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Global Sports Law and Taxation Reports

Contents

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EDITORIAL

We are proud to present and welcome readers to the December 2011 edition *(GSLTR 2011/4)* of our ground-breaking journal and on-line database: ***Global Sports Law and Taxation Reports (GSLTR).***

First of all, we would like to take this opportunity of sending all our readers our seasonal best wishes, and thank you all for your continuing interest and support. Please, also spread the word about our journal, amongst your professional colleagues and associates around the world, and encourage them to subscribe, thereby helping us to achieve a truly global footprint and reach.

As usual, this latest issue is packed with topical information on a wide range of legal and fiscal issues affecting and of concern to the sporting world.

Please note that the publishers of this journal, who are also experienced conference organisers, are putting on a seminar in Amsterdam on 14 & 15 December 2011, which will take the form of a timely update on a range of current sports law and taxation issues. This two-day seminar will be chaired by Dr Rijkele Betten and Prof Ian Blackshaw and will feature speakers all of whom are experts in their respective fields. Details of the seminar may be obtained by logging onto www.sportsandtaxation.com and we look forward to welcoming many of our readers to this important event.The corruption allegations at FIFA, the World Governing Body of Football, continue to dominate the news headlines and sports agenda, with Sepp Blatter, President of FIFA, unveiling on 21 October 2011 his plans to reform FIFA and eliminate corruption at all levels from the "beautiful game". But will this turn out to be all talk and propaganda or will it lead to any concrete and meaningful action? Blatter is a consummate politician, although he put his foot in it recently with his remarks about eliminating racism on the field of play with a handshake! In any case, the corruption reforms are not expected to come into force until 2013. A case of "jam tomorrow"?

Another recent development, which is worthy of particular note, is the recent landmark decision of the Court of Arbitration for Sport (CAS) rendered on 6 October 2011 in the *LaSchawn Merritt* Doping Appeal and its wider implications, particularly in relation to the legality/enforceability of the British Olympic Association life-time Olympic ban on British athletes sanctioned for doping offences. This Appeal was filed by the United States Olympic Committee (USOC) against the International Olympic Committee (IOC) concerning the validity of the "Regulations Regarding Participation in the Olympic Games – Rule 45 of the Olympic Charter" (the so-called "Osaka Rule"). The CAS issued the following decision:

> *"The IOC Executive Board's June 27, 2008 decision prohibiting athletes who have been suspended for more than six months for an anti-doping rule violation from participating in the next Olympic Games following the expiration of their suspension is invalid and unenforceable."*

The CAS Arbitral Panel, composed of Prof Richard H. McLaren (Canada), President, Mr David W. Rivkin (USA) and Mr Michele Bernasconi (Switzerland), came to the conclusion that the "Osaka Rule" was more properly characterised as a disciplinary sanction, rather than a pure condition of eligibility to compete in the Olympic Games. This is also the legal issue in the case of the validity of the BOA rule.

As such, the CAS held that the IOC disciplinary sanction is not in compliance with Article 23.2.2 of the World Anti-Doping Code (WADA Code), which provides that the signatories of the WADA Code may not introduce provisions that change the effect of periods of ineligibility provisions of the WADA Code, because that adds further ineligibility to the Code's anti-doping sanction after that sanction has been served.
The panel further held that, because the IOC made the WADA Code part of its own governing statute (the Olympic Charter, under Rule 44), the "Osaka Rule" amounts, in fact, to a violation of the IOC's own statute and is, therefore, invalid and unenforceable.
The CAS panel also pointed out that, if the IOC wished to exclude athletes who have been sanctioned for doping from competing in the Olympic Games, it could propose an amendment to the WADA Code, which would allow other signatories to consider such an amendment and possibly to adopt it. If so, no ne bis in idem issue (prohibition against "double jeopardy") would arise, as the ineligibility would be part of a single sanction. Also, in the view of the CAS, the principle of proportionality would be met because only one adjudicatory body would be in the position to assess the proper sanction for certain behaviour, taking into consideration the overall effects of the sanction to be imposed.
The CAS award is also particularly noteworthy because the CAS ruled against the IOC, demonstrating –at least, on this occasion – its independence from the International Sports Federations, contrary to the claims of some of its critics that the CAS tends to uphold decisions of these bodies!
The award is published on the CAS official website at www.tas-cas.org/jurisprudence. This is one of the topics that will be discussed at the December seminar. Another seminar topic will be the latest update by Jason Romer of the Channel Islands law firm Collas Crill on the new registrable image right, akin to a trademark, which is due to be introduced in Guernsey by the end of this year.

On the legal side, this edition features contributions on the "Cultural dynamics of the anti doping regime" by the doyen of international sports lawyers, Prof Jim Nafziger; "Settling disputes under sports marketing agreements by expert determination"; "Ambush marketing" (from a South African point of view); an update on the decision rendered by the CJEU on 4 October 2011 in the *Karen Murphy v English FA Premier League* TV rights case; an article on a controversial and topical subject of "super injunctions" for protecting privacy in the United Kingdom, by an expert on the subject; and a SportzPower interview with a leading South African sports lawyer.

On the tax side, we also continue our comparative series of articles on the impact of VAT on sport and how to reduce it in a number of major sporting jurisdictions: this time, in Finland, Italy, Poland and the United Kingdom, contributed, as usual, by leading tax lawyers from these countries.

Finally, as always, we would welcome your comments and suggestions on our journal *GSLTR*, which will help us to realise our mission of producing and providing an invaluable and must-have resource for all those involved in the ever-evolving and often intertwined fields of sports law and taxation.

Cultural dynamics of the anti-doping regime

by James A.R. Nafziger[1]

Sports competition is a fundamental aspect of culture around the world. It is therefore surprising that the relationship between sports and culture is sometimes viewed as disjunctive rather than conjunctive. For example, governments designate ministries of sports and culture, as if they were distinct. The London Olympic Organizing Committee, bidding successfully for the 2012 Games, promised "cultural" exhibits and activities in addition to sports events. And within UNESCO, the United Nations Educational, Scientific and Cultural Organization, sports activity generally falls under the rubric of education, not culture. Still, distinctions between "sports" and "culture" are essentially semantic, colloquial, and perhaps bureaucratic. The traditions and patterns of athletic activity, accompanied by a complex of social expectations and formal sanctions, surely brings sports competition within the framework of relationships between culture and law that defines the broad field of cultural law.

In forecasting trends in this body of law, the challenge is to define the cultural variables that are apt to be the most influential. This essay is one attempt to do so by focusing on doping activity – that is, the use of prohibited performance-enhancing drugs and techniques by athletes and the encouragement of such use by other athletic stakeholders. This focus is significant because of the persistent threat that doping activity poses to the cultural values of fair play and the integrity of international sports.

During the last 25 years, a robust legal regime has grown at the international level in response to this problem. For example, the Court of Arbitration for Sport (CAS) has handled hundreds of cases involving appeals by athletes of their doping-related suspension from sanctioned competition. Its awards, which are enforceable internationally under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards,[2] are nearly always effective. Indeed, CAS has been termed *"one of the world's most successful attempts at bringing order to transnational issues...a valuable example of how an international tribunal can succeed"*. [3]

A newer but also effective mechanism is the World Anti-Doping Agency[4] (WADA). Headquartered in Montreal, it operates partly through official bodies at the national level such as the United States Anti-Doping Agency (USADA). Under WADA supervision, these institutions form a global network for testing and sanctioning athletes and other athletic stakeholders under the World Anti-Doping Code[5]. Within the UNESCO framework, the International Convention Against Doping in Sport[6] provides intergovernmental cooperation to the same ends. National legislation, such as the Anabolic Steroids Control Act of 1990[7] in the United States, supports this regime of anti-doping controls. What has been emerging is essentially a new *legal* culture within the process of international sports law.

The cultural variables that are apt to influence the efficacy and further development of the international anti-doping regime fall into two categories: those that operate within sport (*internal* variables) and those that impact sport from outside (*external* variables). As we shall see, these internal and external cultural variables can interact in important ways.

In sport as a whole, the internal cultural variables incorporate such values as the sheer excitement and personal challenge of competition for athletes, physical fitness, character-building opportunities for youth, and global peacemaking. The elitist aspirations of Baron Pierre de Coubertin, father of the modern Olympic Games, as well as the interlocking rings of the Olympics logo, come to mind. Field-of-play rules, reinforced by an etiquette of good sportsmanship and fair play, define the balance within each sport between competition and cooperation. Imbalances lead to yellow or red cards, ten- or fifteen-yard penalties, expulsion from play, and other sanctions, depending on the particular sport.

These field-of-play sanctions, so fundamental in sports, nevertheless operate beneath the radar of international sports law, which seeks to avoid any direct intervention in the sports arena. Field-of-play rules, not legal rules, are meant to govern the conduct of sports activity. But a legal posture of non-intervention turns out to be impossible in the real world of international politics[8]; terrorism[9]; ethnic, gender and disability discrimination[10]; bribery of athletes and officials[11]; spectator and player violence[12]; and, as will be seen, highly organized doping activity. Such externalities, all of them imported from larger cultures, readily corrupt the purity of field-of-play rules. The need for legal regulation of sports is obvious.

We would also welcome and value your contributions in the form of articles and topical case notes and commentaries, especially for posting on the *GSLTR* dedicated website www.gsltr.com.

So, now read on and enjoy the December 2011 edition of *GSLTR* and also continue to do so in 2012!

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

December 2011

Doping has troubled organized sports since at least the 1930s, although it was overshadowed for many years by the problem of amphetamines and other so-called recreational drugs. It became of paramount concern only at the 1988 Olympic Games in Seoul when Ben Johnson, the Canadian sprinter, was forced to give up his gold medal after lab tests revealed the presence of a prohibited anabolic steroid in his urine[14]. In 1988 lab tests were still haphazard at best, but were nevertheless quite reliable. During the 1990s it became clear that entire sports were infested with doping – most notoriously cycling, baseball, and track-and-field, in about that order of magnitude and visibility.

Think of the cases of Lance Armstrong, Floyd Landis, and Alberto Contador, in cycling[15]; the indictments of Barry Bonds and Roger Clemens in baseball[16]; and the sad curtain calls for such talented world-class runners as Marion Jones, Tim Montgomery, and Butch Reynolds in track and field[17]. Think of the disappearance of entire teams from cycling's Tour de France, as their members, one by one, were disqualified after testing positive, primarily for the presence of the red blood cell-boosting drug Erythropoietin (EPO).[18] One can only hope that the slower performances in the 2011 Tour de France betoken a new and sustained commitment by cyclists and the cycling industry to clean competition.[19] Think of the Congressional hearings in the United States that implicated superstars of Major League Baseball (MLB) and required MLB to get off the bench and swing into action by testing and sanctioning players, particularly for andro (androstenidione) and other steroids. After all, the bulging biceps of Mark McGuire and other home-run heroes were obviously attributable to more than a lifetime of weightlifting.[20] And think of the BALCO scandal in track and field.[21]

Why has doping activity infested entire sports? Very simply: their ethical cultures had become rotten to the core, and nobody cared about the problem as long as records fell and more heroes emerged. An even playing field was out of the question. Interestingly, when the baseball superstar Alex Rodriguez was compelled to admit his use of performance-enhancing drugs, including steroids, he blamed it on "a different culture" of baseball then.[22]

Sometimes, however, the cultural norms of entire nations are instrumental. For example, given the porous border between Canada and the United States, Canada's substantially greater tolerance for the use of drugs has inhibited United States efforts to interdict access to human growth hormone (HGH) by athletes.[23] Of course, this difference may be attributable not only to general cultural norms, but also to more formal legal requirements and considerations of law enforcement that are at most only indirectly traceable to such norms. In any event, HGH has posed a particularly difficult challenge because until recently it was nearly impossible to detect in lab testing. The problem is that such testing is generally based on finding chemical abnormalities in urine samples whereas HGH does not appear to be an abnormality because it is a clone of a natural hormone and acts only indirectly in the body to produce an insulin-like growth factor.[24]

An epicenter of HGH distribution in North America has been the Institute of Sports Medicine Health and Wellness Centre near Toronto, run by Dr. Anthony Galea. In Canada, HGH can generally be prescribed for "off-label" use in order to enhance athletic performance, among other purposes, in addition to explicitly authorized uses. Dr. Galea has discreetly employed this loophole in Canada's compliance with the international anti-doping regime, often by smuggling HGH into platelet-rich plasma injections, which are perfectly acceptable without the HGH. The United States, however, does not permit such "off label" use of the hormone. It can therefore be used legitimately to treat only three disorders – namely, AIDS-related wasting, a particular disorder of the bowels, and, of course, growth hormone deficiencies. Not surprisingly, then, Dr. Galea has attracted a steady flow of top-notch athletes from south of the border mostly by aggressively peddling HGH there and occasionally by accommodating the athletes in Canada.[25] Although the Canadian government fully cooperated with Washington in investigating Dr. Galea, the scene then shifted to his satellite laboratory in Israel, whose culture is even more permissive of doping than Canada's.[26] Gradually, however, national cultures are becoming more uniform and less intolerant of prohibited agents and controversial practices.

