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FORMERLY KNOWN AS: GLOBAL SPORTS LAW & TAXATION REPORTS (GSLTR)

Contents

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EDITORIAL

It is with much pleasure that we welcome readers to the December 2021 edition (citation: *SLT 2021/4*) of our ground-breaking journal *Sports Law and Taxation (SLT)* and on-line database www.sportslawandtaxation.com.

The past year 2021 has again been a challenging one with the economic effects of the COVID-19 pandemic still being felt around the world, not least on sport, although the postponed 2020 Tokyo Summer Olympic Games, despite opposition to them because of the pandemic, took place under unprecedented conditions, mainly without spectators, but notwithstanding these restrictions the Games were generally regarded as a success. However, it has not all been doom and gloom on the sporting front during this year. In fact, some sports have benefitted from "lock downs" due to the pandemic. See, for example, esports below. There have also been a number of major sporting achievements and highlights during the year, with association football again dominating the sporting headlines, and some of these developments will now be briefly mentioned as follows.

Esports continued growth

In 2020, esports stocks soared, whilst traditional sports stocks declined due to the pandemic. Newzoo's latest esports market report shows that global esports revenues will grow to more than US$ 1.1 billion in 2021, with an annual growth of almost 15%. Over 75% of these revenues is expected to come from media rights and sponsorship.
There is also a 10% annual growth in the global games live-streaming audience, expected to reach almost 730 million people. The majority of this audience is below 34 years old. Stakeholders expect the growth and increase in revenues to continue.
As these expectations grow and grow, pricings of these expectations also increase, creating an overwhelming investment sentiment for esports in general.
With so many people around the world working remotely and students attending online classes, this gives the esports industry a unique edge. Even when the pandemic ends, this trend of increasing revenues for esports and big gains for investors is not expected to slow down soon, if at all.
In fact, 22% of the internet population participates in esports, with 39% of that audience being between the ages of 25-34.

Expensive trainers

A pair of trainers belonging to the basketball "star", Michael Jordan, were sold for a record sum of US$ 1.47 million at an auction held by Sotheby's in Las Vegas on 24 October 2021. The red and white Nike Air Ships trainers, which were signed by Jordan, were used during his first season in 1984 with the Chicago Bulls.
The price paid for the trainers is the highest sum ever paid for any used footwear of any sport. The trainers were bought by a well-known collector, Nick Fiorella. Jordan is regarded as the best basketball player in the history of the sport. When he retired in 2003, Jordan was also the first billionaire player in NBA history.

Cricketer makes history

English international cricketer, Jos Buttler, scored a century in the Twenty20 World Cup match against Sri Lanka in Sharjah, United Araba Emirates, and became the first England batsman to score centuries in all three formats of the game at the international level: test matches; one day internationals; and Twenty20 internationals.[1]
Buttler is 31 years old and vice-captain of the England cricket team and the Rajasthan Royals, who play in the IPL. Of his achievement, Buttler commented as follows:

"It's great. Probably something I look back at some point and it's a nice accolade to have."

However, Buttler is not the first international cricketer to achieve this status. That honour goes to Indian woman cricketer, Mithali Raj, who, in July 2021, also became the leading run-scorer in women's international cricket!
Another cricketer also making history, but for all the wrong reasons, is Azeem Rafiq and his revelations about racism at the Yorkshire County Cricket Club and its wider implications for the game of cricket in England and elsewhere in the world.

Cricket and racism

The Yorkshire County Cricket Club has also been in the headlines because of racism claims made by Azeem Rafiq and this affair has also raised questions about the game more widely and heads have rolled.
This is an affair that is likely to run and run and will be covered on the SLT website!

1 For an explanation of these forms and their individual characteristics and skills, log onto www.icc-cricket.com/about/cricket/game-formats/the-three-formats (accessed 6 December 2021).

Sailing

The Ineos Britannia sailing team, led by Olympian Ben Ainsley, have partnered with Mercedes F1 in a bid to win the next America's Cup sailing competition. Ineos were eliminated in the Challenger Series in this year's 36th Cup. Ainsley commented:

"We need to take it to the next level to take on the mighty kiwis, the All Blacks of sailing."

And the owner of Ineos, Jim Ratcliffe, added:

"What we learned in New Zealand is we had a sailing team capable of winning the America's Cup but the boat wasn't good enough. If we don't have a boat [...] *that's capable of winning, it's like putting Lewis Hamilton in a slow car."*

Ainsley and Ineos are hoping that, combined with Mercedes F1 technology, involving aerodynamics and hydrodynamics, and the expertise of their sailing team, they can win the next edition of the Cup in 2024. It will be interesting to see if these hopes are fulfilled; however, the question may well be asked, with such advanced technology, where do sailing skills and seamanship come into the equation?

Transgender issues

Transgender issues in sport have also been in the news this year.
A wide-ranging review of transgender inclusion in non-elite sport in the UK, titled *Guidance for Transgender Inclusion in Domestic Sport 2021*, which was published on 30 September 2021,[2] has found that the current policies are not fit for purpose. Carried out by the Sports Councils Equality Group ("SCEG") and following an eighteen-months' consultation, the review shows that:

"For many sports, the inclusion of transgender people, fairness and safety cannot co-exist in a single competitive model."

The SCEG review does not apply to elite, professional or international sport. In fact, up-dated guidance on the subject from the International Olympic Committee, which last reported in 2015, has been delayed. However, transgender athlete Laurel Hubbard, born a male, made Olympic history by competing in the women's +87 kg weightlifting event in the delayed 2020 Tokyo Summer Olympics this year.
In October 2020, World Rugby ruled that transgender women may not compete at the elite and international levels of the women's game *"on safety grounds"*.
The SCEG review found that:

"While our consultation found that there was widespread support for ensuring that sport was a welcoming place for everyone in society, including for transgender people, it also highlighted that there were concerns relating to safety and fairness in relation to transgender inclusion, particularly in female sport, and that there was no consensus on a single solution as to how this should be addressed."

However, the SCEG review states that transgender inclusion in sport could be improved by adding new categories of *"open" and "universal"* to the existing male and female ones.

Coming out!

Josh Cavallo, an Australian professional footballer, hit the global sporting headlines for perhaps all the wrong reasons! On 27 October 2021, the 21-year-old midfielder, who plays for Adelaide United, announced on social media that he is gay. He stated:

"I'm a footballer and I'm gay."

And added:

"All I want to do is play football and be treated equally."

He is believed to be the first current professional footballer to come out of the closet!
Football is probably the most popular sport in the world and, because of its macho image, only a few retired players have admitted that they are gay, apart from the British player Justin Fashanu, who came out whilst still playing in 1990 and found difficulty in being accepted and committed suicide in 1998.
Cavallo is to be congratulated on coming out and perhaps he will be followed by others in the future. Certainly, sport in general and football, in particular, should be inclusive and open to all without any discrimination on the grounds of sexual orientation!

Controversial takeover of Newcastle United FC

On 7 October 2021, Newcastle United FC was purchased by a consortium for a reported £ 305 million.
The purchase delighted the supporters of Newcastle, as it brought to an end the 14-year ownership of Mike Ashley, an individual who was unanimously despised by the supporters, due to his perceived lack of ambition for and investment in the club.
The purchase by a consortium is not in itself surprising in football; however, the consortium involved in the takeover of Newcastle was different. The majority purchaser, with an 80% stake in the ownership, is the Public Investment Fund ("PIF"), the sovereign wealth fund of Saudi Arabia. The involvement of the PIF has caused severe criticism by human rights' groups, who believe that the PIF has invested in Newcastle United, in order to *"sportswash"* its image and reputation.
It has been reported that the PIF owns the planes that transported the individuals involved in the heinous murder of exiled Saudi journalist, Jamal Khashoggi, to and from Turkey. Furthermore, U.S. intelligence agencies have concluded that the Saudi crown prince, Mohammad Bin Salman, approved the murder of Jamal Khashoggi. The crown prince is the Chair of the PIF and has denied any involvement in the Khashoggi affair.

2 The full review is available at https://equalityinsport.org/docs/300921/Guidance%20for%20Transgender%20Inclusion%20in%20Domestic%20Sport%202021.pdf (accessed 6 December 2021).

The consortium that has purchased Newcastle United also consists of PCP Capital Partners, who own 10%, and the Reuben Brothers (RB Sports & Media), who also own 10%. The repercussions of this takeover will be felt for some time to come!

2021 Summer football transfer window

Continuing with the ubiquitous football, which, despite its financial problems caused by the pandemic, remains the world's favourite sport, mention should be made of some of the highlights of the Summer 2021 transfer window, which ended at 23:00 BST on 31 August 2021, as noted in the *Deloitte Press Release*, issued on 1 September 2021, as follows:

"Premier League clubs spend £1.1 billion in the 2021 summer transfer window but overall spending falls for second consecutive year

- *Premier League clubs' gross spend of £1.1bn in the 2021 summer transfer window is 11% lower than the spend during summer 2020 (£1.3bn), which itself was a 9% drop compared to summer 2019 (£1.4bn);*
- *This is the lowest gross spend by Premier League clubs since 2015, and the first time that there has been a consecutive decline since the global financial crisis (summers 2008 to 2010);*
- *Deadline day activity totalled £150m, meaning Premier League clubs have spent in excess of £1bn for the sixth summer in a row;*
- *The volume of players acquired by Premier League clubs on free transfers has increased to 22% of all players-in during this year's summer transfer window from 20% in summer 2020;*
- *Premier League clubs' net player transfer expenditure in this year's window as a proportion of the clubs' estimated 2020/21 revenue was 10%, down substantially from summer 2020 (18%);*
- *Premier League clubs have purchased only six players from Football League clubs compared to 22 in summer 2020, increasing financial pressure on any EFL clubs who were relying on player transfer receipts;*
- *The German Bundesliga is the only European "big five" league to increase its gross spending this year, whilst also generating a net player transfer income of £35m largely driven by the sale of key players to the Premier League;*
- *The Premier League's net player transfer spend of £560m in the year dwarfed that of La Liga (£55m), Serie A (£50m) and Ligue 1 (£15m), further highlighting the financial strength of the league compared to its peers;*
- *The English Championship clubs gross spend has decreased by £20m (38%) to £35m compared to £55m in summer 2020 which was 64% lower than the £160m gross spend in summer 2019.*

The 2021 summer transfer window saw Premier League clubs' gross transfer spending decrease by 11% year-on-year to £1.1bn, according to analysis from Deloitte's Sports Business Group. This represents the lowest amount spent by Premier League clubs since the 2015 summer transfer window and is the second consecutive summer transfer window in which Premier League clubs' spending has decreased.

Dan Jones, partner in Deloitte's Sports Business Group, commented:

"This has been a remarkable transfer window. Club spending records have been broken, player moves – including the two greatest players of their generation – have grabbed the headlines and Premier League clubs have spent in excess of £1 billion for the sixth summer in a row. Perhaps most remarkable is that all this has been achieved with lower spending than we have seen in the previous two summers."

"Big six" clubs dominant but clubs are spending more within their means

Arsenal, Manchester United, Manchester City and Chelsea were the top four biggest gross spending Premier League clubs and were responsible for the four highest-value individual transfers this window. All transfers were valued at £50m or more, double the two transfers in summer 2020 of that scale, demonstrating the financial capabilities of the highest revenue generating clubs. A key metric to understand Premier League clubs' overall approach compared to previous windows is to assess their net transfer spend as a proportion of their estimated revenue. Last year this totalled 18% compared with an estimated 10% this year, a marked and concerted reduction as clubs look to spend within their means. Tim Bridge, director in Deloitte's Sports Business Group commented:

"Whilst this summer transfer window saw gross spending fall by 11%, many would have actually predicted the drop to be much larger. Even with the pressures of a pandemic, there have been a number of high-profile deals, with some of the highest revenue generating Premier League clubs flexing their financial muscles to strengthen their competitive position both domestically and at a European level."

Outside of the "big six", significant deadline day activity by West Ham, Leeds United, Brighton and Hove Albion and Crystal Palace contributed £90m (59%) of the total deadline day expenditure, as clubs looked to reinforce their squads with the lucrative aims of achieving qualification for UEFA competition and/or retaining their Premier League status.

Free rein: window sees increase in volume of free transfers

Whilst overall spending decreased, the volume of transfers remains relatively consistent with historic levels, with Premier League clubs having signed 148 players-in (on either a permanent or loan-basis). This compares to 132 transfers-in during summer 2020 and 128 in summer 2019.

Interestingly, Deloitte's analysis shows that the percentage of players acquired on a free transfer increased from 20% to 22% during this window. Only four Premier League clubs did not acquire a player on a free transfer in the summer window, half the number compared with last year. Jones added:

"Whilst the volume of transfers has remained consistent, the number of free transfers has increased as have the

number of the highest value deals. This reflects twin forces of clubs prioritising financial stability and seeking value in the market while also being willing to pay for the very best talent. This pattern has been reinforced by the financial impact of the COVID-19 pandemic and the relative financial strength of the Premier League clubs compared to some of their European peers."

European spending dwarfed by Premier League

Behind the Premier League, Serie A €550m (£475m) is the next highest spending league, although Premier League clubs' gross transfer spend is still more than double that of Serie A clubs. With the exception of the Bundesliga, gross transfer spend is down for all other "big five" leagues for the second consecutive year. Bundesliga clubs have reported a net surplus of €40m (£35m) which is largely driven by sales to the Premier League of key players such as Jadon Sancho (£73m), Ibrahim Konaté (£35m) and Leon Bailey (£25m). La Liga clubs are the lowest spenders at a gross level for the second consecutive year. This is largely driven by the relatively restrained spending of Barcelona and Real Madrid, with both generating a net transfer surplus during this window. Bridge added:

"Both of the major Spanish clubs are looking to shore up their finances and, at a time where their stadium redevelopment projects are planned or underway, they have not been able to take their usual approach in the transfer market. Challenging times lie ahead in the short-term for both, who will appreciate the financial boost that return of fans to stadia bring more than most clubs."

EFL net receipts hit following fewer sales to the Premier League

Championship clubs recorded a gross spend of £35m, almost 100% of the spend in the EFL. Championship clubs have spent 38% less compared to prior year (£55m), which itself was 64% lower than gross spend in summer 2019 (£160m). Relegated side Fulham accounted for 55% of gross transfer spend in the Championship, largely driven by the purchase of Harry Wilson from Liverpool for £12m. Due to the stretched financial position many Championship clubs find themselves in, the number of clubs that have acquired a player for a fee has reduced from 18 to just seven clubs. Whilst overall Championship clubs have a net transfer surplus of £60m, this is 77% worse than the prior year due to the post-pandemic market and the substantially lower volume of transfers to the Premier League. Premier League clubs have only purchased six players from the Football Leagues this window compared to 22 in summer 2020. Dan Jones concluded:

"With reduced activity from Premier League clubs acquiring from the Football League, the financial challenge of running a Championship club is going to be tougher than it ever has been. This is perhaps indicative of Premier League clubs being less willing to take a risk on players unproven at Premier League level, in conjunction with a plentiful supply of more established talent not only in the Premier League but across Europe's top tier football leagues."

Summary of key findings from the analysis by Deloitte's Sports Business Group include:

- *Premier League clubs' gross spend of £1.1bn is 11% lower than the previous summer transfer window of £1.3bn which itself was a 9% fall;*
- *This is the lowest gross spend by Premier League clubs since 2015, and the first time there has been a consecutive decline since the global financial crisis (summers 2008 to 2010);*
- *Premier League clubs signed 148 players-in compared to 132 in summer 2020 and 128 in summer 2019;*
- *Players acquired by Premier League clubs on free transfers has increased to 22% of all players-in during this year's summer transfer window from 20% in summer 2020;*
- *There are only four Premier League clubs who did not acquire a player on a free transfer, half the number who did not in summer 2020;*
- *The number of signings on a free transfer by promoted sides increasing from one in summer 2020 to 11 in this window;*
- *Clubs are more wary of selling their players as they are no longer in a financial position to replace these players for large transfer fees;*
- *Premier League clubs' net player transfer expenditure in this year's window as a proportion of the clubs' estimated 2020/21 revenue was 10% down substantially from summer 2020 (18%);*
- *The number of deals equal to or over the value of £50m has increased to four this year – Ben White (£50m), Jadon Sancho (£73m), Romelu Lukaku (£97.5m) and Jack Grealish (£100m) – all players signed by the top four highest gross spending clubs;*
- *The number of signings between £10m – £25m has reduced from 33 to 20 indicating that whilst certain clubs are able to take more of a risk with high value transfers, it is the mid-market deals that have been affected most considerably by the wider conditions;*
- *Premier League clubs have purchased six players from the Football Leagues compared to 22 in summer 2020, causing further financial issues for these clubs;*
- *Bundesliga is the only other European "big five" league to increase its gross spending this year, whilst also generating a net player transfer income of 40m (£35m) largely driven by the sale of key players to the Premier League;*
- *La Liga clubs are the lowest spenders at a gross level for the second consecutive year, having been the second highest spending league in the 2019 summer transfer window;*
- *The Championship clubs gross spend has decreased by 38% compared to summer 2020 (£55m), which was 64% lower than gross spend in summer 2019 (£160m);*
- *Relegated side Fulham are the largest of spenders accounting for 55% of gross transfer spend, largely driven by the purchase of Harry Wilson from Liverpool for £12m;*
- *The number of Championship clubs that have acquired a player for a fee has reduced from 18 to just seven clubs;*
- *Whilst the Championship clubs have a net surplus of £60m, this is 77% less than the prior year."*

Now we turn our attention to the articles that you will find in this issue. As you will see from the *Table of Contents*, we include a wide range of sports law and sports tax articles, which will engage our readers attention and provide them with much "food for thought". We would

highlight the articles on the taxation of Formula 1. This is a complex subject, with Formula 1 being a global event, as is well observed in the introduction to the article on the taxation of Formula 1 in Canada:

"To the victor go the spoils, but also the taxes. Racing all over the world means that Formula 1 teams and drivers are subject to a multitude of tax regimes. Given the complex and ever-changing global tax landscape, the resources expended by Formula 1, the teams and drivers to ensure compliance with a dozen or more tax regimes are surely enormous."

We would also draw the reader's particular attention to the articles on the continuing legal saga involving the controversial South African Olympic middle distance runner Caster Semenya.

As always, we would welcome and value your contributions in the form of articles and topical case notes and commentaries for our journal and also for posting on the *SLT* dedicated website www.sportslawandtaxation.com.

Finally, we are taking this opportunity of wishing all of our contributors and readers the compliments of the season and all the best in the New Year, notwithstanding the COVID-19 pandemic, and whatever 2022 may bring. Let us hope that some kind of normality will return soon, and, as they say in French: *bon courage!*

So, now read on and enjoy the December 2021 edition of *SLT*.

Dr. Rijkele Betten *(Managing Editor)*

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

December 2021

The intersection of gender race and influence

Caster Semenya saga: collapsed by capitalism

Part two

BY CARISSA RODULFO[1]

Part one of this article was published in the September 2021 issue of *SLT*.

History has shown that only by changing the perceptions of normative femininity has the progressive incorporation of women in sporting contests been facilitated. The very idea of women being able to compete in sport was once taboo. The sporting world expends itself to cement biological difference in order to maintain the institutionalisation of its social order. It is clear that even sport needs to be progressing beyond debates based in essentialism. The social meanings of "woman" and "man" are no longer static and are created through and within discourse. The CAS Panel ascertained that an assessment of the likely impact of the DSD Regulations on wider society would require *"an analysis of multifaceted sociological issues which are not amendable to judicial resolution by an arbitral court* [...]"[2] Subsequently, it ought not to be within the jurisdiction of an arbitral court to rearticulate gender classifications, which are intrinsically historical and political, and not isolated to the sports community. Therefore, it is no longer acceptable to allow sport to remain silent and perfunctory to these discussions about inclusion.

However, inclusion has caused discord in subtle but fundamental ways in sport. The racial dynamics of sport and its elusive power struggle is another multifaceted political issue emerging from the *Semenya* case. Due to its multi-ethnic character and popularity, media coverage of sport can contribute to people's beliefs and ideas about race and ethnicity.[3] There is a popular perception in sport that genes and cultural background dictate the prowess of an individual sportsman and sportswoman. This discourse of advantage and disadvantage in sport is invariably reduced to "harmless" racial differences, a reduction that suggests, however, a more sinister undercurrent: "race" logic, racial discourse, racial formations, raciology, racialisation.[4] Racialisation refers to those instances where social relations between people have been structured by the signification of human biological characteristics in such a way as to define and construct differentiated social collectives; the concept therefore refers to a process of categorisation, a representational process of defining an"other".[5]

Sport media plays its own role in racialisation since it is primarily a white dominated institution that often supports and enhances the dominant (socio-economic) position of many middle to upper class white individuals.[6] The capability of the sport media to consistently access millions of different people at the same time, provides them with a significant allocation of power that confirms and reconstructs images that are congruent with hegemonic discourses about social group relations.[7] This is a form of racial capitalism in sport which can be described as a racial formation. By definition, a racial formation is a process involving a series of interrelated but historically situated racial projects where racialised people and social structures are organised and represented.[8] The

1 E-mail: carissa.legal@gmail.com.

2 4A_248 / 201, *Mokgadi Caster Semenya v. International Association of Athletic Federations*, Judgment of 25 August 2020 (1st Civil Law Court) [518], available (in French) at www.bger.ch/ext/eurospider/live/fr/php/aza/http/index.php?highlight_docid=aza%3A%2F%2Faza://25-08-2020-4A_248-2019&lang=de&zoom=&type=show_document (accessed 2 December 2021).

3 Jacco van Sterkenburg, *Race, Ethnicity and the Sport Media* (Pallas Publications, Amsterdam University Press, 2011).

4 Kevin Hylton, *"Race" and Sport: Critical Race Theory* (Routledge 2008).

5 Robert Miles, *Racism* (Routledge 1989).

6 Inge Claringbould *et al.*, "Exclusionary Practices in Sport Journalism", (2004) 51(11)-(12), in: Sex Roles, vol. 51, p. 709-718 (2004), doi:10.1007/s11199-004-0720-3.

7 John Hargreaves, *Sport, Power and Culture: A Social and Historical Analysis of Popular Sports in Britain* (Polity Press, 1986).

8 Michael Omi and Howard Winant, *Racial Formation in the United States* (Routledge 2014).

complexities of racial projects can be surmised as being a reflection of racial dynamics. Historically, sport media has the tendency to portray black athletes more often as "natural" athletes with great physical power than white athletes.[9] Conversely, white athletes are usually shown more often in terms of intellect, perseverance and hard work than black athletes are.[10] Such perceptions have been highlighted by other studies.[11] Consequently, the media reproduces the perception of the dominant societal *status quo* wherein black athletes are affiliated with natural physical strength and white athletes are associated with intellectual capacities. The notion of white dominance that emanates from western societies ascribes greater esteem to mental qualities than physical ones. Thus, this type of discourse reinforces the privileged societal position of whites in the hierarchy of power and status.

While, in theory, white dominance may be secured, the reality is starkly different. If one reverts to this article's discussion of racial capitalism, one can recall the ways in which the success of minorities in sport is used as a tool in global consumerism. It can be argued that the predominance of black athletes at the forefront of sporting success, particularly in athletics, is tantamount to white subjugation. In developing this position, theories of social capital are helpful to clarify the way that race in general, and non-whiteness in particular, is valued, and how that value passes from one actor to another.[12] That value encompasses the status and other resources that individuals and institutions gain from association with an individual of a certain racial identity. Podolny has emphasized that status – defined as an actor's position in a hierarchical order – explains behaviour not only in social settings, but also in the competitive market. He recognised that where there is engagement between actors of unequal status on the market, the higher-status actor is likely to experience a decline in status whereas the lower-status actor will experience an increase. From the offset, athletes are therefore actors in the sporting world at various status levels due to their differing races. However, when they compete and experience success, there is engagement between the races, and this tends to enhance the status of black athletes and lower the status of white athletes.

This sustained transaction leads to an inevitable power struggle between the continued ascendency of black minorities and the deterioration of white dominance.

