



Sports Law & Taxation

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

Contents

2020/12 Sport in a time of COVID-19

2020/13 Settling international sports disputes through the Court of Arbitration for Sport. Part two

2020/14 International tax aspects of esports. Part two

2020/15 Gibraltar: Online sports betting

2020/16 The Netherlands: CFK bridging scheme and international taxation

2020/17 Governmental interference versus governmental intervention in sport

2020/18 How much foreign-source income is exempted for a Netherlands sports person? Or: does a professional sports person have one or two days off per week?

2020/19 Sports agents in Italy. The 2018-2019 legislative reform

2020/20 Football: Extension of players' contracts in Turkey due to the COVID-19 pandemic



11.2

JUNE 2020



Colofon

MANAGING EDITOR

Dr. Rijkele Betten

CONSULTING EDITOR

Prof. Dr. Ian S. Blackshaw

MEMBERS OF THE EDITORIAL BOARD

Prof. Guglielmo Maisto
Maisto e Associati, Milano

Dr. Dick Molenaar
All Arts Tax Advisers, Rotterdam

Mr. Kevin Offer
Hardwick & Morris, London

Mr. Mario Tenore
Maisto e Associati, Milano

COORDINATOR

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

For further information on the journal
and on how to obtain a subscription see:
www.sportslawandtaxation.com.

ISSN nr.: 2211-0895
© Nolot BV 2020
All rights reserved.

Preferred citation: *Sports, Law and
Taxation (formerly GSLTR) 2020/2*, at
page number(s)

DISCLAIMER

Whilst every care has been taken in the
production of this publication and its
contents, the publisher and the authors
of the articles and reports cannot
accept any legal liability whatsoever for
any consequential or other loss arising
therefrom incurred by any subscribers or
other readers as a result of their relying
on any information contained therein,
which is not intended to constitute
any advice on any particular matter or
subject but merely provide information
of a general character.

Table of Contents

Vol. 11 No. 2 June 2020

Editorial	4
Articles	
2020/12 Sport in a time of COVID-19 <i>by Prof. Dr. Steve Cornelius</i>	9
2020/13 Settling international sports disputes through the Court of Arbitration for Sport. Part two <i>by Ian Blackshaw</i>	14
2020/14 International tax aspects of esports. Part two <i>by Robert Esau</i>	19
2020/15 Gibraltar: Online sports betting <i>by Steven Caetano and Paul Morello</i>	25
2020/16 The Netherlands: CFK bridging scheme and international taxation <i>by Dick Molenaar</i>	28
2020/17 Governmental interference versus governmental intervention in sport <i>by Ricardo Williams</i>	32
2020/18 How much foreign-source income is exempted for a Netherlands sportsperson? Or: does a professional sportsperson have one or two days off per week? <i>by Dr. Rijkele Betten</i>	38
2020/19 Sports agents in Italy. The 2018-2019 legislative reform <i>by Edoardo Revello and Marco Vittorio Tieghi</i>	42
2020/20 Football: Extension of players' contracts in Turkey due to the COVID-19 pandemic <i>by Serdar Bezen, Yesim Bezen, Zekican Samli, Tugcan Akalin and Salih Kartal</i>	46
2020/21 Taxability of payments made to a foreign celebrity as the brand ambassador for a product launch event held outside India <i>by Sudarshan Rangan</i>	49
2020/22 Sports broadcast rights in a social media age. A perspective from the Caribbean <i>by Dr. Jason Haynes</i>	54
2020/23 Alonso and Geovanni : image rights case comparison <i>by Kevin Offer</i>	60

EDITORIAL

It is with much pleasure that we welcome readers to the June 2020 edition (citation: *SLT 2020/2*) of our ground-breaking journal and online database (www.sportslawandtaxation.com): **Sports Law & Taxation (SLT)**.

There are no prizes for guessing what has been dominating the general and sporting headlines since our March 2020 issue! Yes, you guessed it: the coronavirus pandemic (COVID-19), which has been – and still is – claiming thousands of lives around the world. At the time of writing, there are over 7 million worldwide confirmed cases of COVID-19 and over 400,000 deaths. COVID-19 has also claimed thousands of lives in Europe, not least in France, Italy, Spain and the United Kingdom, which has the highest number of deaths in Europe to date, namely, over 40,000! In the USA COVID-19 even has cost the life of more than 112,000 people as we write. And in South America the virus is now spreading rapidly. COVID-19 has also been wreaking havoc on sport with the suspension, cancellation and postponement of many major sporting events around the world, including the postponement for a year of the 2020 Olympic and Paralympic Games, which were due to take place in Tokyo, Japan, in July, August and September. Apart from the disappointment of sports fans, there has also been substantial financial loss running into millions of dollars. We have been reporting on the SLT website on the economic impact, in several sporting countries, of COVID-19 on sport, especially association football, which has been a major casualty of the pandemic, and we include highlights from some of these reports.

Italy

As one of the countries first and most heavily hit by COVID-19, Italy is facing a major economic downturn and the sports sector is no exception. Major events, from football to tennis, skiing and basketball, have been disrupted. Essential revenue streams, from sponsorship, production and distribution of media rights, to ticketing and in-stadium corporate hospitality, have suddenly dried up. According to Deloitte's report on the evolution of coronavirus and its effect on the Italian economy, the negative economic impact is estimated at € 80 billion, equal to approximately 4.6% of the country's 2020 GDP. A much worse scenario has been predicted by the International Monetary Fund, as a recent study foresees that the Italian economy will contract by approximately 9% this year. From the Italian football standpoint, Lega Serie A estimates a loss of € 720 million should the season not

be concluded, most of which is due to missed revenues from non-delivery of live matches to broadcasters. Match day revenues have also suffered substantially. Taken as a whole, Italian football – which generates up to 98,000 jobs – has been calculated to be worth € 3.5 billion per year.

Switzerland

Switzerland was hit soon after Italy by COVID-19, especially in the southern part bordering Italy, as well as the western part in the Geneva area. The Swiss Players Union (SAFP) was the first to look after the health of the players and elaborated, on 8 March 2020, rules of conduct for players and clubs, because the COVID-19 situation was not taken so seriously in the sports sector at that time. (See http://safp.ch/sites/default/files/article_attachment/code_of_conduct_for_players_clubs.pdf.) When it became worse, the Swiss Federal Council ("the Council") declared, on 16 March 2020, a state of emergency, which allowed the Council to take control of the legislative power in Switzerland from Parliament. The Council introduced certain prohibitions that had an effect on the sports sector in Switzerland. As of 20 March 2020, gatherings of more than five people were banned. All sports events were prohibited, so sport in Switzerland came to a complete standstill and this is still the situation today. The Council also recognised that sport in Switzerland has been hit hard by the measures and provided a fund for professional sport of CHF 50 Million; and for amateur sport the same amount. This money can be used by clubs to avoid bankruptcy. Furthermore, the Council put in place the possibility for all companies, including companies in the field of sport, to obtain 10% of the yearly turnover of the company as a loan up to CHF 500,000, without interest, to be repaid within 5 years and with a state guarantee in case of insolvency. Discussions between the clubs and the Swiss Football League have started as to ascertain whether the costs of finishing the season with games played behind closed doors are higher than those of stopping the season. If the professional sports sector in Switzerland is not able to return soon to games with fans, some clubs will not survive the COVID-19 crisis. Football clubs are talking about a financial loss of around CHF 250 million for the whole sector.

Cyprus

The government acted quite proactively by imposing strict social measures to fight the spread of COVID-19, including a lockdown of all non-essential businesses. An IMF projection

shows that the Cypriot economy will shrink by 6.5% this year and make a comeback in 2021 with a growth of 5.6%, while local economists' projections show the economy shrinking by a whopping 13%, in a worst case scenario and depending on how long the economy will be in lockdown. Cyprus, deeply hit by the 2012 Eurozone crisis, with a GDP of € 21 billion, has already borrowed € 1.75 billion from international markets and a further € 1.25 billion from local banks by issuing 12-month treasury bills to increase liquidity and support its economy during the lockdown. COVID-19 has struck the sports sector in Cyprus to the core, a sector that, according to EU data, contributes a sizeable share of 1.85% in the total economy and accounts for approximately 2% of total employment in Cyprus. Small or bigger businesses, which are directly or indirectly related to sport, such as fitness clubs and gyms or sports facilities are currently in lockdown, while their fixed costs keep piling up, which can soon lead the financially weakest to bankruptcy. It is inevitable that some of the jobs in the sports sector will be lost. Coaches, instructors, trainers, administrative employees, competition officials and sports journalists have already seen their incomes decreasing, which are fully dependent on training and competitions taking place. Individual athletes have lost their ability to train and compete, which has huge implications for their income and their ability to attract sponsors and public funding.

South Africa

In South Africa, a sport-loving nation, COVID-19 has also wreaked havoc on the sports industry and its economic impact will be felt for years to come. The immediate impact varies from one sport to the next, as some sports were at the beginning, others were in the middle and others towards the end of their competitive seasons. The Super Rugby tournament, which involves teams from South Africa, Australia, New Zealand, Argentina and Japan, felt the early effect as two games of the Japanese Sunwolves team had to be moved to Australia to avoid the spread of the coronavirus in Japan. The tournament was exactly at the halfway point of its 14-week round-robin programme, when international travel restrictions and national government actions prompted the governing body, SANZAAR, to suspend the season indefinitely. If the Super Rugby tournament cannot be completed and if the SANZAAR Rugby Championship, involving the national teams from South Africa, Australia, New Zealand, Argentina and Japan, cannot take place in 2020, SANZAAR stands to lose US\$ 500 million, which could be crippling for some of the member federations. Cricket was in a better position than rugby, with domestic leagues entering the semi-final stages before cricket would go into its off season. However, with a planned inbound tour from the Indian national team, scheduled for August 2020, Cricket South Africa could lose US\$ 10 to 15 million if that tour cannot take place. Also, if the International Cricket Council (ICC) Men's T20 World Cup cannot take place, as scheduled in October, that could have a further negative financial impact on disbursements from the ICC.

The Professional Soccer League could lose more than US\$ 10 million if they are unable to hold any further domestic matches in 2020. When the President of South Africa declared a disaster and ordered a national lockdown, the track and field athletics and road running seasons were just about to enter their showcase grand prix series and national championships. All these events had to be postponed. If these cannot be rescheduled, Athletics South Africa stands to lose more than US\$ 1 million. While these numbers reflect real or potential losses as a direct result of cancellations due to COVID-19, the longer-term effect on South African sport is more uncertain. The global economic impact of COVID-19 will undoubtedly mean that corporate sponsors and advertisers will have less free cash to spend on sports marketing and sponsorships in South Africa and elsewhere.

Spain

All sporting competitions, at amateur or professional level, were suspended from 14 March 2020, with the Spanish Government publishing Royal Decree 463/2020, declaring a "state of alarm" (one step beyond a "state of emergency") for a period of 15 calendar days. This situation has been extended, so, sport in Spain is on hold and with no prospects of being resumed soon. In fact, the country is one of the most affected worldwide by COVID-19 and, despite the fact that the number of deaths is decreasing daily and the number of people who have recovered is the highest in the world, Spain faces a clear challenge: is sport, and football, in particular, going to resume soon? This is no longer a matter of sport or money, but of shyness, as footballers do not want to be pointed out as being "remarkable" or "unique" over other citizens. Football is the most popular sport and an economic motor in Spain, and accounts for 1.4% of the gross internal product. Two of the most visited museums in Spain are the FC Barcelona and Real Madrid ones, with a loss of around 1.2 million euros per month as they are closed, as are all other museums in the country. Finally, sponsors are already set to cut their payments or, at least, to reduce them, due to the lack of impact of their product as they are not displayed either on shirts, training camps or stadia. We cannot yet know what the economic consequences will be for football income. As for other sports, almost all, except basketball, depend on state financial involvement and the money comes mostly from football: TV rights and the "Quiniela" (the weekly pool) which uses the name of the clubs. So, the economic and sporting effects of COVID-19 are disastrous, and will certainly affect the next sporting season too!

The Netherlands

Since the start of the COVID-19 crisis in The Netherlands, sports competitions have been terminated, sports clubs have closed, and all sports events have been cancelled until 1 September 2020. This not only creates a great number of organizational

and social problems, but also entails major financial consequences for sports organizations and top athletes. The NOC*NSF, the overall coordinating Dutch sports organization that also functions as the Dutch National Olympic Committee and National Paralympic Committee, estimates that the total damage for the sports sector until 1 August 2020 is € 950 million. Because competition will not resume this season, the financial damage for Dutch professional football amounts to € 110 million.

In response to the estimated economic damage, NOC*NSF and other sports organizations have called on the government to establish an emergency fund for sport. In addition, NOC*NSF has set aside € 4 to 5 million for an emergency fund for sport. The national government and other sports organizations have been asked to participate in this fund. The government has awarded entrepreneurs in a number of specific sectors, including the sports sector, who have been affected by the COVID-19 measures, under certain conditions, a one-time, fixed reimbursement of 4,000 (tax free). This is called the Reimbursement for Entrepreneurs in Affected Sectors COVID-19 (“Tegemoetkoming Ondernemers Getroffen Sectoren COVID-19, TOGS”). This reimbursement is for those SMEs, with or without staff, that suffer loss because of: necessary closing of their enterprise; and restriction of meetings and/or curtailment of travel. For more information see: <https://business.gov.nl/the-coronavirus-and-your-company>. Sports clubs, who employ staff, and expect a turnover loss of at least 20% for at least three consecutive months can claim, under certain conditions, compensation towards wages for a period of 3 months from NOW: Tijdelijke Noodmaatregel Overbrugging voor Werkbehoud (Temporary Emergency Bridging Measure for Sustained Employment). Clubs can claim a maximum of 90% of wages, depending on how much turnover they lose. However, if a club claims NOW, they are not allowed to dismiss employees on economic grounds during the period for which they receive compensation. For more information see: <https://business.gov.nl/the-coronavirus-and-your-company>.

Emergency fund for sport

The Dutch Government has also set up an emergency fund of € 110 million to support Dutch amateur sports associations. Of these € 110 million € 90 million is intended for cancelling the rent for accommodation of sports clubs over the period 1 March to 1 June 2020. For many sports clubs, rent is the largest cost item on their budgets. The remaining € 20 million is intended for sports clubs who have their own accommodation. Each sports association gets a one-off allowance of up to € 2,500. From May 2020, the NOC*NSF supports talented young athletes up to the age of 21 or their parents, who are in financial difficulties due to the consequences of the COVID-19, with a one-off allowance for accommodation costs, with a maximum of € 1,000 per athlete. In April 2020, the KNVB, the governing body of football (soccer) in The Netherlands, the ING Bank, the main sponsor of football in The Netherlands, and the Dutch

national soccer team jointly presented a financial support package for football clubs, comprising a combination of donations, measures and grants, totalling € 11 million. The effect of COVID-19 on sport in The Netherlands is gigantic and more measures are expected.

Germany

The shutdown has led to a nationwide closure of sports facilities. Since 17 March 2020, there is – with the latest exception of elite sport (only under very strict conditions) – no opportunity to use sports facilities. Training in the old way is still not possible. Sports events are currently strictly forbidden. The shutdown could have major consequences for sport itself and its stakeholders. The latest evaluations of the sports “pre-corona” economy conducted by the Federal Ministry for Economic Affairs and Energy of Germany show:

- sport contributes a good € 70 billion to the overall economic gross domestic product, which corresponds to a share of around 2.3 percent;
- in total, sports-related goods and services are produced with a value of almost € 120 billion;
- private households spend almost € 70 billion on sport-related consumption, of which more than 80% is spent on active sports and the rest on sports interest;
- in addition to the high level of voluntary commitment, around 1.3 million employees are also active in sport;
- the total expenditure for the construction and operation of sports facilities is around € 24.5 billion.
- around € 4.5 billion will be spent on sponsorship, media rights and advertising in the field of sport.

The shutdown affects the entire professional sport in Germany, including ice hockey, handball, basketball and volleyball, all of which have been seriously affected financially, as a result of COVID-19. For example, the German Ice Hockey League expects to lose 20 million and the German Basketball League € 25 million. However, the Bundesliga resumed football matches on 16 May behind closed doors but with live television coverage.

France

On 7 May 2020, France announced some easing, in certain phases and regions, of the strict lockdown measures currently in force in the country. However, according to a shock announcement made by the French Prime Minister, Edouard Philippe, on 28 April 2020, namely, that the 2019-2020 sporting season in France is over. All sporting events, including football, as well as those events to be held behind closed doors, are banned until September. However, even then it is not certain that sport will be back to “normal” in France. The French football governing body – *Fédération Française de Football (FFF)* – had hoped to resume the season on 17 June and end on 25 July 2020. It is not yet known whether the football season will now be abandoned without any promotions or relegations or whether the outcome of the season will be based on the current standings of the clubs in the leagues. Nasser Al-Khelaifi, the chairman of Paris Saint-

Germain, who are top of the French Ligue 1, stated:

“We respect of course the French government decision – we plan competing in the Champions League with UEFA agreement – wherever and whenever it is held.”

And added:

“If it is not possible to play in France we will play our matches abroad subject to the best conditions for our players and the safety of all our staff.”

However, horse racing has restarted in France, which is being regarded, for legal purposes, as “an agricultural event”!

USA

According to Paul Greene and Matthew Kaiser, although all sports in the USA have come to a complete standstill since the onset of the coronavirus pandemic, women’s sports, both at the collegiate and professional levels, will likely be more affected than men’s sports leagues, since women’s sports leagues are still in their infancy compared with men’s leagues. The timing could not be worse for women’s sports following the wave of support for them that followed the victory by the USA team in the FIFA Women’s World Cup in 2019. At the collegiate level, the pandemic has forced the cancellation of all winter and spring sports, which included the crown jewel of collegiate women’s basketball, the women’s NCAA (National Collegiate Athletic Association) basketball tournament. Each division within the NCAA then published decisions that granted spring-sport athletes an additional season of eligibility but did not extend the same waiver for winter athletes, such as those who played basketball. Consequently, while winter-sport athletes, such as basketball players, are now forced to declare for the draft, spring-sport athletes, including those who compete in lacrosse, softball and track & field, will have to decide whether to return for another period of college or turn professional. The three main women’s professional sports leagues in the USA – the Women’s National Basketball Association (WNBA), the National Women’s Soccer League (NWSL) and the National Women’s Hockey League (NWHL) – have all been affected by the pandemic as well. Because each has its own unique challenges and resources, the three have fared quite differently during the downtime. Women’s professional leagues in the USA face a tough road ahead for the remainder of 2020 and so it is to be hoped that they come back stronger than ever when the coronavirus pandemic eventually subsides!

English Premier League

It is planned (hoped) to restart matches in the English Premier League, the world’s most popular and most lucrative league, on 19 June 2020, provided that it is safe to do so, with appropriate “protocols” in place. Training resumed on 19 May in small groups of not more than five, without any contact, and for not longer than 75 minutes. 92 matches remain to be played during the current 2019-

2020 season. The matches will be played behind closed doors but will be broadcast. It is hoped to complete the remaining matches by the end of July. If it proves impossible to do so, it has been reported that refunds, amounting to around £ 0.75 million, will become due to broadcasters under the existing TV contracts.

Belarus

Let us end this short review of the effect of COVID-19 on sport, especially football, the world’s favourite sport, on a more positive note.

Although football is suspended throughout most of the world, due to the COVID-19, in Belarus, the “beautiful game” is still being played. The Belarus Premier League is attracting local and foreign fans and is the only football still being played in Europe, despite the pandemic. On 11 April 2020, the “derby” between FC Minsk and Dinamo Minsk was played in the capital, Minsk, attracting a crowd of some 3,000 persons. In this East European country and former Soviet Republic, with a population of some 9.5 million, there are less than a hundred cases of COVID-19 and, so far, no deaths. The President, Alexander Lukashenko, is quite relaxed about it all and has recommended that his fellow country men and women drink vodka to stave off and fight the disease! The continuance of football in Belarus has also spawned some broadcast deals, allowing fans in several countries, including India, Israel and Russia, to watch games, which otherwise would not be available to them and thus satisfy their need for football.

Articles

Now we turn our attention to the articles that we publish in this issue of SLT.

On the sports law side, we publish the following articles:

- “Settling international sports disputes through the Court of Arbitration for Sport. Part two” by Ian Blackshaw;
- “Football: Extension of players’ contracts in Turkey due to the COVID-19 pandemic” by Bezen & Partners, Istanbul, Turkey;
- “Sports broadcast rights in a social media age; a perspective from the Caribbean” by Dr Jason Haynes, Barbados;
- “Sports agents in Italy; the 2018-2019 legislative reform” by Edoardo Revello and Marco Vittorio Tieghi;
- “Sport in a time of COVID-19” by Prof. Dr. Steve Cornelius, University of Pretoria, South Africa;
- “Governmental interference versus governmental intervention in sport” by Ricardo Williams, sports lawyer in Port of Spain, Trinidad and Tobago; and
- “Gibraltar: Online sports betting” by Steven Caetano and Paul Morello of ISOLAS LLP Law Firm, Gibraltar.

On the sports tax side, we publish the following articles:

- “International tax aspects of esports. Part two” by Robert Esau;
- “The Netherlands: CFK bridging scheme and international taxation” by Dick Molenaar;

- “How much foreign-source income is exempted for a Netherlands sportsperson? Or: does a professional sportsperson have one or two days off per week?” by Dr. Rijkele Betten;
- “Alonso and Geovanni : image rights case comparison” by Kevin Offer; and
- “Taxability of payments made to a foreign celebrity as the brand ambassador for a product launch event held outside India” by Sudarshan Rangan.

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

So, now read on and enjoy the June 2020 edition of SLT.

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

June 2020

Sport in a time of COVID-19

BY PROF. DR. STEVE CORNELIUS¹

Introduction²

Someone once quipped: “Look after the mole hills and the mountains will look after themselves.”³ Mountains do not go anywhere and no-one has ever tripped over a mountain. But molehills? Molehills appear unexpectedly at the most inopportune moments and the most unexpected places so that many a person have stumbled over a humble molehill. In fact, King William III of England died as a result of injuries which he sustained from being thrown from his horse which had tripped over a molehill.⁴ Molehills are dangerous.

It is a fascinating fact of life that the biggest obstacles or problems that one may encounter in one’s life, often prove to be less of a challenge than anticipated. Similarly, the most disruptive and annoying problems often arrive like a bolt from the blue to inflict a disproportionate level of harm. It is often surprising how miniscule or seemingly insignificant the cause of such harm can be.

It can be argued that mountains loom large and are visible from afar. One can anticipate the mountains and plan how to confront or circumvent them long in advance. Molehills, on the other hand, lie hidden in the grass and the moles, out of sight, diligently burrow their underground pathways, only to surface at the most inopportune time and craftily place a molehill in the way of an unwary traveller. It is as if the moles spy on us and plan where to intercept the unwary so that they can cause the most disruption. Then they probably sit snickering in their

dark tunnels and tell their grandchildren the tale of how a carefully placed molehill once toppled a king.

Or perhaps the mountains appear so grand and majestic that we simply reconcile ourselves with their existence and become content to stay this side and never attempt to explore what lies on the other side. We are so enamoured with the view that we convince ourselves that it simply cannot be better and prettier on the other side. In the same way, we face many daily struggles that appear so big and grandiose, that we simply learn to live with them and admire the view they offer. We gain far too much satisfaction from staring at them and analysing them. Poets compose verses about them and students examine every minute detail in doctoral theses. Take inflation, for instance. How can a post-inflationary economy ever be better than the current model with endless price increases? It is simply absurd to even think of it.

But molehills are different. We *know* that we are smarter and stronger than the moles. We are *homo sapiens*, after all, not the moles, who do not even have eyes! We can crush the molehills under our feet and we exterminate the moles wherever we find them. What is more, molehills are sad attempts to replicate mountains and they only spoil the view of the majestic mountains behind them. Consider a simple paper cut, for instance. Has any poet ever written a rapturous poem about a paper cut? No. But there are innumerable poems about the deep wounds of the heart. I doubt whether any medical researcher has ever done extensive research on the best way to treat a paper cut. This is strange, because medical students have to study so many pages and pages of work, that they will all inevitably suffer multiple paper cuts as students. It is probably less likely that a medical student will suffer from a spastic colon than a paper cut. Yet they spend more time studying and analysing spastic colons than paper cuts. This may have something to do with the fact that they are trained by middle-aged professors who understand the dilemma of a spastic colon far better than the vague memory of paper cuts suffered long ago. There is no support group for people who suffer from paper cuts. It is a lonely fate. There are not even guidelines that paper manufacturers must follow to reduce the risk of paper cuts and there has never been a class action to claim compensation from paper manufacturers for the pain and scarring that their product inevitably causes to unsuspecting consumers.

¹ Bluris LLB (SA) LLD (Pret) FA Arb SA M Acad SA. Professor and Head of the Department of Private Law, Faculty of Law, University of Pretoria. Visiting Professor in Law, Faculty of Economics, Law and Political Science, University of Cagliari. Independent non-executive director, Cricket South Africa. Advocate of the High Court of South Africa. Prof. Dr. Steve Cornelius may be contacted by e-mail at steve.cornelius@up.ac.za.

² This article is dedicated to the health-care workers across the globe, who strive with great risk to themselves and their families, to treat patients suffering from COVID-19.

³ Bloch, *Murphy’s Law and Other Reasons Why Things Go Wrong* (1985), p. 56.

⁴ Hughes, *The British Chronicles Book I* (2007), p. 353.

The reason for this is clear. Molehills are often nothing more than an annoyance. They seldom pose real indelible problems. As Rassie Erasmus, the coach of the South African national rugby team told his players who felt the pressure before the final match of the 2019 Rugby World Cup in Japan: “Pressure is not having a job or food to eat – playing rugby does not create pressure.”⁵

But every once in a while – perhaps once in a hundred years – a molehill trips a king’s horse and changes the course of history. Every once in a while – perhaps once in a hundred years – a molehill shows up that decimates the world population, wreaks havoc with the global economy and threatens our way of life. And so, the year 2020, which dawned with grand anticipation – for it would be an Olympic year, a Paralympic year, a year in which world championships would be contested in indoor track and field athletics, ice hockey, rowing, swimming, T20 cricket and cycling – tripped over the tiniest of molehills. One so tiny, in fact, that it is completely invisible to the eye. But one that has a capacity to replicate and cause utter chaos, misery and death wherever it goes, the likes of which the world has not seen for a hundred years.

Enter COVID-19

The seeds of destruction, that would upend the best laid plans of men and women (I am uncertain about the mice), were sown in December 2019 when it was discovered that a local outbreak of pneumonia in Wuhan, China, was caused by a novel coronavirus that became known as severe acute respiratory syndrome coronavirus 2 or SARS-CoV-2.⁶ For most of the world, it appeared to be a localised problem in a country far away, caused by a relative of the common cold,⁷ barely worth noting. But it was not. It turned out that SARS-CoV-2 was highly contagious and could fairly easily be spread by droplets and fomites through direct or indirect contact with the mucous membranes in the mouth, eyes or nose.⁸ What made matters worse is that host carriers of the virus often began spreading the virus while they were asymptomatic and some never even developed symptoms of the coronavirus disease 2019 or COVID-19 which is caused by SARS-CoV-19.⁹

Within a matter of weeks, COVID-19 escalated from a local outbreak of pneumonia to a global health threat. On 11 March 2020, the World Health Organisation declared COVID-19 a pandemic as more than 118,000 cases had

by then been reported in more than 110 countries.¹⁰ This signalled that the WHO considered it very likely that COVID-19 would spread further and that governments should prepare for widespread community infections.¹¹ At the time of writing, COVID-19 had infected more than 4 million people and caused the deaths of almost 300,000 people across the globe, with more than 80,000 new cases being reported every day.¹²

It did not require a mathematician to realise that, if infections continued at these rates, there was a real risk that COVID-19 could claim the lives of tens of millions of people across the globe. This was the worst global health crisis since the Spanish flu claimed as many as 100 million lives between 1918 and 1920.¹³ This may have been more than all the lives lost in all the wars of the 20th century put together, which says a lot since the 20th century saw the bloodiest wars in history in which no one was spared. COVID-19 had all the potential to be as devastating as the Spanish flu. Governments had to act. During March and April, governments in 48 countries ordered full or partial national lockdowns. Borders were closed and international travel ground to a halt.¹⁴

Immediate impact on sport

Sport would not remain unscathed in all of this. Even before governments intervened, it became clear that COVID-19 would have an impact on global sports, as some of the world’s leading footballers, swimmers, hockey players, basketball players, motor racers and cyclists contracted COVID-19. Government actions to curb COVID-19 resulted in large scale cancellation or postponement of sports events.¹⁵ Some sports were proactive and began to implement measures that ranged from events in empty stadiums to cancellation of events. First among these, at the end of January 2020, was World Athletics, which postponed the World Indoor Championships, scheduled for

5 AFP, “‘Pressure is not having a job’, says Boks boss Erasmus”, in: *Eyewitness News*, available at <https://ewn.co.za/2019/11/02/pressure-is-not-having-a-job-says-boks-boss-erasmus> (accessed on 8 May 2020).