Perhaps the single most important cultural influence on the anti-doping regime is the global media. It is hard to exaggerate its expansive role in sports. It often dictates the selection of sports and events in major competition, determines the scheduling of events, promotes the advancement of particular athletes, and identifies sports-related legal issues, disputes, and means for resolving them. The media's quest for sports records has given new meaning to the Olympic motto "*citius, altius, fortius*" – "faster, higher, stronger."[27] In effect, the media has succeeded in trumpeting sports activity as pure entertainment, at the expense of the traditional internal cultural values such as physical fitness for its own sake, character-building, and peacemaking.[28]

The overwhelming emphasis on winning at all costs and general spectator amusement has had a profound effect on the subcultures of spectators. Although public opinion polls consistently show that spectators overwhelmingly oppose the use of performance-enhancing drugs, they equally oppose any significant constraints other than field-of-play rules on the ability of athletes to set records and pummel each other beyond normal capacities. The biochemical origins and dynamics of their performances are therefore of little concern. It is not surprising, then, that in a recent survey to determine the biggest threat to sports, only 3.23% of the respondents selected "use of performance-enhancing drugs", putting doping in eighth and last place among the alternative threats.[29]

In addition to the negative cultural influence of the media and perhaps the public as a whole, efforts to combat doping have been handicapped by "*[d]eliberately inept and unwilling administrators, not wishing to upset the status quo.*"[30] Moreover, although arbitration, civil litigation, and criminal prosecution have become increasingly sophisticated in dealing with the doping problem, they are also becoming alarmingly complicated, protracted, and expensive procedures for resolving disputes.[31]

As for the future, the frontiers of doping are endless. Science is always one step ahead of the law. Masking agents and micro-dosing that are ever more difficult to detect, sophisticated methods of boosting synthetic epitestosterone within acceptable margins, and gene-splicing are just a few of the challenges.[32]

In response, the frontiers of anti-doping efforts include greater reliance on athletic profiling and related techniques such as WADA's Athlete Biological Passport[33] as substitutes for scientific proof so as to detect any physiological anomalies in a single athlete over time that may hint

at otherwise undetectable doping. Such frontiers of control raise questions of due process. Greater use of circumstantial evidence is already redefining what process is due to athletes whose eligibility for competition may be at stake. For example, in the absence of conclusive analytical tests, the admission into courtroom evidence of coded sales receipts and recorded phone conversations spelled doom for BALCO and its gilded clients. Importantly, WADA's Anti-Doping Administration and Management System – the ADAMS Database –, though purely voluntary for national governments, has been a promising and well-received development in systematizing information from anti-doping initiatives and compliance by athletic stakeholders.[34]

There is also growing support for a stronger partnership between sports federations and governments in combating the menace of doping.[35] WADA and the UNESCO Anti-Doping Convention help to forge such a partnership, and the criminalization of doping has gained momentum, particularly in Europe. It is likely that within the next ten years national governments and sports federations, by sharing their otherwise independent investigative and sanctioning powers, will be working much more closely in a united front against doping.

Such teamwork between private and public sectors is still only beginning and may raise serious issues of civil liberties, however. These issues include the fairness of the "whereabouts rule" that requires athletes, year-round, to make their whereabouts known for purposes of out-of-competition drug testing.[36] Other civil liberties issues involve the standard of strict liability with mandatory sanctions for violations of the WADA Code, as well as significant disparities in both laboratory testing and sanctioning processes among different sports and legal systems. Further, in the realm of dispute resolution, CAS arbitrators are struggling to define proportionality in their consideration of appropriate sanctions against athletes and other athletic stakeholders.[37]

Five years ago, in an article on the future of international sports law,[38] the author listed ten trends in international sports law in what he considered to be their approximate order of importance. The #2 trend in importance referred to the rampant problem of doping. A rough assessment of trends in the influential cultural variables, including an emerging legal culture determined to combat doping, augurs well for continued progress in building an effective regime to combat doping.

To be sure, the external cultural variables promoted by the media and sports industry of pure entertainment and the cultivation of superheroes, as well as derivative changes of attitude in the subcultures of spectators, may overshadow traditional internal variables within the arena of sports. Baron de Coubertin's late Victorian aspiration for a lofty role of sports in society seems almost quaint. Also, sports administrators and the dispute resolution process have limited the effectiveness of anti-doping efforts in the past. On the other hand, the positive trends that have been identified in this article are also apparent. We can therefore be optimistic that the emerging regime to combat doping,[39] shaped as it will continue to be by the dominant cultural variables of the entertainment world, manifests a new legal culture to help ensure a more level playing field for all athletes during the next ten years. If so, we can expect to witness a major example of international sports law in action as a vital dimension of cultural law.

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1 Thomas B. Stoel Professor of Law and Director of International Law Programs, Willamette University College of Law; Honorary President, International Association of Sports Law. This article draws on the author's remarks at the International Law Weekend-West, organized by the International Law Association (American Branch), Southwestern Law School, Los Angeles, 26 February 2011.

2 Done 10 June 1958, 330 U.N.T.S. 3.

3 Daniel H. Yi, "Turning Medals into Metal: Evaluating the Court of Arbitration for Sport as an International Tribunal", 6 Asper Rev. Int'l Bus. & Trade L. 289, 290, 291 (2006). See also Richard H. McLaren, "Twenty-Five Years of the Court of Arbitration for Sport: A Look in the Rear-View Mirror", 20 Marq. Sports L. Rev. 305 (2010).

4 For a summary, see James A.R. Nafziger, International Sports Law 161 (2d ed. 2004).

5 World Anti-Doping Code (2003).

6 United Nations Educational, Scientific and Cultural Organization, International Convention Against Doping in Sport, ED/2005/CONV-DOP rev.2, adopted 19 October 2005.

7 104 Stat. 4851, incorporated into and modified in 21 U.S.C. §§ 801-971 and cited in § 801 note, § 802 note, and § 829 note (2006 ed.).

8 See generally Nafziger, supra note 3, at 195-296 (tracing the history of politics in modern sports competition, an issue that has been greatly minimized, however, since the end of the Cold War).

9 Id. at 167, 200, 214.

10 See James A.R. Nafziger, "International Sports Law", in :Handbook on International Sports Law (James A.R. Nafziger & Stephen F. Ross eds. 2011) (forthcoming).

11 See, e.g., Jack Anderson, "Corruption in Sport: Time for an EU Statement of Integrity and Good Conduct in Sport", in: Int'l Sports L.J., 2007/1-2, at 108; Urvasi Naidoo & Simon Gardiner, "On the Front Foot Against Competition", in: Int'l Sports L.J., 2007/1-2, at 21 (drawing from bribery scandals in cricket).

12 See Nafziger, supra note 3, at 164-67, 214-15 (noting the European Convention on Spectator Violence and Misbehaviour at Sports Events and in Particular at Football Matches, ETS 120, reproduced in 24 I.L.M. 1566 (1985)).

13 See Albert Dirix & Xavier Sturbois, The First Thirty Years of the International Committee Medical Commission 1967-97, at 14 (1999).

14 Altman, "New "Breakfast of Champions": A Recipe for Victory or Disaster?", in: N.Y. Times, 20 November 1988, at 1, 34.

15 See, respectively, Bill Strickland, Endgame, BICYCLING, May 2011, at 48, and Selena Roberts & David Epstein, Special Report: The Case Against Lance Armstrong, SPORTS ILLUS., 24 January 2011, at 45 (discussing the Armstrong case); Juliet Machur & Michael S. Schmidt, Investigations in Doping Fraud Case are Facing a Long, Hard Challenge, N.Y. TIMES, 29 June 2010, at B14 (discussing the Landis case); Juliet Machur, New Test, Introduced Without Warning, Could Give Antidoping Officials an Edge, N.Y. TIMES, 10 October 2010, at SportsSunday 8 (discussing the Contador case).

16 See, e.g., Ben McGrath, "King of Walks", in: New Yorker, 28 March 2011, at 32; George Dohrmann, "The U.S. vs. Barry Bonds", in: Sports Illus., 28 March 2011, at 16 (discussing the Bonds case); George Vecsey, "Clemens Fell as Pettitte Refuse to go Along and Lie", in: SportsSunday 8. Int'l Herald Trib., 21-22 August 2010, at 12 (discussing both Bonds and Clemens cases). See also José Canseco, Wild Times, Rampant 'Roids, Smash Hits, and How Baseball Got Big (2005).

17 See James A.R. Nafziger, "Circumstantial Evidence of Doping: BALCO and Beyond", in: 16 Marq. Sports L. Rev. 45 (2005) (focusing on the Bay Area Laboratory Co-Operative (BALCO) scandal involving the widespread purchase and use by world-class athletes of a BALCO-produced anabolic steroid called tetrahydrogestrinone (THG)).

18 The collapse of the team sponsored by the U.S. Postal Service (USPS), an independent federal agency, was both embarrassing to the government and potentially devastating to Lance Armstrong and other team members under investigation who, by virtue of federal law to protect the USPS, might face federal criminal charges of conspiracy, wire fraud, money laundering, racketeering, drug trafficking, and fraud. Roberts & Epstein, supra note 14, at 58.

19 See Ross Tucker & Jonathan Dugas, A Doping-Free Tour de France?, 24 July 2011, at SR3.

20 See, e.g., Anne E. Kornblut, "Now Batting: Hearings in Congress on Steroids", in: N.Y. Times, 13 March 2005, § 8, at 8.

21 Nafziger, supra note 16, passim.

22 Selena Roberts & David Epstein, "Confronting A-Rod", in: Sports Illustrated, 16 February 2009, at 28.

23 See generally David Epstein & Melissa Segura, "The Elusive Dr. Galea", in: Sports Illus., 27 September 2010, at 57; Ian Austen, "H.G.H.'s Conundrum: Does Costly Treatment Enhance Performance?", in: N.Y. Times, 20 December 2009, at SportsSunday 2.

[24] Austen, id.

[25] See Serge F. Kovaleski, "Assistant's Loyalty May Be a Key for Doctor", in: N.Y. Times, 25 July 2011, at D1; Greg McArthur, "The Galea Files: The Many Faces of a Disgraced Sports Doctor", in: Globe and Mail (Toronto), 9 July 2011, at A12.

[26] McArthur, id. at A13; Epstein & Segura, supra note 22, at 60.

[27] Olympic Charter, ch. 1(10) (2007).

[28] The tension between sport as pure entertainment and as a means to achieve loftier goals was traditionally expressed by the distinction between professional and amateur sports. Today, however, that distinction has largely disappeared from international sports law, thanks to the general practice of national laws such as the Amateur and Olympic Sports Act in the United States, which decouples the definition of an "amateur" athlete from financial considerations and has gradually been extended, at least indirectly, to all athletes in this era of open competition. The European conceptualization of an integrated pyramidic structure of clubs from the grassroots on up has blurred the traditional distinction between amateurs and professionals. Of course, the distinction remains significant in such domestic practices as collective bargaining of player contracts, limitations on remuneration of high school and college athletes, and exclusively professional tournaments. The important cultural point is that the traditional ambiguity in defining the social role of sport is being resolved by recognizing that all international competition is, indeed, entertainment. It is subject, however, to rules, practices, and rituals – post-game handshakes, for example – that are designed to help achieve more noble aspirations. This trend toward the reconciliation of conflicting cultural variables is apt to continue.

[29] In a narrower sense of the term, the internal culture of sports activity, on the field of play, is also changing rapidly. The introduction of cameras and computers into the sports arena is gradually blurring the distinction of field-of-play rules, scoring, and decisions, on the one hand, and overarching legal requirements on the other. Increasingly, spectators expect that new technologies should overcome the frailties of human observation and exercise of discretion.

[30] See "Special Report: The Readers Speak", in: Sports Bus. J., 29 November-5 December 2010, at 17.

[31] Richard H. McLaren, "Is Sport Losing Its Integrity?", in: Marq. Sports L. Rev. 551, 551 (2011).

[32] Id. at 569, 571, 572.
For example:
Every advance in the detection of [performance-enhancing drugs] has been met with an advance in masking. When a method for detecting excessive testosterone using the body's testosterone/epitestosterone ratio was developed in 1981, East German doctors began synthesizing epitestosterone for their athletes to inject along with testosterone to keep their ratios stable. The strategy surfaced again in "the cream", the rub-on steroid lotion made infamous in the BALCO case. BALCO client Marion Jones never failed a drug test, and she was caught only through a criminal investigation.
One popular current doping method is micro-dosing, or frequent use of small quantities of testosterone or EPO; enough to get a benefit, but not to exceed the testing threshold. And then there's HGH. The current method of detection is so feeble that an athlete who injects HGH for lunch can be clean for testing by dinner.
David Epstein, "Test Patterns", in: Sports Illus., 30 May 2011, at 16.

[33] See T.M.C. Asser Instituut; The Implementation of the WADA Code in the European Union 33 (2010).

[34] Id. at 13.

[35] The Founding President of WADA and former Vice-President of WADA urged the formation of a 50-50 anti-doping partnership between governments and sports bodies. Richard Pound, "Idea: New Sheriff to Police Sports Doping", in: Christ. Sci. Monitor, 27 December 2010-3 January 2011, at 2. See also McLaren, supra note 29, at 572 (urging "better cooperation between sports administrators and the various governmental agencies that can help them out").

[36] See, e.g., James Halt, "Where is the Privacy in WADA's 'Whereabouts' Rule?", in: Marq. Sports L. Rev. 267 (2009).

[37] See, e.g., Hoch v. F.I.S., CAS 2008/A/1513 (deciding that a lifetime ban on eligibility would violate the principle of proportionality).

