Sports Law & Taxation

CONTENTS

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EDITORIAL

It is with much pleasure that we welcome readers to the March 2023 edition (citation: *SLT 2023/1*) of our ground-breaking journal *Sports Law and Taxation (SLT)* and online database *www.sportslawandtaxation.com*.

Apart from death, tax is one of the other certainties in life and, in view of the fact, that sport, despite the global economic crisis, continues to be big business, worth more than 3% of world trade, we thought that we would devote most of this Editorial to this important subject of tax and sport. In fact, to the need for sportspersons, as high earners, to be aware of and, as far as legally possible, mitigate its effects, through appropriate tax planning. So, we invited a leading expert and regular contributor to SLT, Kevin Offer – a Partner at Hardwick and Morris, LLP, London, UK – to provide some insights into this complex and fascinating topic. His comments now follow.

"Tax challenges for sportspersons playing in tournaments around the world

International sports persons face challenges of various kinds, both on and off the field of play, not least, when it comes to any tax liabilities that may arise on prize money and sponsorship and other payments, including appearance fees that they may receive. The taxation of international sportspersons, who play in international tournaments, is a minefield that can result in high tax charges for some and low or no tax for others. It is not just the country in which the tournament takes place and/or the country in which the sportsperson resides that can affect the tax position, but also the sport, tournament and type of income can all affect how and the extent to which an individual may be taxed.

General tax position

A full analysis of art.17 of the OECD Model Tax Treaty is beyond the scope of this Editorial and most readers will be well aware of its contents and the additional commentary. However, as a starting point, it may be noted that this art. 17 provides for tax to be levied by the tax authorities of the country in which a sportsperson undertakes personal activities as such. A sportsperson resident in country A and playing in a tournament in country B may, therefore, be subject to tax in country B. The sportsperson may also be taxable in country A as a resident of that country. The purpose of the Treaty is to avoid double taxation, although an element of this can still arise. It is also possible to achieve double non-taxation in some cases.

Some countries will allow a credit for overseas tax, whereas others will operate the exemption method so that no tax is levied on overseas tax. Where the exemption method is operated, and no tax is deducted in the country of performance, then no tax may be suffered on the income of a sportsperson.

Where the credit method is applied, then any tax that is suffered in the country of performance may be offset against the tax liability of the sportsperson in the country of residence. In simple terms, if tax is deducted at a rate of 20% in the country of performance and the tax rate in the sportspersons country of residence is 45% then it is just the additional 25% tax that will need to be paid in the home country.

The position in a number of countries, however, is not as simple as this. A number of countries will have domestic legislation that will limit the amount of credit that may be claimed for overseas tax.

For example, a UK resident sportsperson performing in the USA may suffer withholding tax on income generated from a tournament in that country. They may also be able to file a US tax return at the end of the US tax year and claim some expenses resulting in a repayment of some of the tax originally withheld. When the sportsperson files their UK tax return, the UK tax due on their income, including the amount arising from the US tournament, will be calculated. A credit will be given for the US tax suffered and any additional UK tax will be collected. However, the UK has a principle that a taxpayer should take whatever steps that they are able to reduce the tax that is suffered in another country. If the sportsperson has failed to claim any deductions and has decided to accept the full withholding tax, the UK tax authorities may not allow a full credit and an element of double taxation will, therefore, arise.

Whilst it may seem obvious to file a return or take other steps to reduce the tax charge in the US in the above example this may not always be cost effective. Professional fees are likely to be incurred to comply with the tax law of another country which may far outweigh any tax benefit. There is, therefore, an economic decision to be made.

Individual v. team

Whether a sportsperson participates as an individual or as a team player may have an effect on their tax position. A sportsperson playing for a team will be an employee of a club. There has been some consideration that it would be more appropriate for these situations to fall within art. 15 covering employment income. A special arrangement exists between the USA and Canada covering their usual international competitions such as the NHL and NBA. UEFA have operated a system to avoid the need to tax footballers in their European competitions and club finals, such as the Champions League. Some experimentation has been undertaken in football to tax at source such as the

2006 FIFA World Cup in Germany and the UEFA EURO 2008 tournaments, but these proved to give rise to complications. The exemptions for such tournaments (see below) and taxation in the country of residence has, therefore, prevailed.
For an individual sportsperson, such as a tennis or golf player, the position is a little more straightforward. As their income will arise from their individual performances, it is clear that they would fall within art. 17. However, there has been some suggestion that art. 7 (business income) or it's predecessor, art. 14 (self-employment) should apply. Whilst these suggestions may have some credibility, it is generally recognised that art. 17 should prevail. Some treaties (such as a number of those entered into by Switzerland) expressly provide for art. 17 to apply and so most income from self-employment or business income may be taxed in the country of performance no matter that there will be no permanent establishment as required under art. 14 or 7.

Sources of income

The next issue a sportsperson will need to address is the type of income that they will be receiving.

Direct income
In the case of a fee for performing at an event or a prize for winning a tournament, the tax position is straightforward. Such income will arise from the performance itself and so, in most cases, fall to be taxed in the country of performance under art. 17. However, what if the fee is part of a salary for playing for a team? In the absence of any special provisions, it would be necessary to apportion the salary of the sportsperson between the various countries in which they perform and tax in each country accordingly. Whilst an employing club may try to calculate the apportionments centrally, it is the individual sportsperson who has the obligation to pay the correct amount of tax. This is but one example where a sportsperson would be wise to ensure that they have professional advice on taxation, as well as other areas of their affairs.

Indirect income
A sportsperson performing at international level is likely to receive income from sources that may not appear to be directly attributable to a specific performance. However, if the income is connected with the personal activities of the sportsperson performed in another country, the income will fall within art. 17. Examples of this type of income will include such items as income from endorsements, sponsorships, image rights and merchandising.
For example, if a tennis player is sponsored by a racquet manufacturer, then it is likely that they will be required to use the racquets of the sponsor at tournaments around the world and may also be required to wear the sponsor's logo on their clothing. A proportion of the payment by the sponsor will, therefore, be connected with the performances of the sportsperson and an apportionment will be required in a similar way to other fees. The tax position will then need to be considered for each of the various countries in which the sportsperson performs, as well as the sportsperson's home country.
This type of income can create a number of tax issues for the sportsperson as to how much of the sponsor's income should be attributed to a specific tournament. In some cases, the sponsor will pay an increased amount for success in the tournament, so the relevant amounts may be easily identified. However, for an annual payment, it will be necessary to consider how an apportionment should be made. Some countries may not tax the income as not directly attributable to the performance, that is, the payment would be made anyway. Others will impose tax based on the proportion of performance days at a tournament over the total days of performance in the year. Some countries may allow training days, others just the time performing. There is no global view of how this type of income should be taxed and the sportsperson will need to have advisers, who fully appreciate the complications and can source local advice where necessary to ensure that the corresponding tax law is complied with.
Merchandise is another area that can create tax issues for sportspersons. The sale of T-shirts, pictures and other items at tournaments is common. Where a sportsperson is performing at the tournament and receives a payment related to the sale of these items then it is likely that the payment will be regarded as connected to their performance and local tax will apply. This can be contrasted, however, with a sale of the same items within a shop or online which are not connected to a performance. Such income may, however, be in the form of a royalty payment or business income which could result in a local tax charge. A further issue for the sportsperson – or, more likely, their professional advisers – is to identify how the same type of income may be taxed in different circumstances.

Payments to another person
A further area that can cause tax problems for sportspersons is where the amount is not paid to the sportspersons themselves. It is not uncommon for sportspersons to set up a corporate entity to generate income from the exploitation of image rights, endorsements, and the like. Some countries operate a "look though" principle so that a payment to a corporate entity will be taxed in the country of performance if it is connected in any way to a performance at a tournament. One leading UK case on this involved Andre Agassi. A payment was made by a tennis racquet manufacturer to a non-UK company. However, after Agassi performed at a tournament in the UK, the UK tax authorities sought to tax a proportion of the payment as being attributed to the performance at the UK tournament. Despite the payment being made between two non-UK entities, it was decided that a proportion of the payment should be taxed in the UK. A similar situation led to Usain Bolt being reported as pulling out of an appearance in the UK, due to the proportion of his endorsement income that would be subject to UK tax if he went ahead.
Another example of a payment to another person is where a fee is paid to an agent or manager. If the payment relates to a performance at a tournament in, say, the UK, then that payment will fall to be taxed in the UK by reason of art. 17, although it may be possible to reduce the tax charge if not all of the payment is for the

benefit of the sportsperson. Once again, the importance of good tax advice cannot be stressed too highly.

Tournament exemptions

To deal with the tax complications that can arise at international sports tournaments, there are a number of exemptions that are granted. It is a requirement of FIFA and UEFA that tax exemptions are granted to sportspersons who play in their tournaments and finals. The failure to give such an exemption was reported as the reason that the UEFA Champions League final was not awarded to London, resulting in a special tax measure being introduced for the 2011 final. Those special measures only extended to non-resident players, however, so the incentives to win for Barcelona were perhaps greater than for Manchester United in that final!

A similar exemption is required to be granted for countries which host the Olympic Games. However, for the London Olympics in 2012, the exemptions applied to the income derived from performance at the games or in promoting the games. Any sponsorship or endorsement income that was not received from official sponsors of the Olympics was not covered. It is, therefore, important for any sportsperson, playing in a tournament that does allow for tax exemptions, to be certain of what, exactly, will be exempt.

Conclusion

As can be seen from the above remarks, the tax position of a sportsperson taking part in international tournaments can be a minefield and the importance of having professional advisers, who are fully aware of the tax issues, cannot be over emphasised."

We now report on the record results of the Winter 2023 football transfer window, quoting from the *News Release Deloitte Wednesday 1 February 2023*.

"Records tumble as Premier League clubs spend £815m in January transfer window

- *Premier League club's gross spend of £815m during the 2023 January transfer window was the largest ever – 90% higher than the previous record (£430m in 2018) and almost triple the previous January window (£295m).*
- *Premier League clubs also set a record for net transfer expenditure during a January window with a net spend of £720m, eclipsing the previous record set in January 2022 (£180m).*
- *Combined with the record spend during the summer transfer window (£1.9bn), Premier League clubs have spent a total of £2.8bn during the 2022/23 season, a new all-time high.*
- *Deadline day expenditure by Premier League clubs of £275m is also a new January window record, an increase of 83% over the previous record of £150m set in January 2018.*
- *The top six revenue-generating Premier League clubs accounted for 54% of the total gross transfer expenditure by the league, with Chelsea accounting for 37% of the total league spend.*
- *Premier League clubs accounted for 79% of total spending across Europe's "big five" football leagues – marking the highest proportion ever reported.*
- *Transfer spending fell across the rest of Europe's "big five" leagues, from €396m in in the January 2022 window to €255m.*
- *The total gross transfer expenditure for English Football League clubs during the January 2023 window totals £25m, up from £20m in January 2022.*

Premier League clubs spent a record-breaking £815m in the January 2023 transfer window, according to analysis from Deloitte's Sports Business Group. Gross transfer expenditure was almost triple Premier League clubs' spending in January 2022.

Following the record-breaking 2022 summer transfer window (£1.9bn), Premier League clubs have spent a total of £2.8bn overall on player transfers during the 2022/23 season, overtaking the previous record of £1.9bn set in the 2017/18 window by 47%.

Tim Bridge, lead partner in Deloitte's Sports Business Group, said: "The record spending by Premier League clubs this season is beyond anything that we've seen before. It is a clear indication of talent acquisition being core to Premier League clubs' business strategies. In securing the best available talent, clubs hope to improve results on the field, which in turn will enhance the appeal of the Premier League and further cement its position at the very top of world football. Premier League clubs have outspent those within the rest of Europe's "big five" leagues by almost four to one in this transfer window, allowing them to hold on to their key players, while attracting top-talent from overseas. However, while there is a clear need to invest in squad size and quality to retain a competitive edge, there will always be a fine balance to strike between prioritising success on-pitch and maintaining financial sustainability."

Premier League spending power

Over 85% of gross Premier League clubs' spending was directed towards acquiring players playing outside the UK in the 2023 winter transfer window – the highest ever share of transfer expenditure flowing outside of the Premier League. By contrast, £25m was spent on acquiring players from the Football League, up from just £1m in January 2022, but just 3% of total gross spending.*

Bridge continued: "The decline in spending across the English football system is likely to be of growing concern for members of the English Football League and could further fuel the debate around distributing finances more evenly across the pyramid. Transfer income from Premier League clubs, which has historically been an important source of club funding, now appears to be less guaranteed, with Premier League clubs choosing to prioritise talent from abroad."

Within the Premier League, five of the top six revenue-generating clubs (Manchester City, Liverpool, Chelsea, Tottenham, and Arsenal) accounted for 54% of Premier League club gross spend, with Chelsea accounting for 37% of the league's total spend while also breaking the British transfer record. In January 2023, Chelsea spent more on gross transfer expenditure than the combined total of all clubs in the Bundesliga, La Liga, Serie A and Ligue 1, and

more than the cumulative spend of Premier League clubs in each of the previous January windows, excluding 2018 (£430m).
AFC Bournemouth, currently 18th in the table, are the second largest spenders within the Premier League. The five clubs currently at the bottom of the Premier League (West Ham, Wolverhampton, AFC Bournemouth, Everton, Southampton) spent c.£175m, compared to the bottom five clubs in January 2022 (£150m). There are three Premier League clubs (Manchester United, Brentford, and Everton) who did not spend funds on acquiring players in the January 2023 window. Additionally, three Premier League clubs; Leeds, Chelsea and Southampton, broke their transfer records this window.

European transfer market

Across the rest of the "big five" European Leagues there was a cumulative gross spend of €255m and net receipts of €120m. This represents a year-on-year fall of 35% in gross spend compared to January 2022 (€395m).
Serie A reported the steepest year-on-year decline in gross transfer spend, falling 84% from €185m in January 2022 to €30m in January 2023, the lowest spend by the league since 2006, followed by La Liga (63%, €80m to €30m).
During the 2023 window, Premier League clubs reported a net transfer expenditure of €820m. Bundesliga also reported a net transfer expenditure of €5m, however the rest of the big five leagues reported net transfer receipts in this window as clubs looked to sell players before adding permanent or loanee signings (Ligue 1 – net receipts of €75m; Serie A – net receipts of €35m; La Liga – net receipts of €15m).
Calum Ross, assistant director in the Sports Business Group at Deloitte, commented: "Across Europe, many clubs have sold some of their most valuable talent to other leagues, particularly the Premier League, as they look to prioritise financial sustainability and likely have targeted the development of players that will appeal to the English market. The rest of the big five leagues in Europe have had more subdued spending power, likely impacted by negative growth in their broadcast rights in the most recent cycle, while at the same time, some European clubs are still recovering post-pandemic. In the future, the ability of such clubs to invest large sums in on-field talent will continue to be driven by funds generated across commercial, matchday and broadcast revenues, in addition to receipts from the sale of players."

