paragraph 2 ZGB.

16 For example, FIFA, the International Olympic Committee and the International Ice Hockey Federation (IIHF).

17 Article 69a ZGB in conjunction with Article 957 et seq. OR; Article 69b ZGB.

18 Article 55 ZGB.

19 In particular, Articles 752 to 760 OR.

20 Article 754, Paragraph 1 OR.

21 Article 102, Paragraph 1 StGB.

criminal sanctions irrespective of the criminal liability of a natural person, unless the company can prove that it has taken all reasonable organisational measures required to prevent the criminal act.<sup>22</sup>

## II THE DISPUTE RESOLUTION SYSTEM

### i Access to courts

In accordance with Article 30 of the BV, all persons whose case falls to be judicially decided have the right to have their case heard by a legally constituted, competent, independent and impartial court. Further, in accordance with Article 75 of the ZGB, any member who has not consented to a resolution of an association that infringes the law or the articles of association of an association is also entitled by law to challenge such resolution in court within one month of learning thereof, even if the judiciary rules of the association would not foresee such right of challenge.

As already mentioned, a sports governing body, most commonly organised in the form of an association, is free, within the limits provided for by mandatory law, to organise its structure and determine the judicial system that shall apply within the organisation. This includes the setting up of different internal instances that shall determine issues between the association and its members as well as between the members and other stakeholders. Examples of such internal judiciary instances include the FIFA Dispute Resolution Chamber and the UEFA Control, Ethics and Disciplinary Body. This freedom also includes the right to define and apply sanctions in the case of a breach of the statutes, regulations or other rules of the association by its members or officials, and other stakeholders such as players or athletes. Such measures typically include sanctions such as reprimands, fines, suspensions and expulsion.<sup>23</sup> If an association has established such internal judiciary systems, it may foresee that internal sanction decisions may be challenged before an internal higher instance or before a governing body of an umbrella organisation prior to an appeal being lodged before an independent court.<sup>24</sup>

Moreover, freedom of association and economic freedom comprise a sports governing body's right to enact and enforce the rules of the game of its particular sport.<sup>25</sup>

The distinction between the rules of the game and rules of law is of paramount importance. The purpose of the rules of the game is to ensure fair competition, and the rules are aimed at regulating athletes' conduct only during a competition. In other words, they have effect only during the course of the competition, and consequently do not affect the personality or other rights of an athlete. For this reason, it is a widely accepted principle that rules of the game decisions (or field of play decisions) should be and are, as a matter of principle, final and not appealable.<sup>26</sup> On the other hand, decisions of sports governing bodies that affect personality or other rights of an athlete are open to appeal before the state courts or an arbitration court, depending on the dispute resolution mechanism that applies.<sup>27</sup> For

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22 Article 102, Paragraph 2 StGB.

23 BSK ZGB I-Heini/Scherrer, footnote 4, Article 70, Paragraph 18.

24 Hans Michael Riemer, 'Vereinsinternes Verfahren bei Vereinsstrafen', *Causa Sport (CaS)* 2013, p. 297.

25 Such as, for example, the Laws of the Game of FIFA or the IIHF Official Rule Book.

26 Official Collection of the Decisions of the Swiss Federal Tribunal (Swiss Federal Tribunal) BGE 108 II 15, cons 3.

27 BGE 120 II 369 cons 2; BGE 118 II 12, cons 2; BGE 103 Ia 410, cons 3b.



example, the awarding of a penalty kick and the sanctioning of an ice hockey player with a five-minute sanction are rules of the game decisions not open to appeal, while, by way of example, suspending a player from five subsequent games or imposing a fine would be a rule of law decision affecting the athlete's rights that would, consequently, be open to appeal.

Internal judiciary instances of sports governing bodies (as described above) normally do not fulfil the criteria of independent and impartial courts, as their members are usually elected and remunerated by the sports governing body itself.<sup>28</sup> For this reason, any member or other stakeholder that has been sanctioned by an association, or is otherwise subject to a decision of such association, has the right to challenge the decision and file an appeal with the competent state court, even if the relevant regulations of the association would not expressly foresee such course of action. Alternatively, an appeal may be lodged with a court of arbitration (that fulfils the requirements of independence and impartiality) if a valid arbitration agreement is in place.

Sport arbitration is of utmost importance in Switzerland given that the Court of Arbitration for Sport (CAS) has its seat in Lausanne, Switzerland. In the landmark *Gundel* and *Lazutina* cases,<sup>29</sup> the Swiss Federal Tribunal confirmed that the CAS is a true arbitral tribunal.

## ii Sports arbitration

In Swiss domestic arbitration, the *lex arbitrii* is found in the Swiss Civil Procedure Code (CPC). In international arbitration (i.e., where the court of arbitration has its seat in Switzerland, but where at least one party is not domiciled in Switzerland), the 12th Chapter on the Swiss Statute on Private International Law (PIL) applies. Article 354 of the CPC provides that in domestic arbitration, only claims that the parties may freely dispose of are arbitrable, while pursuant to Article 177 of the PIL, in international arbitration, any pecuniary claim may be subject to arbitration. It is strongly disputed whether claims based on Article 75 of the ZGB (i.e., appeals against decisions of an association), for instance, an appeal by an athlete against a sanction for a doping offence or an appeal by a player against a suspension for unfair behaviour on the field, are of a pecuniary nature and are thus arbitrable. According to prevailing opinion, such appeals are deemed to be of a non-pecuniary nature, which would mean that such cases could not be brought to arbitration (e.g., before the CAS).<sup>30</sup> That notwithstanding, the Swiss Federal Tribunal in its practice usually accepts the arbitrability of appeals against sanction decisions of sports governing bodies brought before the CAS in international arbitration.<sup>31</sup>

In domestic arbitration, arbitrability of employment matters is restricted, as disputes regarding the mandatory rights of an employee in the sense of Article 341 of the OR cannot be brought to arbitration against the employee's will, even if the employment agreement provides an explicit arbitration clause.<sup>32</sup> These are rights that the parties cannot freely dispose of. In international arbitration, however, admissibility has to be determined in light of Article 177 of the PIL. The Swiss Federal Tribunal holds that an employment issue may be brought

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28 BGE 119 II 271, cons 3b.

29 BGE 119 II 271 and BGE 129 III 445.

30 For example, BGE 108 II 15, cons 1a.

31 For example, BGE 136 III 345.

32 For example, Swiss Federal Tribunal 4A\_515/2012 of 17 April 2013, cons 4.3. See also: Swiss Federal Tribunal 4A\_7/2018 of 18 April 2018, cons 2.

before a court of arbitration having its seat in Switzerland such as the CAS if the employment agreement provides for an arbitration clause, even if employment disputes are exempt from arbitration in the domicile country of the employee. According to the Swiss Federal Tribunal, Article 177, Paragraph 1 of the PIL provides that any claim that has a pecuniary or economic interest can be brought to arbitration, and that this rule also applies to monetary claims under a labour contract.<sup>33</sup> When assessing the issue of arbitrability of international employment issues, the Swiss Federal Tribunal also considers the risk that the prevailing party may not enforce the arbitral award in the relevant jurisdiction. However, it holds that when enacting Article 177 of the PIL, the Swiss legislator deliberately accepted the risk that an award may not be enforceable in a given jurisdiction, but that it is the parties' duty when agreeing on arbitration to assess whether a final award will be enforceable.<sup>34</sup>

### iii Enforceability

Two basic and fundamentally different avenues of enforceability must be distinguished: the way to enforce decisions of state courts and courts of arbitration, and the path to enforce decisions of internal judiciary bodies of sports associations.

In domestic disputes, decisions of state courts or independent and impartial arbitration courts are subject to enforcement in accordance with Article 335 et seq. of the CPC unless the decision relates to the payment of money or the provision of security, in which case it is enforced pursuant to the provisions of the Federal Act on Debt Enforcement and Bankruptcy. The recognition, declaration of enforceability and enforcement of foreign decisions in Switzerland are governed by said articles of the CPC, as well as relevant international treaties and Article 25 et seq. of the PIL. The recognition of decisions of Swiss state courts and arbitral awards of arbitration courts having their seat in Switzerland is subject to the relevant international treaties such as the Lugano Convention on the Jurisdiction, Recognition and Enforcement of Judgments in Civil and Commercial Matters and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

On the other hand, internal decisions of sports associations are usually not recognised as judgments or awards of a court or an arbitral tribunal, as the requirements of independence and impartiality are usually not met.<sup>35</sup> Therefore, they are not, as such, enforceable in accordance with the international treaties or domestic statutory provisions discussed above. That notwithstanding, such decisions are relevant for the parties concerned, as the decision would still be enforceable at the level of the association rendering the decision. Any non-compliance with the decision could trigger sporting and other sanctions by the relevant association in accordance with its own rules and regulations. If the decision is not appealed with the state courts, or a court of arbitration such as the CAS, it would become final, and the relevant party would become subject to sanctions by its association. Consequently, although such internal decisions of a sports governing body are not enforceable in the manner of decisions of the state courts or courts of arbitration, they are usually complied with by the relevant party as such party would otherwise run the risk of sporting or financial sanctions, or both, of the association that could have a material and adverse impact on that party.

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33 Swiss Federal Tribunal 4A\_388/2012 of 18 March 2013, cons 3.4.1; Swiss Federal Tribunal 4A\_654/2011 of 23 May 2012, cons 3.4.

34 Swiss Federal Tribunal 4A\_388/2012 of 18 March 2013, cons 3.3.

35 *ibid.*

### III ORGANISATION OF SPORTS EVENTS

#### i Relationship between organiser and spectator

The relationship between the organiser of a sports event and spectators is primarily of a contractual nature, with the contract usually becoming effective when a spectator purchases a ticket for the event. The fundamental points of each such spectator contract consist of a spectator being granted admission to the stadium in return for a fee so that the spectator can follow a certain match or other sport event 'live'. The spectator contract may govern additional topics, such as safety, advertising and liability as well as the right – of special importance with a view to the commercial exploitation of a sports event via television broadcasts – to film spectators within the scope of television broadcasts.

#### ii Relationship between organiser and athletes or clubs

The relationship between an organiser and athletes or clubs participating at a certain sports event can, on the one hand, be based on a specific agreement on participation. On the other hand, it can be based on membership to an association, and thus on obligations pursuant to a sports association's statutes and regulations (e.g., competition regulations defining the criteria for being eligible for participation as well as the rights and obligations of the participating athletes or clubs).

#### iii Liability of the organiser

If a person (e.g., a spectator or another third party) suffers damage because of the conduct of other spectators or athletes before, during or after a sports event, the organiser may, in principle, become liable either for breach of contract or, if no agreement with the damaged party is in place, for tort.

If the damage-causing event took place outside the arena and the surrounding private property, liability (if any) would typically be based on tort. Under Swiss law, liability for tort necessitates, *inter alia*, that the damaging party be charged with unlawfulness through inflicting damage in an appropriately causal manner (Article 42 of the OR). Pursuant to the established legislation of the Swiss Federal Tribunal, the causing of damage is unlawful when it breaches a general statutory obligation by either impairing an absolute right of the damaged party or effects pure financial damage through breach of a rule that by its purpose aims to protect against such damage.<sup>36</sup> Since, in this instance, the organiser has not itself caused the damage, it also has not itself breached such protective standard. For this reason, liability from forbearance may be conceivable. A non-contractual liability because of forbearance necessitates, pursuant to the Swiss Federal Tribunal, non-action despite the existence of a legal obligation to act.<sup>37</sup>

Pursuant to the established legislation, however, unlawfulness can only develop when a protective standard in favour of the damaged party explicitly requires action. Such protective standard can first arise from some part of objective law and secondly from general legal principles.<sup>38</sup> If an absolute right is at risk (such as ownership), according to an unwritten legal

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36 BGE 133 III 323, cons 5; BGE 132 III 122, cons 4.1; BGE 123 III 306, cons 4.

37 BGE 115 II 15, cons 3b.

38 Heierli/Schnyder, in *Basler Kommentar zum Obligationenrecht I*, 6th ed. (BSK OR I-Heierli/Schnyder), Article 41, Paragraphs 18, 19a and 37; BGE 115 II 15, cons 3b et seq.; Swiss Federal Tribunal 4A\_520/2007 of 31 March 2008.

principle a capacity to act exists for the person who has created a dangerous circumstance or otherwise is responsible for it in a legally binding manner.<sup>39</sup> This 'danger clause' provides that the person who creates or maintains a dangerous circumstance must take the protective measures necessary to avoid damage.<sup>40</sup> According to the Swiss Federal Tribunal, such clause is suitable, in the event of a breach of absolute legal assets, for establishing unlawfulness in the event of a lack of a specific protective standard.<sup>41</sup> When applied to the question of the possible liability of an organising club for damage caused by rioting 'fans' outside a stadium, these principles confirmed by the Swiss Federal Tribunal mean that an organiser could only be held liable for an unlawful action if a third party suffers damage to an absolute right (such as to his or her property, but not solely his or her assets) and if the circumstances reasonably require action by the organiser to avoid such damage. Whereas a breach of an absolute right will be regularly recognised when a car, house or another item is damaged, in the opinion of the authors, obliging the organiser to compensate such damage would, however, regularly fail in that the organiser cannot take any effective measures in the first place to avert damage outside the stadium, and is not even authorised to do so owing to the monopoly to use force lying with the state.

On the other hand, if a spectator suffers damage in the stadium because of the conduct of another spectator or other person, the liability of the organiser (if any) would typically be contractual. The decisive aspect when assessing the organiser's liability is whether the organising club has an obligation to protect spectators from rioting 'fans'. According to general principles under Swiss law and in light of the nature of the business and the hypothetical will of the parties under a spectator contract, one must assume that the organiser's duties include the obligation to protect the spectators from damage. However, the crucial question is how far this obligation of protection extends. Maximum protective measures protecting against all possible incidents do not exist, and comprehensive protection can also not be expected from an organising club that has acted in good faith. However, it can be demanded that the organiser takes the objectively appropriate protective measures.<sup>42</sup> The event organiser, thus, must take the security measures that the spectator can reasonably expect. When examining the specific circumstances, such as the quality of the stadium, the type of match (friendly, championship-deciding match, etc.) as well as any known willingness to use violence on the part of own fans and those of the visiting club need to be taken into account. In this regard, important indications are also offered by the relevant regulations that the responsible sports association has issued on the topic of safety and safety measures in stadiums. If such regulations exist, a court that has been called upon to assess an incident of damage will then also orient itself to these regulations. If an organising club does not comply with these regulations, it could only in exceptional cases assert that the specified measures were excessive or not expedient, and that it therefore did not comply with them.

#### **iv Liability of the athletes**

Athletes may also become liable either for breach of contract or for tort. In both cases, the athlete may be held liable for compensation of the damage caused. In cases of tort liability,

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39 BGE 121 III 358, cons 4.

40 BGE 124 III 297, cons 5b.

41 Swiss Federal Tribunal 4A\_104/2012 of 3 August 2012, cons 2.1; Swiss Federal Tribunal 4A\_520/2007 of 31 March 2008, cons 2.1; Swiss Federal Tribunal 4C.119/2000 of 2 October 2000, cons 2b.

42 András Gurovits, 'Die zivilrechtliche Haftung für Zuschauerverhalten', *CaS* 2014, p. 271 et seq.

the damage is caused unlawfully when the athlete breaches a general statutory obligation by either impairing an absolute right of the damaged party or effects pure financial damage through breach of a rule that by its purpose aims to protect against such damage.<sup>43</sup>

In respect of sport injuries incurred during participation in a sports event, in general, the principle of 'acting at one's own risk' applies, at least as far as the rules of law have been complied with or have not been breached by the damaging party in a serious manner. In the case of an excess violation of the appropriate standard of care or the rules of the game, or both, the damaging athlete may be not only be held liable for compensation of damages but may also expose him or herself to sanctions under criminal law.

#### **v Liability of the spectators**

Express written terms may be scarce in a spectator contract. For this reason, the generally recognised principles under Swiss law that contractual content is not solely determined by the wording of the contract, and that other obligations exist that result in good faith from the nature of the contract and correspond to the hypothetical will of the parties, are also important in the case of the misconduct of a spectator. In the authors' opinion, such other non-written or implied obligations undoubtedly include, for example, an obligation on the spectators not to let off any firecrackers and, more generally, their obligation not to disturb the course of the event and not to jeopardise the health of the other spectators and the players. From a legal dogma perspective, these are ancillary obligations of spectators (i.e., additional obligations to the payment of the admission price). Such ancillary obligations cannot always be claimed independently, but when they are breached they nevertheless result at least in an obligation of the breaching party to pay compensation. If a spectator breaches a primary or ancillary obligation under the spectator contract, he or she becomes liable for compensation pursuant to the general regulations under Article 97 et seq. of the OR if he or she cannot prove that he or she is not culpable.