[38] James A.R. Nafziger, "The Future of International Sports Law", in: 42 Willamette L. Rev. 861 (2006).

[39] Foremost elements in this regime are the WADA Code, the UNESCO Convention, more systematic and thorough databases, and the prospect of a united front of governments and sports bodies.

Settling disputes under sports marketing agreements by expert determination

by Prof Ian Blackshaw[1]

Introductory remarks

Sport is now big business accounting for more than 3% of world trade. In the European Union, sport has developed into a discrete business worth more than 3.7% of the combined GNP of the twenty-seven member states comprising some 500 million citizens.

Indeed, according to Sepp Blatter, the President of FIFA, the world governing body of football – and the author of this article would entirely agree with him – sport is now a "product" in its own right, and there is much to play for not only on but also off the field of play. Whether this is a good thing as far as the integrity and so-called "Corinthian values" of sport is concerned is, of course, another matter – and, perhaps, a subject for another occasion!

For example, licensing and merchandising rights in relation to major sports events, such as the FIFA World Cup and the Olympic Games, are "hot properties", commanding high returns for the rights owners ("licensors") and concessionaires ("licensees") alike.[2]

Again, the commercial exploitation of the image rights of famous sports persons, such as David Beckham and Tiger Woods (before and even, perhaps to a lesser extent, after his fall from grace), is also big business.[3]

Likewise, sports broadcasting and new media rights are also money-spinners. For example, the English FA Premier League sold its broadcasting rights for the 2010 - 2013 seasons for another record sum of £1.782 billion!

The commercialisation and marketing of sport, sports events, sports teams and sports personalities has developed over the last thirty years or so into a discrete sports marketing industry with its own peculiarities and characteristics.[4]

Much of the pioneering work in the field of sports marketing was done by the late Horst Dassler of the sports goods and clothing manufacturer, Adidas, through the Swiss-based sports marketing company, ISL (International Sport Leisure and Culture), which he founded.[5] He revolutionised the marketing of the Olympic Games, by introducing a unified and global approach, and other major international sporting events, including basketball, football and track and field, through the development of sponsorship, merchandising and other commercial and promotional techniques. Another pioneer in sports marketing was the late Mark McCormack, who founded IMG (International Management Group), which is still going strong today. His particular *forte* was the promotion and marketing of major sports personalities, such as the legendary golfer, Arnold Palmer, who was his first client; and IMG was also Tiger Woods' first agency.

It is not surprising, therefore, that sports business disputes of various kinds are on the increase, especially in the current economic climate, and the question arises how best to resolve them – by traditional means, through the courts, or by modern means, through some form of ADR (Alternative Dispute Resolution)?

In any case, it is advisable to include appropriate dispute resolution clauses in sports marketing agreements, especially those with an international dimension, rather than to rely on the rules of private international law and/or the agreement of the parties in dispute at the time a dispute arises. In the latter case, one party may be willing to invoke some form of ADR, for example, mediation or arbitration, or, indeed, a combination of the two –"med-arb": mediation to identify the issues, and, if unsuccessful,[6] arbitration to settle them – whilst the other party may not. All forms of ADR are consensual in nature!

"Expert determination"

One form of ADR that is particularly appropriate and effective for settling certain kinds of disputes arising under sports

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2 See Chapters 10 & 11 by Ian Blackshaw in Sports Law'by Gardiner et al, 2006 third edition, Cavendish Publishing, London.

3 See Ian S. Blackshaw & Robert C. R. Siekmann (Eds.), Sports Image Rights in Europe, 2005, TMC Asser Press, The Hague, The Netherlands.

4 On the subject of sports marketing generally and sports marketing agreements in particular, see Ian S. Blackshaw, Sports Marketing Agreements: Legal, Fiscal and Practical Aspects, 2011, TMC Asser Press, The Hague, The Netherlands.

5 In the summer of 2001, ISL was declared bankrupt by a Swiss court with debts of reputedly £350 million. The insolvency of ISL was largely due to ever increasing guarantees given by the company in connection with the marketing of major international sports events, such as the FIFA World Cup, which it could not, in the event, fulfil.

6 Where mediation is appropriate, it enjoys a general success rate of 85% according to CEDR (Centre for Effective Dispute Resolution), which is based in London.

marketing agreements is "expert determination".

Depending upon the nature of the agreement and also the dispute, therefore, it may be advisable to include a provision for expert determination as part of the dispute resolution clause. Such a provision would be especially relevant for settling quickly and finally disputes of a technical or financial nature arising particularly under sports sponsorship and merchandising and licensing agreements. The kinds of disputes to be the subject of this form of dispute resolution need to be clearly defined in the expert determination clause itself.

Under expert determination, the parties in dispute agree to appoint an expert to determine their dispute and further agree to be bound by the determination of the expert. In other words, the parties expressly agree that the expert's determination will be "final and binding" on them, ruling out any recourse to the courts. Of course, as any form of ADR, as mentioned above, is consensual, the parties may agree that the expert's determination shall not be "final and binding" on them. However, such an arrangement begs the question of why use expert determination in the first place, if the outcome can be legally challenged by the parties?

Of course, the success of this form of dispute resolution depends upon the parties finding and agreeing on a suitably qualified and independent expert, who is experienced in the kind(s) of disputes concerned. Furthermore, in the appointment clause, it should be expressly stated that the person appointed is acting as an expert and not as an arbitrator, to ensure that the expert's decision is final and not subject to any kind of appeal or legal challenge in the courts (see later).

To avoid a deadlock occurring on the particular expert to be appointed through failure of the parties to agree, the expert determination provision should also provide, in such a case, for the appointment of the expert to be made by an independent third party, such as the president for the time being of The Law Society of England and Wales, and, in both instances, short time lines should be included. Also the expert determination clause should include the express agreement of the parties to accept and abide by the appointment made by that third party. Ideally, the parties should agree on the expert themselves, so that, as they say, they have some "ownership" in the process, which is generally considered as a sine qua non for the success of ADR generally and especially mediation.

The parties may expressly agree in their dispute resolution clause for expert determination to be preceded by an attempt at mediation[7] and the World Intellectual Property Organization, which offers both mediation and expert determination through its Arbitration and Mediation Center, based in Geneva, Switzerland,[8] for the settlement of IP-related disputes in various industries, suggests the following wording:

> *"We, the undersigned parties, hereby agree to submit to mediation in accordance with the WIPO Mediation Rules the following matter:*
>
> [brief description of the dispute or difference between the parties]
>
> *The place of mediation shall be* [specify place]. *The language to be used in the mediation shall be* [specify language].
>
> *We further agree that, if, and to the extent that, any such matter has not been settled pursuant to the mediation within [60][90] days of the commencement of the mediation, it shall, upon the filing of a Request for Expert Determination by either party, be referred to expert determination in accordance with the WIPO Expert Determination Rules. Alternatively, if, before the expiration of the said period of [60][90] days, either party fails to participate or to continue to participate in the mediation, the dispute or difference shall, upon the filing of a Request for Expert Determination by the other party, be referred to expert determination in accordance with the WIPO Expert Determination Rules. The determination made by the expert shall [not] be binding upon the parties. The language to be used in the expert determination shall be [specify language]."*

As with all general precedents, the wording of this clause needs to be customised to fit and reflect the particular facts and circumstances of each individual case.

On the question of the extent to which the courts can intervene in cases where the parties have agreed to settle their differences by expert determination, the following three recent judicial rulings in relation to disputes arising in other industries, but equally applicable to the sports industry, should be particularly noted:

- *where agreed expert determination clauses are binding and the parties have no recourse to the Courts;*
- *where the expert determination clause provides that the expert shall give reasons for a decision the Court will order that they be given; and*
- *where a defendant refused to take part in an expert determination the claimant may recover damages if it has to issue legal proceedings.*

In *Douglas Harper v Interchange Group Ltd*[9], there has been a clear reiteration that the Courts will enforce an expert determination provision in an agreement and that a party will be prohibited from bringing Court proceedings where the dispute falls within an expert determination provision and that provision is ignored. In this case, the agreement contained a comprehensive expert determination procedure. The High Court found that the parties were contractually bound by this procedure, so the plaintiff was barred from issuing Court proceedings claiming commission due. He had not complied with the requirements set out in the expert determination provision.

In *Halifax Life Ltd v The Equitable Life Assurance Society*[10], the Court provided further confirmation that expert determination procedures are binding on the parties, and although the Court may intervene to resolve issues, such as whether the expert should provide a reasoned decision or not, the actual decision of the expert will not be disturbed. Halifax had agreed to reinsure Equitable Life's unit-linked and non-profit business. This required an assessment of an initial premium for the reinsurance, which was referred to an expert to determine. Crucially the parties agreed that the expert would provide reasons for his decision. The expert made his determination, but failed to give reasons. Halifax challenged the decision claiming that it was non-binding on the ground of manifest error. The High Court said that:

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7 Mediation is proving particularly suitable and effective for the settlement of sports disputes generally: see Ian S. Blackshaw, Sport, Mediation and Arbitration, 2009, TMC Asser Press, The Hague, The Netherlands, and, in particular, the Woodhall/Warren case involving a dispute under a boxing management agreement.

8 For further information on the WIPO Arbitration & Mediation Center and its activities, log onto the WIPO official website at www.wipo.int and follow the links.

9 [2007] EWHC 1834.

10 [2007] EWHC 503.

"In litigation justice will not be done if it is not apparent to the parties why one has won and the other has lost."

And, therefore, held that the appropriate course was to adjourn the hearing of Halifax's claim and to remit the matter back to the expert in order that he could state the reasons for his decision. This allowed Halifax the opportunity to understand the reasons for the decision and to decide whether to continue with its legal challenge. The Judge referred by analogy to the provisions in the UK Arbitration Act 1996 (Section 70(4) which allows the Court to order an arbitral tribunal to provide reasons or sufficient reasons for its decision) and was able to require the expert to give reasons either by way of remedy in respect of the provisions of the contract, under the Court's inherent jurisdiction or under its case management powers contained in the Civil Procedure Rules. This case is a reminder that the courts can still intervene in an expert determination, although a "hands off" approach is generally favoured. Parties can take comfort from the fact that they can now expect a properly reasoned decision, if they have expressly agreed that reasons are to be given and they should certainly so provide in their expert determination clause.

In *Sunrock Aircraft Corporation v Scandinavian Airlines System Denmark-Norway-Sweden*[11], the Court of Appeal upheld the validity of an expert determination clause. It considered the measure of damages to be awarded where a party had refused to participate in the expert determination, but the other party had asked the Court to award damages rather than asking for a mandatory order for expert determination. In this particular case, the Court held that nominal damages were the correct measure of the claimant's loss.

These cases indicate that an increasing number of parties in different industries are agreeing to such dispute resolution procedures in their agreements, whether out of a desire to minimise their legal costs or implement a quicker dispute resolution procedure or both. They also underline the need for the parties to carefully consider and think through the suitability of such clauses, and also to appreciate that, once agreed, the procedure is compulsory and the expert's findings may only be legally challenged on the narrowest of grounds, if at all. In other words, the courts will generally uphold and enforce expert determination clauses.

Concluding remarks

Sports business disputes arising under sports marketing agreements, which are on the increase, in view of the financial importance of the global sports industry, are generally being settled *extra-judicially* by some form of ADR or another, including expert determination.

Whether or not to include expert determination as part of the dispute resolution clause in such agreements generally depends upon the nature of those agreements and also the type of disputes that may arise under them.

In other words, to use a sporting metaphor, it is always a matter of "horses for courses"!

11 [2007] EWHC Civ 882.

Ambush marketing in sport[1]

by Steve Cornelius[2]

Introduction

Since the end of the twentieth century, professional sport has developed into a worldwide industry worth hundreds of billions of dollars. Along with that, the idea of sport as a purely recreational activity has also largely disappeared. In the last thirty years, sport has become an important component of the entertainment industry.[3] Sport federations have awakened to the fact that sport has an inherent entertainment value and that this entertainment characteristic of sport also has an inherent market value[4] that can be utilised for the benefit of the relevant sports federations.[5]

The advertising industry has long since recognised the opportunities that sport holds for marketing. The sports industry manages on a weekly basis to attract to a single location a significantly large group of consumers that can all be simultaneously reached with a single message, a feat which no other industry achieves to quite the same extent.[6] The advertising industry has consequently begun to concentrate more and more on sport as a tool to expose consumers to goods and services. This has manifested itself in several ways: billboards have been erected near sports stadia, flyers and free samples are handed out to spectators outside stadia, aeroplanes with banners have flown over jam-packed stadia, businesses in the areas around stadia promote special offers, newspapers and magazines include posters of sports heroes in their publications, advertisements contain images of sports and air time for advertising during radio and television broadcasts of sport are sold like hot cakes.

In the era of strict amateurism in sport, during the late nineteenth century and the early to mid-twentieth century, sports federations were characterised by their cautious approach. They strictly guarded the ethos of a social order together with physical and spiritual health through physical exercise that was founded on the playing fields of the private schools in England[7]. Sports federations paid no attention to the advertising campaigns that began to develop around sport, provided that the sportsmen and women did not breach the amateur code in the process.[8]

However, the cracks soon appeared. Events at local, regional and provincial level were initially principally funded by participants and proceeds from ticket sales. Sports events were largely dependent on local authorities, who provided facilities, and the selfless work of volunteers. However, the increasing need for national, transnational and international competition began to take its toll economically on sports federations. Rising costs also had the effect that the proceeds from ticket sales were no longer sufficient to sustain sport.[9] This resulted in sport, as an industry, becoming more and more receptive to advertising. Initially, many restrictions were placed on advertising. The number, nature, extent, size and positioning of advertising material were strictly regulated.