Articles in this issue

We now turn our attention to some of the interesting and topical articles that you will find in this issue.
As you will see from the *Table of contents* of this issue, we include a wide range of topical sports law and sports tax articles, which will engage and inform our readers' attention and also provide them with many things to consider and ponder. Amongst them, we would mention a couple of them as follows.
One is on sexual abuse in a sporting context in South Africa, which, sadly, is not the only place in the world where such abuse occurs, particularly amongst minors and in a variety of sports, not least in swimming and gymnastics.
For example, see the Post on the *SLT* website on the *Whyte Review of British Gymnastics* published on 16 June 2022. In this article, Anneli Hyman, an Attorney of the High Court of South Africa and a Doctoral Candidate at the University of Pretoria, profiles the victims and perpetrators of sexual offences in sport in South Africa.
In her introductory remarks, Hyman points out that:

> *"In a South African sporting context, existing case law confirms that children are at highest risk of suffering sexual abuse. Studies have also shown that the gender of a victim is not the main indicator of a predisposition to sexual abuse, nor is the role, which the perpetrator portrays within the sport setting, a definitive indicator for occurrences of sexual abuse. Internationally and locally, the male coach remains the most featured perpetrator of sexual abuse in the sport setting, whilst South African case law pertaining to sexual offences committed in the sporting environment indicates that, in seven of the ten known cases, the victims were male children."*

In her concluding remarks, she points out that:

> *"There is no doubt that there exists a grey area in the sporting environment, where ample opportunity for abuse is available, and that the boundaries of acceptable and unacceptable touching between participants or between the coach, assistant coach, team medic, administrators, and participants, are blurred.*
> *Historic research has focused on the female-athlete, male-coach relationship; however, more recent research confirms that the group of vulnerable participants is much wider. South African case law confirms that children are at highest risk of falling victim to sexual abuse in the sporting environment and aligned with findings of past international research, the male coach was the perpetrator of sexual abuse in all South African cases.*
> *The perpetrators are, however, not limited to coaches, with international research showing that perpetrators come from a variety of groups and often include peer-athletes and, to a lesser extent, opponent participants."*

The other article – by David B. Hoppe, Managing Partner, Gamma Law, San Francisco, USA – is on esports and skill-based gaming in the USA .
In his introductory remarks he points out that:

> *"Esports and skill-based gaming have become highly competitive arenas, with millions of people playing against each other daily, vying for lucrative sponsorships, and supported by rabid fan followings. Many want to get a piece of the action. Esports Network expects real-money games industry revenue to top US$ 2.5 billion by the end of the year.*
> *Real-money skill-based gaming competitions are legal by default nearly everywhere globally, including most states in the US. Whilst the UK, Canada, and other countries are exploring the best ways to regulate real-money gaming, US federal law does not forbid it, largely leaving regulation of fantasy sports, online poker, trivia contests, and other skill-based games to the states. Few states expressly prohibit*

skill-based games, opting instead to regulate and license both online platforms and "real life" games in which players compete for money or prizes. The states most often separately categorize these games from online casinos, raffles, and other gambling sites where game outcomes are based upon pure luck.
The proliferation of mobile gaming has contributed to an explosion in both supply and demand for casual skill-based games that offer the opportunity to win real money. Entrepreneurs and investors eager to cash in on the trend must take care to structure their games – and their promotions – to emphasize skill over chance to satisfy state regulators and appropriately inform the gaming public."

In his concluding remarks, he points out that:

"The real-money skill-based gaming industry is exciting, lucrative, and legal in most jurisdictions. However, because it is a relatively new industry with evolving laws and regulations, operators should take steps to avoid misinformation and should, under no circumstances, assume that their games comply with the regulations of the regions in which they play.
Advice from an attorney can help real-money gaming platforms understand the law and standards each state or country applies when determining whether a game is skill based or constitutes illegal gambling."

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*, which has an increasingly wide international footprint! So, now read on and enjoy the March 2023 edition of SLT.

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

March 2023

The rights and obligations of distributors of live sports betting data

The Racing Partnership

BY HOLLIE HIGGINS[1]

Introduction

The Court of Appeal judgment in *The Racing Partnership v. Sports Information Services*[2] is essential reading for practitioners advising those who seek to exploit live sporting data as a commercial asset.

Reversing the judgment of the High Court, the Court of Appeal held that Sports Information Services was liable for unlawful means conspiracy, but not for breach of confidence, in collecting and distributing key "race day" data from horseracing arenas which The Racing Partnership had an exclusive contractual right to exploit.

This article examines the background to the case and the implications of the judgment for the law of breach of confidence/misuse of confidential information and unlawful means conspiracy.

Background

The Racing Partnership ("TRP") entered into an agreement with Arena Leisure Limited ("Arena") by which it acquired the exclusive right to collect and supply live betting and horseracing data from certain Arena racecourses to off-course UK bookmakers (including those operating online). As explained by the Court of Appeal, the ability to collate and distribute key betting data to bookmakers was a lucrative venture and one for which TRP was willing to pay significant sums of money.

However, TRP subsequently discovered that another company, Sports Information Services Limited ("SIS"), had been supplying data from the same racecourses to Betfred Group ("Betfred") and Ladbrokes Coral Group ("Ladbrokes"). SIS had previously been entitled to collect and distribute data from Arena racecourses pursuant to an agreement which had expired immediately before the commencement of the agreement between Arena and TRP.

One of the sources for SIS's alternative data package was race day data obtained from an entity called the Tote (Successor Company) Ltd ("Tote"), which had access to the relevant racecourse arenas in order to offer its pool betting services. The Tote is the successor to what was originally a public body established by the Racecourse Betting Act 1928, named the Racecourse Betting Control Board (later known as t the Horserace Totalisator Board). The Board had been authorised by the 1928 Act to operate a "totalisator" on all approved racetracks (in essence, an automated system which calculates and displays payoff odds for each horse). Throughout the terms of SIS and TRP's agreements with Arena, the Tote offered a pool betting service as part of which it collected and distributed data from racecourses to off-course bookmakers via a dedicated data feed.

TRP argued that SIS's conduct in obtaining and distributing data from Arena racecourses via the Tote, notwithstanding the expiry of SIS's prior contractual licence, was a breach of TRP's copyright and database rights, as well as a breach of confidence.

TRP also alleged that SIS had conspired with Ladbrokes, Betfred and the Tote[3] to use unlawful means to injure it. The unlawful means in question were said to comprise (amongst other things):

1 the Tote's breach of confidence and/or breach of contract in collecting and supplying certain data to SIS;
2 SIS's breach of confidence in supplying certain data to Ladbrokes and Betfred; and
3 SIS's admitted breach of the terms and conditions of third-party betting exchange websites to produce its own "betting shows".

TRP's database and breach of confidence claims focused on two types of horseracing data.

1 Barrister, Blackstone Chambers, London, UK, e-mail: HollieHiggins@blackstonechambers.com.

2 [2021] Ch 233, available at www.bailii.org/ew/cases/EWCA/Civ/2020/1300.html (accessed 15 March 2023).

3 The High Court observed a network of relationships between these alleged conspirators: SIS was wholly owned by Sports Information Services (Holdings) Ltd ("Holdings"); Ladbrokes owned 23% of the shares in Holdings; the Tote owned 6% of the shares in Holdings; in turn, the Tote was wholly owned (indirectly) by Betfred; and Fred Done, the founder of Betfred, owned 8% of the shares in Holdings. In addition, both Betfred and the Tote had the same Chief Commercial Officer at the material times.

1 Betting prices (in particular, fixed odds) being offered by on-course and off-course bookmakers. The parties were particularly concerned with the distribution of a "Betting Show" to off-course bookmakers, which is a single representative price for each horse algorithmically produced following a sampling of fixed odds being offered by on-course bookmakers in the lead up to a race.

2 "Raceday Data" being information specific to the racecourse on the day of the race such as weather conditions, the state of the course, the times and results of races. A subset of the raceday data, described as the "Key Raceday Triggers", comprised data of particular importance to bookmakers.

The High Court

In the High Court judgment[4], Zacaroli J found that both the Tote and SIS had committed a breach of confidence as a result of the communication and distribution of Raceday Data. However, he dismissed TRP's unlawful means conspiracy claim.

As regards breach of confidence, the controversy lay not in the basic principles of law but rather in their application to the facts. The test for breach of confidence is that set out in *Coco v. A.N. Clark (Engineers) Ltd* [5] per Megarry J and endorsed by the House of Lords in *Attorney General v. Guardian Newspapers (No.2)*[6] namely whether:

1 the information has the necessary quality of confidence;
2 the information was imparted to the recipient in circumstances importing an obligation of confidence; and
3 there was unauthorised use of that information to the detriment of the person entitled to the benefit of the confidential information.

Zacaroli J found that SIS was liable for that breach of confidence, because the Raceday Data had the necessary quality of confidence and a reasonable person in the position of SIS would have appreciated that the Tote had acquired the Raceday Data in circumstances imposing obligations of confidence and that those obligations would be breached if the Tote were to use that information otherwise than in the course of running its pool betting operations. Accordingly, SIS was liable as a result of what might be termed its "objective" rather than "subjective" appreciation that the Tote was not free to provide it with the Raceday Data.

As regards the unlawful means conspiracy claim, Zacaroli J found that SIS was not liable in a conspiracy because:

1 the Tote's supply of data to SIS did not amount to a breach of contract. The contractual terms and conditions otherwise applicable to racegoers could not have been intended to apply to the Tote, because they would have expressly prohibited the pool betting activities that the Tote had historically carried out, and there was no basis for implying a term which permitted such activities in the case of the Tote alone.
2 whilst the Tote's conduct did amount to a breach of equitable duties of confidence, this could not found a conspiracy claim, because, in order for a defendant to be liable for an unlawful means conspiracy, it was necessary that the defendant knows that the means were unlawful and SIS did not know that.
3 whilst SIS had breached the terms and conditions of Betdaq and Betfair to produce competing "betting shows", and acted knowing that its conduct was unlawful, that unlawful conduct could not found a conspiracy, because that breach was not the "instrumentality" by which TRP was harmed.

Central to the way in which the issues were determined at first instance, and played out on appeal, were Zacaroli J's findings as to the state of knowledge of SIS at the material times. He found that SIS did not know (in the sense of having actual or "blind eye" knowledge) that the Tote's conduct was a breach of confidence on the part of the Tote. In this regard, it was material that SIS had obtained contractual warranties from the Tote that it had the right to supply the data in question. However, Zacaroli J considered that a reasonable person in SIS's position would have appreciated that the Tote's conduct would amount to a breach of confidence, noting, in particular, that SIS was well aware that the Tote had never used Raceday Data for any purpose other than pool betting over the many decades of its existence and had no express contractual licence to use the Raceday Data. In essence, Zacaroli J was persuaded that SIS genuinely – but unreasonably – believed that what it was doing was entirely lawful.

The Court of Appeal[7]

SIS appealed against the High Court's finding that it was liable for breach of confidence. It argued that the Raceday Data lacked the *"necessary quality of confidence"* to give rise to equitable obligations of confidence, given that it was immediately apparent to racegoers and (at least some) of the data points would be apparent to those watching *"live"* television broadcasts. In any event, SIS argued that it ought not be liable in circumstances where it had received the data from the Tote pursuant to a contractual warranty that the Tote had the right to provide it.

TRP cross-appealed against the dismissal of the claim for unlawful means conspiracy, arguing that Zacaroli J had erred in finding that knowledge of unlawfulness was a requirement of the tort and/or had misunderstood and misapplied the *"instrumentality"* test of causation.

4 [2020] Ch 289, [2019] EWHC 1156 (Ch), available at www.bailii.org/ew/cases/EWHC/Ch/2019/1156.html (accessed 15 March 2023).

5 [1969] RPC 41 at p. 47.

6 [1990] 1 AC 109 at p. 268.

7 [2021] Ch 233, [2020] EWCA Civ 1300.

Breach of confidence

The Court of Appeal overturned the High Court's finding that SIS was liable for breach of confidence:

> *"Live sporting data does have the "necessary quality of confidence."*

At least a majority found that the Key Raceday Triggers[8] did have the necessary quality of confidence, such that there was no necessary bar to this kind of live sporting data being protected by equitable obligations of confidence. That was important in this case, because the Court of Appeal found that there was no express contractual restriction upon the Tote's dealings with the data (as opposed to a limited contractual licence to use that data for certain purposes, exceeding which would amount to a tort of trespass).

The principal reasoning on the *"necessary quality of confidence"* issue is found in the judgment of Arnold LJ[9], with whom Phillips LJ agreed[10] (albeit without further reasoning on this point). In his view, the true criterion of confidential information is not secrecy but inaccessibility. The data at issue in this case had been sufficiently inaccessible through the scheme of restrictions put in place by the racecourse operators and TRP[11]. It was material that TRP only claimed that the data was confidential only for a very short period of time before it entered into the public domain (and the fact that SIS did not rely upon TV broadcasting to obtain the same information illustrated the commercial value in speedier dissemination). It was clear that, for this short period of time, the data was commercially valuable and steps had been taken to control who had the right to deal with it. He placed particular emphasis upon the judgment of Lord Hoffmann in *Douglas v. Hello! Ltd (No.3)*[12] in support of the proposition that what matters in a breach of confidence claim (as distinct from a claim for misuse of private information) is that the information can be controlled and has commercial value, not whether it is information in respect of which any person has any *"reasonable expectation of privacy"* [13]. Just as Michael Douglas and Catherine Zeta-Jones had sufficient control over who photographed their wedding, Arena had sufficient control over who could access the data in the short period of time where it mattered.