The effect is that the racial *status quo* in sport, where black minorities like Semenya are at the helm of prestige and influence, does not mirror the existing power structure of capitalistic society. While success stories of athletic minorities may be appeasing for the racial capitalist agenda, exhibiting their continued triumph, through the mass media, may have more significant political friction. As previously highlighted, global consumption demands consumer representation. The processes by which various social groups give meaning to race/ethnicity in sport are complex and the media create dominant interpretations of reality that appeal to a desired or anticipated audience.[13] In his work, Ben Carrington envisions the black athlete's central role *"in the making and remaking of western ideas about racial difference", while also allowing for "a white masculinist colonial fear of loss and impotence, revealing the comingling of sex, class, race and power"*.[14] The foreign visibility of black minorities in elite sporting culture generates anxiety, tension and desire in the mainstream and has bestowed a precarious forum for black individuals to challenge their oppression. Therefore, sport media must regress to portraying minority racial and ethnic groups in stereotypical ways, thereby reinforcing and confirming racial and ethnic inequalities in society at large.[15] This is why the media viscerally harps on Semenya's appearance instead of her resilience in managing a medical disorder; her alleged genetic advantage rather than the fact that she has not broken world records. The need to restore the balance of power elicits the disturbance of sport's racial status quo and any opposition to structural inequality is simply dismissed as *"using the race card"*.

This power struggle based in racial thinking in sport is presupposed by weak theoretical propositions.[16] One of these is that sport is predicated on theoretical principles of equality. Another is that the results of sporting competition are unequal. There is also the contention that this inequality of results has a racial bias and in the light of the equality of access and opportunity, the explanation of the unequal results lies in racial physicality. However, what racial thinking neglects to acknowledge is that the pressures

9 Annelies Knoppers and Agnes Elling, "Gender, Ethnicity and the Sport Media: An Inventory of Olympic and Regular Coverage" (Utrecht School of Governance and Leisure Studies, Utrecht/Tilburg, The Netherlands 1999).

10 Laurell Davis and Othello Harris, "Race and Ethnicity in US Sport Media", in: Lawrence Wenner (ed.), *MediaSport* (Routledge 1998), p. 154.

11 James Angelini et al., "Competing Separately, Medaling Equally: Racial Depictions of Athletes in NBC's Primetime Broadcast of the 2012 London Olympic Games", in: *Howard Journal of Communications* (2014), 25(2), p. 115, available at https://doi.org/10.1080/10646175.2014.888380 (accessed 2 December 2021); Eric Primm *et al*, "Every Picture Tells a Story: Racial Representation on *Sports Illustrated Covers"*, in: The Journal of American Culture, Vol. 30 no.2 (June 2007), p. 222, available at https://doi.org/10.1111/j.1542-734X.2007.00511.x (accessed 2 December 2021).

12 Joel Podolny, Status Signals: A Sociology Study of *Market Competition*, (Princeton University Press 2005) available through https://doi.org/10.1515/9781400837878.

13 Taylor Henry, ""Sport Is Argument": Polarization, Racial Tension, and the Televised Sport Debate Format", in: *Journal of Sport and Social Issues*, 44(2) (2020), p. 154, available at https://journals.sagepub.com/doi/pdf/10.1177/0193723519881199 (accessed 2 December 2021).

14 Ben Carrington, *Race, sport and politics: the sporting black diaspora* (SAGE Publications, London 2010), p. 297-298, available at https://doi.org/10.1080/19406940.2012.668140 (accessed 2 December 2021).

15 Chelsea Litchfield *et al.*, "Social media and the politics of gender, race and identity: the case of Serena Williams", in: *European Journal for Sport and Society*, 15(2) (2018), p. 154, available at https://doi.org/10.1080/16138171.2018.1452870 (accessed 2 December 2021).

16 Brett St. Louis, "Sport and common-sense racial science", in: *Leisure Studies*, 23(1) (2007), p. 31, available at https://doi.org/10.1080/0261436042000182308 (accessed 2 December 2021).

and limits of a given domination or subordination are experiences and internalised by individuals and groups. This has the effect of power minorities, that is, individuals and groups in society, reinforcing or challenging their own subordination in a system that can alienate and disenfranchise them. A lived hegemony is always an ongoing process: it is not a passive form of dominance, as it must be continually renewed, recreated, defended and modified.[17] Therefore, the impression that there must be one supreme ultimate "race winner" is frivolous.

Nonetheless, the implementation of the DSD regulations fortuitously changes the balance of dominance. The policy mandates "treatment" which disproportionately impacts on individuals from outside the geographic-West. World Athletics stipulated that, athletes with the *"disorder"*, seek assessment and diagnosis at specific, pre-approved reference centres. The significance of such instruction is that the recommended reference centres were established in Australia, Brazil, France, Japan, Sweden and the United States; no approved resource centres existed in Africa or India.[18] Thereafter, the organisation directed that, if diagnosed, the athlete must undergo *"medical treatment"* once the athlete desires to return to competition. The enactment of these new rules, particularly due to the expense of the sport-circumscribed remedy, has led some observers to argue that they specifically target athletes of colour from poor regions. They also appear to reflect a warped sense of racial/gender profiling and could be seen as geared towards enforcing unjustified controls on women's bodies that parallel those imposed in the mediaeval era.[19] The disproportionate effect of these new practices on women from certain regions and ethnic groups continue gendered and racialised anxieties of sport's governing bodies. It increases the concerns about lack of informed consent, particularly as women from poorer socio-economic backgrounds may be affected by additional pressures which arise from the fact that their families, teams and nations may be particularly reliant on them competing.[20] Yet, World Athletics has not revisited the policy and with Semenya's appeal chances on its last leg, it does not seem that the organisation ever will. It appears to be that the more a minority of outcast athletes is framed and suppressed, the more opportunities for the majority to clench the podium positions – a narrative that raises unsolved social justice matters worthy of further reflections.

The crossroads of identity: what makes Semenya's experience unique?

While policies like the DSD Regulations are based on scientific research, they are not significantly immersed in sociological theory so as to comprehensively appreciate their tangible and intangible ramifications. The result of this is that World Athletics, and by extension the sporting world, fails to meaningfully address inequality and inadvertently perpetuates disparity. Therefore, this section uses critical feminist theory to pinpoint where the inadequacies in treating with difference lie in sport and how this has impaired Caster Semenya's athletic experience.

Intersectionality is a feminist framework that acknowledges the multiple aspects of identity that enrich our lives and experiences and that compound and complicate oppression and marginalization.[21] It expands the reach of the monochromatic disposition that feminism conventionally retained. Identities, like individuals, do conflict despite our efforts to find theoretical and practical commonalities. As Stanley Fish and others have depicted, it is not possible to be external from the discourse in order to be neutral so as to find solutions that avoid conflicts among multiple oppressions.[22] Given sport's history of racial discrimination and segregation, coupled with the heterogeneity of its culture, it should be anticipated that the scope of gender issues, which are prominent in sport are broad and intricate. They do not sit compactly in seclusion, but rather overlap, invading boundaries involving pertinent intersections with race, socio-economic status, origin and other elements of identity. It is important for these to be reviewed to foster more meticulous and purposeful matrixes to comprehend and address inequality.

Martha Minow's dilemma of difference theory is also useful in examining how the identity spectrum in sport culture is managed. Her study critically assesses the manner in which the law and society imposes rigid categorizations and how this lends to certain consequences[23] and discusses what she coins "the dilemma of difference" which arises when persons are labelled as different in order to compensate for the adverse consequences of their difference. Correspondingly, the law's dilemma of difference becomes how to proceed in ameliorating unfair consequences to the powerless without further reducing their power.

17 *Ibid.*

18 Jaime Schultz, "New Standards, Same Refrain: The IAAF's Regulations on Hyperandrogenism", in: *The American Journal of Bioethics* (2012) 12, p. 32.

19 Jason Haynes and J. Tyrone Marcus, "Emerging Issues in Commonwealth Caribbean Sports Law", in: *Commonwealth Caribbean Sports Law* (Routledge, 2019), p. 338.

20 *Ibid.*, p. 339.

21 Kimberle Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics", in: *University of Chicago Legal Forum*, 1989(1), available at http://chicagounbound.uchicago.edu/uclf/vol1989/iss1/8 (accessed 2 December 2021); Kimberle Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color", in: Stanford Law Review, 43(6) (1991), p. 1241.

22 Joan Williams, "Fretting in the Force Fields: Why the Distribution of Social Power has Proved So Hard to Change", in: *UMKC Law Review*, (71) (2002), p. 493-499.

23 Martha Minow, "Learning to Live with the Dilemma of Difference: Bilingual and Special Education", in: *Law and Contemporary Problems*, 48(2) (Spring 1985), p. 154, available at https://www.jstor.org/stable/1191571 (accessed 2 December 2021); Judith McMullen, "Book Review: Making all the Difference, by Martha Minow", in: *Marquette Law Review*, 74(2) (Winter 1991), available at https://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1710&context=mulr (accessed 2 December 2021).

Minow repeatedly returns to the themes of normalcy and neutrality and suggests how we might enlarge the circle of what is deemed to be "normal," and through models inclusionary of the range of human experience eliminate the dilemma of difference. Therefore, an openness to refashioning what is perceived as normal and questioning the neutrality of the law is essential to this concept.

While the merger of these concepts – which this article refers to as "intersectional differences theory" – has not been explored by scholars in prior literature, their combination is necessary in both complementing and supplementing the essence of one another. Intersectionality is a crucial apparatus in discerning the substantive aspects of the features that constitute difference while the dilemma of difference prescribes the means, by which these specific encountered differences can be addressed. Subsequently, it is palpable that merging the analytical basis of one to the operative approach of the other can be advantageous to addressing inequality. This may be distinctly efficacious in examining sport policy which attempts to ostentatiously stand in neutrality when addressing individual difference because this analytical framework can emphasise considerations of difference within the webbing of sport's cultural and legal dynamics. It withdraws from establishing a systematic foundation of "normalcy" in its approach to difference and assesses whether the quality of the associations formed by the individuals, within their sporting experience, is a basis of functional integration and social organization for both themselves and the institution.

Caster Semenya has an intersecting identity. As a black intersex athlete originating from lower-income South Africa who identifies as female, her character is nothing short of multidimensional. Her dilemma of difference arises when policies like gender verification and the DSD Regulations connotate that she does not constitute sport's definition of "female" due to her prevailing DSD condition that causes enhanced testosterone levels. Along these lines, these policies are mechanisms designed within the retention of sport's political presumption that difference is attributed to the individual rather than considered as an emergence of a contradiction of the prevailing norms embedded in sport. Semenya's difference has been both an incipiency of stigma and a means of unfairly allocating responsibility and its effects on her. Her intersectional difference only emerges, due to the World Athletics' implementation of provisions which go to the quintessence of whom she is as an individual, and she is spotlighted because the regulations do not affect other athletes who fall neatly within the political brackets of female normativity.

The DSD Regulations clearly adopt the position that Minow theorizes about the law when it inadequately addresses difference. The regulations were constructed with the primary perception that Semenya's testosterone levels are unnatural, thereby deeming her a DSD athlete rather than as a comparator to athletes who do not possess this same condition. Further, they do not expressly provide for what is considered a "female athlete" but only that which does not exude one (primarily intersex females). Even though science remains unclear on such a determination, these provisions demonstrate the political stance of World Athletics that endogenous testosterone is a performance-enhancing hormone. Additionally, the mandate to not partake in competition or compliance or the alternative through medical alterations do not acknowledge resultant effects on the physical or mental state of DSD athletes. Lastly, the substance of the DSD Regulations is rooted in gendered undertones of normative femininity and places a heightened emphasis on "difference" in sexual development as opposed to a "disorder".

In the Semenya case, while the Panel acknowledged that *"the imperfect alignment between nature, law and identity is what gives rise to the conundrum at the heart of [the] case"*, the CAS proceeded to explain that:

"On true analysis, [...[*the purpose of the male-female divide in competitive athletics is not to protect athletes with a female legal sex from having to compete against athletes with a male legal sex. Nor is it to protect athletes with a female gender identity from having to compete against athletes with male gender identity. Rather,* ***it is to protect individuals whose bodies have developed in a certain way following puberty from having to compete against individuals who, by virtue of their bodies having developed in a different way following puberty, possess certain physical traits that create such a significant performance advantage that fair competition between the two groups is not possible."***[24] [emphasis added]

Sport's semblance of fairness in this regard at the expense of inclusion is exceedingly specious. On the assumption that naturally higher levels of endogenous testosterone do prove to offer a competitive advantage by enhancing performance, Semenya's case still depicts noticeable inconsistencies relating to other prevailing genetic advantages existing in sport. There are issues of discrimination and unfairness when Semenya is compared to other prominent sporting figures. For example, it has been suggested that Usain Bolt, who dominated his professional field, had a *"sprinting gene"* which caused him to have fast-twitch muscle reflexes and longer muscle fibres than most; he was also 6 feet 5 inches tall unlike most sprinters.[25] Although these genetic advantages may have contributed to his success, when compared to the vehement campaign against Semenya's genetic advantage, there appears to be no mention of whether Bolt had a competitive edge or whether fairness was compromised. He was simply viewed as talented. There

24 4A_248 / 201, *Mokgadi Caster Semenya v. International Association of Athletic Federations*, Judgment of 25 August 2020 (1st Civil Law Court) [559], available (in French) at www.bger.ch/ext/eurospider/live/fr/php/aza/http/index.php?highlight_docid=aza%3A%2F%2Faza://25-08-2020-4A_248-2019&lang=de&zoom=&type=show_document (accessed 2 December 2021).

25 Milan oh, "Usain Bold – Biomechanical Model of Sprint Technique", in: *Facta Universitatis Series Physical Education and Sport*, 17(1) (2019), available at https://doi.org/10.22190/FUPES190304003C (accessed 2 December 2021); Ralph Beneke and Matthew Taylor, "What Gives Bolt the Edge – A.V. Hill Knew It Already!", in: *Journal of Biomechanics*, 43(11) (2013), p. 2241.

is also the incredibly celebrated record-breaking Olympian swimmer Michael Phelps, who received much acclaim for his physical strength and capabilities. The length of his arms, his hands and relative torso size are beyond ideal for swimming and his body produces less lactic acid than one percent of the entire world's population.[26] This meant that he could have recovered quickly during competitions and trained more than any other athlete. Again, of course, no serious questions or allegations of unfairness pertaining to his genetic advantages ever arose throughout his career. It was simply considered that he won the genetic lottery.

Thus, the position of Semenya that *"it is illogical and unnecessary to regulate one genetic trait while celebrating all the others"*[27] is entirely well-founded. These parallel comparisons, derived from a reductionist perspective, illustrate that, if sport's purpose in achieving fairness is to utilize genetic qualifications emerging from natural biological advantages, then it is impossible to justify the isolation of one natural advantage. If testosterone regulations, such as the DSD Regulations, which go to the crux of Semenya's biology and identity, are meant to promote impartiality, then it is hard to perceive why one advantage would take precedence over another when the extent of individual advantages can barely be measured, far less compared to each other. It seems that the significant biologic consideration is the possible "male advantage" associated with testosterone, which once more returns to sport's culture and its doctrine of normative femininity. If one considers (sport) culture as more of a social order, whose maintenance requires attributing to persons, internal peculiarities and limitations enforced from within, in the way that the intersectional differences theory does, the evolution in sports culture can change its legal and political direction. It is for the actors and agents of sport not only to reimagine constituents of "normalcy" but to actually remove its standards entirely and inculcate that the law must strike an appropriate balance when rights conflict, in order to ensure that one's incorporation into sport is purposeful and free from discrimination.[28] As such, it would be possible to address the kinds of functional differentiation prevalent within sport, which call for carefully deliberated informal cultural changes, in order for policies to be an effective mechanism for social liberalization, participation and inclusion.

In accounting for differences in sex and gender in sport, several positions have been advanced to address its existing analytic and intersecting system of inequality. It can be a regulatory riddle when determining how to balance the interests of sport with the protection of non-conforming athletes' rights, who may not strictly fit into the binary categories of sport.[29] Scholars have proposed that gender identity be deemed the determinant factor in determining participation in sport rather than biological sex.[30] Others have suggested removing binary classifications for a new biological feature since "sex" is not stagnant in its construction as a biological stratum and is "an ambiguous proxy for achieving fairness".[31] Some have advocated for a system to deal with gender variant athletes that relies on a determination of an "athletic gender".[32] There have also been calls to reform the entire system for classification code that distinguishes between biological differences so vigorously to minimize the influence of biological traits to the lowest level possible and "to ensure the success of an athlete is determined by skill, fitness, power, endurance, tactical ability and mental focus".[33] While this is undoubtedly a difficult task for the sporting world, there is no greater force of amiability than to be austere while still allowing for flexibility. How sport choreographs this delicate dance of fairness and inclusion is determinant in building or destroying its industry in the years to come. The solution must involve the integration of persons, especially those with varying backgrounds, to allow for their effective participation in all spheres of the system, so that they no longer feel mistreated, undermined or abused by it. Otherwise, it will be the nonfeasance of not intentionally and significantly adjusting policies to sociological rationales that will be to the detriment to its own cause of fairness.

Conclusions

Caster Semenya's experience illustrates that racialism capitalism through its modus operandi of racialised

26 Krystal Batelaan and Gamal Abdel-Shehid, "On the Eurocentric nature of sex testing: the case of Caster Semenya", in: *Social Identities: Journal for the Study of Race, Nation and Culture* (2020), 27(2), p. 147, available at https://doi.org/10.1080/13504630.2020.1816452 (accessed 2 December 2021); Emily J. Cooper, "Gender Testing in Athletic Competitions – Human Rights Violations: Why Michael Phelps is Praised and Caster Semenya is Chastised", in: *The Journal of Gender, Race and Justice* 14 (2010), p. 233.

27 4A_248 / 201, *Mokgadi Caster Semenya v. International Association of Athletic Federations*, Judgment of 25 August 2020 (1st Civil Law Court) [53], available (in French) at www.bger.ch/ext/eurospider/live/fr/php/aza/http/index.php?highlight_docid=aza%3A%2F%2Faza://25-08-2020-4A_248-2019&lang=de&zoom=&type=show_document (accessed 2 December 2021).

28 Matthias Klatt, "Balancing Rights and Interests: Reconstructing the Asymmetry Thesis", in: *Oxford Journal of Legal Studies*, 41(2) (Summer 2021), p. 321-347.

29 Seema Patel, "Gaps in the protection of athletes gender rights in sport – a regulatory riddle", in: *The International Sports Law Journal* (2021), available at https://doi.org/10.1007/s40318-021-00182-2 (accessed 2 December 2021).

30 Roger Pielke Jr., "Scientific Integrity and the IAAF Testosterone Regulations", in: *The International Sports Law Journal*, 19(1)-(2) (2019), p. 18; Anne Ljungqvist and Joe Leigh Simpson, "Medical Examination for Health of All Athletes Replacing the Need for Gender Verification in International Sports: The International Amateur Athletic Federation Plan", in: *Journal of the American Medical Association* (JAMA), 267(6) (12 February 1992), p. 850, available at https://jamanetwork.com/journals/jama/article-abstract/395077 (accessed 2 December 2021).

31 Maayan Sudai, "The Testosterone Rule – Constructing Fairness in Professional Sport", in: *Journal of Law and the Biosciences* (2017), p.181.

32 Joanna Harper et al., "The Fluidity of Gender and Implications for the Biology of Inclusion for Transgender and Intersex Athletes", in: *Current Sports Medicine Reports* 17(12) (2018), available at https://journals.lww.com/acsm-csmr/FullText/2018/12000/The Fluidity_of_Gender_and_Implications_for_the.13.aspx (accessed 2 December 2021).

33 David Epstein, *The Sports Gene: Inside the Science of Extraordinary Athletic Performance* (The New York Times, 2013), p. 70.

expropriation, though informed by class interests, can be refracted through the workings of race and gender. It has revealed that racism and sexism can no longer be viewed as epiphenomenon of capitalism but rather are crucial organizing institutions in their own respect which impact on status and influence.

As Semenya's case showcases, it is along these lines that sports' politics and its culture are driven to police femininity, manage the power struggle between races and use gender inequality to preserve male-female differences. While Semenya's case is prolific, it is not the first and it will not be the last.

As society progresses, it is inevitable that more cases in sport, based on intersectional differences, will materialise and their plights cannot be ignored. However, if athletes must be oppressed and stigmatised to achieve this holy grail of fairness, then it must be accepted that the promise of equality in sport may be a mere veneer.

The Semenya case has shown that, while gender and sex in sport may be synonymous, the concepts of fairness and equality are not – the DSD Regulations are fair because they allegedly prohibit biological competitive advantages, but they are unequal as their application disproportionately impacts and condemns a specific class of athlete. Therefore, it is evident that the ideals of fairness are bound up in the demands of the majority and capitalist social order and equality becomes despairing ambition for subjugated minorities.

The intersectional differences theory recognises that policies that seek particular objectives, such as fairness, must simultaneously be meaningful and intentional in promoting inclusion and should be uniquely constructed to incorporate such complexity without forfeiting attentiveness to the effects of social relations of capitalism.

Race, sex, gender, and status cannot be discussed in isolation from each other, but must be perceived as a dynamic conglomeration with contradictions and tensions!

The fortress character of the force majeure clause in sports contracts

Part two

BY DR. JASON HAYNES[1]

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Abstract

Force majeure clauses are contractual provisions that are typically found in high stakes sports contracts, including broadcast, sponsorship, venue and event agreements. They are also generally found in professional contracts between players, coaches, managers and clubs. The effect of these clauses is to excuse or in some cases delay the obligated party from the performance of his/her/its assumed duties in circumstances where performance has become impossible, because of an unforeseen event for whose occurrence it bears no fault. While some sports contracts contain an itemized list of situations that may constitute force majeure events, most sports contracts simply provide a general force majeure clause, leaving it to courts and tribunals to determine the extent to which the events in issue necessitate the invocation of the clause. In the last two decades, the true import of these clauses has become increasingly evident, as more and more players, coaches and managers, and, indeed, clubs are seeking to rely on the force majeure clause as the basis for excusing their non performance of contractual obligations. In most of these cases, however, tribunals have adopted a narrow interpretation of these clauses, thereby denying obligated parties the opportunity to rely on these clauses even in extenuating circumstances. This article assesses the seeming fortress character of the force majeure clause in the sporting context, having regard to the jurisprudence of the Court of Arbitration for Sport (CAS). It argues that these clauses, though they inherently import a high threshold for invocation, have achieved a fortress-like character, thanks to the *"lex sportiva"* of the CAS.

Financial challenges

The fortress-like character of the *force majeure* clause is also evident in the way in which the CAS treats with arguments around financial challenges that beset those obligated to perform obligations in the context of a sports contract.

In *Club Atlético Mineiro v. FC Dynamo Kyiv*[2], for example, Dynamo Kyiv and Atlético Mineiro concluded a loan agreement for the transfer of a player to the latter. Atlético Mineiro had paid € 2,300,000 but was no longer able to comply with its outstanding payment obligations in the sum of € 760,000. Atlético Mineiro argued that it encountered enormous financial difficulties because of claims presented by the Brazilian Treasury Department that caused the abrupt and illegal blockage of its credits and funds. In this context, it argued that this was a force majeure event which illegally blocked its bank accounts, credits and prevented its financial transactions, disallowing the payment obligations it had assumed. The CAS, however, held that Atlético Mineiro had failed to establish that the blocking of its accounts by the Brazilian Treasury Department constituted a situation of force majeure, as it was responsible for the blockage itself by virtue of the mismanagement of previous executive boards. In this connection, the CAS concluded that:

"[...] *executive boards represent a football club and that the contractual arrangements entered into by executive boards bind the football club as a legal entity. As such, mismanagement by a previous executive board of a club can, even if this were established to be the reason of the present financial difficulties, not justify any overdue payables of the club under a new executive board."*[3]

In short, then, it appears likely that financial difficulties cannot per se excuse the performance of a sports contract, and that, in any event, if a person or entity is responsible for the force majeure event, he/she/it may not rely on the force majeure clause.

The CAS adopted a similar approach in *Zamalek Sporting Club v. Fédération Internationale de Football Association (FIFA)*.[4] Here, in a prior decision, the CAS had made an award that Manuel Agogo terminated his contract with Zamalek SC with just cause in response to Zamalek SC's contractual breaches. Zamalek SC was, accordingly, required to compensate Manuel Agogo, but it informed FIFA Players' Status Department that it was facing several issues that prevented it from making payment of the outstanding

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2 CAS 2015/A/3909, award of 9 October 2015.

3 *Ibid* [70].

4 CAS 2018/A/5537, award of 31 October 2018.

amounts, namely restrictions imposed by the Central Bank of Egypt with regard to foreign currencies. Notwithstanding the fact that the club and Agogo agreed to a payment plan, after the first payment of US$ 50,000, the club failed to pay the subsequent instalments due. In this connection, the club informed the FIFA Disciplinary Committee that it could not respect the payment plan, due to the fact that its bank account had been seized by an Egyptian national court decision, as well as due to the economic crisis that caused the loss of more than 100% of the value of the local currency.