#### **vi Riot prevention**

The Concordat on Measures to Combat Violence during Sports Events (Concordat) was introduced in Switzerland as an inter-cantonal set of rules aimed at reducing acts of violence at sports events, and in particular at games featuring professional football teams in 2007 and was amended in 2012 (as of today, 24 of 26 cantons acceded to the amended Concordat). Measures under the Concordat include, for actual and potential wrongdoers, the designation of off-limit areas, the requirement to report to the police at certain dates and times, and police custody. The Concordat also makes provision for authorising private security firms commissioned by the organiser of the event to perform admission checks and to conduct clothed body searches for prohibited items, irrespective of a specific suspicion.<sup>44</sup> The Concordat can also result in an obligation for clubs to request that spectators show proof of their identity in order to ensure that no persons are admitted who are subject to a stadium ban or to other measures pursuant to the Concordat.<sup>45</sup> However, while, as a matter of principle clubs are responsible for ensuring security within a stadium and in any surrounding private

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43 In respect of liability in general: BGE 133 III 323, cons 5; BGE 132 III 122, cons 4.1; BGE 123 III 306, cons 4.

44 Article 3b, Paragraph 2 of the Concordat.

45 Article 3a, Paragraph 3 of the Concordat.

area, in the case of a violent dispute inside or outside a stadium pursuant to the monopoly of the state on using force, the police must intervene. Clubs thus have their hands tied with regard to effective measures to curb violence within arenas.<sup>46</sup>

In order to compensate the state for security measures implemented before, during and after a sports event, the cantonal laws foresee an organiser's duty to contribute to the costs incurred.<sup>47</sup> This cost contribution is usually determined by taking into account the entire cost incurred, the purpose of the event and the interest of the general public in such event.<sup>48</sup>

## IV COMMERCIALISATION OF SPORTS EVENTS

### i Types of and ownership in rights

From a legal viewpoint, the organisation and realisation of a sports event, such as a tournament or a championship, presupposes a complex system of contractual arrangements. This is owing to the fact that the organisers of a sports event work together with a multitude of different partners, and must guard against contractual and non-contractual risks to the extent possible and justifiable.

From an organisational viewpoint, the hub of this complex system consists of the organisation agreement that is, as a rule, entered into between the sports association under whose auspices the sports event will be held and the host. In terms of commercial exploitation, television agreements and sponsoring agreements are of substantial importance. Spectators who wish to watch a sports event live in a stadium (or at another event location) are located at the other end of the organisational chain. A separate contract (the spectator contract, discussed in Section III) is entered into with each individual spectator or ticket purchaser. Additional contractual relationships arise with owners or operators of stadiums or other competition sites. As a primary matter, these agreements govern the right on the part of a host or sports association, or both, to use a stadium (or other competition site) for the purposes of the relevant sports event. Depending on the situation, other parties involved in this system may include merchandisers and caterers. Caterers are responsible for supplying competition sites, or certain VIP zones or both, with food, beverages and other resources necessary for catering to the public, provided that this activity is not assigned to a sponsor within the scope of the sponsoring agreement. Merchandisers are responsible for the production and delivery of products (e.g., balls, T-shirts, caps, watches and other fan articles) bearing the logo or the trademark of the sports event or sports association, or both. Finally, the host or the sports association, or both, will have to conclude insurance policies that primarily cover risks of personal injuries and property damages.

Within the above-described contractual framework, a number of different rights are involved that must be appropriately secured or assigned, or both. In this chapter, the discussion is limited to a description of the most relevant rights involved and their protection (i.e., the domestic authority, the rights on the athlete's own image, copyrights and trademarks).

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46 Gurovits, footnote 42, p. 273 et seq.

47 Article 58, Paragraph 1, Letter (a) Police Act of the Canton of Zurich.

48 Gurovits, footnote 42, p. 275 et seq.

## ii Rights protection

### *Domestic authority*

The holder of the domestic authority has the power of decision regarding access to the premises. It may, for example, enter into contracts with spectators and vendors as well as with broadcasting companies to grant the right to access and install the necessary materials for emitting signals to register and broadcast the sport event.<sup>49</sup>

### *Right to one's own image*

The right of athletes and spectators to their own image is protected from unlawful infringements by Article 28 of the ZGB. However, as athletes are usually public personalities, their right to claim protection is limited. They are, as a rule, considered to have accepted that they will be filmed and photographed during events.

However, the reproduction of recordings and pictures is, as a matter of principle, only allowed in relation to a specific event; for any other use, consent is required. For interviews, a tacit consent can be assumed.<sup>50</sup>

### *Copyright*

Sport events are, as a rule, not protected by copyright because they are not works pursuant to the Copyright Act (URG).<sup>51</sup> However, recordings of sports events are considered works pursuant to the URG<sup>52</sup> as long as they have an individual character, which may be the case if specific techniques are applied such as, for instance, special picture direction, specialised commentary or slow motion replays.<sup>53</sup> Copyrights are protected intellectual property with *erga omnes* effect. They do not require any specific registration. The URG provides protection of related rights (or neighbouring rights) of the producer, allowing the reproduction and distribution of recordings,<sup>54</sup> and allowing the broadcasting organisation to retransmit and distribute its broadcasts.<sup>55</sup>

### *Trademarks*

Trademarks need to be registered in the trademark registry in order to be protected.<sup>56</sup> Trademarks are protected intellectual property and have *erga omnes* effect. They can either be assigned, or their usage can be granted through licences. The legal remedies set out in the Trademark Protection Act are similar to those provided in the URG. Trademarks are typically used to designate specific sports events.

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49 See Heinz Tännler, Tanja Haug, 'Kommerzielle Verwertung von Sportveranstaltungen', *CaS* 2007, p. 139.

50 Heinz Hausheer, Regina E Aebi-Müller, *Das Personenrecht des Schweizerischen Zivilgesetzbuches*, 4th ed., Berne 2016, p. 221.

51 Article 2, Paragraph 1 URG.

52 Article 2, Paragraph 2, Letter (g) URG.

53 Thomas Hügi, *Sportrecht*, Berne 2015, p. 195.

54 Article 36 URG.

55 Article 37 URG.

56 Articles 5 and 6 of the Trademark Protection Act.

## V PROFESSIONAL SPORTS AND LABOUR LAW

### i Mandatory provisions

Under Swiss law, an employment agreement does not need to be in writing or to be signed in order to come into force. If a party can otherwise demonstrate that an agreement has been concluded, it is valid and binding.

Employment relationships are subject to a number of mandatory provisions that are to be found in the OR as well as in the Swiss Employment Act. While the former sets out mandatory rules in respect of the content of agreements, such as, for instance, terms, termination, holidays, sickness leave, non-compete clauses and intellectual property rights, the latter contains provisions on employee protection, including health protection, overtime work and work during nights and on weekends. While these latter provisions are, in principle, mandatory and applicable to all employees in Switzerland, they are considered as inappropriate in respect of the activities of professional athletes.<sup>57</sup>

In addition, mandatory provisions can be found in the Federal Act on Employment Services and the Hiring of Services (AVG) and its implementing ordinances is relevant for agents of athletes who, on a regular basis, provide their services in Switzerland.<sup>58</sup> Pursuant to the AVG, such agents need to be Swiss residents and need to obtain a licence from the competent public authority. Further, the agent fee is restricted to a maximum of 5 per cent of the gross annual salary for the first year of the employment contract of the athlete.<sup>59</sup> In the case of infringements the agent may become subject to criminal sanctions.<sup>60</sup> In the authors' experience, this law is disregarded in many cases.

### ii Free movement of athletes

The treaty on the free movement of individuals between the European Union and Switzerland (FZA) grants the citizens of contracting states the right to freely choose their place of work and residence. The FZA is also applicable to professional athletes.<sup>61</sup> In accordance with Article 2 of the FZA, discrimination because of citizenship is forbidden.

The system under the FZA also applies to citizens of the European Free Trade Association countries (Norway, Iceland and Liechtenstein). Citizens of third countries are subject to the Swiss Foreign Nationals Act (AuG), which provides, in general, higher burdens regarding admission to employment and residence, but also provides some exceptions in respect of professional athletes.<sup>62</sup>

Swiss sports associations may, however, voluntarily restrict the free movement of athletes. They did so, for instance, in ice hockey based on a gentlemen's agreement pursuant to which not more than four foreign players shall be on the roster for a particular game.

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57 Hügi, footnote 53, p. 276 et seq.

58 Article 2, Paragraph. 1 AVG.

59 Article 3, Paragraph 1 GebV AVG.

60 Article 39, Paragraph 2, Letter (d) and Paragraph 3 AVG.

61 Kurt Rohner/Adrian Wymann, 'Das Freizügigkeitsabkommen mit der EU und der Schweizer Sport – Konsequenzen für die Arbeitsverhältnisse', *CaS* 2004, p. 5.

62 Article 23, Paragraph 3, Letter (b) AuG.



### iii Application of employment rules of sports governing bodies

Employers and employees are free to determine the terms of their employment contract within the limits of mandatory Swiss law. This includes their right to agree that standard terms of a national sports association shall form an integral part of the agreement. Such standard terms are enacted, for instance, by the Swiss Football League and by the Swiss Ice Hockey Federation with regards to the top junior performance categories.

## VI SPORTS AND ANTITRUST LAW

The Swiss Federal Act on Cartels and other Restraints of Competition (CartA) applies to private and public undertakings that are parties to cartels or to other agreements affecting competition, that exercise market power or that are part of a concentration of undertakings.<sup>63</sup> In accordance with the CartA, agreements that significantly restrict competition in a market for specific goods or services and that are not justified on grounds of economic efficiency, and all agreements that eliminate effective competition, are unlawful.<sup>64</sup> Further, dominant undertakings are seen to behave unlawfully if they, by abusing their position in the market, hinder other undertakings from starting or continuing to compete or disadvantage trading partners.<sup>65</sup>

Undertakings in the sense of the CartA are consumers and suppliers of goods and services regardless of their legal and organisational form if and as far as they are active in commercial activities. Thus, sports governing bodies and other sports organisations are bound by the CartA as they participate in commercial activities such as the sale of broadcast and marketing rights. On the other hand, the activities and regulations of a sports governing body are traditionally considered to be outside the scope of the CartA if and to the extent they are related to the organisation, governance and administration of their particular sport. The rules of the game, eligibility provisions, regime of sanctions, internal dispute resolutions systems and similar provisions are, therefore, usually excluded from scrutiny from an antitrust law perspective.

However, as sports governing bodies may be seen as having a dominant position on the relevant sports market or markets, the above dichotomy of rules falling within and those falling outside the scope of the CartA is subject to growing criticism, and it is also argued that the organisational and administrative rules of a sport governing body may be in violation of cartel law if they significantly impact an athlete's (commercial) rights.

## VII SPORTS AND TAXATION

The Swiss taxation system is complex, and any comprehensive discussion thereof would go far beyond the scope of this chapter. Therefore, the following discussion shall be limited to those Swiss tax aspects that are relevant for foreign (professional) athletes that participate at sports events held in Switzerland.

The income of employed and self-employed athletes who are non-Swiss residents is subject to source tax in respect of the income generated from their participation at sports

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63 Article 2, Paragraph 1 CartA.

64 Article 5, Paragraph 1 CartA.

65 Article 7, Paragraph 1 CartA.

events in Switzerland. Taxable income consists of all gross earnings, including allowances and value in-kind contributions, and it also includes earnings that are not paid to the athlete but to a third party, such as an organiser, manager or agent. The applicable tax rates and allowed deductions depend on the canton of performance. In the canton of Zurich, for instance, a lump sum of 20 per cent of the gross earnings may be deducted for costs incurred in respect of the performance in Switzerland. If the athlete elects to deduct (higher) actual costs, he or she must evidence such higher costs by producing the relevant receipts. Currently, the relevant source tax rate in the canton of Zurich covering federal, state and municipality tax ranges between 10.8 per cent for daily earnings up to 200 Swiss francs and 17 per cent for daily earnings in excess of 3,000 Swiss francs. The source tax becomes due at the date of payment of the taxable income to the athlete. The host of the event must pay the tax to the tax authority of the municipality where the event took place within 30 days of the beginning of the month following the payment. The social security consequences must be reviewed on a case-by-case basis.

Most double taxation treaties entered into by Switzerland follow Article 17 of the Organisation for Economic Co-operation and Development Model Tax Convention and do not alter the rules discussed above.

## VIII SPECIFIC SPORTS ISSUES

### i Doping

Article 19 et seq. of the Federal Law on the Promotion of Sports (LPS) and Article 73 et seq. of its implementing ordinance provide the legal framework for the fight against doping. Measures include restriction of the supply of prohibited substances, the execution of doping controls and the authorisation of private bodies to perform such controls, as well as the sanctioning of certain violations of the LPS. Criminal sanctions for violations of the law include penalties or imprisonment for a period of up to five years, or both.

Criminal sanctions may be imposed on anyone who produces, purchases, imports, exports, transports, distributes, acts as an agent for, prescribes or possesses prohibited substances, or applies prohibited methods to other persons. The ordinance includes a list (annex to the ordinance) of the forbidden substances and methods. This list does not fully correspond with the doping list of the World Anti-Doping Agency (WADA). If a substance or a method is not listed in the annex to the ordinance, it is not relevant from a criminal perspective (*nulla poena sine lege*). According to the LPS, the production, purchase, import, export, transportation or possession of prohibited substances for a person's own consumption are not subject to criminal sanction pursuant to the LPS.

In addition, doping is banned by the relevant doping regulations of the various sports governing bodies and WADA. Violations of these rules will, however, not be sanctioned based on statutory public law, but rather in accordance with the relevant sanction regime of the sports governing body and WADA.

### ii Betting

Under the Federal Lottery Act, commercial betting in the area of sports is, as a rule, forbidden. This ban is to be understood broadly, and it prohibits offering to act as an agent for bets, the operation of a betting provider as well as any form of advertising and promotion of betting activities. Anyone who violates the law may become subject to criminal sanctions, which

could include imprisonment for a period of up to three months or a fine, or both. According to the Lottery Act, the cantons may authorise exceptions and grant licences to specific betting providers.

The provisions of the Lottery Act are also of practical relevance in the international context, in that advertising on jerseys (e.g., jerseys worn by football players) is not allowed, and that this ban would also extend to foreign teams playing in Switzerland during, for example, the UEFA Champions League or Europa League. If a betting provider is a sponsor of such foreign team and its logo is displayed on the players' jerseys, the team would not be allowed to play in Switzerland wearing these jerseys.

The Lottery Act shall be replaced by the Federal Gaming Act, which shall enter into force on 1 January 2019.<sup>66</sup>

### iii Manipulation

At present, Swiss law does not provide specific statutory provisions aimed at banning match-fixing or manipulation in sports. While in specific cases a delinquent may become liable under the current legislation for fraud or corruption if the requirements of proof are fulfilled, the statutory framework currently in force does not provide any comprehensive and proper protection of clean sports in general.

The Swiss parliament has been working on a new gambling law since 2010. After the parliament finally approved the new Federal Gaming Act on 29 September 2017, several groups called a referendum against the new law. In the referendum of 10 June 2018, the Swiss people voted in favour of the new Federal Gaming Act. The new provisions are expected to come into force on 1 January 2019. The new Federal Gaming Act shall replace the existing Federal Law on Lotteries and the Federal Law on Games of Chance and Casinos. As part of the revision, among others, the following measures shall be considered: (1) manipulation of sports results shall be classified as a criminal offence; (2) requirements shall be imposed on sports betting operators to combat the manipulation of sports results; and (3) the exchange of information shall be ensured between authorities, sports organisations and betting operators. As the legislation project has turned out to be complex and politically controversial, the new law has not yet come into force. As a result, certain acts of manipulation cannot be sanctioned as the *nulla poena sine lege* principle requires that criminal sanctions can only be imposed if the wrongdoer commits an act that is clearly specified in the law. The courts are not allowed to apply provisions of the penal code by analogy. As long as the new law has not been set into force, Swiss authorities are also prevented from granting judicial assistance in criminal matters to foreign prosecuting authorities because the Federal Act on International Mutual Assistance in Criminal Matters (IMAC) requires that the relevant act is punishable not only in the relevant foreign jurisdiction, but also in Switzerland.<sup>67</sup>

### iv Grey market sales

In the past few years, three parliamentary interventions in the National Council addressed the issue of grey market sales, asking the Swiss Federal Council to evaluate the situation.<sup>68</sup> The

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66 See Section VIII.iii.

67 Article 64, Paragraph 1 IMAC.

68 Postulate No. 15.3397, Wiederverkauf von Veranstaltungstickets zu überhöhten Preisen. Sanktionen; Motion No. 14.3478, Weiterverkaufte Tickets dürfen nicht teurer werden; Interpellation No. 10.3078, Graumarkt für Tickets für Konzert- und Sportveranstaltungen.