Lewison LJ's views on this first issue are not wholly clear. It appears that he considered that mere commercial value alone could not suffice for confidentiality (in support of which he cited the memorable remark of Lord Walker in his minority judgment in *Douglas*[14], that the law of confidentiality should not *"afford the protection of exclusivity in a [public] spectacle")*[15]. He was also evidently concerned by the fact that some of the data in question was broadcast almost instantaneously to the public at large[16]:

> *"The live sporting data was not imparted to SIS in circumstances importing an obligation of confidence."*

However, the Court of Appeal held SIS was not liable for breach of confidence, because the data had not been imparted to SIS in circumstances importing an obligation of confidence.[17]

The majority placed particular weight upon the fact that SIS had obtained a contractual warranty from the Tote regarding its right to supply it with the data. Phillips LJ considered that contractual warranties of this kind should be the *"starting point"* in any analysis and would prevent recipients of information from being subject to duties of confidence except where there were *"clear countervailing indications, sufficient to override the contractual assurance"*, which did not exist on the facts of this case. Similarly, Lewison LJ considered that there was no reason why SIS ought to have *"second guessed"* the Tote's warranty in circumstances where there was no contractual prohibition upon the Tote's dealings with the data (as opposed to a limited contractual licence) and this was a case in which the relationship between Arena and the Tote was otherwise partly governed by contract (unlike in *Douglas*).[18]

Unlawful means conspiracy

TRP fared better with its unlawful means conspiracy claim.

A majority of Arnold LJ and Phillips LJ held that it is not necessary for an unlawful means conspiracy that the defendants know that the means are unlawful.[19] The key reasons for this conclusion were three-fold. First, ignorance of the law is generally no defence and no exception to that adage was justified (for example, to *"keep the cause of action within proper boundaries"*, as argued by counsel for SIS), because the law does require a defendant to have knowledge of all of the *facts* which make the means unlawful.[20] Second, importing a knowledge requirement into unlawful means conspiracy would render the tort of inducing breach of contract redundant (for which knowledge is

8 On appeal, the focus was on the "Key Raceday Triggers" as a result of the way in which the cases had been pleaded, although it was expressly noted that this narrower focus enabled the Court of Appeal to deal with trickier issues regarding whether information about the weather could ever be protected by obligations of confidence.

9 At p. 43-77.

10 At p. 173.

11 At p. 68.

12 [2008] AC 1.

13 At p. 70-71.

14 At p. 300.

15 At p. 190-193.

16 At p. 189.

17 The key reasoning on this point is found at p. 182-212 (Lewison LJ) and p.170 (Phillips LJ). Arnold LJ dissented on this point (p. 78-103).

18 At p. 139.

19 At p. 139.

20 At p. 141.

required).[21] Third, knowledge would still be required where the unlawfulness of the means requires knowledge.[22]

This approach brings the tort of unlawful means conspiracy into closer alignment with common design. To be liable in common design, *"D must have acted in a way which furthered the commission of the tort by P; and D must have done so in pursuance of a common design to do or secure the doing of the acts which constituted the tort"*.[23] It is not necessary to show that the joint tortfeasor appreciated that the acts, which he had combined to bring about, amounted to a tort in law if he intended for those acts to be done. In his judgment in *Sea Shepherd*[24], Lord Sumption expressed the view that the dual requirements of active co-operation and commonality of intention sufficiently constrained the scope of liability in common design.

However, Lewison LJ's dissent on the knowledge requirement – containing no less than eleven reasons[25] why such a requirement ought to be recognised[26] – indicates that this issue may remain fertile ground for an appeal to the Supreme Court in the future if any litigant should choose to pick up this particular gauntlet.

The determination that knowledge of unlawfulness is not a requirement of the tort of conspiracy, coupled with a finding that the Tote's breach of confidence did satisfy the *"instrumentality"* test of causation, paved the way to TRP's success on its unlawful means conspiracy claim.

Comment

The Supreme Court subsequently granted permission to appeal on grounds which effectively put into play almost the entirety of the Court of Appeal's analysis on both the breach of confidence and conspiracy issues. However, a confidential settlement between the parties meant that the Supreme Court did not get the opportunity to opine upon these issues and the Court of Appeal's judgment therefore remains the leading authority on these matters – for now.

The Court of Appeal's judgment illustrates the difficulties that sporting event organisers and live sporting data distributors with exclusive contractual rights to data will face if they seek to plug contractual gaps in protection by praying in aid of equitable breach of confidence. In particular, the weight placed by the Court of Appeal upon the warranty provided by the Tote to SIS that it was entirely free to distribute the live sporting data – which warranty was, in the event, found to be false – demonstrates one particular problem in seeking to establish equitable duties. Contract, therefore, remains king. Those acquiring distribution rights will do well to undertake proper due diligence of the contractual restrictions placed by organisers and venues on other attendees, including "unofficial" data distributors.

However, the news is not all bad. The clear finding that the live sporting data at issue had the necessary quality of confidence still leaves organisers and official distributors with room for manoeuvre where tighter contractual protections exist. Further, those with less than watertight contractual frameworks will find comfort in the success of TRP's claim for unlawful means conspiracy. Finally, this judgment sits alongside the Football Dataco litigation which established that database rights will serve to prevent the copying of sporting data provided that sufficient investment has been expended in selecting and arranging the same. See the Court of Appeal's judgment following a reference to the CJEU.[27]

Ian Mill KC and Tom Cleaver (counsel for TRP) and Michael Bloch KC (counsel for SIS) are members of Blackstone Chambers, along with the author. The author was instructed with Ian Mill KC to represent TRP in the Supreme Court.

21 At p. 142.

22 At p. 143.

23 *Fish & Fish Ltd v. Sea Shepherd UK* [2015] AC 1229, at p. 21 per Lord Toulson).

24 At p. 44.

25 A much longer article would be required to do justice to Lewison LJ's reasoning but, in essence, his rebuttal centred upon the different societal value underpinning the criminal and civil notions of conspiracy. As regards the latter, in his view the policy behind the economic torts would not be furthered by preventing a defendant from relying upon their mistake as to the law as a reason for justifying what they did.

26 At p. 231-265.

27 [2013] EWCA Civ 27.

Football:

The FIFA football agent regulations

By Dr. Lucien W. Valloni and Sara Botti [1]

Introduction

The *FIFA Football Agent Regulations* ("FFAR") are the result of a consultation process initiated in 2018. In October 2020, FIFA sent a draft to various entities representing member associations, confederations, football agents, players, and clubs. After first consultations, the draft has been re-analysed by parties and on December 2021 FIFA established the ultimate version of FFAR. One year later, after receiving several feedback and modification requests, the final version has been approved when, on 16 December 2022, the FIFA Council, in a meeting claimed by several parties to have taken place in secret, approved the FFAR. In that moment, the agent's clock has been turned back years, specifically to before 2015.

The field of applicability of the FIFA Regulations is international; it applies, by definition, to all representation agreements with an international dimension and to any negotiations related to an international transfer or international transaction; and the new rules will take full effect on 1 October 2023.

This article sets out to analyse the definitive text, which went into effect in early 2023, especially from an athlete protection perspective.

As stated by FIFA *"[t]he new FIFA Football Agent Regulations (FFAR) will come into force on Monday, 9 January 2023, thus marking a landmark step towards the establishment of a fairer and more transparent football transfer system"*[2]. A revolution that was discussed for years and certainly displeased the agent world, as it swept away the incredible space of freedom that the seven-year deregulation had granted.

The main changes are:

- the re-introduction of the worldwide licensing system;
- a ban on representing all parties at the same time;
- a cap on commissions;
- the introduction of the figure of the coach's agent; and
- the introduction of new categories of players as minors.

Lastly, the regulatory provision of devolving dispute resolution to the FIFA Football Tribunal is a hot topic; in other words, a reserve of jurisdiction.

In FIFA's view, these changes should bring stability and transparency to the system, as well as impose an increase in the level of professionalism of agents of whom at least those without pre-2015 licenses are displeased.

The football agent profession from 2015 to the present

In 2015, at the wish of FIFA, the figure of the agent disappeared, and the figure of the intermediary emerged. It was an unprecedented liberalization that FIFA chose to implement in an effort to liberalize the market, but to the detriment of many. In the blink of an eye, duly licensed FIFA agents were equated with self-proclaimed intermediaries, who usually only had to report their status to the federation to operate.

The national federations were, at this point, responsible for regulating access to the profession, and, in some cases, as in Italy and France, a very selective examination was maintained. The experience was disruptive and displeased both the agents holding the license and the football players, the main victims of this system. A clear example of the boundless freedom granted to intermediaries was the option to simultaneously represent the footballer, the releasing club, and the engaging club.

That said, a modification of the "Agent-Athlete-Club" system was considered necessary by several parties because the massive liberalization of 2015 was not satisfactory anymore. Two widespread borderline cases made this requirement necessary. On the one hand, not all soccer players trusted these new intermediary figures; on the other hand, too many young people were entrusted to inexperienced hands.

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2 "New FIFA Football Agent Regulations set to come into force", in: *FIFA*, 6 January 2023, available at https://www.fifa.com/legal/football-regulatory/agents/news/new-fifa-football-agent-regulations-set-to-come-into-force (accessed 15 March 2023).

A 2019 *New York Times report*[3] highlighted the tendency of Premier League players to vest their relatives with the power to represent them. Several interviews later, the conclusion was that many players trusted blood relatives more than strangers as they could have a more direct relationship, did not put their interests ahead, and would never harm.

In parallel, too many stories are told about very young people entrusted by their families to middlemen of questionable provenance and morality, unable to foresee the growth of the represented and interested in immediate gain.

Already in 2018, the desire for change had taken place; the FIFA website states:

> *"The FFAR were approved by the FIFA Council at its meeting in Doha in December 2022 following a very robust and open consultation process carried out by FIFA since 2018 and involving all key international football stakeholders. FIFA's consultation and reform process for the FFAR as a whole was, and is, publicly accompanied and supported by various institutions and bodies."*[4]

In this framework, however, there has also been room for players' unions, which have always been sentinels on the front lines for the protection of players, especially those in the weaker sections. The unions, even in the FFAR approval stages, were formally heard and given an opportunity to intervene, especially on some issues that will be analysed below.

Thus, only three years after liberalization was introduced, the work of modification began, leading us to December 2022.

The new FFAR

Following their approval by the FIFA Council in December 2022, the new FIFA Football Agent Regulations have come into force on 9 January 2023. There will be a transition period ahead of the obligation to only use licensed football agents and the cap on agent fees, which will happen on 1 October 2023.

The FFAR consist of only 28 articles, but very detailed; the opening regulations are filled with intentions.

FIFA reminds us that it has a statutory obligation to regulate all matters relating to the football transfer system to protect the contractual stability between professional players and clubs, encourage the training of young players, promote a spirit of solidarity between elite and grassroots football, protect minors, maintain competitive balance, and, last but not least, ensure the regularity of sporting competitions.

Art. 2 explains very clearly what this is about:

- raising and setting minimum professional and ethical standards;
- ensuring the quality of the service provided at fair and reasonable service fees that are uniformly applicable;
- limiting conflicts of interest to protect from unethical conduct;
- improving financial and administrative transparency;
- protecting players;
- enhancing contractual stability between players, coaches, and clubs; and
- preventing abusive, excessive and speculative practices.

Highlights are:

a the FIFA licensing agent provision;
b ban on multiple representations; and
c the new representable parties: coaches and minors.

The FIFA licensing agent provision

To become an agent, a person may submit a complete license application, if already had, or successfully pass an exam conducted by FIFA; in any case, it is mandatory to comply with the eligibility requirements and pay an annual fee. The exam will be a multiple-choice test prepared by FIFA and will test knowledge of current football regulations; the applicant will sit the exam at the member association selected in their license application. Once taken the exam and paid the annual fee, the agent will receive an indefinite license, valid worldwide and strictly personal, therefore, not transferable.

Of course, a football agent can conduct business through an agency, but remains fully responsible for any behaviour by the agency, the employees, contractors, or other representatives in case of any violation of the FFAR.

According to FFAR, only a football agent may perform football agent services. This simple phrase, contained in art. 11, has given rise to lively exchanges between unions and FIFA. What are *"football agent services"* and why only agents and not, for example, unions, may perform this kind of services to players?

Football Agent Services are clear in the opening definition chart of FFAR as

> *"football-related services performed for or on behalf of a client, including any negotiation, communication relating or preparatory to the same, or other related activity, with the purpose, objective and/or intention of concluding a Transaction".*

In the same chapter, it is possible to read a definition of Other Services as:

> *"any services performed by a Football Agent for or on behalf of a client other than Football Agent Services,*

3 *The New York Times*, "When Soccer Is a Family Business", available at www.nytimes.com/2019/08/17/sports/when-soccer-is-a-family-business.html (accessed 15 March 2023).

4 "New FIFA Football Agent Regulations set to come into force", in: *FIFA*, 6 January 2023, available at https://www.fifa.com/legal/football-regulatory/agents/news/new-fifa-football-agent-regulations-set-to-come-into-force (accessed 15 March 2023).

including but not limited to, providing legal advice, financial planning, scouting, consultancy, management of image rights and negotiating commercial contracts".

Thus, what is the role of other professionals like unions or lawyers? May they assume to be part of the system or no longer?

The lawyer's side is quite simple; as long discussed, lawyers cannot, in any way, be taken away from providing counselling services to agents, individuals, or clubs, but cannot perform as a proper football agent.

In Italy and France, countries with a highly strict national regulation about domestic football agents, the discussion has reached the top level of the jurisdiction. The Appel Court of Paris[5] stated that only a football agent can perform football agents' services; simultaneously, the Italian National Forensic Council opened to a provision of a lawyer football agent, but the National Cassation Court stated[6] that only a *"registered football agent"* may act in accordance to its name.

The unions case is very different. It is in the DNA of any union to protect and represent players. And various unions also have a special official union agency. The reason for this is simple. To many, black sheep were on the market and the unions had to help the players when it was too late. Hence, some unions decided to have their own agency to enter the market and to try to have serious agents in the market for the players to select. The unions were always permitted to exercise this function and under the new Regulations they are still allowed to do so.