6 Dong, Du and Gardner, “An interactive web-based dashboard to track COVID-19 in real time”, in: *The Lancet* (2020), p. 533.

7 Zheng, “SARS-CoV-2: An emerging Coronavirus that Causes a Global Threat”, in: *International Journal of Biological Science* (2020), p. 1678.

8 *Ibid.*

9 *Ibid.*

10 Ducharme, “World Health Organisation Declares COVID-19 a ‘Pandemic’. Here’s What That Means”, in: *Time*, available at <https://time.com/5791661/who-coronavirus-pandemic-declaration> (accessed on 8 May 2020).

11 *Ibid.*

12 Statistics obtained from www.worldometers.info/coronavirus (accessed on 10 May 2020).

13 Davis, *More Deadly than War – The Hidden History of the Spanish Flu and the First World War* (2018), p. 10.

14 Langton, “Lockdown: Which countries are in lockdown: How many people?”, in: *Express*, available at www.express.co.uk/news/world/1260709/lockdown-which-countries-are-in-lockdown-how-many-people-coronavirus-cases (accessed on 8 May 2020).

15 Sport Reporter, “Coronavirus: List of sportsmen infected with COVID-19”, in: *IOL News*, available at www.iol.co.za/sport/coronavirus-list-of-sportsmen-infected-with-covid-19-45397738 (accessed on 8 May 2020).

March 2020 in Nanjing, China, by one year.¹⁶ In February 2020, the Italian football federation suspended matches in its Serie A as football players began to contract COVID-19.¹⁷ The Italian Government then ordered that all sport must be played in closed stadiums without fans.¹⁸ By March 2020, it had become obvious that the once local pneumonia outbreak had become a global crisis. The National Basketball Association (NBA) in the United States, the Union of European Football Associations and SuperRugby¹⁹ in the southern hemisphere followed suit.²⁰ The Indian Wells tennis event became the first major sports event to be called off and the Players Championship golf event was abandoned after one round of play.²¹ One by one, national and international sports federations began to suspend or cancel tournaments and events.²²

Even at this stage, some federations and event organisers seemed reluctant to consider cancellation or postponement of events. Most notable among these, was the Organising Committee for the Tokyo Olympic and Paralympic Games.²³ The Japanese government and the Organising Committee came in for a lot of criticism as a result.²⁴ Eventually, the Japanese Government, the International Olympic Committee and the Tokyo organising committee appeared to succumb to the pressure and announced that the Tokyo Olympic and Paralympic Games would be postponed to 2021.²⁵

Some of the criticism directed towards the Japanese Government, the International Olympic Committee and the Tokyo organising committee may have been harsh. The decision to postpone the two mega-events was not one that

¹⁶ Yang, "Timeline: How Coronavirus is Upending the Sports World", in: *Sports Illustrated*, available at www.si.com/sports-illustrated/2020/03/12/coronavirus-timeline-sports (accessed on 9 May 2020).

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ SuperRugby is a rugby union tournament, played over four continents, which involves teams from South Africa, Australia, New Zealand, Argentina and Japan.

²⁰ Newman and Greenwood, "Update: Australian Super Rugby matches will go ahead as planned this weekend but fans will be locked out from next week in response to the growing coronavirus crisis", in: *RugbyAU*, available at www.rugby.com.au/news/2020/03/12/super-rugby-waratahs-coronavirus (accessed on 9 May 2020).

²¹ Yang, *op cit.*

²² *Ibid.*

²³ *Ibid.*

²⁴ Yamaguchi and Kurtenbach, "COVID-19: Tokyo postpones training for Olympics volunteers as government faces criticism", in: *Global News*, available at <https://globalnews.ca/news/6582412/japan-covid-19-olympics-shinzo-abe> (accessed on 9 May 2020).

²⁵ NBCS NW Staff, "Tokyo 2020 Olympics postponed over COVID-19 concerns", in: *NBC Sports Northwest*, available at www.nbcsports.com/northwest/more/tokyo-2020-olympics-postponed-over-covid-19-concerns (accessed on 9 May 2020).

any one of the role players could have taken unilaterally.²⁶ Detailed discussions were required to ensure that all the relevant role players were in agreement on the way forward.

In fact, whether one considers a mega-event, such as the Olympic Games, a regional event, such as SuperRugby or the UEFA Champions League, or a local event, such as a *Serie A* football match or an NBA basketball game, it is vital to keep in mind that there are numerous role players that are directly and indirectly affected by any decision to cancel or postpone an event. Most discussions around the impact which COVID-19 has on sport, is directed at a high-level analysis which is focussed on sports federations and teams or athletes. But it is important to keep in mind that these are not the only interested parties involved in sport. Professional sport today involves an intricate web of contractual relationships that also involve event organisers and promoters, event officials, trainers and coaches, facility owners and managers, event vendors, sponsors, marketers, advertisers, merchandisers, broadcasters, news media, administrators, players' unions, agents, managers, gamblers, spectators (particularly event- or season-ticket holders), as well as national, regional and local governments.²⁷ As a result, any decision to postpone or cancel an event, can only be made when the interests of all those involved have been considered. Often, the contractual relationships would also require discussions with interested parties before any decision can be taken.

For instance, a decision to hold an event in a closed stadium without spectators impacts on the contractual rights of advertisers, who have placed advertisements in the stadium, as these advertisements are mostly directed at the fans in the stadium. It also impacts on vendors who hold concessions to sell food, beverages and merchandise to spectators. Similarly, postponing an event impacts on broadcasters, who must revise their schedules and rearrange the availability of broadcast equipment. Cancelling an event impacts on players' and officials' match fees, sponsors' and advertisers' ability to attract attention to their brands and stadium vendors, to name but a few. An inauspicious decision to postpone or cancel an event, or to hold it behind closed doors, could have severe legal ramifications for a sports federation or event organiser. As a result, sports federations and event organisers have to consider the web of contractual relationships that surround any sports event.

Frustration and *force majeure*

The law relating to frustration of contract and *force majeure* is well developed and clear. Nonetheless, there seems to be a lot of confusion among lawyers, business people and sports administrators with regard to the meaning and application of these legal concepts.

To begin with, the basic premise of the law of contract

²⁶ *Ibid.*

²⁷ See my analysis "Some Semantic Aspects of the Right to Participate", in: Le Roux and Cornelius, *Sport: The Right to Participate and Other Legal Issues* (2003) 1.

is that any contract, freely entered into, should be honoured by the parties. Where a party fails to honour its obligations in terms of a contract, that failure amounts to breach of contract and exposes that party to claims for performance or cancellation, as well as damages which result from the breach. This is the case, even if the party concerned bears no fault for the failure.²⁸

To alleviate the plights of parties, where events beyond their control make performance of a contract impossible or radically changes the circumstances so that performance of the obligations would become extremely onerous or difficult, the doctrine of frustration was developed in English law. A similar doctrine, known as impossibility of performance, was also developed in other jurisdictions.²⁹ The effect of these doctrines is that a party will, in particular circumstances, be released from performance of its contractual obligations if, due to no fault of its own, a superior force prevents it from performing or makes performance radically different from what was originally contemplated. This effectively means that each party will bear its own loss in the event of frustration and generally places the creditor at a disadvantage as the debtor is released from performance.³⁰

Because the doctrine of frustration could potentially interfere with the contractual relationship between the parties and subvert the basic tenet that contractual obligations must be honoured, parties often include a so called *force majeure* clause in their contract.³¹ The purpose of a *force majeure* clause is effectively to contract out of the doctrine of frustration, to anticipate eventualities that could frustrate the contract and predetermine the allocation of risk in an agreed manner.³²

On the face of it, this seems quite simple. However, the difficulties surrounding frustration and *force majeure* arise not from any complexities of the law – they arise from interpretation of the facts and application of the law to the facts. The main issue that needs to be determined, is exactly when frustration or *force majeure* occurs. To put it differently in the context of this discussion on the impact of COVID-19 on sports, the critical question that must be resolved is at which stage COVID-19 became a frustration or *force majeure*.

This is important, since any decision to cancel or postpone an event before COVID-19 became a frustration or *force majeure*, would constitute a breach of contract towards interested parties with whom the sports federation or event organiser had contracted. To complicate matters further, once a breach occurs, the obligation to perform is perpetuated, which means that a party in breach is

28 McKendrick, *Force Majeure and Frustration of Contract* (1995) 1.

29 Nagel (ed.), *Commercial Law* (2019) 158.

30 McKendrick (1995) 2.

31 *Ibid.*

32 *Ibid.*

not released from its obligations in terms of the contract or excused for its breach when frustration or *force majeure* later occurs.³³ This effectively means that a party cannot pre-empt a frustration or *force majeure*.

Where a contract does not contain a *force majeure* clause, it is my submission that the earliest date on which COVID-19 could have become a frustration, was when the World Health Organisation declared a pandemic on 11 March 2020.³⁴ As a result, where sports federations or event organisers decided to postpone or cancel events before 11 March 2020, they may have committed a breach and may be unable to rely on the doctrine of frustration to avoid liability towards other contracting parties, unless the decision was taken in consultation with the relevant contracting parties and a settlement was reached. It would also not assist them to argue that COVID-19 was subsequently declared a pandemic, since breach once committed, is not cured or excused by frustration. On the other hand, where a sports federation or event organiser decided after 11 March 2020 to postpone or cancel an event, the doctrine of frustration would in all likelihood apply. This may be of little consolation to the sports federation or event organiser, since sponsors and broadcasters would be relieved of their duties to pay sponsorships or broadcasting fees in respect of the event that is cancelled, which could leave the sports federation or event organiser out of pocket to the order of millions of dollars.

Where a contract contains a *force majeure* clause, the question whether and at which time COVID-19 constituted a *force majeure*, depends on proper interpretation of the clause concerned. Where a contract defined *force majeure* as “an act of God”, this may not be adequate to include the spread of COVID-19 as a *force majeure* event. *Black’s Legal Dictionary*³⁵ defines “act of God” as “a natural catastrophe which no one can prevent such as an earthquake, a tidal wave, a volcanic eruption, a hurricane or a tornado”. In other words, the expression “act of God” refers to irresistible natural forces and does not include the spread of contagious diseases. Similarly, if the contract includes “dread disease” in the definition of *force majeure*, it will not avail a party in the context of COVID-19. Dread disease is a term which refers to a specific list of critical illnesses, such as cancer and kidney failure.³⁶ If the contract includes “state action” or “instructions from lawful authorities” in the definition of *force majeure*, the date on which COVID-19 would have constituted a *force majeure* event, would be

33 Nagel (2019) p. 132 *et seq.*

34 Ducharme, “World Health Organisation Declares COVID-19 a “Pandemic.” Here’s What That Means”, in: *Time*, available at <https://time.com/5791661/who-coronavirus-pandemic-declaration> (accessed on 8 May 2020).

35 Available at <https://dictionary.law.com/Default.aspx?typed=act%20of%20god&type=1> (accessed on 9 May 2020).

36 For a complete list of the 36 dread diseases, see <https://kclau.com/insurance/definition-of-36-critical-illnesses-or-dread-diseases-in-insurance-policy> (accessed on 9 May 2020).

the date on which the relevant state authority declared a disaster and ordered lockdowns or travel restrictions which made the hosting of sports events impossible.

Instead of merely relying on frustration or force majeure, the most prudent course of action would have been for the sports federation or event organiser to engage with its respective contracted stakeholders and to come up with a joint strategy on how to deal with sports events affected by COVID-19.

Conclusion

While the direct and immediate impact of COVID-19 has become patently clear and the losses that sports federations, athletes, sports officials and others may suffer as a result of COVID-19 can be quantified with relative ease, the real concern relates to the medium and long term impact that COVID-19 will have on sports. At the time of writing, it was still not clear how long restrictions on international travel and national restrictions on sports events would persist. It is, therefore, not clear whether postponed events, such as the Tokyo Olympic and Paralympic Games, or the World Athletics Indoor Championships, will, in fact, take place or whether they will eventually end up being cancelled. Similarly, future events, such as the 2020 southern hemisphere Rugby Championship and the British and Irish Lions rugby union tour to South Africa, which is scheduled for 2021, may also have to be cancelled or rescheduled. Even the 2022 FIFA World Cup may be compromised and only time will tell when global sports will return to a more normalised competitive schedule.

Another matter of grave concern is the impact which COVID-19 may have on the future ability of sports federations to secure lucrative sponsorships. COVID-19 has already wreaked havoc on the world economy and the World Economic Forum predicts that major economies are expected to contract by up to 8% in 2020.³⁷ Companies that have spent millions of dollars on sports sponsorships will feel the impact of national lockdowns and travel restrictions imposed by governments across the world. Sports federations will certainly find that the available funds to invest in marketing and sports sponsorships will shrink. The exact extent of the decline will eventually depend on how long the COVID-19 crisis endures and how soon an effective vaccine can be developed.

Perhaps COVID-19 was a rude wake-up call to remind us as humans that we are not indestructible and that we could not continue global commerce, including global sports, with its reliance on natural resources and global movement of humans and goods in the way that we have grown accustomed to. Perhaps it is a reminder that we should not only focus on the mountains of global trade, climate change, wars and poverty but also pay more attention to the molehills that show up from time to time. After all, once in a hundred years, a molehill creates mayhem and changes the course of history. But mostly, there is no way to know that the next destructive molehill is one hundred years in the making. Perhaps it has already arrived and we are yet to notice. One thing is certain, life after COVID-19 will be different and sports federations will have to adapt to the new situations and challenges.

³⁷ World Economic Forum, "The economic effects of COVID-19 around the World", available at <https://www.weforum.org/agenda/2020/02/coronavirus-economic-effects-global-economy-trade-travel> (accessed on 9 May 2020).

Settling international sports disputes through the Court of Arbitration for Sport

Part two

BY IAN BLACKSHAW¹

Part one of this article was published in the March 2020 issue of SLT.

The legal status of CAS awards

Awards made by the CAS, like other international arbitral awards, are legally enforceable generally in accordance with the rules of international private law, and also specifically under the provisions of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958, signed by more than 125 countries.² The CAS is also recognised under the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organizations.

Thus, the CAS decisions are legally effective and can be enforced internationally. This is particularly important in the case of disputes involving intellectual property rights, especially trademarks, which are generally of a territorial nature. The procedure is relatively simple: a certified copy of the award and translation is presented to the relevant court in the country in which the award is to be enforced and is treated as if it were a judgement of that court and may be enforced as such by the methods available in the country concerned.

Legal challenges to CAS awards

The CAS awards can be legally challenged in the Swiss Federal Court (TFS),³ also based in Lausanne, by a dissatisfied party, but only in very limited circumstances, in line with general arbitration legal principles, under

the provisions of art. 190(2) of the Swiss Federal Code on Private International Law of 18 December 1987. This article reads (in translation) as follows:

“[The Award] can be attacked only:

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

In practice, perhaps ground d is the most important one, and the CAS bends over backwards, in each case, to ensure that the parties are properly heard and receive a fair hearing.⁴

In practice, there have been few successful legal challenges to CAS awards.⁵ In 2003, in a challenge concerning the independence of the CAS, in view of its association with and partial funding by the IOC, the TFS held that the CAS offered all the guarantees of independence and impartiality to be regarded as a real court of arbitration, even where the IOC – as in that case – was a party in its proceedings.⁶

In that case, two Russian cross-country skiers, Larissa Lazutina and Olga Danilova unsuccessfully questioned the independence of CAS in the Swiss Federal Tribunal (TFS) in 2003. These skiers were disqualified by the IOC after the 2002 Winter Olympic Games in Salt Lake City

¹ Prof. dr. Ian Blackshaw is an international sports lawyer, academic, author and a member of the Court of Arbitration for Sport. Also consulting editor of this journal. He may be contacted by e-mail at ian.blackshaw@orange.fr.

² See www.tas-cas.org/en/general-information/frequently-asked-questions.html.

³ On the role of the TFS, as a “gatekeeper” for fundamental rights under Swiss Public Policy, see Juan de Dios Crespo and Paolo Torchetti, “The Court of Arbitration for Sport and the Swiss Federal Tribunal: legal foundations and the Tribunal as gatekeeper of independence and fundamental freedoms”, in: *GSLTR 2019/4*, December 2019, p. 7-12.

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

⁵ For a recent successful TFS legal challenge to a CAS Award, see the First Civil Law Division Judgement of 22 January 2018 in the case of the professional football player, Ezequiel Matias Schelotto involving a transfer dispute with a football agent (ref: 4A_432/2017).

⁶ See Judgement of 27 May 2003 of the First Civil Law Division of the Swiss Federal Tribunal in the case of A. & B. v. *International Olympic Committee and International Ski Federation* (4P.267/2002; 4P.268/2002; 4P.269/2002; and 4P.270/2002).

for doping offences. The International Ski Federation (FIS) suspended both of them for two years. Their appeal to CAS, calling for the IOC and FIS decisions to be overruled was dismissed. Their legal challenge to the TFS on the grounds that CAS, because it is a creature of and receives some funding from the IOC, is not a truly independent body, was also dismissed. The TFS held that CAS offered all the guarantees of independence and impartiality to be regarded as a real court of arbitration, even where the IOC – as in the Russian skiers' case – is a party to its proceedings. On the question of the partial financing of the CAS by the IOC, the Court concluded as follows:

“To conclude our discussion of the financing of the CAS, it should be added that there is not necessarily any relationship of cause and effect between the way a judicial body is financed and its level of independence. This is illustrated, for example, by the fact that State courts in countries governed by the rule of law are often required to rule on disputes involving the State itself, without their judges' independence being questioned on the ground that they are financially linked to the State. Similarly, the CAS arbitrators should be presumed capable of treating the IOC on an equal footing with any other party, regardless of the fact that it partly finances the Court of which they are members and which pays their fees.”⁷

However, the TFS made the following observation/recommendation to make the list of arbitrators more transparent for the benefit of the parties selecting them:

“It would be preferable, if the published list were to indicate, alongside the name of each arbitrator, which of the five categories mentioned in Article S14 they belonged to (arbitrators chosen from those proposed by the IOC, the IFs and the NOCs; arbitrators chosen to safeguard the interests of the athletes; arbitrators chosen from among persons independent of the three aforementioned bodies) and, for those in two of these categories, by which IF or NOC they were proposed. The parties would then be able to appoint their arbitrator with full knowledge of the facts. For example, it would prevent a party in dispute with the IOC, in the belief that he was choosing an arbitrator completely unconnected to the latter, from actually appointing a person who was proposed by that organisation but who is not an IOC member (see Art. S14 of the Code, which advocates this practice).”⁸

In the most recent legal challenge against the independence of the CAS, on 20 February 2018, the First Civil Chamber of the TFS unanimously confirmed the independence of CAS from the Fédération Internationale de Football Association (FIFA). For an analysis of this Decision, please see the Arbitration Newsletter Switzerland of 3 April 2018 of the Swiss Law Firm of Thouvenin.⁹

⁷ *Ibid.*, at para. 3.3.3.1.

⁸ *Ibid.*, at para. 3.3.3.2.

⁹ Available at <https://thouvenin.com/publication/the-independence-of-cas-confirmed> (accessed 5 June 2020).

Finally, mention should also be made briefly of an earlier landmark decision of the TFS concerning the CAS. On 27 March 2012, the TFS overturned an appeal decision by the CAS in the case of Matuzalem Francelino da Silva, a former professional Brazilian footballer. This case has a long procedural history and the Swiss Court, for the very first time in the history of the Swiss Private International Law Statute of 18 December 1987, annulled the CAS decision for a violation of Swiss public policy, pursuant to the provisions of art. 190 (2) (e) of this Statute. This particular ground for legally challenging arbitral awards in Switzerland, whether rendered by CAS or other Swiss arbitral bodies, is notoriously difficult to establish in practice, as “public policy” (“ordre public”) is a complex and vague concept and one that is restrictively assessed and interpreted.

The ECtHR decisions in the Pechstein and Mutu cases

We turn now to the recent and important decisions of the ECtHR in the Pechstein and Mutu Cases.¹⁰

The key findings of the ECtHR in these cases may be summarised as follows.

- “Forced” arbitration clauses, such as those commonly used in sports governing bodies' regulations are not an effective waiver of rights under art. 6.1 of the ECHR.
- CAS is a “tribunal established by law” for the purposes of art. 6.1 of the ECHR and must therefore comply with its requirements.
- The CAS system is sufficiently “independent and impartial” to satisfy the requirements of art. 6.1 of the ECHR.
- Neither Adrian Mutu's nor Claudia Pechstein's rights to have their cases determined by an “independent and impartial tribunal” under art. 6.1 of the ECHR were violated.
- Claudia Pechstein's right to a “public hearing” under art. 6.1 of the ECHR was, however, violated.

The ECtHR Decisions were rendered with a 5-2 majority of the judges. The dissenting opinions from the Swiss and Cyprus judges, Helen Keller and Georgios A. Serghides respectively, on the following substantive aspects of the majority judgement, may be summarised as follows.

CAS lack of independence and impartiality

The dissenting judges underline that the required level of proof of influence by the majority in the case of Pechstein, seems to indicate that the existence of the influence needs to be proven for each arbitrator on an individual basis. The judges argue that this exceeds what is normally required

¹⁰ *Mutu & Pechstein v. Switzerland* (2 October 2018, nos 40575/10 et 67474/10; full judgment available at <http://hudoc.echr.coe.int/eng?i=001-186828> (accessed 5 June 2020).

in cases of objective impartiality and independence.

The judges further state that, according to the settled case-law of the ECtHR, it is not sufficient for arbitrators to be impartial individually if the structure of the organization lacks the appearance of independence and impartiality. The Court must have regard to “*the manner of appointment of its members and the duration of their term of office [...] the existence of guarantees against external pressures [...] and the question whether the body presents an appearance of independence*”.¹¹

When the Court proceeds with such an analysis, it should not necessarily examine the lack of independence or impartiality of a certain judge. It should examine whether the organization concerned, as a whole, has a balanced composition.

For instance, when examining the impartiality and the independence of an employment tribunal, the Court would not have decided that the tribunal under examination needs to be deemed as being impartial on the sole basis that the judge who rendered the decision under examination was found to be impartial and independent. The Court would have examined the structure of the tribunal and would have deemed the tribunal to be dependent and partial if, for instance, the tribunal concerned was exclusively formed from the representatives of employers. The same line of reasoning should have been applied, *mutatis mutandis*, to CAS.

In the same vein, the two judges underlined that the closed list of arbitrators, from which athletes must choose their arbitrator is problematic, since that list is administered by the ICAS. In particular, the two judges were not convinced by the Swiss Supreme Court’s arguments in defence of a closed list, namely that non-specialised arbitrators would act as lawyers for the parties rather than impartial adjudicators and stated that “*in areas that are way more technical than sports – such as the pharmaceutical industry or aviation – the parties can freely choose their arbitrator without any problems.*”

The Court should have analyzed the criterion of being established by law in more detail

The dissenting judges argue that the majority should have given some additional guidance as to how private entities, such as CAS, may fulfil the requirement of “being established by law”.

On this point, the judges recalled the Suda case¹², in which the ECtHR decided that the tribunal under examination was not established by law, given the fact that it was composed of arbitrators enumerated in a closed-list established by a limited liability company and that the competence

¹¹ *Case of Campbell and Fell v. the United Kingdom*, 28 June 1984, nos. 7819/77 and 7878/77, para. 78, available at www.legal-tools.org/doc/3ec23b/pdf (accessed 2 June 2020).

¹² *Suda v. Tcheque Republic*, 28 October 2010, nos. 1643/06, para. 53.

of the tribunal arose from the consent of Mr. Suda.

The judges stated that CAS, which is a part of ICAS, a private Swiss entity, is similar to the tribunal examined in the Suda case. It is not clear, therefore, why the tribunal in the Suda case was not considered to be established by law, whereas the CAS was. Hence, more explanation was needed on such an important issue.

Mutu’s “voluntary” waiver was used to his detriment

The dissenting judges did not follow the majority in its reasoning according to which the claims advanced by Mutu, regarding the lack of impartiality of CAS, must be rejected on the ground that he voluntarily submitted his case to the jurisdiction of the CAS and not to that of an ordinary court.

The dissenting judges found a contradiction in how, on the one hand, the waiver was not found to be unequivocal, when, on the other hand, the majority took Mutu’s “voluntary waiver” into account when ruling on his complaint about a lack of impartiality. The judges went on to state that, more generally, where a procedure does not offer the minimum guarantees of impartiality and independence, the ECtHR should more strictly analyse whether the applicant’s waiver was indeed “*free, lawful and unequivocal*”. According to the two judges, it seems difficult to conceive that an individual could waive his right to an independent and impartial tribunal and still be subject to a “fair procedure” within the meaning of art. 6(1) of the European Convention on Human Rights.

For an analytical review of these dissenting opinions, described as being “*powerful*”, please see the post of 3 October 2018 entitled “*Mixed message from ECHR on CAS’s independence*” on The Sports Integrity Initiative website.¹³

Reactions to the ECtHR decisions in the Pechstein and Mutu cases

The ECtHR decisions have drawn mixed reactions from several sports lawyers.

The decisions have also been commented on by the CAS itself in a media release issued at the time, the text of which is set out in the Appendix to this article.

The author of this article would make some comments on the decisions as follows.

One can pick holes in a number of aspects of the *ratio decidendi* of the ECtHR decisions in *Pechstein and Mutu*.

In particular, in the author’s opinion, the Court seems to have relied rather blindly, when deciding that the CAS was a fair and independent tribunal, on the Swiss Federal Supreme Court ruling in the Larissa Lazutina and Olga Danilova cases, mentioned above, without any detailed analysis of the application of this ruling to the

¹³ At www.sportsintegrityinitiative.com/mixed-message-from-echr-on-cas-independence (accessed 2 June 2020).

particular facts and circumstances of the Pechstein and Mutu cases. As is well known, circumstances alter cases!

On the question of the independence of CAS from the IOC, it should be mentioned that the President of ICAS – the body introduced in the 1994 Paris reforms and designed to increase the separation of the CAS from the IOC – John Coates is also a member of the IOC. This, to some extent, it is submitted, throws into question the structural independence of the CAS from the IOC.

The partial funding of the CAS by the IOC remains problematic, from an independence point of view, especially as the IOC is the supreme governing body of world sport.

Finally, the author of this article would agree that the two dissenting opinions are quite powerful and, in view of this, it is perhaps surprising that Pechstein's appeal to the Grand Chamber of the ECtHR, for a review of the decisions and, in particular, a testing of these opinions, was dismissed by 17 judges on 5 February 2019.

It should be added that, in parallel judicial proceedings in Germany, an appeal by Pechstein is pending before the German Federal Constitutional Court.

Caster Semenya case

A brief mention should also be made of this case, which has been described by some sports law commentators as perhaps the most important and influential case to be handled to date by the CAS in its thirty-five years' history and has also been characterised by the CAS itself as "pivotal"¹⁴

After a lengthy hearing before the CAS, Semenya lost her case and an appeal by her is pending before the TFS. Its outcome is awaited with great interest in international sporting and legal communities.

Russian athletes WADA (World Anti-Doping Agency) ban

Finally, we should also mention that the WADA four-year ban on Russian athletes competing in major international sports competitions, including the 2020 Summer Olympics in Tokyo and the 2022 Winter Olympics in Beijing, for manipulating laboratory data on the results of doping samples has been referred on 9 January 2020 to CAS for a ruling.¹⁵

Conclusions

After thirty-five years of operations, the CAS goes from strength to strength and its workload continues to increase. As mentioned, between 550 and 600 new cases are registered each year.

¹⁴ See the Executive Summary of 1 May 2019 of this case on the CAS website at www.tas-cas.org/fr/medias/actualites/article/semenya-asa-and-iaaf-executive-summary.html (accessed 2 June 2020).

¹⁵ See www.reuters.com/article/us-sport-doping-russia/doping-wada-requests-cas-ruling-on-russias-ban-idUSKBN1Z82L3 (accessed 2 June 2020).

Despite unease in some quarters about the impartiality and independence of CAS, the international sporting community seems, on the whole, to be satisfied with CAS for the settlement of their sports-related disputes of many kinds, including commercial ones (for example, disputes arising under sponsorship and broadcasting agreements), preferring such a body to decide them rather than the ordinary courts, which tend to be slower and more expensive.