The increased inclination towards professionalism also lead to the awareness of sport as a business. Seasoned business tycoons like Kerry Packer, Rupert Murdoch and Louis Luyt turned to the management of sports federations and sports leagues.[10] It would inevitably lead to the development of sport as a business. Where sport previously distanced itself from advertising, sports federations and sports leagues now embraced it. Where sport was initially indifferent to the advertising practises that developed around sport, sports federations and leagues now sought to control them and utilise them to their greatest benefit. This would unavoidably lead to tension between sports bodies and business enterprises, but also among business enterprises themselves.

It is out of this tension that the notion of ambush marketing would emerge. According to Leone[11], the concept "ambush marketing" is a derogatory label that opponents attach to any advertising activity that refers to or alludes to sports or a sports event, even if it does not allude to a relationship or a connection with the sports event itself. The controversy surrounding ambush marketing invokes a hefty debate, with viewpoints ranging from the absolute free market approach allowing everything to the draconian regulation of any form of advertising during a specific sports event. In essence, the debate turns firstly on the question of whether ambush marketing should be subject to regulation at all. Secondly, if ambush marketing indeed requires regulation, to what extent should it be regulated?

Although the controversy around ambush marketing comes to the fore largely in sport, and particularly in relation to high level sport, such as the Olympic Games, World Cup tournaments and international competitions and leagues, it is not uncommon for this phenomenon also to emerge in other social and cultural spheres.[12] The focus in this article is limited to ambush marketing in sport, but the same principles will also be applicable to ambush marketing in any other context.

What is ambush marketing?

Ambush marketing in sport is defined as marketing enabling a business enterprise to insinuate a relationship between specific goods or services and a sports event, without the marketer actually making any financial contribution to the sports event, whether by sponsorship or any other method.[13] The aim here is to use the goodwill of the sports event to secure exposure for the goods or services of the advertiser.[14] According to Epstein[15] ambush marketing consists of any marketing activity relating to a sports event, in which a party is involved without being an official sponsor of that event. This occurs when an enterprise, with no direct involvement with or interest in a sports event, presents its trademarks, trade names, goods or services in such a way that it creates the impression that a relationship exists between the sports event and that enterprise, when in reality there is no such connection. For example, in the lead up to the 2000 Olympic Games in Sydney, the airline Qantas launched an advertising campaign of "Special Olympic offers". Qantas also engaged well known athletes to appear

in these advertisements. Although Ansett was the official airline sponsor of the 2000 Olympic Games, market research showed that 60% of Australians were under the impression that Qantas was in fact the official airline.[16]

Griffith-Jones[17] takes the definition one step further and suggests that ambush marketing also occurs when no relationship with the sports event is suggested, but an enterprise uses the interest that the sports event generates to promote its trade names or trademarks, without that enterprise having any direct involvement or interest in the sports event. For example, in the lead up to the 1996 Olympic Games in Atlanta, the sports clothing manufacturer Nike bought an old building in the city centre of Atlanta and turned it into a Nike museum.[18] Nike is known as an enterprise that does not often get involved with sport as an official sponsor, but never lets a marketing opportunity at a large sports event pass by unharnessed.[19] The question arises whether or not such advertising practises amount to ambush marketing.

The interest that a sports event generates with the public bestows an inherent goodwill or marketing value on that event. A sponsor effectively "purchases" the sports federation's permission to use that goodwill or marketing value to its advantage. Ambush marketing means that a third party, often a direct competitor of the sponsor, unlawfully tries to gain advantage from the marketing value of the sports event without the permission of the sports federation, diverting the focus from the sponsor, and diminishing the impact of the sponsor's advertising.[20]

In this article I distinguish between ambush marketing, which is unlawful, and parallel marketing, which is lawful. It is often difficult to discern when advertising goes too far. The aim is then also to develop a guideline whereby the differentiation between ambush marketing and parallel marketing can be readily determined.

Why is there ambush marketing?

Many reasons have been offered to explain why a business enterprise would be tempted to resort to ambush marketing. Firstly, especially in high level sports, it demands an excessive amount of money to be declared an official sponsor of a sports event. Many enterprises quite simply cannot afford it or cannot justify the expenditure, and then follow the alternative route of ambush marketing. Secondly, the number of sponsors that can get involved in a particular sports event is naturally limited. This is further complicated by long-standing established relationships between a specific sport or sports event and a specific sponsor.[21] Competitors that also want to utilise the opportunity to promote their goods or services then sometimes resort to ambush marketing. Moreover, there may be a prohibition on advertising in respect of the product that the marketer wishes to advance (such as tobacco) or the product may not be compatible with the image that the particular sports federation wishes to portray (for example pornographic material).[22]

Whatever the particular reason, a business enterprise resorts to ambush marketing with one aim, that is to associate the goodwill of the enterprise so closely with the goodwill or marketing value of the sports event that the enterprise's goodwill is in fact enhanced by the goodwill of the event.[23] This is also an important characteristic distinguishing ambush marketing from parallel marketing.

Ambush marketing can also be aimed at creating uncertainty among consumers, so that they identify the goods or services in the advertisement with the specific sports event. The goal is then to create the impression that the enterprise is associated with the sports event. The objective is two-fold, namely to advance the enterprise's goods or services, and simultaneously to undermine the impact of the advertisements of the official sponsors.[24]

To regulate or not to regulate?

Unavoidably, the controversy surrounding ambush marketing has attracted the attention of authorities worldwide. The question arises whether sports federations must simply be left at the mercy of the free market or if government involvement is required.

The decision to regulate can only be justified if there is a legitimate interest worthy of protection, the interest is under threat and current law is insufficient to offer protection.[25] Leone[26] is of the opinion that these requirements are absent and that regulation would consequently improperly interfere with the free market. She bases her viewpoint on various arguments:

– A prohibition on ambush marketing is unnecessary. Why should authorities have to get involved to protect sports federations (and sponsors)? The 2006 Football World Cup was successfully hosted in Germany without any official measures implemented by the authorities to forbid ambush marketing, and so was the 2008 European Football Championship that took place in Austria and Switzerland.
– A prohibition on ambush marketing does not benefit sport. Enterprises that utilise ambush marketing are often involved as sponsors at different levels of sport. If the restrictions on ambush marketing are too strict, it would deprive sport of those sponsorships to the detriment of sport in general.
– A prohibition on ambush marketing does not have broader economic advantages. It only benefits large international sports federations and multinational companies.
– Ambush marketing is acceptable on every other level of the economy and that should therefore also be the case in sport. If sport cannot cope with normal competitive practices, then it is the business model of sport that should be reconsidered, not ambush marketing.
– The restriction of ambush marketing is anti-competitive and it is unreasonable to afford the opportunities to benefit from a large sports event only to selected large business enterprises. Besides, the hundreds of millions of dollars contributed by official sponsors pale in comparison with the billions of dollars in taxpayers' money that authorities pump into large sports events. A large number of enterprises, which have contributed to making a sports event possible through payment of their taxes, are prevented from gaining any advantage from the interest generated by the sports event.
– It is too difficult to draw a line between unlawful ambush marketing and lawful parallel marketing. Advertisers attempt to gain advantage from sports events in diverse ways and not all methods evoke the same level of indignation. For example, can a school present a "Summer Games" without infringing measures aimed at the 2012 Olympic Games in London? Or what about the barkeeper that writes on a blackboard outside the door "Watch the Games here"?
– Existing law already offers sufficient protection. Sports federations and their official sponsors are already protected by means of the existing intellectual

property law (especially with regards to trademarks and trade names) and regulation of unlawful competition. There are also avenues outside the law that can be used to put an end to ambush marketing. Official sponsors can, for example, purchase all the advertising space around a stadium and sports federations can agree with broadcasters to only sell advertising air time to official sponsors.

Consequently, Leone[27] concludes that any prohibition on ambush marketing is draconian and unjustifiable, especially considering that the lion's share of the funding of a large sports event or tournament comes from taxpayers' contributions.

The validity of these arguments must be investigated to determine if the regulation of ambush marketing is truly desirable or not.

Is there a legally recognized interest?

Any discussion of ambush marketing and the need for regulation rests mainly on the question of whether the particular sports federation has a legally recognized interest that would be violated or infringed upon in the event of ambush marketing. In other words, is the advertising value of the sports event an interest worthy of legal protection? The answer to this question will determine not only if regulation is necessary, but will also indicate the extent to which regulation is required, if indeed there is an interest being threatened.

Most legal systems today recognize a variety of statutory and common law commercial, personality and intellectual property rights. It is particularly in this variety of recognized rights that the advertising value of an enterprise as a legally protectable interest lies. In some respects, the recognition and protection of advertising value is quite obvious, such as in the case of registered trademarks in terms of applicable legislation. When, whether by ambush marketing or by other means, these rights are infringed, the applicable law places a variety of remedies at the disposal of the disadvantaged party.

The law has recognised for quite some time that every business enterprise has a subjective right to the goodwill of the enterprise.[28] A sports federation, as an enterprise, accordingly also has this subjective right to goodwill. This goodwill is not just the embodiment of the reputation of an enterprise. Reputation is predominantly a personality interest,[29] but goodwill is indeed a patrimonial interest that vests in the estate of the enterprise.[30] It is likely the most important asset of any enterprise, because without the ability to attract and entice clients no enterprise could maintain a meaningful existence.

Goodwill is an immaterial asset in the estate of an enterprise, just as confidential information or trade secrets may be. As Judge Diemond explained,[31] an enterprise acts unlawfully when it uses, to its own advantage, the confidential information that a competitor developed with zeal and expertise. The unlawful use of confidential information entails laying claim to a trade asset that was created by the efforts of another. According to Judge Diemond[32] it is difficult to see how this usurpation differs in principle from stealing the goods out of a competitor's shop. This begs the question; does ambush marketing not also comprise the advancement of an enterprise through the use of the goodwill attached to a sports event? Is the goodwill attached to a sports event not an asset developed through the skill and expertise of the particular sports federation? If goodwill is an asset, in principle there can then be no distinction between the unlawful use of goodwill and the unlawful use of any other trade asset, such as confidential information. Judge Van Dijkhorst explained[33] that the misuse of confidential information indeed also amounts to violation of goodwill. There is consequently no underlying difference between misuse of confidential information and misuse of goodwill. At the end of the day, both are forms of unlawful competition.

The position is similar to that of English law. Judge Laddie[34] puts it that

> *"although the defendant may not damage the goodwill as such, what he does is damage the value of the goodwill to the claimant because, instead of benefitting from exclusive rights to his property, the latter now finds that someone else is squatting on it. It is for the owner of goodwill to maintain, raise or lower the quality of his reputation or to decide who, if anyone, can use it alongside him. The ability to do that is compromised if another can use the reputation or goodwill without his permission and as he likes."*

In *Douglas v Hello! Ltd*.[35] the House of Lords held that photographs of the applicants' wedding ceremony could not be published without permission. The reason for this finding did not lie so much in the violation of the applicants' privacy (they had, after all, already agreed to publish the wedding photographs in another magazine), but more in the possible commercial disadvantage that was held in the infringement of the applicants' exclusive rights (as famous movie stars). In German law the protection of goodwill is also seen as the foundation for restrictions on ambush marketing.[36]

Besides the patrimonial interest in goodwill, there are also personality interests at stake. For purposes of this discussion, it is of the utmost importance to note that it is not only natural persons that have personality interests, but also juristic persons – insofar as it is reasonable – in the sense of personality rights such as reputation and identity.[37]

Naturally, the patrimonial interest of goodwill is strongly connected with the personality interest in reputation. However, both goodwill and reputation are inextricably linked with identity. Goodwill, or reputation, is senseless if not related to a specific identifiable individual or enterprise. The unique essential elements that underlie the right to identity, are simultaneously also the characteristics that distinguish an individual or enterprise with a particular goodwill or reputation from another.

In this regard identity consists of that uniqueness or distinctiveness that identifies a person as an individual and separates him from others. Identity is made up of the collection of characteristics that make an individual different.[38] In the case of an enterprise, identity consists firstly of the registered and common law trademarks of that enterprise. But it is also so much more. It includes the manner in which shops are furnished – a person can walk into a McDonalds fast food outlet anywhere in the world and experience a sense of familiarity. Identity also includes the merchandise of an enterprise, as well as the packaging and presentation. In the case of a sports federation, identity also consists of the tournaments that the sports federation hosts that make it different from other sports federations. When one thinks of the International Olympic Committee, one involuntarily thinks of the Olympic logo of five coloured rings on a white background. At the same time, one thinks of the Olympic Games, the grand opening ceremony, the lighting of the Ol-

ympic torch, the competition in a variety of sport disciplines, and the list goes on. They are all inseparable characteristics that determine the identity of the International Olympic Committee. The same can be said of other sports federations and the large tournaments that they host.