Ban on multiple representations

In addition to the reintroduction of the license system, aimed at raising the standard of professionalism of agents, the ban on multiple representations and therewith to avoid conflict of interests of agents, is certainly one of the most important innovations of the reform, with the aim to protect players. A football agent may only perform services for one party in a transaction, subject to the sole exception of art. 12.8. A dual representation is permitted in the same transaction, only if explicit written consent is given by both clients.

A ban also exists on the category of represented client: an agent may not represent simultaneously the releasing entity and the individual or the releasing entity and engaging one.

Furthermore, a football agent may not bypass these restrictions by acting through an agent connected to the same agency or an agent with whom it has entered into a contractual or other formal or informal agreement to cooperate.

If it is clear why a triple representation could be detrimental for parties involved in a deal under a conflict of interest perspective, it is not as clear why a football agent is not entitled to represent the releasing club and the athlete, considering that the interests of both usually go in the same direction and given the fact that the rules do permit the agent to represent the player and the engaging club.

Anyway, who is going to pay what? The FFAR point out, at art. 14, that:

"a football agent may charge a service fee to a client as agreed in a representation agreement. Payment of the service fee due under a representation agreement shall be made exclusively by the client of the football agent. A client may not contract with or authorise any third party to make such payment."

The only exception to this principle is when a football agent is representing an individual and their negotiated annual remuneration is less than US$ 200,000 (or equivalent), not counting any conditional payments. In such cases, an engaging entity may agree with an individual to pay the service fee for that transaction to their football agent in accordance with the representation agreement.

According to art. 14, if an agent acts on behalf of an engaging entity and player or coach in the same transaction (permitted dual representation), the engaging entity may pay up to 50% of the total service fee due.

A representation agreement may be terminated at any time by either party if there is only cause to do so; otherwise, an obligation arises to compensate the other party for any resulting damage.

However, just cause is not required when a party can no longer reasonably expect, in accordance with the principle of good faith, to continue the contractual relationship for the agreed term.

The new representable parties: coaches and minors

Coaches had already been using agents to advocate their positions in negotiations with clubs for some time, but now they have obtained with the new FFAR an ad hoc provision. Greenlight, then, to the figure of the coach's agent, who will be subject to the same rules established for other representable parties.

One revolution is certainly the normalization of the agent of minor players, with an express provision for linkage to the legislation of the country where the minor will be employed.

About minors, the need to expand their protection has been reported from many sides. The trafficking of very young players, especially from the global south is a worrisome phenomenon, and FIFA could not turn its back on it. Again, an expansion of protection can only be welcomed by athletes.

5 Walid Kachour, "Football: les agents de joueurs marquent un point contre les avocats", in: *Le Monde*, 28 December 2021, available at www.lemonde.fr/sport/article/2021/12/28/football-les-agents-de-joueurs-marquent-un-point-contre-les-avocats_6107515_3242.html (accessed 15 March 2023).

6 Cass., Sez. III Civile, 23 September 2015, no. 18807.

So, as ruled by FIFA, an approach or any subsequent execution of a representation agreement to a minor or their legal guardian may only be made not more than six months before the minor reaches the age where they may sign their first professional contract in accordance with the law applicable in the country or territory where the minor will be employed. This approach may only be made once prior written consent has been obtained from the minor's legal guardian.

It is also provided that an agent that wishes to represent a minor or represent a club in a transaction involving a minor shall first successfully complete the designated Continuing Professional Development course on minors and comply with any requirement to represent a minor established by the law applicable in the country or territory of the member association where the minor will be employed.

The service fee cap: the wrath of the agents

The service fee cap is the topic that mostly impacts on players; this sounds strange, but it is not if you do not go beyond a shallow reading of FFAR. During the writing of the drafts that have followed one another over time went out an alternative service fee payment method, based on an hourly rate and retainers in a manner that was not capped. This provision has been dismissed to introduce a new service fee cap.

During the working progress, FIFA understood that the capping of service fee payments was a contentious issue. Two general sets of submissions were received:

- the cap should cover all forms of payment of service fees to football agents;
- the cap for representing engaging entities or individuals should be increased, and this has happened.

According to FIFA, a fee cap was necessary for protecting the integrity of the sport and good functioning of the football transfer system by tackling the alleged excessive level of agent fees and, basically, to preventing abusive, excessive and speculative practices.

Concerning the introduction of a lower cap fee, FIFA accepted the proposal of increasing if a low percentage will mostly affect football agents with small or medium-sized businesses and it will also incentivise football agents with large-sized businesses to circumvent the FFAR. Besides, a low fee cap will probably create a "black market" encouraging the activity of unlicensed agents as an opposition to football agents.

From the side to players and coaches, FIFA appointed that such a situation would encourage football agents to advise their individual clients to move as much as possible to obtain a service fee, as opposed to acting in their best interests.

The fact is that today FIFA has contemplated direct control over agent service fees.

Who is going to save money or have the higher profit?

It is clear that the new rules will help clubs to save money. As a principle the players will have to pay their own agent unless they earn less than US$ 200,000. This was done to eliminate the conflict-of-interest issues. However, if an agent was acting honestly, diligently and in full transparency with his client and in the interest of the player, it was a positive thing for the player that the agent costs were paid by the club. Furthermore, the clubs are going to save money also on the amount of agents' fees as such because a mandatory cap was introduced on these fees.

The following are the regulations:

- if the client is an individual, in case of annual remuneration less than or equal to US$ 200,000 the cap fee is 5%, which becomes 3% in event of major remuneration;
- same story if the agent represents an engaging entity;
- the cap fee rises to 10%, with no provision of remuneration stage, if the client is the releasing entity;
- if the agent represents simultaneously the individual and the engaging entity, the cap fee is 10% of the annual remuneration if less than US$ 200,000 and 6% in other scenarios.

The remunerations must be intended as gross and may not consider any conditional payments.

Disregarding any kind of privacy, art. 19 of the FFAR mandates that FIFA make available the details of all agents, including the list of their clients, details of representation agreements, and even the amounts of commissions paid. Besides, all service fee payments to football agents shall be made through the FIFA Clearing House. Transparency more extreme than this does not exist.

For sure, football agents are on the rampage. The Professional Football Agents Association ("PROFAA"), based in Switzerland, announced on 17 January 2023, to have formally commenced action against the FFAR; according to the media statement, the matter will be pursued before the Court of Arbitration for Sport ("CAS"). IAFA (Italian Association of Football Agents), from its side, announced a range of events to dispel doubts about the impact on the domestic rules.

The EFAA (European Football Agents Association), the longest-running agents association, with over 1,000 members across five continents, uses strong words and dismisses FIFA's forthcoming Regulations and the regulatory process in totality; FIFA, it has been claimed:

> *"has tricked the football world into believing it is the saviour of the industry, using agents as scapegoats for its political mission. They choose to create an unjustified 3% fee cap that will destroy the careers of thousands of small agents worldwide so that they can look good in press headlines the next day."*[7]

No doubt, therefore, that there will be a legal fight from football agents all over the world leading to severe implications on agreements signed in the meantime.

The Agent Chamber of the Internal Football Tribunal and the validity of existing representation agreements

On the matter of jurisdiction, FIFA also wanted to strengthen its direct control over agents and act directly in disputes. Indeed, provision was made for the Agent Chamber, a section of the Internal Football Tribunal aimed at settling all disputes:

a arising out of, or in connection with, a representation agreement with an international dimension;
b where a claim is lodged in accordance with the procedural rules governing the Football Tribunal;
c where no more than two years have elapsed from the event giving rise to the dispute.

However, without prejudice to the right of an agent or a client to seek redress before an ordinary court of law, for disputes arising out of, or in connection with, a Representation Agreement without an international dimension, the decision-making body identified in the national football agent regulations of the relevant member association has jurisdiction to determine such disputes.

As closing articles, the FFAR states that Representation Agreements that expire on or after 1 October 2023 in force at the time at which these Regulations are approved, notwithstanding those that do not meet the minimum requirements as the indication of the names of the parties, duration, amount of service fee, nature of services to be provided and parties' signatures shall remain valid, but not be extended until they expire.

Conclusions

On 6 February 2023, FIFA announced to have established a Football Agent Working Group composed of representatives of professional football stakeholders and agent organisations from across the world that will act as a permanent consultative body in relation to football agent matters, including the practical implementation of the new framework, as well as possible future amendments or changes to the FFAR.

Between the 18 representatives indicated, one seat is allocated to FIFPRO. It is thus obvious that players that are in almost all cases affected by these rules are underrepresented in this Football Agent Working Group.

7 EFAA, "EFAA Publishes Press Release in Response to FIFA's Claims", available at www.eufootballagents.com/blogs/efaa-publishes-press-release-in-response-to-fifas-claims (accessed 15 March 2023).

Guide for players, agents, coaches and clubs

Basketball Arbitral Tribunal

BY PAUL J. GREENE

Introduction

Originally known as the Fédération Internationale de Basketball (FIBA) Arbitral Tribunal, the Basketball Arbitral Tribunal ("BAT") was established in 2006 to allow for the resolution of contractual disputes between players, agents, coaches, and clubs through arbitration. The organization, which has its seat in Geneva, Switzerland, is composed of a president, a vice-president, and eight arbitrators.

When compared to a traditional litigation and a court-based approach to resolving conflicts, the BAT provides a simple, quick, and inexpensive method of dispute resolution.

General features of the BAT

- Decisions are made based on the legal concept *"ex aequo et bono"*, which translates literally to *"according to the right and good"* or *"from equity and conscience"* (that is, what is fair or equitable). This equity standard means that BAT decisions are made on the basis of general considerations of justice and fairness without referring to any particular national or international law, which allows arbitrators more discretion of how to resolve matters.

- It generally takes between six and nine months to receive a BAT arbitration award. In comparison, it would take two to three years for a similar lawsuit to proceed through a civil court.

- The administrative fees to bring a case to the BAT are between € 1,500 and € 7,000 depending upon the amount in dispute. Fees for the arbitrator and the BAT president are based upon the complexity of the case and are generally between € 4,000 and € 12,000. In comparison, costs for bringing lawsuits in European countries often exceed € 75,000.

Jurisdiction of the BAT

The BAT can resolve contractual, that is, non-disciplinary, non-technical, and non-eligibility related disputes in the world of basketball, as long as FIBA, its respective divisions, or its disciplinary bodies are not directly involved in the dispute.

However, since the BAT is not mandatory for basketball disputes, a dispute is only admissible to BAT if the contractual agreement between the parties contains an arbitration clause such as:

> *"Any dispute arising from or related to the present contract shall be submitted to the Basketball Arbitral Tribunal (BAT) in Geneva, Switzerland, and shall be resolved in accordance with the BAT Arbitration Rules by a single arbitrator appointed by the BAT President. The seat of the arbitration shall be Geneva, Switzerland. The arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law, irrespective of the parties' domicile. The language of the arbitration shall be English. The arbitrator shall decide the dispute ex aequo et bono."*

A BAT arbitrator can refuse to proceed with the arbitration, at any time, if they believe that the tribunal is not appropriate to resolve the dispute.

Language of the proceedings

The working language of the BAT is English, but the arbitrator may decide to hold proceedings in another language after consulting the parties involved in the dispute.

Any documents provided in a language other than English must be accompanied by a certified translation unless the arbitrator decides otherwise.

Procedure

The BAT is seated in Geneva, Switzerland. Accordingly, BAT arbitration is governed by local Swiss laws as well as its own arbitration rules as outlined in Chapter 12 of the Swiss Act on Private International Law ("PILA").

As compared to the Court of Arbitration for Sport ("CAS"), which allows for either one or three arbitrators to decide a dispute, BAT is different in that its rules allow for only one arbitrator, chosen by BAT itself, to arbitrate the matter.

If you have legitimate doubts about the arbitrator's independence or objectivity, you have the right to challenge their appointment.

This request must be brought within seven days after the grounds for the challenge first become known. Challenges are reviewed by the BAT president. If the challenge is

successful, the next available arbitrator will be chosen.

A BAT arbitration can only commence once the claimant(s) send the BAT Secretariat a complete Request for Arbitration. There is a pre-established template on the FIBA website1 that is used to ensure all necessary information is provided from the start.

Besides providing a copy of the contract containing the BAT arbitration agreement, the Request for Arbitration must contain:

- contact details of all parties involved;
- a statement of all the facts and legal arguments on which the claimant seeks to rely (given claimants are typically only permitted one submission, all information the claimant deems relevant should be incorporated into the Request for Arbitration);
- the claimant's request for relief;
- the total amount of interest or penalties sought;
- all the evidence the claimant intends to rely upon; and
- whether the claimant requests a hearing.

However, a hearing is only held if the arbitrator determines that it is necessary after having consulted the parties.

Similar to the CAS, the BAT will not proceed until the full amount of the advance of costs is received. A party may decline to advance their share of costs, but if this happens, the other party will have the opportunity to pay the full amount to ensure the arbitration commences.

Awards

The BAT will issue an arbitration award within six weeks of the end of the proceedings or payment of any outstanding advance on costs, whichever comes last.

The BAT awards are not confidential unless this has been ordered by the arbitrator or the BAT president.

BAT awards do not automatically include reasons unless the dispute exceeds € 100,000. If the dispute is under this amount, reasons will only be provided if the party files a request at any stage of the proceedings from when the request for arbitration is filed until no later than 10 days after the notification of the award without reasons.

Awards are final and binding upon communication of the award to the parties by e-mail, fax, courier, or registered letter. If the award is unable to be delivered directly to one of the parties, it becomes final and binding when published on the website of FIBA, assuming that the party was notified of the arbitration and the appointment of the arbitrator.

Failure to honour a BAT award may result in FIBA sanctions such as:

- monetary fines;
- ban on international transfer for a player;
- ban on registration of players for a club; or
- withdrawal of a FIBA agent's license.

Sanctions can be applied cumulatively and more than once if the BAT deems it appropriate.

Enforcement of BAT awards and appeals

As true arbitral awards, BAT awards may be enforced in accordance with the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958.

Initially, parties were allowed to appeal BAT awards to the CAS. However, this right to a CAS appeal was abolished in 2010. Currently, the annulment authority is the Swiss Federal Tribunal. Acceptable grounds for annulment are outlined in Chapter 12 of the PILA:

- wrongful appointment of a sole arbitrator or the constitution of the panel;
- the BAT wrongly accepted or declined jurisdiction;
- the arbitrator ruled beyond the claims submitted to it or failed to decide one or more claims submitted to it;
- the parties' fundamental procedural rights were breached; or
- violation of basic procedural rules or Swiss public order.