Swiss Federal Council, however, held that the legislation already provides efficient means to combat grey market sales. It also held that technical and contractual measures are available for organisers to prevent or limit grey market sales.<sup>69</sup> For these reasons, the Swiss Federal Council did not propose any new measures in this context. The National Council shared this opinion and renounced recently again initiating a legislation process.<sup>70</sup>

## IX THE YEAR IN REVIEW

On 16 September 2016, the Swiss Federal Council opened the consultation procedure on the approval of the Convention on the Manipulation of Sports Competitions (the Convention) that the Member States of the Council of Europe signed in 2014. The purpose of the Convention is to combat the manipulation of sports competitions in order to protect the integrity of sports and sports ethics in accordance with the principle of the autonomy of sport. Pursuant to Article 3, Paragraph 4 of the Convention, ‘manipulation of sports competitions’ means an intentional arrangement, act or omission aimed at an improper alteration of the result or the course of a sports competition in order to remove all or part of the unpredictable nature of the sports competition with a view to obtaining an undue advantage for oneself or for others. The Convention proposes a number of measures that the signatory states shall implement, including measures on domestic cooperation, risk assessment and management, education and awareness raising, and information exchange. The Convention, subject to ratification, shall enter into force on the first day of the month following the expiry of a period of three months after the date on which five signatories, including at least three Member States of the Council of Europe, have expressed their consent to be bound by the Convention. The Swiss National Council recently expressed its clear support for the ratification of the Convention. The necessary amendments with respect to the implementation of the Convention are included in the latest draft of the new Federal Gaming Act.<sup>71</sup>

With regard to the international combating of doping, it is worth noting that the International Testing Agency (ITA), a Swiss foundation based in Lausanne, was founded in December 2017 and started operations in June 2018. The ITA’s mission is to offer comprehensive anti-doping services, independent from sporting or political powers, to international federations, major event organisers and all other anti-doping organisations requesting support. The activities of the ITA include planning tests in and out of competition, evaluating risks and athlete whereabouts, managing therapeutic use exemptions and results management.

On 7 December 2017, the FIFA Disciplinary Committee sanctioned the Peruvian football player Guerrero with a one-year suspension. The player had tested positive for cocaine metabolite benzoylcegonine, a substance included in WADA’s 2017 Prohibited List. Upon appeal, the FIFA Appeal Committee (FIFA AC), reduced the initial period of ineligibility to six months. The FIFA AC had considered that the player had been able to establish that the adverse analytical finding had been caused by the ingestion of tea containing prohibited

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69 Interpellation No. 10.3078, Graumarkt für Tickets für Konzert- und Sportveranstaltungen.

70 Postulate No. 15.3397, Wiederverkauf von Veranstaltungstickets zu überhöhten Preisen. Sanktionen.

71 The Federal Office of Sport press release: [www.admin.ch/gov/de/start/dokumentation/medienmitteilungen.msg-id-63792.html](http://www.admin.ch/gov/de/start/dokumentation/medienmitteilungen.msg-id-63792.html); [www.coe.int/fr/web/conventions/full-list/-/conventions/rms/09000016801cdd7e](http://www.coe.int/fr/web/conventions/full-list/-/conventions/rms/09000016801cdd7e) (last visited on 8 September 2017).

substances. As the FIFA AC considered the degree of negligence as not significant, it reduced the ban for the sake of proportionality, although FIFA Anti-Doping Regulations provide for a minimum one-year suspension applicable in the case of no significant fault or negligence. WADA challenged this decision to the CAS, which, on 14 May 2018, increased Mr Guerrero's suspension to 14 months. Mr Guerrero appealed against this decision and requested for super provisional measures to the Swiss Federal Tribunal in order to be eligible to play the FIFA World Cup in Russia. On 31 May 2018, the Swiss Federal Tribunal granted suspensory effect, which allowed the player to participate in the World Cup. However, the final decision regarding the 14-month ban is still pending at the Swiss Federal Tribunal.

Another case pending at the Swiss Federal Tribunal concerns the Italian tennis player Sara Errani. On 3 August 2017, Ms Errani had been sanctioned by the Independent Tribunal of the International Tennis Federation (ITF) with a two-month period of ineligibility and disqualification of the results she achieved in the period from 16 February 2017 to 7 June 2017. Upon appeal of both the player and the national anti-doping agency (Nado Italia), the CAS upheld Nado Italia's appeal and imposed a 10-month period of ineligibility. With respect to Nado Italia's appeal, the panel accepted that the athlete established, by a balance of probability, following the ITF Tribunal, that the source of letrozole found in her sample was medication taken by her mother that found its way into the family meal prepared by the athlete's mother and eaten by the entire family. Upon appeal of the athlete, the case is now pending at the Swiss Federal Tribunal.

On 19 June 2018, the Adjudicatory Chamber of the UEFA Club Financial Control Body (CFCB) established that AC Milan had failed to fulfil FIFA's break-even requirements according to the UEFA Club Licensing and Financial Fair Play Regulations (UEFA FFP rules) and sanctioned the club with exclusion from the next UEFA club competition for which it would qualify over the following two years (2018/19 and 2019/2020 seasons). AC Milan appealed to the CAS, which upheld the appeal on 20 July 2018 and referred the case back to the Adjudicatory Chamber of the UEFA CFCB and acknowledged that the exclusion from the UEFA club competition was not proportionate. The panel considered that some important elements had not been properly assessed by the Adjudicatory Chamber, or could not be properly assessed at the time the appealed decision was rendered, and further noted that the current financial situation of the club had improved, following the recent change in the club's ownership.

In September 2017, UEFA opened a formal investigation into the €222 million transfer of Brazilian forward Neymar from FC Barcelona to Paris Saint-Germain Football Club, with regards to FIFA's break-even requirements. Although the case was closed by the chairman and chief investigator of the CFCB's investigatory chamber, finding that the club's transfers in the concerned time period were in line with the UEFA FFP rules, the UEFA issued a statement saying: 'In light of the recent decision of the Club Financial Control Body chief investigator to close the investigation into Paris Saint-Germain – which commenced on 1 September 2017 – the chairman of the CFCB has decided to send this decision for review by the adjudicatory chamber.'<sup>72</sup> After Paris Saint-Germain acquired the French international Kylian Mbappé for €180 million from Monaco in summer 2018, it is likely that the case will remain in the focus of the UEFA supervisory authorities.

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72 UEFA press release dated 3 July 2018: [www.uefa.com/insideuefa/about-uefa/news/newsid=2563921.html](http://www.uefa.com/insideuefa/about-uefa/news/newsid=2563921.html), last accessed 24 September 2018.

## X OUTLOOK AND CONCLUSIONS

Swiss law does not provide a comprehensive set of rules for sports-related legal issues. Sport is, rather, subject to the general statutory framework, and the relevant rules can be found in codifications such as the OR, the ZGB, the StGB, the PIL, the CPC and many others. The current statutory framework provides appropriate solutions for most topics that are of relevance in the sports sector. Issues that are not covered, and where a loophole in the law could be identified, include certain methods of manipulation and betting. The new Federal Gaming Act shall implement certain provisions of the Convention and shall enter into force on 1 January 2019.

Sports governing bodies and other sports organisations established in Switzerland enjoy a broad autonomy in regulating their internal affairs. In addition, Swiss law and the jurisprudence of the Swiss Federal Tribunal are 'arbitration-friendly'. This is particularly important for the impressive number of international sports associations that are domiciled in Switzerland, as well as for the CAS, which has its seat in Lausanne. The judiciary system in the world of sports that provides that the CAS shall act as final instance in sports matters is based on pertaining arbitration clauses mostly set out in the statutes and regulations of the sports governing bodies to which athletes are bound through their affiliation to the relevant association.

The foundation of the ITA in Lausanne has once again shown that Switzerland is and probably will remain a highly attractive place for international sports organisations.

# UNITED STATES

*Steve Silton and Cassandra Jacobsen*<sup>1</sup>

## I ORGANISATION OF SPORTS CLUBS AND SPORTS GOVERNING BODIES

### i Organisational form

In the United States, sports clubs typically organise themselves in one of three ways: either a sole proprietorship, a partnership or a corporation. The form a sports club decides on is dependent on factors such as potential liability, federal tax laws, flexibility of the form and ease of ownership transfer.<sup>2</sup>

A sole proprietorship is the simplest form of ownership as it is controlled by only one person.<sup>3</sup> In light of the financial and legal complexity of modern professional sports, this is a rare form of ownership. The largest drawback to a sole proprietorship is the liability. All legal and financial liability associated with the sports club is attributed directly to the owner personally. An additional drawback is a sole proprietorship's limited ability to borrow funds. The sports club can only borrow as much as the owner can personally receive approval for.

The most prevalent type of sports club ownership is the partnership.<sup>4</sup> The laws regarding partnerships are very straightforward. Each partner makes a measured contribution to the partnership and, in turn, each partner receives a share of the profits and losses of the business, unless a different arrangement has been made.<sup>5</sup> Partnerships do not require any formal documentation or legal paperwork to come into existence, though a designation can be made to protect partners from personal liability. This lack of legal work can substantially reduce the sports club's start-up costs. Partnerships can further reduce their costs by taking advantage of pass-through taxation, which allows the partnership to file a general tax return while the partners themselves file personal returns accounting for all the profits and losses.<sup>6</sup>

Similar to a sole proprietorship, a partnership's drawback can be the lack of liability protection. Partners are held to be joint and severally liable for the acts of the other partners and the partnership as a whole. Furthermore, partners have a fiduciary duty to the other partners and the partnership as a whole. Partnerships have other unique limiting factors.

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1 Steve Silton is a partner and Cassandra Jacobsen is an associate at Cozen O'Connor.

2 Glenn M Wong, *Essentials of Sports Law* 746 (4th ed. 2010).

3 *id.* at 747.

4 *id.*

5 *id.*

6 *id.*

Since a partnership is created by contract, a given partner cannot sell or transfer their interest to a party outside the partnership.<sup>7</sup> This means if one partner wants out of the partnership, or if a partner should die, the partnership is dissolved.<sup>8</sup>

There is a common subset of partnerships often used to govern sports clubs. 'Limited partnerships' can be thought of as a hybrid of a partnership and a corporation. In a limited partnership one or more partners control the sports club while other 'limited' partners supply investment money for the partnership. The limited partners have no control over the sports club; they only share in the profits and losses. Limited partnerships have the same advantages and disadvantages as general partnership, the only difference being that a limited partner is only as liable as their investment into the partnership.<sup>9</sup> Should a limited partner become a managing partner, only then will he or she be held joint and severally liable for the partnership, just as in a general partnership. Becoming a limited partner is a common way individuals become owners in professional sports teams in the United States. While limited partners have no operational control, they are able to view 'up close' the manner in which a professional sports team operates. Many majority owners of sports teams in the United States started as limited partners.

Corporations are also used to govern sports clubs. Corporations are different from both sole proprietorships and partnerships in that they are legal entities separate and apart from both the owners and shareholders.<sup>10</sup> The creation of a corporation is governed by the local laws of the state in which it is incorporated. In many ways a corporation is treated as an individual in the eyes of the law. Just like an individual, a corporation has rights, can be sued, and must pay its own taxes. If a sports club is created as a corporation, its shareholders elect a board of directors to oversee the business and that board elects officers to manage the sports club. One advantage of using a corporation as a business model is the limited liability of its shareholders; a shareholder is only as liable as their investment.<sup>11</sup> Corporations also have an easier time raising capital. If a corporation needs more funding it can simply sell more stock. This diverse ownership means a corporation's life span is not tied to a single person or a partnership, a corporation can well outlast a single lifespan.<sup>12</sup> Still, using a corporation as an ownership vehicle for a sports club has serious disadvantages.<sup>13</sup> A corporation's profits are taxed twice. Once when they are earned at a corporate tax rate, and again when they are distributed to shareholders as dividends. Although a corporation's limited liability is attractive, its tax disadvantages will be taken into account by a team's owner when choosing the right business structure.<sup>14</sup>

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7 *id.* at 748.

8 *id.*

9 *id.* at 749.

10 *id.*

11 *id.* at 750.

12 *id.*

13 *id.*

14 *id.*



## II THE DISPUTE RESOLUTION SYSTEM

### i Sports arbitration

Professional players consent to punishment handed out by their respective clubs and leagues through their collective bargaining agreements (CBAs) as well as personal contracts.<sup>15</sup> Those contracts are kept very broad and simply secure the player's agreement to follow the rules set by the individual team or league. The standard player's contract (SPC) will typically state that the club may create rules governing the player's conduct, and in return, the player promises to follow those rules. Penalties for infractions come in various forms. The contracts typically explain the procedural rights the player will receive; usually in the form of notice and review by the respective league's commissioner.<sup>16</sup> The SPCs also provide a given league's commissioner with independent disciplinary authority.<sup>17</sup>

The National Football League (NFL) has a personal conduct policy that pertains to all persons associated with the league and not just the players.<sup>18</sup> The policy specifically reserves the option to punish regardless of whether there is a legal conviction for a crime, stating the NFL holds its employees and club members to a higher standard.<sup>19</sup> The policy forbids behaviour that undermines or risks the NFL's integrity or reputation and if a violation is found, the commissioner is given wide latitude to discipline as he or she sees fit.<sup>20</sup> The policy states the punishment is to be proportional to the infraction and take into consideration the nature of the conduct, the risk entailed in the conduct, the existence of any prior or additional misconduct and any other relevant factors.<sup>21</sup>

The NFL commissioner's disciplinary authority is governed by three documents: the Constitution and Bylaws of the National Football League (League Constitution), the CBA and the NFL's SPC.<sup>22</sup> The League Constitution is a contract that defines the authority of the league and its member clubs.<sup>23</sup> In addition to empowering the commissioner, the constitution also provides the commissioner with authority to recommend punishment matters to an Executive Committee. A commissioner might do so should he or she find the punishment he or she is authorised to administer is inadequate or insufficient.<sup>24</sup>

The NFL's SPC allows for the commissioner to punish for two types of conduct: conduct on the field and conduct that is harmful to the integrity of, and the public confidence in, the NFL.<sup>25</sup> The CBA limits the player's ability to appeal the commissioner's decision by allowing a player to only appeal to the commissioner or his or her designee directly.<sup>26</sup> Although the league constitution provides the commissioner with guidance, it is the CBA

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15 Walter T Champion, Jr, *Fundamentals of Sports Law*, § 14:4, (2d ed. 2016).

16 *id.*

17 *id.*

18 Michael A Mahone, Jr, Note, 'Sentencing Guidelines for the Court of Public Opinion: An Analysis of the National Football League's Revised Personal Conduct Policy', 11 *Vand. J. Ent. & Tech. L.* p. 181 (2008).

19 *id.*

20 *id.*

21 *id.* at 186.

22 *id.* at 190.

23 *id.* at 191.

24 *id.*

25 *id.* at 192.

26 *id.*

that is the real authority concerning the employment relationship between the players and the commissioner; it is the CBA that determines how much authority for punishment the players will accept.<sup>27</sup>

Similar to the NFL, the Major League Baseball (MLB) commissioner is provided with a wide scope of authority to punish for matters that effect the integrity of baseball and the public confidence in it.<sup>28</sup> However, unlike the NFL, in the MLB there are more actors with punishment authority.<sup>29</sup> In addition to the commissioner, the league's executive vice president and the senior vice president also have the authority with regards to fines and suspensions for conduct on the field. In the MLB an appeal can be made to the commissioner, the executive vice president, or an independent arbitrator or arbitration panel. Although technically the MLB has significant discretion and authority, many find the use of arbitration, which is provided for in the CBA, has undermined that authority.<sup>30</sup> Historically arbitrators have overturned commissioners' decisions, including the reinstatement of players the commissioner has banned for life.<sup>31</sup>

In professional baseball, conduct violations are punished in two ways: by the player's team or by the league.<sup>32</sup> Team-sponsored punishments are regulated by the player's contract. Although an individual's contract might be negotiated so it reads differently, generally teams have the authority to terminate the player's employment. The player's contract holds him or her to the highest level of sportsmanship and personal conduct, and infractions stemming from chemical abuse, gambling, domestic violence, fighting or illegal weapons possessions are seen as falling under the 'personal conduct' clause.<sup>33</sup> Further, the MLB's commissioner is given the responsibility for investigating incidents, deciding guilt or innocence, and handing out the punishment. The commissioner's biases are supposedly only toward the protection of the game, where the individual owners of the teams have a financial stake in a player's punishment. In fact, even the Supreme Court of the United States has upheld the MLB commissioner's broad powers and discretion.<sup>34</sup>

In basketball, under the CBA, punishment by the National Basketball Association's (NBA) commissioner can be generally divided into two categories: suspensions of fewer than 12 games or suspensions of more than 12 games.<sup>35</sup> In a suspension of fewer than 12 games, where the reason for the suspension was owing to concern over preserving the integrity of, or the public confidence in, the NBA, the commissioner has the final word and no arbitration is allowed. Any appeal of a suspension for fewer than 12 games must be made to the commissioner. One caveat to that rule is a player may appeal to the Player Discipline

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27 id.

28 Bethany P Withers, 'The Integrity of the Game: Professional Athletes and Domestic Violence', 1 *Harv. J. Sports & Ent. L.* 145, 152 (2010).