The CAS held that Egypt did indeed suffer an economic crisis at the time and the operations of the Egyptian banking sector were placed under strict regulatory restrictions since January 2014, whereby a cap of US$ 50,000 per month and US$ 100,000 per year on international payments with foreign currencies was imposed. However, these restrictions did not result in an outright ban on all international transfers of capital through Egyptian banks since, with exceptional approval from the Egyptian authorities and/or the Central Bank of Egypt, international payments and transfers of capital abroad were possible in certain instances and for specific purposes. Interestingly, Zamalek SC was still able to make several international payments in foreign currencies to Agogo during this period as well as to other clubs by obtaining exceptional approvals from the Egyptian authorities. However, on the facts, Zamalek SC did not make a request for exceptional approvals to make international transfers of US$ 50,000 each month to Agogo.

Having regard to the foregoing, the CAS held that the alleged financial difficulties that Zamalek SC faced because of the economic crisis in Egypt and the consequential loss of value of the local currency were not valid arguments. In this connection, the CAS was emphatic in noting that *"financial difficulties or the lack of financial means of a club cannot be invoked as justification for not complying with an obligation to pay".*[5] Moreover, although applications for exceptional approval from the Egyptian authorities involved a bureaucratic procedure, the CAS explained that this did not entail an undue burden that ultimately made it impossible or extremely difficult for Zamalek SC to make payments abroad.

Separately, Zamalek SC argued that it had proposed to Agogo in good faith alternative payment methods in order to be able to continue fulfilling its payment obligations, such as the opening of a bank account in Egypt to which Zamalek SC could deposit the amounts directly, or Agogo coming to Egypt to collect the due amounts in cash. Nevertheless, Agogo refused all the proposed alternative methods and requested for the due amounts to be paid by international bank transfers. Despite the apparent feasibility of these alternative methods, the CAS found that:

"[...] *the Player could not be forced to accept these alternative payment methods, despite the feasibility of them. The Panel finds that it is to the discretion of the creditor to determine the details and the place of the bank account into which the amount due is to be transferred. It is the responsibility of the debtor to do all relevant efforts to comply with its payment obligation in accordance with a FIFA decision and according to the creditor's wishes. The latter is therefore free not to accept a payment made to a bank account other than the one he had duly specified."*[6]

The CAS rulings in the foregoing cases make it clear that even extenuating financial difficulties will not sway the tribunal in the direction of countenancing the invocation of the *force majeure* clause, once again illustrative of the fortress-like character of the clause. That the CAS ruled that a party is obliged to perform financial obligations owed to another party in exactly the same manner envisaged by the parties, without the possibility of demanding payment through alternative feasible means, may, however, create undue prejudice in individual cases, which is a cause for concern.

Bureaucratic challenges

Bureaucratic challenges, like financial difficulties, have not been regarded by the CAS in its case law to date as justiciable *force majeure* events. In Club Africain v. Seidu Salifu[7], for example, Salifu did not receive his salary and bonuses for four months. In consequence, the player terminated his contract with the club, citing just cause, and sued for damages. The club argued that it was unable to respond to Salifu nor make payments because of a force majeure situation which was prompted by the sudden resignation of a large part of the elected office holders of the club, thereby disturbing its normal management. The CAS, however, held that the sudden resignation of a number of its office holders did not make it impossible to meet its payment obligations with respect to its debt in favour of the player. As such, the club was unable to rely upon the force majeure clause.

A similar outcome was obtained in *Panthrakikos FC v. FIFA*[8]. Here, the FIFA Dispute Resolution Chamber had decided that Panthrakikos FC had to pay the club "Dauphins FC" training compensation for player L. in the sum of € 72,500 within 30 days. Thereafter, the CAS delivered a Consent Arbitral Award ratifying a Settlement Agreement concluded between Panthrakikos FC and Dauphins FC which provided for the payment of € 70,000 by Panthrakikos FC in instalments. Panthrakikos FC, however, failed to comply with the CAS Consent Award, as it paid only the first instalment (€ 10,000). Panthrakikos FC argued that it was unable to pay the outstanding amounts under the CAS Consent Award because of legislative restrictions on the international transfers of capital imposed by the Greek government since 28 June 2015. It was, however, held that the restrictions did not result in an outright ban on all international transfers of capital through Greek banks. In fact, since the reopening

5 *Ibid.* [70].

6 *Ibid.* [75].

7 CAS 2016/A/4874, award of 22 August 2017.

8 CAS 2016/A/4402, award of 20 September 2016.

of the Greek banks on 20 July 2015, Panthrakikos FC was aware that international payments and transfers of capital abroad were possible in certain instances and for specific purposes upon authorization and approval by the Greek Committee for the Approval of Banking Transactions. On the facts, Panthrakikos FC did not sufficiently establish that Greek legislation, as in force since 20 July 2015, constituted such an absolute obstacle to the transfer of capital that effectively prevented it from settling its outstanding debt to Dauphins FC. The CAS accordingly noted that, while the Greek legislation involved a bureaucratic procedure, this did not entail an undue burden that ultimately made it impossible or, extremely difficult, for Panthrakikos FC to make payments abroad. Consequently, Panthrakikos FC could not invoke a situation of *force majeure* for not making the outstanding payments under the CAS Consent Award.

The foregoing cases illustrate that bureaucratic difficulties, whether of an internal or external nature, do not operate to invoke the *force majeure* clause.

Adverse socio-economic conditions

Generalized socio-economic difficulties in a particular jurisdiction, which adversely affect the performance of a sports contract, have to date not been regarded by the CAS to constitute a force majeure event. In *Football Club Metallurg v. UEFA*[9], for example, Metallurg had breached the UEFA Club Licensing & Financial Fair Play Regulations because it had overdue payables towards other football clubs (€ 200,000 and € 890,000, respectively). However, only € 150,000 of the overdue payables had been paid by the deadline, thereby leaving € 740,000 outstanding. Metallurg argued that, due to financial problems and the problematic social and political environment in Ukraine, it became impossible to pay the full amounts to foreign clubs by the applicable deadline. It appears that foreign currency payments from Ukraine to clubs outside Ukraine were technically impossible. However, payments by Metallurg were made through an offshore company. Metallurg argued that it was not ready to settle the relevant overdue payables being apparently quite substantial and submitted that the club's investors did not provide for such expenses in its budget.

It was, however, held by the CAS that financial problems, or the lack of financial means of a club, cannot be invoked as a justification for non-compliance with an obligation. More specifically, the CAS held that, although the socio-economic situation in Ukraine was difficult, the conditions for the occurrence of force majeure were not satisfied, since the *"problematical social and political environment in Ukraine apparently did not prevent Metallurg from paying its creditors an amount of € 150,000"*.[10]

In the CAS view, the fact that emergency payments were made by Metallurg through an offshore account in the past meant that, objectively, Metallurg was not prevented from performing its payment obligations because of the problematical social and political environment in Ukraine. In this connection, the CAS explained:

"[...] *the mere reference to a general situation of troubles in a concrete place is not enough to justify a breach on the basis of exceptional circumstances as the force majeure. The party asking for its application shall duly identify and accredit which specific and precise fact prevented it to perform a certain activity."*[11]

In addition, Metallurg's argument that the club's investors did not provide for such expenses in the club's budget was not deemed sufficient to constitute a force majeure event.

Conclusion

The CAS cases discussed above illustrate, in no uncertain terms, that the force majeure clause has acquired a fortress-like character that has made it virtually impossible for a party to escape performance of contractual obligations assumed, even where extenuating circumstances exist.

Terror attacks, personal challenges, financial difficulties, bureaucratic difficulties and adverse socio-economic conditions, even if severe, will not operate to excuse a party's non-performance of its obligations, unless the breach was committed because of the occurrence of an unforeseen event or impediment, not attributed to the party in question, that is truly beyond the control of the obligated party.

While the sanctity of contracts should indeed be preserved, this article concludes that the narrow construction of the force majeure clauses in the case law of the CAS, to date, may create undue personal prejudice in individual cases, including those cases in which serious attacks of a terrorist nature cause legitimate fear and trepidation.

9 CAS 2014/A/3533, award of 9 September 2014.

10 *Ibid.* [61].

11 *Ibid.* [62].

Oscar Pistorius may be eligible for parole soon

BY LLEWELYN CURLEWIS[1] AND STEVE CORNELIUS[2]

Introduction

South Africa has a very proud, if very chequered, history in sport and has produced some of the most iconic moments in the annals of global sport. This ranges from the very historic Gleneagles Accord which signalled the heyday of the anti-apartheid movement in sport,[3] to Nelson Mandela handing the Webb Ellis trophy to Francois Pienaar when South Africa defeated New Zealand in a tense final of the 1995 rugby union world cup.[4]

But South Africa has also had more than its fair share of great sports heroes who ended up with feet of clay. One only needs to think of former Proteas Cricket captain, Hansie Cronjé, considered to be a true gentlemen of a gentleman's game and one of the best players to ever grace a cricket field – that is, until it was revealed that he was a key player in a global web of match-fixing and corruption in cricket.[5]

Then there is Oscar Pistorius – the iconic "Blade Runner" – whose rise to stardom and his battle to participate in the regular Olympic Games, made him a hero of the fight for disability rights and a role model for aspiring athletes everywhere. That is until that disastrous evening on St Valentine's Day in 2013, when he shot and killed his girlfriend, Reeva Steenkamp.[6]

Pistorius was charged with murder and eventually, after a series of appeals, convicted and sentenced to fifteen years' imprisonment. In 2015, Pistorius was released from prison and placed under correctional supervision and house arrest. This was overturned and Pistorius had to report back to prison.[7]

Now that Pistorius is nearing the halfway mark of his fifteen-year sentence, he could become eligible for parole.[8]

Statutory framework

The situation with regard to parole is a complex one as our laws have changed over time. The laws that applied to offenders at the time when they were sentenced, are the laws that will determine their release and placement on parole. Simply put, this means that laws that are made today cannot change sentences that were imposed yesterday. It is, therefore, important to know all the detail of a particular case and the laws applicable at the time of sentencing. This is exactly why the issue relating to parole of Oscar Pistorius is not necessarily a straightforward one. Naturally, this makes it difficult to formulate general rules of what applies in which cases. The conditions set out below, nevertheless, will apply to Pistorius.

The situation with regard to parole and release is, in essence, one where there are few rules and many exceptions. The basic rules applicable specifically to Oscar Pistorius are contained in section 73(1) of the Correctional Services Act[9]. This Act created a rights-based framework for South Africa's correctional system:

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3 Anon., "From the Archive: Gleneagles Agreement on Sport", in: *The Commonwealth*, 9 November 2016, available at https://thecommonwealth.org/media/news/archive-gleneagles-agreement-sport (accessed 3 December 2021).

4 Anon., "On this day in 1995: Mandela, Williams and Pienaar help unite South Africa", in: *Rugby World Cup*, 14 June 2020, available at www.rugbyworldcup.com/news/572348/on-this-day-in-1995-mandela-williams-and-pienaar-help-to-change-south-africa.

5 *Cronje v. United Cricket* Board of SA 2001(4) SA 1361 (T).

6 Maughan, "Oscar Pistorius now eligible for parole in March 2023 – after Appeal Court admits error in murder sentence", in: News24 6 February 2021, available at www.news24.com/news24/southafrica/news/oscar-pistorius-now-eligible-for-parole-in-march-2023-after-appeal-court-admits-error-in-murder-sentence-20210206.

7 *Idem*.

8 *Idem*.

9 Act 111 of 1998 as promulgated in 2004.

1 \a sentenced offender (such as Pistorius) will remain in a correctional centre for the full period of the sentence;[10]
2 a sentenced offender must be released when he has served his term of incarceration (or community corrections) [section 73(2)][11];
3 a sentenced offender may be placed (under certain conditions) on parole or correctional supervision before he has served the full term of incarceration [section 73(4)][12];
4 the decision to release a sentenced offender on parole or correctional supervision is made by the Correctional Supervision and Parole Board if that offender has been sentenced to imprisonment for a period of more than 24 months, but not life imprisonment [section 73(5)(a)][13].

The above rules are subject to the following conditions or exceptions:

1 the sentenced offender must accept and agree to the conditions of his release on parole[14];
2 a sentenced offender serving a determinate sentence of longer than 24 months, must serve at least half of his sentence before he can be considered for parole [section 73(6)] unless the Court specified a non-parole period longer than half the sentence in the case of sentences longer than 24 months, but this non-parole period may not be longer than two thirds of the total sentence of 25 years, whichever is the shorter. The Court did not make such an order in the case of Pistorius[15];
3 a person shall serve at least a quarter of the effective terms imposed or the non-parole period if specified by the Court, whichever is longest before being considered for parole.[16]

Many other exceptions may also be applicable, but we refrain from discussing these due to the voluminous nature of them.

Discussion

In many instances, parole in South Africa is very often confused with another principle in law known as "clemency". It is important to distinguish between parole and clemency. In *Van Vuren v. Minister of Correctional Services*[17] it is pointed out, with reference to the release and placement policy of the Department of Correctional Services, that parole has a restorative purpose aimed at eventual rehabilitation and reconciliation within the context of the state's duty to protect the community, which is obviously entitled to be protected from criminals. The court held that:

"Parole has a restorative-justice aim. It is aimed at the eventual rehabilitation and reconciliation processes of the offender – themes that underpin restorative justice. Importantly, all these interests must be balanced against those of the community, which include the right to be protected against crime."

In Jimmale and *Another v. S.*[18], the Constitutional Court confirmed the above view and acknowledged the influence of the Constitution on the correctional system, when it held that:

"Parole is an acknowledged part of our correctional system. It has proved to be a vital part of reformative treatment for the paroled person who is treated by moral suasion. This is consistent with the [South African] law: that everyone has the right not to be deprived of freedom arbitrarily or without just cause and that sentenced prisoners have the right to the benefit of the least severe of the prescribed punishments."

Parole is governed in South Africa by the provisions of the Correctional Services Act[19] (except for two aspects dealt with in section 276B(1)(b) of the Criminal Procedure Act,[20] which provides on a non-parole period, and section 299A of the same Act, and the statutory and policy framework within which parole decisions are made. The crux was summarised in *Barnard v. Minister of Justice, Constitutional Development and Correctional Services*[21].

It is accepted that a prisoner, like Oscar Pistorius, has no right to be released on parole, but only a right to be considered for parole.[22] As it was stated in Van Vuren[23]:

"The Act enables sentenced offenders to anticipate consideration for some form of non-custodial supervision."

However, human dignity forms a core component of all rights constitutionally protected and, consequently, a prisoner (Oscar Pistorius) is entitled to constitutional restrains such as fair procedure, equality before the law, legality in the law and the right not to be deprived of freedom arbitrarily or without just cause, as guaranteed by section 12(1)(a) of the South African Constitution of 1996.

Section 35(3)(n) of the South African Constitution entrenches the principle of legality in the criminal law by prohibiting the retroactive application of a punishment

10 s73(1).
11 s73(2).
12 s73(4).
13 s73(5)(a).
14 s73(5)(b).
15 s276B Criminal Procedure Act 51 of 1977.
16 s73(6) read with s276(1)(b) 276(1)(b).
17 2012 (1) SACR 103 (CC) at [51].
18 2016 (2) SACR 691 (CC) at [1].
19 Act 111 of 1998.
20 Act 51 of 1977.
21 2016 (1) SACR 179 (GP) at [19]- [28].
22 *Van Gund v. Minister of Correctional Services* 2011 (1) SACR 16 (GNP) at [11]; *Du Preez v. Minister of Justice and Correctional Services* 2015 (1) SACR 478 (GP) at [12].
23 s73(5)(b).

that is more severe than that prescribed when the offence was committed. Section 9 of the Constitution emphasises equality before the law, embracing the requirement of a legitimate government purpose, and any purpose at odds with the rule of law could never be legitimate.[24]

Consideration of parole is, therefore, an administrative action. Oscar Pistorius will as a result consequently be entitled to a fair procedure in accordance with the *Van Gund decision*[25] as well as the *Du Preez decision*[26].

In the South African legal history, many examples of judiciary review of parole decisions by the Minister of Correctional Services on account of non-compliance with the Promotion of Administrative Justice Act[27] can be found.

The most famous to our knowledge is the case of *Derby-Lewis v. Minister of Justice and Correctional Services*.[28] Clive John Derby-Lewis was responsible for the murder of the well-known political leader of the ANC, Chris Hani. He was a South African politician himself, who was involved first in the National Party (the ruling party from 1948-1992 when former president Nelson Mandela was released from prison), and then (while serving as a member of parliament), in the Conservative Party (the official opposition of the National Party). In 1993, he was convicted of conspiracy to murder the South African Communist Party leader (who led the military wing of the ANC party), Chris Hani, and sentenced to life imprisonment. He was charged with Janusz Walus, the killer, and both men were jailed as a result. He ultimately died at the age of 80 on 3 November 2016. Although Janusz Walus shot Hani, among the country's most popular black politicians, Derby-Lewis provided the gun. Both prisoners were initially sentenced to death, but their sentences were commuted when South Africa abolished the death penalty in 1995. The murder was intended to spark riots that escalated racial tensions and harmed reconciliation efforts. Partly because of his terminal lung cancer, Derby-Lewis was granted parole in June 2015 after 22 years in prison, despite fierce objections from the Hani family. This suggests, in itself, that, even if the family of Reeva Steenkamp disapprove of parole for Oscar Pistorius, such objection is but one consideration for a parole application.

Janusz Walus, the Polish convicted murderer, who held dual Polish-South African citizenship from 1986 until his South African citizenship was revoked in 2017, is serving a life sentence in the C-Max section of the Kgosi Mampuru prison in Pretoria. On 13 November 2020, Walus was refused parole for the fourth time, despite his lawyer's claim that he was completely rehabilitated. He has also lost his bid for leave to appeal the refusal of his release on parole in the Supreme Court of Appeal in Bloemfontein on the 16 April 2021. Judge Elizabeth Kubushi, sitting in the High Court in Pretoria and who earlier turned down the bid for parole, said there was no prospect of success in the Supreme Court. Walus had asked for leave to appeal the entire judgment and order handed down by Judge Kubushi. His legal team argued that, apart from them believing that the Supreme Court would rule in his favour, they believed that his constitutional rights were trampled on by his further incarceration and that politics, in essence, hampered his application. Walus has spent [28] years up to date in prison. The Court of First Instance said that the argument that his further incarceration amounted to cruel and degrading punishment was unsustainable. Lawyers on behalf of the Applicant told the judge that, after all these years in jail and several fruitless attempts to obtain parole, it was time for the Court to decide on the issue and to overrule both the decisions of the Parole Board and subsequently the Minister of Justice and Constitutional Development (having a internal appeal prerogative). Neither his submissions that he had paid his dues, had genuine remorse for what he had done, and over the years rehabilitated to become a model prisoner, was sufficient. The widow of Hani, Mrs Limpho Hani, in a 48-page opposing affidavit, did not accept his apology, nor did the South African Communist Party. They maintained that he had no remorse and had to remain behind bars. She said that it was her right not to accept his apology and no one could force her to forgive her husband's killer. The same principle could surely apply for Reeva Steenkamp's family. In *Kelly v. Minster of Correctional Services*,[29] this principle was reiterated.

Presidential clemency, of which free pardon, reprieve and remitting of sentence form part, differs from parole. As explained above, it is governed by the Constitution and an *ex abundanti cautela* provision in the Criminal Procedure Act.[30] The discretion for clemency is exclusively entrusted to the President himself. In this instance, President Cyril Ramaphosa, can exercise such a discretion, which will also be subject to possible judicial review. Although no person has a right to receive clemency, once again and on par with parole, he/she is entitled to at least be considered for clemency. The effect of presidential clemency is that a conviction or sentence is expunged, and that the convicted person, consequently, has a clean record as far as the particular conviction and sentence are concerned. It should, therefore, be clear to the reader that Oscar Pistorius will not be considered for possible free pardon, reprieve and remitting of sentence (presidential clemency).

Although there are certain similarities between presidential clemency and parole, such as that their purposes are both restorative, they differ materially in law. Apart from the fact that parole is governed and administered by other legislation and persons than presidential clemency, the material difference lies in the effect of the action: parole merely ensures the release of a prisoner from a

24 *Phaahla v. Minister of Justice and Correctional Services* 2019 (2) SACR 88 (CC); *Makhokha* 2019 (2) SACR 198 (CC).

25 At [11].

26 At [12].

27 3 of 2000.

28 2015 (2) SACR 412 (GP).

29 2016 (2) SACR 351 (GJ).

30 Act 51 of 1977.

correctional facility, in accordance with the principles stated above, and does not lead to the expungement of his or her criminal record and can be revoked.

Section 299A of the Criminal Procedure Act[31] already mentioned above, was inserted by the Judicial Matters Second Amendment Act[32] with effect from 31 March 2005. It gives the victims in cases in which serious offences have been committed the rights to make representations when placement of the prisoner on parole, day parole or under correctional supervision is considered or to attend any relevant meeting of the parole board. It is an instance of recognition of victims' rights.[33]

Conclusion

In the case of Pistorius, he will soon be eligible to be considered for parole. This is not to say that he will necessarily be granted parole the first time. He definitely appears to be a candidate to be considered favourably for parole. Many factors, including but not limited to expert reports, victim dialogue feedback, his rehabilitation and behaviour in prison, and so on will be considered. At the end of the day, even the Minister of Justice and Correctional Services and/or a court may be approached to review any decision (either in favour or against his parole) afterwards.

It would seem that victim dialogue may be a key element in this case, with reports suggesting that the willingness of Reeva Steenkamp's parents to meet with Pistorius and whether or not they would be opposed to him being granted parole, would play an important role – and so will the inevitable media frenzy that will surround this case. Whether it is appropriate or not and whether one likes it or not, the media will give a clear expression of the public sentiment in this matter and that will inevitably influence the decision of the Correctional Supervision and Parole Board when the application lands on their desk.

31 Act 51 of 1977.

32 Act 55 of 2003.

33 Directives regarding complaint participation in Correctional Supervision and Parole Boards were published under GN R248 in *Government Gazette* 28646 of 7 April 2007.

Switzerland:

The trust and sport

BY DR. LUCIEN W. VALLONI AND VIOLA DELCÒ[1]

Introduction

Trust and sport is not a topic that was discussed much in the sports law world. However, based on a very recent case in Italy, it is worth looking at this topic, from a general point of view.

But let us first look at this very interesting case that happened this summer concerning the Salernitana football team (Italian Serie A). The president and owner of the Lazio football team is also among the traceable owners of the Salernitana football team. Both teams will play in Serie A in the 2021-2022 season. In order to avoid conflicts of interest and to comply with the rules imposed by the FIGC (prohibition of timeshare, art. 16 bis of NOIF), the owners of Salernitana chose to set up a trust to manage the total shareholding and to allow the separation of the ownership of the Salernitana club from that of Lazio.

The club's shares were transferred to the trust and the trust was created for the purpose of selling the club within a time limit of six months. The FIGC has accepted the trust, stipulating that the Lazio president must no longer have anything to do with the administration of the Salernitana club over the next six months. He will have no control and power over the trustees, otherwise a sham trust may have been created. The trustees will have to administer and sell the club independently.[2]

These examples show the versatility of the trust. In this article, we will describe the trust, its definition, the involved costs, the tax implications and we will describe examples where a trust can be useful also in the world of sport.

Definition of a trust

There is no precise and exhaustive legal definition of the term trust in the doctrine and jurisprudence of common law countries, but the following quotation is often used:

"A trust is an equitable obligation, binding a person (called a trustee) to deal with property (called trust property) owned by him as a separate fund, distinct from his own private property for the benefit of persons (called the beneficiaries or, in old cases, cestuis que trust), of whom he may himself be one, and any one of whom may enforce the obligation."[3]

The settlor generally draws up a deed of trust which sets out the structure and purpose of the trust and the guidelines to be followed by the trustee.

The settlor may, in some cases, declare himself trustee or may reserve the right to revoke the trust (revocable trust). In all cases, he may be appointed beneficiary of the trust. In addition, the settlor may appoint a protector, a trusted person to oversee the trustee's administrative activities.

The trustee, who may be a natural or legal person, has the power and the duty, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law.[4]

There are various forms of trust; this article is based on the express trust, that is, the most common trust, established voluntarily by a person.

Costs of a trust

The costs of setting up a trust depend on many factors: the first cost is related to the drafting of the trust deed. The amount of this cost varies depending on the complexity of the trust. If a public deed is required, for example, following a transfer of real estate, the costs of the notary's fee for the relevant transfer deeds must be taken into account. Finally, the administration of the trust by the trustee requires various costs. The costs here vary depending on the type of trust, the professional qualification of the trustees and their work activity.