Hiring an experienced sports arbitration lawyer

Hiring an experienced and proven sports arbitration lawyer for a BAT case will ensure that you understand what rules are in place and prevent you from making statements that might inadvertently hurt your case. Your sports arbitration lawyer will also handle all communication with parties involved in the dispute, which will allow you more time to focus on excelling in the sport you love.

One advantageous feature of the BAT is the ability to award legal costs to the victorious party. This allows you to use a specialized law firm that best meets your needs since any expenses incurred by your lawyers may ultimately be recovered.

1 www.fiba.basketball/bat/process (accessed 15 March 2023).

Inspirational athletes:

Mbappé "the golden boot" and Messi "the G.O.A.T. of football"

BY STEFANOS GREGORIOU AND CONSTANTINOS MASSONOS[1]

Mbappé

Kylian Mbappé Lottin is a French professional soccer player who plays forward for the Ligue 1 club Paris Saint-Germain and the French national team.

He is considered to be one of the world's top youngest soccer players and is admired for his incredible speed, accuracy, perseverance and scoring ability, when it comes to his performance on the field. At 24 years old, he has already managed to achieve more than most professional soccer players ever will: winning the hearts of his fans all around the world.

First and foremost, his athletic accomplishments and performance are truly inspiring.

Mbappé was born in 1998, in Bondy, France. He quickly burst onto the scene with AS Bondy's youth academy, where he rapidly distinguished himself and stood out for his extraordinary sports talents. He later joined the youth academy at INF Clairefontaine, where he continued to work on his skills and athletic abilities.

In 2013, at the age of 14, Mbappé joined the youth academy in Monaco, where he quickly made a name for himself. In 2015, he made his professional debut for the club, becoming the club's youngest player in almost 30 years. He soon established himself as a regular starter and helped lead the team to the 2016-2017 Ligue 1 title.

Mbappé's achievements with Monaco attracted the interest of some of Europe's top clubs, leading him to join Paris Saint-Germain on loan in August 2017, with the option to make the transfer permanent. There, his talent shined once again, having an instant impact on the club, scoring 26 goals in all competitions and helping lead the squad to the Ligue 1 title in his debut season. In 2018, his loan was converted to a permanent transfer, and he became a permanent member of the club.

It is also worth mentioning, that, at an international level, Mbappé made his debut with the French national team in March 2017 and soon became a key player for the team. He helped France win the 2018 FIFA World Cup, by scoring four goals and becoming the youngest player to score in a World Cup final since Pele in 1958.

By the end of the 2021-2022 season, Mbappé had managed to win five Ligue 1 titles: one with Monaco and four with Paris Saint-Germain and three French Cups with Paris Saint-Germain.

Another moment of glory at an international level was when France won the 2020-2021 UEFA Nations League. Even though the French did not manage to beat Argentina in the finals of the FIFA World Cup Qatar in 2022, Mbappé stole the show; being the tournament's top scorer with eight goals and the second player in history to score a hat-trick in the final. His performance won him the Adidas Golden Boot award.

His fame and sports success led to several partnerships, including major brands like Nike and Hublot. In 2020, he was chosen by EA Sports for the cover of FIFA 21, making him one of the youngest players to ever get a solo cover with the brand.

Mbappé is not just a soccer icon, but he is also known to the general public for his social impact and activism. He has openly addressed the issue of racism in soccer and has been a supporter of greater diversity and inclusion in sports. He is not afraid to use actively his social media platforms to raise awareness about the need for change and to motivate others to take action in the fight against racism in sports.

Furthermore, Mbappé is also involved in a variety of charitable causes, particularly ones involving children and their rights. In 2021, he also released *"Je m'appelle Kylian"*, a graphic novel whose purpose is to inspire children to chase their dreams.

1 Both of The Sports Financial Literacy Academy, Nicosia, Cyprus. For further information on the services to athletes of the Academy, log onto: https://moneysmartathlete.com.

Despite his great success, he remains down-to-earth and is respected by teammates, coaches and fans for his humility, dedication and work ethic, on and off the field of play. In addition, his charismatic and authentic personality, personal beliefs, and life story serve as an inspiration to many. He comes from a humble family background and always remains faithful to his roots; never forgetting where he came from and always willing to give back.

His dedication and perseverance are also shown in his famous quote:

> *"I've never said I was going to be the greatest player in history, but I've never put limits on myself. If I get to a certain level, I'm not going to stop myself by putting a barrier up, like: "If I get there, then that's it, that's my maximum." No, I try to push my boundaries and see where that takes me. For the moment, it's working well for me, and I'll keep doing that until the end of my career."*

Obviously, Kylian Mbappé is more than just a talented soccer player: he possesses a personality that inspires and influences the general public. His professional accomplishments, as well as his personal life, show that achieving tremendous success whilst making a difference in the world is an attainable goal!

Messi

It was a first for the worldwide football community to watch the 2022 FIFA World Cup taking place during November and December in Qatar, instead of the typical June and July. There was a lot of anticipation for the tournament, not because of the dates on which it was taking place, but rather because it felt like it was "a last dance" for one of the greatest footballers of all time, Lionel Messi, forward for Paris Saint-Germain and Argentine national team captain.

Messi at the age of 35, has already won some of the most prestigious trophies in the football world with his former club FC Barcelona, before moving to France and Paris Saint-Germain in 2021. He is also the highest paid athlete for 2022 according to Forbes. Yet, Messi's career could have finished before it even began if FC Barcelona had not decided to invest in his natural football talent.

Lionel Andres Messi was born on 24 June 1987 in Santa Fe Province, Argentina. He started playing football at the age of 5 at a local club called Grandoli, where his father was also working as a coach and in 1994 he was scouted and recruited by top tier Argentinian football club Newell's Old Boys. Despite his small stature, young Lionel was not a pushover and managed to score more than 500 goals during his tenure in Newell's.

At the age of 11, Lionel's height was 132 cm, and he had not grown at all since he was 9. After a year of tests, he was diagnosed with growth hormone deficiency. His father, a steelworker, and his mother, a part-time cleaner, tried their best to keep up with Lionel's hormone therapy that cost around US$ 1500 per month.

Utilizing family connections in Catalonia, Messi's family managed to arrange a trial in La Masia and Lionel convinced the coaches that he was worth investing in. All his treatments were now covered by FC Barcelona, something that allowed him to eventually reach the average height for an Argentinean male.

A few years later, Barcelona started cashing in on its investment after Messi rose through the youth ranks to have his first team debut at the age of 17, next to players such as Ronaldinho and Samuel Eto'o, and, eventually, becoming an iconic player for his club and his country.

The hardships Messi faced early in his life have played a huge role in building his humble character, both on and off the field of play, making him an inspiration to us all. His small size taught him to play with sharpness and quickness, making him stand out from the rest of his teammates. His rivalry with Cristiano Ronaldo will forever be one of the longest and fiercest rivalries between players in the history of sport.

And, as in every fairy tale, the hero fights his demons, strives through adversity and finally manages to reach Ithaca. For Lionel Messi, who won almost everything during his 18-year tenure at the top football level, including seven Ballons d' Or, lifting the World Cup in Qatar on the 18 December 2022 was reaching his Ithaca.

Mbappé and Messi: two great sporting heroes!

Real-money gaming – taking off and cashing in!

US esports and skill-based gaming

BY DAVID B. HOPPE[1]

Introduction

Esports and skill-based gaming have become highly competitive arenas, with millions of people playing against each other daily, vying for lucrative sponsorships, and supported by rabid fan followings. Many want to get a piece of the action. Esports Network expects real-money games industry revenue to top US$ 2.5 billion[2] by the end of the year.

Real-money skill-based gaming competitions are legal by default nearly everywhere globally, including most states in the US. Whilst the UK[3], Canada[4], and other countries are exploring the best ways to regulate real-money gaming, US federal law does not forbid it, largely leaving regulation of fantasy sports, online poker, trivia contests, and other skill-based games to the states. Few states expressly prohibit skill-based games, opting instead to regulate and license both online platforms and "real life" games in which players compete for money or prizes. The states most often separately categorize these games from online casinos, raffles, and other gambling sites where game outcomes are based upon pure luck.

The proliferation of mobile gaming has contributed to an explosion in both supply and demand for casual skill-based games that offer the opportunity to win real money. Entrepreneurs and investors eager to cash in on the trend must take care to structure their games – and their promotions – to emphasize skill over chance to satisfy state regulators and appropriately inform the gaming public.

This article highlights the best practices and legalities involved in launching a skill-based gaming service.

What is considered a skill-based game?

Skill-based games are generally defined as contests in which winning is determined more by player ability and strategy than by luck. In these games, players' knowledge, decision-making ability, and reflexes preponderantly determine the outcome. Most games, even those requiring high levels of skill, also contain some amount of luck. A hack golfer, for instance, may hit a wicked slice that caroms off a tree and deflects within a foot of the cup, where the tap-in birdie wins the hole over an LPGA pro. But throughout a full round, the pro's skill should be expected to overcome chance, allowing her to win the vast majority of skins. As Damon Runyon explained:

> *"The race is not always to the swift nor the battle to the strong. But that's the way to bet."*

Often, but not always, games of chance can be detected by their use of gambling paraphernalia in determining the outcome. These may include:

- cards;
- dice;
- random number generators;
- spinners;

Card games may present a gray area. Several states and countries allow online poker. Whilst the outcome of a hand can change on the turn of a single card, experts generally agree that when pitted against each other over the long term, skilled players will win more than novices. The skill element comes from understanding whether to check, bet, raise, or fold to maximize profits and minimize losses.

Skill games that involve pre-contest choices such as player attributes or weapons should make all options available to all players to ensure fairness[5] and that skill – in this case, the ability to select the optimal loadout – prevails. Allowing players to purchase upgrades tilts the odds in the purchaser's favor. This may greatly reduce the influence luck has on the game, but it also reduces the skill element.

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2 Ross Krasner, "Esports Industry Growth Underestimated, Will Exceed $2.5 Billion in 2022", in: *ESPN Network*, 13 Augusr 2021, available at www.esportznetwork.com/esports-industry-growth-underestimated-will-exceed-2-5-billion-in-2022 (accessed 16 March 2023).

3 David Hoppe, "UK Studies May Determine Future of Real Money Gaming", in: *Gamma Law*, 5 January 2021, available at https://gammalaw.com/uk-studies-may-determine-future-of-real-money-gaming (accessed 16 March 2023).

4 David Hoppe, "Will Canada's Online Gambling Legislation Influence the United States?", in: *Gamma Law*, 12 February 2021, available at https://gammalaw.com/will-canadas-online-gambling-legislation-influence-the-united-states (accessed 16 March 2023).

5 David Hoppe, "Blockchain Technology Brings Provably Fair Gaming to Life", in: *Gamma Law*, 1 February 2021, available at https://gammalaw.com/blockchain-technology-brings-provably-fair-gaming-to-life (accessed 16 March 2023).

Anyone considering launching a real-money game should consult an attorney experienced in online game regulations, licensing, and digital media as they specifically apply to real-money gaming. This article provides a general overview and should not be considered legal advice.

Organizers must observe and address a few key factors when structuring cash tournaments to ensure that they are categorized as non-gambling events. States consider a game to be gambling if it contains three elements:

1 a prize – winners receive something of value;
2 chance – every entry has a shot at winning although winning is not guaranteed; and
3 consideration – entrants must pay to play.

For skill-based games sharing the first and third of these attributes, the distinction comes down to the role of chance. US states usually employ one of three standards to determine whether there is sufficient skill involved in determining the outcome of a game to exclude it from the definition of illegal gambling:

– Dominant Factor Test – Some state courts follow the California Supreme Court's guideline in games of chance pursuant to which *"[i]t is the character of the game [...] that determines whether the game is one of chance or skill. The test is not whether the game contains an element of chance or an element of skill but which of them is the dominating factor in determining the result of the game"*.

– Material Element Test – Other states are more stringent, deeming a contest a "game of chance" if luck materially impacts the outcome, even if skill remains the primary determinant. States applying this criterion might be more likely, for example, to outlaw poker than dominant-factor states.

– No Chance Test – Some states take the luck factor to the extreme and categorize games as illegal gambling when luck plays any part whatsoever in the outcome. Under this test to be legal a game must have no chance elements whatsoever. Many games fail to clear this hurdle. Possible exceptions include trivia contests and chess.

Game rules conditions and formats

A real-money game service terms and conditions form a contract between the operator and the contestants. Contracts should clearly define each party's obligations and limitations to avoid future disputes. Effective terms and conditions include several provisions:

– acceptance of the terms as a condition for utilizing the skill game;
– age requirement for entrants;
– rules of the game and how to enter;
– skills required to be successful;
– how winners will be determined;
– prize list for each game, including prize amounts and to whom they will be awarded.

Platforms should record gameplay and document the winners to demonstrate fairness.

The terms and conditions should also comply with state regulations and those of the Federal Trade Commission6. As noted above, some states and territories may deem a game to be based on chance even when skill is involved. And even if a game's outcome is based primarily on skill, state or national jurisdictions may still regulate it.

Skill-based games should be structured to pay out with a hierarchy of prizes with the prize amounts and recipient places determined in advance (for example, first place receives 40%, second place receives 25%, and so on). To avoid possible betting pool and percentage game issues, in states, such as California, prizes should not be based upon player entry fees and the operator staging the competition should not keep a percentage of wagers made or money changing hands.

An attorney well versed in contracts and licensing can help skill-based game companies craft language that will withstand the skill/chance/gambling criteria. Incorrect terms, phrasing, and syntax may raise red flags among regulators. At face value, skill-based gaming tournaments may resemble illegal gambling activities. Indeed, as the California Supreme Court noted, the term *"games of chance"* is often used to include any game involving real money, regardless of the degree to which skill is required to win. Using incorrect terminology or imprecise game descriptions, particularly for skill-based games, can result in states deeming that a game constitutes illegal "gambling" and trigger severe restrictions on the territories in which the game can be legally played.

For skill-based games with cash rewards, it may be best to remove references to stakes, wagers, gambling, and bets. Alternative terms that can be used include entry fees, tournaments, challenges, contests, and other competition-based words.