29 Adriano Pacifici, 'Scope and Authority of Sports League Commissioner Disciplinary Power: Bounty and Beyond', 3 *Berkeley J. Ent. & Sports L.*, 93, 101 (2014).

30 Footnote 28, at 153-154.

31 id. at 153.

32 Matthew A Foote, 'Three Strikes and You're (Not Necessarily) Out: How Baseball's Erratic Approach to Conduct Violations Is Not in the Best Interest of the Game', 27 *WTR Ent. & Sports Law.* 3, \*4 (2010).

33 id.

34 *Flood v. Kuhn*, 407 US 258 (1972); See also *Charles O Finley & Co. v. Kuhn*, 569 F.2d 527, 538 (7th Cir. 1978) (upholding Commissioner Bowie Kuhn's right to determine the best interests of baseball); Footnote 32, at \*5.

35 Footnote 29, at 102-03.

Arbitrator if the player is seeking a review owing to the financial impact of the commissioner's decision.<sup>36</sup> However, in such a case the arbitrator may only lower the financial penalty. For suspensions over 12 games the player or the player's union may file a grievance and have an arbitrator review the discipline given.<sup>37</sup>

### III ORGANISATION OF SPORTS EVENTS

#### i Relationship between organiser and spectator

Venue owners in the United States are open to a certain level of liability. However, using the affirmative defence of 'assumption of the risk' can limit that liability.<sup>38</sup> Courts typically deny recovery for injuries resulting from hazards inherent to the sport under the presumption that spectators have sufficient knowledge of the sport and assume the risk of being injured; even if it is the first sporting event ever attended by the patron.<sup>39</sup> To succeed in an assumption of the risk defence, venue owners must show either (1) the plaintiff had personal knowledge of the risk (claims of ignorance of the risk have generally failed), (2) that the risk was obvious and apparent to a reasonable and prudent person under the circumstances, or (3) that there was seating provided behind a protected screen that the spectator chose not to sit in.<sup>40</sup> Venue owners have also tried using liability releases to limited effectiveness.<sup>41</sup> Some courts have held that a liability release may be void if it is against public policy. Liability releases are also considered to be void if the court finds it is counter to a state statute or if the release was not brought to the attention of the patron.<sup>42</sup> Regardless of this, professional sports leagues have put protections in place to mitigate any future liability.

After a 13-year-old girl was killed by a puck at a National Hockey League (NHL) game, the NHL made Plexiglas along the boards mandatory. The NHL further required each rink to put protective netting above the Plexiglas behind the goal nets in order to protect fans from flying pucks.<sup>43</sup> Further still, the NHL has mandated rink operators must provide a protective area for spectators who prefer to be wholly protected from the risks of flying pucks.<sup>44</sup>

In Major League Baseball, courts have held there is no duty to warn spectators of the possibility that a ball or bat may enter the stands.<sup>45</sup> Baseball stadiums are only required to provide screening behind home plate. Spectators who voluntarily choose to sit in an area unprotected by a screen, even if there are no seats available behind the screen, accept the 'obvious danger' of being hit by a ball or other potential hazards that the average person would perceive in attending a baseball game.<sup>46</sup>

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36 Footnote 29, at 103.

37 id.

38 20 COA2d § 361 (2017).

39 *Sciarrotta v. Global Spectrum*, 944 A.2d 630, 641 (NJ 2008).

40 20 COA2d § 361 (2017).

41 id.

42 id.

43 Brett Celedonia, 'Flying Objects: Arena Liability for Fan Injuries in Hockey and Other Sports', 15 *Sports Law J.* 115, 117 (2008).

44 Footnote 39.

45 *Benejam v. Detroit Tigers*, 635 N.W.2d 219, 220 (Mich Ct App 2001).

46 id.

In professional football, a fan is considered to be on notice that a ball may enter the stands. Given the dimensions of a football, along with the nature of the game, courts have seen the risks to patrons as being low.<sup>47</sup>

Alcohol consumption is also an area of concern for venue owners. In order to protect players and coaches from fans running onto the field during a game, some teams employ security guards armed with tasers.<sup>48</sup> The concern doesn't end with the games' final score. Approximately 10 per cent of fans leave a sporting event intoxicated.<sup>49</sup> The risk of these fans driving after the game has prompted stadium owners to hire extra security, which in turn has led to fans complaining about overzealous security enforcement outside the stadiums.<sup>50</sup> Stadium owners take this liability seriously. The Minnesota Twins suspended a local legend, Wally the Beer Man, for allegedly selling beer to a minor at a home game. Even though selling alcohol to a minor is considered a serious offence, local fans were still outraged.<sup>51</sup>

#### IV COMMERCIALISATION OF SPORTS EVENTS

Athletes are celebrities. The general public admires their fame and fortune.<sup>52</sup> It is virtually impossible to avoid an advertisement that harnesses a professional athlete's celebrity status. Whereas athletes used to be 'pitchmen' for sports-related products, these days athletes endorse everything from Rolex watches to breakfast cereal.<sup>53</sup> This rise in celebrity status has allowed professional athletes to increase their earnings off the field.<sup>54</sup> A 1990 *Sports Magazine* issue estimated US companies spent more than US\$580 million to have professional athletes promote their products.<sup>55</sup> *Forbes* magazine estimated that, during 2017, Cristiano Ronaldo, LeBron James, Roger Federer, Kevin Durant, Rory McIlroy, Stephen Curry, Tiger Woods and Phil Mickelson made combined earnings of US\$351 million in endorsement revenues.<sup>56</sup>

##### i Types of and ownership in rights

Each major sports league maintains the rights to market the names and logos of the individual teams in their respective leagues.<sup>57</sup> A player's contract will typically contain provisions regarding publicity for the sports club and restrictions on a player's ability to engage in endorsements.<sup>58</sup> In fact, often, a player's contract will require a certain number of

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47 Footnote 43, at 131.

48 Troy Graham, 'Phils Security Puts Police on Sideline', *Phila. Inquirer*, 6 May 2010, available at 2010 WLNR 9346261.

49 Peter Funt, 'Limit Alcohol in Stadiums', *Monterey County Herald*, 25 May 2011, available at 2011 WLNR 10428563.

50 id.

51 'Wally The Beer Man Found Not Guilty', CBS Minnesota (22 March 2011), <http://minnesota.cbslocal.com/2011/03/22/wally-the-beer-man-found-not-guilty/>.

52 James T Gray, *Sports Law Practice* § 7.01 (Matthew Bender, 3d ed. 2014).

53 id.

54 id.

55 id.; Complete, Corporate America's Team, *Sport Magazine*, June 1990, at 80.

56 *Forbes* magazine, [www.forbes.com/athletes/list/](http://www.forbes.com/athletes/list/) (last visited 16 September 2018).

57 James T Gray, *Sports Law Practice* § 7.03 (Matthew Bender, 3d ed. 2014).

58 id.

appearances in connection with licensing agreements made by the league.<sup>59</sup> Restrictions on a player's endorsement of a given product include what the player wears during a game, or even during a preseason or warm-up game.<sup>60</sup>

**ii Contractual provisions for exploitation of rights**

The Federal Trade Commission (FTC) has established guidelines concerning the use of endorsements and testimonials in advertising.<sup>61</sup> The guidelines require that the endorsement must always reflect the honest opinions, findings, beliefs or experience of the endorser.<sup>62</sup> Furthermore, the endorsement may not contain any representations that would be deceptive, or could not be substantiated and made directly by the advertiser.<sup>63</sup> Celebrity endorsements may only be used if the advertiser has good reason to believe that the endorser continues to subscribe to the views presented in the advertisement.<sup>64</sup> An advertiser may only run the advertisement as long as it has good reason to believe the endorser remains a user of the product.<sup>65</sup>

Companies often contract with professional athletes to wear or display the company's products.<sup>66</sup> Typically, such contracts require the athlete to use the endorsed product exclusively while participating in all athletic activities.<sup>67</sup> For instance, if the endorsed product were shoes, the company will prohibit the athlete from wearing athletic shoes manufactured by another company.<sup>68</sup> Given the FTC guidelines and the legal exposure an athlete might endure, athletes try to make sure the promoted materials are in good taste and do not harm the public image of the athlete.<sup>69</sup>

Although the terms of an endorsement contract are negotiable between the company and the athlete, certain provisions are common place.<sup>70</sup> Endorsement agreements should identify with specificity the products or services the athlete will endorse during the term of the contract.<sup>71</sup> An overly broad or loose definition of the products to be endorsed may result in an agreement that precludes competitive endorsements with other companies even though the first company does not presently manufacture those products.<sup>72</sup> Thus, if an athlete is endorsing a certain type of basketball, the endorsed product should not be referred to in terms of 'basketball product' because this term is too broad.<sup>73</sup>

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59 id.

60 id.

61 id. at § 7.05.

62 id.

63 16 CFR Chapter I, Subchapter B, Part 255.1(a).

64 16 CFR Chapter I, Subchapter B, Part 255.1(b).

65 16 CFR Chapter I, Subchapter B, Part 255.1(c).

66 James T Gray, *Sports Law Practice* § 7.08 (Matthew Bender, 3d ed. 2014).

67 id.

68 id.

69 id.

70 id.

71 id.

72 id.

73 id.

## V STADIUM DEVELOPMENT

In the United States, stadiums are a large part of professional sports. Cities and states compete with one another to become home to a professional sports stadium owing to the profitable benefits of increased revenue and spending the stadiums generate.<sup>74</sup> Aside from the increased revenue, having a stadium allows locals to follow their home team as well as drawing people into a city's downtown area.<sup>75</sup>

The Los Angeles Rams and Chargers are building the largest and costliest NFL stadium in history.<sup>76</sup> The 3 million square foot facility that will cost a projected US\$2.6 billion is scheduled to open in 2020. The Oakland Raiders also started construction on a new stadium located adjacent to the south end of the Las Vegas Strip.<sup>77</sup> The Raiders' stadium features a translucent ceiling and retractable doors offering views of the Strip, as well as a small jail and courtroom to detain and process unruly fans.<sup>78</sup>

The Mercedes-Benz Stadium opened its doors in August 2017 after 28 months of construction.<sup>79</sup> The newest state-of-the-art sports facility seats 71,000 for Atlanta Falcons games, and can expand or reduce the number of seats to house the FIFA World Cup, a Final Four, Major League Soccer (MLS) soccer games and concerts. Super Bowl LIII is already scheduled to be played in the Mercedes-Benz stadium in 2019.<sup>80</sup>

2016 brought the US Bank Stadium home to the Minnesota Vikings. The project began in 2014 and had its ribbon-cutting ceremony in July 2016. The overall budget for the stadium was US\$1.061 billion. The new stadium has resulted in an increase of revenue to the surrounding area. Super Bowl LII was played in the new US Bank Stadium in 2018 and this event brought US\$370 million to the area.<sup>81</sup> Wells Fargo relocated 5,000 employees to a new regional headquarters built next to the US Bank Stadium.<sup>82</sup> Apartments, restaurants and shops have also opened up near the stadium, resulting in more than US\$1 billion

74 John Holler, 'Fifth Vikings stadium option emerges', FoxSports.com (23 February 2011), [www.scout.com/nfl/vikings/story/1050421-fifth-vikings-stadium-option-emerges?s=63](http://www.scout.com/nfl/vikings/story/1050421-fifth-vikings-stadium-option-emerges?s=63).

75 Martin J Greenberg, 'Sports Facility Financing and Development Trends in the United States', 15 *Marq. Sports L. Rev.* 93, 157 (2004).

76 Elijah Chiland, 'NFL stadium takes shape in Inglewood', Los Angeles Curbed (3 January 2018), <https://la.curbed.com/2018/1/3/16847374/rams-nfl-stadium-los-angeles-chargers-construction-photos>.

77 Gary Peterson, 'What happens in Vegas? Raiders' new stadium has a jail for that', the *Mercury News* (21 August 2018), <https://www.mercurynews.com/2018/08/21/what-happens-in-las-vegas-raiders-new-stadium-has-a-jail-for-that>.

78 id.

79 Courtney Martinez, 'Infographic: Mercedes-Benz Stadium v. Georgia Dome, by the Numbers', AJC.com (18 August 2017), [www.ajc.com/news/local/infographic-mercedes-benz-stadium-georgia-dome-the-numbers/iW40buMpslOwAqmZmxhA0O/](http://www.ajc.com/news/local/infographic-mercedes-benz-stadium-georgia-dome-the-numbers/iW40buMpslOwAqmZmxhA0O/).

80 Jeremy Cluff, 'Atlanta Falcons new stadium – Mercedes-Benz Stadium details, photos', *Azcentral.com* (August), [www.azcentral.com/story/sports/heat-index/2017/08/24/atlanta-falcons-new-stadium-mercedes-benz-stadium-z/595135001/](http://www.azcentral.com/story/sports/heat-index/2017/08/24/atlanta-falcons-new-stadium-mercedes-benz-stadium-z/595135001/).

81 Rochelle Olson and Eric Roper, 'Super Bowl LII adds up to \$370 million for Minnesota, report says', *Startribune.com* (29 May 2018), [www.startribune.com/super-bowl-lii-adds-up-to-370m-for-minnesota-report-says/483949311/](http://www.startribune.com/super-bowl-lii-adds-up-to-370m-for-minnesota-report-says/483949311/).

82 Sam Black, 'Wells Fargo opens \$300M downtown Minneapolis office towers, *Minneapolis/Sr Paul Business Journal* (25 July 2016, 2.33 pm), [www.bizjournals.com/twincities/news/2016/07/21/wells-fargo-opens-minneapolis-twin-towers-offices.html](http://www.bizjournals.com/twincities/news/2016/07/21/wells-fargo-opens-minneapolis-twin-towers-offices.html).

worth of additional investment in the area.<sup>83</sup> Further, the 2019 National Collegiate Athletic Association (NCAA) Final Four is scheduled to be held at the US Bank Stadium, bringing in an estimated US\$200 million alone.<sup>84</sup>

These multibillion-dollar facilities do not always go as planned. One of the most anticipated features of the new Mercedes-Benz stadium was its retractable roof. Unfortunately, the roof caused three construction delays and was not fully functional when the stadium opened.<sup>85</sup> As of July 2018, the Mercedes-Benz roof finally opened, as it should, in just over eight minutes.<sup>86</sup> The new US Bank Stadium continues to battle ongoing issues with its moisture barrier, loose exterior panels and leaking walls.<sup>87</sup> The building is still under warranty and the general contractor and two of its subcontractors responsible for the design and installation of the exterior panels are in arbitration to determine who will pick up the tab for repairs.<sup>88</sup>

Along with the new stadium, the Minnesota Vikings built a new headquarters and training facility in a neighbouring city. The team bought nearly 200 acres of land, which it plans to develop over the next decade. The training facility, the Twin Cities Orthopedics Performance Center, opened in 2018. The 277,000 square foot state-of-the-art training facility features cryotherapy chambers, virtual reality training technology and lockers with individual ventilation systems.<sup>89</sup> The team also plans to develop the surrounding land, which is being called Viking Lakes.<sup>90</sup> The development is to include a hotel, a conference centre, apartments, restaurants and office space, as well as lakes and trails and a Skol Pavilion for events.<sup>91</sup>

There is currently a trend of building high-profile training facilities. The Dallas Cowboys opened their new training facility in mid-2016, naming it The Ford Center at the Star.<sup>92</sup> The Star is located 25 miles north of Dallas in Frisco, Texas, and serves as the Cowboy's