Appendix: CAS media release

"Media release

Statement of the Court of Arbitration for Sport (CAS) on the decision made by the European Court of Human Rights (ECHR) in the case between Claudia Pechstein / Adrian Mutu and Switzerland

The ECHR recognizes that CAS fulfils the requirements of independence and impartiality

Lausanne, 2 October 2018 – The Court of Arbitration for Sport (CAS) has noted the ruling of the European Court of Human Rights (ECHR) in relation to the cases between Claudia Pechstein (speed skating / Germany), Adrian Mutu (football / Romania) and Switzerland. Both athletes filed appeals at the ECHR in 2010 against judgments of the Swiss Federal Tribunal (SFT) which confirmed the decisions rendered by CAS in these matters. The ECHR has dismissed all claims, except one concerning the right to a public hearing. The ECHR judgment, published on its website, determines that:

- *The ECHR considers that there is an interest in allowing the disputes arising in professional sport, in particular those with an international dimension, to be submitted to a specialized jurisdiction, able to rule on such cases in a quick and inexpensive manner. [...] The recourse to an international arbitral tribunal, unique and specialized, facilitates a certain procedural uniformity and strengthens the legal certainty. That is all the more true when the awards of that arbitral tribunal may be appealed before the supreme court of a single country, i.e. the Swiss Federal Tribunal, which renders final judgments.*
- *The ECHR recognizes that a non-State dispute resolution mechanism of first and/or second instance, with a possible appeal, even limited, before a State court, as a last instance, is appropriate in this area (of international sport).*
- *Considering the particular nature of the CAS arbitration system, with mandatory arbitration clauses inserted in the regulations of sports federations, such arbitration shall offer the guarantees provided by Article 6 § 1 of the European Convention on Human Rights.*
- *As far as the funding of CAS by sports entities is concerned, the ECHR emphasizes that State courts are always financed by governments and considers that this aspect is not sufficient to establish a lack of independence or impartiality of these jurisdictions in disputes between citizens and the State. By analogy, it is not possible to establish a lack of independence or impartiality of the CAS based on its funding system.*

The ECHR does not see any relevant grounds to overturn the consistent jurisprudence of the Swiss Federal Tribunal stating that the system of a mandatory list of arbitrators complies with the constitutional requirements of independence and impartiality applicable to arbitral tribunals and that the CAS, when it acts as an appeals authority external to international federations, is similar to a judicial authority independent

from the parties. The public nature of the judicial procedures is a fundamental principle of Article 6 § 1 of the European Convention on Human Rights; such principle is also applicable to non-State courts ruling on disciplinary and/or ethics matters. In the case of Claudia Pechstein, the CAS should have allowed a public hearing considering that the athlete had requested one and that there was no particular reason to deny it.

The ECHR judgment is another confirmation, this time at a continental level, that CAS is a genuine arbitration tribunal and that such sports jurisdiction is necessary for uniformity in sport. The SFT already came to the same conclusion in 1993 and 2003; the German Federal Tribunal as well in 2016. While these procedures were pending before the ECHR (8 years), ICAS, the governing body of CAS, has regularly reviewed its own structures and rules in order to strengthen the independence and the efficiency of the CAS year after year. ICAS is now composed of a large majority of legal experts coming from outside the membership of sports organizations and has achieved an equal representation of men and women. The list of arbitrators has been increased and the privilege reserved to sports organizations to propose the nomination of arbitrators on the CAS list has been abolished. Furthermore, ICAS has already envisaged the possibility of having public hearings at its newer and much larger future premises at the Palais de Beaulieu in Lausanne.

CAS was created in 1984 to provide dispute resolution services to the sports world. For over 35 years, it has settled disputes involving athletes, coaches, federations, sponsors, agents, clubs, leagues and organizers of sports events from almost every country in the world through arbitration and mediation procedures. It handles over 550 cases each year.”

International tax aspects of esports

Part two

BY ROBERT ESAU

Part one of this article was published in the March 2020 issue of SLT.

Player taxation

Prize money

Prize money represents a very substantial income source for esports players. As discussed in the section *Overview of the esports industry* in Part one of this article, the amount of prize money available to players and teams continues to grow year over year. Epic Games, the company behind the game Fortnite, contributed US\$ 100,000,000 alone in prize money during 2019.¹ These prize pools will continue to grow as new games are created and esports popularity continues to rise. Prize money is funded by revenue sources discussed above, as well as marketing funds contributed by tournament organizers and game publishers in order to increase awareness for events.

Prize money is either paid directly to esports players themselves or to the players' team and subsequently paid to the players through their regular salary or in the form of a bonus. Prize money paid directly to the player will be covered under the first paragraph of art. 17. This is confirmed by the OECD in the Commentary of the Model Convention, which states that art. 17.1 "covers prizes and awards paid by a national federation, association or league which a team or an individual may receive in relation to a particular sports event".² Therefore it can clearly be concluded that the allocation of taxing rights for prize money will be dictated by para. 1 of art. 17, resulting in source state taxation and relief provided by the residence state of the professional esports player.

Prize money paid to the team first creates a more complicated picture. Under this arrangement, we deal with

the indirect earnings issue discussed in the subsection *Indirect earnings* in Part one of this article. Thereby, any earnings relating to the professional esports players' personal performances as an entertainer or sportsperson will be taxable under art. 17, regardless of the fact that it is paid to the team as opposed to the players themselves. As the prize money represents the team or player's earnings specifically from performing in a public tournament, it would be difficult to argue that any of these earnings are not directly connected to the player's public performance. Through the functioning of art. 17's two paragraphs, as discussed in the subsection *Indirect earnings* in Part one, the entire amount will be subject to taxation in the performance state. If taxation is applied at the level of the team and at the level of the player, a deduction must be allowed at the team level for the amounts taxed in the hands of the player to avoid double taxation.

It should be noted that this prize money will likely not require an allocation between various jurisdictions as, in general, this prize money is specific to a performance in a single state. The commentary to the OECD Model Convention specifically addresses this situation, stating that:

*"an element of income that is closely connected with specific activities exercised by the entertainer or sportsperson in a State (e.g. a prize paid to the winner of a sports competition taking place in that State; a daily allowance paid with respect to participation in a tournament or training stage taking place in that State; a payment made to a musician for a concert given in a State) will be considered to be derived from the activities exercised in that State"*³

As such the jurisdiction in which the tournament is held may tax the income.

Player fees/salary

Individual players that are members of an esports team will generally be remunerated for their services to the team. The form of this remuneration depends on how the individual team members are engaged. Similar to the sports industry, players can be engaged under a regular employment agreement. In this case, the player would sign a contract with the team and be paid regular employment income, with standard deductions for income tax, social

¹ See "Competitive - Fortnite World Cup", 23 July 2019, available at www.epicgames.com/fortnite/competitive/en-US/news/the-fortnite-world-cup-a-record-setting-tournament (accessed 2 June 2020).

² OECD Comm. on Art. 17, Sec. 8.1, 2nd sentence.

³ OECD Comm. on Art. 17, Sec. 9.2, 3rd sentence.

security, etc. Alternatively, players can be engaged as independent contractors. Under this arrangement, players retain their independent status and are paid a fee from the team for their participation in the team's activities.

It should be noted that regardless of whether the esports player is paid directly or indirectly through an intervening entity, such as a personal management corporation, the income will still fall under the scope of art. 17. Refer to subsection *Indirect earnings* in Part one for a fulsome discussion of indirect payments.

Professional esports players contracted as employees

Under this arrangement, players will sign a contractual employment agreement with the team. The team, which can be viewed as its own entity, will generate income through its own contractual arrangements, for instance through sponsorship or participation and winnings from tournaments. Refer to section *Key taxation concepts* in Part one of this article for a more robust discussion of income streams arising from the esports industry. This income earned by the team is then paid to the professional esports player employees in the form of a regular salary. The players may also receive bonuses from the team for winning at tournaments which generates large amounts of prize money. Refer to subsection *Prize money* above for a discussion of the taxation of this prize money.

In general, a professional esports player's employment earnings from being a member of a team will not have any reference to the location and nature of the activities performed by the team member. For instance, a given player could receive a set yearly salary. This salary can be attributed to the player's training activities, participation in tournaments, etc. In a given tax year these activities could take place in several jurisdictions, creating difficulties for players in determining their tax positions in the various jurisdictions in question.

As discussed in section *Key taxation concepts* in Part one of this article, esports team members will be considered to be entertainers and sportspersons under the meaning prescribed by the OECD Model Convention. The text to art. 17 of the Model Convention, covering these entertainers and sportspersons, is clear in stating that art. 17 will take precedence over art. 15 with regards to employment income relating to the team member's public performances. As such any of the team member's employment income attributable to their personal performances as an entertainer or sportsperson in a given jurisdiction will be covered under art. 17 and be subject to source taxation in the country where the performance takes place. The team member's country of residence will therefore be able to tax additionally under the OECD Model Convention and provide relief in the form of an income exemption or foreign tax credit to avoid double taxation.

Any employment income not relating to the team members' activities as an entertainer or sportsperson would be covered under art. 15 employment income. This income would only be subject to source taxation if one of the art.

15 thresholds, discussed above, prescribed by the Model Convention were met.⁴ It should be noted that art. 17 is not subject to any threshold requirements, as contrasted to art. 15. As such any income earned by the team member creating taxation in the source state in their capacity as an entertainer or sportsperson will trigger the application of art. 17 of the Model Convention, regardless of the amount of income or time present in the source jurisdiction.

Therefore, the first step in determining the tax consequences of a player's employment income is to split their income received between income covered by art. 17 and income covered by art. 15. As discussed in section *Key taxation concepts* in Part one of this article, income covered by art. 17 relates to income earned by the entertainer or sportsperson that has a close connection with their public performance. Therefore, income that does not have this close connection, meaning that it is not directly or indirectly related to the public performance of the player, is out of scope for purposes of art. 17 and will be covered by art. 15.⁵

Clearly, the employment income earned by the player for his or her attendance at the tournament has a close connection to their public performance. This subset of employment income is earned directly for participating in a public tournament. Therefore any income earned in this regard will be covered by art. 17 of the Model Convention, allowing the source state to tax and requiring the player's state of residence to provide relief.

Employment income earned by the players for their ancillary activities creates a more complicated situation. In addition to earning employment income for their attendance at tournaments, players will also receive income for their training and preparatory activities as well as casual earnings related to press appearances, interviews, autograph sessions, etc. Professional esports players spend a significant amount of time training in order to prepare themselves for the large tournaments played throughout the year and as such a significant portion of their employment income can be allocated to this type of activity.

At first glance, it would appear that any training or preparatory activities would not fall under the scope of art. 17. These activities are generally not performed in front of an audience and therefore lack a direct connection to the public performance. Further, they are often performed in a jurisdiction that is separate from where the tournament and actual public performance is exhibited. Therefore it is difficult to conclude that they, in fact, meet the indirect connection necessary to meet the conditions of art. 17. However, the OECD took a clear position on this in the 2014 update to the Model Commentary. The commentary now contains a section addressing the treatment of specific cases under art. 17. Per the commentary, this preparatory activity is exercised by an entertainer or sportsperson in their regular activities

⁴ Art. 15 OECD Model.

⁵ Karolina Tetlak, *supra* n. 24 at p. 266.

as an entertainer or sports person, and as such will be covered by art. 17.⁶ The commentary further states that:

“this would apply regardless of whether or not such rehearsal, training or similar preparation is related to specific public performances taking place in that State (i.e., remuneration that would be paid with respect to the participation in a pre-season training camp would be covered).”⁷

Consequently, any income that can be attributed to the player’s training and preparatory activities will be covered by art. 17 and taxable in the state of performance.

This clarification by the OECD of the inclusion of this type of preparatory income in the scope of art. 17 creates further complications. As discussed above, and addressed specifically in the Commentary to the Model Convention, it is common practice for esports players to perform training and preparatory activities in jurisdictions that are separate from where the tournaments and public performance occurs. The training and preparatory activities could be conducted in multiple jurisdictions, including the players’ state of residence. The question then arises as to which state is allocated source taxation rights: the state(s) where the preparatory activities are exercised or the state(s) in which the tournament, and therefore public performance, occurs. This taxing right will be given to the state where the public performance occurs, as the aim of art. 17 is to give taxing rights of personal income earned by entertainers and sports persons in their capacity as such to the state in which the public performance occurs. This is confirmed in the Commentary, as noted above, which mentions that art. 17 applies regardless of whether the public performance that the preparatory activities have a connection to occur within the same state. Therefore it is irrelevant as to where the training or preparatory activities occur – as long as the training and preparatory activities have a connection with the public performance the state in which the tournament occurs will be able to tax the earnings pertaining to these activities as the source state under art. 17.⁸ The residence state of the player will further be able to tax as the residence state and provide relief through an exemption or credit. Note that as a result of the 2014 update to the OECD Model Commentary, specifically paragraph 9.4, when there is no connection between the training or preparatory activities and the public performance the income from the training or preparatory activities may be taxable in the state where the activities occur, even if there is no public performance there.⁹ This can be further

supported through case law, including a 2016 case between the Netherlands Tax Authorities (*Belastinginspecteur*) and a professional Dutch athlete in which the Dutch taxpayer received relief in The Netherlands for specific payments pertaining to training in a foreign country.¹⁰ Note that in this case he was also denied relief on other payments from a different professional association that were deemed by the court not to be related to those training days.

In addition to income relating to training and preparatory activities, players of an esports team will earn other ancillary income commonly referred to as “casual earnings”. This can include income from autograph sessions, interviews, and participation in press conferences, as well as sponsorship income, discussed in the subsection *Sponsorship income* in Part one of this article. In order to determine whether this type of income has a close connection to the players public performance, and therefore should fall under the scope of art. 17, the OECD offers two factors that can be used to infer this connection: the timing of the income-generating event and the nature of the consideration for the payment of the income.¹¹

In terms of timing, it can generally be considered that any consideration for casual earning activities, such as interviews and autograph sessions, taking place during or immediately before or after a tournament will be considered income falling under the scope of art. 17.¹² This is due to the fact that the immediacy of this income-generating activity, when compared to the public performance, clearly indicates a strong link between the casual earnings and the performance-related income. As such, it would be difficult to say that these events are not related. With regards to the nature of consideration for the payment of the income, the OECD offers the example of a payment made to a tennis player for the use of his picture on posters advertising tournaments in which he will participate, a fairly specific example. This sort of payment will fall under the scope of art. 17 as the income is clearly related to the public performance of the sports person; there would be no market for photos of the sports person on posters if he was not performing in the tournament. This commentary added by the OECD goes to show that the scope of art. 17 is fairly large. Items of income should be analyzed on a case by case basis to determine whether they have enough of a sufficient link to the public performance to fall under the scope of art. 17. If so, this income will be taxable to the player in the source state of performance, with relief provided by the residence state of the player in the form of an exemption or credit.

Once the amount of income pertaining to art. 17 has been determined, the next step in determining the tax consequences of an esports player’s employment income is to allocate this income between the various

⁶ OECD Comm. on Art. 17, Sec. 9.1, 8th and 9th sentence.

⁷ OECD Comm. on Art. 17, Sec. 9.1, 10th sentence.

⁸ A. Cordewener, “Article 17. Entertainers and Sports persons”, in: Ekkehart Reimer & Alexander Rust (ed.), *Klaus Vogel on Double Taxation Conventions, Volume 2* (Kluwer, Alphen aan den Rijn 2015), note 11 at p. 1353.

⁹ Dick Molenaar, “OECD - Entertainers and Sports persons Following the Updated OECD Model (2014)”, *Bulletin for International Taxation, 2015 Volume 69 No. 1* (12 December 2014), 37 - 47 at 46.

¹⁰ Rechtbank (District Court) Zeeland-West Brabant, 12 December 2016, 16-1205, IBFD Case Law.

¹¹ Sec. 9, 4th sentence, OECD Comm. on Art. 17.

¹² A. Cordewener, supra note 11 at 1354.

jurisdictions in which the public performances occurred. This is specifically stated by the OECD in the Commentary to the Model Convention:

“Where the remuneration received by an entertainer or sportsperson employed by a team, troupe or orchestra covers various activities to be performed during a period of time (e.g. an annual salary covering various activities such as training or rehearsing; traveling with the team, troupe or orchestra; participating in a match or public performance, etc.), it will therefore be appropriate, absent any indication that the remuneration or part thereof should be allocated differently, to allocate that salary or remuneration on the basis of the working days spent in each State.”¹³

Therefore, the employment income covered by art. 17 should be allocated between source states in which the player engaged in a public performance based on the number of days spent in each state unless another method would be considered more appropriate. Given that players generally are in a source state for only a few days to participate in a tournament, and these days are well documented by organizers, press, etc., this number of days method is likely the most appropriate method to allocate a player’s salary between source states.

Professional esports players contracted as independent service providers

Another popular method for esports players to earn income from their participation in the esports industry is to be engaged as independent contractors. Under this arrangement, the player is not an actual employee of the team but is instead an independent service provider. The player could receive separate payments for each of their performances or ancillary activities but will likely receive a lump-sum payment for all their activities over a given year.

In this form of engagement between the team and the esports player, it would seem that art. 7 covering business profits would be the appropriate article within the OECD Model Convention to allocate taxing rights. The result of the application of art. 7 to this type of income would mean that only the residence state would be able to tax the professional esports player’s income unless a permanent establishment was deemed to exist under the requirements set out by art. 5 of the OECD Model Convention. It is unlikely that an esports player would meet the threshold of a permanent establishment due to the brevity of their presence in the source state as well as the lack of a fixed place of business made available to them. Therefore, in most cases, the residence state would be the only jurisdiction to be allocated taxing rights. However, as discussed in the subsection *Entertainers and sportspersons in Part one*, art. 7 serves as a general rule, *lex generalis*, and is not applicable in the case of a more appropriate article. This is explicitly stated in para. 4 of art. 7, which states:

“where profits include items of income which are dealt

¹³ OECD Comm. on Art. 17, Sec. 9.2, 5th sentence.

with separately in other Articles of this Convention, then the provisions of those Articles shall not be affected by the provisions of this Article.”¹⁴

Given that the players meet the definition of an entertainer or sportsperson as set out by the OECD Model Convention, discussed in the subsection *Entertainers and sportspersons in Part one*, art. 17 will take precedence over art. 7 for any income earned by the players in their capacity as an entertainer or sportsperson. The result of the application of art. 17 will be that the source state of performance will be able to tax the income earned in connection with the performance in the state, with the residence state providing relief in the form of a credit or exemption.

Similar to the discussion of esports players under an employment arrangement, an esports player engaged as an independent contractor will, in general, receive income relating to their public performances as well as ancillary activities. The discussion regarding the splitting of the income in an employment relationship between income-generating activities relating to the player’s public performance, and therefore covered under art. 17, and ancillary activities not relating to the public performance holds true for individuals engaged as independent service providers. The analysis should be done on a case by case basis, looking at the timing of the income-generating event and the nature of the consideration for the payment of the income. The key difference here, as discussed above, is that the income not covered under art. 17 will be covered by art. 7 in an independent contractor situation, as opposed to art. 15 in an employment situation.

It should be noted, however, that the end result is likely the same for ancillary income not falling under the scope of art. 17 in an employment relationship and an independent contractor setting. In order to allow for source taxation under art. 15 one of the three connecting factors must be met.¹⁵ As discussed in the players contracted as employees section above, it is unlikely that the players will meet any of these thresholds, resulting in no source taxation in the state of performance and exclusive taxation by the residence state. In an independent contractor setting, the ancillary income not covered by art. 17 is dictated by art. 7 which requires the player to meet the permanent establishment threshold set out in art. 5 of the OECD Model Convention. Given the professional esports player’s limited presence in the source state of performance during a tournament, it is very unlikely they would meet this threshold and be subject to taxation in the source state. As is the case with employment income, the end result would be no source taxation in the performance state and exclusive taxation by the residence state. No relief would be required in both cases.

In an independent contractor setting the income earned by the esports player likely pertains to public performances in multiple jurisdictions. As such, the income must be

¹⁴ OECD Model, art. 7.

¹⁵ Art. 15 OECD Model.

allocated between the various source states of performance. The discussion regarding this allocation is the same under an independent contract arrangement and an employer relationship: the income should be allocated between source states in which the player engaged in a public performance based on the number of days spent in each state unless another method would be considered more appropriate.

An additional complexity in an independent contractor setting not inherent in an employment setting is that it is common for esports players to interpose a personal management company between themselves and the team paying their income. These companies are generally single shareholder companies with the player being the sole shareholder. Income is recognized in the entity and subsequently paid out to the player in the form of employment income or dividends. As discussed in the subsection *Indirect earnings* in Part one of this article, the OECD Model specifically addresses this situation and will still consider any income paid to the esports player connected to their public performance in scope for application of art. 17. This results in source taxation in the performance state with relief provided by the residence state of the professional esports player. Through the workings of the first and second paragraph of art. 17, this will occur regardless of whether the source state of performance has an entertainer and sportsperson look through provision in their domestic law. Refer to subsection *Indirect earnings* in Part one of this article for a more fulsome discussion of how indirect earnings earned by an entertainer or sportsperson are taxed.

Conclusion

The esports industry has become a billion-dollar industry and is expected to continue to grow at a rapid pace. It is a complex industry with many different market participants looking to monetize their investments in various ways. Similar to the sports industry, a single esportsing event can involve participants from multiple jurisdictions competing in a source state, while being simultaneously broadcast to various countries around the world. From a tax perspective, this creates a significant risk of double taxation or double non-taxation without the proper allocation of taxing rights between participating countries.

There are five main income streams within the esports industry: sponsorship income, advertising income, media rights income, game publisher fees, and merchandise and ticket sales. Using the current OECD Model Convention, which has been used as the basis for more than 3000 international tax treaties around the world, these income streams can be allocated between participating countries in order to avoid any double taxation or non-taxation. Sponsorship income is governed by art. 7 of the OECD Model Convention, covering business income, unless paid in relation to the public performance of the esports players. These players are considered sportspersons under the convention, and this income would be covered under art. 17, covering entertainers and sportspersons. Advertising income, game publishing fees, and merchandise and ticket sales will be covered under art. 7 of the treaty, while media rights will primarily be covered by art. 12, covering royalties.

In addition to these five primary income streams, there are also additional tax considerations relating to the earning of income by the esports players themselves. Income earned by the esports players attributable to their public performances will be governed under art. 17 of the OECD Model Convention. Any income earned by esports players not connected to their public performance will be governed by art. 15 in the case of an employment relationship, and art. 17 in the event that they are engaged as independent contractors.

Bibliography

- 1 PricewaterhouseCoopers Hungary Ltd., *E-sport's moving into the big leagues* (PricewaterhouseCoopers, Budapest 2018). This article provides an overview of the business aspects of the esports industry. The article focuses primarily on the Hungarian market, but offers good insight into the industry as a whole from a business perspective.
- 2 S. van Overbeek and D. Molenaar, "The Emergence of Esports", in: *Bulletin for International Taxation*, Volume 73 No. 2 (18 December 2018), p. 106-111, at 107. The article provides a very high level overview of international tax considerations for the esports industry.
- 3 Newzoo, *2019 Global Esports Market Report* (Newzoo, Amsterdam 2019). This report provides an overview of the esports business. It also contains market analysis and data relating to the industry, including viewership and income statistics.
- 4 L.A. Romero Topete, "Analysis of the Case Law on the Scope of Article 17 of the OECD Model: Issues Resolved and Yet to Be Resolved", in: *Bulletin for International Taxation*, Volume 71 No. 3/4 (27 February 2017), p. 1-12, at 1. This condensed version of an ITC student's year end paper provides an analysis of case law regarding art. 17 of the OECD Model Convention.
- 5 A. Cordewener, "Article 17. Entertainers and Sportspersons", in: Ekkehart Reimer & Alexander Rust (ed.), *Klaus Vogel on Double Taxation Conventions*, Volume 2 (Kluwer, Alphen aan den Rijn 2015), p. 1287-1411, at 1321. This chapter of the Klaus Vogel on Double Taxation Conventions provides information regarding art. 17 of the OECD Model Convention. It combines scholars views on application of art. 17 and provides specific examples.
- 6 Karolina Tetak, "Tax Treatment of Team Performances under Art. 17 of the OECD Model Convention", in: *World Tax Journal*, Volume 2 No. 3 (3 September 2010), p. 262-290, at 273. This article discusses the international taxation aspects of a sports team and the treatment of income under the OECD Model Convention. It discusses the concept of the team as an independent taxpayer and as an intermediary. It also looks at performing sportspersons and non-performing individuals on a team, engaged as employees or independent contractors, and the tax consequences of each category.
- 7 E. Cacciapuoti & I. Zammit, *Outline of Art. 17 (Entertainers and Sportspersons)* (ITC, Leiden 2017). This outline provided as part of the reading material for the Advanced Masters of International Tax Law at Leiden University provides an overview of art. 17 of the OECD Model Convention. The outline discusses the specifics of the workings of the article, provides

background to the article, and lists several practical examples.

- 8 Chris Grove, *eSports and Gambling: Where's the Action?* (Las Vegas: 2016)

This report discusses the business of gambling on esports. It provides market research and analysis on the industry and provides useful statistics and projections regarding the market.

- 9 SuperData, *2018 Year in Review* (SuperData, New York 2019).

This report provides market research on the profitability of the major players in the esports industry. It provides market statistics on these companies, including revenue amounts for the top free to play esports companies.

- 10 Organisation for Economic Cooperation and Development, *Addressing the Tax Challenges of the Digitalisation of the Economy – Public Consultation Document*, (OECD, Paris 2019).

This public consultation document discusses the OECD's working proposals on the tax challenges arising from the digitalisation of the economy.

- 11 Dick Molenaar, Mario Tenore, Richard Vann, "OECD – Red Card Article 17?", in: *Bulletin for International Taxation*, Volume 66 No. 3 (27 January 2012), p. 127-173, at 132.

This article was written prior to the 2014 updates to the OECD Model Commentary on Article 17 and discusses the author's opinion on the proposed changes to the commentary.

- 12 Dick Molenaar, "OECD – Entertainers and Sportspersons Following the Updated OECD Model (2014)", in: *Bulletin for International Taxation*, Volume 69 No. 1 2015 (12 December 2014), p. 37-47, at 46.

This article focuses on the history of and issues pertaining to art. 17 and its corresponding commentary. It specifically focuses on the 2014 update to the Model.

- 13 Mediakix, *How Much Do Top Twitch Streamers Make* (Mediakix, Los Angeles 2018).

This article discusses the earnings available to esports players outside of the traditional esports industry.

- 14 Dr. Craig West, *Comments on the public discussion draft on issues relating to article 17*.

This article includes commentary made by the author in response to proposed updates to the OECD Model Commentary surrounding art. 17.

- 15 J. Sasseville, "Chapter 5: The 2014 Changes to Article 17 of the OECD Model Tax Convention", in: G. Maisto (ed.), *Taxation of Entertainers and Sportspersons Performing Abroad* (IBFD 2016).

This article addresses the updates made to the OECD Model Convention and Commentary with respect to art. 17.

- 16 J. Roeleveld and K. Tetak, "Article 17: Entertainers and Sportspersons – Global Tax Treaty Commentaries", in: *Global Tax Treaty Commentaries* IBFD.

This article discusses the impact of art. 17 on entertainers and sportspersons.

- 17 E. Barret, "The Changes Introduced by the 2014 Update to the OECD Model Tax Convention", in: *Bulletin for International Taxation*, Volume 68, No. 10 (IBFD, 2014).

This article discusses the changes to the OECD Model Tax Convention and related commentary during the 2014 update.

Table of cases, orders, and opinions

(in chronological order)

- 1 Rechtbank (*District Court*) Zeeland-West Brabant, 12 December 2016, 16-1205, IBFD Case Law.

- 2 Case 24947/06-17-01-3/2081/08-PL-08-09 (2009 – Federal Court of Fiscal and Administrative Justice) involving Mexico and The Netherlands.

- 3 *Thomas F. Cheek v. Her Majesty the Queen* (2002).

Gibraltar:

Online sports betting

BY STEVEN CAETANO AND PAUL MORELLO¹

Introduction

The legal and regulatory framework for the online betting and gaming industry in Gibraltar may seem complex, but this article aims to breakdown key points and provide insight into the rules, as well as setting out some key benefits of doing business in the jurisdiction.

The legal and regulatory framework for online betting

All gambling operations in Gibraltar need to be licensed under the Gambling Licensing Authority ("GLA") of Her Majesty's Government of Gibraltar ("HMGOG").

The Gambling Commissioner, appointed under the provisions of the Act, is granted powers to ensure that licensees conduct their operations under their licenses and maintain the good reputation of Gibraltar.

The GLA will only consider companies for licensing, which have a proven track record in gambling; are licensed in a reputable jurisdiction; have good financial standing; and can provide a viable business plan. Licences are, therefore, generally difficult to obtain and the threshold for acquiring such licences is high.

Licensing conditions

Below are some of the principal conditions and licensing requirements for fixed odds betting and online casino licensed operations, (which apply to both B2C and B2B licences).

Advertising guidelines

All advertising, promotion and sponsoring activity concerning gambling activities, is required to be truthful, accurate and exclusively targeted at adult players. Licensees must ensure that their websites, which are used to advertise, promote and/or operate gambling activities, do not include hyperlinks to other sites with violent or immoral content or that may be accessed by minors.

¹ Partner and Legal Assistant respectively at ISOLAS LLP Law Firm, Gibraltar. E-mail: steven.caetano@isolas.gi and paul.morello@isolas.gi.

Licences are issued on the basis that the advertising and promotion of such gambling activities can only be directed to citizens of nations in which it is not illegal, or to anyone who does not meet their countries legal age to play.

Pay-out of prize monies

Licensees are required to have adequate financing available to pay all current and reasonably estimated prospective obligations in respect of prize pay-outs and to ensure there is adequate working capital to finance ongoing operations at all times. Also, such licensees must pay winnings and account balances to registered players by established arrangements as agreed and made between the licensee and the customer.

Customer privacy and data protection

Licensees must obtain the following basic personal information about each prospective customer:

- 1 full name;
- 2 residential address; and
- 3 date of birth.