Conclusion: knowing the law protects your investment

The real-money skill-based gaming industry is exciting, lucrative, and legal in most jurisdictions. However, because it is a relatively new industry with evolving laws and regulations, operators should take steps to avoid misinformation and should, under no circumstances, assume that their games comply with the regulations of the regions in which they play.

Advice from an attorney can help real-money gaming platforms understand the law and standards each state or country applies when determining whether a game is skill based or constitutes illegal gambling.

6 Federal Trade Commission – Bureau of Consumer Protection, *Advertising and Marketing on the Internet. Rules of the Road* (September 2000), available at www.ftc.gov/system/files/documents/plain-language/bus28-advertising-and-marketing-internet-rules-road2018.pdf (accessed 16 March 2023).

South Africa:

The profile of victims and perpetrators of sexual offences in sport

BY ANNELI HYMAN[1]

Introduction[2]

Sexual offences[3] within the sporting environment have received increasing academic attention globally and locally within the last two decades and this is a well-known social and cultural setting in which sexual offences regularly occur.[4]

This is partly due to the perception that sport is a sanctified part of our culture where social rules are relaxed or even suspended and, consequently, behaviour that is generally unacceptable becomes acceptable due to most sports requiring some level of physical touching, *inter alia*, to teach proper techniques, whilst in other sports, such as gymnastics, safety requirements inevitably entail that a coach or assistant will touch a participant.[5] Congratulatory exhibition on excellent performance, such as high fives, and even kissing and hugging between participants as well as participants and coaches, are often publicly displayed during sporting events.

However, the reporting of sexual offences that occur in the sporting environment face similar reporting challenges known to exist outside sport and are, subsequently, largely under reported for a variety of reasons.[6]

In South Africa, there has been no research conducted on the issue, specifically in the sporting environment; however, reporting has increased in recent years.[7] Whilst the focus of past studies on the occurrence of sexual offences in sport were mostly directed at the female athlete-male coach relationship,[8] more recent studies have shown that there are several vulnerable groups prone to falling victim to sexual abuse in the sporting environment.[9]

In a South African sporting context, existing case law confirms that children are at highest risk of suffering sexual abuse.[10] Studies have also shown that the gender of a victim is not the main indicator of a predisposition to sexual abuse, nor is the role, which the perpetrator portrays within the sport setting, a definitive indicator for occurrences of sexual abuse.[11] Internationally[12] and locally, the male coach remains the most featured perpetrator of sexual abuse in the sport setting, whilst South African case law pertaining to sexual offences committed in the sporting environment indicates that, in seven of the ten known cases, the victims were male children.

1 LLB (Pret), LLM (Pret); Attorney of the High Court South Africa.

2 This article is based on a dissertation prepared by the author in partial fulfilment of the requirements for the LLM degree at the University of Pretoria, prepared under the supervision of prof. dr. Steve Cornelius.

3 For purposes hereof the terms *"sexual offences"* and *"sexual abuse"* are used interchangeably and include rape, sexual assault and sexual grooming.

4 A. Skelton, P. Singhand S. Cornelius, "Protection of young athletes", in: eds. J. Nafziger and R. Gauthier, *Handbook on international Sports Law* (2022), Chapter 13, p. 403. Also R. van Niekerk and R. Rzygula, "The perceptions and occurrence of sexual harassment among male athletes with male coaches", in: *African Journal for Physical, Health Education, Recreation and Dance* (2010), p. 49, 50.

5 G. Kerr, A. Striling and A. Heron, "The Importance of Touch in Sport: Athletes' and Coaches' Reflections", in: *International Journal of Social Science Studies*, Vol. 3, No. 4 (2015), p. 56, 60.

6 Civilian Secretariat for Police Services, *Policy on Reducing Barriers to the Reporting of Sexual Offences and Domestic Violence*, available www.policesecretariat.gov.za/downloads/policies/policy_reduc_barriers_sexual_offences.pdf (accessed 16 March 2023).

7 P. Singh, "The Protection of Children in Sport", in: eds. R. Le Roux and S. Cornelius, *Sport: the right to participate and other legal issues* (2003), p. 53, 54 and 61.

8 I. Bjonseth and A. Szabo, "Sexual Violence Against Children in Sports and Exercise: A Systematic Literature Review", in: *Journal of Child Sexual Abuse* (2018), p. 365, 367.

9 *Idem*, no. 8, p. 377.

10 *Idem*, no. 4, Skelton et al. (2022).

11 *Idem*, no. 8.

12 T. Vertommen, J. Kampen, N. Schipper-van Veldhoven, K. Wouters, K. Uzieblo and F. van den Eede, "Profiling perpetrators of interpersonal violence against children in sport based on a victim survey", in: *Child Abuse & Neglect*, Vol, 63 (2016), p. 172, 173.

Profile of vulnerable participants

The first step in trying to prevent the occurrence of sexual abuse in sport is to identify the vulnerable groups and to determine the profile(s) of possible perpetrator(s).

Studies have shown that perpetrators select victim athletes that are vulnerable for some reason:[13]

- they have low self-esteem;
- they have few friends;
- they often do not have a close relationship with their parent(s);[14] and/or
- they find themselves in an isolated position on the team.[15]

Groups that have been found to be particularly vulnerable are minors,[16] women, young adults, homosexuals, bisexuals,[17] ethnic minorities,[18] and disabled athletes.[19] The vulnerability of these groups can directly be attributed to their social standing and the unequal power balance in relationships in which they find themselves.[20]

The identified groups of vulnerable persons are not only vulnerable in the sporting environment, but are also classified as vulnerable groups in society by the South African Government.[21] Studies have shown that additional factors exist that may make a participant even more susceptible to fall victim to sexual abuse.[22] The most prominent factor identified was difference in age and maturation between the perpetrator and the victim.[23] Another factor is that of the suppression of the participant's individual autonomy especially in elite coaching[24] where, for instance, the coach is afforded expert control over the participant and often controls every aspect of the participant's life, including social life and diet.[25] Generally speaking, in most of the sexual abuse cases, the victim has an emotional or acquainted link with the abuser and the latter is a person in a position of power, which means that the sporting environment, where a similar dynamic exists between a participant and coach, provides a conducive platform for sexual abuse.[26] Brackenridge et al. (2005) has found that participants are typically unaware or unsuspecting of the gradual erosion of the personal boundary between him/her and the perpetrator.[27]

Profile of perpetrators

The authority afforded to a coach, assistant coach, team medic or administrator, for example,[28] inevitably places him/her in a position of power and provides an effective smokescreen for grooming and abuse.[29]

13 C. Brackenridge and K. Fasting, "The Grooming Process in Sport: Narratives of sexual harassment and abuse", in: *Auto/Biography*, Vol. 13, Issue 1 (2005), p. 33, 44.

14 *Idem*, no.13, p. 41.

15 M. Cense and C. Brackenridge, "Temporal and Development Risk Factors for Sexual Harassment and Abuse in Sport", in: *European Physical Education Review*, Vol. 7 (2001), p. 61, 68.

16 Section 32 of the Children's Act 38 of 2005 requires a person who has no parental responsibilities and rights in respect of a child but who voluntarily cares for the child either indefinitely, temporarily or partially, including a care-giver who otherwise has no parental responsibilities and rights in respect of the child, must whilst the child is in that person's care: a safeguard the child's health, well-being and development; and b protect the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation, and any other physical, emotional or mental harm or hazards.

17 Hall Law, "A Comprehensive Investigation of Sexual Abuse in Youth Sports, 2 April 2022, available at www.hallinjurylaw.com/a-comprehensive-investigation-of-sexual-abuse-in-youth-sports (accessed 16 March 2023).

18 *Idem*.

19 *Idem*, no. 8.

20 *Idem*. Also *McGregor v. Public Health and Social Development Sectoral Bargaining Council and Others*, 2021 (5) SA 425 (CC), where the Constitutional Court of South Africa highlighted the power imbalance in situations of sexual harassment.

21 Department of Justice and Constitutional Development, *National Intervention Strategy for Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Sector* (2011), available at www.gov.za/sites/default/files/gcis_document/201409/2014dojnationalinterventionstrategylgbtisector.pdf (accessed 16 March 2023); National Council of & for Persons with Disabilities, "Heightened vulnerability of women and children with disabilities to physical and sexual assault", available at https://ncpd.org.za/heightened-vulnerability-of-women-and-children-with-disabilities-to-physical-abuse-and-sexual-assault (accessed 16 March 2023); Department of Planning, Monitoring and Evaluation, "Impact on Vulnerable Groups" (2021), Chapter 5.3 Vulnerable Groups, Ddraft dated 19 May 2021, available at https://www.gtac.gov.za/wp-content/uploads/2022/03/Chapter-5.3-Vulnerable-groups-v1.0-19-May.pdf (accessed 16 March 2023).

22 *Idem*, no. 15.

23 *Idem*. Also *S. v. Venter* 2014 (2) SACR 127 (GP) where the Supreme Court of Appeal emphasised that the maturity of the perpetrator, in comparison to that of the victim (12 years), played a definite role in commission of the sexual offence.

24 *Idem*, no. 17.

25 C. Brackenridge and K. Fasting, "Sexual harassment and abuse in sport: The research context", in: *Journal of Sexual Aggression*, Vol. 8, Issue 2 (July 2002), p. 1, 8.

26 S. Parent, and G. Demers, "Sexual abuse in sport: A model to prevent and protect athletes", in: *Child Abuse Review* (2010), p. 120.

27 *Idem*, no. 3, p. 37.

28 *Idem*, no. 13, p. 43.

29 *Idem*, no. 13, p. 38.

Gradual shifts in the personal, physical and/or mental boundaries between the perpetrator and the participant mostly remain *"unnoticed, unrecognised or unreported"* by the participant *"until the point where she/he has become completely entrapped and is unable to resist advances"*.[30]

In addition, Brackenridge et al. (2005) found that:[31]

> *"[t]he physicality of sport requires not only close proximity of bodies in states of undress and/or exertion but also intimates actions that might, in non-sport contexts, be regarded as invasive. In this way, sport also fosters a degree of interpersonal closeness between athletes and coaches that might otherwise only be seen within the family or care home setting. Many of these apparent invasions of privacy – whether involving touch or other forms of interaction – are thus legitimated in sports coaching, such as technical correction, physical support or the use of terms of endearment."*

The blurred boundaries of the interpersonal relationship between an athlete and his/her coach, coupled with societal perceptions of behaviour that is acceptable in the sports setting, result in a situation where sexual abuse is often overlooked. In addition, there is a lack of clearly defined roles of sporting organisations and/or governments pertaining to such interpersonal relationships. This is especially true in regard to policing authorities, who have shown reluctance to intervene in these perceived "private" spaces which often leads to a situation where sexual abuse in an environment such as sport is overlooked or not investigated with the same effort and earnestness.[32] Brackenridge et al. (2002) notes in this regard that:[33]

> *"[s]port, however, includes both private and public spaces and is a de facto family[34] for many athletes. Public violence on the field of play which is often legitimated[35] through the ideology of "boys will be boys" whereas sexual violence in sport takes place within the private domain of the locker room and other spaces away from public gaze. Just as with marital rape, there has been a traditionally high tolerance of sexually exploitative practices, such as locker room sex talk and demeaning treatment of women sports journalists, women fans and "groupies"."*

Ladika[36] highlights that the perpetrators of sexual offences are sometimes team members or peer-athletes of the victim. Ladika refers to a recent case in Texas, where football, baseball and basketball players allegedly took part in team "initiations" (also referred to as hazing) involving violent sexual abuse of male team members.[37]

There are numerous other examples of peer-athletes being the perpetrators of sexual abuse. In 2015, two separate complaints were filed against a university that accused the women's softball team of a *"culture of abusive and sexually charged hazing."*[38] The team coach was included as a defendant. According to the lawsuit reports, female victims were forced to simulate sexual acts on peers and to participate in similar demeaning and humiliating activities.[39] In another incident it was reported that in December 2015, a high school basketball team was playing at a regional tournament and, whilst under limited supervision and over the course of four days, three of the older team members repeatedly assaulted and sexually abused four of the freshmen members of the team. During one incident, a pool cue was forcibly inserted into the rectum of a freshman following which he required emergency surgery to repair a ruptured colon and bladder! After the assault, coaches reportedly did not contact the victims' families and the perpetrators were allowed to play the next day. Since then, all three assailants have been charged with aggravated assault or aggravated rape.[40]

There have been two known incidents where a participant of a sports team was accused of sexual abuse of a participant of the opposing team. In 2001, John Hopoate, a professional rugby league player in Australia, was banned for twelve matches for inserting his finger into the anuses of three opponents in the course of play.[41] Newspaper reports suggest Hopoate was charged with unlawful sexual connection, although it appears that he was not prosecuted. In the most recent incident on record, in July 2021, the *New Zealand Herald* reported that Kenny Edwards, a New Zealand Rugby League player, playing for Huddersfield,

30 *Idem*, no. 13.

31 *Idem*, no. 25, p. 6.

32 *Idem.*

33 *Idem.*

34 H, Owton and A. Sparks, "Sexual Abuse and the Grooming Process in Sport: Learning from Bella's Story", in: *Sport, Education and Society*, Vol. 22, No. 6 2017), p. 732, 737.

35 P. Labuschagne, ""Violence" in Sport and the *Violenti non fit Iniuria* Defence: A Perspective on the Death of the Cricket Play Phil Hughes", in: *Potchefstroom Electronic Law Journal*, Vol. 21 (2018), p. 1, 4.

36 S. Ladika, "Can colleges and pro leagues curb abuse by athletes", in: *Sport and Sexual Assault*, Vol. 27, Issue 16 (2017).

37 *Idem.*

38 A. Jeckell, E. Copenhaver and A. Diamond, "The Spectrum of Hazing and Peer Sexual Abuse in Sports: A Current Perspective",in: *Sports Health*, Vol 10, Issue 6 (2018), p. 558.

39 V. Razzi, "Hazing horror: lawsuits allege female athletes at Catholic university forced to simulate sex acts", in: www.thecollegefix.com, 28 June 2015, available at www.thecollegefix.com/post/23120 (accessed 16 March 2022).