The right to identity can in this regard be violated in one of two ways. Firstly, violation occurs if the unique characteristics of that person are used in a manner that cannot be reconciled with the true image of that person. In addition, the unauthorised use of the individual's image includes some type of misrepresentation, for example that the individual endorses or approves of a particular product.[39] The unlawfulness in this type of situation mainly lies in the misrepresentation regarding the person involved. If it is established that every sports federation has personality rights, and more specifically a right to identity, then there can be no logical distinction between the case where the false impression is created that a person endorses a product, and the case where advertising falsely alludes to a relationship between a sports federation and an enterprise.

Secondly, the right to identity is infringed if a unique characteristic of a person is used without authority by another person for commercial gain. Besides the unlawful use of the person's image, such use also primarily has a commercial motive that is exclusively intended to promote goods or services in order to increase client or customer base.[40] This infringement of the right to identity thus mainly concerns the unlawful use of the person's personal characteristics for advertising purposes. The unlawfulness in this case lies in the violation of the right to freedom of association and the commercial exploitation of the individual. If it appears that every sports federation has personality rights, and more specifically a right to identity, then there can be no logical distinction between the case where the image of an individual can be used without authority in advertising, and the case where advertising without authority uses the image of a sports federation.

The restriction of ambush marketing consequently rests on the recognition and protection of various related patrimonial interests and personality interests, namely goodwill, reputation and identity. Where advertising during a large sports event infringes on one of these rights of the particular sports federation, then it amounts to ambush marketing and it is therefore unlawful. Where advertising merely relies on the increasing interest that a sports event generates, without violating the sport federation's right to goodwill, reputation or identity, then it amounts to lawful parallel marketing.

Is regulation necessary?

International sports federations have relatively recently become aware of ambush marketing and measures to prohibit it have only received serious attention in the last decade. It must therefore be considered whether perhaps sport can get along without any regulations to restrict ambush marketing.

Research has shown that ambush marketing is very effective. It convinces consumers that there is a close bond between an enterprise and a sports event. Hence, research indicates that ambush marketing undermines the exposure of the official sponsors. Consumers often remember the trade name that is used in ambush marketing, while the official sponsors are less often seen as being associated with the sports event. It all leads to confusion amongst consumers.[41]

But then, what about the 2006 Football World Cup in Germany which seemingly ran smoothly without the implementation of any legislation to restrict ambush marketing? And what about the 2008 European Football Championship in Austria and Switzerland that was also apparently a success in the absence of any such rules?[42] The simple answer is that it is misleading to suggest that ambush marketing was not restricted during these events. It is true that neither the German authorities, nor the Swiss or Austrian authorities, implemented any particular measures specifically for the respective tournaments. However, ambush marketing is prohibited under German law by means of laws aimed at unlawful competition. Misleading business practices are viewed as unfair and thus unlawful. More specifically, a business practice is inter alia misleading if it contains false information or other misleading details, including statements or symbols which directly or indirectly allude to a sponsorship or to the endorsement of an enterprise or the goods or services that are associated with the enterprise.[43] Here is consequently a general provision that forbids ambush marketing in general, making it unnecessary to adopt specific measures for each particular sports event. This stipulation does not specifically refer to sport, which means that ambush marketing in any other environment is also forbidden. The statute books of both Switzerland[44] and Austria[45] also contain rules that can be used to prohibit ambush marketing.

Today it is unthinkable that international sports federations would award any large sports event to a particular country if regulations to prohibit ambush marketing are lacking. There is at least one good reason for this. It is estimated that the sports industry annually loses more than $1 billion due to varying forms of ambush marketing.[46] The extent of these losses is in itself already a strong indication that there may be serious prejudice and that this prejudice is not adequately addressed under current law. The law recognizes the patrimonial interest that every enterprise has in its goodwill, together with the right to exploit this interest profitably.[47] Goodwill is an asset which, just like any other trade asset, must be protected against misuse and usurpation.

The interest of sport

The view that regulation of ambush marketing is not in the interest of sport is not sustainable in the context of professional sport. The more ambush marketing in sport increases, the more the value of association with a sports event decreases for an official sponsor.[48]

The further argument that restriction of ambush marketing will deprive sport of sponsorships, because many enterprises that make use of ambush marketing are actually sponsors on other levels of sport, is equally untenable. It ignores the fact that it is often those very same sponsors that are demanding that sports federations and authorities implement prohibitions on ambush marketing.[49]

The converse is actually true. If ambush marketing is not restricted, there is a very real possibility that existing sponsors may withdraw their sponsorships and follow the route of ambush marketing themselves.[50] This is not just a hypothetical risk. There have already been several cases where sponsorships have been ended or where former sponsors have resorted to ambush marketing.

In 1993, the official sponsor, Panasonic,

refused to fork out $2.5 million in sponsorship for the Formula 1 South African Grand Prix. Oil producer Sasol had bombarded the area surrounding the Kyalami racetrack with advertising boards and had purchased the greatest part of the advertising time on the television broadcasting of the event. The consequence was that Panasonic's sponsorship was overshadowed and the impression created that Sasol was the official sponsor of the South African Grand Prix. In a later court battle, the court ruled in favour of Panasonic, and held that the funds could indeed be withheld.[51]

In 1997 the relationship between the United Cricket Board of South Africa and their sponsor at that time, Vodacom, soured after MTN's blimp floated above the stadium during the third test match between South Africa and Australia.[52] The dispute ended up in court[53] and eventually lead to Vodacom withdrawing its sponsorship from cricket.[54]

The problem also emerged in Europe. The manufacturer of potato chips, Pringles, was one of the official sponsors during the European Football Championship in 2000. By the time the next championship dawned in 2004, Pringles had withdrawn as sponsor and reverted to ambush marketing instead.[55] The result was that Pringles still reaped the rewards of being associated with the soccer tournament, but at a fraction of the costs, without having to make any contribution to the financing of the tournament.

In 2003 Australia and New Zealand were to host the Rugby World Cup jointly. New Zealand's rugby authorities were not capable of providing "clean" stadiums, without any advertising. The International Rugby Board thus decided to strip New Zealand of the honour of hosting certain matches, with the result being that Australia ended up being the sole host of the tournament. The costs that New Zealand had incurred in preparation for the tournament were therefore wasted.[56]

If ambush marketing is not restricted, there is the risk that existing sponsors will stop sponsoring events, and this is a significant disadvantage that should be averted. It may be that these are a few examples out of the large number of sponsorships where sponsors have indeed pulled out, but they should not be overlooked, and the law must also guard against the risk of harm and not only the actual, existing harm.[57] In other words, the law must be proactive and not reactive. The risk of withdrawal of sponsors is thus another reason to justify the implementation of measures restricting ambush marketing.

Economic Interest

The economic impact of professional sport reaches much further than merely ticket sales, or the sale of merchandise, food and beverages around the stadium. Sport annually contributes approximately $1 billion in direct expenditure to the South African economy.[58] Some large sports events inherently have a large impact. The rugby tour of the British and Irish Lions in 2009 attracted around 37,000 tourists to South Africa, and in six weeks contributed about $200 million to the gross domestic product in South Africa.[59] The dress rehearsal for the Football World Cup, the Confederations Cup, also drew about 15,000 visitors to South Africa in 2009, and contributed approximately $100 million to the economy.[60] In the same year, the Indian Premier League cricket tournament, which was moved to South Africa amid the unrest surrounding the elections in India, contributed about $150 million to the economy.[61] The Football World Cup in 2010 attracted an estimated 400,000 tourists to South Africa, and contributed around $2 billion to the gross domestic product.[62] When one takes into account that these events all took place during the greatest economic crisis since the Great Depression, the statistics are mind boggling. Furthermore, it is estimated that the exposure that South Africa received during the Football World Cup by means of television broadcasts and the experiences of tourists could amount to an annual increase of 1,6 million more tourists visiting South Africa than what was originally estimated.[63] To add to this, one must account for the direct and indirect job opportunities that are created as a result of such sport events, particularly in the construction and tourism industries. Ultimately these economic benefits mean that the billions of dollars of tax money that are pumped into the events, eventually return to the pockets of tax payers in various ways and on a fairly large scale.

Because of this it is of cardinal importance that the sponsors that make large-scale sports events possible must be protected. Withdrawal of sponsors could have catastrophic consequences for sport. As mentioned above, in 2003 Panasonic refused to pay out their $2 million sponsorship for the Formula 1 South African Grand Prix. This lead to the organisers of the race having insufficient funds to satisfy their financial obligations and consequently being liquidated due to bankruptcy.[64] The result of the debacle is that South Africa has since not been able to host a Formula 1 race. The liquidation of the organisers and the associated protracted litigation left a void and it was not possible in the following years to host a Formula 1 race in South Africa. Competition for the right to host a Formula 1 Grand Prix is tough, since there are limited opportunities available. South Africa's loss was another country's gain. This filled up the race calendar to the extent that later attempts by South Africa to secure another opportunity have been in vain. The direct loss to the South African economy is astronomical. In 1996 it was estimated that the Formula 1 Australian Grand Prix in Melbourne that year pumped $80 million into the gross domestic product of the state of Victoria and created more than two thousand full-time jobs.[65] This may mean that the South African economy has lost in the region of $1 billion and thousands of job opportunities in the fifteen years since the previous Formula 1 South African Grand Prix. This is largely owed to the fact that the sponsors were not looked after.

Besides that, the indirect losses are difficult to determine. The direct broadcast of any Formula 1 race attracts over 350 million viewers in more than 150 countries.[66] With the loss of this single annual opportunity, South Africa has been deprived of one of the best opportunities of marketing itself as a tourist and commercial destination.

This all means that clamping down on ambush marketing clearly furthers a broader economic interest, and is thus also justifiable in this regard.

Competitive advertising

Some advertisers view ambush marketing purely as a creative marketing strategy. When an enterprise takes on a specific role in the market, its competitors should have the right to seize every opportunity possible to compete with that enterprise for the attention of consumers.[67] This approach suggests that it is only in sport that certain forms of advertising are branded as ambush marketing, while similar advertising schemes in other settings are deemed acceptable.[68]

This view is once again unfounded. It is not only sport that labours under ambush marketing. Any event that attracts the attention of the public is susceptible to ambush marketing.[69]

Sainsbury's, sponsor of famous television chef Jamie Oliver, were livid when a photo of Oliver's wife, Jules, with a trolley of groceries from a competitor, Waitrose, was published. Pepsi's $75 million sponsorship contract with Britney Spears came under threat when she was photographed with a can of Coca-Cola in her hand. To Pepsi's great embarrassment, Spears was later photographed holding a can of Schweppes Sunkist.[70] In Germany, the whiskey manufacturer Jim Beam used a photograph of a whiskey bottle on the bonnet of a Rolls Royce motor vehicle. The court held that Jim Beam wanted to exploit the reputation and status of Rolls Royce in an unauthorised manner to advertise their whiskey.[71] In the United States of America, the Washington Post instituted legal action against Gator, an enterprise employing pop-up advertisements on internet websites. The pop-up advertisements often market products in direct competition with the products displayed on the website.[72]

Ambush marketing is therefore to be found all over, and is problematic regardless of the industry in which it is used. Sport is thus no different from any other industry in this regard. The restriction of ambush marketing in sport (as well as in other industries) boils down to a statutory extension of the common law prohibition against unlawful competition. Unlawful competition occurs when an enterprise takes advantage of the reputation of a competitor to advertise its own product. This is often achieved by using similar brand names or packaging to that of a competitor. The aim is to deceive consumers into confusing the product of that enterprise (usually of an inferior quality) with the product of the competitor (usually of a superior quality and more popular). The sales of that enterprise are boosted in this way at the expense of the competitor's product.[73] An important aspect of the law regarding unlawful competition is that it is aimed at protecting consumers from misleading and confusing marketing practises. Is that not precisely the aim with the regulation of ambush marketing? As indicated previously, ambush marketing is hugely effective due to its success at confusing consumers. The restriction of ambush marketing should thus be seen as a logical extension of the law as regards passing off and misappropriation.

Free market

Sports sponsorships, and especially the hold that large multinational enterprises have over sponsorship of major international sports events, are often viewed as anti-competitive. Measures to restrict ambush marketing entrench these anti-competitive practises.[74] It prevents competitors of established sponsors from gaining any advantage from the interest generated by large sports events. It also seemingly prevents smaller enterprises from getting any advertising from large sports events. This is unreasonable towards these smaller enterprises, especially since they contribute to the financing of the sports event through the payment of taxes.

This problem can be easily avoided. The measures that restrict ambush marketing can include protection for these smaller enterprises. This is also the position in South Africa. Section 15A of the Merchandise Marks Act[75] empowers the Minister of Trade and Industry to declare that a sports event be protected against ambush marketing. The Minister may only do so if the organisers have created sufficient trade opportunities for the smaller enterprises. Before the organisers of the Football World Cup could thus claim protection under s15A, they had to present plans which would advance the interests of the smaller enterprises to the Minister. (Whether or not such plans were indeed implemented and carried out is not clear. But the lack thereof would bring the validity of the Minister's notice, and consequently the legal validity of any acts against alleged instances of ambush marketing, into question.[76])

There is also a practical solution. The experience in South Africa was that the smaller enterprises were not at all excluded from the advantages offered by the Football World Cup. It was difficult to find a single shop where the 2010 World Cup logo was not prominently displayed. But how could they do so without invoking the wrath of the international soccer federation, FIFA?