Upon obtaining the required information and completing all requisite AML checks, the licensee is entitled to deal with the customer as a registered player under the operator's terms and conditions of service and other rules or policies (as applicable).

Gaming tax

Under the Gambling (Duties and Licensing Fees) Regulations 2018, annual licence fees range from £ 100,000 for each B2C licence (both land-based and remote) and £ 85,000 for each B2B licence, with gambling tax only paid by the B2C operators on their gross receipts, both gaming receipts and betting receipts, at the rate of 0.15%.

A licensing year starts on 1 April, ending the following 31 March, for renewal of licences and payment of the annual licence renewal fee.

The applicable tax rates are set out in Schedule 1 and the licence renewal fees in Schedule 2 of the Regulations. The licence renewal fee is payable annually on the 1 April or, at the discretion of the GLA, may be payable by way of quarterly instalments on 1 April, 1 July, 1 October and 1 January of each licensing year. The 0.15% duty applies to:

- 1 general betting (with the first £ 100,000 of the operator's gross betting profit on bet receipts in each year being exempted);
- 2 betting intermediary's (with the first £ 100,000 of the operator's gross profit on betting event revenues in each year being exempted); and
- 3 general gaming (with the first £ 100,000 of the operator's gross gaming yield on gaming receipts in each year being exempted).

The Regulations contain anti-avoidance provisions, whereby the GLA may disregard any arrangements by an operator (or part thereof) to eliminate or reduce duty or licensing fees, which are considered by the GLA to be artificial or fictitious. Further, any change in the status of an operator, including suspension or revocation or surrender of a licence, does not affect the operator's obligation to pay licence fees or duty under the Regulations in respect of the period of activity for which the duty or licence fee is due.

Bank accounts

The bank accounts which receive, hold or pay out any customer funds, stakes, wagers, prizes or other monies must be controlled by the licensed operator. The operation of any credit card merchant account at any point in the transaction must be fully and effectively controlled by the licence holder and maintained in Gibraltar or a jurisdiction acceptable to the GLA with comparable safeguards and regulatory standards as those prevalent in Gibraltar.

Audited accounts

The licensee is required to produce audited accounts to the GLA each year during the licence period and maintain its financial records in accordance with the applicable law from time to time, which means that licence holders are required to meet all accounts and filing requirements as set out in the Companies Act, the Companies (Accounts) Act and Companies (Consolidated Accounts) Act and any other applicable legislation.

Effective control in Gibraltar

The licensee shall at all times be effectively controlled and managed from Gibraltar. The licensee must, upon request by the GLA, produce lists of key personnel (with CVs or such other information as is reasonably appropriate) including shareholders, directors and executive managers involved in the management and operation of the licensee's business in Gibraltar. This means that control of the entire business of the licensee is required to be exercised in Gibraltar.

Codes of practice

The Gambling Commissioner is responsible for drawing up and issuing codes of practice as to good practice in the conduct of their undertakings by licensees, and to ensure that licensees conduct their undertakings lawfully. The licensee agrees to be bound by any code of practice issued by the Gambling Commissioner from time to time.

The generic code

The code of practice titled *The Generic Code* is intended to be "interpretive guidance" to the Gibraltar gambling industry

in respect of the provisions of the Act, and outline, for development, a fair and transparent regulatory framework within which licensees will be required to operate.

Anti-money laundering code

The Anti-Money Laundering Code of Practice is "interpretive guidance" to the Gibraltar gambling industry regarding the Act, the Gibraltar Crime (Money Laundering and Proceeds) Act, and the latest EU Anti-Money Laundering Directive in force. This AML code applies to all financial transactions associated with defined gambling activities undertaken under the authority of a Gibraltar gambling licence.

Remote technical and operating standards

The purpose of the Remote Technical and Operating Standards (RTOS) is to offer more detailed guidance to Gibraltar's remote gambling industry on meeting the broader policy requirements of Gibraltar's gaming/betting regulatory framework. This document includes technical, responsible gambling and other operating guidelines for Gibraltar's remote gambling industry.

Testing requirements

Remote gambling licensees must ensure that their gambling products and services have been duly tested and certified as compliant with Gibraltar's regulatory model and standards by an independent testing facility approved by the GLA.

Ongoing requirements

Licence holders are subject to ongoing compliance requirements, such as providing the GLA with certain information and allowing the GLA and Gambling Commissioner with access to records and premises for any inspection or compliance audit. Also, there are separate notification and/or consent requirements should a licence holder undertake certain actions, such as sharing use of some of its remote gambling facilities with other gaming companies or joint ventures and/or operating branded casinos or betting sites in a name other than its own (i.e. commonly known as "skin" arrangements).

Change of control or change of corporate structure

Licence holders agree under the terms of their licence agreements (the operating terms and conditions of a licence), that there shall be no material change or modification to the corporate structure (including any material changes or modification to share capital or rights attaching thereto) and no change or modification whatsoever to the beneficial ownership of the licence holder (or any part of a group related to the licence holder or its business in Gibraltar) other than with the prior written approval of the GLA. These conditions are designed to ensure that no one exercises control over a gaming/betting firm which is not approved or subject to probity checks by the GLA.

Football related rules and regulations

The betting industry forms an integral part of modern-day football. Football fans are exposed to advertising and sponsorship of "in play" betting offers, whether it be

on club attire, advertising boards or commercial adverts during live coverage of games. Many football teams display betting firms as their main front shirt sponsor and Gibraltar football is not an exception to this trend.

In Gibraltar, there are specific rules that regulate participation in betting by persons associated with the sport. Under the Gibraltar Football Association (“GFA”) Disciplinary Regulations, which regulate Gibraltar football, all clubs, officials, team officials, any other member of team staff, player, match official or other person under the jurisdiction of these rules must refrain from any behaviour that damages or could damage the integrity of matches and competitions, and must cooperate fully with the GFA at all times in its efforts to combat such behaviour², they are strictly prohibited from placing any bets concerning football (worldwide).

The criteria which will cause a player to fall foul of the rules under art. 63 of the GFA Disciplinary Regulations is provided for below and in their capacity as a representative of a professional club they shall therefore not:

- 1 gamble in any way on a football match anywhere in the world;
- 2 under the jurisdiction of the Gibraltar FA, engage in gambling of any description on football; and
- 3 knowingly behave in a manner, during or in connection with a match in which the party has participated or has any influence, either direct or indirect, which could give rise to an event in which they or any third-party benefits financially through gambling.

Those persons as defined under the GFA Disciplinary Regulations, who do not immediately and voluntarily report to the GFA on any behaviour he is aware of that may fall within the scope of art. 62, may be subject to disciplinary action under these rules. For those persons involved in Gibraltar football, who are subject to betting and/or gambling investigations, the investigator may, in its discretion, request the immediate suspension of a participant whilst an investigation is being carried out.³

Should those defined under the scope of art. 63 be under investigation for an alleged offence under the GFA Disciplinary Regulations, they will also be subject to a limitation period for prosecution, as seen in civil law. The commencement of the limitation period for an offence begins from the day on which the perpetrator committed the offence.⁴ The limitation periods which are applied vary, as they depend on the alleged offence or offence committed. Prosecution for offences against children, betting or for corruption are not subject to a limitation period.⁵ Ultimately,

² Gibraltar Football Association – Disciplinary Regulations, art. 63.

³ Gibraltar Football Association – Disciplinary Regulations, art. 207.

⁴ Gibraltar Football Association – Disciplinary Regulations, art. 149 (a).

⁵ Gibraltar Football Association – Disciplinary Regulations, art. 148.

when determining the sanction, the general regulations as regards the GFA Disciplinary Regulations are that the body shall take account of all relevant factors in the case and the degree of the offender’s guilt when imposing the sanction.⁶

Those words highlight the robust measures that are in place in Gibraltar in relation to betting, given their importance, such rules are also in force worldwide, either at FIFA or at continental level. The current regulations preventing players from betting, ultimately leads the worldwide football industry to consider and distinguish between betting rules and match-fixing rules as Spapens and Olfers recently observed:

“As sports betting has become an overriding motive for match-fixing, nowadays the first criterion for categorisation seems to be whether or not it is related to gambling.”⁷

Football governing bodies must continue to liaise with law enforcement agencies (not just football related) as well as gambling regulators and betting firms. To date, the GFA have ensured that all thirteen clubs forming part of the Gibraltar National League, national team and match officials have participated in multi-language integrity workshops delivered by Sportradar, both in English and Spanish, to reinforce awareness and compliance by all involved in the sport.⁸

Concluding remarks

Considering that football has transformed itself into an immersive environment for betting and gambling, it is important that all pertinent supervisory authorities act together and transparently in the interests of consumers, the vulnerable, to keep crime out of gambling and sport and to maintain the integrity of the game above all.

Certainly, the legal and regulatory framework in relation to sports, online gaming, gambling or betting is ever-evolving both worldwide and locally. A new Gambling Act is expected in 2020 to come into force to further enhance and modernise the existing regime. We aim to ensure that each and every client has a clear understanding of the local legal and regulatory framework governing these related industries. At the end of the day, regulations protect consumers who keep the industry moving and capital flowing. To maintain the integrity and appeal of sport, everyone involved in running it must be fully informed of the regulations.

⁶ Gibraltar Football Association – Disciplinary Regulations, art. 157.

⁷ T. Spapens and M. Olfers, “Match-fixing: the current discussion in Europe and the case of the Netherlands”, in: *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 23 No. 4 (2015), p. 333-358.

⁸ See <https://integrity.sportradar.com/news-archive/news/2019/10/gibraltar-football-association-hosts-sportradar-integrity-workshops> (accessed 2 June 2020).

The Netherlands:

CFK bridging scheme and international taxation

BY DICK MOLENAAR¹

Introduction

The Netherlands has a special bridging scheme for professional football players and cyclists, the CFK.²

During their active career they pay contributions into the CFK fund, from which they will receive the benefits directly after their career, paid as an annuity over a period of time. The purpose of the CFK fund is to give football players or cyclists time to adjust to a life without active sports and to build up a new career.

The contributions during the career can be deducted from the taxable salary, which means that the benefits after the career are taxable income. But it might be that the football player or cyclist has become a resident of another state than The Netherlands when the benefits are paid and then the question arises which state has the right to tax the income.

This was at stake in the decision of *Rechtbank* (Court of First Instance) *Gelderland* of 21 January 2020, which concluded that only the residence state Australia had the right to tax the benefit from the bridging scheme of the CFK and not the source state The Netherlands.³ This decision was based on the text of art. 18 of the Tax Treaty between Australia and The Netherlands.

A comparable situation has been discussed by Rijkele Betten in *GSLTR* 2013/4, but then about an appeal court decision in Antwerp, Belgium⁴. That court came to the

same conclusion about the application of art. 18 of the Tax Treaty Belgium-Netherlands as *Rechtbank Gelderland* in this case about Australia, but with other considerations.

CFK scheme

The CFK bridging scheme started in 1972, initially only for professional football players, but later also for professional cyclists. The reasons for the CFK bridging scheme are:

- a the bridging payments give the football player or cyclist a period of time to switch to a new profession;
- b the contributions are taken from the top of the high salary and create considerable tax savings (NL top tax rate is 49.5% in 2020, but was 52% for many years), while the later benefits after the career most often are taxed at a lower rate (NL starting tax rate of 37%, above the personal allowances);
- c the football players and cyclists do not have to do the savings themselves, but are helped by a professional and independent institution, which also makes a yearly return on investment of between 1% and 4% on the fund of the participants (after expenses);
- d no Dutch wealth tax of approx. 0.7%-1.6% per year is due on the individual participant fund at the CFK.

The CFK organization falls under the control of the Dutch National Bank and other financial authorities. The fund had a total value of approx. € 630 million at 30 June 2019 and invests with a mixed but low risk strategy. The scheme is obligatory for all Dutch professional football clubs and cyclist teams because it is mentioned in the *collectieve arbeidsovereenkomsten* (collective employment agreements) and these CAOs have been declared generally binding for the whole professional football and cyclist sectors.

The contribution to the CFK scheme is 15%-30% of the gross salary with a maximum contribution of € 5,785 per month. Also signing bonuses can be used as contribution, up to 100% of the bonus. The contributions come in an individual fund per football player or cyclist at the CFK, to which the return on investment is added yearly. This individual fund can be checked online by the participant. There is a cap of 1 million total fund value per individual, but this will anyhow not be reached within 10 years employment with the club or team.

¹ Dr. Dick Molenaar is partner with All Arts Tax Advisers and researcher at the Erasmus School of Law in Rotterdam, The Netherlands. E-mail: dmolenaar@allarts.nl.

² *Contractspelers Fonds KNVB* ("CFK") – Contractplayers Fund KNVB. The KNVB (*Koninklijke Nederlandse Voetbal Bond*) is the Royal Netherlands Football Association.

³ *Rechtbank* (Court of First Instance) *Gelderland* 21 January 2020, ECLI:NL:RBGEL:2020:259, NTFR 2020/829.

⁴ Rijkele Betten, "Belgium: court case on the taxation of a pension payment out of the Netherlands Cyclist Fund to an emigrated Netherlands' professional cyclist", in: *GSLTR* 2013/4, p. 44. That was based on the decision of the Court of Appeal of Antwerp of 25 September 2012, Nr. 2011/AR/2067.

The CFK scheme is not a pension scheme, because it is not meant for an old age benefit at the pension age⁵, but for a bridging benefit directly after the end of the active sports career. This means that the general Dutch tax exemption for pension rights⁶ would not work for the CFK scheme and the contribution to the CFK would normally not be tax deductible from the salary. But this has been repaired by the Dutch Minister of Finance with a separate decision⁷, which allows that the contributions can be deducted and are tax-free, while only the later benefits are taxable at the moment when the instalments are received by the ex-football player or cyclist.⁸ This is comparable with the tax treatment of pensions in The Netherlands.

The only dispensation from the CFK scheme is for foreign football players and cyclists who are entitled to the Dutch 30% scheme. Under this scheme, the foreign employee can deduct 30% from his salary before Dutch income tax is calculated. The 30% is meant as deemed compensation for extraterritorial costs for the foreign employee, who comes to The Netherlands for temporary work. The 30% rule is valid for a maximum of 5 years.⁹ There are minimum conditions for the 30% rule, which means that only some foreign football players and cyclists at Dutch clubs or teams qualify for the 30% rule. They can apply for a dispensation for the CFK scheme.

Football players and cyclists also have a scheme for old age pensions, separate from the CFK scheme. This pension scheme is not run by the CFK, but by Nationale Nederlanden, a commercial (life) insurance company.

Taxing right under the OECD Model Tax Convention

When the foreign football player or cyclist moves to another state after his active career at a Dutch club or team, then the question arises whether The Netherlands as the source state has the right to tax the income.¹⁰ Under its national tax law, The Netherlands will tax the CFK benefits as periodic payments, but also the new residence state will want to tax this income. The result would be double taxation, unless when a bilateral tax treaty between The Netherlands and the new residence state applies, because then the taxing rights are allocated and double taxation is eliminated.

⁵ The Dutch pension age has been 65 for many years but is now increasing gradually to 67 years in 2024.

⁶ *Wet op de loonbelasting* (Wage Tax Act), art. 18.

⁷ *Besluit* (Decision) 30 November 1972, nr. B 71/24096.

⁸ This is called the *omkeerregel* (delayed taxation system).

⁹ This period has been 10 years, 8 years previously but was brought down to 5 years by the Dutch government in 2016 as a budget savings measure.

¹⁰ This is only when the foreign football player or cyclist was not exempted for the CFK because of the 30% rule.

These tax treaties mostly will follow the OECD Model Income Tax Convention, but this Model does not seem to have a special provision for such bridging schemes. Art. 18 only applies to real pension schemes (and other similar payments in consideration of past employment), meant for old age benefits. This article allocates the taxing right solely to the residence state of the pensioner, so that the source state needs to allow an exemption at source to eliminate double taxation:

“Article 18 – Pensions (OECD Model (2017)):

Subject to the provisions of paragraph 2 of Article 19, pensions and other similar remuneration paid to a resident of a Contracting State in consideration of past employment shall be taxable only in that State.”

Where the official Commentary on Art. 18 OECD Model is clear that the article is only meant for pensions (and similar payments) and not for other annuities, some states have made a reservation with the article: Brazil, Bulgaria, Ivory Coast, South Africa and Ukraine. They reserve the right to include an explicit reference to annuities in art. 18 of their bilateral treaties.¹¹ The OECD discusses this option in the Commentary on Art. 18 but concludes that it prefers to restrict art. 18 to only pensions for old age benefits.

A missing element is that the OECD has not included a subject-to-tax clause for the annuity in the residence state in art. 18. The Commentary discusses that it might be possible that source and residence state have different taxation rules for pensions and that double taxation may occur, but it can also lead to double non-taxation.

Art. 19 of the OECD Model with the specific rule for government pensions is not relevant here, because football clubs are almost everywhere private entities.

Dutch tax treaties

Strangely enough, The Netherlands did not make a reservation with art. 18 OECD Model, although it has included annuities in this article in most of its bilateral tax treaties and has made this its official policy in the *Notitie Fiscaal Verdragsbeleid* (Notice Tax Treaty Policy).¹²

An example of this text of art. 18 can be found in the tax treaty between Australia and The Netherlands:

“Article 18 – Pensions and Annuities (Australia and Netherlands (1976)):

- 1 *Pensions, including pensions provided under the provisions of a public social security system, but not including pensions to which Article 19 applies, paid to a resident of one of the States, and annuities*

¹¹ See para. 2 of the Positions on the Article in the Commentary on Art. 18 OECD Model.

¹² See part 2.11.4 of the *Notitie Fiscaal Verdragsbeleid* (Notice Tax Treaty Policy) of 15 February 2011.

so paid, shall be taxable only in that State.

- 2 The term “annuity” means a stated sum payable periodically at stated times during life or during a specified or ascertainable period of time under an obligation to make the payments in return for adequate and full consideration in money or money’s worth.”

The remark at the end of the previous paragraph about the missing subject-to-tax clause is also relevant here. Australia has a different view on the taxation of pensions and other annuities, for which very often the contributions are not deductible but the benefits are tax-free. If that would apply to the Dutch CFK benefits, then this art. 18 in the treaty with The Netherlands would lead to double non-taxation.

The case before *Rechtbank Gelderland*

The case before *Rechtbank Gelderland* was about the year 2018 and was started by the CFK itself. It was paying benefits to a former football player, who had played for clubs in various countries, also for some years for a club in The Netherlands. From his salary, the football player had paid contributions into the CFK fund and after he ended his professional career, he had moved to Australia and started to receive benefits. But then a discussion between the CFK and the *Belastingdienst* (Dutch Tax Authorities) arose whether art. 18 of the tax treaty would apply to these benefits. That would mean that The Netherlands would not have the taxing right, but solely Australia.

For many years, the *Belastingdienst* had accepted that CFK benefits to residents of other states would fall under an extended art. 18 of a tax treaty, which includes annuities.¹³ But if art. 18 of the treaty was restricted to only pensions, then the benefits would fall under art. 17 of the treaty, because the income came from (previous) activities as a sportsman.¹⁴ Then The Netherlands would have the source taxing right and the residence state would have to allow elimination of double taxation.

But the *Belastingdienst* changed its mind after a court decision about ontslagvergoedingen (dismissal compensations), which were not paid at once but in periodic instalments. In that case, the *Hoge Raad* (Supreme Court) decided that these periodic payments cannot be considered as “annuities” under art. 18, because the benefits were not “in return for adequate and full consideration in money or money’s worth”, as required in the definition in art. 18(2) of an annuity in the tax treaty.¹⁵ The *Belastingdienst* ordered the CFK to apply this decision to the benefits to former football players and cyclists, which means that CFK benefits would not fall under an extended art. 18

¹³ This was decided in The Netherlands already with *Gerechtshof* (Appeal Court) *Amsterdam* 3 January 1986, BNB 1987/182.

¹⁴ This was decided in The Netherlands with *Hoge Raad* (Supreme Court) 3 May 2000, BNB 2000/328.

¹⁵ *Hoge Raad* (Supreme Court) 19 May 2017, BNB 2017/179.

(including annuities) anymore but under art. 17 of a treaty. With the result that The Netherlands has the taxing right for any CFK payment to rights holders abroad.

The CFK followed the order of the *Belastingdienst* under protest and appealed against the obligation to withhold the Dutch loonbelasting (wage tax). The *Belastingdienst* rejected this administrative appeal, after which the CFK sent its appeal to the rechtbank (court).¹⁶

Rechtbank Gelderland decided not to follow the reasoning of the *Belastingdienst*, because the CFK benefits do not come from a type of dismissal payment, but from a fund which was created after contributions from the salary of the football player. Therefore, *Rechtbank Gelderland* came to the conclusion that the CFK benefit payments to the resident of Australia still fall under art. 18 of the Tax Treaty Australia-Netherlands as an annuity, so that The Netherlands does not have any taxing right on the income.

Hierarchy between (extended) art. 18 or art. 17

It is interesting that *Rechtbank Gelderland* considers that the taxing right for the CFK income for former football players and cyclists, in principle, falls under art. 17, unless when this income can be characterized as a pension or annuity because then art. 18 applies.¹⁷ This suggests a hierarchy between an extended art. 18 and art. 17 in a tax treaty, but it can be discussed whether this is correct. The text of art. 17 is not specific about this, only art. 15 is mentioned:

“Article 17 – Entertainers and sportspersons
(OECD Model (2017)):

- 1 Notwithstanding the provisions of Article 15, income derived by a resident of a Contracting State as an entertainer, such as a theatre, motion picture, radio or television artiste, or a musician, or as a sportsperson, from that resident’s personal activities as such exercised in the other Contracting State, may be taxed in that other State.
- 2 Where income in respect of personal activities exercised by an entertainer or a sportsperson acting as such accrues not to the entertainer or sportsperson but to another person, that income may, notwithstanding the provisions of Article 15, be taxed in the Contracting State in which the activities of the entertainer or sportsperson is exercised.”

And it is also clear that art. 17 prevails over art. 7, as is mentioned in art. 7(4) of the OECD Model.

¹⁶ See para. 5.4 of the CFK *Annual Report* 2018/19. The *Belastingdienst* agreed not to enforce the taxing right retroactively, but only for new benefit payments. This case before *Rechtbank Gelderland* can be seen as a test-case and both parties have agreed to go directly to the *Hoge Raad* (Supreme Court) for the appeal, which means that they will leave out the appeal stage at the *Gerechtshof* (Appeal Court).

¹⁷ Consideration 12 of the Court decision.

The question is whether deferred payments, which are taken from the salary as contributions in a personal fund, from which directly after the active career benefits are paid as periodic payments, still fall under the original article of the OECD Model. If so, then in this case, it would be art. 17 for sportspersons, but for employees it would be art. 15.

Art. 15 of the OECD Model is clear in para. 1 that it gives priority to art. 18:

“Article 15 – Income from employment (OECD Model 2017):

- 1 Subject to the provisions of Articles 16, 18 and 19, salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that State unless the employment is exercised in the other Contracting State. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in the other state.”

But this is not mentioned in the text of art. 17, while also the Commentary on Art. 17 does not discuss this situation. This means that it is unclear whether art. 18 has priority over art. 17.

Elimination of double taxation/administrative burden

The reasons for the OECD for residence taxation of pensions and exemption at source are that:

- 1 the residence state has the best position to apply the proper tax rates and personal allowances; and
- 2 the taxpayer and the pension fund would have much lower administrative expenses than with taxation at source.

These reasons are also relevant for an extended art. 18 with other annuities. Here in this case, without the application of art. 18, The Netherlands would have to withhold *loonbelasting* (wage tax), while Australia would also want to include the CFK benefits in the worldwide income, but would have to allow a tax credit for the Dutch *loonbelasting*.

Some states also oblige their residents to file income tax returns after the taxable year in the source state, because a tax refund might be possible and then the residence state would only have to allow a tax credit for the final income tax in the source state. In addition, The Netherlands has the calendar year as taxable year, while in Australia this is July up until June, which means that tax certificates and income tax returns/assessments need to be divided to the right periods to come to the right figures. This creates an even more administrative burden.

Good reasons in favour of the application of the extended art. 18 (including annuities) of the Tax Treaty Australia-Netherlands and the sole taxing right for Australia, which means exemption at source in The Netherlands.

In the comparable case in Belgium from 25 September

2012,¹⁸ there was a specific reason why the former football player wanted the source withholding tax from the CFK in The Netherlands. That Dutch source tax would have been quite low because the football player did not have any other Dutch income, while the tax exemption in Belgium would be quite high, as it was calculated from the total income. The former football player would have had to pay some additional Belgian tax because of the progression, but together with the low Dutch source tax it would have been much lower than the normal Belgian tax on the CFK benefits. But the football player lost his case in the Court of Appeal of Antwerp, which confirmed that art. 18 of the Treaty Belgium-Netherlands gives the sole taxing right for the CFK benefits to the residence state Belgium.

Final words

This decision of *Rechtbank Gelderland* of 21 January 2020 had the same result as previous court decisions, not only in The Netherlands but also in Belgium. Whether the new theory of the *Belastingdienst* that the CFK benefits are comparable to dismissal compensations for employees makes sense, will be decided by the *Hoge Raad der Nederlanden* (Supreme Court of The Netherlands) as the final appeal instance.

It is interesting to see that The Netherlands uses the extended version of art. 18 in most of its tax treaties, because this is not in line with the OECD Model, but The Netherlands has not made an official reservation with the article. It is clear that, with a normal art. 18 in a bilateral tax treaty, the CFK benefits would fall under art. 17 of the same treaty and that The Netherlands would keep the taxing right.

But even when the extended art. 18 with pensions and other annuities is included in a tax treaty, it can still be discussed whether this will prevail over art. 17 for sportsmen. There is no wording as in art. 15 to support this priority and with the short time period between the contributions and the benefits, the income from the personal CFK bridging scheme could still be characterized as “income from the personal activities of the sportsman as such”, as mentioned in the text of art. 17. It is interesting whether the *Hoge Raad* (Supreme Court) will also pay attention to this aspect in its forthcoming decision.

An extended art. 18 with only taxation in the residence state would bring down the administrative work considerably, not only for former football players and cyclists but also for the CFK and the tax authorities in the residence state. But it also creates the chance of double non-taxation, if the income would not be taxed in the residence state.

Finally, this is a small subject, because only The Netherlands has such a bridging scheme and foreign high earners can get dispensations when they qualify for the 30% rule, but still there are interesting international tax aspects to this CFK scheme.

¹⁸ See footnote 4.

Governmental interference versus governmental intervention in sport

BY RICARDO WILLIAMS¹

Introduction

It is a salient fact that international sports governing bodies have taken an inflexible approach on an increased political interference in sports organisations. Rightly so, as they are private organizations and are independent in their management and operations.

There have been occasions that national sports governing bodies have used the “defence of government interference” conveniently to refuse to participate in a government joint venture that would benefit the sports body. Further, a government may want to get more involved with a sports governing organisation due to allegations of fraud and corruption and the term government interference is thrown about loosely. It is important to determine what are the subtle differences between governmental interference and governmental intervention in sport, which have been used interchangeably and which can create some confusion.

This article will attempt to add some clarity as to the interpretation of governmental interference versus governmental intervention; also briefly look at the autonomy or non-interference rules of a few of the major sporting organisations; and examine some actual examples of these rules as enforced over the years. Also, we will make a cursory analysis of the different types of approaches when governments intervene and the practicalities of such approaches.

The rules governing interference

Many of the international sports governing bodies have provisions in their respective constitutions and/or governing documents that specifically deal with the issue of governmental interference. A few extracts of those rules are mentioned below.

International Olympic Committee (IOC): Olympic Charter

Chapter 2 Rule 16 (1.5) of the Olympic Charter², states:

“Members of the IOC will not accept from governments,

¹ Sports lawyer, Port of Spain, Trinidad and Tobago, West Indies. E-mail: ricwil3o6@hotmail.com.

² *Olympic Charter June 2019.*

organisations, or other parties, any mandate or instructions liable to interfere with the freedom of their action and vote.” [emphasis added]

This rule requires that the running of the IOC itself and its members remains free from any sort of governmental interference, in that they will not accept any directive or instructions that would interfere with its governance.

Chapter 4, Rule 26.6³ states:

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

As a result, the implication is that the rule requires NOCs to maintain their independence and withstand any type of pressure from governments and other third parties, and, importantly, which may prevent them from complying with the principles of the Olympic Charter.

The Charter under Chapter 4 Rule 9⁴ states:

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

Thus, subject to the Rules of Natural Justice, failure to abide by the Olympic Charter will have consequences and as such the IOC will take appropriate action, including the suspension or withdrawal of recognition of an NOC, as it relates to the particular circumstances.

The reason for the IOC having such strict guidelines is to ensure the autonomy of its members, so that they remain free of any political

³ *Ibid.*

⁴ *Ibid.*

interference, nepotism and discrimination.⁵

Fédération Internationale de Football Association (“FIFA”)

The world governing body for association football (soccer) has similar rules or principles within its statutes to those of the IOC with respect to non-governmental interference.