40 K. Rainwater, "All three defendants in Ooltewah rape case found guilty, two receive reduced charges", in: Chattanooga Times Free Press, 30 August 2016, available at www.timesfreepress.com/news/local/story/2016/aug/30/all-three-defendants-ooltewah-rape-case-found-guilty-two-reduced-charges/384141 (accessed 16 March 2023).

41 "Disgraced player in sue threat", in: *BBC Sport Online*, 4 April 2001, available at http://news.bbc.co.uk/sport2/hi/rugby_league/1259969.stm (accessed 16 March 2023).

was facing a ban following allegations by Sam Kasiano of the opponent team, Catalans Dragons, that Edwards had inserted his finger into Kasiano's anus during a scrum.[42]

Case law

In South Africa, there have been very few reported cases dealing with sexual abuse emanating from the sporting environment (including school sport and sport as leisure) and it seems true that only the proverbial tip of the iceberg is in the public domain.

The most prominent case in South Africa, which made international newspaper headlines, is that of *S. v. Hewitt*,[43] concerning a 75-year-old renowned champion tennis player and coach, who was convicted of having raped two girls (12 and 13 years old, respectively) in the 1980's and having indecently assaulted a 17-year-old girl in 1994. All three of the victims were "chosen" by the accused and in respect of two of them he approached their parent(s), offering to coach them, whilst all of the victims were described as promising tennis players. A pattern of sexual grooming, which escalated to sexual abuse and rape, emerged from the victim's testimony provided during the trial.

Another case that was highly publicised was the matter of *S. v. Rex*[44], likely due to the vast amount of charges the perpetrator faced. Rex, a high school water polo coach, was charged with, *inter alia*, 198 counts of sexual assault, seven counts of exposing children to pornography and two counts of sexual grooming of male children. Rex was sentenced to an effective twenty-three years' imprisonment of which twenty years was for the 144 sexual assault convictions. This case revealed a shocking culture of sexual abuse at the high school which created the perfect environment for a *"serial sexual offender"* such as the perpetrator giving him access to countless victims. Johnson, AJ, commented during sentencing on the prevalence of sexual abuse at the school:

> *"The Court gained the impression from the complainants' evidence, which is not disputed, that there existed a culture at the school where junior learners were coerced into a code of silence by senior learners and they again continued the culture.*
> *As a former learner who became a water polo coach and a Hostel Master and a person in authority over learners and well aware of this culture you exploited it to your own benefit.*
> *[...]*
> *It is disturbing that the victims were brought under the impression that your conduct was normal."*

In the case of *S. v. Peyani*[45] a volunteer soccer coach was convicted on seven counts of sexual offences, including rape and sexual assault of three boys (10, 14 and 16 years old, respectively) to whom he coached soccer. The accused was convicted on all counts and, on appeal, his sentence was reduced to an effective 24 years' imprisonment. The perpetrator abused his authority and the trust relationship that he established with the victims, and, in certain instances, the victim's parents, luring the victims to his residence, under the guise of practicing soccer, where he sexually abused and raped them.

In *S. v. Venter*[46] the appellant was employed as a swimming and cricket coach at Cornwall Hill College, the school attended by the complainant. The complainant was a 12-year-old female, in grade seven. The complainant was a swimmer and she and the appellant were both members of the University of Pretoria Sport Institute and would sometimes train together at the university's swimming pool. The relationship between the victim and the perpetrator started off platonic; however, it progressed into an intimate one which included sexual intercourse. The appellant was, *inter alia*, convicted for having unlawful sexual intercourse with a minor under the age of 16 years. On appeal against sentence, the Supreme Court of Appeal, emphasised the difference in age and maturation between the perpetrator and the victim and also noted that the complainant admired the appellant as her swimming role model. The Supreme Court of Appeal stated:

> *"The appellant was in a position of authority and trust with regard to the complainant. In spite of this, the appellant began grooming the complainant when she was still young, and when she was 15 years old, he began a sexual relationship with her."*

In *S. v. O.*[47] a full time gymnastics coach, pleaded guilty to three charges of indecent assault and one of attempted indecent assault of four boys, between 8 and 12, which occurred over an extended period between 1983 and 2000. The appellant was found guilty by the regional court and sentenced to an effective eight and a half years' imprisonment. The appellant appealed the sentence to the High Court, where his appeal was upheld and the sentence was replaced with that of 12 months' imprisonment and he was banned from coaching any sport to persons under the age of 19 years.

Other known convictions on sexual offence charges committed in the South African sporting environment include John Mosiane, a karate instructor who was charged and convicted on seven counts of rape of seven boys, between the ages of 4 and 10 years

42 "Rugby league: Kenny Edwards faces ban for putting finger up player's anus", in: *nzherald.co.nz*, 4 July 2021, available at www.nzherald.co.nz/sport/rugby-league-kenny-edwards-faces-ban-for-putting-finger-up-players-anus/3CDEQ2NXCZNOVX43TZDESXWANU (accessed 16 March 2023).

43 2015 JDR 1923 (GJ), 2015 JDR 1924 (GP) and 2017 (1) SACR 309 (SCA).

44 Case number SS92/2017, High Court of South Africa, Gauteng Local Division, Johannesburg, 14 September 2018 (unreported).

45 2014 (2) SACR 127 (GP).

46 2020 JDR 0457 (SCA).

47 2003 (2) SACR 147 (C).

old in 2014.[48] Mosiane was sentenced to seven life sentences on the seven counts of rape.[49]

In July 2013, a former high school sports coach, Jacques Strydom, was sentenced to 21 years' imprisonment after pleading guilty to raping two boys and sexually assaulting three others that he was coaching.[50]

In November 2002, Joe Lourenco pleaded guilty to charges of sexually abusing two of his minor male gymnasts over two decades ago. Lourenco received a five year suspended sentence and was ordered to pay damages to one of his victims to cover the cost of psychotherapy.[51] In episode 14 of the podcast named "Behind the Dream",[52] titled "Former Elite Gymnast Glenn Joselowitz – A story of trauma, courage and healing", Glenn Joselowitz, who was 11 years old when the sexual abuse started, states that he both respected and feared the appellant and that he was constantly reminded by the appellant that his parents and him, as his coach, are investing a lot of time in his gymnastics coaching. Similarly, Glenn's parents reminded him that he was very lucky to have the appellant as his coach. This elevated the appellant into a position were Glenn found it impossible to speak about the abuse that was taking place.

In 1995 Andries Kok, a karate instructor, was convicted of raping his 15-year-old female karate student[53] and, in 1994, Brian Schofer, a soccer coach, was found guilty of sixteen charges of sexual assault of minor males.[54] Schofer was released on parole after serving ten months of his sentence under condition that he would not allow minor boys into his house. He did not adhere to the parole condition and was rearrested and only released from prison in 1998. In July 2001 Schofer again faced charges of sexually assaulting boys between 12 and 14 years old. Before establishing his soccer club in 1999, Schofer was a former boxing and karate coach, which lured the boys closer to him and groomed them by buying them fast food, soccer boots and outfits, and by allowing them to drive his van.

Conclusions

There is no doubt that there exists a grey area in the sporting environment, where ample opportunity for abuse is available, and that the boundaries of acceptable and unacceptable touching between participants or between the coach, assistant coach, team medic, administrators, and participants, are blurred.

Historic research has focused on the female-athlete, male-coach relationship; however, more recent research confirms that the group of vulnerable participants is much wider.

South African case law confirms that children are at highest risk of falling victim to sexual abuse in the sporting environment and aligned with findings of past international research, the male coach was the perpetrator of sexual abuse in all South African cases.

The perpetrators are, however, not limited to coaches, with international research showing that perpetrators come from a variety of groups and often include peer-athletes and, to a lesser extent, opponent participants.

48 South African Police Service, Media Statement, KwaZulu Natal Media Centre Corporate Communication, 4 March 2014, available at https://www.saps.gov.za/newsroom/msspeechdetail.php?nid=1638 (accessed 22 December 2022, not reachable 16 March 2023).

49 P. Bruwer, "Karate-man sit lank na hy seuns verkrag" ("Karate man sit long following rape of boys" (translation from Afrikaans)), in: Maroel Media, 5 March 2014, available at https://maroelamedia.co.za/nuus/karate-man-sit-lank-na-hy-seuns-verkrag, accessed 22 December 2022.

50 Sapa, "Coach groomed boys for abuse – judge", in: *IOL*, 2 July 2013, available at www.iol.co.za/news/south-africa/gauteng/coach-groomed-boys-for-abuse-judge-1540464 (accessed 16 March 2023).

51 P. Singh, "The Protection of Children in Sport", in: eds. R. Le Roux and S. Cornelius, *Sport: the right to participate and other legal issues* (2003), p. 53, 64.

52 K. van Heerden, "Former Elite Gymnast Glenn Joselowitz – A story of trauma, courage and healing", in: *Newton Sports Agency Podcast episode 14*, 21 October 2022, available at https://newtonagency.co.za/episode-14-former-elite-gymnast-glenn-joselowitz-a-story-of-trauma-courage-and-healing, accessed 16 March 2023).

53 *Idem*, no. 51, p. 63.

54 *Idem*.

US esports:

States struggle to provide an effective framework for esports regulation

BY CHRISTOPHER REGGIE[1]

Introduction

As of early 2022, esports tournaments have paid more than US$ 1 billion[2] in prize money to nearly 100,000 players over 48,000 tournaments worldwide. New and ongoing tournaments award an average of around US$ 1 million per month in prizes as players, sponsors, team owners, tournament organizers, marketers, and other stakeholders rush to claim their piece of the action.

As one of the latest waves in the digital gold rush, esports is plagued by non-existent or inconsistent rules and regulations, jurisdictional squabbles, lax enforcement, and unreliable protections for players, fans, and the integrity of the games that are played.

Esports continues to grow in scale, acceptance, and popularity. The 2022 Asian Games included esports events and talks of the inclusion of esports in future Olympic Games are ongoing. A steadily increasing fan base, the emergence of formal team structures, and partnerships with traditional sporting organizations such as Formula One Racing, FIFA, and FIBA have further solidified the legitimacy of esports as "real" sports.

The need for regulation

However, lack of overall regulation has led to virtually every game experiencing at least some accusations of cheating, abuse, and exploitation for criminal or fraudulent intent.

Moreover, the challenges and difficulties faced by state regulators are not unique to the United States: other western countries have been similarly unsuccessful to date. Germany's, Italy's, and Spain's regulations have been characterized[3] as cumbersome, piecemeal, and *"extremely fragile and easy to maneuver"*. Games, leagues, and tournaments must adopt comprehensive governance similar to the regulation of traditional sports if they are to deliver on their financial, legal, and social responsibilities.

The time may be right for US states, the federal government, or an international body to take the lead in laying down guidelines for the esports universe to help ensure fair play and adequate protections for e-athletes, consumers, and game owners. Implementing and enforcing such regulations, however, raises unique issues never addressed before in connection with sports competition.

Unlike traditional sports, esports games are owned by developers and publishers. No one owns soccer, for example, so youth leagues, the NCAA, and CONCACAF can decide for themselves how to structure and play games and tournaments. Conversely, Riot Games owns *League of Legends ("LoL")* and so has the sole authority to dictate game rules and tournament structures. If Riot does not like the way organizers plan to operate an *LoL* tournament, it can simply withhold consent for the use of its game in the event.

The number and diversity of stakeholder agendas and the fragmented nature of the industry present further challenges to US states aiming to regulate esports. These factors necessitate close cooperation among states hosting esports events to prevent tournament operators from jurisdiction shopping. However, such cooperation presents a conflict of interest as states may view one another as competitors for the revenue generated by esports events and favor attracting esports events over adequately regulating them.

A bill introduced in the 2021 Nevada legislature illustrates how stakeholder interests can affect the implementation of esports regulations. The bill sought to create a commission to regulate esports, similar to the state's athletic commission that oversees boxing and mixed martial arts. Objections from video game and esports heavyweights, including Nintendo, Activision Blizzard, Microsoft, and Electronic Arts, centered on what they described as onerous rules

1 Gamma Law, San Francisco, USA. For further information, log onto https://gammalaw.com (accessed 17 March 2023).

2 Esports earnings, available at www.esportsearnings.com (accessed 17 March 2023).

3 Charis Georgiades, "The Regulatory Landscape of eSports", in:SFLA, 13 June 2021, available at https://moneysmartathlete.com/esports/the-regulatory-landscape-of-esports (accessed 17 March 2023).

and unnecessary fees that would discourage tournament promoters and organizers from hosting events in Nevada. They stated that tournament promoters would simply select a venue that does not impose such regulations. In the end, a watered-down version of the bill passed into law; rather than fulfilling the initial vision of regulating esports, the bill merely established a committee to advise the Nevada Gaming Control Board regarding esports wagering.

To address these novel issues, states could take a "buffet style" approach and borrow from trade association rules and esports law in other areas of the world, choosing workable or adaptable components and tying them together with local amendments. Alternatively, they could use the Esports Integrity Coalition (ESIC) methods for monitoring for cheating and match-fixing and the World Esports Association (WESA) policies for soliciting player input on best practices for running leagues and tournaments. Similarly, states could follow the lead of Korea's Electronic Sports Association (KeSPA) which licenses and regulates professional e-athletes while ignoring the elephant in the room – betting. Finally, states could enact laws similar to those adopted by France to protect players, both developmentally and financially by limiting pro contracts to one to five years and banning players under 12 from competitions that offer prizes.

Whatever approach the states should choose, effective state regulations should focus on three key areas that will determine the outlook for the industry's future: player welfare; gameplay; and consumer protection.

Player welfare

Esports are a young person's game. Players often peak in their late teens and retire by their mid-20s. To reach those heights at such a young age, players may practice dozens of hours per week by the time they are teenagers. However, young players may be more susceptible to gaming addiction and gambling as well as being less willing to report and less able to deal with cyberbullying, sexism, racism, and other antisocial behaviors that run rampant in esports settings. Most teen players lack sophisticated negotiation and social interaction skills, and they may become easy victims of unscrupulous promoters, agents, coaches, and other authority figures. State esports regulation should safeguard players from exploitation in contracting, earnings, fees, labor conditions, and even emotional, physical, and sexual abuse.