The answer is simply that the business enterprises displayed advertisements of the official sponsors containing the 2010 World Cup logo in their shops too. Every business that accepted payment by credit card prominently sported the advertisement of VISA, an official sponsor and credit card service provider, in their windows. Every fast food outlet, restaurant and supermarket displayed advertisements of the official sponsor, Coca-Cola. Every travel agent prominently displayed advertisements of the official airline, Emirates. Sport and clothing shops displayed advertisements of Adidas, another official sponsor, and sold replicas of Adidas's Jabulani football. Electronics shops and department stores displayed advertisements of the official sponsor, Sony. Any shop that sold mobile phones and airtime advertised MTN as official sponsor. The official mascot, Zakumi, was on sale everywhere. This had advantages for all the involved parties. The official sponsors received maximum exposure in the process. This made it especially difficult for any competitors (at least in South Africa) to overshadow the official sponsors through ambush marketing. More importantly, smaller enterprises still had the opportunity to take advantage of the large numbers of visiting tourists, despite the restrictions on ambush marketing. As already mentioned, the tourist spend in 2010 contributed $2 billion to the gross domestic product.[77] In this way the billions of dollars in taxes that the state pumped into the World Cup eventually found its way back to the enterprises that paid the taxes in the first place.

The prohibition of ambush marketing therefore does not necessarily have the effect of suppressing smaller enterprises. Large multinational enterprises are, however, still restricted. With Cola-Cola as an official sponsor no room was left for Pepsi or Schweppes to get a foot in the door with advertising directed at consumers attending the World Cup. The official sponsorships of Hyundai and Kia also prevented any other vehicle manufacturers from garnering any marketing opportunities at the World Cup. In this regard, Leone[78] may have a valid argument when she asserts that sports sponsorships are anti-competitive and that the business model of sport should be revised. It is actually not the entire business model that requires revision, but only the manner in which official sponsors are appointed. Most international sports federations, including the International Olympic Committee, already have well established, long-term relationships with certain sponsors.[79] This makes it impossible for other enterprises to become involved as a sponsor of a large sports event, even if they were to offer remarkably greater value. Perhaps the time

has come to confront international sports federations and require free competition for large sponsorships. Why can the sponsors for a specific Olympic Games or World Championship not be appointed by way of an open tender process? This is, however, a wide-reaching issue that falls outside the scope of this article.

Where is the line to be drawn?

It is true that it is often difficult to draw the line between unlawful ambush marketing and lawful parallel marketing. When major sports events take place, a wide variety of enterprises attempt to make use of the opportunity to advertise in many different ways. The possible ways in which ambush marketing and parallel marketing can take place are endless, and the inventiveness of advertisers knows no bounds. It would be impossible to present an exhaustive list, and only a small selection of the countless possibilities is therefore considered.

One approach is for an enterprise to purchase advertising space around a stadium or air time during broadcasts. Enterprises also purchase advertising space in magazines and newspapers, especially in the sports pages. It is especially where there is a theme or golden thread regarding the sports event running through such advertisements that the line between the lawful and the unlawful blurs.[80] In exceptional cases enterprises can use the trademarks of the relevant sports federations or sports events in such advertising without authority and in an unlawful manner.[81]

Enterprises can sponsor specific athletes or teams. Occasionally this requires the specific athlete or team to use the sponsor's products, such as rugby or football boots, during the sports event. In other instances, the enterprise will advertise its sponsorship of the athlete or team during the sports event. Sometimes the athlete or team will appear in the advertisements of the enterprise.[82]

It is possible for an enterprise to be a secondary sponsor of a sports event, but to advertise their sponsorship aggressively and out of proportion to the value of the sponsorship.[83]

Enterprises often make special offers to the public during large sports events. These offers may exceed the limits of lawful advertising when referred to as an "Olympic offer" or a "World Cup offer".[84] Sometimes promotions occur in the area of the stadium, which can include the handing out of flyers or free samples.[85]

The ultimate question is: which of these forms of marketing are lawful, and which are not? Leone[86] correctly remarks that it is particularly difficult to make this distinction. Her opinion that ambush marketing should not be regulated for this reason, is short sighted. To the contrary, proper regulation will result in the concept of ambush marketing being authoritatively defined. The advantage of such a definition is that official sponsors and other enterprises that wish to advertise during a large sports event will have clarity on what is allowed and what not. Enterprises will at the outset also be made aware of the consequences of the use of ambush marketing, and will thus contribute to the discouragement of the use of unlawful ambush marketing. The uncertainty surrounding ambush marketing is therefore a strong argument in favour of implementing regulation.

Are existing regulations insufficient?

It is often suggested that the existing laws offer sufficient protection to sports federations and their sponsors, and that it is therefore unnecessary to implement measures to restrict ambush marketing. The current laws mainly offer protection in two ways. Firstly, there is intellectual property law that protects trademarks and trade names. Secondly, there is the law of competition which guards against unlawful and unfair competition.[87]

When an enterprise without permission uses the names or logos of the International Olympic Committee or that of a sports federation or sports tournament in its advertising, the law regarding trademarks and trade names is infringed. The owner of the trademark can institute legal action to protect the trademark and prevent its unlawful use.[88] In such cases, the existing intellectual property laws already offer adequate protection.

Competition law also offers a measure of protection against ambush marketing. An enterprise which improperly encroaches on the goodwill of a competitor can be held liable in delict or tort for these actions. Infringement is improper when it is contrary to public policy and negates the merits of competition. Unlawful competition can take various forms. With ambush marketing, of importance is the misleading or undue influence of consumers, passing off, misappropriation, and interference with a contractual relationship.[89]

Misleading or undue influence of consumers is self explanatory, as is interference with a contractual relationship. Ambush marketing is particularly aimed at hijacking the goodwill of a sports event, to the detriment of the sports federation and the official sponsors. In certain cases this can also interfere with the contractual relationship between the sports federation and the sponsor, in the sense that the sponsor does not achieve the agreed advantages from the relationship.[90]

Passing off consists of the copying or imitating of a competitor's logos or trademarks, or the use of packaging that is almost identical to that of the competitor's packaging. This creates the impression that the performance of the party committing the act of passing off is equal to the performance of the competitor. Unsuspecting consumers that wish to purchase the competitor's product are then deceived into purchasing the product of the party committing the act of passing off instead.[91]

Misappropriation occurs when one competitor takes advantage of another competitor's reputation by openly creating the impression of a connection with that competitor.[92] As such the majority of cases of ambush marketing will fall into this category. The objective of ambush marketing is after all to take advantage of the interest in (or reputation of) a sports event to achieve a trade advantage for an enterprise.

At face value therefore, it appears that the current law does in fact have sufficient rules and regulations to effectively protect sports federations or official sponsors against ambush marketing. In cases where trademarks are used without permission, this is indeed the case. However, in cases of unlawful competition the position is not so clear. The law of competition offers the disadvantaged party a remedy in tort or delict. An essential requirement to succeed with such a claim is the proof of damages. The damage must in essence be quantified. In many cases of ambush marketing it is practically impossible to meet this requirement. For example, how does FIFA, or any of the official sponsors, prove that they suffered damage as a result of Kulula.com's advertisement during the World Cup that declared that Kulula is the "Unofficial national carrier of the 'you

know what'"?[93] Ambush marketing violates the goodwill of the sports event and official sponsors, and as such it is very difficult to quantify damages in dollars and dents.[94]

Apart from that, an international sports event, and the ambush marketing that accompanies it, is of short duration. It is often not worth the effort for sports federations and official sponsors to spend years and years in civil litigation and appeals while the ambush marketing only lasted for several weeks.[95] It is not uncommon for litigation to drag on for considerably longer than the four year interval between each Olympic Games or World Cup. >From a practical point of view, drawn out civil litigation is therefore undesirable.

Despite the fact that there are existing laws that can, at least in theory, offer the required protection against ambush marketing, in reality those measures are often not effective. Thus there is a great need for effective practical regulation to restrict ambush marketing.

Ethical questions

The phenomenon of ambush marketing inevitably raises the question whether such advertising practices are ethically justifiable. There are three important ethical principles relevant to advertising.[96] Firstly, advertising must be responsible. The advertising industry offers a service to a community of enterprises and consumers. On the one hand, an advertiser must assist an enterprise to market its goods and services and increase its profit margin. On the other hand, advertisers also have a responsibility towards consumers, mainly to ensure that they are not misled. Advertisers also have a duty to ensure that advertising is fair towards all the parties involved, including other enterprises. Secondly, advertising must be socially and economically accountable. Thirdly, advertising must not be harmful. Advertisers must be aware of the conscious and subconscious consequences of advertising. An advertisement for a vacuum cleaner or washing powder could, for example, further entrench the stereotypical image of the role of women in our society, and this can be detrimental. Another example could be the use of cartoons in advertisements for alcoholic beverages, which could be harmful towards children.

Ambush marketing does not meet any of the mentioned ethical standards. To a large extent, it boils down to the unlawful use of a trade asset that vests in a particular sports federation, and as such it is just as detrimental and irresponsible as any other form of usurpation. Furthermore, ambush marketing often leads to confusion, and in this sense it is not fair towards consumers. It is further irresponsible because it does not treat all the role players fairly. Sports federations do not get any advantage from the usurping of their goodwill, and official sponsors are upstaged unfairly. In addition, the losses suffered annually by sports federations as a result of ambush marketing, and the danger that sponsorships may be reduced or withdrawn on account of ambush marketing, means that ambush marketing is not socially or economically responsible and that it is harmful.

Because of all of this, it is difficult to justify ambush marketing from an ethical point of view. Although the unethical nature of ambush marketing in itself is perhaps not a reason to forbid it, together with all the arguments already advanced, it strongly indicates that regulation is both necessary and desirable.

Quo vadis regulation?

It may be clear that ambush marketing does in fact need to be regulated. The question then remains to what extent and in what way should it be done. Statutory measures to guard against ambush marketing mainly fall in two categories, namely specific measures that are only applicable to a specific sports event or specific type of advertising, and general measures that are applicable to any sports event that meets certain requirements.

Australia applied the approach of implementing specific measures for a particular sports event. On a national level, this includes Sydney 2000 Games (Indicia and Images) Protection Act 1996 and the Melbourne 2006 Commonwealth Games Protection Act 2005. On a regional level, the Victoria State Australian Grand Prix Act 1994 and the New South Wales Olympic Arrangements Act 2000. Legislative measures are also focused on regulating certain forms of ambush marketing, as with the Victoria Major Events Aerial Advertising Act 2007.

A similar approach is taken in the United Kingdom, where legislation was promulgated to protect the 2012 Olympic Games in London against ambush marketing. The necessary measures are contained in the London Olympic Games and Paralympic Games Act 2006.

This approach is actually juristically unsound. The law should lay down general regulations that apply to all similar cases.[97] The law should not provide relief separately to each individual case, because that results in the measures being arbitrary and inconsistent.

The promulgation of general measures is preferable. This approach is followed in Germany[98] and South Africa.[99] It is also the approach taken in New Zealand with the promulgation of the Major Events Management Act 2007. Some federal states in Australia have also since begun to move in the same direction with the Queensland Major Sports Facilities Act 2001 and the Victoria Major Sports Events Act 2009.

Regardless of whether the measures are aimed at a specific event or are of general application, the measures all have one thing in common: they prohibit any suggestion or allusion to a connection between an enterprise and the protected sports event.[100]

According to these regulations, the mere purchasing of advertising space near the stadium, advertising air time during broadcasts or advertising space in magazines and newspapers will not amount to ambush marketing. Sponsorships of athletes or teams are not affected by the provisions, and the athletes are permitted to use the sponsor's products during the sports event. During the 2010 Football World Cup where Adidas was an official sponsor, Nike inter alia sponsored the official clothing for the teams from the Netherlands, Brazil and the United States of America, while Puma sponsored the clothing for the teams from Italy, Algeria and Ghana. The relevant enterprise is also permitted to advertise its sponsorship of a particular team during the period of the tournament. During the 2010 Soccer World Cup, ABSA made no secret of the fact that they were the official sponsor of the South African soccer team, and no steps were taken against ABSA, even though First National Bank was one of the official sponsors of the tournament.

Therefore there is still provision for parallel marketing. An essential element of the measures is that advertising must allude to an involvement with the sports event

for it to be classified as ambush marketing. When advertising uses the logo and trademark of the sports federation or sports event without authority, the provisions are infringed. Any direct or indirect reference to the sports event in advertising could possibly amount to a violation of the measures.

One can apply a simple context test to draw the line between lawful parallel marketing and unlawful ambush marketing. The test merely requires that the specific advertisement be taken out of the context of the sports event and be considered against the backdrop of a normal, everyday situation. If the message in the advertisement can still be regarded as meaningful, then it is parallel marketing. If the message is rendered senseless, then there is a clear infringement on the goodwill of the sports event and it can be categorised as ambush marketing. In other words, is the advertisement of such a nature that it is to be expected in the everyday, ordinary course of business? If so, it is parallel marketing. If it is obviously only focused on the specific sports event, then it is ambush marketing.

One can illustrate this context test by means of a few examples. During the 2010 Football World Cup, the low-cost airline, Kulula.com, launched an advertising campaign in the Sunday newspapers in which it stated that it was the "unofficial national carrier of the 'you know what'". The advertisement also consisted of images of footballs, vuvuzelas, a soccer player and an image of a structure that looked very similar to the soccer stadium in Cape Town.[101] When one views this advertisement outside the context of the World Cup, it makes very little sense. It is thus hardly surprising that Kulula.com was threatened with legal action. They wisely decided not to try their luck in the courts.