We often hear that trusts are only set up by people with large amounts of capital. But, in reality, the trust is also useful for people with medium capital. Indeed, the smaller

1 Valloni Attorneys at Law, Zürich, Switzerland, https://valloni.ch (accessed 2 December 2021)

2 https://salernitananews.it/trust-salernitana-2021-protocollato-atto-di-cessione-quote-i-dettagli (accessed 2 December 2021)..

3 David Hayton, Paul Matthews and Charles Mitchell, *Underhill and Hayton: Law relating to trusts and trustees*, Eighteenth Edition (LexisNexis Butterworths, London 2010), p. 2.

4 Art. 2(1) lit. c HTC.

the assets placed in trust, the lower the administration costs. Moreover, trusts with few assets can also be administered by non-professional trustees. In such cases, costs are greatly reduced. For these reasons, the trust can be useful for any person, regardless of the amount of the assets.

Adding up all the costs, it can be estimated that setting up a trust costs from CHF 5,000 upwards. If created through professionals and lawyers, the cost is higher. A percentage (approximately 0.05% or higher) is often provided for the management of the trust fund in addition to the trustee's salary.

Taxation in Switzerland

Following Switzerland's ratification of the Hague Convention on the Law Applicable to Trusts and on their Recognition in 2007, the tax authorities have devised general (non-binding) guidelines for harmonising the taxation of trusts, but have not introduced any legislative provisions on trusts. The guidelines are applicable to both direct federal income tax and withholding tax.[5]

The tax burden strongly depends on the type of trust. A distinction must be made between revocable and irrevocable trusts, which are further subdivided into irrevocable discretionary and irrevocable fixed interest trusts. For tax treatment, it is not the designation of the type of trust in the trust deed that is decisive, but the economic consequences.[6]

Swiss tax law has no legal basis for granting a trust legal personality. For this reason, a trust cannot be a taxable entity. Taxes on the assets given to the trust and the income derived from them do not have to be paid by the trustee because, although the trustee is formally the economic owner, he is not entitled to the assets.[7]

To be a revocable trust, the transfer of the assets in trust must not be final. The settlor must either benefit from the income from the trust assets or have the right to revoke, the right to remove the trustee, to appoint new beneficiaries or to amend the trust deed. In the case of a revocable trust, the substance and income from substance will continue to be attributed to the settlor if he is domiciled in Switzerland. Distributions of trust assets made to beneficiaries are considered donations.[8]

In an irrevocable fixed interest trust, the beneficiaries have a claim to the assets which they can enforce in court. It is, therefore, possible to attribute to the beneficiary the amount of his participation in the substance of the trust. Only distributions in the form of investment income should be taxed as income to the beneficiaries. Distributions from private capital gains are generally exempt from tax.[9]

The rights of the beneficiaries of irrevocable discretionary trusts are instead simply an expectation. The timing and amount of any liberality are not fixed, as they depend on the trustee's margin of appreciation. If the settlor is domiciled in Switzerland when the trust is created, the assets and income from the assets continue to be attributed to the settlor. The tax consequences are identical to those of a revocable trust. If the settlor is resident abroad at the time the trust is created, the trust property cannot be attributed to either the settlor or the beneficiary. In this case, distributions must be taxed at the time of inflow as income of the beneficiaries.[10]

The usefulness of the trust in the world of sport

The trust is a useful legal instrument in many fields. Although the trust is not overused in the world of sport, this versatile institution is especially important for the estate planning of professional athletes and can also be practical for other purposes, as two concrete examples will show.

Trust for athletes

Most professional athletes have a complex career over a short period of time, usually from 18 to 35 years. During this period and at this young age, they often earn large sums of money.

Many factors can influence the management of the capital earned by athletes.

For example, the inexperience, the lack of financial education, the lack of time and family relations can lead to unsatisfactory management of capital and cause financial difficulties, especially once the athlete's career is over or when the lifestyle is wasteful.

Receiving a large sum of money at a young age can lead to squandering and wrong investments, often caused because the athlete relies on the wrong people or family members who do not think about the athlete's welfare and future.

Nowadays, in the world of social media, young athletes reaching a certain level of competition can be influenced by peers to overspend their earnings and buy luxurious things, without having thought through any financial plan.

Many athletes drop out of school early and, therefore, have limited economic and legal knowledge.

In addition, the business of sport has become increasingly competitive and stressful. Athletes have little time to administer and manage their capital, image rights, brands and sponsors. The competitive level of professional sports requires more and more time for body care, nutrition, training, matches, meetings and interviews. Travelling between regions or countries for tournaments and events also requires time and energy.

5 Circulaire 30 du 22 août 2007, Imposition des trusts, Conférence suisse des impôts ("Circulaire").

6 Circulaire, Nr. 3.7 et seq.

7 Circulaire, Nr. 4.1 et seq.

8 Circulaire, Nr. 3.7.1, 5.1.1.2 and 5.2.1.

9 Circulaire, Nr. 5.1.2 and 5.2.2.

10 Circulaire, Nr. 5.1.2 and 5.2.3.

It must also be taken into account that, once an athlete's career is over, the salary is no longer assured and the earnings from sponsors and image rights decrease. The trust offers optimal solutions, mainly for the preservation of assets, and to enable the athlete to have a sufficient amount of money to continue his life once his career is over. The settlor (athlete) can stipulate in the trust deed that part of the assets will only be available to the beneficiaries or to him as beneficiary after the end of his career, or periodically, or only after he has reached a certain age or for an education during his career to prepare the career after the sporting career.

The chances of going bankrupt or squandering all the earnings once the sporting career is over cannot be underestimated. As examples of famous athletes who went bankrupt or eroded large sums of money we can mention Mike Tyson, Allen Iverson, Terrell Owens, George Best and many others.

The athletes mentioned have earned many tens of millions during their careers. Due to their fame and popularity, it was probably easier to start earning again. But there are examples of professional athletes, who accumulated much less wealth during their careers and who lost almost all of it once it was over. For these athletes, it is often more complicated to make a profit and, if we add the fact that many athletes do not have a school diploma, some situations become dramatic.

Economic problems can arise from family problems, divorce and child support. These are factors that every athlete must take into account. A trust can also be useful for managing marital assets. For example, the professional athlete can stipulate that periodically his (ex-)wife or children receive money from the trust.

All athletes need careful financial planning, not only high earning athletes. A trust is an excellent solution to the financial needs of athletes. Indeed, the trust offers secure asset management with a strategy defined by the athlete himself, without personal or family feelings interfering.

As mentioned above, the trustee, protector, purpose of the trust and the beneficiaries of the trust are determined in advance by the settlor (the athlete). The amount, frequency and purpose of the benefits are also chosen by the athlete. The settlor may determine that he himself is the beneficiary of the trust.

The versatility of the trust makes it possible to combine various clauses and to stipulate them according to the needs of the athlete.

For example, health and injuries play a key role during a sports career, so they must be protected from the vicissitudes of life with special insurance plans. The trust may, therefore, contain clauses referring to health insurance, or the athlete may stipulate that part of the assets are to be used periodically for therapy and body care.

It is up to the trustee to administer the athlete's assets in accordance with the guidelines set out in the trust deed.

Refusing offers from friends and family can often be emotionally difficult. The advantage of having a trustee is that it leaves it up to the trustee to deal with the social pressures.

Obviously, the trustee must be a competent person. The advantage of the trust is that the athlete can combine a professional trustee with a family member or a trusted person. Decisions will be taken by the professional trustee either by mutual agreement or after listening to the other party.

The athlete may reserve the right to revoke the trust or to dismiss the trustee.

Even in the event of transfers between different cities or countries, for example, due to a change of team or international tournaments, the athlete can be sure that the management of his assets or part of them will remain located in a fixed city and will, therefore, continue to be subject to the same legislation.

The assets in trust are segregated from the personal assets of the trustee. The trustee cannot, therefore, profit from the assets placed in trust. In addition, the rest of the athlete's assets (that is, those not placed in trust) are also segregated from the trust, so that third-party claims cannot endanger the trust.

For the club owners

We already described the case of Salernitana football club, which shows that there are good reasons to use a trust for club owners to eliminate conflicts of interest.

A trust can also be useful for professional team owners for another purpose than in the Salernitana case, as can be seen from an example from the United States, namely, the case of Pat Bowlen trusts and the Denver Broncos (NFL). Pat Bowlen purchased the Denver Broncos in 1984. Sometime prior to 2004, Bowlen established a family trust with the intention of eventually transferring control of the team to one of his seven children, whilst giving the others a financial stake in the franchise. Bowlen publicly acknowledged that he had been diagnosed with Alzheimer's disease in 2009 and ceded major decision-making for the team in 2010. He fully relinquished control to the trust on 23 July 2014 and died in 2019. Under the provisions of the trust deed, three trustees were supposed to control the team until a new successor could be appointed under the trust's terms. Pat Bowlen reportedly made it clear that, if none of his children fulfilled the duties laid out in the trust, an outside buyer could purchase the team.[11]

11 www.palisadeshudson.com/2018/12/pat-bowlens-trust-a-fumbled-handoff (accessed 4 December 2021).

To date, after a lawsuit that was recently dismissed by the judge, it has not yet been decided which of the children will become the new controlling owner of the Broncos or whether the team will be sold.[12]

On 13 September 2019, two children of Pat Bowlen *"filed a petition for declaratory judgment for finding of lack of capacity and undue influence based on probable cause and for determination of invalidity of Trust"*. After the two petitioners filed a motion to dismiss the case, the judge found that the 2009 estate planning documents, including the Patrick D. Bowlen Trust documents, and the 2010 Delegation of Authority *"are valid, enforceable, and reflect Patrick D. Bowlen's intent and will"* and dismissed the case on 13 July 2021. The three trustees *"have the full and complete authority to administer the trust in accordance with the terms and provisions of the PDB trust"*. Hence, this case shows also that the trust is a good protection for the real will of the settlor.

For the community

In addition, some legislations allow the creation of charitable trusts whose purpose is to promote sports and social activities, physical and mental health. Each country determines what requirements must be met for a trust to be defined as charitable. In many countries, it is not always clear what kind of activity or sports organisation falls under charitable purposes. The development of these trusts is important, because they benefit the community and could also be an important tool for athletes to create through the establishment of a trust a professional structure for a good cause.

For example, in the UK and New Zealand, charitable trusts can promote the advancement of education or health. In New Zealand, the promotion of amateur sport may be a charitable purpose.

A charitable purpose includes every charitable purpose, whether it relates to the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community (Charities Act 2005 Section 5). The purpose must provide a public benefit. Even in the UK, a community amateur sports club can theoretically be a charitable trust according to the Charities Act 2011.

The advantages of the trust

a The professional athlete can have a solid capital base at the end of his career, which is managed according to the needs of the athlete.

b Sponsors, media and third parties cannot take advantage of the inexperience and young age of the athlete, because they will still have to deal with trustees and the group of advisors and interlocutors involved in the trust.

c The trust can be set up by any athlete, irrespective of the amount of their capital.

d The assets of the trust are, in any case, segregated from the personal assets of the settlor, his family and personal affairs are unlikely to affect the assets. The trust is in favour of the beneficiaries but remains confidential and autonomous. The beneficiaries are not aware of all the terms of the deed of trust.

e The law applicable to the trust is chosen by the settlor and is not variable which provides for legal certainty.

f Some legislations have favorable taxation of trusts.

g The trust is one of the most flexible, customisable, privacy-friendly and effective legal instruments.

h Management decisions are taken in a more objective and impartial manner, thus respecting the interests and wishes set out in the trust deed by the settlor.

i Assets in trust are segregated and, therefore, not subject to the claims of the trustee's personal creditors, since they do not form part of his personal estate; and the creditors of the settlor, because they no longer form part of his leftover assets (except in the event of ordinary and bankruptcy revocatory actions).

j Unlike a fiduciary, the trustee is not obliged to the settlor but only to the beneficiary.

Conclusions

The trust is typical of the legal systems of common law countries but is increasingly expanding to civil law countries as well.

The taxation of trusts depends on the legislation of the country in question, we have shown the Swiss one.

The costs of a trust are also very variable, but, in principle, are not excessively high, so that even non-superstars can benefit from the trust.

As can be seen, the trust is a very efficient legal institution for professional athletes and is also optimal for determining how a transfer of management or a sale of a team should take place.

The advantages of a trust are many, so it is time to develop the use of trusts more in the world of sport.

12 www.nytimes.com/2021/07/16/sports/football/denver-broncos-sale-bowlen.html (accessed 4 December 2021)..

Copyright and esports

BY DR. JUSTIN KOO[1]

Introduction

When copyright is discussed in connection with sports, it is usually in relation to broadcasting rights. This is because there is no copyright in the actual playing of traditional sports and, therefore, focus is placed on the recording and broadcasting of live sporting events.

However, with a broader interpretation of "sports" encompassing esports, it is time to re-evaluate the relationship of copyright and sports. Therefore, this article will explore the potential copyright issues involved with contemporary esports and the implications of such issues on the operation of esports.

Defining "sports"

Traditionally, the concept of "sports" was limited to purely physical activities.[2] However, in the 21st century, a broader interpretation of "sports" includes non-physical activities due to the increased emphasis on mental activity.[3] As such, esports can now be argued to come within the scope of what is conceived of as "sports". In fact, esports is recognised in a number of countries as an official sport[4] and, moreover, has gained the attention of the International Olympic Committee ("IOC") where the Olympic Virtual Series was a licensed IOC event.[5] With the increasing popularity of esports and its potential to be considered alongside traditional "sports", it is now necessary to consider the copyright implications as they may impact on the operation and legality of the concept of esports itself.

Copyright and "sports"

Copyright does not subsist in the playing of adversarial sports such as football.[6] As such, sporting moves, plays, tactics and other live occurrences cannot be protected in and of themselves.[7] This can be contrasted to aesthetic sports that involve choreography and repetition without interference.[8] Thus, copyright can subsist in aesthetic sports, the recording of live sporting events in the form of broadcasts and audio-visual works, as well as literary and artistic works illustrating/describing tactics, formations and other sporting information. Consequently, organisers of sporting events have very limited avenues to preserve the value in the live sporting events that they showcase, because there is no underlying copyright work in the matches themselves. Due to this, emphasis is placed on protecting the live broadcast of matches and replays. It is this difficulty in applying copyright to sports that contributed to the development of the live injunction in *FAPL v. BT*.[9]

Similarly, athletes do not have recourse to any copyright protection for their on-field contributions. Unlike actors and singers that obtain performers' rights, athletes do not have any equivalent rights, because their contributions are deemed non-authorial contributions and, moreover, there is no work being created. As such, there is no

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2 See art. 2(1) of the European *Sports Charter and United Nations, Sport for Development and Peace: Towards Achieving the Millennium Development Goals* (2003) 2.

3 See s.2 of the Kenya Sports Act 2013.

4 Esports is recognised in the following countries: USA, Finland, South Korea, China, South Africa, Russia, Italy, Denmark, Nepal, Ukraine, Germany, Pakistan, Indonesia, Sri Lanka, Brazil and Georgia. Note, even though esports may be recognised as an official sport, this may not be reflected in the definition for what constitutes a sport in these countries.

5 See S. Palar, "The Olympic Virtual Series" (21 June 2021), available at https://olympics.com/en/featured-news/olympic-virtual-series-everything-you-need-to-know (accessed 22 November 2021).

6 Sports can be described as adversarial or aesthetic – Loren J. Weber, "Something in the Way She Moves: The Case for Applying Copyright Protection to Sports Moves", in: *Columbia-VLA Journal of Law & the Arts* 23 (1999), p. 317, 320-321; V. Elam, "Sporting events as dramatic works in the UK copyright system", in: *Entertainment and Sports Law Journal* 13 (2015) p. 1, para 7; Chamila S. Talagala, "Copyright in Sports?" (10 February 2019), , p. 15-16, available at www.academia.edu/38346302/Copyright_in_Sports (accessed 3 December 2021).

7 Cases C-403/08 and C-429/08 *Football Association Premier League (FAPL) and others v. QC Leisure and others and Karen Murphy v. Media Protection Services Ltd* [2011] ECLI:EU:C:2011:631, para 98; *National Basketball Association v. Motorola Inc* (1997) 105 F 3d 841, 846 and P. Das, "Offensive Protection: The Potential Application of Intellectual Property Law to Scripted Sports Plays", in: Indiana Law Journal 75(3) (2000), p. 1073, 1089-1095.

8 William Tucker Griffith, "Beyond the Perfect Score: Protecting Routine-Oriented Athletic Performance with Copyright Law", in: *Connecticut Law Review* 30 (1998), p. 675, 677-678; Elam (2015), para 40 and 51 and D. Burk, "Owning Esports: Proprietary Rights in Professional Computer Gaming", in: *University of Pennsylvania Law Review* 161(6) (2013), p. 1535, 1568.

9 *Football Association Premier League Ltd v. British Telecommunication plc* [2017] EWHC 480 (Ch).

copyright or neighbouring rights to be derived from the playing of traditional sports. Copyright only arises where a match is broadcast or recorded. Furthermore, copyright does not accrue to the athletes. Ownership vests with the broadcaster or organiser of the event.

By contrast, esports directly involves underlying copyright works. This is because the playing of esports requires the use of software in the form of video games. Thus, unlike traditional sports, the players of esports interact with a copyright work and arguably create their own derivative copyright work. To this end, the relationship of copyright and esports will be explored subject to the following themes: the existence of copyright works and the rights of broadcasting and streaming. For the purposes of this article, the copyright vesting in the software belonging to the video game publisher and any accompanying contractual terms will not be discussed.[10] Emphasis is placed, instead, on the potential derivative works created by virtue of the playing of esports.

Esports and derivative copyright works

In order to determine the relationship between copyright and esports, it is necessary to ascertain whether there are any copyright works arising from the act of playing video games. Similar to traditional sports that are deemed to have no underlying copyright works prior to the broadcasting or recording of the live match, it is arguable that esports should be treated in a similar manner, because the same considerations of monopolising moves or tactics and the spontaneous nature of sports come to mind. Put differently, the lack of copyright in sporting activity can be attributed to its non-authorial nature, where the contribution made by a player is not perceived as being literary or artistic in the copyright sense. Thus, the contribution is not seen to be within the sphere of what is protectable copyright subject matter. This argument has virtue for the preservation of access to sport and to ensure there are no encumbrances on the free flow of the games.[11] However, one can argue that the protection of sporting moves or tactics are not different from protecting choreography as a dramatic work.[12] Nonetheless, this parallel should be dismissed, because choreography is designed with a necessary artistic element and, for the purpose of repeat performances, in a controlled environment. Whereas, the very nature of sports implies spontaneity and uncertainty, which means the repeatability of a performance is unlikely.

Notwithstanding the basic parallels between traditional sports and esports in terms of spontaneity, esports has one significant difference. Esports is played using software, and, as such, the very video game comprising the foundation of the "sport" is subject to predetermined parameters. Due to this, the essence of spontaneity and variables that affect traditional sports are not as significant for esports. For example, a player in esports is confined by the software and hardware of the video game and the video game system and, as such, can only do a finite number of actions.[13] Thus, it is arguable that a player of esports has the level of control to create a repeatable performance giving rise to a protectable copyright work. However, this does not prescribe that players must react or move in a certain manner.[14] Therefore, it remains unclear whether a sporting performance should come within the scope of copyright protection.[15]

Given the nature of the sporting performance in esports, the most appropriate type of copyright subject matter would be a dramatic work. For a sporting performance to constitute a dramatic work, it would have to be proved that there is certainty and unity of the performance.[16] This is difficult to achieve, because the very nature of sports implies spontaneity and uncertainty of outcomes. Therefore, it is unlikely that a sporting performance will amount to a dramatic work. Even in instances where there is an open list approach to copyright subject matter as with civil law countries, copyright is unlikely to subsist, because the work lacks the required artistic and literary elements necessary for protection.

However, there may be a viable argument for the copyright protection of the sound recordings related to the live chat of the players. The fact that the standard for originality in copyright is generally low, the recordings of players in game audio can amount to a copyright sound recording. Regardless of this possibility, copyright should not subsist in esports performances, because, like traditional sports, the propertisation of select moves or tactics will prevent the free flow of sports and stifle competition. Furthermore, it will be impractical to regulate the use of copyright protected moves or tactics, as it is an absurdity to seek permission to do something during a match or alternatively to request permission prior to the match and thus disclose one's game plan. Beyond this, sports performances do not come within the scope of what is protectable copyright subject matter, because they lack the required artistic and literary aesthetic. Whilst there are artistic elements in sport, the playing of sports is a functional activity that is an end in itself opposed to having an underlying creative aspect.

There are potential arguments as to whether the playing of esports should give rise to a copyright work. If no copyright work arises from the playing of esports it is

10 See Burk (2013). p. 1545.

11 See Weber (1999), p. 327-333, 336-341.

12 F.F. Scott Kieff, Robert G. Kramer and Robert M. Kunstadt, "It's Your Turn, But It's My Move: Intellectual Property Protection for Sports "Moves"", in: *Santa Clara Computer & High Technology Law Journal* 25 (2008), p. 765, 777 and Das (2000), p. 1091-1092.

13 Burk (2013), p. 1553-1554, 1558-1563.

14 Bruce E. Boyden, "Games and Other Uncopyrightable Systems", in: *George Mason Law Review* 18 (2011), p. 439, 477.

15 It has been argued that sports moves are better protected by social norms – Griffith (1998). p. 700.

16 *Green v. Broadcasting Corporation of New Zealand* [1989] RPC 700, 702 and *The Ukulele Orchestra of Great Britain v. Erwin Clausen & Yellow Promotion GmbH* [2015] EWHC 1772 (IPEC) para 104.

because the situation is deemed comparable to traditional sports and, as such, there is no underlying copyright work stemming from the playing of esports. Consequently, the player has no authorial or ownership claim over their playing contribution. However, if copyright hypothetically subsists in the performances of an esports player, then the player will be considered an author of a copyright work with the full complement of exclusive rights available. But, the subsistence of copyright will be a derivative copyright work, which brings into question the value of the copyright created. There will be a derivative copyright work, because the esports player's contribution involves the reproduction of the video games' artistic elements.

Therefore, even if there is copyright in the playing of esports, the player has limited or no control over the subsisting work, because it would be an infringing copyright requiring the authorisation of the video game developer/owner to exploit the work. Thus, the existence of player owned copyright for esports is a secondary consideration. Nonetheless, the finding of copyright in esports media has implications for the broadcasting and streaming of esports matches and highlights.

Broadcasting and streaming esports

The determination of who controls the right to broadcast or stream esports matches depends on whether copyright subsists in the performance of the esports player. If copyright subsists in the performance, then the player will control the right to broadcast or stream the live match or replay. However, the player will also have to obtain the authorisation of the video game developer/owner to avoid infringement. Failing to obtain authorisation will potentially mean that the video game developer/owner can sue the player for reproduction and communication to the public infringement and/or the broadcaster or streaming platform for an infringement of the communication to the public right. However, if no copyright exists in the playing of esports, then the right to broadcast or stream will solely vest with the video game developer/owner, because the only copyright works involved are the graphical and musical aspects of the video game.

Determining who has copyright interests for the purpose of esports is critical, because of the nature of the industry and the reliance on user-led live streaming to reach audiences. Unlike traditional sports, that primarily utilise an organiser led broadcast approach, esports has been user driven. Whilst there are major tournaments with centralised broadcasting/streaming, the majority of esports streaming is facilitated by users. This, therefore, raises the question of potential copyright infringement. As a matter of due diligence, tournament organisers and streaming platforms should determine whether they require copyright licences to put on tournaments and, moreover, broadcast/stream the esports matches.

The practical reality of esports is that a culture of live streaming game play is the norm without due regard for any potential copyright infringement of the artistic and musical works embodied in video games, the possible copyright works of players in the recordings of their matches, and possibility of intermediary liability for the hosting and streaming of esports matches. Ultimately, it may be argued that the rights holders of copyright in video games may not intervene in the live streaming of esports, because it would lead to negative public relations and, alternatively, the growth of esports is positive for their business interests. However, this does not remove the fact that potential infringements are occurring and, moreover, that esports players benefit from monetising their video streams and create further commercial opportunities by utilising the underlying copyright works in video games.

Potential implications

An historical look at the response of rights holders of copyright to disruptive activities would suggest that litigation is a likely reality. For example, the case law on peer-to-peer file sharing and torrents,[17] hyperlink aggregators[18] and media players with add-ons[19] would indicate the potential adoption of a heavy-handed approach. However, the burgeoning sharing culture, that has become the norm on the internet, may dictate a different outcome, as evidenced by the shift away from pursuing litigation against individuals to a targeted attack on platforms. Consequently, it may not be the players who face liability for streaming their esports matches, but rather the platforms that make this possible.[20]

It is a prediction that the broadcasting and streaming of esports will not disappear regardless of whether copyright subsists in the performance of esports players or video game developers/owners become litigious. However, the likely outcome is that the commercialisation of esports media will be met with copyright licensing requests and attribution of commercial proceeds to rights holders. This will not be a new development as, platforms, like *YouTube*, already pay proceeds of monetisation from user generated content to the rights holder of copyright. Thus, the esports media industry will probably follow a likely trajectory to that of the music industry in terms of user generated content.