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- 83 Robert Gray, 'Here Are 5 Amazing Things About the Minnesota Vikings' New Stadium', *Fortune* (27 August 2016, 9 am), <http://fortune.com/2016/08/27/nfl-minnesota-vikings-stadium/>.
- 84 Tim Yotter, 'Stadium officials boast economic development', *247Sports.com* (19 July 2016), <https://247sports.com/nfl/minnesota-vikings/Article/US-Bank-Stadium-officials-boast-economic-development-103099923/>.
- 85 Tim Tucker, 'Plan: Stadium roof will be closed for rest of Falcons season, open for one soccer game', *AJC.com* (6 October 2017, 3 pm), [www.ajc.com/sports/plan-stadium-roof-will-closed-for-rest-falcons-season-open-for-one-soccer-game/eFcG6uolRi3qcGatIffwxL/](http://www.ajc.com/sports/plan-stadium-roof-will-closed-for-rest-falcons-season-open-for-one-soccer-game/eFcG6uolRi3qcGatIffwxL/).
- 86 Tim Tucker, 'Mercedes-Benz Stadium roof opened in about eight minutes', *AJC.com* (25 July 2018), [www.ajc.com/sports/mercedes-benz-stadium-roof-opened-about-eight-minutes/3fTRqV1w31y64UY76DoABO/](http://www.ajc.com/sports/mercedes-benz-stadium-roof-opened-about-eight-minutes/3fTRqV1w31y64UY76DoABO/).
- 87 Rochelle Olson, 'Leaky walls, loose panels still plague stadium, with no clear fix', *StarTribune.com* (29 April 2017), [www.startribune.com/u-s-bank-stadium-s-leaky-walls-flying-panels-remain-an-unresolved-issue-at-9-month-old-building/420777093/#1](http://www.startribune.com/u-s-bank-stadium-s-leaky-walls-flying-panels-remain-an-unresolved-issue-at-9-month-old-building/420777093/#1).
- 88 id.; See also Rochelle Olson, 'US Bank Stadium repairs behind schedule, still "several weeks" from completion', *StarTribune.com* (20 September 2017), [www.startribune.com/u-s-bank-stadium-repairs-behind-schedule-with-completion-date-unclear/446139173/](http://www.startribune.com/u-s-bank-stadium-repairs-behind-schedule-with-completion-date-unclear/446139173/); see also Tom Lyden, 'Blame game over falling panels at U.S. Bank Stadium', *Fox9.com* (12 September 2017, 8.25 pm), [www.fox9.com/news/investigators/blame-game-over-falling-panels-at-us-bank-stadium](http://www.fox9.com/news/investigators/blame-game-over-falling-panels-at-us-bank-stadium).
- 89 Mark Craig, 'Built for success', *Startribune.com* (24 July 2018), [www.startribune.com/vikings-facility-tco-performance-center-headquarters-video-tour-details-photos/487412921/](http://www.startribune.com/vikings-facility-tco-performance-center-headquarters-video-tour-details-photos/487412921/).
- 90 Nick Ferraro, 'New Vikings campus in Eagan to feature areas for fans to walk, sit, play and interact', *Pioneer Press* (25 July 2017, 6.55 pm), [www.twincities.com/2017/07/25/new-vikings-campus-in-eagan-to-feature-areas-for-fans-to-walk-sit-play-and-interact/](http://www.twincities.com/2017/07/25/new-vikings-campus-in-eagan-to-feature-areas-for-fans-to-walk-sit-play-and-interact/).
- 91 id.
- 92 Gil Brandt, 'The Star is born: Cowboys' new \$1.5B facility lives up to hype', *NFL: The Brand Report* (11 October 2016, 1.48 pm), [www.nfl.com/news/story/0ap3000000719290/article/the-star-is-born-](http://www.nfl.com/news/story/0ap3000000719290/article/the-star-is-born-)

new headquarters. The facility includes two outdoor practice fields and a 12,000-seat indoor stadium. Football teams from the local school districts will also have access to the training facility. The area surrounding the Star also includes a retail area, an upscale hotel, a sports medicine facility and a fitness centre.<sup>93</sup>

In September 2017, the Green Bay Packers officially opened the 'Titetown District' to the public. The 34-acre complex sits adjacent to Lambeau Field, home to the NFL team.<sup>94</sup> The Titetown District provides a large park dedicated to fitness-related activities, cultural events and game-day celebrations. The complex will also provide an upscale hotel, a restaurant, town homes and a sports medicine clinic.<sup>95</sup>

The NBA's Minnesota Timberwolves and the Women's National Basketball Association's (WNBA) Minnesota Lynx recently opened a new practice facility and corporate headquarters at Mayo Clinic Square, adjacent to their home stadium, the Target Center in Minneapolis, Minnesota. Aside from being a completely privately funded state-of-the-art project, this 107,000 square foot development is noteworthy for its repurposing of an existing urban structure into a full-sized arena. Before it was a training facility, the real estate housed a cinema.<sup>96</sup> Today, it provides a training area complete with two basketball courts, one for each team. The Minnesota Lynx are now the first WNBA team to have its own court and training area.<sup>97</sup> The facility will also be used by the area's youth and local athletes.<sup>98</sup> *Finance & Commerce* declared the facility one of the Top Projects of 2015.<sup>99</sup>

Minnesota recently opened the Treasure Island Center, which houses the Minnesota Wild's new 1,200-seat practice rink.<sup>100</sup> TRIA Rink, named after the Minnesota-based orthopaedic division of HealthPartners, opened in early 2018.<sup>101</sup> The space is used for Wild practices in the morning, leaving the afternoon and evening slots available for schools and

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cowboys-new-15b-facility-lives-up-to-hype.

93 Jean-Jacques Taylor, 'How Jerry Jones is changing game with Cowboys' new training facility', ESPN (3 March 2016), [www.espn.com/nfl/story/\\_/id/14878969/how-jerry-jones-dallas-cowboys-changing-game-new-training-facility](http://www.espn.com/nfl/story/_/id/14878969/how-jerry-jones-dallas-cowboys-changing-game-new-training-facility).

94 Todd Bragstad, 'Green Bay Packers open Titetown Park next to Lambeau Field: Slideshow', *Milwaukee Business Journal* (18 September 2017, 1 pm), [www.bizjournals.com/milwaukee/news/2017/09/18/green-bay-packers-open-titetown-park-next-to.html](http://www.bizjournals.com/milwaukee/news/2017/09/18/green-bay-packers-open-titetown-park-next-to.html).

95 Todd Bragstad, 'See the construction progress on the Titetown District near Lambeau Field: Slideshow', *Milwaukee Business Journal* (3 May 2016, 6 am), [www.bizjournals.com/milwaukee/news/2016/05/03/see-the-construction-progress-on-the-titetown.html](http://www.bizjournals.com/milwaukee/news/2016/05/03/see-the-construction-progress-on-the-titetown.html).

96 'Grand Opening Held Today for Timberwolves and Lynx Courts at Mayo Clinic Square', NBA.com, [www.nba.com/timberwolves/grand-opening-held-today-timberwolves-and-lynx-courts-mayo-clinic-square](http://www.nba.com/timberwolves/grand-opening-held-today-timberwolves-and-lynx-courts-mayo-clinic-square) (last visited 7 October 2017).

97 id.

98 Rhoda Madson, 'Celebrating Grand Opening Today for Mayo Clinic Square: Mayo Clinic, Minnesota Timberwolves, Minnesota Lynx, Mayo Clinic', the Mayo Clinic (17 June 2015), <https://newsnetwork.mayoclinic.org/discussion/mayo-clinic-minnesota-timberwolves-minnesota-lynx-celebrate-grand-opening-for-mayo-clinic-square/>.

99 Julie Kendrick, 'Top Projects of 2015 series: Mayo Clinic Square', *Finance & Commerce* (12 August 2016, 6.50 am), <http://finance-commerce.com/2016/08/top-projects-of-2015-series-mayo-clinic-square/>.

100 Frederick Melo, 'On the old Macy's rooftop, they "broke ground" for the new MN Wild practice rink', *Pioneer Press* (11 April 2017), [www.twincities.com/2017/04/11/on-the-old-macys-rooftop-they-broke-ground-for-the-new-mn-wild-practice-rink/](http://www.twincities.com/2017/04/11/on-the-old-macys-rooftop-they-broke-ground-for-the-new-mn-wild-practice-rink/).

101 id.; Dane Mizutani, 'Wild's downtown practice facility set for December opening', *Pioneer Press* (3 September 2017), [www.twincities.com/2017/09/03/wilds-downtown-practice-facility-set-for-december-opening/](http://www.twincities.com/2017/09/03/wilds-downtown-practice-facility-set-for-december-opening/).



amateur leagues.<sup>102</sup> Hamline University will use the space to host home games for both its men's and women's hockey teams, and it will also be home for Minnesota's professional women's ice hockey team, the Minnesota Whitecaps.<sup>103</sup> Treasure Island Center will also house a brewing company, retail stores, the St Paul Police Department, TRIA Orthopedic Center and a donut shop.<sup>104</sup>

## VI PROFESSIONAL SPORTS AND LABOUR LAW

The SPC is an outgrowth of the respective league's CBA.<sup>105</sup> The SPC is written by the individual team the player is signing with; as such, any ambiguity is interpreted against the team.<sup>106</sup> The SPC specifies the player's obligations, including his or her performance outside the sport, and explains the employer or team's control over the player.<sup>107</sup> The SPC provides for penalties in cases of prohibited conduct.<sup>108</sup> In addressing the penalties the SPC explains all of the elements of a given infraction.<sup>109</sup> It spells out the amounts of possible fines, expected lengths of suspensions, as well as the process of instituting the punishment and the process of any subsequent appeals.<sup>110</sup>

### i Mandatory provisions

Generally speaking, players have very little control over non-monetary terms of their contract.<sup>111</sup> The exception to the rule is a player such as LeBron James who has an exceptional talent or skill so rare that accommodating the player's stipulations is still a bargain.<sup>112</sup> This sort of clout allows a player to negotiate several provisions of their contract.<sup>113</sup>

An average professional player still might be able to negotiate some parts of his or her contract.<sup>114</sup> For instance, a player might be able to negotiate his or her signing bonus, the timing of payment of any bonuses, length of the contract and guarantees in case of injuries.<sup>115</sup>

The SPC also incorporates collateral agreements.<sup>116</sup> For example, an SPC will contain a clause incorporating the league's constitution and by-laws.<sup>117</sup> This means that when a player signs his or her 10-page SPC, he or she is also binding him or herself to the 300 pages of

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102 Mizutani, note 101.

103 id.; see also Chris Long, 'Behind-the-Scenes Tour Inside Wild's New Downtown St Paul Practice Facility', KSTP-TV (13 September 2018), <https://kstp.com/sports/behind-the-scenes-tour-inside-wilds-new-downtown-st-paul-practice-facility/5069944/>.

104 id.

105 John O Spengler, et al., *Introduction to Sport Law* 111 (Myles Schrag et al. eds., 2009).

106 Walter T Champion Jr, *Fundamentals of Sports Law* § 16:2 (4th ed. 2016).

107 id.

108 id. at § 16:3.

109 id.

110 id.

111 id.

112 id.

113 id.

114 id. at § 16:2.

115 id.

116 id. at § 16:4.

117 id.

other material usually from the league's CBA.<sup>118</sup> Better known collateral agreements include the signing bonus and the no-cut clause.<sup>119</sup> The signing bonus is payment simply for signing the contract and the player will get the payment once he or she shows up for the first day of training. Once the player receives the bonus, he or she is not obliged to give it back, even if he or she is cut later on. A no-cut clause prevents a team from cutting a player during the life of the contract. These types of clauses are difficult to obtain given the nature of sports.<sup>120</sup> They typically protect a player's contract from being terminated owing to poor performance or poor physical condition. A no-cut clause is interpreted very strictly, it will only protect a player from termination of the type specified.<sup>121</sup>

## ii Free movement of athletes

It is possible for players to negotiate a no-trade clause in their contract. A no-trade clause gives a player the right to refuse a trade. Because a no-trade clause is so powerful, they are typically only given to senior players or players with a large amount of clout.<sup>122</sup> In baseball, a player with five years on one team and 10 years of experience can veto a proposed trade.<sup>123</sup> A player might want a no-trade clause if he or she has substantial business ties with the location of the signing team.<sup>124</sup>

## VII SPORTS AND ANTITRUST LAW

Antitrust is a major component of sports in the United States. There are four legislative acts that govern the majority of antitrust action in professional sports:

- a the Sherman Act;
- b the Clayton Act;
- c the Norris-LaGuardia Act; and
- d the National Labor Relations Act (NLRA).

The Sherman Act was enacted to regulate business practices among competitors so as to promote economic competition by deterring monopolies. The US Supreme Court has held the Act is to be analysed in two manners: the *per se* rule and the 'rule of reason'.<sup>125</sup> *Per se* analysis is used when a particular labour practice has been presumed to have a negative effect on competition, and is therefore illegal. For instance, price fixing is a *per se* violation of antitrust laws because of its negative effects on competition and consumers. Rule of reason analysis looks at a particular practice and asks whether it is reasonable or unreasonable. However, if a particular labour practice is found to be a *per se* violation it is unnecessary to be further examined under the rule of reason.<sup>126</sup>

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118 id.

119 id.

120 id.

121 id.

122 id.

123 id.

124 id.

125 Adam Epstein, *Sports Law* 220 (2003).

126 id. at 222.

The Clayton Act allows labour unions and labour activities to be exempted from the Sherman Act. Section 6 of the Act mandates labour should not be treated as commerce. This is known as the 'statutory labour exemption'.<sup>127</sup> The statutory labour exemption allows labour unions to enter into agreements between themselves that might result in the elimination of competition from other unions, essentially allowing for monopolies by unions.<sup>128</sup>

The Norris-LaGuardia Act allows employees to bargain as a collective unit (CBA). Bargaining collectively allows an employer to negotiate a contract that is binding on all parties within the collective unit. The Act, along with Section 17 of the Clayton Act, makes labour union activities exempt from antitrust laws. The Act also limits the power of the federal courts to grant injunctions in labour disputes.<sup>129</sup>

The NLRA promotes collective bargaining between employees and employers. It requires parties to a labour negotiation to act in good faith regarding wages, hours and terms and conditions of employment. The NLRA is bilateral in that it protects both unions and employers. The NLRA does not require either party to concede on a point, nor agree to a certain proposal, in the name of coming to an agreement.<sup>130</sup> Under the NLRA, workers reserve the right to strike if an agreement cannot be reached. The Act requires a vote in which a majority of the union votes for the strike before a strike is allowed. The union must then give the employer a 60-day notice before the strike starts. For the League's side of the process, the NLRA allows League management to conduct a lockout, which prevents the players from playing, if a collective bargain agreement cannot be reached.<sup>131</sup>

Today, the most restrictive of antitrust infractions have been placated by players' collective bargaining. CBAs are effective once a players' union and league management confer and agree on labour issues. Agreements reached might breach antitrust laws in other settings; however, when they come about through the collective bargaining process they are considered 'non-statutory' labour exemptions and are immune to antitrust laws. The non-statutory exemption is applied where the restriction on trade affects only the parties to the CBA; where the restraint concerns a mandatory subject of the collective bargaining; and where the agreement that is sought to be exempted is a product of a true arm's-length bargaining process.<sup>132</sup>

The non-statutory labour exemption is at the heart of virtually all antitrust action in sports labour law. For years the NFL followed what was known as the 'Rozelle Rule', named after an early NFL Commissioner. The rule stated that when a player's contract ended, he or she became a free agent and could be signed by a different team than the one he or she was previously on.<sup>133</sup> If a player did switch teams, the new team was required to compensate the old team for its loss.<sup>134</sup> Compensation was determined by the Commissioner and was in the form of money, additional players, and/or future draft picks.<sup>135</sup> In 1976, a court determined the Rozelle Rule restricted players' movement between teams, thereby constricting salaries.

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127 id. at 220.

128 Walter T Champion, Jr, *Sports Law in a Nutshell* 93-94 (4th ed. 2009).

129 Adam Epstein, *Sports Law* 221 (2003).

130 id.

131 id. at 223.

132 See *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976).

133 id. at 610-11.

134 id. at 611.

135 id.

Therefore, the court held, the Rozelle Rule constituted a mandatory subject of collective bargaining. By not addressing the rule in the league's CBA it was not protected as a non-statutory exemption to antitrust laws.

Conversely, in *Wood v. NBA*, the court examined a salary cap limiting the amount a team can pay its players.<sup>136</sup> Although the cap hampered a player's ability to maximise his salary, the court determined the cap was exempt from antitrust laws because it had been bargained over by the players' union in the CBA; it was therefore a non-statutory labour exemption.<sup>137</sup> The cap only affected the parties to the CBA, it involved mandatory subjects of the CBA, and was the result of good faith negotiations.<sup>138</sup>

There is a large exception to the interplay between professional baseball and antitrust laws in the United States, an exception that no other professional sport enjoys. In 1922 the United States Supreme Court decided professional baseball was not a business that involved interstate commerce and therefore issues that related to the business of baseball were immune from antitrust laws.<sup>139</sup> Proliferation of players' unions and CBAs have made this immunity essentially meaningless for professional players. However, for minor league players and for team owners the exemption is still meaningful. Minor league players are still bound to the original team they signed with.<sup>140</sup> League management can block a team's attempt to relocate to a more lucrative city. There are several examples of states' attorneys general being blocked from even investigating antitrust activity by the MLB or team owners owing to this immunity from antitrust laws.<sup>141</sup>

Antitrust laws do not only apply to professional sports. In March 2015 the Ninth Circuit Court of Appeals found the NCAA rules forbidding compensation to college athletes for using their image or likeness were subject to antitrust laws.<sup>142</sup> The case began when Ed O'Bannon, who played basketball at UCLA from 1991 to 1995, noticed his image was being used in a video game.<sup>143</sup> His original claim argued student athletes should be paid for the use of their likeness by the NCAA upon graduation from college. The NCAA responded by arguing that paying a student athlete would contradict the amateur nature of college sports. The court ruled that the NCAA is a business, and requiring student athletes to sign over rights to their likeness in order to be eligible to play violated antitrust laws.<sup>144</sup> As a result, students no longer must sign away the rights to their likeness in order to be eligible

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136 See *Wood v. NBA*, 602 F.Supp. 525 (SDNY 1984).

137 id.

138 id.