Art. 14 para. (1) (i) of the FIFA Statutes⁶ states that national federations are obligated:

*“To manage their affairs **independently** and ensure that their own affairs are **not influenced** by any third parties.”* [emphasis added]

Paragraphs 2 and 3 of the same article, when read, in tandem, essentially provide that such a federation can face sanctions from FIFA for infringing para. 1(i), even if the infringement is not the fault of the federation.

*Art. 15 of FIFA Statutes⁷ mandates their member federations, at the very least, to incorporate within their statutes, provisions dealing with neutrality in political and religious matters, also “to be **independent** and avoid any form of **political interference**”* [emphasis added].

Further, art. 16⁸ gives FIFA the power to suspend a member federation, which is in breach of any obligations under the *FIFA Statutes*.

Over the years, FIFA has banned or suspended various football federations, such as Nigeria, Brunei, Ghana, and Kuwait, because of governmental interference in the running of their football federations. In fact, there are at least fourteen members that have been suspended by FIFA because of political or governmental interference since 2004.

World Athletics (“WA”) (formerly IAAF)

Art. 13.1 (C)⁹, in essence, outlines that any acts by a government, which may conflict or derail one of the purposes of the WA, would be considered interference and a suspension may apply.

International Cricket Council (“ICC”)

Art. 2.4 (c) of ICC Constitution¹⁰ states:

“[...] ensure that: (i) its statutes provide a process for free and democratic elections and appointments from amongst its members (or nominees from outside its

members) for its executive body; and (ii) it determines its office-holders by free and democratic elections in accordance with the process set out in its statutes [...].”

Article 2.4 (D)¹¹ states:

*“[...] manage its affairs **autonomously** and ensure that there is **no government (or other public or quasi-public body) interference** in its governance, regulation and/or administration of Cricket in its Cricket Playing Country (including in operational matters, in the selection and management of teams, and in the appointment of coaches or support personnel).”* [emphasis added]

As a consequence, the ICC imposes an obligation on members to provide a process for free and democratic elections and to ensure that there is no governmental interference in its governance and/or administration of cricket.

Actual governmental interferences

ICC

In 2019, the ICC suspended Zimbabwe for failing to ensure there is no governmental interference in its running of the sport. Zimbabwe were in breach of art. 2.4 (c) and (d) of the ICC Constitution. ICC funding was withdrawn and frozen and their representative teams were barred from participating in ICC events.

ICC Chairman, Shashank Manohar stated:

“We do not take the decision to suspend a Member lightly, but we must keep our sport free from political interference. What has happened in Zimbabwe is a serious breach of the ICC Constitution and we cannot allow it to continue unchecked.”¹²

World Athletics

It was in or around 2006, the IAAF, now World Athletics, suspended Algerian track and field athletes from all international competitions after the world governing body suspended the country’s athletics federation. This was a result of a decision by a government minister to dissolve the executive officers of the national federation with an interim committee.

The then IAAF President, Lamine Diack, was quoted as saying:

“The IAAF [now World Athletics] will strongly support the independence of democratically elected federations against all forms of government interference.”¹³

⁵ See Roshan Gopalakrishna, “Government “Interference” in Sport”, in: SLPC Blog, available at <https://lawnk.wordpress.com/2011/08/06/government-interference-in-sport> (accessed 3 June 2020).

⁶ *FIFA Statutes 2019 Edition*.

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *World Athletics’ Constitution (November 2019)*.

¹⁰ ICC’s Article of Association 2017.

¹¹ *Ibid.*

¹² ICC Media Release, 18 July 2019, available at www.icc-cricket.com/media-releases/1288479 (accessed 3 June 2020).

¹³ “IAAF suspends Algerian federation”, in: *The Sydney Morning Herald*, 14 November 2006, available at www.smh.com.au/sport/iaaf-suspends-algerian-federation-20061114-gdotp5.html (accessed 3 June 2020).

FIFA

There are numerous instances where FIFA has had to take action against its members as a result of political or governmental interference.

Nigeria

In 2010, FIFA imposed sanctions on the Nigeria Football Federation (NFF) because of governmental interference. Nigeria was sanctioned, due to the decision of the President, Goodluck Jonathan, to ban the national side from all international competition for two years. Though he may be justified in that the NFF had serious allegations of widespread corruption coupled with terrible performance at the World Cup, ultimately there was governmental interference into the affairs of the NFF.¹⁴

In 2014, the NFF was again suspended, after a court ordered the Minister of Sports to appoint a civil servant to run the federation. The NFF was later reinstated after the court order was revoked.^{15,16}

Greece

Over the years, FIFA had issued many warnings to the Hellenic Football Association and the Greek government that the running of the federation should be free from any kind of political involvement.

In 2004, the Greek government adopted a new law, which increased government involvement in the running of the professional football leagues in Greece. As a consequence, FIFA found that the Greek government had broken rules on the independence of members and decision-making in that country. The Hellenic Football Association was banned by FIFA from any involvement in international competitions.¹⁷

The ban was subsequently revoked, when the Greek government amended the law restricting the independence of the Hellenic Football Association.

Kuwait

In 2016, Kuwait was suspended by FIFA because there was government legislation, which prevented the national football association and the clubs from carrying out their operations independently.

The Kuwait Football Association was suspended from football activities by FIFA three times, once in

each of 2007 and 2008, and once in October 2015.¹⁸

The Iraqi Olympic Committee

In 2008, the Iraqi government took the decision to disband the country's National Olympic Committee. Iraq was subsequently suspended from participating in the 2008 Olympics in Beijing, due to the ongoing political interference by the government in the sports movement in Iraq.

Government intervention

Many professionals, when describing government's actions or inactions with reference to sports' governing bodies, sometimes use intervention interchangeably with interference.¹⁹ Other times, intervention is used in the context of preventing something bad from happening or to prevent or alter a result or course of events.

Interfere usually has an unpleasant connotation. Generally speaking, the person or party doing the interfering is up to no good.

Governments may get involved in sports for different reasons, such as, promoting fitness and health, promotion of a community or nation, reproduce societal values, promote international cohesion and facilitate economic growth.

However, governments tend to intervene for varied reasons, from sinister political agendas to constructively intervening to address matters that may be fundamentally wrong.

Governments participation in sport has evolved over the years and has a greater involvement in how sport is governed. There are number of contributory factors for this:

- the overwhelming financial contribution by governments in sport, as such has led to a greater say in how taxpayers' money is spent;
- many issues sporting bodies are confronted with are beyond their direct ability to control;
- sport itself has support from governments, whether it be legislative, operational and financial on complex issues;
- public and media pressure has both expected and demanded that governments take a direct involvement in sporting matters, citing the huge impact it has on both foreign and domestic policy.²⁰

Thus governments are arguably the most important stakeholders in sport or one of the most important. As an important stakeholder, governments have to be mindful of their roles in sport and their relationship with sports' governing bodies. Though governments' intervention in sport is inevitable, they have to

¹⁴ "FACTBOX-FIFA suspensions caused by political interference", in: *Reuters*, 28 November 2016, available at www.reuters.com/article/myanmar-rohingya-malaysia-soccer-backgro/factbox-fifa-suspensions-caused-by-political-interference-idUSL4N1DO3Ho (accessed 3 June 2020).

¹⁵ *Ibid.*

¹⁶ "List of Countries Affected FIFA sanctions", in: *Tivad News*, available at <http://tivad.blogspot.com/2011/03/list-of-countries-affected-fifa.html> (accessed 3 June 2020).

¹⁷ Lucy Trevelyan LLB, "Government involvement in sport", in: *In Brief*, available at www.inbrief.co.uk/sports-law/government-involvement-in-sport.

¹⁸ *Supra* 14.

¹⁹ "Ministry of Sports, Sport stay clear of NGB interference", in: *Trinidad & Tobago Guardian*, 16 March 2016, available at www.guardian.co.tt/article-6.2.351927.63ff4f1244 (accessed 3 June 2020).

²⁰ Adam Lewis and Jonathan Taylor, *Sport: Law and Practice*, 2 Edn. (Bloomsbury Professional).

consider their approach in wanting to improve governing issues and the like without disrupting the autonomous nature of sports governing bodies.

There are three main approaches in which governments intervene in terms of regulating sport:

- interventionist model;
- non-interventionist model; and
- public-private partnership.

Interventionist model

This is a direct intervention based on the premise that sport is a public function that the state has the right and the responsibility to deliver, achieved by implementing “specific legislation and or regulatory measures” on the structure and mandate of a significant part of the nation’s sports movement. Many southern and eastern European states, of which many sports organizations are created and existing by virtue of governmental licence and funding, intervene specifically in order²¹ to fulfill that responsibility as agents of the state.²²

In France, for example, their state authority²³ provides that the “*development of physical activities, sports and high level sports is incumbent on the state*”.²⁴ France’s Ministry of Sport is responsible for the promotion of sport to all age groups, and for the management and supervision of government grants to sports.

The above scenario will give rise to two issues:

- 1 potential governmental interference in sporting decisions; and
- 2 direct state intervention in the regulation and operation of sport.

However, there are instances where a government may intervene by legislative means where it is necessary to legislate specifically and directly on issues relating to the sports sector, whether or not in pursuit of specific sporting objectives. For example, in the UK, two pieces of legislation that are noteworthy are, the Safety of Sports Grounds Act 1975²⁵ and the Football Offences Act 1991²⁶.

21 European Commission, *The development and prospects for Community action in the field of sport* (Brussels 1998).

22 *Supra* 20.

23 “Loi du Sport”.

24 *Supra* 20.

25 In response to the collapse of a stand at Ibrox Stadium in 1969 killing 66 spectators.

26 Which created football specific crimes to address football hooliganism.

Non-interventionist model

Many countries have traditionally taken up this method. The idea of governments getting involved in the actual operation of sport has generally been frowned upon. Governments have taken up this approach, by generally leaving sport almost entirely up to each specific sport, to organize and manage itself, and also to regulate the entire conduct of sport.

However, instead, a government may use exhortation, persuasion and pressure on a sports’ governing body to act in a certain way. This approach sometimes sees governments imply they may be forced to resort to legislative action or policy direction if a certain route is not taken. At the same time, they cautiously stress only that this is their opinion as an interested and knowledgeable bystander.²⁷

In 2007 for example, the Australian Prime Minister, John Howard, put a lot of political pressure on Cricket Australia (CA) to voluntarily cancel the tour of Zimbabwe. They did not do so.

The Australian government subsequently banned the national cricket team from their upcoming three-match tour of Zimbabwe. They cited legal regulations allowing them to withhold the passports of players as justification for their actions. As a result, the Australian government avoided making a politically uncomfortable US\$ 2 million payment to Zimbabwe Cricket and its chief patron Robert Mugabe.²⁸

Public-private partnership

Public-private partnership can also be referred to as an indirect intervention, which has been increasing because of the perception that government sports policy can only be implemented in partnership with the private sports movement and the recognition that such a partnership and the increased public funding that comes with it, must be on a professional basis in accordance with normal public standards of transparency, equity and accountability.

Governments’ financial contributions to sport in many countries, along with the public interest, give a powerful policy making tool to achieve social and political objectives. The European Commission has identified that sport fulfills an education function, a public health function, a social inclusion function, a cultural function and a recreational function, making it a particularly effective weapon in the fight against intolerance, racism, violence, alcohol and narcotics abuse.²⁹

The tremendous public interest in sports, its social and

27 *Supra* 20.

28 Michael Herborn, “Australian government bans cricket team from Zimbabwe”, in: *Play the Game*, 24 May 2007, available at www.playthegame.org/news/news-articles/2007/australian-government-bans-cricket-team-from-zimbabwe (accessed 3 June 2020).

29 *Supra* 21.

economic importance, the role it plays in society and the large and continuous investment of public funds, all these factors and more are reasons why there is encouragement or pressure on governments to intervene in sport. Together with the growing need for government assistance whether it is legislative, operational and or financial.

This approach conditions sports' governing bodies' access to public funding on compliance with public policy objectives in the sector. This type of partnership has prompted several governments to seek reform and modernization of some of the practices of the private sports movement, amounting to a degree of intervention in the administration of sport, as well as in its regulatory imperatives, that departs significantly from the traditional method.³⁰

Thus recognition of a sports' governing body and access to public funds are coming to depend on compliance not only with objective standards on public interest issues, but also on issues relating to corporate governance and accountability that see the government taking a far more interventionist role, albeit indirectly.

There is an increased willingness by governments to intervene constructively to address issues said to be fundamentally wrong in sport, including mismanagement, poor governance, corruption and fraud. After all, governments are often big financial stakeholders and contributors to sport.

There are a number of countries that have adopted the public-private partnership approach in lifting their countries sporting sector to another level. Countries, such as Australia and the United Kingdom, have collaborated with sporting organizations and gained just rewards. Their involvement or intervention has been through their respective public sports' agencies. These agencies usually work in conjunction with the respective national sports' governing bodies and, most importantly, respect the autonomy of the sporting organisations in fulfilling their mandates.

Australia's intervention

Australian Sports Commission ("ASC") is the Australian Government agency responsible for supporting and investing in sport and physical activity at all levels. The ASC unites two other entities, namely Sport Australia and Australia Institute of Sport.

These organizations invest, collaborate, partner with national sporting organisations and are focused on improving the capacity and capability of national sporting organisations to create a sustainable and cohesive national sports sector.

As part of ASC's vision "[they] *work together with the sport industry and the wider community to champion*

the role sport can play in engaging every Australian."³¹

United Kingdom's intervention

Likewise, in the United Kingdom, there is the Department for Digital Culture, Media and Sport, which the public agencies, such as UK Sport, UK Anti-doping and Sport England, fall under.

UK Sport focuses on Olympic and Paralympic sports and provides strategic investment to enable these sports and athletes to achieve their full medal winning potential.

Their investment is wide ranging from grassroots, performance solutions, events, governance, leadership, financial accounting to technology.

In the UK, as a result of the establishment of the "Code for Sports Governance", organizations must adhere to "gold standards" of transparency, accountability and financial integrity.^{32 33}

The code calls for:

- increased skills and diversity in decision-making, with a target of at least 30% gender diversity on boards;
- greater transparency, for example, publishing more information on the structure, strategy and financial position of the organization;
- constitutional arrangements that give boards the prime role in decision-making³⁴

UK Sport and Sport England mandated the adoption and implementation of the Code, which imposes specific governance principles and rules affecting the institutional make-up of sports regulators, by NSOs funded by the government. Chief Executive of Women in Sport, Ruth Holdaway, stated:

*"If sport wants to be publicly funded, it must reflect the public it serves."*³⁵

There was also public warning to the UK's Football Association. In July 2016, the Sports Minister in the UK expressed the view that England's Football Association would face the prospect of the withdrawal of government funding if it did not engage in institutional reform. This aim was to foster best practice and modernize the governing principles of the Football Association.

³¹ Australian Sports Commission: www.sportaus.gov.au/sportaus/about (accessed 3 June 2020).

³² "Funding warning for sports governing bodies under new gender diversity code", in: *BBC Sport*, 31 October 2016, available at www.bbc.com/sport/37823821 (accessed 3 June 2016).

³³ UK Sport: www.ukssport.gov.uk/our-work/about-us (accessed 3 June 2020).

³⁴ *Ibid.* 32.

³⁵ *Ibid.*

30 *Supra* 21.

European Union

On a European level, the EU specifically states its respect for sports organisations' autonomy, but promotes compliance with the following principles:

- democracy;
- transparency;
- accountability in decision-making;
- inclusiveness in the representation of interested parties.

A "Good Governance" Expert Group in September 2013 published *Principles of good governance in sport*³⁶ which called on sports authorities to set out in published materials clear statements of their objectives, rules and processes, as well as to adopt democratic processes which engaged with relevant stakeholders. The EU has intervened in trying to provide a template for good governance principles in sports organisations throughout Europe.

CARICOM and Cricket West Indies

The Caribbean Community, better known as CARICOM³⁷, is slowly recognizing there needs to be more governmental involvement and intervention in sport. This has been seen especially in cricket, as it is the sport that unifies the Caribbean in providing a team that represents all the Caribbean.

Over the last twenty years, West Indies cricket has been on a continuing downward spiral. As such, in 2015 the CARICOM member states commissioned a Prime Ministerial Committee to report on the governance of West Indies cricket. The main mandate of the panel was to review the administrative and governance structure of the West Indies Cricket Board, now Cricket West Indies. CARICOM, amongst other things, contended that governance and transparency were paramount for a successful turn around of West Indies cricket.

The report³⁸ stated, inter alia:

"The shareholders of West Indies cricket, led by the WICB, however, rely on the active involvement of other stakeholders of the game to deliver its product. These include several Caribbean governments who finance the construction and maintenance of the stadia where the game is played; [...]"

The report further stated:

"In spite of substantial transformation and modernization of the business of cricket in other countries such as Australia (Cricket Australia) and England (England and Wales Cricket Board), the governance of West Indies cricket has failed to

*evolve in a manner which accords with the exigencies of the modern game, but continues to be governed by a structure that is not reflective of the transformation of the game elsewhere."*³⁹

Though laudable, their approach was found wanting. CARICOM was pursuing a "legislative approach" in an effort to achieve its objectives. In addition, a recommendation of the report called for the "immediate dissolution of the West Indies Cricket Board and the appointment of an Interim Board".^{40 41}

Of course, there was no other response expected from the Cricket West Indies than what CARICOM intended amounted to governmental interference.

Conclusion

It goes without saying; that governments are one of the biggest and influential stakeholders in sport. They have contributed financially, legislatively, operationally and have used sport to impact positively in communities of their respective countries. As such, they have a strong argument to intervene when necessary. The question is how can they intervene without interfering negatively in any particular sports movement.

Governments should ultimately use a public-private partnership approach. With this approach, they can intervene through collaboration, facilitation and partnership, in pursuance of good governance principles, transparency and accountability. It should be a symbiotic relationship, especially as the sporting sector frequently relies on legislative, operational and/or financial assistance.

Governments can legislate and set out regulations for the benefit of sport as a whole without interfering with sporting bodies' autonomy. Legislation is often required to assist sport, whether it is for international sporting events, such as the Olympics, anti-doping legislation, hooliganism and ambush marketing. However, legislation and regulatory measures by governments should never seek to directly intrude or interfere with the operations, management, structure and governance of a sports movement.

Thus, each government has to have a good understanding of the parameters of their roles and functions. A government can intervene, when it is necessary, but has to do so without interfering and thereby encroaching on the autonomy of sports' governing bodies.

³⁶ Expert Group on Good Governance, 21 July 2016.

³⁷ CARICOM is a grouping of twenty countries in the Caribbean: fifteen member states and five associate members.

³⁸ *Final Report of the Review Panel on the Governance of Cricket*, October 2015, available at <https://caricom.org/final-report-of-the-review-panel-on-the-governance-of-cricket> (accessed 3 June 2020).

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ "CARICOM laying groundwork to restructure West Indies cricket", in: *Jamaica Observer*, 4 April 2018, available at www.jamaicaobserver.com/latestnews/CARICOM_laying_groundwork_to_restructure_West_Indies_cricket (accessed 3 June 2020).

How much foreign-source income is exempted for a Netherlands sportsperson?

Or: does a professional sportsperson have one or two days off per week?

BY DR. RIJKELE BETTEN¹

Introduction

For many employees with a full 40-hours contract the working day still consists of five week days followed by two weekend days during which the employee is free from working obligations.

In the case of professional football players in The Netherlands, the employment contract usually contains a 40-hour working week. The contract does not specify how the hours are to be divided over the week, and since the majority of the professional games takes place on a weekend day, most professional football players will not, on a regular basis, have two free weekend days.

The case at hand dealt with the calculation of the amount which The Netherlands resident football player could deduct from his amount of income tax due. The football player had, in 2015, spent 11 days in Spain with his team, for playing and training purposes. Undisputedly, all these days were considered to be working days. Under the tax treaty concluded between Spain and The Netherlands, artistes and sportspersons are entitled to an ordinary exemption for the avoidance of double taxation. Under The Netherlands rules and practice, this exemption is calculated by allowing a deduction of the income tax due on the active income of a quotient consisting of the number of working days spent in Spain (in this case 11) divided by the number of working days in 2015. The more working days that are taken into account the smaller the exempt amount will be. Hence, the wish of the football player to take two days off into account and the wish of the tax authorities to allow for one free day per week.

The facts

During 2015, football player X resided in The Netherlands and was employed by a Netherlands football club. His employment contract mentioned 40 working hours per week without specifying anything on which weekdays needed to be worked. During 2015, he went on two training trips to Spain; one lasted 9 days and the other 2 days.

In 2015, he was assessed for a taxable active income of € 1,638,034 and € 33,522 as (fictitious) income from capital. The taxpayer claimed a deduction of 11/230 times the tax due, which amounted to € 77,057 (which entails a credit of about € 38,960). The tax authorities determined the exemption by using the formula 11/284 and hence allowed a credit of € 31,827. The after-tax amount at stake was about € 7,133.

The issues

The main issue was how to determine the lower amount in the formula for determining the credit following the exemption for the avoidance of double taxation. There were also several other more formal issues, which we will not deal with here.

The decision of the Court of First Instance²

The Court of First Instance held in favour of the taxpayer and determined the credit by using the formula 11/230. The arguments were dealt with by the Court of Appeal and we will mention them there.

The decision of the Court of Appeal³

The Court of Appeal added several factual considerations.

The Court referred to the *Collectieve Arbeids Overeenkomst* ("CAO") (Collective Labour Agreement) that was effective between 1 July 2010 and 30 June 2014. In this version, there

² Decision of 2 December 2017, Court of First Instance of North-Holland, HAA 18/593.

³ Decision of 11 February 2020, Court of Appeal of Amsterdam, Nr. 18/00665.

¹ International tax adviser, The Netherlands. E-mail: betten@xs4all.nl.

was no mention of the number of working days during the weeks. This was different from one of the previous CAOs, which did include mentioning that an employee had, in principle, the right to 2 free days per week.

This player concluded an agreement with his club on 1 July 2013 and, *inter alia*, the following elements were mentioned by the Court:

- the agreement was concluded for a period of 5 years;
- the player enters into a full contract of on average 40 working hours per week;
- working hours include: labour as ordered by the management, technical staff and board of the football club, including preparation for training and games, medical treatment and participation in training periods in The Netherlands and abroad;
- participation in activities for the benefit of society;
- promotional activities for the club and sponsors;
- the player is entitled to 20 days' holiday per year;
- where work needs to be performed outside normal working hours the player has no right to payment for extra time.

The Court also mentioned that the tax authorities had called the team manager of the club, who had stated that indeed players worked more than 5 days, but not 8 hours per day since training, as a rule, is not that long. Still, the team manager had apparently stated that, on average, the 40 hours is correct, only divided over more days. The players usually have one free day per week, still they need to be very flexible and often have no free weekend.⁴

Then, the Court of Appeal summarized the decision of the Court of First Instance. The parties had agreed that art. 18 of the tax treaty that was concluded between Spain and The Netherlands on 16 June 1971 allocated the right to tax the salary income earned during the 11 training days in Spain in 2015 to Spain.

This art. 18 is based on art. 17 of the 1963 Model Convention and reads as follows:

*“Article 18 Artistes and athletes
Notwithstanding the provisions of Articles 15 and 16, income derived by public entertainers, such as theatre, motion picture, radio or television artistes, and musicians, and by athletes, from their personal activities as such may be taxed in the State in which these activities are exercised.”*

For the method of applying the exemption for avoiding international double taxation, the parties made reference to the method in the Unilateral Decree for the avoidance of double taxation⁵.

The most relevant provision can be found in art. 10

⁴ Later the representatives of the player stated that the team manager did not remember having stated the above.

⁵ *Besluit voorkoming dubbele belasting 2001*.

para. 2 and reads (unofficial translation) as follows:

“The [...] exemption for foreign income from labour [...] is equal to the amount which has the same relation to the tax that would be due without applying this Unilateral Decree as the foreign income from labour [...] relates to the income in the denominator [this is effectively the taxpayer's worldwide income from labour in the relevant year].”

The issue at hand is the attribution of the salary to foreign days spent. This attribution is done by multiplying the yearly income with the quotient in which the foreign working days functions as the numerator and the total number of working days functions as the denominator. The number of foreign working days was 11, and the parties did not disagree about this.

Then, the denominator is, in many cases, equal to the days in the year (365 or 366) minus the weekend days (104), holidays (around 20) and public holidays (around 9 depending on whether the public holiday is on a week or a weekend day). Also important is that the salary can evenly be attributed to all working days.

The Court of First Instance then reiterated several Supreme Court cases on these issues.

The Supreme Court decided on 23 September 2005⁶ that, if the specific amount that is earned on foreign working days cannot be determined in a direct way, this should be done on a pro rata temporis basis. This also applies to holiday payments (the Supreme Court decided this on 17 December 1997⁷, thereby reversing an earlier decision of the Supreme Court). The Supreme Court in its September 2005 decision held in 3.3.5 as follows (unofficial translation):

“[...] the amount of salary that needs to be attributed to the labour performed in the labour state needs to be determined by multiplying the yearly salary with the quotient in which the numerator is the total number of days worked in the labour state, and the denominator is the number of calendar days minus the weekend days, the agreed holiday days, the public holidays etc. on which no work needed to be performed.”

On the basis of these main rules, the Court of First Instance held that the number of weekend days needs to be deducted from the number of calendar days, because otherwise branch-specific denominators would be necessary and this would reduce the manageability of the formula.

Hence the Court of First Instance held that the denominator should be determined as follows: 365 calendar days minus 104 weekend days minus 29 own and public holidays = 232.

Judgment by the Court of Appeal

The Court of Appeal summarized the position of the parties as follows.

⁶ ECLI:NL:HR2005:AP1424.

⁷ Nr. 32946.

The tax authorities held that the decision of the Court of First Instance is wrong, since the phrase “*on which no work needed to be performed*” would also refer to weekend days and holidays.⁸ The Court held that it only applied to the latter category of other days. The tax authorities also held that only days on which no labour is performed need to be excluded; it does not matter how many hours an employee needs to work on a particular day. Finally, the tax inspector tried to find through the published agenda on how many days in 2015 the player had to work. However, the agenda was not complete, as it did not contain the training periods in Spain and some other days on which training activities were normally performed.

The taxpayer held that the Court of First Instance decided correctly. No professional football player maintains an administration of days worked and the situation may be different from day to day. The taxpayer held that decisive should be that there is an obligation to work on average 40 hours per week. The conclusion from the cited phrase of the Supreme Court mentioned above is correct according to the taxpayer.

The Court of Appeal held as follows.

The Court agreed, in principle, with the basic reasonings followed by the parties and the Court of First Instance. It, therefore, focussed solely on the number of days that needs to be included in the denominator of the quotient.

The Court discussed two other Supreme Court cases (on a person with a 70% employment, and in this case the denominator had to be determined by calculating the number of working days with 70%)⁹ and then reformulated the main rule of the Supreme Court decision that was cited by the Court of First Instance into:

“The number of calendar days reduced with the contractually agreed holidays, public holidays, weekend days, and other days on which, according to the contractual arrangement, no labour needs to be performed.”

In addition, the Court held that all days need to be taken into account, not only those on which 8 hours have been worked.

And then the Court decided that the tax authorities had made it plausible that the football player was entitled to only one free day per week. The taxpayer failed to make facts and circumstances plausible that would have shown that the tax authorities determined the exemption at a too low amount. The Court held that the taxpayer had not made it plausible that the during every week he had two days off.

To conclude: the football player was held to have only one day off per week (and the quotient at 11/284) and

hence was entitled to a lower credit as exemption for avoiding international double taxation.

Comments

Some professional football players enjoy a significant salary during their active career. From an income of around € 60,000, the tax rate in the Netherlands is already 52%, so the taxpayer in this case, who earned around € 1,6 million per year will have paid an amount of income tax of around € 800,000.

Effective international double taxation for professional football players is, in practice, not very common. Still, there may be international situations in a country that applies the exemption method – such as The Netherlands – to reduce the tax burden by claiming an exemption for days worked outside The Netherlands.

In recent years, The Netherlands has tried to replace in its tax treaties the exemption method for sportspersons by the credit method so that only in case of actual taxation in the source country relief needs to be given. The 1971 tax treaty with Spain still contains the exemption method (and no subject to tax condition), so that The Netherlands still needs to allow an exemption for days worked in Spain. The case dealt with here deals with the calculation of the amount that may be credited as a consequence of the exemption. The tax authorities argued that football players do not have two days off per week and thereby tried to reduce the credit for the football players. This effect is the consequence of the quotient in which the number of foreign working days is the numerator and the number of working days in a calendar year is the denominator. The more working days the lower the quotient. In this case, the authorities succeeded in achieving their goal.

When reading the decision of the Court of Appeal it is difficult not to see several examples of target reasoning. The language of the decision of the Supreme Court that was used by the Court of First Instance that held in favour of the football player, was rephrased by the Court of Appeal to the disadvantage of the football player. Then it was stated that days on which only a limited time is spent are not to be considered as days off.

Professional sportspersons need to maintain their physical condition very well, of course, so no practice at all on two days would probably not be a good idea. Still, there are many more professions in which 5 working days of 8 hours in each week are by no means the standard; what about business people running their own business, lawyers who need to read every week(end) new legislation, case law and literature, high-level managers? It is submitted that each of these persons does not leave his or her business, profession and development unattended for two full days per week.