17 *Twentieth Century Fox Film Corp v. Newzbin Ltd* [2010] EWHC 608 (Ch); *Twentieth Century Fox Film Corp v. BT* [2011] EWHC 2714 (Ch); *Dramatico Entertainment Ltd v. British Sky Broadcasting Ltd* [2012] EWHC 268 (Ch); *EMI Records Ltd v. British Sky Broadcasting Ltd* [2013] EWHC 379 (Ch) and *1967 Ltd v. British Sky Broadcasting Ltd* [2014] EWHC 3444 (Ch).

18 *Paramount Home Entertainment International Ltd v. British Sky Broadcasting Ltd* [2013] EWHC 3479 (Ch); *Case C-160/15 GS Media BV v. Sanoma Media Netherlands BV and others* [2016] ECLI:EU:C:2016:644; *Twentieth Century Fox Film Corp v. Sky UK Ltd* [2015] EWHC 1082 (Ch) and *Warner Music v. TuneIn* [2019] EWHC 2923 (Ch).

19 Case C-527/15 *Stichting Brein v. Jack Frederik Wullems (acting under the name of Filmspeler)* [2017] ECLI:EU:C:2016:938.

20 See: Case C-610/15 *Stichting Brein v. Ziggo BV and XS4All Internet BV* [2017] ECLI:EU:C:2017:456 and Cases C-682/18 *Frank Peterson v. Google LLC and Elsevier Inc v. Cyando AG* [2021] ECLI:EU:C:2021:503.

Conclusion

The relationship of copyright and esports remains unclear, as the nature of esports is nuanced from that of traditional sports. The growth and development of esports media will be influenced by the determination of whether the performances of esports players amount to copyright works in themselves. However, the presence or absence of copyright in this sense is a secondary consideration, because there is underlying copyright in the playing of esports that is owned by the video game developer/owner. As such, any use of esports media will potentially require the permission of the video game developer/owner. Notwithstanding this, the growing popularity of esports and its accompanying culture is here to stay, the only thing to be seen is how the system will be regulated going forward.

Image rights in sport – the state of play

The future of sports data

BY ANNA SOILLEUX-MILLS[1]

Introduction

This article examines what we mean by "image rights" in the UK and how a combination of intellectual property and other legal rights may be used by athletes to challenge the use and commercialisation of their image and likeness, particularly where athletes feel that they are not getting their fair share of remuneration for that usage.

There have been a number of headline-grabbing stories recently involving sports stars wading into the murky waters of image rights. This article looks at the current state of play and where we might be headed. It focuses on the position in the UK, with a hefty health warning that the position in other jurisdictions is likely to be quite different. In particular, the UK has a reputation for being an unfriendly place to seek to enforce the rights in an individual's name or likeness, whereas many continental European jurisdictions have a long-standing history of protecting image rights.

The issue of image rights in sport came to the fore again at the end of 2020 when football player Zlatan Ibrahimovi (who was then backed up by Gareth Bale) took to social media to complain that his name and face were being used by the FIFA video game franchise to make money without his consent. This immediately gives rise to two questions:

1 does EA Sports (the publisher of the game) need Ibrahimovi 's consent?
2 if so, has he given it?

To answer the first question, we look at the avenues for legal protection of image rights in the UK. We then look at football's current licensing arrangements to try to answer the second question.

Although this article focuses on football, and that is certainly the sport where image rights are most valuable, at least in the UK, image rights disputes in sport are by no means confined to football. For example, it was reported in late 2020 that the cricket players' union, FICA, had made a legal challenge against the International Cricket Council ("ICC"), the cricket governing body, alleging that the ICC is using players' image rights in a manner which has not been authorised by the players, including for the purposes of fantasy cricket games and behind the scenes documentaries.

Legal protection of image rights in the UK

To answer the first question, it is necessary to consider what action a sports player could take to prevent the use of his image in the UK. Image rights are particularly complex under English law. There is no codified or consolidated legislation that protects image rights as such. Instead, sports stars need to rely on a patchwork of laws, including intellectual property rights, passing off, privacy laws, defamation and advertising regulations to prevent authorised exploitation of their image.

Passing off

This is perhaps the cause of action in the UK which is closest to an image right and indeed one of the leading cases in the area that is sports related: Formula 1 driver Eddie Irvine's claim against Talksport Radio. It is generally considered the most obvious means of enforcing the image right of a sports star, because its three constituent elements appear well suited to the types of scenarios in which sports stars will be wanting to take action. It first requires a goodwill, which when you are dealing with famous sports stars can often seem like a given. Next it requires a misrepresentation, which again can appear obvious when a sports star's name or likeness has been used to imply their connection to a certain product or service which does not reflect reality. Finally, it requires some damage to have been caused. All sports stars today are acutely aware of the value of their sponsorship and merchandising deals and would immediately point to any situation which could jeopardise their position under those deals as clearly causing them damage.

However, the situation is not as clear cut as it would first appear. The UK courts have been very reluctant to provide sports stars with broad rights merely because they have a high degree of recognition amongst the public. First, being famous does not necessarily equate to having a goodwill, which refers specifically to the

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power of attraction generated by some business. Sports stars will need to show that they are regularly in the business of commanding fees for product endorsements before a court will agree that a goodwill exists in their name or image. Second, the alleged infringement must involve a genuine deception. Unless consumers are actually likely to believe that the sports star is associated with or has authorised the alleged harm, then a court is unlikely to accept that an actionable misrepresentation has occurred. Thus, the evidence required to succeed in a passing off claim often makes such a claim untenable.

Trademarks

Registered trademark protection is one of the few registered rights which sports stars can obtain to seek to protect their name, nickname or any logos associated with them. For example, Cristiano Ronaldo owns "CR7" and Roger Federer has his "RF" logo. David Beckham owns a huge range of registered trademarks including even SMOKEY BECKHAM (which was assigned to him following a dispute with a businessman who tried to trademark the name). There was also the famous example of trademark registrations for José Mourinho's name holding up negotiations regarding his becoming Manchester United manager as the marks were still owned by his former club, Chelsea.

Registered trademark protection has its benefits; if a third party uses the owner's identical name on identical goods/services for which the trade mark is registered, the owner does not need to prove that consumers would actually be confused or that the third parties use would take advantage of the owner's reputation. However, they also have their limits. First, registries are reluctant to accept trademark applications from sports stars in respect of goods which would simply bear the person's image rather than designate the origin of the goods. For example, Alex Ferguson failed to secure registrations for his name in relation to goods such as posters, photographs, transfers and stickers for this reason. Ultimately, trademark registrations are a limited tool which can be used only in quite specific circumstances.

Copyright/performer's rights

Copyright is of narrow use in protecting image rights since no intrinsic copyright exists in an individual (for example, their face or name). The copyright in any photograph of a sports star would belong, in the first instance, to the photographer. However, if the sports star acquires the copyright in any works (such as photographs, drawings, films) of them, then they could exploit those specific works by licensing them to third parties. Performers' rights, whereby an individual can control the dissemination or exploitation of their performances, are not relevant because a "performance" for the purposes of the legislation is a dramatic or musical performance, or a reading or recitation of a literary work, which is a live performance. It would not include, for example, a player's performance on a football pitch (even though some performances may seem like they could be classed as "dramatic"!) although these rights may arise in other sports that are more akin to dance, such as ice dancing or gymnastics floor.

Privacy/breach of confidence

Celebrities have successfully relied on the law of privacy to protect commercial image rights in the past (the most famous example being that of *Douglas v. Hello!* which involved unauthorised photographs taken for *Hello!* magazine at the wedding of Catherine Zeta-Jones and Michael Douglas). This case led to the recognition of the right to sell private information for profit in order to protect those who have entered into exclusive arrangements regarding the publication of information that would otherwise be considered confidential. However, it was key to that case that considerable control was exercised over the images (and the attendees at the wedding) such that an obligation of confidentiality was created. It is likely that this would apply to photographs taken of sports stars only in very specific circumstances, such as where those photographs were taken at a private event.

Data protection

The General Data Protection Regulation (GDPR) and the Data Protection Act 2018 impose broad obligations on those who collect and process personal information, the key obligation being to process personal data "lawfully". It also grants significant rights to individuals in respect of an organisation's processing of their personal data, including rights in certain circumstances to access what data is being processed about them, to object to the processing and to obtain erasure of their personal data. Sports stars seeking to protect their image may, therefore, be able to rely on these rights to prevent the unauthorised publication of photographs or films bearing their image.

However, obtaining an individual's consent is not the only way for commercial parties to process that individual's personal data "lawfully". The primary argument that a publisher of an image of a sports star would raise in response to any objection from the individual that they had not consented to the use would be that there is a "legitimate interest" for the publisher's actions. This is the most flexible basis on which to justify the processing of personal data about an individual, but it is not always appropriate to rely on it (and it also has not yet been tested in any detail by the courts). In order to rely on this condition for lawful processing, a commercial party must balance its (or a third party's) interests against the player's rights, interests and freedoms, including the likelihood of the publication to cause unjustified harm. However, one key consideration is whether the individual could reasonably expect their image to be published. In the case of a sports star, who more than most should be aware that their image taken in their professional capacity is likely to be published extensively in multiple different contexts, an objection on data protection grounds may be more difficult.

Defamation/malicious falsehood

If the name or image of a sports star were used without their permission in a manner which is inaccurate and potentially harmful to their reputation, they could consider a claim for defamation or malicious falsehood.

However, although a sports star might consider that

the use of their name or likeness to endorse a certain product harms their reputation in the opinion of the public, the bar for an actionable claim is set high. Firstly, there must be the publication of a statement or allegation that is false and defamatory, which is not straight forward in false endorsement cases. Secondly, the Defamation Act 2013 introduced a requirement that a statement must have caused, or be likely to cause, serious harm to the individual's reputation for it to be classified as defamatory. This condition means that the circumstances in which a sports star could bring a defamation claim in relation to the use of their name or image to promote a product are likely to be rare.

As for a malicious falsehood claim, although "serious harm" is not required, evidence of "malice" is. That typically requires that the defendant knew that the relevant statements were false, was reckless as to their truth or falsity when publishing them or, even though the defendant believed the statements to be true, their dominant motive in publishing the statements was to injure the claimant's interests. Again, this seems unlikely to be satisfied in promotional material.

Advertising regulation

The regulation of advertising in the UK is conducted with reference to the CAP and BCAP codes[2], which contain specific measures dealing with the use of images of individuals that could be relied upon by players in making a complaint to the Advertising Standards Authority ("ASA") in the event they are portrayed or referred to in advertisements without their permission. Although breaches of the codes would not provide the players with any right to compensation or other remedy from the advertiser, a successful complaint to the ASA would typically result in the ASA demanding that the advertiser withdraw the offending ad and publishing their adjudication against the advertiser.

An example of this in the sports world is the ASA complaint lodged by David Bedford (a runner in the 1970s) against a TV advert for 118 118 directory enquiries services, in which he claimed his image had been exploited by the actors caricaturing him. No action was taken against the ads, despite them being held to be a breach of advertising rules, in part because it was not clear that Mr Bedford had actually suffered any financial loss as a result.

The licensing of image rights

The second question, as to whether sports stars such as Ibrahimovic might have already given their consent to the use of their image, is equally complicated. Companies like EA Sports acquire their rights to the sports stars' images that they use in their games through a weave of separate direct agreements with clubs, leagues, governing bodies, players' unions and individual players.

To add further complexity, some football clubs sell their licensing rights for video games collectively, such as those in the English Premier League; whereas others do not, for example, Italy's top-flight sides agree their own separate licensing deals. However, in either scenario, almost all top clubs will obtain the rights to use their players' image to promote both the club and the relevant league's licensed products and services in their contracts with the players. These rights would allow the clubs to license on the use of the players' image to third parties, such as EA Sports.

In football in England, there is a "Standard Player's Contract" with the Premier League. This contains a specific clause under which the player grants the club the broad rights to use his image, including in relation to products or services which are endorsed or produced under licence from the club or the Premier League. This clause cannot be varied in a way which would affect the rights granted to the Premier League.

It seems unlikely that Ibrahimovi 's contract with AC Milan (his current club) would not permit the use of his image in the FIFA video game series. However, interestingly, there is a specific exclusion that prohibits the use of a player's image or photograph to imply any brand or product endorsement by the player. It may be, therefore, that there is a distinction to be drawn between a player's image being used in the FIFA game itself and the image being used, for example, on the front cover of the game's packaging (as Bale's image was used for the FIFA 14 version of the video game), which might imply that the player endorses the video game itself.

In Ibrahimovi 's original social media post about the issue, he also referred to FIFPro (the International Federation of Professional Footballers). FIFPro is a global players' union, consisting of 65 national member associations around the globe, which acquires image rights via those national players' unions and makes them available to EA Sports (and others in the video gaming industry). However, Ibrahimovi complains that he was not aware that he was a member of FIFPro and, if he was, it was "without any real knowledge". Since one of FIFPro's key principles is that "[a] player's name, image and performance may only be commercially utilised with his or her consent, voluntarily given" it is less than ideal that players appear not to know that they are members, never mind that they have purportedly consented to the use of their image via such membership arrangement.

Both EA Sports and FIFPro released statements in response to the Ibrahimovi /Bale complaint, with FIFPro saying that it "is reaching out to the players and their representation that have recently raised concerns so we can address their questions" and EA Sports stating:

"To be very clear, we have contractual rights to include the likeness of all players currently in our game. As already stated, we acquire these licenses directly from leagues, teams, and individual players. In addition, we work with FIFPro to ensure we can include as many players as we can to create the most authentic game. In these instances, our rights to player likenesses are granted through our club agreement with AC Milan and our long-standing exclusive partnership with the Premier League, which includes all players for Tottenham Hotspur."

2 "CAP" is the Committee of Advertising Practice and "BCAP" is the Broadcast Committee of Advertising Practice.

The same disputes are beginning to surface in other sports. The allegation made by FICA against the ICC raised similar claims that, whilst players give the ICC certain limited rights to use their image in specific ways during ICC events and for a short period before and after them, the ICC is using player attributes and other commercial rights outside of this and in a way that has not been authorised by the players.

These disputes highlight the importance of carefully checking the scope of all contractual arrangements, although arguably the hardest part is knowing all the contracts that apply to a specific individual or set of circumstances.

Conclusion

Whilst matters on this front have gone quiet over the past few months, it seems fairly certain that further issues surrounding image rights will surface in the near future, and it is certainly an area to keep a close eye on.

Super-agent Mino Raiola (who represents Ibrahimovi as well as a host of other big names such as Paul Pogba and Romelu Lukaku) has claimed that over 300 players are ready to join Ibrahimovi in his battle with EA Sports.

As discussed above, data protection laws are one potential component of an image rights claim and, in the UK, we may shortly see this play out in the courts. It is reported that there is a legal action pending from over 400 professional footballers against gaming, betting and data-processing companies over lucrative player performance data. The effort, known as Project Red Card, is understood to be based on a complaint that these companies are using the players' personal, performance and tracking data without their consent in breach of the players' rights under data protection laws.

Mothers are forever changing the sports landscape!

BY PAUL J. GREENE[1] AND MATTHEW D. KAISER[2]

Introduction

At the postponed 2020 Tokyo Olympic Games, held in the Summer of 2021, Allyson Felix surpassed Carl Lewis as the most decorated U.S. Olympic track athlete in history when her 4 x 400-meter relay team captured gold.

Whilst Felix will be forever remembered for her unprecedented record of success, her most lasting impact might instead be the way she has altered the sports landscape for mothers competing as pro athletes.

Felix's return from a challenging pregnancy to the pinnacle of her sport has forced a new approach to pregnant athletes throughout the sports industry that is resulting in better treatment for professional athletes who become mothers.

The pregnancy taboo

It was only a few years ago that pregnancy was considered the "kiss of death" for any female athlete. Not only did women risk having their salaries cut by sponsors if they wanted to have children, but many could not even afford to raise their children with the low salaries they were being paid by their clubs given the substantial costs associated with child rearing. Sadly, many professional leagues and national governing bodies did not even guarantee paid maternity leave for their athletes or, at best, offered minimal financial assistance.[3] Consequently, for decades, many women felt they had to make a choice between their dream of being a professional athlete and their dream of being a mother. It did not seem possible to achieve both simultaneously.

It was not until very recently that this trend started to change as mothers, like Allyson Felix, used their platforms to reveal their stories of mistreatment while pregnant and the difficult situations in which they felt trapped.

Changing maternity policies amongst sponsors

In 2019, Olympic runners Alysia Montaño and Kara Goucher broke their non-disclosure agreements with Nike to reveal to the world how terribly they were treated while pregnant and sponsored by Nike. When Kara Goucher told Nike that she was pregnant, not only did Nike not want her to tell anyone so that Nike could announce it for its own marketing purposes on Mother's Day to enhance its brand, but the executives told Kara Goucher that Nike would stop paying her until she started racing again. As a result, Goucher scheduled a half-marathon just three months after her son was born.

With the pressure she felt to compete prematurely so that she could get paid again, Goucher could not be with her son "like a normal mom would" when he got dangerously ill and went to the hospital.[4] Instead, she had to choose her career for fear she would not be paid. This was a choice Goucher would never forgive herself for making.[5]

Allyson Felix's story was yet another example of how sponsors did not properly support athletes who became mothers. In December 2017, Felix's contract with Nike expired. She was in the middle of negotiating a new one in 2018 when she decided to start a family. Notwithstanding the fact that she was a six-time Olympic gold medal winner and an eleven-time world champion, Nike wanted to reduce drastically her pay (by 70%) and provide her with no promise of financial security after she returned from maternity leave.[6] As a result, Felix ended negotiations with Nike and, in July 2019, she signed a multi-year apparel sponsorship contract with GAP's Athleta. The contract with Athleta, unlike Nike, included *"full protection during maternity"* and a partnership for

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3 Michael LoRé, "What The NWSL Can Learn From The WNBA's New Collective Bargaining Agreement", in: Forbes, 25 February 2020, available at www.forbes.com/sites/michaellore/2020/02/25/what-the-nwsl-can-learn-from-the-wnbas-new-collective-bargaining-agreement/?sh=27efc14c3d89 (accessed 4 December 2021); Stephanie Yang, "The most interesting USWNT CBA details", in: *SB Nation*, 4 February 2016, available at www.starsandstripesfc.com/2016/2/4/10916838/most-interesting-uswnt-cba-collective-bargaining-details (accessed 4 December 2021).

4 Alysia Montaño, "Nike Told Me to Dream Crazy, Until I Wanted a Baby", in: *The New York Times*, 12 May 2019, available at www.nytimes.com/2019/05/12/opinion/nike-maternity-leave.html (accessed 4 December 2021).

5 *Id.*

6 Allyson Felix, "Allyson Felix: My Own Nike Pregnancy Story", in: *The New York Times*, 22 May 2019, available at www.nytimes.com/2019/05/22/opinion/allyson-felix-pregnancy-nike.html (accessed 4 December 2021).

initiatives that empower women.[7] It also provided for her daughter to join her whenever she was competing.[8]

In response to the plight being suffered by these women, there was a public outcry against Nike and other apparel companies for maintaining outmoded maternity policies or not having any maternity policies at all. As a result, many companies, including Nike, announced new contractual guarantees for women who have children during their sponsorship contracts. For example, Nike changed its policy to guarantee that a pregnant athlete's pay and bonuses would not be cut over an eighteen-month period (up from its previous policy of twelve months) covering eight months before the athlete's due date and ten months postpartum.[9] Additionally, Nike said it would waive performance-pay reductions for twelve months for athletes who have a baby.[10] Many other companies have since made similar changes.

Felix also used her platform to set up a foundation to help professional athlete mothers, who do not have the backing of sponsors, with the help of her new sponsor, Athleta. Together with the Women's Sports Foundation, Felix and Athleta created the Power of She Fund: Child Care Grants, which is *"designed to support female athletes with children, who are striving for peak performance on the court, track, pitch, field, pool or mat while also balancing the challenges of motherhood"*.[11] The "program has committed $ 200,000 to professional athlete mothers with the goal of covering childcare costs as they pursue goals in their respective sports".[12] To date, nine athletes – both Olympians and Paralympians alike – have received US$ 10,000 grants from the Power of She Fund.

Leagues upgrade maternity policies

Team sports are also being forced to revisit outdated maternity policies. Sydney Leroux, a member of the U.S. Women's National Soccer team ("USWNT") and Orlando Pride in the Women's National Soccer League ("NWSL") (the professional women's soccer league in the USA.), spoke out publicly about the challenges of balancing motherhood and being a professional athlete. Leroux explained that she spent more money on childcare than she made in salary whilst playing for the Orlando Pride.[13] Leroux went on to say that the NWSL was losing out on great talent since it was nearly impossible to return from maternity leave, properly care for a child and resume a career as a pro soccer player without proper financial support.

Encouragingly, clubs within the NWSL have begun to make changes to their maternity policies to support their players. For example, Arin Wright, a player on the NWSL Chicago Red Stars, thought her career was over when she entered her locker room to tell her coach that she was six weeks pregnant and would have to miss the rest of the 2019 season as her team made its way to the championship game.[14] Wright was unsure what becoming pregnant would mean for her financial stability and career. Thankfully, with a supportive coach and ownership group, she earned her full salary and post-season bonuses, despite missing the final few games of the 2019 season.[15] Other NWSL players are hopeful that such policies will be implemented universally throughout the league.

A league-wide maternity policy was recently enacted by the Women's National Basketball Association ("WNBA") as part of its new eight-year Collective Bargaining Agreement. The new WNBA policy provides for:

1 childcare assistance by reimbursing eligible childcare expenses up to US$ 750 per month during which one or more regular season games are played (capped at US$ 5,000 per year);
2 reimbursement of up to US$ 20,000 to eligible players (those who have eight or more years of service) *"for costs directly related to adoption, surrogacy, oocyte cryopreservation, or fertility or infertility treatment"*; and
3 a player who is pregnant will receive 100% of their base salary that they would have received.[16]

7 Adam Kilgore, "Under fire, Nike expands protections for pregnant athletes", in: *The Washington Post*, 16 August 2019, available at www.washingtonpost.com/sports/2019/08/16/under-fire-nike-expands-protections-pregnant-athletes/ (accessed 4 December 2021).

8 Tayor Dutch, "Allyson Felix and Athleta Create a Childcare Fund to Support Athletes Who Are Mothers", in: *Runner's World*, 13 July 2021, available at www.runnersworld.com/news/a37014589/allyson-felix-athleta-womens-sports-foundation-childcare-fund (accessed 4 December 2021).

9 Adam Kilgore, "Under fire, Nike expands protections for pregnant athletes", in: *The Washington Post*, 16 August 2019, available at www.washingtonpost.com/sports/2019/08/16/under-fire-nike-expands-protections-pregnant-athletes/ (accessed 4 December 2021).

10 Kevin Draper, "Nike Says It Will End Financial Penalties for Pregnant Athletes", in: *The New York Times*, 25 May 2019, available at www.nytimes.com/2019/05/24/sports/nike-pregnant-athletes.html (accessed 4 December 2021).

11 Women's Sports Foundation, "The Power of She Fund", available at www.womenssportsfoundation.org/wsf_program_categories/power-of-she-fund (accessed 4 December 2021).

12 Taylor Dutch, "Allyson Felix and Athleta Create a Childcare Fund to Support Athletes Who Are Mothers", in: *Runner's World*, 13 July 2021, available at www.runnersworld.com/news/a37014589/allyson-felix-athleta-womens-sports-foundation-childcare-fund/ (accessed 4 December 2021).

13 Cassandra Negley, "Sydney Leroux says she paid more for child care than she made in salary from Pride", in: Yahoo!, 26 February 2020, available at www.yahoo.com/now/sydney-leroux-says-she-paid-more-for-childcare-than-she-made-in-salary-from-nwsl-pride-012355672.html (accessed 4 December 2021).

14 Annie Costabile, "Arin Wright puts face on NWSL's need for maternity leave, day care", in: Chicago Sun-Times, 20 March 2021, available at https://chicago.suntimes.com/2021/3/20/22332215/arin-wright-puts-face-nwsl-need-for-maternity-leave-day-care-red-stars-whisler-gorden (accessed 4 December 2021).

15 *Id.*

16 *Women's National Basketball Association Collective Bargaining Agreement*, available at https://wnbpa.com/wp-content/uploads/2020/01/WNBA-WNBPA-CBA-2020-2027.pdf (accessed 4 December 2021).