139 See *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*, 259 US 200 (1922).

140 David Greenberg, 'Baseball's Con Game', *Slate* (19 July 2002, 10.36 am), [www.slate.com/articles/news\\_and\\_politics/history\\_lesson/2002/07/baseballs\\_con\\_game.html](http://www.slate.com/articles/news_and_politics/history_lesson/2002/07/baseballs_con_game.html).

141 *Minnesota Twins Partnership v. State ex rel. Hatch*, 592 N.W.2d 847 (Minn 1999); *Major League Baseball v. Butterworth*, 181 F. Supp. 2d 1316 (ND Fla 2001).

142 See *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015).

143 Eden Laese, 'O'Bannon vs. NCAA Results Explored', *The Gonzaga Bulletin* (26 October 2016, 10.38 pm), [www.gonzagabulletin.com/sports/article\\_2bcaddee-9bd7-11e6-b3dd-e7ca37a83d69.html](http://www.gonzagabulletin.com/sports/article_2bcaddee-9bd7-11e6-b3dd-e7ca37a83d69.html).

144 id.

to play. Donald Remy, the chief legal officer for the NCAA, noted disappointment in the US Supreme Court's refusal to review the case, but applauded the Ninth Circuit's decision recognising amateurism's essential nature of collegiate sports.<sup>145</sup>

## VIII SPORTS AND TAXATION

In the United States one of the most fundamental aspects of taxation is determining one's domicile or legal residence (actual physical residence and the intent of making it one's permanent home). Domicile is important because it establishes whether a state has the ability to tax a player's worldwide income. Even if a player is domiciled in one state, that player may still be taxed as a non-resident in another state. This requires a complicated process of apportioning income to different states based on where games are played.<sup>146</sup> To further complicate the domicile issue, in many instances players live in a given team's state or country only during the season and live elsewhere during the off season.<sup>147</sup>

In the United States, state tax rates vary from state to state. The majority of states use a bracket system to determine a player's income tax. In California, for example, a person who earns over US\$1 million per year is taxed at a rate of 13.3 per cent, whereas a person who earns less than US\$18,610 is taxed at 2 per cent.<sup>148</sup> Colorado, Illinois, Indiana, Massachusetts, Michigan, North Carolina, Pennsylvania and Utah apply a flat tax rate, meaning that every individual, regardless of income, is taxed at the same percentage.<sup>149</sup> In contrast, Alaska, Florida, Nevada, South Dakota, Texas, Washington and Wyoming do not have any individual income tax.<sup>150</sup> State taxes are generally deductible on federal income tax returns.<sup>151</sup> However, even after state tax deductions, athletes who live in states with no state income tax can maintain up to 10 per cent more of their salary than athletes who play for teams in other states with an income tax.<sup>152</sup>

Generally, the US government uses a bracket system similar to that of many states, such as California. Similar to state taxes, US tax law allows the taxation of a US citizen regardless of where they live in the world.<sup>153</sup> However, under some circumstances a US citizen may qualify for exclusion of certain types of foreign earnings.<sup>154</sup>

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145 Associated Press, 'Supreme Court rejects NCAA appeal of Ed O'Bannon Case', *LA Times* (3 October 2016, 10.50 am), [www.latimes.com/sports/sportsnow/la-sp-supreme-court-ed-obannon-20161003-snap-story.html](http://www.latimes.com/sports/sportsnow/la-sp-supreme-court-ed-obannon-20161003-snap-story.html).

146 Alan Pogroszewski, 'When is a CPA as Important as your ERA? A Comprehensive Evaluation and Examination of State Tax Issues on Professional Athletes', 19 *Marq. Sports L. Rev.* 395, 396 (2009).

147 William H Baker, 'The Tax Significance of Place of Residence for Professional Athletes', 1 *Marq. Sports L. J.* 1, 4 (1990).

148 Bankrate, [www.bankrate.com/finance/taxes/state-taxes-california.aspx](http://www.bankrate.com/finance/taxes/state-taxes-california.aspx) (last visited 16 October 2018).

149 *id.*

150 *id.*

151 IRC § 164(a)(3) (2015).

152 Footnote 146, at 414.

153 IRS, U.S. Citizens and Resident Aliens Abroad (16 September 2018), [www.irs.gov/individuals/international-taxpayers/us-citizens-and-resident-aliens-abroad](http://www.irs.gov/individuals/international-taxpayers/us-citizens-and-resident-aliens-abroad).

154 IRS, Foreign Earned Income Exclusion (30 May 2018), [www.irs.gov/individuals/international-taxpayers/foreign-earned-income-exclusion](http://www.irs.gov/individuals/international-taxpayers/foreign-earned-income-exclusion).

## IX SPECIFIC SPORTS ISSUES

### i Doping

In the United States, professional baseball and football are most heavily scrutinised when it comes to performance-enhancing drugs (PEDs).

In December 2007, a government report was released detailing the history of PEDs in the MLB. It specifically named several players who allegedly used such drugs, which in turn brought the attention of the media and fans to the epidemic. The MLB's response was to create harsh punishments for PED users.<sup>155</sup> The MLB now mandates that every player will be subject to a minimum of two drug tests a year, with no cap on how many additional random tests a suspected PED user can be given.<sup>156</sup> The policy dictates that a first-time offending player must sit out 50 games, second-time offenders must sit out 100 games and third-time offenders are banned from baseball for a minimum of two years.<sup>157</sup>

Similar to baseball, the NFL began testing and enforcing its penalties more intensely in recent years. The NFL maintains the right to randomly test players during pre-employment (free agents and rookies), annually during the preseason, randomly during the regular season, during the postseason, during the offseason or anytime the NFL believes it has 'reasonable cause'.<sup>158</sup> Like baseball, a player may be tested as many times as the league feels necessary.<sup>159</sup> In the NFL, first-time offenders are suspended for four games without pay, second-time offenders are suspended for a minimum of six games and third-time offenders are suspended for 12 months.<sup>160</sup> After the third offence, the NFL must reinstate an athlete before the athlete can play again. In addition to the prescribed suspension, offenders are not allowed to be around the team or any team facilities while on suspension.<sup>161</sup>

Although the NHL and NBA have experienced less pressure from the media to regulate PED use, both leagues have established drug-testing policies and repercussions for failed tests.<sup>162</sup>

The NHL bans the same substances that are banned by the World Anti-Doping Association (WADA). However, unlike the NFL and MLB, the NHL does not perform tests during the off season, and the league can only require up to two random tests during a given season.<sup>163</sup> Punishment for PED users varies. All players who fail a drug test are automatically

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- 155 Andrew LT Green, 'Spreading the Blame: Examining the Relationship Between Dshea and the Baseball Steroid Scandal', 90 *B. U. L. Rev.* 399, 424 (2010).
- 156 Tiffany D Lipscomb, 'Can Congress Squeeze the "Juice" Out of Professional Sports? The Constitutionality of Congressional Intervention into Professional Sports' Steroid Controversy', 69 *Ohio St. L. J.* 303, 314 (2008).
- 157 Joshua M Kimura, 'The Return of the Natural: How the Federal Government Can Ensure that Roy Hobbs Outlasts Barry Bonds in Major League Baseball', 16 *Sports Law. J.* Ill, 133 (2009).
- 158 Benjamin B Hanson, 'Defend the Williams Wall, Leave Professional Sports Drug Testing Policies in Shambles: The Decision and Consequences of Williams v. NFL', 33 *Hamline L. Rev.* 327, 341 (2010).
- 159 id.
- 160 Paul A Fortenberry, 'Illegal Muscle: A Comparative Analysis of Proposed Steroid Legislation and the Policies in Professional Sports' CBAs that Led to the Steroid Controversy', 5 *Va. Sports & Ent. L. J.* 121, 127 (2006).
- 161 Footnote 156, at 311.
- 162 Brent D Showalter, 'Steroid Testing Policies in Professional Sports: Regulated by Congress or the Responsibility of the Leagues?', 17 *Marq. Sports L. Rev.* 651, 656 (2007).
- 163 Shayna M Sigman, 'Are we all Dopes? A Behavioral Law & Economics Approach to Legal Regulation of Doping in Sports', 19 *Marq. Sports L. Rev.* 125, 167 (2008).

referred to the league's substance abuse programme. The length of the punishment begins at 20 games without pay for the first violation, extends to 60 games without pay for a second violation, and results in a permanent suspension from the league for a third violation.<sup>164</sup>

The NBA's CBA establishes that players may not be tested more than four times per season. Like the NHL, upon a failed test, the NBA requires automatic entrance into the league's substance abuse programme.<sup>165</sup> Punishment in the NBA for PED use ranges from a multiple game suspension for first-time offenders, to a ban from the league after a fourth failed test. The NBA does not test its players during the off season.

The prevalence of doping in professional sports led to the creation of WADA. WADA was established in 1999 as an international independent agency composed and funded equally by the sports movement and governments of the world. Its key activities include scientific research, education, development of anti-doping capacities and monitoring of the World Anti-Doping Code – the document harmonising anti-doping policies in all sports and all countries.<sup>166</sup> In June 2018, WADA opened the first World Anti-Doping Global Athletes Forum in Calgary where athletes from 54 countries gathered to discuss and further the anti-doping movement in international sports. One international athlete, Beckie Scott, called doping the greatest threat to sports today.<sup>167</sup> Whistleblowers and other insiders also spoke to the Forum about the Russian Doping Investigation.<sup>168</sup>

## ii Betting

In the United States, there is a long history between gambling and sports. Unfortunately, players, coaches and other officials have periodically been implicit in illegal sports betting. One of the most famous instances occurred in professional baseball and is referred to as the 'Black Sox' scandal. In the 1919 World Series, the Chicago White Sox lost to the Cincinnati Reds. Eight White Sox players were later accused of intentionally throwing the game in return for bribery money. Although the players were exonerated, they were still banned from baseball for life. Since then there have been other occasions in US sports where players have helped gamblers by intentionally missing free throws, fumbling the football or throwing a 'phantom' punch.<sup>169</sup>

Professional coaches have also been caught up in gambling scandals.<sup>170</sup> Former NHL assistant hockey coach, Rick Tocchet, was found to be financing a nationwide gambling ring. In baseball, Pete Rose was betting daily on MLB games while managing a team. The reason for the concern is that when managers and athletes bet on the game, their decisions are made

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164 Steve R Heisler, 'Steroid Regulation in Professional Sports: Sarbanes-Oxley as a Guide', 27 *Cardozo Arts & Ent. L. J.* 199, 218 (2009).

165 id. at 217.

166 World Anti-Doping Agency, 'Who We Are', [www.wada-ama.org/en/who-we-are](http://www.wada-ama.org/en/who-we-are).

167 Jeff Mcintosh, 'Canadian, international athletes mobilize at anti-doping forum in Calgary', the *Globe and Mail* (4 June 2018), [www.theglobeandmail.com/sports/article-canadian-international-athletes-mobilize-at-anti-doping-forum-in/](http://www.theglobeandmail.com/sports/article-canadian-international-athletes-mobilize-at-anti-doping-forum-in/).

168 id.

169 Brent J Goodfellow, 'Betting on the Future of Sports: Why Gambling Should be Left Off the Field of Play', 2 *Williamette Sports L. J.* 21 (2005).

170 id.

based on the chance to win money, which may be counter to the team's best interest. To this day, Pete Rose has not been inducted into the Hall of Fame (even though many argue he should be) and is banned from baseball.<sup>171</sup>

In May 2018, the Supreme Court of the United States struck down a 1992 law known as the Professional and Amateur Sports Protection Act, which effectively banned commercial sports betting in most states. This decision allows states to legalise an estimated US\$150 billion in illegal wagers on professional and amateur sports that Americans make each year.<sup>172</sup> In *Murphy v. National Collegiate Athletic Association*, No. 16-476, Justice Alito wrote in his majority opinion, 'Congress can regulate sports gambling directly, but if it elects not to do so, each state is free to act on its own.'<sup>173</sup>

### iii Manipulation

Analytics are a major part of baseball and sports. The 'Moneyball' era has made statistics king and analysed information a premium in baseball and sports generally. Today, professional sports view every action in a game as a bit of data to be used for a more successful analysis and prediction.

Some forms of manipulation receive criminal attention from government authorities. In 2015, members of the St Louis Cardinals were investigated by the FBI for possibly hacking a database owned by the Houston Astros.<sup>174</sup> The Astros had reported cybersecurity breaches going back to 2014. The FBI investigation focused on persons employed by the Cardinals management who had gained access to passcodes owned by the Astros.<sup>175</sup>

### iv Grey market sales

In the United States, the resale of tickets for sporting events is referred to as 'scalping', and is controlled by individual states' laws. Some states such as Minnesota allow for the unregulated resale of tickets.<sup>176</sup> Other states have laws against reselling tickets but upon a closer examination of the law shows the prohibitions are very nuanced. For instance, in Arizona, reselling tickets is only illegal within 200 feet of the venue.<sup>177</sup> Other states, such as Georgia, New Jersey and New York, require a licence to sell or resell tickets.<sup>178</sup>

Regardless of the state jurisdiction, anti-scalping legislation is directed at the seller of the tickets and not the buyer. Patrons that buy tickets should be alerted to the fact that the tickets themselves might be forgeries. It is not uncommon for scalpers to sell tickets for seats that don't even exist in a given venue.<sup>179</sup> Patrons that purchase their tickets on the grey market

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171 id.

172 Adam Liptak and Kevin Draper, 'Supreme Court Ruling Favors Sports Betting', the *New York Times* (14 May 2018) [www.nytimes.com/2018/05/14/us/politics/supreme-court-sports-betting-new-jersey.html](http://www.nytimes.com/2018/05/14/us/politics/supreme-court-sports-betting-new-jersey.html).

173 id.

174 Derrick Goold, 'Baseball Waits to Act on Cardinals' Hacking Case', *St Louis Post-Dispatch* (15 July 2015), [www.stltoday.com/sports/baseball/professional/baseball-waits-to-act-on-cardinals-hacking-case/article\\_1b11cf4d-2311-5618-9213-b73cff32a367.html](http://www.stltoday.com/sports/baseball/professional/baseball-waits-to-act-on-cardinals-hacking-case/article_1b11cf4d-2311-5618-9213-b73cff32a367.html).

175 id.

176 Myles Kaufman, 'The Curious Case of US Ticket Resale Laws', Seatgeek (28 September 2014), <https://seatgeek.com/tba/articles/ticket-resale-laws/>.

177 Michelle Fabio, Esq., 'Who Needs Tickets? Is Ticket Scalping Legal?', Legal Zoom (December 2009), [www.legalzoom.com/articles/who-needs-tickets-is-ticket-scalping-legal](http://www.legalzoom.com/articles/who-needs-tickets-is-ticket-scalping-legal).

178 id.

179 id.



also need to consider whether the tickets were originally bought with a stolen credit card. In 2006, Ticketmaster invalidated 1,000 Barbra Streisand concert tickets because they were bought with stolen credit card information.<sup>180</sup>

## X THE YEAR IN REVIEW

### i Concussion suits

More than 4,500 former NFL players sued the NFL (beginning in 2011) alleging the league concealed the long-term dangers of concussion.<sup>181</sup> Before the start of the 2013 season, a settlement was reached providing any former NFL player showing symptoms consistent with long-term concussion-caused damage would be eligible for awards of up to US\$5 million.<sup>182</sup> The presiding US District Judge, Anita B Brody, would not approve the settlement. Her concern was over the amount of money, US\$765 million, not being enough to cover all the possible claims.<sup>183</sup> Eventually a settlement was reached in April 2015.<sup>184</sup> The most notable change included uncapping the amount of the settlement, which ensures damages for affected retired NFL players and their families.

However, many former players opted out of the 2015 settlement and instead sued the NFL separately, alleging the earlier settlement did not adequately include all former players with varying concussion-related symptoms.<sup>185</sup> Those players challenged the 2015 settlement based on the fact that the settlement only covers former players diagnosed with Alzheimer's or Parkinson's disease and players who have already died from chronic traumatic encephalopathy (CTE), a degenerative brain disease that was, until very recently, only diagnosable posthumously.<sup>186</sup> The settlement did not address former players currently exhibiting possible symptoms of CTE. The Third Circuit Court of Appeals denied those players' challenge to the settlement.<sup>187</sup> Certain players objected further, petitioning the United States Supreme Court for writ of *certiorari*. The Supreme Court declined to review the settlement, making the settlement final.<sup>188</sup> It is estimated the uncapped deal will provide more than US\$1 billion

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180 Christine Paluf, 'Streisand Tickets Cancelled Due to Credit Card Fraud', Ticket News (29 August 2006), [www.ticketnews.com/streisand-tickets-cancelled-due-to-credit-card-fraud/](http://www.ticketnews.com/streisand-tickets-cancelled-due-to-credit-card-fraud/).

181 Associated Press, 'NFL, ex-players agree to \$765M settlement in concussions suit', NFL.com (29 August 2013, 2:52 pm), [www.nfl.com/news/story/0ap1000000235494/article/nfl-explayers-agree-to-765m-settlement-in-concussions-suit](http://www.nfl.com/news/story/0ap1000000235494/article/nfl-explayers-agree-to-765m-settlement-in-concussions-suit).