During the 1996 Olympic Games in Atlanta, New Zealand Telecoms placed an advertisement in New Zealand newspapers, where the word "Ring" was written five times as follows in blue, black, red, yellow and green:

Ring **Ring** Ring
Ring Ring

The manner in which the words were placed and the colours used directly alluded to the Olympic logo of five coloured rings. New Zealand's Olympic and Commonwealth Committee instituted legal action against New Zealand Telecoms, but based on the law at the time, the court dismissed the application because it did not violate the trademark of the Olympic Committee.[102] New Zealand only promulgated legislation in 2007 to restrict ambush marketing, and the question is how the advertisement would have been judged if the legislation had been in force at the time. If one applies the context test to the facts, one can conclude that the advertisement would probably not have had the same impact in another context. The word "ring" in the context of an advertisement for mobile phones is not unexpected, but the importance of the positioning and colours would have lost its effect in other circumstances. Consequently, under current legislation it would probably have been deemed to be ambush marketing.

How would ABSA's advertising during the World Cup be regarded? ABSA aggressively advertised their official sponsorship of the South African national football team. Football is a game that is played all year round, and the national team does on occasion take part in tournaments and friendly matches. The marketing of the sponsorship would consequently still be meaningful even when viewed out of the context of the World Cup, and it thus amounts to lawful parallel marketing.

Conclusion

It appears that there is an increasing tendency to restrict ambush marketing by means of specific legislation. This tendency is encouraged by the realisation that ambush marketing is detrimental, not only for the official sponsors of international sports events and sports federations, but also for the economic wellbeing of regions and countries. It is further promoted by the prestige associated with the hosting of major international sports events and the rivalry between cities and countries to be appointed as hosts. Focused legislation will undoubtedly do much in the way of addressing the problem of ambush marketing. Also undoubtedly, however, advertisers will come up with innovative advertising campaigns that will test, and often blur, the boundary between ambush and parallel marketing. As long as there are still major international sports events, the discourse in this regard will continue.

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1 An earlier Afrikaans version of this article entitled "Sluikreklame in Sport" was published on *Litnet Akademies Geesteswetenskappe* at www.litnet.co.za/cgi-bin/giga.cgi?cmd=cause_dir_news_item&cause_id=1270&news_id=111977&cat_id=284] I am much indebted to Jonè Laubscher who assisted with this English translation. Any errors are solely due to my stubbornness.

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[91] Neethling et al, 330-331.
[92] Neethling et al, 311.
[93] Daryl, "FIFA has $1 billion in reserve funds, but still doesn't appreciate clever advertising", on www.worldcupblog.org/world-cup-2010/fifa-has-1-billion-in-reserve-funds-but-still-doesnt-appreciate-clever-advertising.html (accessed on 30 March 2011).
[94] Neethling et al, 327.
[95] Wong, 681.
[96] Jones, *The Advertising Business* (1999) 502 et seq.
[97] Du Plessis, 164 et seq.
[98] UWG Art 5 par 1 no 4.
[99] S 15A *Merchandise Marks Act 17* of 1941; s 9(d); *Trade Practises Act 76* of 1976.
[100] Schwartz, Hall and Shibli, *Sport Facility Operations Management: A Global Perspective* (2010) 150 et seq.
[101] Daryl, "FIFA has $1 billion in reserve funds, but still doesn't appreciate clever advertising" , on www.worldcupblog.org/world-cup-2010/fifa-has-1-billion-in-reserve-funds-but-still-doesnt-appreciate-clever-advertising.html (accessed on 30 March 2011).
[102] Amis and Cornwell, 216.

Football Association Premier League Ltd and Others v QC Leisure and Others
Karen Murphy v Media Protection Services Ltd
Judgment of the Court (Grand Chamber)

by Max Eppel[1]

Attempt by the FA Premier League ("FAPL") and BSkyB to prevent public showing of Football matches via broadcaster from another EU state contravened EU single market principles.

This article is a direct follow up to my earlier article on this case in the March 2011 edition of *GSLTR*.

The judgment was handed down on **4 October 2011**. Rather than enter into an exhaustive analysis of the points of law in this case – which was largely covered in my earlier article on the AG's Opinion in any event – the purpose of this article is simply to highlight and comment upon the key aspects of the decision to enable fellow-practitioners to have an aide-memoire when conducting their own research:

1 The FAPL and BSkyB contended that the restriction in the current legislation which is currently in favour of rights holders should remain in place and is in place to ensure that rights holders can be remunerated properly for providing the exclusivity for which they themselves pay so much for as regards territorial exclusivity.

2 The counter-submission from Ms Murphy was that *"such a restriction on the freedom to provide broadcasting services cannot be justified because it results in a partitioning of the internal market"* – a direct contravention of the EU free/single market principle.

The CJEU provided a fairly lengthy decision which really fell short of providing anything that either party could definitively call a win. See, for example, the rather terse press release issued by the FAPL shortly after the judgment[2]:

> *"On the broader points that could flow from the ECJ judgment; the areas of law involved are complicated and necessarily we will take our time to digest and understand the full meaning of the judgment and how it might influence the future sale of Premier League audio-visual rights in the European Economic Area.*
>
> *"We are pleased that the judgment makes it clear that the screening in a pub of football-match broadcasts containing protected works requires the Premier League's authorisation. Currently only Sky and ESPN are authorised by the Premier League to make such broadcasts."*

What should have been the chief concern – the public's right to watch a game of live football in a pub – seems to have been totally missed by the CJEU. It highlighted the following when pointing the particular area of EU law it directed itself (para. 115):

> *"...a premium is paid to the right holders concerned in order to guarantee absolute territorial exclusivity which is such as to result in artificial price differences between the partitioned national markets. Such partitioning and such an artificial price difference to which it gives rise are irreconcilable with the fundamental aim of the Treaty, which is completion of the internal market. In those circumstances, that premium cannot be regarded as forming part of the appropriate remuneration which the right holders concerned must be ensured."*

The court goes on, at paragraph 117, to bulwark the foregoing by clearly stating:

> *"Having regard to the foregoing, it is to be concluded that the restriction which consists in the prohibition on using foreign decoding devices cannot be justified in light of the objective of protecting intellectual property rights."*

Returning briefly to paragraph 115, one must consider what the FAPL and indeed other sports governing bodies and sports TV rights holders will do now that it has been held that the current model of selling the rights on a territorial/exclusive basis has been deemed to be incompatible with EU legislation. The present deal expires in 2013. Does the value diminish if the rights cannot be packaged up and sold for the added value that exclusivity provides? The immediate answer would appear to be that yes it does. If the FAPL cannot guarantee to their media partners that what they are selling them for such large sums can only be bought from them – and in return the media outlets are one of a select cartel who can screen the games – then wherein lies the added value?

However, since cornering the market in 1992 the FAPL and BSkyB have shown themselves to be resourceful and innovative when it comes to adapting to the changing external pressures which govern

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2 www.premierleague.com/page/Headlines/0,,12306~2472418,00.html [Press release is hier niet meer te vinden.]

the market. Whilst it is likely that they will come up with a new way to ensure the massive contracts it is unlikely this ruling will enable the consumer to watch football more cheaply or in an especially more available way.

What the court were saying was the partitioning of the market into exclusive territories flies in the face of one of the fundamental principles of EU law – that of the single market and the demolition of internal trade and commercial barriers. The sale of such rights in individual packages was held to contravene article 101 of the Treaty of Lisbon and the practice should not continue.

Whilst this may on the face of it seem like a victory for the publicans of the EU, the court went on to "qualify" this aspect of its decision with the following ruling on copyright at paragraphs 205 and 207:

"In a situation such as that in the main proceedings, it is indisputable that the proprietor transmits the broadcast works in his public house in order to benefit therefrom and that that transmission is liable to attract customers to whom the works transmitted are of interest. Consequently, the transmission in question has an effect upon the number of people going to that establishment and, ultimately, on its financial results."

"In light of all the foregoing, the answer to the question referred is that 'communication to the public' within the meaning of Article 3(1) of the Copyright Directive must be interpreted as covering transmission of the broadcast works, via a television screen and speakers, to the customers present in a public house."

What then does the future hold? As I mention above, the current deal expires in 2013 which gives the respective legal teams plenty of time to consider what to do. In my opinion, it seems likely that they will have no choice but to sell the rights under a single EU-wide exclusive licence. Whether this proves to be as lucrative for the stakeholders as the present deal – and its predecessors under the current model – is a matter for conjecture. I find it hard to believe that there is not a way to structure a future deal which at once provides the consumer with the football but which also enables the respective parties to continue earning their billions.

What is the practical effect of this ruling? In essence, the court has now provided a ruling which allows the Ms Murphy's of this world (well, the EU part of it at least) to screen live football in her pub using a Greek decoder card. But because the court came down in favour of the FAPL and BSkyB on the copyright point – meaning that their logo, music and commentary were protected by international copyright law – the pub are forbidden from screening it via their Greek decoder card without the permission of the FAPL and BSkyB. Clearly, this is not a permission they are likely to receive.

The CJEU will now refer the case back to the English High Court for a final decision. This, presumably, will mean that Ms Murphy will have her fine quashed and be awarded costs of some £8,000. Perhaps she could spend the £8,000 on an English decoder card...

So, if you fancy joining me for a pint of Dutch lager in an English pub screening live Premier League football this Saturday and have a working knowledge of the Greek language so that you can translate the commentary for me, well, the first round's on me.

Thank you, Luxembourg.

Super injunctions in privacy cases

by Robert Deacon[1]

Injunctions prohibiting the publication of intimate details of an individual's private life are useless if reports of the proceedings reveal the very details the injunction is intended to protect from disclosure. Although the principle of open justice requires court proceedings to be public and reportable, it has long been recognised that this principle has to be modified in certain cases, such as those involving confidence and privacy.

"Super injunctions" are interim injunctions which restrain:

1 the publication of confidential or private information about the applicant; and
2 publicising or informing others of the existence of the order and the proceedings.

It is the latter part which is the "super" element of the order. "Anonymised injunctions" are interim orders where the parties' identities are concealed usually by the substitution of capital letters for their names. The two forms of injunction are often sought in cases where unidentified persons have intimated they intend to publicise a "kiss and tell" story. If granted, such injunctions have a tendency to promote speculation on the internet as to the identities of those involved and celebrities are now wary about applying for them. They are an amalgam of fairly routine types of order, i.e.:

1 anonymity orders;
2 privacy orders;
3 non-disclosure orders in relation to the fact of the substantive order or proceeding;
4 anti-tipping-off orders;
5 orders restricting access to the court file.

Super injunctions are notorious for prohibiting publication of the fact that proceedings are on foot and that an order has been made. But such orders are no different from anti-tipping-off orders often seen in freezing and injunctions and search orders. Anti-tipping-off is a short term remedy preventing the order being frustrated by third parties disclosing the protected information or destroying evidence before the court can deal comprehensively with the application.

Despite their comparative rarity super injunctions are highly newsworthy, because they usually involve the media wishing to expose the private lives of celebrities. The right to privacy and the right to freedom of expression are usually engaged and, if a restraining order is sought, the principles of open justice and the right to a fair trial come into play. The disquiet over the use of "super" injunctions in such cases led to a review of this area of procedural law in the *"Report of the Committee on Super Injunctions: Super Injunctions, Anonymised Injunctions and Open Justice"*.

The "super" element in super injunctions which prohibits the disclosure or communication of the existence of the order and the proceedings, was brought to public notice in the *Trafigura* case and has now been identified by the Court of Appeal in *Ntuli v Donald* as the defining feature of such injunctions. In *Trafigura* the claimant obtained an injunction restraining *The Guardian* from publishing a draft report revealing the company's alleged involvement in the dumping of toxic waste in the Ivory Coast. In effect nothing could be published and the term "super injunction" was coined by The Guardian to describe this state of affairs.

The next major development was the John Terry case which concerned the England football captain. Tugendhat J noted that applications for "super injunctions" had sought the following:

1 a private hearing;
2 anonymity for those involved;
3 the sealing of the entire court file pursuant to CPR5.4C(4);
4 a prohibition against publishing the existence of the proceedings until after trial or further order;
5 release from the requirement[5] that the applicant provides any third party served with a copy of the order any materials read by the judge and/or a note of the hearing;
6 an order with no return date;[3]
7 a general extension of time for service of the claim form until the respondent has been identified.[4]

Those wishing to contest such orders would not know why they were made or whether they would be allowed to see the evidence. Those obtaining such injunctions might never bring the matter back to court making the injunctions permanent and binding on anyone notified of their existence. Tugendhat J ultimately was not satisfied John Terry was likely discharged of the burden under section 12(3) of the Human Rights Act 1998 ("HRA") of showing he was likely:

1 to defeat a public interest defence if raised;
2 to establish there had been a breach of a duty of confidence; or
3 to establish that publication of the fact of the relationship should be prohibited on privacy grounds.