The WNBA's new maternity policy stands as a significant step in the right direction and a model for other leagues to copy and improve on.

International federations enact maternity policy changes

Mothers competing outside the USA as pro athletes face an even more draconian system internationally as it relates to their maternity rights. For example, in some countries, "anti-pregnancy" clauses still exist, which give clubs the right to terminate a female athlete's contract without compensation if she becomes pregnant.[17]

Given the disparate handling of maternity rights between countries, international federations have an opportunity to step in and institute universal policies to better protect women's rights regardless of the country where they play. Two international federations, in particular, have updated their rules to better accommodate female athletes: the International Bobsleigh and Skeleton Federation ("IBSF") and the Fédération Internationale de Football Association ("FIFA").

In October 2020, the IBSF announced that, following the Beijing 2022 Winter Olympics, the IBSF World Cup would grant quota spots to Intercontinental Cup athletes who missed one season due to maternity leave, meaning those athletes could return from maternity leave and not have to re-qualify for a World Cup quota spot.18 The rules state that the specific quota spot will be linked to the athlete's name and will be assigned as an additional quota spot for the National Federation.19 Seeking to draw more women to the sport, the IBSF has led the way by trying to better accommodate female athletes so that they do not have to make a choice between motherhood and their careers.

In December 2020, FIFA instituted reforms for female players involving working conditions and maternity protection. FIFA stated its reforms were designed to encourage growth and sustain the longevity of women's soccer. These new rules include:

1 14 weeks of paid maternity leave, with at least 8 weeks designated post-childbirth, where players are paid at least two-thirds of their salary;
2 a guaranteed spot for a player returning *postpartum*;
3 adequate ongoing medical support as well as facilities to tend to a baby's needs that are in accordance with national legislation or a collective bargaining agreement;
4 flexibility allowing a club to register a player outside the normal registration period to replace temporarily a player on maternity leave;
5 allow for a free-agent player to return from maternity leave and register with a new club;
6 a requirement that clubs must work with a player to formalize a plan for alternative employment if the player cannot return immediately; and
7 sanctions for a club that wrongly dismisses a player who becomes pregnant.[20]

As these new rules illustrate, FIFA has made significant changes to recognize the rights of players who become mothers and allow them to return to the pitch.

It seems inevitable that other international federations will soon follow suit and provide similar support for female athletes who become pregnant.

Conclusion

Longstanding policies that have forced women to make their lives fit within a male-dominated sports industry are finally changing. In large part, these changes are thanks to the courageous example set by mothers like Allyson Felix, whose public stance has led to a new approach within the sports industry that is finally affording women the chance to be both a pro athlete and a mother at the same time.

Although maternity rights and protections have not been instituted universally yet, the changes made thus far are significant first steps.

Whilst the future remains unclear, it seems that the trend will continue within the sports industry toward universal adoption of policy changes that permit female athletes to continue their careers as mothers.

17 Mherunisa Hussain, "The pressing matter of female maternity rights in sports", in: *The Boar*, 7 December 2019, available at https://theboar.org/2019/12/maternity-in-sports/ (accessed 4 December 2021).

18 Michael Houston, "IBSF to award quota spots for female athletes returning from maternity leave", in: *Inside the games*, 20 October 2020, available at www.insidethegames.biz/articles/1099787/ibsf-congress-bobsleigh-skeleton (accessed 4 December 2021).

19 "IBSF paves the way for female athletes to return to competition after maternity leave", in: *IBSF*, 19 October 2020, available at www.ibsf.org/en/news/21824-ibsf-paves-the-way-for-female-athletes-to-return-to-competition-after-maternity-leave (accessed 4 December 2021).

20 FIFA, "Women's football: Minimum labour conditions for players", available at https://digitalhub.fifa.com/m/033101649cc3c480/original/f9cc8eex7qligvxfznbf-pdf.pdf (accessed 4 December 2021).

Belgium:

Taxation of Formula 1

BY DAAN BUYLAERT[1], MONA VERA[2] AND ARIF KESKIN[3]

Introduction

The Spa-Francorchamps circuit has celebrated its 100th anniversary in the summer of 2021.

The Belgian Grand Prix is a racing event that has been a key part of the World Championship since 1950 and is often mentioned as a favourite of fans and drivers alike.

This article will set out the key Belgian tax features relevant to teams and drivers participating in this legendary event.

Teams

Corporate income tax and the permanent establishment concept

F1 teams will, in principle, not fall within the scope of Belgian corporate income tax. Belgian corporate income tax applies to resident companies or companies that have a permanent establishment ("PE") in Belgium. Since none of the F1 teams are established in Belgium, the relevant question will be whether the presence of the F1 teams in Belgium during Spa-Francorchamps can give rise to a Belgian PE.

The scope of the PE concept under Belgian tax law is wider than the PE concept under the OECD Model Convention. However, both under the treaty PE concept (for teams based in a treaty state) and under the national law PE concept (for teams based in non-treaty states), it is unlikely that an F1 team will be deemed to have a Belgian PE, given the limited duration of the Belgian presence of F1 teams during Spa-Francorchamps.

To date, there has been no known precedent in Belgian case law regarding the creation of a Belgian PE by an F1 team.

Reporting and withholding obligations

In the event that one of the F1 teams would have a PE in Belgium, this would entail a number of obligations (e.g., reporting obligations, the filing of corporate income tax returns, annual payment of Belgian company contribution, *etc.*).

Regardless of whether the F1 team has a PE in Belgium, the F1 team will be subject to a specific wage withholding tax obligation. As an exception to the general rule that a non-resident company can only be liable to withhold wage withholding tax when the company has a Belgian PE, a specific wage withholding tax obligation applies to the debtor, mandatary or intermediary that pays income to non-resident sportspersons, or, in the absence thereof, by the organiser of the sports event (see below under "Income for sports performances").

Drivers

Tax residency

The tax regime applicable to the F1 drivers depends primarily on whether the driver qualifies as a Belgian resident or non-resident for tax purposes. Belgian tax residents are liable to Belgian income tax on their worldwide income, whilst non-residents are only taxable on Belgian sourced income. An individual will be considered as a tax resident if he has his "domicile" in Belgium, or, if he does not have his domicile in Belgium, when his centre of economic interest is situated in Belgium.

To the knowledge of the authors of this article, there are no F1 drivers living in Belgium at the moment. In the case of the drivers currently participating in the F1, it is clear that they do not qualify as Belgian tax residents.

For this reason, we will focus on the Belgian tax aspects applicable to non-residents.

Belgian tax regime for non-resident sportspersons

In general

F1 drivers often have multiple agreements with their team: for example, a driving contract and a promotional contract. The driving contract generally compensates the F1 driver for his race driving services. The promotional contract generally remunerates the marketing and promotional activities (for example, sponsor days and factory days). In

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addition, F1 drivers often receive income from sponsorship or endorsement agreements with third parties. In what follows, we first discuss the income for sports performances and secondly the income received for commercial activities.

Income for sports performances
Belgian tax rules will only be applicable when the taxing rights are allocated to Belgium under the relevant double tax treaty, or for F1 drivers that are residing in a state that has no double tax treaty with Belgium. Depending on the type of contract and the nature of the performances, the driver may qualify as an employee or as an independent contractor. In certain cases, the driver may also operate via a personal service company. In a treaty context, it will thus be necessary to examine whether the income falls within the scope of art. 17 of the treaty concerned.

For the application of the Belgian national tax regime on income derived by non-resident sportspersons for sports performances in Belgium, this distinction between employees/self-employed/personal service company is less relevant. Under the Belgian Income Tax Code of 1992, the following income earned or obtained by a non-resident is taxable in Belgium:

"Income of any kind, from an activity performed in Belgium by a performing artist or an athlete personally and as such, even if the income is not attributed to the performing artist or the athlete himself but to another natural person or legal entity;"[4]

In other words, F1 drivers that participate in the Belgian Grand Prix are subject to non-resident income tax on the income derived from their sports performance in Belgium, regardless of the type of contract. The applicable tax regime will, however, vary depending upon the duration of their activities in Belgium.

- Less than 30 days – withholding tax regime

A specific regime is applicable to F1 drivers who perform sports activities in Belgium for less than 30 days in a 12-month period. Belgian income tax on revenues derived in consideration of the participation in Spa-Francorchamps will, under those circumstances, be levied via an 18% wage withholding tax, even if the driver is a self-employed person or operates via a personal company (in the latter "personal service company"-scenario, taxability arises only if the applicable double tax treaty provides in an art. 17.2).

- Tax return obligation?

Provided that the F1 driver has no other Belgian sourced income that gives rise to a tax declaration obligation in Belgium, 18% flat rate is the final tax. This means that, provided the abovementioned conditions are met, the F1 driver will have no obligation to file a tax return in Belgium, as opposed to "regular" non-residents active in Belgium. Non-resident F1 drivers may however voluntarily opt to declare their Belgian income through a non-resident tax return (the so-called *"optional regularisation"*), entailing taxation at the progressive income tax rates. This may be advantageous in certain specific situations, for example, to deduct professional expenses, should the F1 driver have incurred any significant expenses in relation to the activities performed in Belgium. However, this rarely will be the case.

- Who is to withhold the withholding tax?

The obligation to withhold the 18% tax rests with the F1 teams (in particular the debtor, mandatary or intermediary that pays the income), and in the absence thereof, the organiser of the Belgian Grand Prix.

The fact that foreign teams are liable to withhold Belgian withholding tax on the revenues in consideration of the Belgian activities of their drivers is an exception to the general rules on Belgian withholding tax, which usually only provide in a withholding obligation for non-resident companies in the event where a PE in Belgium is created. In the past, the obligation to withhold the 18% withholding tax was often overlooked by the F1-teams, resulting in outstanding tax liabilities, penalties, and late payment interests.

- Taxable basis and allocation method

The 18% withholding tax applies on any income derived from a personal sports activity performed in Belgium. For certain income components, such as bonuses or premiums that are specifically linked to a specific performance during a specific Grand Prix, it will be clear that the income can be considered to be "derived from" that personal sports activity. The question which part of the more general income components, such as the monthly salary, general bonuses or the sign-on fees, is to be allocated to the Belgian activities is, however, the subject of much debate.

The Income Tax Codes does not specify how the income should be apportioned and allocated to the different activities. Generally, two approaches are applied in practice, referred to as the "duty days method" and the "race day method". The first method takes into account all days for which a person is remunerated, including training days, in the denominator and all Belgian workdays in the nominator. The second method only takes into account the race days in the denominator and the nominator.

The Belgian tax administration has expressed its position in a number of circular letters. The circular letters are largely based on and often refer to art. 17 of the OECD Model Convention and Commentary.[5] The tax administration in principle puts forward the duty days method as the most appropriate method.[6] The circular letter specifies that the actual number of working days performed (as shown in the individual account) should be taken into

4 Art. 228, para. 2, 8° ITC92, unofficial translation.

5 OECD Commentary on Article 17, no. 9.1–9.3.

6 Circular letter AFZ 2/2012 (AFZ/2012-0288) d.d. 27.04.2012.

account, unless this would be unavailable, in which case a total of 220 working days per year could be used.[7] The tax administration however accepts that a different method may be more appropriate in certain cases, in particular if it can be demonstrated which part of the annual income can be linked to e.g. certain specific games or training sessions and provided that this method is applied *"on bona fide grounds that are customary in the branch of the sport concerned (for example, on the basis of internationally accepted clauses included in the employment contract) and thus not solely motivated by tax-related motives"*.[8]

The most appropriate method will thus need to be determined on a case-by-case basis and taking into account the contractual provisions.[9] Given the large number of individual training days of F1 drivers, the duty days method will, in principle, lead to a low percentage of income to be allocated to the Belgian performances, whilst applying the race day method will, generally, lead to a greater apportionment to the Belgian activities.

- Lump sum for professional expenses

The 18% withholding tax is calculated on the basis of the gross income. The taxable basis may however be reduced by a limited lump sum cost deduction. The lump sum amounts to € 300.00 (for travel expenses) for the first day performed, plus € 37.50 (for meals and other small expenses) and € 62.50 (for accommodations) per work day.

Other income
Other types of income, such as sponsorship or endorsement agreements, that relate to the Belgian Grand Prix may, in certain cases, be subject to the same tax regime as described above, provided, of course, that Belgian tax law is applicable under art. 17 of the relevant double tax treaty, or for F1 drivers residing in a non-treaty state.

In particular, sponsorship income may be treated in the same way as the income for the sports performances if there is a close connection between the income and the performance of the sports activities at the Belgian Grand Prix.10 The Belgian tax administration adheres to the OECD guidelines in this respect. In its circular letter, the Belgian tax administration reiterates the OECD Commentary that such a close connection exists when "it cannot reasonably be considered that the income would have been derived in the absence of the performance of these activities" and that this connection may be related to the timing (for example, a payment received by an F1 driver for an interview given during the Belgian Grand Prix) or the nature of the consideration for the payment of the income (for example, a payment made to an F1 driver for the use of his picture on posters advertising the Belgian Grand Prix).

If it can be demonstrated that such close connection exists, the tax regime for non-resident sportspersons, as described above, would also apply to the sponsorship income, entailing also the obligation to withhold 18% withholding tax on the payment concerned.

7 Circular letter AFZ 2/2012 (AFZ/2012-0288) d.d. 27.04.2012.

8 Circular letter AAFisc Nr. 40/2015 (nr. 701.057) d.d. 02.12.2015, no. 14.

9 Circular letter AFZ 2/2012 (AFZ/2012-0288) d.d. 27.04.2012, no. 3.

10 OECD Commentary on Article 17, no. 9. and Circular letter AAFisc Nr. 40/2015 (nr. 701.057) d.d. 02.12.2015, no. 7.

Canada:

Taxation of Formula 1: a Canadian perspective

BY MARIE-FRANCE DOMPIERRE[1] AND RYAN WOLFE[2]

Introduction

To the victor go the spoils, but also the taxes. Racing all over the world means that Formula 1 teams and drivers are subject to a multitude of tax regimes. Given the complex and ever-changing global tax landscape, the resources expended by Formula 1, the teams and drivers to ensure compliance with a dozen or more tax regimes are surely enormous. While the Canadian tax treatment of athletes and teams competing in the major North American sports leagues is reasonably well understood,[3] the taxation of Formula 1 teams and drivers has yet to be fully canvassed by the Canadian courts and tax authorities.

The lack of guidance in this area is somewhat surprising, given that the Canadian Grand Prix has, with a few exceptions, taken place in Montréal annually since 1961.[4] The fact that the Grand Prix occurs in Montréal, the capital city of Canada's second-largest province – Québec – also gives rise to complicated tax dynamics in the context of Canada's bijural legal system and federalist system of government.

Canada's legal system and tax regime in brief

Constitutionally, there are two levels of government in Canada: federal and provincial (or territorial). Both the federal and provincial/territorial governments levy income taxes and sales taxes, with some provinces, including Québec, having their own tax legislation and tax authorities. Thus, Formula 1 teams and drivers will need to consider not only Canada's federal taxation system but also provincial taxes, particularly in the province of Québec where the Grand Prix is located.

Canada is one of the few countries where two fundamentally different legal regimes co-exist: English common law and French civil law. This bijuralism creates complex legal issues, particularly in the area of tax law. In Canada, tax law is generally considered to be an "accessory system", such that the tax consequences of commercial transactions will in many cases flow from the private law consequences of the transaction.[5] Thus, Canadian bijuralism can cause the Income Tax Act (Canada)[6] ("ITA") and other federal tax legislation not to be applied uniformly throughout the country. In Québec, regard will be had to the *Civil Code of Quebec* with respect to matters of private law that are relevant to the application of the ITA and the *Taxation Act (Quebec)*[7] ("QTA").

Canada taxes income based on residence and source. Individuals in Canada are taxed on a progressive or graduated basis, meaning the greater the income earned, the greater the income taxes paid.[8] Canadian residents are subject to tax on their worldwide income, while non-residents of Canada are generally subject to source-based taxation in Canada in respect of income earned from:

a a business carried on in Canada;
b an office or employment performed in Canada; and
c gains realized on the disposition of certain types of property with a Canadian situs.[9]

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3 Albeit unnecessarily burdensome for many teams and athletes.

4 The Canadian Grand Prix has formed part of the Formula One World Championship since 1967.

5 Like many jurisdictions, Canadian tax law also employs numerous deeming rules that can override the ordinary legal or factual consequences of a given transaction.

6 R.S.C. 1985, c. 1 (5th Supp.).

7 R.S.Q., c. I-3.

8 Corporate tax rates in Canada are not progressive, although a lower tax rate is generally available in respect of the first C$ 500,000 of active business income earned by certain corporations controlled by Canadian residents. Canadian corporate taxes are imposed by the federal government and each of the provinces, with the general combined rate of corporate tax ranging from 23% to 31% (depending on the rate of provincial taxation).

9 Canadian withholding tax is also imposed on certain types of passive income received by non-residents from Canadian residents.

At the provincial level, residents of Québec are liable for taxation in the province, and non-residents of Québec may be liable for provincial source-based taxation. A corporation will generally be subject to provincial tax in Québec if it has or is deemed to have an "establishment" in Québec in the year.

Taxation of Formula 1 and teams

Carrying on business in Canada

To our knowledge, none of the current Formula 1 teams are resident in Canada. Neither is the U.K.-based Formula One World Championship Ltd. ("FOWC").[10] However, both may nonetheless be liable to pay Canadian income tax if they are considered to "carry on business in Canada". Canadian courts have interpreted this phrase broadly, and the threshold for carrying on business in Canada is relatively low.[11] The ITA also deems a non-resident person to carry on business in Canada where certain specified activities are carried out in the country, such as where a non-resident person solicits orders or offers anything for sale in Canada through an agent or employee or disposes of Canadian real property.

However, where a particular Formula 1 team is entitled to benefits under one of Canada's tax treaties, its liability to pay Canadian tax on its business profits should be determined in accordance with the provisions of the applicable treaty.

Permanent establishment

Art. 7 of most of Canada's treaties is generally consistent with the OECD Model Convention, such that Canada's jurisdiction to tax the business profits of an enterprise of the other contracting state is typically limited to situations where the enterprise carries on business through a permanent establishment ("PE") situated in Canada, and then only to the extent that the profits are attributable to such PE. The meaning of *"permanent establishment"* under Canada's treaties is generally defined to include a fixed place of business or agency permanent establishment, and generally follows the OECD Model Convention in this regard.

We are not aware of any court decisions in Canada addressing whether a Formula 1 team has a PE in Canada for the purposes of any of Canada's tax treaties. However, reference may be made to decisions involving North American sports teams. In *Toronto Blue Jays Baseball Club et al. v. Ontario (Minister of Finance)*[12], the Ontario Court of Appeal considered the definition of "permanent establishment" for the purposes of the Employer Health Tax Act (Ontario) ("EHTA"). The court considered whether locker rooms and other facilities used by the Toronto Blue Jays, the Toronto Maple Leafs and the Toronto Raptors during away games outside Ontario constituted a PE of the teams for the purposes of the EHTA. The Court of Appeal concluded that the teams' connections with and control of the venues outside Ontario was so transitory that they could not be viewed as having fixed places of business at those venues. While the CRA has indicated that it would not be bound to follow this decision in interpreting the definition of *"permanent establishment"* under the ITA or Canada's tax treaties, the definition of *"permanent establishment"* in the EHTA is very similar to the ITA and the treaty definitions, so Canadian courts may find the decision to be of persuasive value.

As a general matter, the term *"permanent establishment"* tends to suggest something more than isolated activities. The word *"permanent"* has been interpreted by the courts as *"the antithesis of temporary or tentative. It indicates permanence and stability."*[13] Therefore, a mere presence in Canada would normally not be sufficient. The generally accepted meaning of the term *"permanent establishment"* under Canadian law can be contrasted with the relatively recent decision of the Supreme Court of India in *Formula One World Championship v. Commissioner of Income Tax*[14]. In that case, it was held that FOWC had a PE in India on the basis of its control and supervision over the Buddh International Circuit for a period of three weeks per year. We note that the Supreme Court cited the Canadian decision of *Fowler v. Minister of National Revenue*[15] in support of its conclusion that the peculiarities of a business can give rise to a PE notwithstanding the short duration of time that the business is conducted in a particular place.[16] However, the Fowler case has not, to our knowledge, been followed by any Canadian court and was in fact distinguished by the Ontario Court of Appeal in the *Toronto Blue Jays* case. It thus seems unlikely that a Canadian court would conclude that FOWC has a PE in Canada by virtue only of its involvement with the Canadian Grand Prix for a period of a few weeks each year.

Provincial estabishment

The QTA does not follow the OECD Model Convention in several important respects, and this difference can potentially give rise to complications. Rather than using the expression *"permanent establishment"*, the QTA adopts the term *"establishment"* to determine the residence of a corporation. The meaning of the term *"establishment"* under the QTA differs in some respects from the meaning

10 Which controls the contracts, distribution, and commercial management of rights and licences of the Formula 1 circuit.

11 *Backman v. R.*, 2001 SCC 10 (Supreme Court of Canada).

12 250 DLR (4th) 63, 2005 DTC 5360 (Ontario Court of Appeal) [*Toronto Blue Jays case*].

13 *Consolidated Premium Iron Ores Limited et al. v. Commissioner of Internal Revenue,* 59 DTC 1112 (U.S. Court of Appeal, 6th Circuit).

14 Decision of 24 April 2017, Civil Appeal Nos. 3849, 3850 and 3851 of 2017.

15 90 DTC 1834 (Tax Court of Canada) [Fowler].

16 The taxpayer in Fowler was a U.S. resident who sold his wares at the Pacific National Exhibition in Vancouver, which occurred annually for a period of approximately three weeks. The taxpayer attended the Pacific National Exhibition each year for approximately 15 years, in addition to two other annual fairs in California. The court held that the taxpayer had a PE in Canada, noting that mobility of the taxpayer's activities and the three-week period spent in Canada were not material when taken into the context of the taxpayer's business. The court held that it was *"the very nature of the business itself that mandated these aspects"*.

of *"permanent establishment"* for ITA and treaty purposes, but it is generally defined as *"a fixed place where a business or the main place where a taxpayer carries on his business"*.

Whilst the courts have tended to apply these terms consistently, differences can arise in fringe cases. For example, in a decision rendered in Québec[17] prior to the *Toronto Blue Jays* case, the Court of Québec held that locker rooms in other stadiums were *"establishments"* of the former Montréal Expos. This is precisely the opposite view of that expressed by the Ontario courts in the subsequent *Toronto Blue Jays* case, and illustrates how similar factual circumstances can give rise to inconsistent tax results in different Canadian provinces. However, notwithstanding the Montréal Expos case, l'Agence du Revenu du Québec ("Revenu Québec") has expressed the position that a limited and temporary presence in Québec would not have the degree of permanency necessary to create an *"establishment"* in Québec.

In addition, a corporation that is not resident in Canada is deemed to have an establishment in Québec, for the purposes of the QTA, where it produces or presents a public show in the province. For federal income tax purposes, a non-resident corporation performing a public show typically would not be considered to have a permanent establishment in Canada solely as a result of the show. The determination would be made under ordinary principles of treaty interpretation.

Branch tax

Canada also imposes a special "branch tax" on profits earned by a non-resident corporation from a business carried on in Canada to the extent that those profits are not reinvested in Canada.

Branch tax is, in essence, a proxy for the dividend withholding tax that would have otherwise arisen if the non-resident carried on its Canadian activities through a Canadian subsidiary and received dividends equal to the distributable profits of the subsidiary.[18]

Relief from branch tax may be available under an applicable tax treaty.[19]

Withholding tax

Non-residents are also liable to pay tax on various types of passive income received from Canadian resident payers, such as management fees, rents, royalties and similar payments. Canada imposes a withholding tax of 25% – which may be reduced or eliminated under an applicable tax treaty – on these amounts. The resident payer is responsible (and liable) for withholding and remitting the tax at the appropriate rate.

Canada also imposes a withholding tax of 15% on fees, commissions or other amounts paid to a non-resident in respect of services rendered in Canada of any nature whatever. Thus, even if a Formula 1 team is not liable to pay Canadian tax in a given year,[20] a withholding may be required on payments made to it in respect of services rendered in Canada.

The team should then obtain a refund of this withholding tax when filing its Canadian tax return for the year.

Sales tax

Canada imposes a federal goods and services tax ("GST"), which is a value-added tax, and Québec imposes a provincial sales tax ("QST"). The nature of these taxes are such that their cost is borne by the ultimate consumer, but non-residents of Canada may be required to register with the CRA or Revenu Québec to collect these taxes on taxable supplies made in Canada.