182 id.

183 Maryclaire Dale, 'Judge: \$765M might not cover NFL concussion claims', the *Seattle Times* (15 January 2014), [www.seattletimes.com/sports/seahawks/judge-765m-might-not-cover-nfl-concussion-claims/](http://www.seattletimes.com/sports/seahawks/judge-765m-might-not-cover-nfl-concussion-claims/).

184 Joe Van Acker, 'Correction: NFL Concussion Settlement Gets Final OK', Law360 (22 April 2016, 4:20 pm), [www.law360.com/articles/646700](http://www.law360.com/articles/646700).

185 Zachary Zagger, 'NFL Concussion Deal Affirmed By 3rd Circ.', Law360 (18 April 2016, 11:36 am), [www.law360.com/articles/785651/nfl-concussion-deal-affirmed-by-3rd-circ-](http://www.law360.com/articles/785651/nfl-concussion-deal-affirmed-by-3rd-circ-).

186 id.

187 Joyce Hanson, NFL, Union Launch Concussion Enforcement Protocol, Law360 (26 July 2016, 9:56 pm), [www.law360.com/articles/821298/nfl-union-launch-concussion-enforcement-protocol](http://www.law360.com/articles/821298/nfl-union-launch-concussion-enforcement-protocol).

188 AJ Perez, 'Supreme Court declines to take up NFL concussion case, settlement final', *USA Today* (12 December 2016, 12:39 pm), [www.usatoday.com/story/sports/nfl/2016/12/12/supreme-court-denies-nfl-concussion-case-settlement/95332068/](http://www.usatoday.com/story/sports/nfl/2016/12/12/supreme-court-denies-nfl-concussion-case-settlement/95332068/).

to a class of over 20,000 retired players.<sup>189</sup> Although the settlement was finalised in January 2017, nearly two years later a number of players are encountering difficulties collecting their settlement funds.<sup>190</sup>

The concussion lawsuits did not stop with the settlement. Former New England Patriots player Aaron Hernandez committed suicide in April 2017 while serving a life sentence for the murder of Odin Lloyd.<sup>191</sup> Following his death, Hernandez's family sent his brain to Boston University's CTE Center for further study.<sup>192</sup> At only 27 years of age, Hernandez was diagnosed with Stage III CTE, a level typically seen in players with a median age of death of 67 years.<sup>193</sup> Hernandez's family sued the NFL and the Patriots seeking US\$20 million in damages claiming the NFL was 'fully aware of the damage that could be inflicted from repetitive impact injuries and failed to disclose, treat or protect him from the danger of such damage'.<sup>194</sup> There is a question as to whether Hernandez is part of the concussion class action settlement. If he is, the settlement could preclude his family's claims. The NFL intends to vigorously contest Hernandez's claim.<sup>195</sup>

The NFL has implemented new protocols to address concussion concerns. In July 2016, the NFL and the NFL Players Association agreed to enforce new concussion protocols to include disciplining clubs with fines and future draft picks.<sup>196</sup>

In May 2016, the NCAA revised a settlement first proposed in 2013 with a number of student-athletes creating an opportunity for students suffering from concussion-related injuries to sue their colleges.<sup>197</sup> The previous US\$75 million settlement raised concerns it might do away with otherwise-valid injury claims. The new agreement would enable students to sue their school directly, but only on behalf of fellow players in a given sport.<sup>198</sup>

Federal courts are also addressing claims by former NHL players. In October 2016, a federal judge allowed former hockey players to amend a previously filed class action suit adding the estate of player Lazarus Zeidel, who was posthumously diagnosed with CTE.<sup>199</sup>

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189 id.

190 Rick Maese, 'Former NFL players' concussion suit back in court amid delays in payment, the *Washington Post* (18 September 2017), [www.washingtonpost.com/sports/former-nfl-players-concussion-suit-back-in-court-amid-delays-in-payment/2017/09/18/f93c0920-9cc0-11e7-9c8d-cf053ff30921\\_story.html?utm\\_term=.0c79b552c778](http://www.washingtonpost.com/sports/former-nfl-players-concussion-suit-back-in-court-amid-delays-in-payment/2017/09/18/f93c0920-9cc0-11e7-9c8d-cf053ff30921_story.html?utm_term=.0c79b552c778); see also Ken Benson, 'NFL Says Fraud Plagues the Concussion Settlement', the *New York Times* (13 April 2018), [www.nytimes.com/2018/04/13/sports/nfl-concussion.html](http://www.nytimes.com/2018/04/13/sports/nfl-concussion.html).

191 Rick Maese, 'NFL says it will "vigorously" fight CTE lawsuit filed by Aaron Hernandez's family', the *Washington Post* (22 September 2017), [www.washingtonpost.com/news/early-lead/wp/2017/09/21/aaron-hernandez-was-suffering-from-advanced-form-of-cte-family-files-suit-against-nfl/?utm\\_term=.ded709b3a215](http://www.washingtonpost.com/news/early-lead/wp/2017/09/21/aaron-hernandez-was-suffering-from-advanced-form-of-cte-family-files-suit-against-nfl/?utm_term=.ded709b3a215).

192 id.

193 id.

194 Footnote 190.

195 id.; See also Michael McCann, 'How Does Aaron Hernandez's CTE Diagnosis Affect a Potential Lawsuit Against the NFL', *Sports Illustrated.com* (27 September 2017), [www.si.com/nfl/2017/09/21/aaron-hernandezs-cte-diagnosis-affect-potential-lawsuit-nfl-patriots](http://www.si.com/nfl/2017/09/21/aaron-hernandezs-cte-diagnosis-affect-potential-lawsuit-nfl-patriots).

196 Footnote 187.

197 Jessica Corso, 'NCAA takes Another Swing at \$75M Concussion Settlement', *Law360* (23 May 2016, 8.41 pm), [www.law360.com/articles/799348](http://www.law360.com/articles/799348).

198 id.

199 Zachary Zagger, 'CTE Sufferer Allowed as Class Rep in NHL Concussion MDL', *Law360* (14 October 2016, 6.30 pm), [www.law360.com/articles/851649/cte-sufferer-allowed-as-class-rep-in-nhl-concussion-mdl](http://www.law360.com/articles/851649/cte-sufferer-allowed-as-class-rep-in-nhl-concussion-mdl).

The suit alleges the NHL hid the harmful effects of head injuries. In June 2018, Minnesota Federal Court Judge Susan Nelson denied the hockey players' motion for class certification, which means former players will not be automatically added to the lawsuit, but instead will have to file individually.<sup>200</sup> Shortly after that decision, Judge Nelson ordered the parties to attempt mediation.<sup>201</sup>

## ii Media rights

In 2016, Disney and Time Warner signed extensions of their 2014 rights to televise NBA games.<sup>202</sup> Under the new nine-year contract, Disney outlets (ABC and ESPN) will pay up to US\$1.4 billion for the rights to show 100 games a season, more than double what the company was paying under the previous contract.<sup>203</sup> Time Warner, who will be playing 64 NBA games a season, will pay up to US\$885 million, which is over a 90 per cent increase. These increases in contract price make NBA games the most expensive in regards to per-viewer costs.

## iii Premier soccer

In 2015, the NBC Sports Network acquired the TV rights for the English Premier League from the 2016/2017 season to the 2021/2022 season. The deal cost the NBC Sports Network US\$1 billion and provided NBC with the rights to broadcast 380 live matches every year.<sup>204</sup> Although the network admitted the deal itself is not profitable, NBC Sports Network stated it adds to its profitability overall.<sup>205</sup>

## iv Daily fantasy sports

In 2015, the Minnesota Wild of the NHL and Emil Interactive Games LLC, parent of DraftOps, a daily fantasy sports (DFS) operator, entered into a sponsorship agreement. In May 2016, the Wild filed suit alleging breach of contract and unjust enrichment, seeking US\$1.1 million, plus 1.5 per cent interest per month, along with US\$50,000 in damages.<sup>206</sup> Emil proffered an unexpected response, claiming the contract is void because the state of Minnesota has not legalised the relevant type of gaming. The court denied Emil's motion to dismiss in part because Emil failed to cite any legal authority addressing whether online DFS

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200 'Class-action status denied for NHL concussion lawsuit by ex-players', Reuters (13 July 2018), [www.reuters.com/article/us-nhl-concussions/class-action-status-denied-for-nhl-concussion-lawsuit-by-ex-players-idUSKBN1K3318](http://www.reuters.com/article/us-nhl-concussions/class-action-status-denied-for-nhl-concussion-lawsuit-by-ex-players-idUSKBN1K3318).

201 John Wawrow, 'Bettman tells AP: NHL in mediation on concussion lawsuit', *AP News* (11 September 2018), <https://apnews.com/b2b9fd5c9820406c9cd112047a41335a>.

202 Ronald Grover, 'Disney, Time Warner Get LeBron, Steph Curry and Skyrocketing Costs Under New NBA TV Deal', *TheStreet* (19 October 2016, 1.11 pm), [www.thestreet.com/story/13858154/1/disney-time-warner-get-lebron-steph-curry-and-skyrocketing-costs-under-new-nba-tv-deal.html](http://www.thestreet.com/story/13858154/1/disney-time-warner-get-lebron-steph-curry-and-skyrocketing-costs-under-new-nba-tv-deal.html).

203 id.

204 Jack Gaughan, 'Premier League just keeps getting richer: Another whopping payday as NBC agree \$1 Billion deal to retain US rights', *Mail Online* (11 August 2015, 12.58 pm), [www.dailymail.co.uk/sport/sportsnews/article-3193629/Premier-League-set-1billion-windfall-new-NBC-live-TV-rights-deal.html](http://www.dailymail.co.uk/sport/sportsnews/article-3193629/Premier-League-set-1billion-windfall-new-NBC-live-TV-rights-deal.html).

205 Richard Sandomir, 'NBC Retains Rights to Premier League In Six-Year Deal', the *New York Times* (10 August 2015), [www.nytimes.com/2015/08/11/sports/soccer/nbc-retains-rights-to-premier-league-in-six-year-deal.html?\\_r=0](http://www.nytimes.com/2015/08/11/sports/soccer/nbc-retains-rights-to-premier-league-in-six-year-deal.html?_r=0).

206 Fola Akinnibi, 'NHL Team Sponsorship Deal Void, Daily Fantasy Co. Says', *Law360* (2 June 2016, 3.47 pm), [www.law360.com/sports/articles/802995/nhl-team-sponsorship-deal-void-daily-fantasy-co-says](http://www.law360.com/sports/articles/802995/nhl-team-sponsorship-deal-void-daily-fantasy-co-says).

activities were unlawful in Minnesota.<sup>207</sup> Unfortunately, Minnesota will have to continue to wait for clarification. Although legislation aimed directly at DFS gaming was introduced again in 2018, the bill did not pass the house. The courts are also at a standstill because, shortly after the denial of Emil's motion to dismiss, Emil filed for Chapter 11 bankruptcy, which then stayed the litigation in Minnesota.<sup>208</sup>

## XI OUTLOOK AND CONCLUSIONS

### i Concussions

The NFL is approximately a US\$12 billion-a-year industry.<sup>209</sup> Fallout from concussion litigation will continue to impact the NFL decisions going forward. Players suffered 281 concussions in the 2017 season – the highest in six years.<sup>210</sup>

NFL Commissioner Roger Goodell has stated that making the game safer is the NFL's number one priority.<sup>211</sup> In an open letter, Goodell outlined the NFL's new initiative 'Play Smart, Play Safe', which comprises several new steps the league intends to take to address concussion-related injuries and their long-term effects.<sup>212</sup> The initiatives include an additional US\$100 million for medical research, engineering advancements and the creation of an independent, scientific advisory board to advise and steer scientific research regarding concussions. Further, in the next league labour negotiation, Goodell intends to address what the league can do to better serve retired players. In 2017, 25 NFL teams purchased new high-tech helmets that are designed to lower the risk of concussions.<sup>213</sup> The NFL has implemented new safety regulations, including one that penalises players that lead with the crown of their helmets to initiate contact against an opponent on any play.<sup>214</sup>

Until recently, it was thought CTE could only be diagnosed through a brain autopsy after a person had died. However, researchers at Brown University and VA Boston Healthcare System believe they have developed a method that could help diagnose CTE in living

207 *Minnesota Wild Hockey Club, LP v. Emil Interactive Games, LLC, et al.*, No. 16-cv-01545 (WMW/TNL), Doc. 32 at pp. 6–7 (D Minn 28 December 2016).

208 *Minnesota Wild Hockey Club, LP v. Emil Interactive Games, LLC, et al.*, No. 16-cv-01545 (WMW/TNL), Doc. 33 (D. Minn. 3 January 2017).

209 Chris Isidore, 'NFL revenue: here comes another record season', CNN Money (10 September 2015, 7.25 pm), <http://money.cnn.com/2015/09/10/news/companies/nfl-revenue-profits/>.

210 Lindsey H Jones and Lorenzo Reyes, 'NFL's reported concussions at six-year high in 2017', *USA Today* (26 January 2018), [www.usatoday.com/story/sports/nfl/2018/01/26/nfl-concussions-2017-season-study-history/1070344001/](http://www.usatoday.com/story/sports/nfl/2018/01/26/nfl-concussions-2017-season-study-history/1070344001/).

211 Jay Cohen, 'Even superfans see concussions as a threat to pro football's future', the *Globe and Mail* (28 April 2016, 7.55 pm), [www.theglobeandmail.com/sports/football/even-superfans-see-concussions-as-a-threat-to-pro-footballs-future/article29794935/](http://www.theglobeandmail.com/sports/football/even-superfans-see-concussions-as-a-threat-to-pro-footballs-future/article29794935/).

212 Roger Goodell, 'NFL Commitment to Player Health and Safety: A Letter from Commissioner Roger Goodell', NFL (14 September 2016), [www.playsmartplaysafe.com/wp-content/uploads/2016/09/nfl\\_goodell\\_letter\\_091316-xfinalx.pdf](http://www.playsmartplaysafe.com/wp-content/uploads/2016/09/nfl_goodell_letter_091316-xfinalx.pdf).

213 Jared Dubin, 'The safest helmet in football is set to make its NFL debut next season', CBS Sports.com (14 May 2017), [www.cbssports.com/nfl/news/the-safest-helmet-in-football-is-set-to-make-its-nfl-debut-next-season/](http://www.cbssports.com/nfl/news/the-safest-helmet-in-football-is-set-to-make-its-nfl-debut-next-season/).

214 Austin Knoblauch, 'NFL explains the helmet-hit rule, working on targeting rule', NFL.com (27 March 2018), <http://www.nfl.com/news/story/0ap3000000923435/article/nfl-expands-helmet-hit-rule-working-on-targeting-rule>.

patients.<sup>215</sup> The ability to test for CTE during one's life could impact the talent pool. Several players have left NFL citing concerns for their health and safety, including Husain Abdullah, Chris Borland and John Urschel.<sup>216</sup> The ability to test for CTE could also implicate the terms of the NFL class action settlement.<sup>217</sup> The settlement did not address former players currently exhibiting possible symptoms of CTE. While the NFL would not be required to add CTE as a recognisable condition, the settlement does require the NFL meet with retired players every 10 years to evaluate whether the changes are warranted.<sup>218</sup> If science continues to progress and players can be diagnosed with CTE while alive, it would be reasonable to request an amendment to the settlement.