Two elements from the contract were not mentioned in the decision: first that overtime was not paid (this is also typically included in a labour contract of other well-paid employees) and the number of holidays, which was set at 20 days. These days probably refer to 4 holiday weeks,

⁸ Rather strange regarding holidays, since on those days of course no work needs to be performed.

⁹ Decision of 17 December 1997, Supreme Court, ECLI:NL:HR:1997:AA3266.

hence 5 working days per week. A different presentation of the facts could have been as follows: the professional football player needs to work at the club for 5 days per week, the schedule of which varies along the competition programme. If he needs to do some extra exercises on other days for physical maintenance, he is not paid for these additional working hours nor for other overtime activities.

Now, the tax inspector made a phone call to the team manager, who apparently stated that, as a rule, the players would have one full day off every week. The inspector also tried to work out the public agenda of the football club, without success since it was not complete. The Court of Appeal must have used this information to conclude to the one day off per week, a little strange because it rephrased the decision of the Supreme Court by including a reference to contractual days off. On the hand being formalistic to make a point and then following oral information that was later not confirmed by the taxpayer.

The author of this article is curious to see whether a following Netherlands court case on this issue will concern a CEO of a multinational, who would be in a comparable situation (utilizing art. 16 of a tax treaty). It is submitted here that probably he would not be confronted with a tax inspector who would state that, in practice, he would work every day (which he would probably do) and reduce his exemption for foreign working days by increasing the number of working days by taking only one weekend day into account. The amount at stake was relatively limited for taxpayer and the tax authorities (around € 7,133); at least, we have now paid attention to how to determine the denominator that is used in the quotient for determining the effective amount that follows from the ordinary exemption method used in The Netherlands tax treaties.

The 2018-2019 legislative reform

Sports agents in Italy

BY EDOARDO REVELLO AND MARCO VITTORIO TIEGHI¹

Introduction

2018 will be remembered as the year of a landmark reform involving sports agents in Italy, no longer limited solely to football's regulations: an epochal change following the so-called FIFA "deregulation" in 2015 enacted at an international level.²

Indeed, the Italian Parliament at the end of 2017, introduced a specific set of rules for sports agents with the 2018 Budget Law³.

This was the first time the Italian state-law intervened aiming to regulate professionals that did not have formal recognition before outside the sporting system.

The legislator's intention was quite clear: to regulate the access to this profession by establishing a register to be held directly by the Italian National Olympic Committee ("CONI")

in cooperation with the respective national sport federation.⁴

The 2018 Budget Law: the national Register and the qualifying examination. The ministerial decree and the CONI Regulations on Sports Agents

The 2018 Budget Law defined the new discipline in broad terms and referred to a subsequent decree of the President of the Council of Ministers⁵ after consultation with CONI, which detailed the procedures for the exams, the composition and functions of the judging committee and the obligations to update the register, as well as the parameters for determining the agents' commissions. Furthermore, CONI was appointed to issue ad hoc regulations, according to which each federation, operating in professional sports as per Italian Law no. 91/1981⁶, has to enact its own internal provisions.⁷

4 "The National Register of Sports Agents is established at CONI", reads art. 1 par. 373 of the 2018 Budget Law, "where [...] any person, who [...] connects two or more entities, operating in a sport discipline recognized by CONI, for the purpose of concluding a professional sports contract, its transfer, or the registration with a professional sports federation, must be registered. Only the Italian citizen or the citizen of another EU Member State [...] who has passed a qualifying exam is entitled to the registration."

5 Decree ("DPCM") of 23 March 2018, consisting of twelve articles, which sets the criteria for enrolling with the Registry, as well as for maintaining the registration. The Decree was amended firstly by the DPCM of 10 August 2018 and, then, by the DPCM of 27 June 2019, all available at www.sport.governo.it (accessed 3 June 2020). These two amendments have extended the validity of the licenses issued between 31 March 2015 (date of entry into force of the "deregulation") and 31 December 2017 (date of issue of the 2018 Budget Law) respectively until 30 June 2019 and, lastly, until 31 December 2019, thus guaranteeing a more extended transition period for the former agents. The Italian Football Federation, FIGC has consequently introduced a Federal Provisional Register of the qualified agents by FIGC between 31 March 2015 and 31 December 2017, operating until 31 December 2019 (FIGC Official Statement no. 33/A of 23 July 2019, available at www.figc.it (accessed 3 June 2020)).

6 Law no. 91 of 23 March 1981 ("Regulations on the relations between sports clubs and professional athletes"), available through the Italian Official Journal: www.gazzettaufficiale.it (accessed 3 June 2020). Currently, only four Italian sport federations have recognized the professional sector: the Italian Football Federation (FIGC), the Italian Basketball Federation (FIP), the Italian Cycling Federation (FCI) and the Italian Golf Federation (FIG).

7 All the provisions contained in the new CONI Regulations are also applicable, subject to the resolution of CONI National Council, to those national sport federations that have not established the professional sector.

1 Managing directors and co-founders of SportsGeneration Srl. Lecturers at the postgraduate course "Sports Law and Sports Justice – Lucio Colantuoni", held at the University of Milan. Co-founders of the Scientific Sports Law Centre of Milan (CSDS). E-mail edoardo.revello@sportsgeneration.it and marco.tiegghi@sportsgeneration.it.

2 Meanwhile, it is worth noting that FIFA decided to establish a new set of rules on professional football and agents in the 2019-2020 biennium. The FIFA Football Stakeholders Committee has been working, as of 2018, on a reform package for the entire system of players' transfers. A concrete series of proposals were enacted during the Committee's last meeting on 25 September 2019 (www.fifa.com/who-we-are/news/fifa-and-football-stakeholders-recommend-cap-on-agents-commissions-and-limit-on (accessed 3 June 2020)) and then reported to the following session of the FIFA Council on 24 October 2019. In particular, with respect to the agents, the most notable are:

- 1 a cap on commissions;
- 2 the limitation to multiple representation;
- 3 the reintroduction of the national licensing system through an exam (following its abolishment with the "deregulation" in 2015); and
- 4 the creation of a unique "clearing house" to manage any payment of agent's commissions.

3 Law no. 205 of 27 December 2017, available through the Italian Official Journal: www.gazzettaufficiale.it (accessed 3 June 2020).

As anticipated, the first significant decision was the introduction of the qualifying examination for all sports agents, without prejudice to those licenses released, respectively, before:

- 1 31 March 2015 according to FIFA regulations on football⁸, or
- 2 31 December 2017 according to FIBA regulations on basketball.

The exam consists of a double test⁹: a “general test” organized by CONI at least twice a year during the months of April and October, based on a written and oral examination on principles of sports law, private law and administrative law.

Then, a “special test”, which is accessed once the general is passed, organized independently by each federation during the months of June and December each year. In this case, the test will focus on the relevant regulations of the respective federation, in particular on the registration system, the sports justice code and its specific internal regulations.

There are other significant innovations to be noted. Firstly, the provision of constant professional educational updating for agents in order for them to keep their registration: agents are now obliged to attend a minimum of formation training hours established by the federation where they are operating. In addition, the obligation to sign, upon registration, the code of professional conduct, issued by the federation where the agent intends to operate.

Lately, another DPCM of 24 February 2020¹⁰ was enacted with the main aim to clarify the regulations on EU sports agents and the mutual recognition of their qualification, following some uncertainty arising from the first Decree of March 2018.

Regarding the so called “established agents” (“agente stabilito”), when a citizen of the European Union, already registered with another EU national football federation, wants to register with the FIGC, such agent shall request to be inserted in the specific section of the Register, provided that he/she has already passed an “equivalent exam” in his/her country.¹¹ After 3 years from this registration and effective operativity (with at least 5 representation contracts signed per year), should the agent be in good standing with all the obligations

provided for by the Italian federal regulations, he/she can request the ordinary registration with FIGC and CONI, without any obligation to take the relevant examination.

On the other hand, the discipline provided for non-EU agents is different: the agent is obliged to work with an Italian agent (or an “established agent”) duly authorized by FIGC and to formally involve the latter in the relevant transaction.¹²

As a result of the legislative reform, CONI Sports Agents Regulations were then approved with resolution no. 1596 of the CONI National Council of 10 July 2018 and, subsequently, updated with resolution no. 1630 of 26 February 2019 and resolution no. 1649 of 29 October 2019.¹³

In order to be able to attend the general test, the candidate must have preliminarily completed a training period of at least 6 months with effective duties with an operative agent; or alternatively having attended a training education course of at least 80 hours organized by CONI (or an accredited entity). For the special test, the individual national sport federation may request further requirements.

In addition to the introduction of the above-mentioned double level examination and the mandatory education updating, it is worth noting the presence of 15 subjective specific requirements to obtain the registration (following the examination procedure above), including the taking out of a professional insurance policy.

With regard to the commissions, CONI reserves the right for any national sport federation to introduce a specific maximum cap, expressed as a percentage on the value of the transaction or on the total gross player’s salary.¹⁴

Furthermore, CONI’s “*Collegio di Garanzia dello Sport*” (i.e. the supreme Italian sports justice body) will have jurisdiction on any appeal against disciplinary measures adopted by the Sports Agents Commission,¹⁵ as well as on any disputes concerning the validity, execution, interpretation of the representation contracts

8 The legislator took into account the mentioned “deregulation”, as enacted by FIFA in March 2015 with respect to professional football.

9 With respect to the first session for football agents (between the CONI general test and the FIGC special test, held between March and June 2019) only 1% of more than 800 candidates passed the exams, denoting a highly selective access procedure.

10 Available at www.sport.governo.it/it (accessed 3 June 2020).

11 CONI is entitled to introduce “compensatory measures” (i.e. an exam or a course) for those EU agents where their respective national sport federation does not provide for a qualifying examination.

12 The same procedure is applicable also to those EU agents where their national sport federation does not provide for an examination and they have not taken the “compensatory measures” (yet to be enacted by CONI).

13 CONI Sports Agents Regulations, available through <https://scuoladelloSPORT.coni.it>. It is worth noting that another update on the regulations is expected to be published by CONI as per last amendments of DPCM of 23 March 2020.

14 This provision must be now read in conjunction with the FIFA reform currently in progress at the international level with respect to professional football.

15 Upon registration, the sports agent agrees to voluntarily submit to the jurisdiction and disciplinary powers of CONI and the Commission. It is worth highlighting that a member proposed by the most representative association for players’ agents in Italy officially sits within the Commission.

and on all disputes of an economic nature.¹⁶

Finally, with the aim of limiting the increase of incorrect conduct between agents, relevant sanctions have been introduced, such as:

- the suspension from 6 to 24 months should the agent enter into a relationship with athletes already contracted with another agent, “*inducing them to early terminate their contract or to breach the obligations set forth therein*”; or
- the expulsion whether the agent “*offers or corresponds to colleagues or third parties commissions or other compensation or gifts, as consideration for the presentation of an athlete or a club or for the execution of a representation contract*”.

The new 2019 FIGC Regulations on Sports Agents

On 17 April 2019, FIGC issued its specific Regulations for Sports Agents¹⁷ based on the provisions of the CONI Regulations.

The main principles of the FIGC Regulations are essentially the same as those provided by CONI, such as the subjective requirements for admission; the two sections for the agents authorized by FIGC; and the so-called “established agents” coming from other EU sport federations.

The FIGC Regulations shall be amended according to the new provisions of DPCM of 24 February 2020 and the related new CONI Regulations (yet to be published).

The representation contract

Not only the figure of sports agents themselves, but also the nature of the agent’s appointment, as the core of their activity, has raised considerable debate in doctrine and jurisprudence.

The new 2019 FIGC Regulations state that the representation contract must contain a series of minimum requirements, but the parties are free to introduce further integration during the negotiation.¹⁸

In particular, such contract cannot have a duration longer than 2 years unless further renewed. It must expressly provide for the agreed commission fee with the related payment methods and modality, in

¹⁶ Starting from the football “*deregulation*” in 2015, the jurisdiction was devolved to the ordinary court in the absence of a delegated federal body. Consequently, the parties were free to agree upon the competent court in a specific clause within the representation contract.

¹⁷ Official Release no. 102/A of 17 April 2019 and subsequent amendments introduced with the Official Statement no. 137/A of 10 June 2019, available at www.figc.it (accessed 3 June 2020).

¹⁸ FIGC has published a non-binding contract sample that incorporates the minimum requirements requested by CONI (on the contrary, before the 2015 international reform, the parties must adopt the FIGC contractual standards). At the same time, the representation contract is null and void when it is not filed with the federation along with an executive summary (available at the official website).

addition to any penalty or termination clauses.

Furthermore, the agent is still allowed to simultaneously assist more than one party with respect to a transaction (such as, the releasing club and the player), provided that each party provides written consent avoiding any conflict of interest.¹⁹ The contract must be signed by the parties in triplicate copies and filed with the federation within 20 days, otherwise it would be null and void.

The parties may also establish the payment of a predetermined sum to be paid in the event of early termination. This is the so-called “flat-rate system”, that consists on a sum mutually predetermined by the parties in the contract.

Regarding the forms of termination of the representation contract, the new FIGC Regulations do not provide for any specific provision, thus applying the ordinary civil law rules on contracts.

The agents’ commissions

The 2019 FIGC Regulations have not amended any provision on agent’s commissions. Should the agent receive the mandate from the player to negotiate his employment contract, the agent can be paid with a lump sum to be freely determined by the parties, or with a percentage of the player’s total gross salary.

In the event that the agent is appointed by the club, the agent – in addition to the above principles – may alternatively agree upon a different form of remuneration, consisting of a percentage of the value of the player’s transfer price.

Furthermore, the parties can refer to some specific criteria, according to which the total amount of the commission payable to the agent “*shall not exceed 3% of the base remuneration of the player*” or “*of the transfer price value*”. It should be noted that this is only a non-binding recommendation (same as at the FIFA level with the “*deregulation*” of 2015), with the consequence that, unlike that in other foreign federations, the aforementioned percentage measure can be freely determined without any maximum cap.²⁰

Finally, regarding the commission’s limitations, the 2019 FIGC Regulations establish that “*no payment, utility or benefit whatsoever is due to the sports agent in relation to transfers, signing of contracts*”

¹⁹ An agent can represent a minor as long as he is 16 years old (in this case, the mandate will obviously have to be signed by those with parental responsibility or legal protection). Among the main innovations, for the first time, an amateur footballer can also be officially represented by an agent, but the effects of the related contract cease should the player not acquire the professional status by signing a professional contract within the following 8 months.

²⁰ As said, the above-mentioned FIFA reform on professional football will introduce a cap on the agents’ commissions worldwide. The entry into force is yet to be announced.

or registrations of minor players”, in accordance with the general principle enacted by FIFA.

Sports lawyers and agents

The debate on the possibility for a qualified lawyer to carry out the profession of sports agent (already started under the previous legislation) is now renewed in the light of the recent reform. One of the doubts raised is regarding the possibility for a lawyer to register also in the new agents’ Register provided by CONI, since such circumstance may constitute cause for incompatibility.

In this respect, the Italian Forensic National Council (“CNF”), rendered an opinion on 13 February 2019, stating that *“there is no obstacle to the simultaneous enrollment of the lawyer registered in the Register of Sports Agents, provided that the activity carried out is not of a continuity nature”*.

The most debated critical issues are connected to the “forensic ethics” arising with specific reference to two institutions contemplated by the sports regulations:

- 1 the multiple representation; and
- 2 the possibility for the agent to define his remuneration also as a percentage of the player’s annual salary or the amount of the transfer price.

Furthermore, with respect to the position of lawyers, who have not achieved the qualification of sports agents and, therefore, remaining completely unrelated to the sports ecosystem, it is worth highlighting the above-mentioned 2018 Budget Law (as referred to the 2019 FIGC Agents Regulations), according to which *“professional players and clubs affiliated to a professional sports federation are forbidden to make use of persons not registered in the official Register, without prejudice to professional competences recognized by law”*. A lawyer is certainly entitled to provide traditional legal assistance with respect to a negotiation in the professional sports scenario, whether it is a transfer between clubs or a player’s employment contract.

Conclusions: from “deregulation” to “overregulation”?

The Italian scenario has probably become one of the most complex systems with respect to a sports agent’s activity: after the international 2015 “deregulation” in football, there are now a detailed set of ordinary provisions (*i.e.* an article of the 2018 Budget Law and the related four decrees) applicable to the professional sports world and the subsequent CONI and federal regulations (with three different exam levels).

With respect to football, taking into consideration the co-existence of the new Register and the FIGC Provisional Register in force until 31 December 2019 (for agents who started their activity between 31 March 2015 and 31 December 2017 but not having passed the new exam yet), the Italian reform in its entirety is effective as of 1 January 2020.

In the meantime, FIFA is working on the above-mentioned reform package and each national football federation will have to comply with it in the future.²¹

Finally, the Italian legislator has enacted another sports dedicated law in August 2019²², according to which the Government shall be appointed to enact specific provisions with respect to clubs’ and athletes’ representation and the access to the profession of sports agents... apparently with a potential lack of coordination with the previous article of the 2018 Budget Law on the same matters.

More to come!

²¹ The emergency due to the coronavirus COVID-19 may cause a postponement of such reform.

²² Law no. 86 of 8 August 2019, available through the Italian Official Journal: www.gazzettaufficiale.it (accessed 3 June 2020).

Football:

Extension of players' contracts in Turkey due to the COVID-19 pandemic

BY SERDAR BEZEN, YESIM BEZEN, ZEKICAN SAMLI, TUGCAN AKALIN AND SALIH KARTAL¹

Introduction

The new coronavirus ("COVID-19") pandemic has become a global crisis in only a few months following its outbreak in Wuhan, China, in December 2019. According to the World Health Organisation, COVID-19 has spread to 213 countries, infected almost 6.5 million people and caused the deaths of over 383,000 people worldwide.²

Following the outbreak, national and international governmental and non-governmental organisations have implemented various measures to reduce the spread of COVID-19 by encouraging people to stay at home and avoid public gatherings. All social events, such as concerts, art exhibitions and sports competitions have, therefore, either been postponed or cancelled.

This is also the case for football competitions as European governments and local football associations have postponed the current football season for all European leagues, except for Belarus. In Turkey, all professional leagues and sports activities have been suspended on 19 March 2020 for an indefinite period.³

A significant number of football players' contracts expire on a specific date after the end of a regular football season. Such date is usually determined as 31 May. This year however – due to COVID-19 – most league competitions are planned to be completed in June or July. The same is true for the Turkish football league.⁴

¹ Of Bezen & Partners, Law Firm, Istanbul, Turkey. E-mails: serdar.bezen@bezenpartners.com, yesim.bezen@bezenpartners.com, zekican.samli@bezenpartners.com, tugcan.akalin@bezenpartners.com and salih.kartal@bezenpartners.com.

² Figures as of 3 June 2020. See for actual figures www.worldometers.info/coronavirus (accessed 3 June 2020).

³ Türkiye Futbol Federasyonu: www.tff.org/default.aspx?pageID=687&ftxtID=33181 (Turkish) (accessed 3 June 2020).

⁴ As of the date of this article, the Turkish Football Federation announced that the Turkish football leagues will resume on 12 June 2020.

This raises a major question: how will the contracts of football players playing in the Turkish league – especially those due to expire on 31 May – be affected by the suspension of official competitions?

Authority of regulatory football bodies

The Turkish Football Federation ("TFF") is a member of both the Fédération Internationale de Football Association ("FIFA") and the Union of European Football Associations ("UEFA"). UEFA is the administrative body for football associations in Europe whereas FIFA, the parent organisation of UEFA, is the highest governing body of football associations worldwide.

The scope of FIFA and UEFA's authority over its member associations is set out in the June 2019 edition of the FIFA Statutes (the "FIFA Statutes") which can be regarded as FIFA's articles of association.

Pursuant to art. 60 of the FIFA Statutes:

"[...] the confederations, member associations and leagues shall agree to comply fully with any decisions passed by the relevant FIFA bodies which [...] are final and not subject to appeal [...] They shall take every precaution necessary to ensure that their own members, players and officials comply with these decisions."

This obliges member confederations, such as UEFA, and member football associations, such as the TFF, to abide by the decisions of FIFA.

However, this provision does **not create a direct obligation** for football players as they and their respective clubs are not members of FIFA. The FIFA Statutes do not grant FIFA or UEFA the authority to directly interfere in the contractual relationship between a football player and his/her football club. For instance, in the event that a contract executed between a football player and a football club does not fully abide by the decisions adopted by FIFA or UEFA would not affect the legal status of such contract.

The FIFA circular⁵ no. 1171, dated 7 April 2020 (the "Circular") sets out the minimum requirements for

⁵ FIFA circulars constitute letters issued by FIFA's Secretary General for complementing or clarifying FIFA's decisions, rules and regulations.

contracts of professional football players. Art. 10 of the Circular explicitly states that such contracts are subject to the provisions of the domestic law.

FIFA and UEFA are hence incorporated as private associations, which derive their regulatory authority from their contractual relationship with their member associations (i.e. local football associations).⁶ FIFA and UEFA are not authorised to adopt binding decisions concerning the contractual relationship between football clubs and football players.

On 7 April 2020, FIFA published guidelines on certain football-related regulatory issues due to the outbreak of COVID-19 (the “Regulatory Guidelines”).⁷ The Regulatory Guidelines include FIFA’s recommendations on various subjects. One of the issues addressed in the Regulatory Guidelines relates to the expiry of football players’ contracts during the suspension of competitions. FIFA proposes that those contracts, that are to expire at the end of a regular season should be deemed extended until the newly designated end date of such season, which will most probably coincide with the end of the COVID-19 suspension period.

Extension of football players’ contracts under Turkish law

Nature of football players’ contracts

Under Turkish law, football players’ contracts are classified as “employment contracts” and are governed by the Turkish Code of Obligations no. 6098 (the “TCO”)⁸ The TFF also issues certain specific requirements in line with the FIFA Statutes and other relevant requirements set out by FIFA. Such TFF requirements for football players’ contracts are set out in the August 2016 edition of the TFF Directive on the Status and Transfer of Professional Football Players (the “TFF Directive”).¹⁰

Pursuant to art. 19(3) of the TFF Directive, the expiry date of a football player’s contract is required to be set as 31 May of the relevant calendar year. The idea behind such provision

⁶ Dr. Lloyd Douglas Freeburn, *Power, Legal Authority and Legitimacy in the Regulation of International Sport*, (2017). p. 26-27. Retrieved from <https://minerva-access.unimelb.edu.au/handle/11343/197924> (accessed 3 June 2020).

⁷ Retrieved from <https://resources.fifa.com/image/upload/1714-covid-19-football-regulatory-issues.pdf?cloudid=x9q8h6zvyq8xjtfzmpyg> (accessed 3 June 2020).

⁸ Published in the *Official Gazette* dated 4 February 2011 and numbered 27836.

⁹ As a general rule, under Turkish law, employment contracts are governed by the Labour Law no. 4857, published in the *Official Gazette* dated 10 June 2003 and numbered 25134 (the “Labour Law”). However, art. 4(g) of the Labour Law excludes contracts pertaining to athletes from its scope. Such contracts, including contracts of football players, are instead governed by the provisions of the TCO.

¹⁰ www.tff.org/Resources/TFF/Documents/TALIMATLAR/Profesyonel-Futbolcularin-Statusu-ve-Transferleri-Talimati.pdf (accessed 3 June 2020).

is to ensure that all football players’ contracts are effective until the end of the relevant competition season, which – in normal circumstances – runs from August to May in Turkey.

Another objective sought by the TFF with such regulation is to create harmony with global – and especially European – registration periods, i.e. transfer windows¹¹. Although there are certain specific requirements prescribed by FIFA (i.e. a pre-season transfer window may not exceed 12 weeks in total), transfer periods are different in each country and determined by each national football association independently. As transfer windows of most major European leagues take place between June and September, the TFF has adopted such “31 May” requirement, in order to allow players from Turkey to benefit from such transfer windows.

Pursuant to art. 14(a) of the TFF Directive, a contract executed in accordance with the requirements of the TFF must be submitted to the TFF for registration. Upon such registration, the TFF will grant such player a licence allowing him/her to play officially for the club with which he/she is registered. Accordingly, the TFF may not grant a licence to a football player if such player’s contract does not comply with the requirements of the TFF.

For instance, if a contract does not include the “31 May” provision, the TFF may not grant such player a licence preventing such player from participating in official competitions. However, this does not affect the validity of the contract under the TCO. Hence, even if the TFF does not provide a football player with a licence, the obligations of the football club towards the football player would still be valid as the contract itself is deemed to constitute an employment contract legally by nature.¹²

Extensions of contracts

The TFF Directive includes a safeguard for “extreme” or unforeseeable situations. Pursuant to art. 19(3) of the TFF Directive, football players’ contracts must include a provision stating that the duration of the contract will automatically extend in the event that official competitions are extended beyond 31 May. Since this provision is required to be incorporated in football players’ contracts, the suspension of official competitions will hence automatically entail an extension of the duration of such contracts until the actual end date of competitions. This requirement is in line with Section 2 of the Regulatory Guidelines of FIFA and comes in very handy during the current COVID-19 pandemic.

¹¹ A transfer window is a period in which football players are allowed to transfer from one football club to another.

¹² For instance, in 2015, Galatasaray signed a contract with Kevin Grosskreutz, a German football player. However, as the registration of such contract with the TFF and the FIFA transfer registration system could not be completed by the end of the transfer window deadline, the TFF did not provide Kevin Grosskreutz with a licence to play for Galatasaray. As such contract was a valid contract under the TCO, Galatasaray had to honour the contract and pay the monthly salary of the player although the player could not participate in any official competition until the next transfer window.

The effect of contract extensions on transfer windows

The suspension of official competitions also impacts on transfer windows. FIFA adopted the general principles and regulations regarding transfer windows in the March 2020 edition of the FIFA Regulations on the Status and Transfer of Players (the “RSTP”).¹³

According to art. 1(3)(a) of the RSTP, member associations must incorporate the FIFA principles pertaining to the transfer and registration of players in their regulations. FIFA’s aim is to unify the principles of transfer in each jurisdiction and provide for a globally consistent transfer market.

Member associations may set the specific dates and durations of local transfer windows in accordance with the RSTP and their local legislation. Once such periods are determined, member associations submit their transfer windows to FIFA through the transfer matching system (the “TMS”) 12 months in advance according to art. 6(2) of the RSTP and art. 5.1 of Annex 3 of the RSTP. During “exceptional circumstances”, however, art. 5.1 of Annex 3 of the RSTP allows member associations to amend the dates and durations of their local transfer windows after such details have been entered into the TMS.

One of the issues that has been addressed in the Regulatory Guidelines refers to transfer windows and how each member association should operate during the continuation of COVID-19. The Regulatory Guidelines explicitly provide that:

“[...] the COVID-19 outbreak is clearly an exceptional circumstance.”

In other words, FIFA explicitly allows, and even encourages, local football associations to postpone their local transfer windows.

As the Regulatory Guidelines are non-binding, this is at the discretion of the local associations to implement. From the perspective of football players and football clubs, it seems fair to follow FIFA’s guidelines and postpone transfer windows where competitions have been suspended due to COVID-19.

Conclusions

COVID-19 has adversely affected professional football, forcing many local football associations to take drastic measures by suspending and postponing official competitions. Although this constitutes a welcome response in the fight against the spread of the pandemic, it has also created uncertainty as to the expiry of football players’ contracts.

FIFA has been quick to issue guidelines in order to offer a solution. However, whether such solution will be adopted and followed remains to be seen.

In the meantime, the question to ask is whether the parties have incorporated an extension clause in their relevant contract, either as a pre-existing requirement of their respective football association or as a result of their negotiations. All Turkish players’ contracts contain such an extension clause in accordance with the provisions of the TFF Directive.

During these uncertain times, a solution will have to be sought in the rules of the local football association and hence domestic law in circumstances where players’ contracts lack such an express provision on contract extensions.

¹³ Available at <https://resources.fifa.com/image/upload/regulations-on-the-status-and-transfer-of-players-march-2020.pdf?cloudid=pljykaliyao8b1hv3mnp> (accessed 3 June 2020).

Taxability of payments made to a foreign celebrity as the brand ambassador for a product launch event held outside India

BY SUDARSHAN RANGAN¹

In this article, the author examines an interesting decision pronounced by the Mumbai bench of the Indian Income Tax Appellate Tribunal pertaining to an income received by a non-resident foreign celebrity from an Indian company and its Indian affiliate for a promotional appearance in a product launch event held outside India. The question pertains to whether the said income is an Indian source income under the Indian Income Tax Act as well as the relevant tax treaty warranting withholding of taxes by the payer, that is, the Indian company.

Prelude

Taxation of international entertainers and sportspersons has always remained a vexed issue, considering that their income is largely determined based on their performance/acts which normally take place across the globe and difficulty in attributing to the correct income in the performance state. Normally and more so for an emerging market like India, invariably the non-resident entertainer or celebrity passes the tax burden to the organizers or sponsors. These organizers or the sponsors being an Indian entity will have to bear the tax cost and hence taxation assumes immense commercial significance.