A person (resident or non-resident) is required to register for GST and QST if it makes a taxable supply in Canada in the course of *"carrying on business in Canada"*.[21] A non-resident must also register for GST and QST if it makes taxable supplies of admissions in Canada for a place of amusement, a seminar, an activity, or an event held in Canada.

CRA has expressed the view that where the object of a transaction is the rendering of service by a non-resident and a non-resident technician enters Canada to carry out the terms of the undertaking, and to perform the service which is the *principal object of the contract*, entry of the technician into Canada in such a case will generally be sufficient to constitute carrying on business by the non-resident principal.[22]

Prizes awarded in competitive events generally are not subject to GST or QST. This includes the organization, promotion, hosting or other staging of a competitive event.

17 *Club de baseball Montréal ltée c. Québec (Sous-ministre du Revenu)*, [1995] R.D.F.Q. 322 (Cour du Québec) [Montréal Expos case].

18 The theory being that, if the non-resident corporation instead established a Canadian subsidiary to conduct its Canadian activities, profits that are not otherwise reinvested in Canada would have been distributed to it as dividends, and thus would have been subject to dividend withholding tax.

19 As branch tax is effectively a proxy for dividend withholding tax, the rate of branch tax under Canada's treaties generally tracks the rate of tax payable on dividends. See, for example, art. 22(3) and (4) of the Canada-U.K. tax treaty.

20 Presumably, on the basis that it did not carry on business in Canada through a permanent establishment in the particular year.

21 Subject to an exemption for *"small suppliers"* that is unlikely to be available to Formula 1 teams.

22 See GST Headquarters Letter 5729-19 (dated 29 November 1994; last updated 19 January 1996), wherein the CRA considered whether an unnamed international automobile racing organization was required to register for GST in connection with two annual races held in Canada. The CRA ultimately concluded that registration was not required on the basis that the organization did not carry on business in Canada and it did not make taxable supplies of admissions because its role was limited to overseeing the races and marketing the television rights.

Payroll taxes

Canadian and provincial income tax is withheld at the source on salary, wages and other remuneration paid to Canadian resident employees and certain non-resident employees performing services in Canada. Formula 1 teams, as employers, would be required to withhold tax on these amounts, unless a waiver of withholding tax has been issued. The rate of income tax withholding is generally determined in accordance with the combined federal and provincial graduated tax rates for individuals. The residence of an employee will determine the province in which he or she will be liable to pay income tax and to whom the employer must remit the provincial source deductions.[23]

Formula 1 teams would also be required to make contributions to Canada's federal public pension and employment insurance programs on behalf of their Canadian resident employees and certain non-resident employees performing services in Canada. There are also various provincial contributions to which Québec employers are required to contribute.[24] These obligations do not solely relate to drivers but also to other employees of a team performing their duties in Canada.

For Québec provincial tax purposes, source deductions and employer contributions are required if the employee either:
- reports for work at an employer's establishment located in Québec; or
- the employee is not required to report for work at any of the employer's establishments (located in Québec or elsewhere), but is paid from one of these establishments located in Québec.

Taxation of Formula 1 drivers

Income tax

Most Formula 1 drivers would normally be considered to be employees for Canadian tax purposes. We understand that Formula 1 drivers typically enter into an employment agreement with a team to render their services and under which they generally receive a base salary and other remuneration that is related to their racing performance. These amounts are generally considered employment income and, unless a driver is resident in Canada, should only be taxable in Canada to the extent of the services performed by the driver in Canada (and subject to the provisions of an applicable tax treaty).[25] However, a driver's status as an employee of a Formula 1 team is always a question of fact and the CRA could challenge this status where the association between a driver and a team does not align with that of an employee-employer relationship. The outcome will depend not only on the terms of the driver's contract but also on common law or civil law factors.

Drivers may also earn other types of income, such as for the use of image rights, from endorsements and public appearances. This income is not typically considered employment income, even if the driver is otherwise an employee.

Canadian residence

Canadian residence, for tax purposes, may arise by virtue of a driver having significant or, in some cases, ancillary residential ties to Canada ("factual residence"). A driver will also be deemed resident in Canada if they are physically present in Canada for 183 days or more in a particular year (*"deemed residence"*). Given the demanding racing schedule of Formula 1 drivers, with races occurring in various jurisdictions throughout the year, it is unlikely that many drivers would satisfy the bright-line *"deemed residence"* test.

Factual residence is often the subject of considerable uncertainty. Over the years, the courts and tax authorities have developed guidelines for determining whether an individual is a factual resident of Canada. As Canada has a relatively high personal tax rate, Canadian drivers may wish to relinquish Canadian residency to reduce their overall tax burden.[26] However, the tax authorities can generally be expected to carefully scrutinize a loss of Canadian residence. Some of the residential ties that will be considered in determining whether an individual is resident in Canada (or in a province, such as Québec) include the existence of an owned or leased personal dwelling that is available to the individual, or a spouse or children who remain in Canada (or in a province). The tie-breaker rules under Canada's tax treaties may also be relevant in determining an individual's residency status.

Canadian resident drivers

Canadian resident drivers will generally be liable to pay federal and provincial tax on any income earned from employment, regardless of where the driver's employment duties are performed. As mentioned above, employment income is subject to source deductions. For provincial income tax purposes, Canadian resident drivers will be liable to pay tax in the province or territory in which they are domiciled on 31 December of a given year.

Income earned by a Canadian resident driver from personal appearances, sponsorships or the use of image rights, whether directly or via another entity, are also taxable in Canada. Where a foreign entity controlled by a Canadian resident driver derives income from services rendered by the driver, such income is generally subject

23 Where a non-resident performs employment duties in Canada, federal income tax withholding at the source is generally increased to account for the fact that the non-resident does not pay provincial income tax.

24 These contributions are made *in lieu* of contributions to the federal public pension.

25 This characterization may not apply to "pay drivers", who are drivers that generally race for free and generate income from personal sponsorships or otherwise fund their activities personally.

26 It is noted that persons who cease to be resident in Canada are subject to a deemed disposition of most of their property, such that a loss of Canadian residence may accelerate the realization of accrued gains on such properties.

to Canadian income tax on a current basis.[27] Thus, income earned by an offshore company from the performance of services by a Canadian driver will generally be taxed in the driver's hands in the year in which it is earned.

A Canadian resident driver, who also pays income taxes abroad, may be entitled to a foreign tax credit ("FTC") in respect of such foreign taxes. Many provinces also grant an FTC to avoid double taxation.

Non-resident drivers

Non-residents of Canada are subject to Canadian tax in respect of certain sources of income. There is no de minimis filing threshold, such that a non-resident of Canada is generally liable for Canadian tax on the first dollar of income earned in Canada (subject to the provisions of an applicable tax treaty), subject to a waiver being previously obtained.

- Employment income

Where a non-resident performs employment duties in Canada and abroad, a reasonable allocation of the non-resident's employment income must be made between Canada and other jurisdictions.[28] In computing their income from employment, non-residents are entitled to the same deductions that are ordinarily available to Canadian residents.

The determination of the correct method of allocating income earned in Canada and elsewhere is a question of fact and reasonability. The case of *Sumner v. R.*[29] involved the allocation of employment income earned by Gordon Sumner[30] from a North American concert tour with stops in Canada. Sumner provided his services through Roxanne Music Inc., a U.S.-resident loan-out corporation with no PE in Canada. Sumner had allocated 2.5% of his overall salary from the tour to services performed in Canada on the basis that only six concerts out of the assumed 240-day period of the tour occurred in Canada. The CRA asserted that 9.11% of Sumner's salary should be allocated to Canada, as this was the percentage of the overall gross revenue of the tour that was generated by the Canadian concerts. The Tax Court of Canada upheld the CRA's reassessment on the basis that Sumner did not demonstrate that the *per diem* method used was more accurate than the gross revenue method used by the CRA.[31]

The question of whether an employment is "performed" in Canada was also considered in the recent case of *Nonis v. R.*,[32] which involved a former general manager of the Toronto Maple Leafs. The CRA had reassessed Nonis to include in his income for Canadian tax purposes certain amounts received by him under his employment contract following his termination. Nonis had returned to his home in the U.S.A. after his termination, and the Tax Court held that he did not perform any services in Canada after his return to the U.S.A. Therefore, the payments received by him during the remaining term of his employment contract were not taxable in Canada.

- Other income

In addition to employment income, non-resident Formula 1 drivers may also earn other income in connection with the use of image rights, sponsorship, broadcasting and merchandising income. The taxation of this other income depends on the nature of the payments as well as the relationship between the driver and the payer.

Payments made by a Canadian resident for the use of a non-resident individual's image rights and name in a merchandising or advertising campaign are generally considered royalty income, which is subject to Canadian withholding tax at a rate of 25%, unless this rate is reduced under an applicable tax treaty. Sponsorship, advertising and endorsement income and broadcasting income related to services performed in Canada may also be subject to a 15% withholding tax.

Treaty application

Although income earned in Canada by a Formula 1 driver for competing in the Canadian Grand Prix would generally be considered taxable in Canada and in Québec under the domestic law, many of Canada's tax treaties provide a limited exemption from Canadian taxation for employment income earned in Canada by a non-resident.

Each of Canada's tax treaties contains a provision similar to art. 17 of the OECD Model Convention, which precludes the application of art. 7 (business profits) and art. 15 (income from employment) to income derived from the personal activities of an entertainer or athlete.[33] Accordingly, non-resident entertainers and athletes generally will not be entitled to rely on art. 7 or art. 15 to exempt income from

27 Regardless of whether the income is distributed to the driver in the year.

28 Similar principles apply for the purposes of determining a non-resident's liability for Québec provincial tax under the QTA. However, the QTA imposes tax on a non-resident if he or she "was an employee" in Québec while the ITA taxes *"income from an office or employment performed in Canada"*. This can lead to inconsistencies between the Canadian federal tax treatment and Québec provincial tax treatment of employment income.

29 2000 DTC 1667 (Tax Court of Canada).

30 Known by his stage name "Sting".

31 In reaching this conclusion, the Tax Court of Canada noted that Roxanne Music Inc. had deducted 9.11% of Sumner's salary from its gross Canadian revenue in computing its taxable income earned in Canada, and that Sumner determined his U.S. taxable income on a gross receipts basis.

32 2021 TCC 31 (Tax Court of Canada).

33 The CRA has stated that it considers race car drivers to be athletes for these purposes.

a business or employment from Canadian taxation.[34]

Art. 17 of Canada's treaties generally does not extend to endorsement or sponsorship payments made by a Canadian resident to an entertainer or athlete for the use of their image or likeness. Instead, these amounts are typically treated as royalties paid to the entertainer or athlete and are subject to withholding tax.[35] Many of Canada's tax treaties reduce the rate of withholding tax on royalties to 10%.

Special accommodation is provided under the Canada-U.S.A. tax treaty for athletes who compete in regularly scheduled games in both Canada and the U.S.A.[36] However, this treatment is generally restricted to athletes who compete in North American sports leagues, and would not be available to Formula 1 drivers.[37]

Conclusion

The foregoing discussion provides a high-level overview of the Canadian tax treatment of Formula 1 teams and drivers, and demonstrates the complexity associated with racing and paying tax in several countries around the world.

Additional complexity arises in the Canadian context by virtue of Canada's bijural legal system and federalist system of government, as teams and drivers must grapple with federal and provincial tax issues that are informed by two distinct legal regimes.

34 Canada has reserved the right to propose an amendment to the OECD Model Convention that paragraph 2 of art. 17 should only apply to the use of so-called *"star-companies"*, and not to management companies, teams, or other entities where it is established that neither the entertainer or sportsperson, nor a related person participates directly or indirectly in the profits. This policy has been followed in several of Canada's tax treaties (see, for example, the Canada-U.S.A. tax treaty).

35 Withholding tax can apply even if the entertainer or athlete is never present in Canada.

36 These athletes are generally only subject to Canadian taxation on their employment income where they are physically present in Canada for more than 183 days in a given year.

37 The CRA has stated that it would not apply the relevant treaty provision to race car drivers on the basis that they do not compete in *"league with regularly scheduled games in both Contracting States"* within the meaning of that provision.

Why F1 drivers, tennis players and golfers have a great deal in common in Switzerland

Part one

BY MARCEL MEIER[1]

Part two of this article will be published in the March 2022 issue of *SLT*.

Introduction

Bahrain, Italy, Portugal, Spain, Monaco, Azerbaijan, France, Austria, Great Britain, Hungary, Belgium, The Netherlands, Italy, Russia, Turkey, United States of America, Mexico, Brazil, Qatar, Saudi Arabia and Abu Dhabi. These places may be some exciting travel destinations for ordinary people. By contrast, they also correspond to the 2021 FIA Formula One World Championship race calendar and thus the places of work for F1 drivers in 2021. A similar calendar may apply to other top athletes who are passionate about other sports or esports. Hence, it is obvious that top athletes are always on the move and travel the world to earn their money. Since taxation is governed by domestic tax laws in conjunction with double taxation conventions, internationally mobile top athletes face not only sporting challenges but also various tax issues. In recent years, several sports personalities have fouled the taxman, as they were not compliant with the tax laws, and hence paid important supplementary taxes, late interest and penalties.

Subject to certain conditions, Swiss tax resident athletes, who participate in competitions outside Switzerland, may benefit from a rather simple tax regime, which is called the expenditure-based taxation. The purpose of this article is to provide an outline on the current expenditure-based taxation in Switzerland[2] and to analyze some specific features and activities of top athletes and their impact on the eligibility and application of this Swiss tax regime.

Swiss tax domicile or residence

Reasons to move to Switzerland

There are many reasons to move to Switzerland. Switzerland is a very multi-national country which is open to foreigners. Currently, approximately 25%[3] of the population is composed of foreigners. Switzerland has four language regions: German, French, Italian and Romansh. The two most widely spoken non-national languages are English and Portuguese. In addition, Switzerland has one of the best educational systems in the world. Moreover, Switzerland has a high-quality health care system. Furthermore, the country is often voted one of the safest countries to live and raise a family in the world. It also has a history for neutrality and is home to one of the most stable democracies in the world. In addition, Switzerland has a strong reputation for its cleanliness and hygiene standards, as well as its care of the environment. Last but not least, foreign citizens, including athletes, may be attracted by the expenditure-based taxation regime or other Swiss tax advantages (for example, in most cantons, there are no gift and estate taxes for the spouse and children).

Conditions to establish tax domicile or residence

Under Swiss domestic tax law, individuals establish their tax domicile in Switzerland if they reside here with the intent of permanently staying.[4] In a nutshell, individuals must have their center of vital interests in Switzerland, taking into account all the relevant circumstances (personal, social and economic analysis on a generally long-term basis). Moreover, individuals are considered as Swiss tax resident based on Swiss domestic tax law if they stay in Switzerland at least:

– 30 days and engage in a gainful activity on Swiss territory; or

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2 As of 1 January 2021, all Swiss tax resident individuals who benefit from the expenditure-based taxation regime are subject to the same rules, since the 5-year transitional period in relation to the revised 2016 Swiss tax rules terminated on 31 December 2020.

3 This is the average rate in Switzerland. For instance, the rate is approximately 40% in the Canton of Geneva and approximately 35% in the Canton of Vaud.

4 Art. 3 para. 2 of the Swiss Federal Law on the Direct Federal Tax (*Loi fédérale sur l"impôt fédéral direct*, DTL) and art. 3 para. 2 of the Swiss Federal Law on the Harmonization of Cantonal Direct Taxes (*Loi fédérale sur l"harmonisation des impôts directs des cantons et des communes*, THL).

– 90 days without performing any gainful activities, regardless of temporary short interruptions.[5]

It is necessary for the relevant individuals to establish a Swiss tax residence which is recognized by both the foreign and the Swiss tax authorities (that is, state of origin and state of destination). Hence, it is standard practice for a Swiss tax advisor to collaborate with the foreign tax advisor of the relevant individuals who move to Switzerland.

If individuals are domiciled or resident based on the respective domestic tax law, both in Switzerland and in another state, their tax status will be assessed in accordance with the so-called tie-breaker rules of an applicable double taxation convention (typically, art. 4 para. 2 if it follows the OECD Model Tax Convention on Income and on Capital). In the absence of such a convention, only Swiss domestic tax law applies from a Swiss point of view, which could result in an effective double taxation of income and/or assets (i.e. taxation in Switzerland and abroad).

Tax treatment

Individuals who establish their tax domicile or tax residence in Switzerland become subject to Swiss taxation (at federal, cantonal and communal levels) on the basis of their personal affiliations. Accordingly, they are subject to a generally unlimited Swiss tax liability. This tax liability captures worldwide income and assets, apart from business operations, permanent establishments and real estate located abroad.[6]

Based on the foregoing, Swiss tax resident athletes must declare their total income realized abroad (for example, appearance fee, prize money and expense allowance) in their Swiss tax return, even though their income may also be subject to taxation at source abroad. The Swiss tax treatment of such income (that is, analysis whether part of taxable basis or only impact on applicable tax rate and international allocation of certain deductions) depends on the specific rules of the double taxation convention concluded between Switzerland and the state of performance.[7] In the event of an applicable double taxation convention, such income is generally exempt from taxation in Switzerland (exemption with progression).[8]

Moreover, subject to certain cumulative conditions, Swiss tax resident athletes may benefit from the expenditure-based taxation regime.[9]

Expenditure-based taxation

Background

Expenditure-based taxation has a long-standing tradition in Switzerland. It was first introduced in the Canton of Vaud in 1862. The canton of Geneva has applied the expenditure-based taxation since 1928.

Today, in most cantons[10], foreigners who:

1 establish their tax domicile or tax residence in Switzerland for the first time or following an absence of ten years; and
2 do not carry out any gainful activity on Swiss territory,

are eligible for the expenditure-based taxation which corresponds to a simplified tax assessment procedure.

However, in the canton of Zurich, the expenditure-based taxation was abolished by virtue of a 2009 popular vote effective as of 2010. On the one hand, the cantons of Schaffhausen[11], Appenzell Ausserrhoden, Basel Landschaft[12] and Basel Stadt followed Zurich's example. On the other hand, the cantons of Thurgau, St Gallen, Lucerne and Bern decided to maintain the expenditure-based taxation, but stricter rules were introduced at cantonal and communal levels. Moreover, other cantons, such as Geneva, Vaud and Valais, did not adjust their cantonal taxation rules at that time.

Considering the foregoing cantonal developments, the Swiss Federal Council advocated more stringent rules to improve acceptance of this Swiss tax regime by Swiss nationals. Furthermore, the Swiss voters rejected a popular initiative in November 2014 to abolish the expenditure-based taxation at the federal level. As a result, legislative amendments came into force on 1 January 2014 (amendments to the Swiss Federal Law on the Harmonization of Cantonal Direct Taxes ("THL")) and on 1 January 2016 (amendments to the Swiss Federal Law on the Direct Federal Tax ("DTL")). These further developments provide legal certainty and stability in relation to the expenditure-based taxation regime in Switzerland.

Moreover, for individuals who have already been taxed on an expenditure basis when this reform entered into force, a five-year grandfather clause[13] resulted in the application of the previous tax legislation until 31 December 2020. Accordingly, as of 1 January 2021, all Swiss tax resident individuals who benefit from

5 Art. 3 para. 3 DTL and art. 3 para. 1 THL.

6 Art. 6 para. 1 DTL.

7 See Decision of Swiss Federal Supreme Court (SCD; *Tribunal Fédéral*) of 6 May 2008, 2C_276/2007, consideration 3.2.

8 Art. 17 OECD Model Tax Convention on Income and on Capital.

9 Art. 14 DTL and art. 6 THL.

10 Each of the 26 cantons has its own tax system which includes cantonal and communal taxes.

11 The expenditure-based taxation is only available in the year of arrival and until the end of the relevant tax period.

12 The expenditure-based taxation is only available in the year of arrival and until the end of the relevant tax period.

13 Typical Swiss measure in the event of change of tax law in compliance with good faith principle; art. 205d DTL and art. 78eTHL.

the expenditure-based taxation are generally taxed based on the revised tax rules (equal treatment).

Conditions

Overview
According to Swiss domestic tax law, foreign citizens who:

1 establish their Swiss tax domicile or tax residence in Switzerland for the first time; or
2 come back to Switzerland after a leave of at least ten years, and
3 who do not exercise any business activity in Switzerland,

may request to be taxed by reference to their worldwide expenses.[14]

Therefore, to benefit from the expenditure-based taxation, mainly the following three *cumulative* conditions have to be met:[15]

1 non-Swiss citizenship; and
2 no gainful activity in Switzerland (the applicant must not work in Switzerland, but may work abroad); and
3 domicile or residence for the first time in Switzerland or after a leave of at least 10 years.

Absence of Swiss citizenship
Foreign citizens (as opposed to Swiss nationals) are the only ones who may request the application of the expenditure-based taxation. Swiss nationals, who have an additional (foreign) citizenship, do not qualify as foreigners and hence do not meet the conditions of the expenditure-based taxation. In addition, the entitlement to the expenditure-based taxation expires if the taxpayer obtains the Swiss citizenship. In such a case, the ordinary income taxes are due for the entire tax period during which the naturalization takes place.

Move to Switzerland and absence of gainful activity on Swiss territory
One of the crucial conditions of the expenditure-based taxation is the absence of gainful activity on Swiss territory. Therefore, non-Swiss citizens, who take domicile or residence in Switzerland for the first time or after an absence of at least 10 years, may request to pay taxes computed based on their worldwide annual expenses instead of the usual taxes on income and wealth only if and when they do not exercise a gainful activity in Switzerland. In other words, the physical presence on Swiss territory to carry out a salaried (dependent) or independent gainful activity is not allowed.[16]

Taxpayers who were subject to the expenditure-based taxation in the past and return to Switzerland after an absence (stay abroad) may however request the application of the expenditure-based taxation regardless of the 10-year deadline.

A gainful activity in Switzerland which excludes the expenditure-based taxation regime exists if an individual exercises an activity in Switzerland (main profession or part-time activity) which generates income in Switzerland or abroad.[17] The foregoing applies, amongst others[18], to athletes who carry out gainful activities personally in Switzerland. In such cases, the relevant individual is not entitled to apply the expenditure-based taxation regime but is subject to the ordinary Swiss taxation on income and wealth.

Both spouses have to meet relevant conditions
Based on the revised Swiss tax rules, spouses who live in legally and effectively unseparated marriage must both meet the cumulative conditions outlined in the three sections above.19 If one of the spouses has (or obtains) the Swiss citizenship or carries out (or starts) a gainful activity in Switzerland, both spouses do not (or no longer) qualify for the expenditure-based taxation in Switzerland. In such a case, the ordinary income tax is due for the entire tax period.

Minimum taxable basis

Assessment in general
It is important to note that the Swiss taxes within the scope of the expenditure-based taxation regime do not correspond to an annual lump-sum tax payment as it applies, for instance, under the so-called "resident non domiciled" tax regime in the UK. In general, there is neither a specific Swiss tax amount to be paid nor a special Swiss tax rate which applies within the scope of the expenditure-based taxation regime.

The ordinary Swiss income taxes are generally levied on the basis of the annual expenditures (living costs) of the relevant individual and of the other persons who are supported by the former (dependents) which are generated in Switzerland and abroad[20].

14 Circular Letter No. 44 of the FTA regarding expenditure-based taxation published on 24 July 2018 (CL No. 44).

15 CL No. 44, section 2.4: if the relevant individual is married, the conditions have to be met by both spouses (see also below in the next section).

16 For more details: M. Simonek, *Rechtsgutachten zur Besteuerung nach dem Aufwand*, erstattet an die Eidg. Finanzkontrolle EFK, vom 15. April 2019; P.-M. Glauser and F. Epitaux, *La portée de l"interdiction de l"exercice d"une activité lucrative dans le contexte du forfait fiscal: examen en particulier du cas des administrateurs*, ASA 88/8/2019 - 2020, p. 623-643; C. Suter, *Die Pauschalbesteuerung, Aktuelle Entwicklungen in Verwaltungspraxis und Rechtsprechung*, StR 76/2021, p. 86-102, in particular p. 92 et seq.