## ii Soccer

Soccer is the world's most popular sport, and its fan base is still growing.<sup>219</sup> The top 20 soccer clubs in the world are worth an average of US\$1.6 billion dollars and earned an average of US\$428 million in revenue during the 2016/2017 season, an increase of 40 per cent from five years ago.<sup>220</sup> Soccer's popularity is also rising in the United States with a 27 per cent increase in interest since 2012.<sup>221</sup> In 2016, the average MLS team was worth US\$185 million, up 80 per cent from 2013 estimates.<sup>222</sup> In 2013, the MLS averaged 18,600 attending fans per match; in 2017, that number increased to 22,112 fans per game.<sup>223</sup> Those numbers put MLS attendance ahead of both the NBA and the NHL.<sup>224</sup>

Soccer's growing popularity is being met with new stadiums. Minnesota's MLS team, Minnesota United FC, will have a new home in 2019. Initial site preparation for the US\$200 million stadium, Allianz Field, began in late 2017.<sup>225</sup> The stadium will seat

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- 215 Shaker Samman, 'A Boston University Study May Lead to a Way to Diagnose CTE in Living Patients', *The Ringer* (26 September 2017), [www.theringer.com/nfl/2017/9/26/16369804/cte-brain-trauma-living-patients-study](http://www.theringer.com/nfl/2017/9/26/16369804/cte-brain-trauma-living-patients-study).
- 216 Kevin Clark, 'Boston University's CTE Breakthrough Could Forever Change Football', *The Ringer* (26 September 2017), [www.theringer.com/nfl/2017/9/26/16372088/boston-university-cte-test-for-the-living-football-impact](http://www.theringer.com/nfl/2017/9/26/16372088/boston-university-cte-test-for-the-living-football-impact).
- 217 Michael McCann, 'Will New CTE Findings Doom the NFL Concussion Settlement?', *Sports Illustrated*.com (15 August 2017), [www.si.com/nfl/2017/08/15/new-cte-study-effect-nfl-concussion-settlement](http://www.si.com/nfl/2017/08/15/new-cte-study-effect-nfl-concussion-settlement).
- 218 id.
- 219 Ira Boudway, 'Soccer Is the World's Most Popular Sport and Still Growing', *Bloomberg* (12 June 2018), [www.bloomberg.com/news/articles/2018-06-12/soccer-is-the-world-s-most-popular-sport-and-still-growing](http://www.bloomberg.com/news/articles/2018-06-12/soccer-is-the-world-s-most-popular-sport-and-still-growing).
- 220 Mike Ozanian, 'The World's Most Valuable Soccer Teams 2018', *Forbes* (12 June 2018), [www.forbes.com/sites/mikeozanian/2018/06/12/the-worlds-most-valuable-soccer-teams-2018/#5a7af9e745c8](http://www.forbes.com/sites/mikeozanian/2018/06/12/the-worlds-most-valuable-soccer-teams-2018/#5a7af9e745c8).
- 221 'Gaining Ground: Major League Soccer Popularity in the U.S.', Nielsen (31 July 2018), [www.nielsen.com/us/en/insights/news/2018/gaining-ground-major-league-soccer-popularity-in-the-us.html](http://www.nielsen.com/us/en/insights/news/2018/gaining-ground-major-league-soccer-popularity-in-the-us.html).
- 222 'Forbes Releases 2016 MLS Team Valuations', *Forbes* (7 September 2016), [www.forbes.com/sites/forbespr/2016/09/07/forbes-releases-2016-mls-team-valuations/#78c4d7924f85](http://www.forbes.com/sites/forbespr/2016/09/07/forbes-releases-2016-mls-team-valuations/#78c4d7924f85).
- 223 Jeff Carlisle, 'MLS sets average attendance record as Seattle Sounders lead all clubs', *ESPN* (24 October 2016), [www.espnfc.com/major-league-soccer/story/2980505/mls-sets-average-attendance-record-in-2016-as-seattle-sounders-lead-all-clubs](http://www.espnfc.com/major-league-soccer/story/2980505/mls-sets-average-attendance-record-in-2016-as-seattle-sounders-lead-all-clubs); Peter C, '2017 MLS regular season average finishes 2% higher than 2016', *World Soccer Talk* (23 October 2017), <http://worldsoccertalk.com/2017/10/23/2017-mls-regular-season-average-attendance-finishes-2-higher-2016/>.
- 224 Chris Smith, 'Major League Soccer's Most Valuable Teams 2015', *Forbes* (19 August 2015), [www.forbes.com/sites/chris-smith/2015/08/19/major-league-soccer-s-most-valuable-teams-2015-2/#5a1cc8593ba4](http://www.forbes.com/sites/chris-smith/2015/08/19/major-league-soccer-s-most-valuable-teams-2015-2/#5a1cc8593ba4).
- 225 Andy Rathbun, 'St. Paul's new Midway soccer stadium gets its name', *Pioneer Press* (25 July 2017), [www.twincities.com/2017/07/25/minnesota-united-naming-rights-soccer-stadium-st-paul/](http://www.twincities.com/2017/07/25/minnesota-united-naming-rights-soccer-stadium-st-paul/).

nearly 20,000 fans.<sup>226</sup> While the stadium is privately funded by the team and its investment partners, the city and other public sources are contributing more than US\$18 million in infrastructure and to clean up the surrounding area.<sup>227</sup>

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226 *id.*

227 *id.*

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## **PÉTER RIPPEL-SZABÓ**

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Péter Rippel-Szabó advises broadcasters, agencies, sports gear manufacturers, sports federations, clubs, athletes and agents on broadcasting matters, organisation of events, enforcement of rights, marketing, sponsorship, endorsement, ambassador, cooperation and player contracts, regulatory issues, disciplinary procedures and day-to-day operations, as well as internal regulations of sports federations. Further, Péter has special experience in providing advice on esports matters, including licences, team and player participation agreements and internal regulations of esports federations. He is often invited to speak at national and international conferences and expert workshops on sports law. As the national expert for Hungary, he contributed to the 'Study on sports organisers' rights in the EU' and the 'Study on assessment and management and prevention of conflicts of interest in the prevention and fight against betting-related match-fixing' for the European Commission. Péter is the author of numerous articles and studies analysing the many crossovers between sport and the law. He is co-author of the textbook *Sports Law – The Civil Law of Sports*. His articles on sports law are regularly published in prestigious law journals, leading business newspapers and on prominent websites. He is the lecturer for the Sport: Law and Business course at the Mathias Corvinus Collegium. According to *The Legal 500* (2016): 'Péter Rippel-Szabó is a key name for broadcasting and sports law.' Péter is the editorial board member for LawInSport's Europe division. In addition to his extensive sports sector experience, Péter is an experienced adviser on commercial agreements, such as supplier agreements, contracts for works and services, property leases and joint ventures, as well as complex international litigation. He graduated from the University of Pécs in 2008 having completed the LLM programme at the University of Erlangen-Nürnberg as a DAAD scholarship holder, where he studied German law and sports law in 2008/09.

## **MARCO RIZZO JURADO**

*Allende & Brea*

Marco Rizzo Jurado is a senior associate in Allende & Brea's intellectual property department. He obtained his degree at the Austral University in Buenos Aires and in 2012 he obtained a master's in intellectual property law at the same university. He joined Allende & Brea in 2012. Mr Rizzo Jurado has broad experience in trademark prosecution and intellectual property litigation. He has provided advice to local and foreign clients on matters related to intellectual property and internet law, domain names, entertainment, consumer or unfair competition, copyright, trade secrets, regulatory affairs, privacy and data protection. Mr

Rizzo Jurado has been cited as a leading practitioner in intellectual property law by, among others, *Chambers Latin America*, *The Legal 500* and *Managing Intellectual Property* (IP Stars). He is a member of the Argentine Association of Industrial Property Agents, the International Trademark Association (INTA), Marques and the American Chamber of Commerce. He is also a former member of INTA's internet subcommittee and Marques' international trademark law and practice team. He is a professor at the University of San Andrés.

## **ANTONIO ROCCA**

*AR Sports & Law*

Antonio Rocca, a former professional football player and beach soccer player, is the managing director and founder of AR Sports & Law. He is a national judge for the Italian Federation of Equestrian Sports, an assistant coordinator on the postgraduate course 'sports law and sporting justice', held at the University of Milan and a co-founder of the Scientific Sports Law Centre (CSDS). Antonio regularly provides assistance to football players, coaches and other athletes, as well as to professional and amateur football clubs.

## **MICHAŁ SAŁAJCZYK**

*Bird & Bird Szepietowski i wspólnicy sp k*

Michał Sałajczyk is an associate in the intellectual property and data protection team at Bird & Bird's Warsaw office. Michał is an attorney-at-law.

Michał specialises in intellectual property, advertising and gaming and gambling law. He also advises on matters concerning e-commerce and unfair competition. His experience includes advice on athletes' image rights as well as drafting and negotiating sports sponsorship agreements, including the agreement between a leading Polish football club and its main sponsor – a sports betting company. He advises individuals and businesses from the creative industry, such as advertising, and interactive agencies, production houses, artists and entertainers. He also has extensive experience in providing comprehensive legal services regarding film and TV production.

His practice also includes preparing terms and conditions for e-commerce services, regulations for contests and promotions and advising on aspects of their organisation. In addition, he has experience in IT-related issues.

## **PAUL SHAPIRO**

*Northridge Law LLP*

Paul is a managing associate at Northridge. His experience includes acting for athletes, brands and rights holders on sponsorship, licensing and merchandising programmes. He also regularly advises on governance issues and financial regulation in sport and on player contracts, football transfers and image rights structures. In addition, he has particular expertise in establishing new sports competitions and tournaments. He has also spent time on secondment at Nike, where he advised on the merchandising programme for Nike's key football assets, and the FA, where he advised on the FA's commercial rights programme. Paul has completed the BASL/De Montfort Law School diploma in sports law and practice with distinction and has returned to lecture on the course. He speaks at conferences and on university courses and has appeared as a legal commentator in *The Telegraph*, *The Independent*, Sky Sports News and BBC Sport. Paul is also a non-executive director of England Handball.

Paul is recommended in *The Legal 500* for sports law.

## **STEVE SILTON**

*Cozen O'Connor*

Steve is a partner at Cozen O'Connor and focuses his practice on sales and professional athletes and sports franchises, financing, securities placements and related work for mid-sized corporations, banks, credit unions, financial groups and purchases of businesses. Steve also applies his corporate experience in the representation of professional athletes, agents and franchises, documenting everything from endorsement contracts to secured financing deals. He also works with distressed businesses in their reorganisation efforts. Steve serves on Cozen O'Connor's board of directors.

Steve is a frequent author and lecturer and most recently taught a class at the University of Miami Law School called 'Representing a Professional Sports Franchise'. His co-instructors included Danna Haydar, associate general counsel at the Tampa Bay Lightning and Kevin Warren, COO of the NFL's Minnesota Vikings. Additionally, Steve serves as an advisory board member of the University of Miami School Sports and Entertainment Law LLM. The firm is nationally recognised for its work in sports law and was recently recognised by Holt Hackney Publications as one of their Top 20 Law Firms in the Professional Sports Team Industry.

Cozen O'Connor held its fourth Sports Law CLE and Players Panel with representatives from professional and amateur sports, owners and executives, agents and agencies, athletes, venues and arena management companies, corporate sponsors and sporting equipment manufacturers attending. Steve led the programming for this day-long CLE event featuring speakers from all facets of pro and amateur sports, including the Olympics, college and university programmes and the major leagues.

## **LUÍS SOARES DE SOUSA**

*Cuatrecasas*

Luís Soares de Sousa's practice focuses on advising and representing airlines, banks, manufacturers and leasing companies on cross-border leasing operations. He represents both Portuguese and foreign clients in all kinds of transactions, in particular: purchase and sale of aircraft, aircraft leasing, aircraft finance, insurance, mortgages, import, export and aircraft repossession. He also deals with the registration of aircraft in Portugal, as well as with all legal formalities required to obtain operation licences, air operator's certificates and other regulatory permits required for the use and operation of aircraft. He focuses on the incorporation of scheduled and non-scheduled air carriers in Portugal and in relation to the purchase of several aircraft, certification of the aircraft in Portugal, negotiation of lease agreements, the obtaining of the required authorisations and clearances to operate seasonal charter flights, and in the incorporation of airline companies in Portugal.

His main areas of practice include not only aviation and aviation finance, but also procurement, mergers and acquisitions, real estate, projects and infrastructure, insolvency and business reorganisation proceedings and sports law.

He is recommended by several directories, including *Chambers Europe* (ranked as Tier 1 in Aviation).

He has a law degree from the Lisbon Universidade Livre (1984), and has been a member of the Portuguese Bar Association since 1985. He started practising in aviation in 1986. In 2001, he joined Cuatrecasas as a partner, heading the firm's corporate and aviation practice area. He regularly contributes to publications regarding aviation matters.

## **ROMAIN SOIRON**

*Joffe & Associés*

Romain Soiron is a partner in Joffe & Associés sports law department.

As a lecturer on the master's degrees of sports law at the University of Panthéon Sorbonne and the University of Aix-Marseille, Romain is widely known for his substantial sports-related work. According to clients quoted by *Chambers Europe 2016*, 'Romain Soiron receives glowing reviews from clients, who praise his "availability and responsiveness". He is recommended for handling media and broadcasting rights as well as contractual agreements.'

## **VICTOR STANCESCU**

*Niederer Kraft Frey Ltd*

Victor Stancescu is an associate at Niederer Kraft Frey Ltd in Zurich, Switzerland. His main areas of practice include corporate and commercial law, privacy law and mergers and acquisitions, as well as sports law. He is a member of the NKF sports and technology teams.

Mr Stancescu regularly advises corporations and other entities of different sizes active in various industries on a broad range of matters of corporate and commercial law as well as mergers and acquisitions. He is a member of the player safety committee of the International Ice Hockey Federation and a member the board of the Swiss Association for Sports Law.

## **YAGO VÁZQUEZ MORAGA**

*Pintó Ruiz & Del Valle*

Yago Vázquez Moraga was admitted to the Barcelona Bar Association in 2003. He has been a partner at the Spanish law firm Pintó Ruiz & Del Valle since 2014, and is one of its leading lawyers in the litigation and arbitration practice. He holds a master's in advanced studies in law from the University of Barcelona. He specialises in procedural and sports law, and appears regularly before the Spanish courts in matters of a civil, corporate and administrative nature. He is a professor lecturing on sports law courses and master's degrees. He regularly participates in sports proceedings before the Court of Arbitration for Sport in Lausanne, Switzerland, assisting the court as *ad hoc* clerk. He also provides legal advice to clubs and professional athletes, both at a national and international level.

## **FEDERICO VENTURI FERRIOLO**

*ELSA LEX*

Federico Venturi Ferriolo is an associate at ELSA LEX, working out of the Milan and Vicenza offices. He is founder of Olympialex.com and a co-founder of the Scientific Sports Law Centre (CSDS). He is a double qualified attorney-at-law (Italian and Spanish BAR) and he obtained an LLM degree in international sports law at the Higher Institute of Law and Economics in Madrid. He focuses on sports and media law, including advising athletes, agents, coaches, clubs, leagues and companies on a range of commercial, regulatory and contentious issues. As part of such advice, he regularly assists in proceedings brought before arbitral tribunals and sports-related bodies, such as UEFA, FIFA, the Basketball Arbitral Tribunal and the Court of Arbitration for Sport.



## **MARCO VITTORIO TIEGHI**

*SportsGeneration Srl*

Marco Vittorio Tieghi is a managing director and co-founder of SportsGeneration. His years spent working in Milan in sports, media and entertainment law, while at the same time working as a FIFA-licensed agent, helped him to obtain experience in business and sports marketing. Marco has extensive expertise in professional sports contracts for players, coaches and sports executives, as well as domestic and international transfers of athletes and coaches. Marco also works as an assistant coordinator on the postgraduate course 'sports law and sporting justice', held at the University of Milan and is a co-founder of the Scientific Sports Law Centre (CSDS).

## **MATTHEW WHITAKER**

*Jones Day*

Matthew Whitaker is an associate at Jones Day in the antitrust and competition group and has experience in a range of commercial matters across a broad spectrum of issues in Australia. He has primarily worked on antitrust and competition, intellectual property and commercial litigation matters, but also has some experience in commercial transactions and employment law. He has been involved in disputes in the Federal Court of Australia, Australian Patent Office, and state Supreme Courts and also in regulatory matters involving the Australian Competition and Consumer Commission, the Therapeutic Goods Administration, the Department of the Environment and Energy, and the Department of Health.

Matthew holds a Bachelor of Laws and a Bachelor of Science (advanced mathematics) from the University of Sydney. He is presently studying a master's in global competition and consumer law at the University of Melbourne. In his spare time, he has a strong interest in Australian sports and running, and previously held the Guinness World Record for the fastest marathon dressed in a suit.

## **MICHAEL WHITBREAD**

*Jones Day*

Michael Whitbread is an associate at Jones Day who advises employers on all aspects of Australian employment, industrial and health and safety laws. He represents employers in the resolution of disputes involving the termination of employment, discrimination and sexual harassment claims, industrial disputes, the enforcement of post-employment restraints and confidentiality obligations. He assists clients in responding to work health and safety (WH&S) incidents and audits or investigations instigated by WH&S and environmental regulators. Michael is an experienced advocate and has appeared on behalf of employers in the Fair Work Commission, Australian Federal Courts and Supreme Courts.

Michael also assists clients with sports law-related issues and disputes. Between 2011 and 2014 Michael served as a clerk at the Oceania Registry of the Court of Arbitration for Sport where he assisted the Court to arbitrate anti-doping prosecutions, selection disputes and contractual disputes.

In 2016 and 2017, Michael acted as country counsel for Boeing in Australia. Michael holds a Bachelor of Laws and Bachelor of Science from the University of New South Wales. In 2016, Michael was appointed as a professional fellow at the Law School of the University of Technology Sydney where he coordinates and lectures an industrial and labour law course.

**PIOTR ZAWADZKI**

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Piotr Zawadzki is a senior associate in the intellectual property and data protection team at Bird & Bird's Warsaw office. Piotr is an attorney-at-law and a patent and trademark attorney.

He focuses on intellectual property, as well as e-commerce, lotteries and promotions, sponsorship in sports and media regulation, including advertising law, protection of business and trade secrets and personal data regulations.

He also represents clients in litigation before common and arbitration courts and advises clients on intellectual property and personal data protection issues in a variety of business transactions. He is an author or co-author of over 30 articles on intellectual property, as well as a lecturer and speaker at numerous trainings and conferences.

## Appendix 2

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