Labor laws

Few regulators have approached limiting esports training and practice as severely as China. Despite the inclusion of eight esports events in the Hangzhou-hosted 2022 Asian Games, China restricted game time for players under 18 to one hour per night and only on Fridays, Saturdays, Sundays, and holidays. The crackdown, designed to combat video game addiction, handicaps training for esports teams and individuals who are in or approaching their prime. With many top athletes retiring before they reach age 30, and teams and players around the world often logging full-time hours honing their skills, internal and external pressures to practice constantly are intense. Without enforceable labor guidelines, team policies and player ambition may present temptation to cheat and/or drive players to overtrain, risking physical injury, mental health issues, and potential substance abuse.

Wage exploitation

Some critics argue that teenagers comprise the majority of esports athletes because only people living under their parents' roofs can afford to pursue careers in the industry. While top 20 players may earn millions of dollars, one independent professional revealed that his seventh-place finish[4] in the world's largest Super Smash Bros. Melee tournament earned him less than US$ 300. The economic situation becomes direr below the elite playing level. As one industry insider[5] noted, players in this stratum are at the mercy of game developers, promoters, leagues, and teams as they:

> *"are trying to move from the amateur to the professional, through that [...] murky semi-pro scene. And the lower down the tier of game you go, the worse it gets."*

Cheating

Esports attracts marketers, merchandisers, and other deep-pocketed partners, which enables tournaments and leagues to allocate large sums of money to prizes and bonus pools in order to attract top talent. With so much money at stake, athletes, coaches, teams, and gamblers face greater incentive to influence the outcomes of contests by means outside the competitors' abilities. These methods range from the use of stimulants, souped-up controllers, aimbots, or cheat codes to augment players' skills, to bribery and match-fixing. For state regulators to be taken seriously and for the games under their jurisdictions to maintain their integrity, these issues must be managed forcefully and consistently.

Doping

This is one area where states do not need to reinvent the wheel. The World Anti-Doping Agency ("WADA") has developed a code used by numerous online and traditional sports organizations. The comprehensive code includes a list of prohibited nutritional supplements, over-the-counter medications, and illicit drugs. Athletes, coaches, trainers, and other persons associated with teams and events who possess or test positive for prohibited substances face an escalating menu of punishments. States can partner with WADA to customize the list of banned substances and the sanctions to be meted out for violations. At the same time, states should ensure that their adjudication of alleged violations does not infringe upon individuals'

4 Alexander Lee, "E-Sports Are Rife With Exploitation", in: *The Nation*, 26 February 2020, available at www.thenation.com/article/culture/esports-labor-freelance (accessed 17 March 2023).

5 Q. Peng, G. Dickson, N. Scelles, J. Grix and P. Brannagan, "Esports Governance: Exploring Stakeholder Dynamics", in: *Semantic Scholar*, 8 October 2021, available at https://www.semanticscholar.org/paper/Esports-Governance%3A-Exploring-Stakeholder-Dynamics-Peng-Dickson/050fb4fceed34d91f5433c409d962af3821c9c84?p2df (accessed 17 March 2023).

rights. Care should be taken that allegations are fully and fairly investigated, the burden of proof is met, and players' constitutional rights are respected. Racial, gender, and other biases should be eliminated from this process.

Manipulation

States should partner with agencies that monitor US-based and offshore betting for signs of unusual or suspicious activity. Oskar Froberg, founder and CEO of Abios, an esports data provider, notes that whilst cheating scandals could hurt esports revenue:

> *"most high-tier tournaments have proficient safeguards in place against unsavory behavior. As tournaments have moved back to offline LAN events, it's easier for tournament organizers and their partners to safeguard games against cheating attempts".*[6]

He also suggests that states can mitigate this type of cheating through continued education and preemptive diligence:

> *"Many players in prominent esports teams are young adults, and as such might not be knowledgeable about the risks or implications posed by match-fixing or cheating. What can seem like an easy way to make some quick money or help a team win, might have detrimental consequences for both the player and esports organization. Both the players and teams need to be educated in the risks and why they're not worth the potential short-term rewards."*

Consumer protection

State-instituted esports regulation should also take steps to protect fans, subscribers, and casual players.

Privacy

Even the UK, which is sensitive to the potentially harmful effects of video games, sees esports as a potential source for national strength, even investing £ 4 million in a new esports broadcasting platform[7]. The platform's *"use of AI & data learning to create highly personalized viewing experiences […] which will permit this project to demonstrate insight into how audiences of the future engage in immersive experiences and the pathways to future commercialization,"* however, raises data privacy concerns.

Gambling addiction

A study[8] by *Plos One* found a correlation between the amount of money that players spend on video game loot boxes and their scores on the Problem Gambling Severity Index ("PGSI"). The study did not conclude that loot boxes serve as a gateway or substitute for problem gamblers, but it did find that games may profit from some players' tendency to gamble. It is likely that esports gambling would fall into a similar category. Whilst esports may not entice most people to bet more than they can afford, it provides an opportunity for people predisposed to engage in this type of self-destructive behavior. A UK DCMS (Department of Digital, Culture, Media and Sport) Committee inquiry found that websites, likely including gaming and esports streaming platforms *"are based on the science of* ***persuasive and behavioral design****, and nudge users to prolong their engagement."* These sites have a very real interest in keeping players on the platform for as long as possible so they can learn more about their preferences and use that information to target in-game advertisements to drive spontaneous purchases.

Conclusions

Whilst workable governing frameworks have been established for traditional sports, there are numerous characteristics unique to esports that require a more nuanced and balanced approach for effective unified legislation, regulation, and governance.

While quasi-regulatory bodies have sprung up, they address only a subset of the issues affecting fairness and protection issues facing in esports and generally lack the legitimacy, buy-in, reach, and muscle to enforce them. Moreover, self-serving and inadequate regulation efforts have contributed to the fragmentation of esports competitions and hindered efforts to develop workable overall standards and practices.

The establishment of an overall regulatory framework will require a coordinated and collaborative approach in which stakeholders are able to put aside their individual interests and priorities and collectively work toward the greater good. Given the size and growth of the esports industry to date, the rewards for the successful implementation of such forward-thinking and unselfish behavior can be tremendous.

Consultation with an experienced esports attorney[9] can help players, developers, and other stakeholders comply with applicable law and navigate the complex and constantly evolving esports legal and regulatory landscape.

6 "Abios: Combatting match-fixing and cheating in esports is crucial", in: *Esports Insider*, 18 January 2022, available at https://esportsinsider.com/2022/01/abios-combatting-match-fixing-and-cheating-in-esports-is-crucial (accessed 17 March 2023).

7 UK Research and Innovation, *Digital, Culture, Media & Sport Committee's "Immersive and addictive technologies" Inquiry*, available at http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/digital-culture-media-and-sport-committee/immersive-and-addictive-technologies/written/95558.pdf (accessed 17 March 2023).

8 David Zendle and Paul Cairns, "Video game loot boxes are linked to problem gambling: Results of a large-scale survey", in: *Plos One*, 21 November 2018, available at https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0206767 (accessed 17 March 2023).

9 "Esports", in: *Gamma Law*, available at https://gammalaw.com/esports-lawyers (accessed 17 March 2023).

The Netherlands:

Court decision on the income tax status of a professional hockey player

BY DR. RIJKELE BETTEN[1]

Introduction

Occasionally the question arises in The Netherlands jurisprudence whether a professional sportsperson should, for income tax purposes, be treated as an employee or as an entrepreneur.

For The Netherlands income tax purposes, an entrepreneur includes an independent profession, such as a dentist or a lawyer.

The Lower Court of Haarlem recently had to deal with the 2017 tax assessment of a professional field hockey player, who for more than ten years played for the same team. After a concise description of the facts, we will deal with the reasoning of the Court.

We will then conclude with some observations.

The facts

The taxpayer was a professional field hockey player and played for the same team from 2010 until 2021. In May 2012, a partnership, in which the player participated, and the club agreed a so-called assignment agreement as the contractual basis for his activities for the team. The partnership was, for income tax purposes, to be considered as a transparent entity. Similar agreements were signed in June 2014 and January 2016.

The 2016 agreement covered 4 years, and, according to the agreement, the taxpayer was, for example, entitled to have himself replaced by another player with similar qualities as himself. If an opportunity would arise for the player to go abroad for a lucrative contract, then the parties would enter into contact to discuss a potential ending of the agreement. The agreed yearly remuneration was € 50,000, excluding VAT and travel costs. The remuneration would not be due in case of sickness or absence for holiday purposes. No mention was made whether injuries would need to be considered as sickness.

The invoicing would take place on a monthly basis and amounting to € 4,166,67, excluding VAT. Although the agreement was signed by the partnership, the taxpayer sent invoices in his own name.

In December 2016, the player entered into an agreement with a foreign club to play between 10 January and 27 February 2017. For these two months, the player received eventually US$ 22,500 and a bonus of US$ 5,514. Later on in 2017, the player concluded a sponsorship agreement with three businesses. In 2017, he sent invoices for respectively € 17,5763, € 12,500 and € 1,500.

For The Netherlands income tax purposes, it makes a huge tax difference whether an individual works as an employee or as an entrepreneur.

Employees are subject to wage tax including social security contributions (to be withheld by the employer) and entrepreneurs are entitled to substantial reductions of the effective tax due. In order to control access to the entrepreneurial status, the tax authorities introduced the possibility to ask upfront for each labour relation a Statement on the Labour Relation (*Verklaring arbeidsrelatie, "VAR"*). The taxpayer asked in 2012 and 2014 for a VAR as an entrepreneur. He, indeed, obtained this status, and had declared in the relevant form that:

- his activities included: on a contractual basis representing business during sports events and companies activities;
- he would work 700 hours per year;
- he could not have himself replaced without permission of the contract's party;
- he would make € 25,000 per year; and
- he was obliged to follow instructions by the other party.

The issue

Before the Court, the issue was, in the first place, whether the relation between the taxpayer and the team was to be considered as an employment relationship.

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If so, the next issues were whether for 2017 the taxpayer could rely on the agreed VAR, which was extended in 2015.

Decision and reasoning of the Court

The Court started by reiterating that The Netherlands Income Tax Act contains a ranking scheme between the various possible types of income. In this case, it means that first it needs to be determined whether the taxpayer enjoyed a profit from an enterprise, or independent profession. Only if not, the taxpayer can be enjoying employment income. In other words, profits from an enterprise goes before employment income.

The Court held that the income from the agreement with the hockey team cannot be classified as a profit from an enterprise, considering the level of independence, the sustainability and scope of the activities, the (non-)running of entrepreneurial risks, the external fame and knowledge about it, the profit expectation, the number of clients and the usage in society. The Court held that the majority of the player's income came from acting as a field hockey player, and in connection with it several sponsorship contracts.

According to the Court, the activities of this hockey player, for income tax purposes, do not constitute an enterprise.

Then the Court reiterated previous jurisprudence from The Netherlands Supreme Court which, in short, held that under an employment contract one party, the employee, connects himself with another party, the employer, to perform labour during a certain time period against the payment of a wage. It is not relevant whether or not the parties intended to agree upon an employment agreement. The facts and circumstances decide this. Thus, the income from the hockey team should, for income tax purposes, be treated as employment income.

The next issue was whether the theory of absorption would be applicable. Absorption means that certain smaller income components can, for income tax purposes, be attributed to a higher-ranking income category. For example, a partner in a law firm who teaches part-time at a university may attribute the pertinent employment income to his profit from his enterprise. The taxpayer argued that his sponsorship activities did constitute an enterprise, which was, in his case, indeed, accepted by the tax authorities, and that the income from the contract with the hockey team would be absorbed with the other profits as profit from an enterprise. The Court held that the income from the latter contract amounted to 60% of the total income, and that the Court held that it was not likely that more time would be spent for the sponsorship activities than for training and playing hockey. The employment income could not be absorbed by the smaller profits from an enterprise.

Last but not least, the taxpayer filed an appeal on raised confidence by the actions of the tax authorities. Until and including 2016, the income was taxed as profit from an enterprise. The taxpayer argued that enough confidence was raised for him to expect to be treated in the similar way during 2017. The Court refused this appeal on raised confidence. The VAR was ended by the tax authorities as of 1 May 2016, and also the taxpayer invoiced the team in 2017 in his own name, rather than the partnership, which had invoiced earlier. So, the facts were not the same and, moreover, the Court added, a bit superfluously, that the description mentioned by the taxpayer on the request for the VAR:

> *"on a contractual basis representing business during sports events and company activities"*

would reasonably not encompass playing hockey for the hockey team. Hence the taxpayer's income from playing with the team was to be treated as employment income whilst the sponsorship income was treated as profit from an enterprise.

Comments

In many countries, there is a striking difference between the tax treatment of sportspersons participating in team sports and those performing an individual sport. The latter are often to be treated as entrepreneurs and in those countries subject to effectively lower tax rates than team sports players. Also, participants in individual sports can more easily escape taxation by moving to a tax-friendly country, like Monaco or other countries with a beneficial tax regime.

In today's world, also team sports players are becoming individual stars with their own market position. That applies not only to the most renowned US basketball stars or European soccer players, but also more and more to younger upcoming stars that have their own set of advisors and consultants that look after their physical development and also work on their image and possibilities to earn other income during and after their sports' careers. In that sense also, team sports players more and more work on their own career despite their attachment to a specific professional team in which they undertake their sporting activities.

In tax law, there is seldom a black and white outcome. In this case, imagine that the sportspersons would earn much more from their sponsorship agreements than from the income from their sports activities. Perhaps because they are in the fall of their sports careers.

Would then the theory of absorption lead to the result that the employment income from playing for the sports team could be absorbed by the greater profits from his or her enterprise? One hurdle may be that the time spent on sponsorship activities will be less than the time spent on training and participation in games. It would eventually be up to the Courts to make a reasonable consideration of the various relevant factors.

The Court did not mention the first months of 2017 during which the player was active in another country for another team. In The Netherlands, a rather widespread phenomenon is that consecutive short-term employments for different employers are accepted to lead to the existence of an enterprise for income tax purposes. Also, the Court did not discuss whether the qualities of the player could be seen as

an independent profession. The top quality of this player, built up through talent and training, appears to have been unique and could he possibly be classified as exercising an independent profession? Probably not; as far as the author knows the question has not been dealt with in case law.

In the meantime, The Netherlands sports teams will not easily accept that one or more of their players set up a similar juridical structure. Employers are liable for setting up a proper wage administration and for withholding wage tax and social security contributions. From that perspective, this was probably a rather unique fact pattern.