17 See SCD of 15 May 2000, in: StE 2001 B 29.1 Nr. 6 and ASA 70, p. 575-581.

18 For instance, artists (musicians), board members and scientists.

19 CL No. 44, section 2.4.

20 The term "lump-sum taxation" is not entirely correct and does not fully reflect the concept of this Swiss tax regime.

There is however a rule whereby the Swiss taxes are computed and levied based on the greater of:
- CHF 400,000 (minimum amount at the federal level) and a range between approximately CHF 250,000 and CHF 900,000 (at cantonal and communal levels; the cantons are competent to define this minimum amount which includes wealth tax or is the basis to assess the wealth tax) for EU/EFTA citizens[21]; or
- seven times:
  1 the annual rent paid for the house or apartment of the taxpayer, or
  2 the annual rental value (assessed by the local tax authorities; "income in kind") of the house or apartment acquired and occupied by the taxpayer; or
- three times the annual lodging costs if the taxpayer resides (temporarily) in a hotel or the like; or
- the sum of the annual control computation which corresponds to the sum of gross income from Swiss sources and, as the case may be, increased by foreign income in order to claim a (full or partial) foreign withholding tax refund and/or to have access to double taxation conventions concluded with certain countries.[22]

Worldwide expenditures in particular
As mentioned above, the ordinary Swiss income taxes are generally levied on the basis of the annual expenditures (living costs) of the relevant individuals and of their dependents which are generated in Switzerland and abroad (principle of worldwide expenses).[23]

It is important to note that extraordinary and non-periodic costs, such as sporadic donations, are generally not considered when assessing the annual living costs of the relevant individuals and their family. The annual living costs are generally defined as follows[24]:

- costs for food and clothes;
- costs for main and secondary dwellings, including but not limited to heating, cleaning and maintenance;
- taxes and social security contributions;
- costs for staff who works for the relevant individual(s);
- alimony payments;
- education costs, including but not limited to schooling fees for children abroad, hobbies and sporting activities;
- costs for travelling, holidays and treatments at health resorts, *etc.*;
- costs for expensive domestic animals (for example, horses); and
- operating and maintenance costs for cars, boats, yachts and aircraft, and so on.

In practice, various cantonal tax authorities request the taxpayer to complete a (more or less) detailed questionnaire which allows to compute the annual worldwide expenses. The resulting amount corresponds to the taxable basis which is subject to Swiss ordinary taxation if it is not lower than the comparative amounts mentioned above under "Minimum taxable basis". The taxable basis must be computed annually, and deductions are not available.

Increased taxable basis for citizens of non-EU/EFTA states
Citizens of EU/EFTA states are granted a residence permit without gainful activity in Switzerland if they have sufficient financial resources and provide evidence of adequate health and accident insurance coverage. By contrast, applications of citizens of non-EU/EFTA states (nationals of third countries, including the U.K. since brexit entered into force) are examined on a case-by-case basis. In particular, higher minimum taxable bases (depending on the practice of the competent canton) are applicable to citizens of non-EU/EFTA states who request the expenditure-based taxation in Switzerland. Furthermore, residence permits are generally granted on the basis of cantonal fiscal interests.

To be continued: part two of this article will be published in the March 2022 issue of *SLT*.

21 Based on current Swiss tax law and the related practice, persons of working age (under 55) from non-EU/EFTA states (third states) are subject to a higher minimum taxable basis (see also the next section below).

22 Modified expenditure-based taxation regime which applies to Austria, Belgium, Canada, France, Germany, Italy, Norway and U.S.A. (See also the section "Modified expenditure-based taxation" in part two of this article, to be published in the March 2022 issue of SLT).

23 CL No. 44, section 3.2.

24 CL No. 44, section 3.2.

India:

2020 Tokyo Olympics – prizes and their taxation

BY KEVIN OFFER[1]

Introduction

The Olympics in Japan proved to be successful for the Indian athletes. A gold was won in athletics for the first time by Neeraj Chopra, whilst the total of seven medals was the highest achieved by India in any summer Games.

The gold for Chopra has particularly resulted in praise and awards for him with other medal winners also receiving payments and/or gifts as a result of their success. As with most countries, however, where there is a payment, tax is never far behind.

Olympic prizes

A tax exemption applies to prize awards to non-resident athletes participating in the Olympics and Paralympics in Japan. No taxation will, therefore, arise in Japan as would normally be the case under art. 17 of the OECD Model Tax Convention. This exemption, however, only applies to taxation in Japan. It is, therefore, necessary for the athletes to consider the tax position within their country of residence.

Indian athletes may receive payments from a number of sources as a reward for Olympic success and also for just participating. In particular, awards and prizes can be made by the following:

- the central government,
- state governments,
- government bodies such as the Ministry of Railways,
- local authorities, trusts and companies,
- individuals.

The tax position on the awards/prizes from these various sources can vary significantly.

Indian domestic law

The tax position on payments to Olympic athletes in India is far from clear. Before considering the current position, it is perhaps necessary to first consider the case of Abhinav Bindra.

At the Beijing Olympics in 2008, Bindra became the first Indian to win an individual gold medal. This resulted in a number of awards and prizes being made to him. This also brought him to the attention of the Indian Tax Department, which demanded tax from him based on Indian tax legislation at the time.[2] Bindra appealed against the demand to the Income Tax Appellate Tribunal (ITAT), on the basis that only income received by a professional sportsperson should be taxable. The implication being that Bhindra, as a non-professional, should not be liable to tax. The ITAT ruled in favour of Bhindra on the basis that he was an amateur and the sum received was not in the nature of income. A similar view was taken in a separate case involving the cricketers Kapil Dev and G.R. Viswanath.

The question of what distinguishes a professional sportsperson from an amateur is not defined within the Income Tax Act 1961. The general position, however, is that an amateur or a non-professional sportsperson is one who participates in sport under the name of and as a representative of the country. A person who participates under their own name and charges a fee for participation is a professional sportsperson. The position is far from clear though and full consideration of the facts is often required.

Whilst this may seem good news the position changed with effect from 1 April 2017 with the implementation of Section 56(2)(x). Under this section, any income in the form of rewards shall be regarded as gifts taxable under the Income Tax Act 1961, if paid in cash or other property exceeding Rs 50,000. This brings the payments to non-professional athletes back into the charge to income tax, although there is doubt created by what constitutes property for the purposes of the legislation.

Lastly, it is also necessary to consider a specific exemption for rewards provided under Section 10(17A) Income

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2 Section 56(2)(v) of the Income Tax Act 1961.

Tax Act 1961. This section provides authorisation to the Central Board of Direct Taxes (CBDT) to declare that certain rewards may be made tax free if provided by the central and state governments. The provision has been on the statute book since 1989, but it was only in 2014 that an order was making any reward paid in cash or in kind to a medal winner at the Olympic Games, Commonwealth Games and Asian Games tax free.

Domestic tax treatment of Olympic prizes

Medal winners

The exemption within Section 10(17A) relates only to medal winners who receive rewards provided by the central government and state governments. Any awards made by other authorities such as local/sports authorities, industrial companies or individuals will remain fully taxable.

The exemption covers any state government and not just the state in which the athlete resides. Thus, payments made to Chopra as a reward for his gold medal in Japan by the Punjab and Manipur governments as well as the Haryana government, where Chopra resides, are exempt from tax.

A reward in the form of a car made by an individual, however, would seem to be taxable. Here again the position is far from clear and will depend on Chopra's status. If he is a professional, the car would be regarded as a benefit derived from the exercise of his profession and taxed as professional income[3]. If he is an amateur (as would seem more likely for a javelin thrower) the car would fall within Section 56(2). However, as a car is not specifically included within the list of property set out in the explanatory notes to Section 56(2), the car may ultimately escape tax.

Non-medal winners

As indicated above, Section 10(17A) will only cover payments made to medal winners. The Haryana government made a payment to the Indian women's hockey team as a reward for their performance at the Japan Olympics. However, the disappointment of a 4-3 defeat to the British team in the bronze medal match may have been all the harder to take with the tax liability that subsequently arose on the payment made to them in recognition of their strong performance. The men, meanwhile, won their bronze medal match against the German team 5-4 and so received their payments tax free. Perhaps never has the difference a goal can make been seen to be greater.

Tax payments

Where a tax exemption does not apply, then the reward will be subject to tax at a flat rate of 30%. There is a requirement for this to be deducted at source by the payer. If the reward is paid in kind, then the recipient can reimburse the person providing the reward or the reward may be "grossed up" to cover the tax payment.

Conclusions

As can be seen, the taxation in India of rewards and prizes received by Indian athletes competing in the Olympic Games is complex.

It can depend on the status of the athlete, who is making the payment and whether the athlete wins a medal.

In general, the system can be seen to reward success and only exempts payments from government authorities. The example of the men's and women's hockey teams, however, perhaps suggests a change should be made.

3 Section 28 of the Income Tax Act, 1961.

Russian Federation:

2020 Tokyo Olympics – prizes and their taxation

BY REVAZ CHITAYA[1]

Introduction

Being accused of doping, Russia had not been allowed to present its national team for the Olympic games in Japan. Meanwhile, Russian athletes were ordered to compete in uniform without a national flag as a team of the Russian Olympic Committee (the ROC).

Russia supports the development of professional sport in the country using national victories as an attraction to a healthy lifestyle.

Usually, the Russian team gets to be in the top five of the medal table. The Tokyo Olympics are not the exception. In the last games, the ROC team won 20 gold medals, 28 silver medals, and 23 bronze medals.

Olympic prizes in Russia

It should be noted that, besides medals, all Russian Olympic champions and medal-winners earned special monetary remuneration for every medal won as a prize from the Russian Federation (the size depending on the kind of medal: RUB 4 million, RUB 2.5 million or RUB 1.7 million); a lifelong monthly payment; a premium branded vehicle (granted by the state Fund of Olympians support); different kinds of prizes from Russian regional authorities (money, apartments, and so on); remuneration from private funds and persons.

Russian tax legislation

Domestic law

Russian tax legislation is favourable to Olympic medal winners, providing several exemptions for the purposes of the personal income tax.

The prizes in monetary and/or non-monetary form received by sportspersons for prize-winning places in the Olympic games are non-taxable if they are granted by official organizers, or on the basis of the decisions of state or local bodies (clause 20 of art. 217 of the Russian Tax Code). Also exempted are additional one-time payments of every type received from a non-commercial organization, having as a purpose of its business the support in the area of high-performance sport, listed in the special register (clause 20.1 of art. 217 of the Russian Tax Code).

Therefore, the medals, the one-time remunerations received from the federal and regional bodies, and the vehicles granted by the special fund are subject to an exemption from the personal income tax of Olympic athletes.

The exemption is applied for Russian tax residents and non-residents.

Meanwhile, all the remuneration granted by private persons and the lifelong monthly payment is subject to taxation under the general rules.

Russian tax residents have to pay tax at the rate of 13% (or 15%) depending on the gross amount of the income for the calendar year from their worldwide income.

Non-residents have to pay tax at the rate of 30% in relation to income sourced from Russia.

Tax treaty with Japan

The Russian Federation and Japan have agreed on the international taxation in the Convention for the avoidance of double taxation with respect to taxes on income dated 7 September 2017 ("DTT Russia-Japan").

According to art. 16 of the DTT Russia-Japan, the income of the sportspersons may be taxed in the country where the activity related to the income is carried out. In other words, Japan has a primary right to tax the income of the Olympic athletes (being Russian tax residents).

If Japan taxes the income in accordance with its national legislation, the Russian tax resident will have a right to use the tax credit method under the DTT Russia-Japan for the prevention of double taxation.

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United Kingdom:

2020 Tokyo Olympics – prizes and their taxation

BY KEVIN OFFER[1]

Introduction

With the Olympics in Japan over, athletes will now turn their attention to Paris in three years' time. However, for some, the effects of success in Tokyo may lead to attention from the tax authorities in their home countries.

It is, therefore, important for athletes to get their tax affairs in order when filing their next returns. Whilst athletes may be perceived as unpaid amateurs it is common for success in events, such as the Olympics, to be rewarded in the home country or for income to be generated as a result of the success. This is one of a series of articles that looks into the way Olympic athletes are taxed.

Olympic prizes

A tax exemption applies to prize awards to non-resident athletes participating in the Olympics and Paralympics in Japan. No taxation will, therefore, arise only on payments for performing in the Olympics as would normally be the case under art. 17 of the OECD Model Tax Convention. This exemption, however, only applies to payments specifically related to the Olympic Games and would not cover personal sponsorship payments. The exemption also applies solely to taxation in Japan. It is, therefore, necessary for the athlete to consider non-Olympic income and the tax position within their country of residence.

The U.K. does not provide prizes or any other form of pay for success at the Olympics. Nor does the U.K. tax athletes for success at the Olympics, such as on the value of any medal won. Thus, the simple answer to the question of how tax is levied on Olympic prizes would be that no prizes are paid so no tax is levied. However, the U.K. does provide funding for athletes to compete within the Olympics. This may be taxed in certain circumstances depending upon whether the athlete is carrying on a trade.

U.K. domestic law

Whilst the U.K. pay nothing for a medal win, there is support provided in the form of grants funded either through a national governing body ("NGB") or by way of an Athlete Performance Award ("APA") funded by the National Lottery. This support will initially be free of tax. However, if the athlete is successful and earns income after success at the Olympics, HMRC[2] may regard the support payments as part of a trade carried on by the athlete and, therefore, taxable.

Employment?

When obtaining funding, an athlete will enter into an agreement with the NGB for their sport or, if an APA, with UK Sport. The agreements for funding contain express clauses that no employment relationship will be created by entering into the agreement. Whether an employment relationship exists is, however, a matter to be determined by the courts and based on a review of all relevant facts. It is unlikely, however, that an athlete will be regarded as an employee in these circumstances, and this is supported by the case of the British cyclist Jess Varnish brought before the Employment Tribunal.[3]

HMRC do not consider an employment relationship to exist between UK Sport and an athlete who receives an APA. Their view is that the athlete will be in receipt of a grant. It is then necessary to consider if the receipt of the grant is in the course of a trading activity.

Trade or hobby?

Athletes competing in the Olympics are generally considered to be amateur sportspersons. HMRC consider that the majority of athletes will be carrying on a "hobby" and, therefore, not liable to tax on the receipt of the grant. However, where an athlete receives a gift from a commercial organisation in the form of an endorsement or sponsorship, it may constitute a trading activity.

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2 HM Revenue & Customs, the U.K. tax authority.

3 See Katie Russell and Rebecca Nicholson, "Are professional athletes employees?", in: *GSLTR* 10-2 (June 2019).

HMRC have provided some guidance as to the distinction between a hobby and a trade.[4] They do stress, however, that it *"is very much a question of fact and degree. Amateur status is not decisive."* When considering whether a trade is carried on it is necessary to look at the various sources of income and the circumstances in which they arise. The HMRC guidance identifies four sources of income and considers how they may affect the tax status of the athlete.[5]

- Awards such as the APA are unlikely to result from the carrying on of a trading activity if the athlete has no other sources of income from their athletic activities. In addition, HMRC have confirmed they would not regard the APA as a means of income in such circumstances and so no U.K. tax charge would arise[6]. If, however, it is determined that the athlete is carrying on a trade, due to other factors, then the APA would be included as part of the income of that trade.

- If funding is received from a commercial concern, it will be necessary to consider the full facts and any documentation to confirm that the payment is not a form of sponsorship or endorsement payment. However, unlike with the APA, the receipt of the funding would be regarded as miscellaneous income and, therefore, taxable.[7]

- A sponsorship or endorsement payment will usually involve a contractual arrangement requiring the athlete to provide some service in return for the payment. This may include appearance in advertisements or requiring the athlete to appear at events leading to a conclusion that the athlete is carrying on some form of trading activity. It would, however, be necessary to review the contractual arrangement to determine whether a trade exists or whether the athlete is carrying on a hobby. In either case, taxation would be payable on the income.

- Payments for appearance, participation and performance will be taxable as for sponsorship and endorsement fees.

HMRC provide some helpful case studies to demonstrate the difference in tax treatment indicated above.[8] Two of these are included within this article. In example 1, the athlete is not taxable on the APA, as he is not considered to be carrying on a trade. The other income is, however, still taxable. In example 2, the athlete is regarded as carrying on a trade.

Example 1

Lloyd is on a team on the World Class Performance Programme. He receives a £ 16,000 Athlete Personal Award (APA). Although he competes at world level he still holds down a part-time job as an administrative assistant. In his sport it is generally very difficult for athletes to attract sporting income. He has been given £ 1,500 and some sporting kit as a gift by a local manufacturer. Lloyd's sporting activities do not amount to carrying on a trade. Therefore each of the payments Lloyd receives needs to be looked at separately for tax purposes.

As Lloyd is not carrying on a trade, the APA is not taxable.

The £ 1,500 and the value of the sporting kit are not taxable as these were not received under an enforceable contract and Lloyd did nothing in return.

If, however, the facts and documentation indicate that the £ 1,500 payment was received under an enforceable contract for work done for services rendered, the £ 1,500 and the value of the sporting kit would be taxable as miscellaneous income under Part 5 Chap 8 Income Tax (Trading and Other Income) Act 2005 (ITTOIA 2005), not as trading income.

Any loss of earnings support paid to Lloyd by his sport's governing body is not taxable as Lloyd is in employment. Loss of earnings support paid to an athlete who carries on a trade is a taxable trading receipt.

Example 2

Mary participates at elite level in a sport which requires heavy expenditure on equipment. She moved from her parents' home, where she normally lived, to a flat which she rents near the sport's national training facilities because it is too far to travel from her parents' home each day.

She is in receipt of an Athlete Personal Award (APA) of £ 22,000 and sponsorship income of £ 7,000. This total funding of £ 29,000 is however insufficient to meet her training and subsistence expenses which include the costs of the flat. Even though Mary is still only exercising a hobby and not yet trading it is worth noting that if the sponsorship income is received in return for services rendered, and this could simply be an endorsement of certain products, then the £ 7,000 would be taxable as miscellaneous income under Part 5 Chap 8 ITTOIA 2005. The APA is not taxable as Mary is not carrying on a trade.

Mary wins gold at the Olympics and engages an agent to help her exploit her success. As a result she is able to secure more sponsorship income and promotional work for a national company.

Mary's sports activities are no longer a hobby for tax purposes. She is now organised in a business-like manner and conducts her sports activities with a view to profit. She is now taxable on all sources of income and funding as she is carrying on a trade.

4 HMRC, *Business Income Manual*, available at www.gov.uk/hmrc-internal-manuals/business-income-manual/bim50605 (accessed 5 December 2021).

5 HMRC, *Business Income Manual*, available at www.gov.uk/hmrc-internal-manuals/business-income-manual/bim50610 (accessed 5 December 2021).

6 HMRC, *Business Income Manual*, available at www.gov.uk/hmrc-internal-manuals/business-income-manual/bim50665 (accessed 5 December 2021).

7 Part 5, Chapter 8, Income Tax (Trading and Other Income) Act 2005 (ITTOIA 2005).

8 HMRC, *Business Income Manual*, available at https://www.gov.uk/hmrc-internal-manuals/business-income-manual/bim50606 (accessed 5 December 2021).

Conclusions

A British athlete at the Olympics will suffer no taxation on medal wins. In addition, for most athletes, any funding provided to help the athlete to enable them to compete at the Olympics will also not be taxable.

However, where the athlete receives income from other sources, such as sponsorship, to compete at the Olympics, then U.K. tax will be payable. In addition, where the athlete capitalises on their success at the Olympics, then it is likely that they will be considered to be carrying on a trading activity and taxed accordingly on all income that arises from that activity. This would include any grants (such as the APA) which may otherwise escape taxation.

The West Indies:

2020 Tokyo Olympics – prizes and their taxation

BY CARISSA RODULFO

With great regional economic downturn as a result of the COVID-19 pandemic, there were subsequent reductions in funding support and assistance for many Caribbean athletes prior to the 2020 Tokyo Olympic Games. This caused many persons to be both concerned and curious about the extent to which the quality of these athletes' performances would be compromised. Despite this, however, there were still several significant and successful showings from the Jamaican, Bahamian and Grenadian athletes, which brought much elation to a region undergoing perilous times.

Like many past years, the 2020 Tokyo Olympics had much of the customary dominance of Jamaican athletes on the track. However, unlike previous Olympic years, where Usain Bolt was the main feature, the cleats of the female Jamaican runners held the spotlight and grabbed the headlines.

Elaine Thompson Herah commanded and stunned the field by winning three gold medals in the 100 metres, 200 metres and 4 x 100 metres relay events respectively. Her teammates in the 4 x 100 metres relay, 34-year-old Shelly-Ann Fraser Pryce and Shericka Jackson, also would have claimed gold and were also outstanding in individual competition with Fraser Pryce winning silver in the 100 metres and Jackson gaining bronze in the 100 metres and 4 x 400 metres relay events.

According to the Jamaica Olympic Association, Jamaica's Olympic medallists and coaches will benefit from a J$ 41 million "Olympic Rewards Programme". The Jamaica Olympic Association provided J$ 5 million to the initiative, with Supreme Ventures Foundation and Mayberry Investments contributing J$ 30 million and J$ 6 million, respectively. This equates to roughly US$ 271,050.00.

The funds are invested in individual Mayberry Investments accounts for three years or until the athlete retires from track and field. At the conclusion of the three years or retirement, the athlete must select whether to cash out their investments or keep their accounts open.

A gold medallist receives J$ 6 million (US$ 39,257); a silver medallist receives J$ 4 million (US$ 26,171); and a bronze medallist receives J$ 2 million (US$ 13,085).

A comparable sum is retained for the relays, however J$ 6 million is split among members of the relay gold medallists, whilst J$ 2 million is shared among members of the women's 4 x 400 metres relay team that finished third.

Coaches are also recognized for their efforts. A gold medallist's coach receives J$ 1 million (US$ 6,543); a silver medallist's coach receives J$ 750,000 (US$ 4,907); and a bronze medallist's coach receives J$ 500,000 (US$ 3,271). This coaching reward is only available to individual medallists.

This investment model of prizegiving varies from previous years and proves to be a significant increase in monetary awards. Jamaican athletes who participated in the 2016 Rio Summer Olympics received cash awards of between J$ 1.3 million (US$ 10,000 as the currency was then valued) and J$ 325,000 (US$ 2,500 as the currency was then valued), amongst other incentives for their performances. The athletes received J$ 1.3 million for each gold medal ranging down to J$ 325,000 for those who failed to make the finals.

In ascertaining how these awards would be taxed, one must consider the OECD model double taxation treaty which exists between Jamaica and Japan.

Taxation of these awards by Japan authorities would have normally arisen under art. 14 and 16 of the Jamaica-Japan DTT. Thereafter, art. 22 which allows for the elimination of double taxation would have mandated that Jamaican tax authorities allow as a deduction from the Jamaican tax on the income of these athletes, an amount equal to the Japanese tax paid in Japan.

However, due to the Olympic tax exemption1 which ultimately overrides these provisions for these non-resident/Jamaican athletes, one has to consider how these earnings/awards will be taxed in Jamaica. Tax concessions regarding these accounts have not been mentioned.

Generally, there is no capital gains tax in Jamaica, therefore, gains from equities would benefit and there are long term savings accounts which allow for tax-free interest income if no more than J$ 1,000,000 (US$ 6,543) is deposited in such accounts each year, if no more

1 *Tax Guide for the Olympic and Paralympic Games Tokyo 2020* (March 2021), available at https://inside.fei.org/system/files/TAX%20GUIDE%20%28final%29%20March%202021.pdf (accessed 5 December 2011).

than 75% of the interest earned each year is withdrawn and if the principal remains for five years. Therefore, as there are a number of non-disclosed factors, one cannot make a conclusive finding as to whether these investment accounts essentially serve as a domestic tax shelter and their Olympic prizes will be tax free.

For the Bahamas, Steven Gardiner and Shaunae Miller-Uibo were their shining stars at the 2020 Tokyo Olympics, with each winning a gold medal in their respective 400 metre events. Their success will be rewarded with a monetary payment of B$ 40,000 (US$ 40,000). Only Japan and Singapore offer gold medal winners more money. As there is no double taxation treaty between the Bahamas and Japan, some would even argue that this reward is made even sweeter by the fact that the Bahamas does not impose personal income tax. Therefore, with the Olympic tax exemption in play, Gardiner and Shaunae Miller-Uibo's prizes will also be tax free, like their fellow Jamaican Olympic medallists.

After being diagnosed with Graves diseases and spending more than a year side-lined from his sport, the world applauded the comeback of Grenadian, Kirani James, who secured a bronze medal in the 400 metres event at the 2020 Tokyo Olympics with a time of 44.19 seconds.

Whilst the government has not openly stated how or if James will be rewarded for his performance, one can still consider the manner in which a potential monetary award would be taxed. Even with the Olympic tax exemption, if James' prize is not deemed personal foreign income, James' prize would incur personal income tax at rate of 10% if this award is XCD 24,000 (US$ 8,880), or at rate of 30% if the prize exceeds that amount under the domestic provisions.

Most certainly, this does not negate the fact that the government can nonetheless expressly provide a tax concession for this reward or develop an arrangement similar to what was given to the Jamaican athletes, whereby the monetary award may be somewhat sheltered from taxation.