In this regard, recently an interesting issue that made the tax headlines is the case of Volkswagen Finance Private Limited² (“Indian Company”), a decision rendered by the Division Bench of the Mumbai Income Tax Appellate Tribunal (“ITAT”) where the ITAT had to answer a question as to whether a payment made by the Indian Company to a star-company in the United States of America (“USA”) for a product launch event held outside India, can be categorized as Indian income?

The ITAT interestingly expanded the source concept in India by invoking an intangible business connection concept and categorized the income as

¹ Advocate, Global Tax Laboratory, India.

² TS-172-ITAT-2020 (Mumbai).

Indian income, warranting withholding of taxes.

This article will analyse the judgement more specifically, the applicability of “Article 18 –Taxation of Sportsperson and Entertainers” under the India-USA Double Tax Avoidance Agreement (“Indo-USA DTAA”) in the given scenario.

The judgement – in brief

Volkswagen Finance Private Limited, an Indian company along with its Indian associate entity, jointly had planned for a launch of its new product, a motor car (Audi 8L) outside India. In this regard, the taxpayer had engaged a foreign international celebrity, a renowned Hollywood actor from the USA, Mr Nicholas Cage. For this purpose, the taxpayer had entered into a contract with his star-company in the USA – Kim Productions Inc., (“Star-Company”) which as part of the contract facilitated the appearance of the celebrity in the product launch event which happened in Dubai, UAE. Further, as part of the contract, it was also agreed that the non-exclusive promotional usage of the launch event will be utilised for “below the line publicity” for six months and for an unlimited period by the taxpayer for internal usage within the Volkswagen group entities. The issue before the ITAT was whether such payments made to the foreign celebrity for an event held outside India warrants withholding tax obligations as per the Indian Income Tax Act (“the Act”).

The contentions by the taxpayer were that the payment was made for an event occurring outside India and the said payment characterise in the nature of business income for the Star-Company. Therefore, the said payment does not accrue or arise in India and hence cannot be taxed in India by virtue of Section 5 read with Section 9(1)(i) of the Act. On the contrary, the revenue’s contention was that the payment to the Star-Company is in the nature of a royalty and hence warrants withholding of taxes under Section 195 read with Section 9(1)(vi) of the Act.

The ITAT on its judgement appears to have gone in detail on the nature of the product launch. The ITAT had convinced itself that the product launch in Dubai, UAE was a “below the line publicity” through the internet, press releases etc., which means the event was for mainly promoting the product in India and

the target audience is for the Indian market.

Further, the ITAT also observed that the expense for the event including the payment for the star company was claimed as business expenditure under Section 37 of the Act by the taxpayer and its Indian associate entity. Therefore, the ITAT invoked and concluded that there is a business connection by virtue of the expansive definition under Section 9(1)(i) of the Act (Explanation 3). The ITAT observed that the modern-day business models are dynamic and one needs to look at it from a different perspective. Therefore, it held that, even though the event was held outside India, the event is for the purpose of the Indian market and there possesses an intangible business connection for the Star-Company. Accordingly, it concluded that such an income will be taxable in India under Section 5(2)(b) read with Section 9(1)(i) of the IT Act. On this basis, the ITAT held that the payment made to an international celebrity for a product launch outside India by the taxpayer warrants withholding of taxes under Section 195 of the IT Act.

While deriving the conclusions, the ITAT had considered the Indo-USA DTAA and interestingly held that the said nature of income on account of participation in a product launch event outside India is not covered by any specific provisions including art. 18. No clear explanations had been provided as to why these clauses are not applicable. Further, on assessee's contention that the income will fit into art. 23(1) – Other Income of the DTAA – and accordingly be taxed only in the resident state of the income recipient, i.e. the USA, was also rejected. The ITAT held that art. 23(3) of the DTAA will trigger and since income is arising in the source state, i.e. India, it will also have the taxing right on the income.

Analysis – applicability of art. 18 of the DTAA

An interesting observation, as emphasised earlier, is the lack of explanation on why art. 18 of the DTAA shall not be applicable. One reason could be that the issue raised before the ITAT was not concerning the treaty implication, as the assessee's moot contention was that the said income does not accrue or arise in India for the recipient and, consequentially, the question of taxability in India does not arise. Be that as it may, the objective of this article is to look into the DTAA aspects and analyse whether the said income derived by the foreign celebrity will fit into art. 18 of the DTAA.

The relevant article for consideration here is art. 18(2) of the Indo-USA DTAA³, which reads as follows.

“Article 18 – Income Earned by Entertainers and Athletes

2. *Where income in respect of activities exercised by an entertainer or an athlete in his capacity as such accrues not to the entertainer or athlete but to another person, that income of that other person may, notwithstanding the provisions of Articles 7 (Business Profits), 15 (Independent Personal Services) and 16 (Dependent Personal Services),*

³ Art. 18(1) refers to individual entertainers/performers subject to certain other conditions. Since the payment is made to a star company, art. 18(1) will not be not relevant.

be taxed in the Contracting State in which the activities of the entertainer or athlete are exercised unless the entertainer, athlete, or other person establishes that neither the entertainer or athlete nor persons related thereto participate directly or indirectly in the profits of that other person in any manner, including the receipt of deferred remuneration, bonuses, fees, dividends, partnership distributions, or other distributions.” [emphasis added]

On breaking down the art. 18(2), the following key important factors emerge:

- activities to be exercised by an “entertainer”;
- accrues to another person, i.e. “star company”;
- taxability in the state where the activities are exercised.

Taxability of a star company

Taxability of a star company is covered under art. 18(2) of the Indo-USA DTAA. The facts of this case and the analysis of the taxability have a direct bearing on the provisions of this art.18(2). Art. 18(2) in the Indo-USA DTAA addresses the taxability on the basis of where the income for the performance is being paid to **the star-company as opposed to payments being made directly to the entertainer/performer.**

The Indo-USA DTAA considers art. 18(2) as an anti-tax abuse mechanism⁴, wherein it provides benefit in genuine circumstances where a legal entity has employees who are employed to undertake performance, then in such a scenario, the legal entity can invoke art. 7 of the DTAA and will be taxed in the performing state only if there exists a permanent establishment in that state. The employees in such a scenario may have their proportionate remuneration to the extent derived from the performance state be taxed under art. 18(1). We may, however, not be concerned about this as it is not relevant to the set of facts of this case.

In the given case, the taxpayer has entered into a contract with the Star-Company. A simple *Google* search indicates that the Star-Company is owned by the foreign celebrity. Therefore, art. 18(2) of the Indo-USA DTAA squarely applies. As per art. 18(2) of the DTAA allows the state in which **the activities of an entertainer or sportsperson** are exercised to tax the income and, therefore, the state where the activity is held will get the taxing right. In the given case, the activity was exercised in Dubai, UAE.

Now having determined the applicability of art. 18(2) that will squarely be applicable to the given case, let us look at the first key factor of it to check whether art. 18(2) of Indo-USA DTAA applies holistically.

Whether the foreign celebrity is an entertainer?

A moot question does arise whether the activity exercised by the foreign celebrity can be considered as an activity exercised by an entertainer?

⁴ US Treasury Technical Explanation on India-USA DTAA, p. 44.

“Entertainer” is neither defined under the Indo-USA DTAA nor under the Act. Further, the term does not have any definition from the OECD Model Convention as well. However, the OECD model convention provides indicative examples of who an entertainer can be. The commentary also mentions that the term is not exhaustive.⁵ In this regard, entertainer under general English meaning provides the following:

- *Collins Dictionary*: “An entertainer is a person whose job is to entertain audiences, for example by telling jokes, singing, or dancing.”⁶
- *GCIDE*: “A person who entertains others, someone who puts on a show for the entertainment or enjoyment of others.”⁷

Further from a tax context, one may refer to the definition of entertainer in The United Kingdom (UK) Statutory Regulation on The Income Tax (Entertainers and Sportsmen) Regulations 1987⁸:

“entertainer” means any description of individuals (and whether performing alone or with others) who give performances in their character as entertainers or sportsmen in any kind of entertainment or sport; and

“entertainment or sport” in this definition includes any activity of a physical kind, performed by such an individual, which is or may be made available to the public or any section of the public and whether for payment or not.”

Dr. Dick Molenaar, in his book on Taxation of International Performing Artistes⁹ after analysing the term in different pieces of literature across jurisdictions, defines, in his own way, the term artiste (the term entertainer was subsequently replaced to remove the term artiste, hence a common analogy can be derived) as follows:

“An artiste is a person giving an artistic and entertaining performance directly or indirectly before an audience, regardless of the artistic or entertainment level.”

Therefore, in the given case, the foreign celebrity is a popular and well renowned international actor famous for his Hollywood movies. Since Hollywood movies have a global audience, the renowned actor has a global celebrity status and appeal and this is an obvious reason for product endorsements in India. The fact remains undisputed that the foreign celebrity was present before a set of

audience present during the launch event¹⁰ and, therefore, there is absolutely no doubt that the foreign celebrity, in the given case, can be interpreted as an “entertainer”. Whether the activities exercised by such entertainer are akin to a performance will have to be determined and which we will do in the following sub-section.

Whether promotion and appearance for a product launch event can be treated as an activity exercised by the entertainer?

Having determined the foreign celebrity to be an entertainer, within the context of the Indo-USA DTAA, the other moot question that needs to be answered is whether the foreign celebrity appearing for a product launch, in the given case for the promotion of an Audi motorcar (Audi 8L) in Dubai, amounts to a performance?

Like in the case of the definition of the term entertainer, there is no definition contained in the Indo-USA DTAA to determine what may amount to an income from performances in order to trigger art. 18 of said DTAA. Further, the model conventions also do not provide this definition or clarity for Income from Entertainers and Sportspersons. Relying on para. 1 of the OECD MC Commentary¹¹, it mentions that art. 17 applies to income derived directly and indirectly from **a performance** by an individual entertainer or sportsperson. One may normally presume an entertainer to derive performance income through various streams, such as for playing a role in a movie, for singing a song, or even performing in an event or being present in award functions, etc. So, it appears that all these, directly and indirectly, connected income from the **a performance** will fall under art. 18 of the Indo-USA DTAA.

Having said that, there are other incomes which an entertainer derives, such as sponsorship or advertising or royalty from image rights. In this regard, there is no clarity on how these incomes will be treated for the purposes of characterization of income under the tax treaties. In this regard, the UN Model Convention and the OECD Model Convention commentaries are of the view that:

- royalties for intellectual property rights will fall under art. 12 (like in the case of image rights);
- general advertising and sponsorship fees will fall outside art. 12. Art. 17, i.e. income from entertainers and sportspersons will apply to advertising or sponsorship income, etc. related directly or indirectly to performances or appearances in a given state; and
- in general, other articles would apply whenever there was no direct link between the income and a public exhibition by the performer in the country concerned.

Therefore, based on the above, it is imperative to ascertain whether the income received by the foreign

⁵ Model Tax Convention (condensed version), OECD 2017, p. 332.

⁶ www.collinsdictionary.com/dictionary/english/entertainer (accessed 4 June 2020).

⁷ www.definitions.net/definition/entertainer (accessed 4 June 2020).

⁸ www.legislation.gov.uk/ukksi/1987/530/made (accessed 4 June 2020).

⁹ Dick Molenaar, IBFD Publications, The Netherlands; 1st edition (February 2006).

¹⁰ As culled out from the judgement copy, around 150 Indian customers were part of the event.

¹¹ Model Tax Convention (condensed version), OECD 2017, p. 333, para. 8.

celebrity/his Star-Company is for an activity exercised in the performing state. In the given case, Mr Cage, the foreign celebrity, appears in Dubai for the Audi 8L product launch event and as cited in the judgement¹² he undertakes certain functions such as:

- meet and greet the audience in the launch event;
- autographs;
- interact with the guests; and
- engage with the Audi director for a brief Q&A session.

Hence, it can be deciphered that the foreign celebrity has certainly engaged in activities of a performing nature. One may contend that performing will amount to only dancing, singing or similar sort which should be of an artistic nature. Further, the primary activity of the entertainer is only to promote or sell the product and hence should not be classified as income for the purpose of art. 18 of the Indo-USA DTAA. Accordingly, the argument could be that the mere presence of the actor for endorsement will not be tantamount to being a performing or activity exercised by the entertainer.

The counter argument to the above proposition can be that the entertainer is present in the product launch in his capacity as an entertainer. The Audi motor car launch event has invited the foreign celebrity, who is a well renowned Hollywood actor and not as an automobile wizard. Further, the activities listed, such as signing autographs, meeting and greeting are largely associated with an entertainer celebrity. According to Klaus Vogel in his treatise on double tax convention has indicated that, with regard to sponsorship income, if the sponsorship income is paid to an artiste, even for non-performance, it will amount to income from activities exercised by the sportsperson.¹³ Further, the UN and OECD Model Convention in its respective commentaries has held that “*Article 17 will apply to advertising or sponsorship income, etc. which has a close connection with a performance in a given State*”.

Further, the legal meaning of performance under the Indian contract law is “*Performance, in law, act of doing that which is required by a contract*”.¹⁴ Further, whether the performance is entertaining in nature is the follow-up question. The answer to it should be in the affirmative, considering that there were around 150 guests and a few other Indian celebrities present to make it a glamorous and entertaining event. Further, the agreement mentions that the said event will be broadcasted in all its Indian showrooms as an advertisement also passively indicates that the event has certain entertainment element in it. The contractual arrangement clearly specifies the participation of the entertainer for the specified event, viz., the product launch of the Audi 8L motor car and, more importantly, undertaking

certain activities. Therefore, it appears that certain activities have been exercised and performed by the entertainer.

Further reference for this argument can also be made to the UK legislation referred earlier, The Income Tax (Entertainers and Sportsmen) Regulations 1987. Under the said legislation, an activity of an entertainer “*which is designed to promote commercial sales or activity by advertising, the endorsement of goods or services, sponsorship, or other promotional means of any kind*”¹⁵ shall be construed as a relevant activity for the entertainer and shall be taxed in the UK if such activity was exercised in the UK.

Also, there are few Indian judicial precedents under the provisions of Section 80RR of the Act, which entitles deductions on foreign source income for certain specified professionals such as authors, actors, musicians or sportsmen. In this regard, the Mumbai ITAT in the case of Shahrukh Khan¹⁶, a popular Indian actor, held that income received for product launch, appearance in the launch events and photo sessions, will be tantamount to being an income received in the capacity of an actor and, accordingly, eligible to claim tax deductions on those incomes. Therefore, one may imply that the advertisement, endorsement incomes will be tantamount to being income in the category of an entertainer as appearance fees for the entertainer and, accordingly, will fall into the clutches of art. 18(2).

It is worth mentioning here that in the impugned case, the agreement entitles the taxpayer, and its group entity, to utilise the footage and pictures of the launch event containing the international entertainer’s picture on a non-exclusive basis for the promotion of the product up to a certain period. Since this part of the rights is directly linked to the activities during the product launch related activities, it partakes of the character of income under art. 18 of the Indo-USA DTAA and characterizing them as royalty under art. 12 shall not be appropriate as imaging rights. Reference can also be made to the OECD MC 2017 commentary on this very particular aspect:¹⁷

“[...] *There are cases, however, where payments made to an entertainer or sportsperson who is a resident of a Contracting State, or to another person, for the use of, or right to use, that entertainer’s or sportsperson’s image rights constitute in substance remuneration for activities of the entertainer or sportsperson that are covered by Article 17 and that take place in the other Contracting State. In such cases, the provisions of paragraph 1 or 2, depending on the circumstances, will be applicable.*”

Therefore, based on the above arguments, it can be contended that the income derived by a foreign celebrity

¹² Page 2 of the judgement [TS-172-ITAT-2020(Mumbai)].

¹³ Klaus Vogel on Double Tax Conventions, Third Edition.

¹⁴ www.britannica.com/topic/performance-contract-law (accessed on 4 June 2020).

¹⁵ Section 6: Relevant Activity.

¹⁶ IT Appeal No. 3894/Mum/2000 dated 19 June 2008.

¹⁷ Model Tax Convention (condensed version), OECD 2017, p. 336, para. 9-5.

engaged in the promotion of a product and appearance for the product launch-related activities falls under the clutches of art. 18(2) of the Indo-USA DTAA. Therefore, the taxing rights for the income are with the Star-Company where the activity is exercised which is in Dubai, UAE, and hence India shall not have the taxing right based on treaty application, even if the said income is taxable under the domestic legislation. Under the Indian domestic legislation, domestic legislation cannot override a tax treaty.

Epilogue

As can be seen in the Judgement, the ITAT has certainly expanded the goal post of the “source” concept by invoking an intangible business connection concept. The fact that the celebrity is an entertainer, what constitutes activities exercised or performance income remains contentious. In the case of Volkswagen Finance Private Limited, the question will be whether such income will fall under the clutches of art. 18 of Indo-USA DTAA (or) will fall into art. 23(3) of the Indo-USA DTAA was the moot issue. Unfortunately, the ITAT did not deal with the issue of classification of this income from a tax treaty perspective and had decided the issue of tax withholding on a very superficial level.

For the classification of income from a tax treaty perspective, it is relevant that art. 18 is to be looked into first, since it is a priority rule. Art. 18(2) will override art. 7 or art. 15 in lieu of the priority rule afforded to art. 18 of Indo-USA DTAA. Art. 23 can apply only when none of the articles in the Indo-USA DTAA was satisfied.

Further, even from the domestic legislation perspective, the ITAT had held that the impugned income is taxable under the Act¹⁸ on the basis that there exists a business connection¹⁹ for the non-resident, *i.e.*, the Star-Company which is intangible/virtual. The observations of the ITAT appear to be based on the Doctrine of Updating Construction, *i.e.*, the law also needs to be interpreted in lines with the neoteric business models and connected evolution of business transactions in today’s context.

New business concepts of “below the line publicity” etc. trigger intangible business connection, deserve definite merit. However, with due respect to the ITAT, the concept of business connection encompasses a certain degree of continuity and consistency. Certain isolated and sporadic transaction by a non-resident with an Indian party cannot trigger business connection. The concept of business connection (or) even a permanent establishment is basically **doing business in a country** and not for instances of **doing business with a country**. Mere isolated business with a country cannot trigger business connection. The ITAT had failed to consider this principle which was highlighted in the landmark Supreme Court of India judgement in the case of *CIT v. R.D. Aggarwal & Co*²⁰, where the highest court gave its meaning to the term “*business connection*”.

“Business connection contemplated by section 42 involves a relation between a business carried on by a non-resident which yields profits or gains and some activity in the taxable territories which contributes directly or indirectly to the earning of those profits or gains. It predicates an element of continuity between the business of the non-resident and the activity in the taxable territories, a stray or isolated transaction not being normally regarded as a business connection.” [emphasis added].

As a parting note, time is certainly ripe for both the relevant model conventions to look into the scope of art. 17 of the Model Conventions and art. 18 of Indo-USA DTAA, considering the significance of the entertainment and sports industry is to the global economies, more so for India, considering the audience size. Further domestic legislation, including the judicial authorities, must be circumspect regarding their creative interpretations and not to keep extending the source goal post to cover extra-territorial jurisdictions.

¹⁸ Section 5 read with Section 9(1)(i) of the Act.

¹⁹ *Business connection* in the domestic legislation is akin to permanent establishment in the treaty parlance and one of the prerequisites for taxing the income in India for non-residents.

²⁰ (1965) 56 ITR 20 (SC).

A perspective from the Caribbean

Sports broadcast rights in a social media age

BY DR. JASON HAYNES¹

Introduction

The near ubiquitous use of social media today has undoubtedly changed the way we consume sporting activities.

Whereas in the past, television sets were the primary means through which the public consumed sporting events, the times have changed. Today, sporting events can be uploaded; the increased visibility on social media creates unique opportunities for athletes to demonstrate their athletic prowess to a global audience, and broadcasters the opportunity to create and market their content on various platforms. This has invariably come at a cost, as now, more than ever, clips of sporting events are shared on social media without authorization.

This article addresses the challenges posed by social media to sports broadcast rights holders, in particular, in the Caribbean, where the online consumption of sport has grown exponentially in recent years.

The proliferation of social media

Over the last decade or so, social media has revolutionized the ways in which we share and consume content, including sporting activities. Now more than ever, sporting organisations are investing in various social media platforms, broadcasting organisations are sharing their content on these platforms, either on a free or subscription basis, and virtual spectators are viewing and engaging with this content from the comfort of their homes. Interestingly also, we have seen the rise of social media influencers and buzz marketers, who are increasingly being used by large and small companies to share their content on social media, which might contain clips of sporting events.

Conservative estimates indicate that, today, *Facebook* alone generates interest from nearly 2.23 billion monthly users

from all across the globe.² In addition to images, *Facebook* allows users to upload and share videos, including live videos of sporting events, onto its platform, where they are widely circulated. *YouTube*, which has 1.9 billion monthly users, also allows videos of sporting events to be uploaded, and shared widely. In fact, social media influencers can create content on *YouTube*, sometimes using clips of sporting events, share these widely, and generate tremendous public interest as part of their strategy towards monetization.

Instagram, which has about 1 billion monthly users, *Tumblr* 642 million monthly users, *Tik Tok* 500 million monthly users, *Twitter* 335 million monthly users, *LinkedIn* 294 million monthly users, *Snapchat* 255 million monthly users and *WhatsApp* 1.5 billion monthly users, are all being increasingly used to upload and share content, which may contain clips from sporting events and which are protected by copyright law.

In most cases, these clips are shared for sheer entertainment, but increasingly, broadcasting organisations, social media influencers and buzz marketers are using social media platforms to create and share sporting events for purely commercial purposes. This invariably gives rise to serious challenges.

The value of sports broadcast rights

There has never been a time in the history of sports broadcasting like now.

For the first time in the history of sport, sporting organisations, which have traditionally generated most of their income through sponsorship and advertising partnerships and ticketing and hospitality, have begun to see broadcast revenue dominating their balance sheets. In fact, recent statistics from the 2018-2019 edition of the UEFA Champions League suggest that € 1.976 billion in broadcasting revenues were generated. Of this, FC Barcelona benefited from € 298.1 million; Manchester City FC € 287.1 million; and FC Bayern München € 211.2

¹ Lecturer in Law, University of the West Indies, Cave Hill Campus, Barbados. E-mail: jasonkhaynes@hotmail.com.

² Alfred Lua, "21 Top Social Media Sites to Consider for Your Brand", in: *Buffer* (2020), available at <https://buffer.com/library/social-media-sites> (accessed 4 June 2020).

million.³ Meanwhile, statistics from the English Premier League (EPL) show that 2018-2019 matches were followed in 188 countries by TV audiences of 3.2 billion people. International broadcast revenue amounted to £ 43,184,608, while broadcast revenue from within the UK amounted to £ 34,361,519. Top broadcasting revenue earners were Liverpool with £ 30,104,476; Manchester City with £ 28,985,373; and Tottenham with £ 31,223,579.⁴

In so far as the Cricket World Cup, England 2019, was concerned, reports indicate that some £ 400 million⁵ was generated in broadcast revenue, while over \$ 4 billion was generated in broadcast revenue from the hosting of the 2016 Rio Olympic Games.⁶ While statistics on revenue generated from broadcast rights are not publicly available in the Caribbean, there is widespread acknowledgement among statisticians, sporting associations, leagues and clubs that a considerable amount of money is being earned from the broadcast of major sporting events, including the Confederation of North, Central American and Caribbean Association Football (CONCACAF) Championship, the Caribbean Premier League (CPL),⁷ and myriad athletic championships.

The revenue generated from broadcast rights are used by sporting associations for a variety of laudable purposes, including the remuneration of key personnel; investment in modern technology; enhancement of stadia and other sporting facilities; and funding to support grass roots organisations, athletes and other persons concerned with the playing, management and administration of sport.

Social media as a threat to broadcast rights

While increased access to social media has done a world of good to sporting organisations, athletes, broadcasting organisations, app developers and consumers by creating a global village where sporting activities can be shared and consumed in an instantaneous

fashion, this has, in many respects, come at a cost.

Indeed, in the last decade or so, social media platforms have increasingly been used to perpetuate the infringement of broadcast rights in sporting events. This is primarily because rival broadcasters, app developers, social media influencers and consumers no longer regard social media platforms as avenues for sharing content for entertainment purposes, but as a means of earning money. In this unbridled quest towards commercialization, many of these persons and entities have both advertently as well as inadvertently engaged in practices on their social media platforms which are likely to breach the copyright that subsists in sports broadcasts.

The principal threat, in this connection, is the inclusion, without authorization of the copyright holder, of clips illegally obtained from sports broadcasts, which are then shared widely for non-informatory purposes on social media platforms. These clips, which are typically used in a variety of online content, including counter-programmes, video blogs and highlights, reach billions of users monthly, and are increasingly becoming a significant source of revenue for these persons and entities, even though they have not obtained a license to use the underlying copyright subject matter.

The protection of sports broadcast rights in a social media age

The *International Convention for The Protection of Performers, Producers of Phonograms and Broadcasting Organisations* ("The Rome Convention"), adopted on 26 October 1961, to which many Caribbean countries are States Parties, is the international instrument that gives protection to copyright holders in sports broadcasts. To the extent that the subject matter at issue is the transmission by wireless means for public reception of sounds or of images and sounds, the Rome Convention affords broadcasters a number of rights, including the ability to prohibit others from rebroadcasting their broadcasts; fixating their broadcasts; reproducing their broadcast without permission; and communicating to the public their broadcasts, if such communication is made in places accessible to the public against payment of an entrance fee.⁸ These rights are afforded for a period of 20 years from the time the broadcast took place.⁹

The Convention, however, recognizes that the rights of broadcasters must be balanced against the rights of the general public, and accordingly provides for a number of exceptions; that is, circumstances where it would be lawful to use a broadcast, namely for private use; use of short excerpts in connection with the reporting of current events; ephemeral fixation by a broadcasting organisation by means of its own facilities and for its own broadcasts; and use solely for the purposes of teaching or scientific research.¹⁰

³ *The European Champions Report 2020* (KPMG, 2020), available at <https://assets.kpmg/content/dam/kpmg/nl/pdf/2020/persberichten/the-european-champions-report-2020.pdf> (accessed 4 June 2020).

⁴ Sean O'Brien, "RAKING IT IN – Premier League: How much every club earned during the 2018/19 season revealed", in: *Talk Sport*, 24 May 2019, available at <https://talksport.com/football/548092/premier-league-every-club-earnings-revealed> (accessed 4 June 2020).

⁵ Tim Wigmore, "Cricket World Cup has grown into a commercial monster – but it's wealthiest nations whose pockets are being lined", in: *The Telegraph*, 25 May 2019, available at www.telegraph.co.uk/cricket/2019/05/25/cricket-world-cup-has-grown-commercial-behemoth-wealthiest (accessed 4 June 2020).

⁶ Ben Chapman, "Rio 2016: The richest Games in 120 years of Olympic history", in: *The Independent*, 4 August 2016, available at <https://www.independent.co.uk/news/business/analysis-and-features/rio-2016-olympic-games-richest-ever-usain-bolt-mo-farah-a7171811.html> (accessed 4 June 2020).

⁷ Kunal Dhyani, "Caribbean economy had a \$127 million impact from Hero CPL", in: *Inside Sport*, 18 January 2019, available at www.insidesport.co/caribbean-economy-had-a-127-million-impact-from-hero-cpl (accessed 4 June 2020).

⁸ Rome Convention, art. 13.

⁹ *Ibid.*, art. 14.

¹⁰ *Ibid.*, art. 15.

Although the Rome Convention has been criticized for its lack of a comprehensive approach towards the protection of broadcasters and a Standing Committee on Copyright and Related Rights has recently created a Draft Treaty on Broadcasters' Rights, the Rome Convention has served broadcasting organisations fairly well since it came into existence. In fact, it is pursuant to this Convention, and, to a lesser extent, *The Agreement on Trade-Related Aspects of Intellectual Property Rights*, that Caribbean nations have adopted domestic copyright legislation,¹¹ *inter alia*, to combat the infringement of broadcasting rights. These pieces of legislation define what is a broadcast in largely a manner consistent with the Rome Convention; outline the term of protection, which is usually 20 years, but 50 years in some countries; outline the rights that copyright holders in broadcasts enjoy; specify the circumstances in which broadcasting rights will be infringed; outline the defences available to rebut allegations of infringement; and provide appropriate remedies to the copyright holder where these defences fail.

Social media and the infringement of copyright in sports broadcasts

As intimated earlier, the near-ubiquitous and often unrestrained use of social media platforms has created tremendous difficulties for the owners of copyright in sports broadcasts. Unable sufficiently to restrain infringers through polite requests and take down notices, sports broadcasters are increasingly becoming litigious. Litigation, in this context, has arisen largely because third parties, contrary to copyright legislation, have, without permission, copied the whole or a substantial part of a sports broadcast; or issued copies of it to the public; or played or showed it in the public domain; or rebroadcast it on social media.

While there are instances in which third parties have used the whole of a sports broadcast for purely commercial purposes, more often than not copyright holders face the challenge of a substantial part of their work being used in an unauthorised fashion by third parties on social media. As a matter of principle, where a third party, on social media, has taken and used a substantial part of a broadcast in an unauthorised fashion, the court will likely find an infringement. This notion of a "substantial part" is a ubiquitous concept that has been interpreted variously by courts and tribunals as referring to, among other things, whether what has been taken amounts to:

- “essentially the heart” of the copyrighted work;
- “the essential part of the copyright work”;
- “an important ingredient” of the copyright work;
- “the best scenes from the programme”;
- “highlights from the programme”;
- “central to the programme in which it appeared”; and
- “the “heart” – the most valuable and pertinent portion – of the copyright material”.

The nuanced question of whether posting on social media a clip of a sporting event, obtained by a third party from a broadcast without permission, amounts to an infringement of copyright arose in the Jamaican case of *Television Jamaica Limited v. CVM Television Limited*.¹²

Here, TVJ had, for the year 2015, the exclusive licence to broadcast the IAAF's World Athletic Championship (WAC) held in Beijing, China. CVM, a competitor, apart from developing a one-hour counter-programme, *Return to the Nest*, monitored the WAC on the IAAF's website and the IAAF live *YouTube* stream, and posted clips on its *Twitter* and Facebook platform. These clips included footage of not only races, but interviews and reactions. TVJ claimed a breach of its copyright in CVM's allegedly unauthorised use of its broadcast, *inter alia*, on the latter's social media platforms. The Court ultimately held that CVM had breached TVJ's copyright in the sporting broadcast, as there was copying of a substantial part of TVJ's broadcast without permission. The court made an award of damages, as well as additional damages to take account of CVM's deliberate and calculated use of TVJ's copyright content.

In arriving at its finding as to infringement, the court considered that quantitative and qualitative considerations undergird the test for substantiality. Essentially, therefore, even though the length of the clips posted on CVM's social media pages was relatively short (quantitative consideration), when looked at holistically, it was clear that the clips in question, which contained footage of races and interviews and reactions, were qualitatively significant, such that they could be properly described as going to the heart or essence of the claimant's copyright in the broadcast. In the court's estimation:

“In the world of copyright, very significant portions has both a quantitative and qualitative dimension to it. The last 10 metres of a race is very significant because the last 10 metres will show the medal winners. This is track and field's equivalent of goals and near misses of football. It is ultimately that type of information that many members of the viewing public want to know.”¹³

The court, quite progressively, rejected the argument advanced by the defendant that it did not actually take the clips from TVJ's broadcast, but from the IAAF's *YouTube* stream. In response to this difficult question,

¹¹ Anguilla Copyright Act Chapter C120 (Act 3/2002); Antigua and Barbuda Copyright Act 2003 (Act No. 22 of 2003); The Bahamas Copyright Act 1998 (CH.323); Barbados; Copyright Act, 1998 (Cap. 300); Bermuda; Copyright and Designs Act 2004; The British Virgin Islands (BVI) the United Kingdom extended the Copyright Act, 1956 to the BVI by the Copyright (Virgin Islands) Order 1962 (SI No 2185 of 1962); Cayman Islands Copyright (Cayman Islands) Order 2015; Dominica Copyright Act 2003 (Act 5 of 2003); Grenada Copyright Act (Cap. 67, Act No. 21 of 2011); The Copyrights (British Guyana) Order 1966 No. 79; Jamaica The Copyright Act (Act No. 5 of 1993); Montserrat (Montserrat has continued to use the United Kingdom's 1956 Copyright Act); Saint Kitts and Nevis Copyright Act (Cap. 18.08) of 2002; Saint Lucia Copyright Act 1995 (Act No. 10 of 1995); Saint Vincent and the Grenadines Copyright Act 2003 (Act No. 21 of 2003); Trinidad and Tobago Copyright Act, Cap. 82:80 8 of 1997; Turks and Caicos Islands (The United Kingdom Copyright Act 1911 applies to the TCI).

¹² [2016] JMSC COMM 21.

¹³ *Television Jamaica Limited v. CVM Television Limited* [2016] JMSC COMM 21 [188]

the court, quite intuitively, considered that:

“[...] it is no defence to say that the infringement did not actually involve taking, in this case, the live or delayed TVJ broadcast. In other words, the infringer cannot say in defence, “I got the material from somewhere else and not from TVJ’s actual broadcasts. I did not intercept any broadcast signals intended for TVJ or neither did I feed into TVJ’s broadcast after it received the broadcast signals.” Once a person, natural or otherwise, has an exclusive licence then no other person, natural or otherwise, can do any of the acts the exclusive licensee can do by accessing the exclusively licenced material from some other source unless there is a legal exemption or lawful excuse.”

While the foregoing ruling on infringement was both robust and progressive, perhaps the most significant aspect of the TVJ v. CVM judgment was the court’s treatment of the fair dealing defence for the reporting of current events.

At the very outset, the court rightly noted that broadcasters do not enjoy a monopoly with regard to their broadcasts:

“[...] the absolute monopoly that broadcasters had over their undoubted copyright protected material no longer exists. The legislature broke it and created a fair dealing defence for the purpose of reporting current events. This is exactly what has happened in Jamaica.”¹⁴

As such, not only can broadcast organisations rely on the fair dealing defence, but ordinary citizens in a social media context, in relation to whom there was previously a lack of clarity as to whether the fair dealing defence inures to their benefit. Quite progressively, the court affirmed the English decision of *England and Wales Cricket Board Ltd & Anor v. Tixdaq Ltd & Anor*¹⁵ when it found that:

“[...] when the Berne Convention came into being, social media did not exist, the “citizen journalist” was not clearly recognized even if he or she existed in the nineteenth century. The Berne Convention had in mind governmental or formal news agencies.¹⁶

In respect of [the fair dealing defence], this court is of the view that firstly, the [defence] is one of general application to all citizens. There is nothing in section 53 [of the Copyright Act] and the rest of the statute that precludes an ordinary person from running a blog, a vlog or some other form of communication on social media for the purpose of criticism or review of a protected work. Equally, there is nothing in the provision that precludes an ordinary person from reporting on current events. The word “reporting” in the phrase “reporting current events” simply means giving an account of some event. The expression “reporting current events” means

¹⁴ *Ibid.* [93]

¹⁵ [2016] EWHC 575 (Ch)

¹⁶ *Television Jamaica Limited v. CVM Television Limited* [2016] JMASC COMM 21 [108]

*giving an account of something that is happening now or if it has occurred in the past is sufficiently connected to present events to make it properly part of current events. For example, the attacks on the World Trade Centre in 2001 can properly be regarded as a current event if sufficiently connected to a present event such as the recent attacks in Paris.*¹⁷

*[...] There is no reason why an ordinary citizen unconnected with any news organisation cannot report on a current event. There is nothing in the section that restricts the act of reporting to journalists or news reporters. The wording is sufficiently wide to include ordinary citizens even though the framers of the law had in mind news organisations. Thus in this regard this court agrees with Arnold J on the result but not the route to the result.*¹⁸

The court is to be commended for accepting that “sports news”, even if posted on social media, can properly be characterized as “news” for the purposes of the fair dealing defence. In this regard, it noted that:

“[...] sports news reporting can be regarded as genuine news albeit of a sporting character; [and] the wording of the section is not to be restricted to general news reporting.”¹⁹

Sporting news is as much news as the usual form of news that tell us of the latest atrocity of criminals, failed banks, successful business launches, the peccadillos of public figures, the virtue of the ordinary man and the most recent earth quake or other natural disaster.”²⁰

The court, while principally ruling in connection with CVM’s *Return to the Nest* programme, nonetheless developed principles which can be easily applied to the social media context. In this connection, one of the likely implications of the court’s judgment is that, even if a person, using a social media platform, creates a programme that uses some of the content of a sports broadcaster, this rival programme will not necessarily nor inevitably result in there being an infringement of copyright:

“[...] the fact that a rival is doing the reporting on current affairs is nothing to the point. It is whether the dealing is fair.”²¹

If the programme is a true reporting of current events then it is nothing to the point to say that the alleged infringer is making the programme attractive to viewers.”²²

Another statement from the court’s judgment, which

¹⁷ *Ibid.* [116]

¹⁸ *Ibid.* [117]

¹⁹ *Television Jamaica Limited v. CVM Television Limited* [2016] JMASC COMM 21 [97]

²⁰ *Ibid.* [149]

²¹ *Ibid.* [145]

²² *Ibid.* [157]

will likely have profound implications in future, in so far as the relationship between sports broadcasts and social media is concerned, is the test for determining whether the fair dealing defence has been made out. In this connection, the court applied the quantitative-qualitative dichotomy, ultimately finding that:

“[...] in determining whether fair dealing has been established, the court must have regard to the quality and quantity of protected material that was used and its purpose. The defence of fair dealing is not lost simply asserting that the infringer took large portions from the work but depends on whether what was taken was “reasonably requisite” for the purpose.”²³

Of course, in cases where persons or entities have been accused of infringing copyright in sports broadcasts through postings to their social media performs, the court will be guided by a range of statutory factors, including the nature of the broadcast in question; the extent and substantiality of that part of the broadcast affected by the defendant’s act in relation to the whole of the broadcast; the purpose and character of the defendant’s use; and the effect of the defendant’s act upon the potential market for, or the commercial value, of the broadcast. In this connection, the court has made it clear that:

“[...] no one factor [is] decisive. The determination of whether there was fair dealing is an intensely factual question. Each case stands on its own. What is significant in one case may well be not so important in another. This is why the trial court must actually view the material or as much of it as is possible [...].

The length of the extract, the part that is extracted, the type of programme, how it was promoted, the purpose of the programme are all important matters. What is to be prevented at the end of the day is the defendant taking the claimant’s protected work and treating as it were his own and trying to pass off his misuse as fair dealing. As should be clear from the cases it is often a close thing. The ultimate decision one way or the other is not precise as in mathematics but a judgment call based on the overall impression the court is left with after taking into account all the relevant factors of the particular case.”²⁴

Persons who use and share broadcast content belonging to sports broadcasters on their social media platforms, and who are contemplating relying on the fair dealing defence, must be aware that the court will ask itself:

“[...] was this genuine, good faith and bona fide reporting or is it commercial utilisation of another’s protected work masquerading as reporting? The answer depends on duration of the segment, what came before and after it, how was it presented, was it being presented as a substitute for the protected work, the degree to which the challenged use competes with the exploitation of

the copyright by the copyright holder or as in this case the licence holder, the whole circumstance is looked at including the fact of an exclusive licence.”²⁵

On the facts, the court, while accepting that the fair dealing defence must be given a “liberal interpretation”, found that CVM’s social media postings that consisted solely of interviews with Jamaican athletes, which were not in the context of reporting the event, could not be characterized as fair dealing.

The court was nonetheless mindful that its ruling was very likely to have a lasting effect on how future courts in the Caribbean construe the fair dealing defence; in this regard, it was careful to conclude that:

“If the court were to hold in favour of CVM on the interviews then it would be setting the stage for unrestricted utilization of interviews without the need for any context such as reporting on current events. The interviews were not reporting and therefore they were in breach of TVJ’s exclusive licence.”²⁶

The decision in *TVJ v. CVM* is reminiscent of the judgement in *England and Wales Cricket Board Ltd & Anor v. Tixdaq Ltd & Anor*²⁷, where the English court similarly dealt with the posting of clips from the claimant’s cricket broadcast, without permission, on the defendant’s social media platforms, including its *Fanatic app*.

In that case, the English court, while accepting that contemporaneous sporting events (i.e. cricket matches) are current events, nonetheless found that the clips were not used in order to inform the audience about a current event, but were presented for consumption because of their intrinsic interest and value. In other words, the defendants’ objective was purely commercial rather than genuinely informative, and accordingly could not rely on the fair dealing defence. The English court’s conclusion was buttressed by some important considerations, namely, the defendant’s use of the clips conflicted with the claimant’s normal exploitation of the broadcast, since the unauthorised posting of the clips reduced the attractiveness of Sky’s cricket offering to subscribers; the clips damaged the claimant’s own service because licensees were reluctant to commit to paying a large sum for use of the clips when they were already made available freely to the public by the defendant; and the clips were made available on a near-live basis by the defendant. In addition, despite the relatively small scale of the use in a quantitative sense, the defendant’s apps were clearly designed to be used by very large numbers of users, as the defendants were seeking to attract as many users as possible. In short, the purpose of the use was not informative, but for consumption; it was, therefore, not for reporting current events, but for sharing the clips of footage from sporting events.

²⁵ *Ibid.* [168]

²⁶ *Ibid.* [216]

²⁷ [2016] EWHC 575 (Ch)

23 *Ibid.* [100]

24 *Ibid.* [161]

While neither the court in *TVJ v. CVM* nor *England and Wales Cricket Board Ltd & Anor v. Tixdaq Ltd & Anor* meaningfully addressed the question of fair dealing for the purpose of criticism and review, it is submitted that appropriate guidance on this question could nevertheless be gleaned from the case of *TCN Channel Nine Pty Ltd & Anor v. Network Ten Pty Limited*,²⁸ where the Australian court considered the following:

*"[...] is the program incorporating the infringing material a genuine piece of criticism or review, or is it something else, such as an attempt to dress up the infringement of another's copyright in the guise of criticism, and so profit unfairly from another's work? [...] it is not fair dealing for a rival in the trade to take copyright material and use it for his own benefit."*²⁹

Of course, users of social media, who post content that includes copyright material from a sports broadcast, can do so and still be protected by the fair dealing defence even if the criticism or review may be unbalanced or strongly expressed. However, it must be recognizable as criticism or review; that is, the passing of judgment. While criticism and review of a sports broadcast, through social media, may be strongly expressed, it is fundamental that such be genuine and not a pretense for some other purpose. In other words, an oblique or hidden motive may disqualify reliance upon the defence of fair dealing for the purpose of criticism and review, particularly where the copyright infringer is a trade rival who uses the copyright subject matter for its own benefit.

Conclusions

The court in *TVJ v. CVM* has made a significant contribution to the development of the law relating to the relationship between sports broadcast rights and social media, which must not go unnoticed.

Its ruling, in particular, on the quantitative-qualitative approach to be used in cases where social media content is alleged to infringe the copyright in an extant sports broadcast is particularly instructive; in addition, of course, to its ruling on the scope of the fair dealing defence in this age of social media.

It is submitted that the court was successful in striking a fair balance between the rights of organisations and persons, who use social media to share their content, and the interests of sporting organisations and sports broadcasting organisations to have the maximum level of protection available to them by copyright law.

That said, while the *TVJ v. CVM* judgment, as well as the *England and Wales Cricket Board Ltd & Anor v. Tixdaq Ltd & Anor* judgment, mark an important and pragmatic contribution to copyright jurisprudence, it can only be assumed that the tension between social media use and copyright in sports broadcasts will only escalate in future in view of the projected increased affinity to social media platforms!

²⁸ [2002] FCAFC 146, Federal Court of Australia, 22 May 2002.

²⁹ *Ibid.*, 43

Alonso and Geovanni : image rights case comparison

BY KEVIN OFFER¹

Introduction

Image rights for professional sportspersons is a subject that has occupied the minds of most lawyers working within the sports industry in recent years. It is a matter that divides opinion, although recent cases brought before the courts have provided guidance and some comfort as to what is acceptable.

The purpose of this article is to compare two cases on which decisions were handed down in 2019.

Background

Before looking at the two cases, it is perhaps useful to mention the case of the Brisbane Bears² which was covered in a previous issue of this journal.³ The Australian court held that amounts paid to players in respect of their image rights by the club for which they played was part of the remuneration of their employment. This decision led to a change in Australian tax law to confirm that image rights payments linked to an employment contract are part of the remuneration for the services provided under that employment contract. This view is, perhaps, not surprising to some readers from jurisdictions where this has been understood to be the case for some time.

The Geovanni case⁴ in the UK involved the assignment of image rights by the player to an offshore company and the payment by Hull City for the use of those image rights. The First Tier Tribunal held that the payments constituted remuneration from the employment of the player and should be taxed accordingly.

The Alonso case⁵ also related to the assignment of image rights to an offshore company. In this case, however, the case considered whether the assignment itself had actually taken place. The court was not persuaded by this argument and Alonso and his co-defendants were acquitted.

Looking at the two decisions, it appears, at first glance, that the UK decision in the case of Geovanni considered the substance of the image rights arrangements over the legal form. The Spanish court, however, appears to have decided the case on the legal form rather than substance. This, however, is a simplistic view and the cases are more closely aligned than may appear.

The Geovanni case

A more detailed analysis of the Geovanni case was published in previous issues of this journal.⁶ In summary, Hull City entered into an image rights agreement with Joniere Limited ("Joniere"), a company registered in the British Virgin Islands, to which Geovanni had assigned his image rights. The agreement covered non-UK image rights only with UK rights appearing to be covered by the player's contract with the club.

The Tribunal judge held that the payments were part of the player's earnings from employment with the football club based on the legal principle of substance over form. This principle determines the realistic view of what the payments constituted as opposed to following the legal form that is evidenced by contracts between the parties.

Facts of the case

From December 2008 to July 2010, the club paid a total of £ 440,800 to Joniere. The club claimed these payments were made under the image rights contract and were not part of Geovanni's contract of service with the club. The UK tax authorities claimed that the payments were earnings and, therefore, subject to income tax and National Insurance Contributions.

It was accepted by both parties that, in appropriate circumstances, payments could be made to a third party for

¹ Partner at Hardwick and Morris LLP. He specialises in the taxation of private clients and their business interests with a particular interest in sportsmen and entertainers. He is also a member of the International Tax Specialist Group and the International Taxation of Entertainers Group. E-mail: kevin@41gp.com.

² *Brisbane Bears-Fitzroy Football Club Limited v. Commissioner of State Revenue* [2017] QCA 223.

³ Gil Levy, "Australia: The taxation of income from the exploitation of image rights – currently and proposed changes", in: *GSLTR 2019/1* (March 2019).

⁴ *Hull City AFC (Tigers) Limited v. HMRC* [2019] UKFTT 227.

⁵ Audiencia Provincial de Madrid – Sentencia no. 672/2019.

⁶ Kevin Offer, "Image rights payments are earnings: the Geovanni case", in: *GSLTR 2019/2* (June 2019); and Ian Blackshaw Athena Constantinou, "Football: sports image rights and the Geovanni case", in: *GSLTR 2019/4* (December 2019).

the exploitation of image rights which will not be regarded as earnings. The Tribunal did not, however, accept that this was applicable for Geovanni. In particular, with reference to the decisions of the Supreme Court in the Glasgow Rangers case⁷ and the Court of Appeal in a UK tax case involving PA Holdings,⁸ a realistic view of the facts of the payments led to the conclusion that the payments were “*emoluments as a reward for Geovanni’s past, present or future services*”.

One of the main reasons that the club were unable to persuade the Judge that the payments were for image rights was that very little documentation was provided as evidence of the negotiations of the contracts for playing or for the image rights. The playing contract between Hull City and Geovanni included a schedule referring to an agreement for image rights signed on the same day (it was not actually signed for another four months) which included the amount to be paid. This was not considered a relevant factor as it was a requirement of Premier League rules and the standard playing contract.

At the time in the UK, there was a general assumption that a payment for image rights of up to 25% of basic salary was acceptable. The payment to Joniere was exactly 25% of the basic salary. The playing contract was extended in September 2010 with a corresponding increase in the payment for image rights despite the image rights agreement not permitting such an increase. A variation to the image rights agreement was drawn up but HMRC were told by the club in June 2010 that this was still under negotiation, despite having been signed by Joniere in March 2010.

Decision

Very little reference is made to UK tax legislation within the decision. There was no suggestion that the image rights agreement was a “sham” and it did, as a matter of contract, grant rights to the club to exploit Geovanni’s non-UK image rights. The Judge concluded, however, that the image rights had no commercial value and, on a realistic view of the payments by reference to their substance, there was no conclusive evidence of the existence of the image rights agreement.

In reaching his decision, the Judge made reference to a number of findings, which provide a useful indication of what clubs, players and their advisers should consider when reviewing image rights contracts with which they are involved, as follows:

- 1 the club did not have any clearly defined intention or plan to commercially exploit Geovanni’s overseas image rights;
- 2 there is no reliable evidence as to how the club arrived at the annual image rights payments;
- 3 the club did not obtain any valuation or opinion as to the value of Geovanni’s overseas image rights;

- 4 the club offered to increase the sum payable for Geovanni’s overseas image rights without any contractual obligation to do so;
- 5 the club did not have the resources to exploit Geovanni’s overseas image rights even if there was a market to do so;
- 6 the club did not have any real interest in commercially exploiting Geovanni’s overseas image rights;
- 7 there was little if any prospect of the club exploiting those rights;
- 8 Geovanni’s overseas image rights were never commercially exploited, before, during or after his period at the club;
- 9 the club did not satisfy the Judge that Geovanni’s overseas image rights had any commercial value;
- 10 no-one at the club could reasonably have believed that the rights had any commercial value to the club; and
- 11 no-one at the club ever addressed their minds to whether it was realistic to consider that the club could commercially exploit Geovanni’s overseas image rights.

In the case of Geovanni, there was nothing to suggest that the sums payable by the club to Joniere were anything other than part of the overall amount to secure Geovanni’s services as a footballer and employee of the club. The appeal was, therefore, dismissed.

The Alonso case

The March 2020 issue of this journal contained an analysis of the Alonso Case⁹ by Mariana Diaz-Moro Paraja.

Xabi Alonso and two others were charged with three criminal offences of tax fraud around the assignment of his image rights to a company in Madeira. The case is unique in Spain in that it went to trial rather than being settled as is more common. In previous cases, an admission of guilt with the payment of tax and penalties has been agreed to avoid time in prison.

The Provincial Court of Madrid held that the company was the actual assignee of the image rights and that the assignment could not be qualified as “simulated” (i.e. a sham). Alonso and his co-defendants were, therefore, acquitted. The case has been appealed.

Facts of the case

Alonso joined Real Madrid in August 2009. Prior to signing and whilst resident in the UK, he entered into an agreement with a company (Kardzali), resident in Madeira, under which Kardzali had exclusive rights to exploit Alonso’s image rights for a period of five years in exchange for a fee of € 5 million.

At the time of the agreement Alonso was resident in the UK after being a Liverpool player for the previous five seasons. Due to the UK tax regime available to non-domiciled individuals, he was not taxable on the assignment to Kardzali. In addition, Kardzali was able to

⁷ RFC 2012 [2017] UKSC 45.

⁸ PA Holdings [2011] EWCA Civ 1414.

⁹ Mariana Diaz-Moro Paraja, “Football: Assignment of image rights and the Xabi Alonso case”, in: *GSLTR 2020/1* (March 2020).

take advantage of a favourable tax regime in Madeira, whereby the company was exempt from paying tax until 2012, suffered a tax rate of only 4% in 2012 and 5% from 2013 to 2020. In addition, no withholding tax was payable on distributions to non-residents.

Alonso had granted an exclusive right to exploit his image rights to a well-known sports brand from the beginning of January 2009. This contract was assigned to Kardzali in August 2009.

On signing for Real Madrid, Kardzali assigned 50% of the image rights to the club. The payments relating to this agreement were made after deduction of the necessary withholding tax.

In December 2009, Alonso acquired 100% of the share capital of Kardzali for a price of € 5,000. This was stated as enabling Alonso to guarantee the recovery of the € 5 million for the assignment of the rights to the company which remained unpaid at that time.

Kardzali subsequently entered into a number of agreements whereby fees were received for the use of Alonso's image rights by various entities. In most cases, these contracts were negotiated by The Best of You, a company to which Kardzali had sub-contracted this work. Invoicing and payments were handled by Kardzali in these cases.

The Spanish tax authorities took the view that the arrangements were a "simulation" or, in the general English term, a "sham". The purpose of the assignment to Kardzali was to avoid Spanish taxation and should, therefore, be ignored.

Decision

The issue to be decided in this case was whether the assignment of Alonso's image rights to Kardzali had taken place. If the assignment had taken place, there could be no simulation. In addition, if there was no simulation, there would be no tax avoidance as the amount paid by Real Madrid to exploit the image rights did not exceed 15% of the total paid for the image rights and the amount paid to Alonso by the club for his professional services.¹⁰ To quote from a translation of the decision:

"Xabi Alonso's personal income tax for the disputed periods will not be imputed [...] if it is understood that said taxpayer – through the repeated contract of 1 August 2009 – actually ceded the right to the exploitation of his image to another person or entity, resident or non-resident [...] since the remaining requirements set forth in article 92 of the Income Tax Law, are fulfilled without a doubt, specifically:

- 1 *provides its services to a person or entity within the scope of an employment relationship;*

¹⁰ In accordance with the jurisprudential doctrine in the sentence of the Third Chamber of the Supreme Court of 24th March 2012.

- 2 *this person or employing entity has obtained the transfer of the right to exploitation or consent or authorisation for the use of the taxpayer's image; and*
- 3 *the income paid for work income is equal to or greater than 85 per cent of the total amount paid for both concepts (work and image rights)."*

The decision, therefore, continues by considering whether the assignment had taken place based on the facts. In conclusion, the court determined that no simulation had taken place for the following reasons:

- 1 It is common practice for intermediary companies to be utilised in obtaining sponsorship contracts. The lack of infrastructure within the company was therefore considered irrelevant. The court did go as far to say that "no particularly complex framework is required to manage the exploitation of the image of a person whose sporting activity endows him with great notoriety" which may come as a surprise to some.
- 2 The continuation of the contract with the sports brand through Kardzali was cited as acceptance of the assignment.
- 3 Alonso had not participated in negotiations or search for opportunities to exploit the image rights beyond giving consent in some cases.
- 4 There was no doubt that Kardzali had issued all invoices and collected all payments relating to the image rights agreement entered into in its name.
- 5 Based on an expert witness report, Kardzali had benefitted from increased income as a result of the assignment of the image rights which enabled the company to develop its activity of making investments.
- 6 The value of € 5 million placed on the assignment to Kardzali was based on a valuation report which took into account all facts available at the time of the assignment.
- 7 The debt owed to Alonso by Kardzali for the assignment had been declared for Spanish Wealth Tax.
- 8 The acquisition of Kardzali by Alonso was simply to guarantee the debt owed to him.

Based on the above, the court held that Kardzali was the assignee of Alonso's image rights and had exploited those rights. It was irrelevant where Kardzali was resident, the tax regime in that jurisdiction or who owned the company. The facts presented do not, therefore, "constitute the crimes against the Public Treasury, and therefore the defendants for such crimes are acquitted".

Geovanni v. Alonso

As indicated at the commencement of this article, the decision in the Geovanni case was based on the substance rather than the legal form of the contracts. The decision in the Alonso case may appear at first to rely more on the legal form seeming to dwell on who had raised invoices,

collected income, etc. However, there are a number of similarities which do suggest where cases involving image rights can be decided with some level of certainty.

In both cases, it was decided that a transfer of image rights had taken place. Neither arrangement was, therefore, considered a sham. This led to consideration in both cases of the value placed on the rights at that time of assignment and the income received for exploiting the rights.

In the Geovanni case, reliance was placed on a perceived agreement with the tax authorities as to how much could be paid for image rights as a percentage of overall income. This was decided to be excessive based on the value of the image rights and the amount of exploitation that was carried out by the club.

Similar consideration was given in the Alonso case, but emphasis was placed on the valuation of the rights and the actual income generated from contracts rather than a fixed percentage that may be accepted. The presence of a formal valuation based on future income and the standing of the player clearly helped in the Alonso case.

The Tribunal in the Geovanni case was provided with no similar valuation and, in the absence of anything to show otherwise, the Tribunal concluded the image rights had little or no value.

Another similarity between the two cases is the undertaking of exploiting the rights.

In the case of Geovanni, it was determined that the club had no plan and did not actually exploit the rights.

In the case of Alonso there was clear evidence of the exploitation by Kardzali with third parties and the use of an intermediary in arranging these contracts was irrelevant.

Where the cases are different is that, based on the facts, the Geovanni case would seem to be an allocation of part of the remuneration payable by the club.

In the Alonso case, the income on which tax had not been paid was determined by fulfilled contracts and the agreed 85/15 split permitted under Spanish law.

A further difference is the location of the image rights holding company in each case.

In the Geovanni case, an entity in a tax haven was utilised to avoid UK tax.

In the Alonso case, the assignment was to a company within a jurisdiction operating a special tax regime approved by the European Union. That may have helped, although the Spanish court suggested location was not relevant in that case which seems to suggest a company in a tax haven may also have been accepted for the same reasons. Perhaps one of the other cases in Spain would also have been decided in the same way if it had ever got to court? Going forward, however, the EU Economic Substance requirements may affect the location of the image rights structures and it may be more difficult to justify the use of intermediaries as referred to in the Alonso case.

Conclusions

Despite the cases being in separate jurisdictions, it is, in the author's opinion, the similarities in the two cases regarding valuation, exploitation, etc. that led to the decisions.

The Geovanni case failed due to the lack of commercial substance whereas the Alonso case was won for similar reasons.

It will be interesting to see if the appeal in the Alonso case results in a different decision but, for now, there would seem to be some comfort that properly constructed image rights arrangements undertaken on a proper commercial basis will stand scrutiny in the courts.