To obtain an injunction in any privacy case there must be evidence that the public interest favours the right to privacy over the competing right to freedom of expression. Neither right, as such, has precedence over the other. The court will consider the strength of the justification for interfering with or restricting each right and then apply the proportionality test to each. Applicants must show they are likely to establish at trial that the public interest favours a restraint on publication. Most intended applicants will be unable to meet this high standard. The courts do not like interfering with the media's right to publish what they want to publish, particularly if it is journalistic, literary or artistic material.[5]

Advance notice must be given to persons

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2 In CPR PD 25 para 9.2.
3 Contrary to CPR PD 25 para 5.
4 Pursuant to CPR 7.5 and CPR 7.6(1).
5 Section 12 of the HRA and see *Cream Holdings Ltd v Banerjee* [2005] 1AC 253).

against whom an application is made for a super injunction save in the exceptional circumstances. CPR 25.3 and CPR PD25A (1)-(5) provide that the court may grant an interim remedy on an application without notice if it appears that there are good reasons for not giving notice which are stated to the court.

Where it is known that the story is about to be published but it is not known exactly by whom, the real value of the super injunction is that it can be served on the media, thus prohibiting them from disclosing or publishing stories concerning the protected information pending further order. Third parties, such as media organisations, notified of their existence are bound under the *Spycatcher* principle (which subjects third parties to the court's contempt jurisdiction; the aim being to protect the court's process against *"acts and words tending to obstruct the administration of justice"*). Media organisations will, therefore, lose the protection provided under section 12 of the HRA because they would not have been notified the application for an order was being made.

CPR PD 25A 9.2 provides that any third party served with an order is entitled to a copy of any material read by the judge including any material prepared after the hearing at the direction of the judge and a note of the hearing. The order when a super injunction is granted may restrict that right and restrict access to court documents (sometimes referred to as sealing the court file).

In summary, super injunctions are a means of obtaining short term relief with the object of maintaining the status quo until the question of the parties' respective substantive rights (privacy versus freedom of expression) can be addressed. Without such restraining orders the right to privacy could not be effectively enforced. If a claim fails, however, the case will probably generate more publicity than it might otherwise have occurred. Super injunctions are rarely applied for and rarely granted. If granted, it is usually for a short period, in order to facilitate effective service of the injunction or to maintain secrecy pending an on-notice hearing of the interim injunction application. They can only properly be granted for longer periods where such restraint is strictly necessary on the facts. In light of the Court of Appeal's decision in *Ntuli* [2010] EWCA Civ 1276 at [54], such circumstances will be extremely limited.

Anonymity orders

Anonymity orders provide for the names (and hence the identities) of the parties, or any witnesses, to be anonymised.[6] Such orders can either be of temporary or permanent effect. Most, if not all, of the details can still be published. These orders simply protect against identification and they are familiar in family and criminal cases. The court must be satisfied that the facts merit such an encroachment on the principle of open justice. If the threatened publication justifies an anonymity order, the issue then arises as to which type of order should be made. Either the applicant's name is concealed but details of the case published, or the applicant's identity is revealed but details of the case concealed. The Court of Appeal has held[7] that anonymity and publication of limited details of the case is usually the appropriate order to make. The issue of jigsaw identification must be addressed because if the claimant can be identified from the published details the purpose of the order will be defeated. Orders are often made prohibiting the publication of "*any information identifying or tending to identify the applicant save for that contained in the order and in any public judgment of the court*"[8]. The purpose of the order is to prevent the publication of items of information which identified or tended to identify the claimant.

Contra mundum orders

Contra mundum orders (against the whole world) have been made to protect the personal safety of certain notorious individuals (such as James Bulger's killers and Mary Bell and Maxine Carr). Final orders are, at present, understood to have no binding effect on third parties.[9] This gives claimants an incentive to prolong the life of their interim injunctions by not bringing their cases to trial. In a recent blackmail case[10] the claimant required an injunction *contra mundum* for when the interim order ceased to have effect, because it was believed the allegations would be published in the media when the *Spycatcher* restraints fell away. Eady J held that *contra mundum* orders were available, wherever necessary and proportionate, for the protection of Convention rights.[11] On the issue whether the "ultimate balancing exercise" favoured the granting of a *contra mundum* injunction, the judge found that in view of the clear risk of publication in the media, there was no other means open to the court to protect the Convention rights than grant a *contra mundum* injunction and that, accordingly, it was necessary and proportionate to do so.[12]

In the past the real possibility of serious physical harm or death was required before a *contra mundum* injunction was granted, but Eady J held that they could be granted "*whenever necessary and proportionate, for the protection of Convention rights, whether of children or adults*"[13] . In that case there was, however, medical evidence about the health, including mental health, of the applicant and family members. Butler-Sloss P held that it was sufficient that someone was "*well aware of the spirit of the order*"[14] for them to be bound by the terms of a contra mundum injunction. The same test probably applies when considering whether third parties are bound by interim orders under the *Spycatcher* principle. It has been suggested that contra mundum orders should contain a provision to enable third parties to apply to discharge or vary the order if so minded.

Super injunctions and anonymised injunctions should be actively case managed and the court should not become a permanent warehouse for such orders. Such injunctions must contain a return date to ensure they cannot in practice become permanent.

Summary of guidance

– On any application for an order which seeks a derogation from the principle of open justice, the court must ultimately determine whether, on the facts of the particular case, the derogation applied for is strictly necessary in order to do justice.

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6 CPR 39.2(4)78.

7 In *JIH v News Group Newspapers Ltd* [2011] EWHC Civ 42.

8 See eg *POI v Person Known as "Lina"* [2011] EWHC 234 and *MNB v News Group Newspapers Ltd* [2011] EWHC 528.

9 See *Jockey Club v Buffham* [2003] Q.B. 462 where it was held that interim injunctions do not bind third parties once the proceedings come to an end.

10 *OPQ v BJM*.

11 See [17]-[18] of the judgment.

12 See [24]-[26] of the judgment.

13 In OPQ v BJM.

14 In *Attorney General v Greater Manchester Newspapers* [2001] EWHC 451 at [19].

– Super injunctions should not usually be granted for any longer than any other non-disclosure or anti-tipping-off order can properly be granted, i.e. normally until the return date for the injunction.
– In rare circumstances it might be justified to grant a super injunction for a longer period on grounds of strict necessity, but the order should be kept under active and close scrutiny by the court.
– In every case:
  a the order should contain a return date, and
  b the court should give proper regard to the rights of the public at large to freedom of expression.
– No super injunction should become permanent without a specific order of the court, i.e. without the grant of a final injunction.
– It is fundamental that proper notice is given to those affected by an application unless a without-notice application is permitted by a rule, practice direction or court order where it appears to the court that there are good reasons for not giving notice e.g. secrecy is strictly necessary to ensure the injunction is not rendered pointless prior to it being served. The default position is that advance notice must be given before an application is made for a privacy injunction.

Under CPR PD 25A 9 non-parties who are notified of the injunction are to be provided with information about the hearing, including a note of the hearing. The order may provide that before non-parties are provided with such information they or their legal representatives on their behalf should give a written irrevocable undertaking to the court to use the documents and information etc. solely for the purpose of the proceedings subject to provisos set out in the undertaking.

Where a non-party is given prior notice that the application is being made, the order should make it clear that, before formal notice or information needs to be given by the applicant to non-parties in advance of a hearing, the non-parties must give an irrevocable undertaking to the court that they will use the documents and information provided solely and exclusively for the purpose of the proceedings subject to the provisos set out in the undertaking (the undertaking to endure beyond the conclusion of the proceedings).

Proposed forms of Practice Guidance and Model Order are set out at Annex A and B to Report of the Committee on Super Injunctions.

Is a super injunction really necessary or desirable?

Even with the protection of a super injunction little can be done about the internet. Jeremy Clarkson obtained an anonymous injunction[18] which banned the media from reporting "*sexual or other intimate acts or dealings*" between him and his former wife as well as his "*private thoughts and feelings, his health and other financial affairs*". His name, however, started to appear on the internet in connection with the injunction and there were many false rumours linking him to celebrities, including Jemima Khan. He eventually had the injunction lifted[19] saying they were a "*waste of money*" and "pointless" adding "*If you take an injunction out it isn't an injunction because of Twitter and Facebook... everybody knows anyway*". Celebrities are no doubt beginning to doubt the prudence of risking a storm of speculation on the internet by applying for a super injunction.

15 Following the approach in *DFT v TFD* and *Ntuli v Donald.*
16 CPR 23.4.
17 E.g. under CPR 25.3(1).
18 *AMM v HXW.*
19 26th October 2011.

Insider's perspective – SportzPower interview with Dr Andre M. Louw[1]

Interview first published on the Indian sports law and business website (and newsletter) SportzPower.com

Interview

Andre, could you tell us a bit about your journey leading up to your current academic position?

After completing articles of clerkship with a Cape Town law firm and qualifying as an attorney I returned to the University of Stellenbosch, where I had obtained my undergraduate degrees, as a researcher and part-time lecturer mainly in employment law. When I registered for my doctoral degree in 2003 my promoter suggested considering writing about the employment of professional athletes in team sports. Once I started reading more widely and encountering the range of relevant issues relating to the application of law to sport I was hooked. I found that there are many fascinating issues in sports law that have probably not been considered sufficiently to date by academics and legal theorists, and the opportunities for scholarly work are truly boundless. In a sense this decision to focus my research, exclusively, on sports law has proven to be serendipitous for me as a (relatively) young academic in the process of building a career and body of work. In South Africa, currently, there is no more than a handful, literally, of academics that specialise in sports law. While I would love to see more locally-based colleagues writing within this field, the current situation does allow for great scope and when submitting draft articles to law journals I have always experienced enormous interest and enthusiasm on the part of editors to explore this area of law.

My ambition, currently, is to establish a sports law centre for dedicated research in this field at the university where I teach, in Durban. South Africa is an important jurisdiction in the scheme of international sports law, with world champion teams and athletes in various sporting codes as well as significant international links in various competitions and leagues. While our cricketers and rugby players may currently be less popular than a few years ago as Kolpak players in the UK and Europe, competitions such as the southern hemisphere Super Rugby franchise tournament and the ICC's champions' league cricket competition serve to maintain the importance of South Africa in international sport. The South African legal system (based on Roman-Dutch and English law, but incorporating one of the world's most progressive Bills of Rights in its 1996 Constitution), is well suited to providing a model for the development of legal theories and solutions to problems which may be successfully followed elsewhere.

I believe that such a sports law research centre (which would be the only one of its kind in South Africa and, indeed, on the African continent) would add value to research in international sports law. The aim would be to establish close links with similar centres and associations elsewhere (such as the Asser International Sports Law Centre in Europe, the Australia/New Zealand Sports Law Association and like-minded groupings of academics and practitioners on the Indian sub-continent), for purposes of research and teaching (I hope that the activities of such centre will feed into the teaching of sports law in our post-graduate business law programme).

As an academician with specific interest in sports law, how would you trace the development of the field over the past decade? Do you think that the level of interest in academic research in the area of sports law has increased?

I believe that the past decade has seen exciting developments in respect of the development of this field of law as a truly distinct discipline, not only in practice but also in terms of academic treatment in a number of different jurisdictions. It is encouraging (for me, personally) to see that references to the earlier debate of whether there exists such a thing as "sports law" or whether one is simply concerned with the application of general principles of law to sport, are starting to disappear from the literature. An important contributor to this process has been the publication of quality, comprehensive and in-depth works on sports law (such as the leading UK-based Lewis & Taylor book *Sport: Law and Practice* and Gardiner et al *Sports Law*).

Unsurprisingly, the vast scale of commercialisation of professional sports has brought with it the accompanying le-

Short bio

Andre M. Louw

- BA, LL.B, LL.M, LL.D (doctorate in sports law from the University of Stellenbosch – the only doctorate in sports law to have been awarded by a SA university to date).
- Senior Lecturer, Faculty of Law, University of KwaZulu-Natal, Durban, South Africa.
- Attorney of the High Court, South Africa.
- Member of the British Association for Sport and Law.
- Author of *Sports Law in South Africa* (Kluwer Law International, June 2010); numerous law journal articles on various aspects of sports law (including race-based discrimination and affirmative action in professional sports, regulation and governance of sport, ambush marketing, athletes' image rights, etc.).

[1] This article first appeared on SportzPower.com, an online platform focused on the business of sports. Reprinted with due permission.

gal disputes and greater involvement of the legal fraternity. While the late 1990s saw much attention being paid to developments after the seminal Bosman judgment in the EU, the scope of legal issues concerning sport across a wider range of jurisdictions has increased exponentially due mainly to commercial aspects of the organisation and governance of sport (and the expansion of commercially-motivated leagues and competitions). A prime example is the Indian Premier League competition (which has flourished in parallel with issues such as restraint of trade regarding the ICL competition). Sports broadcasting developments (including both new media, as well as new forms of piracy) have continued to expose sports leagues and those who govern them to competition law challenges, especially, while contractual and employment disputes remain ubiquitous. The trend in respect of exploitation of commercial rights to events promises to continue the process of greater involvement of IP law specialists in the context of sport and the development of a context-specific application of IP to sport (somewhere in the book that I am currently writing I quote an American observer who commented that one can now teach an entire IP law programme at university by using only examples of case law from the world of sport, so true). In short, I believe that the expanding importance of sports law as a niche field of practice amongst a greater number of law firms, internationally, has driven the demand for better and more in-depth, specialist, textbooks and reference works on the subject, and the emergence of such works in the past decade has in turn contributed to the development of better-equipped, specialist "sports lawyers".

That being said, I would love to see more critical works that engage with specific legal issues and with the suitability of the current state of the law, rather than the more descriptive and encyclopaedic type of works which are still common in this field of law (an understandable state of affairs in what is still a quite new field of legal specialisation). While many sports lawyers need to advise lay persons (mostly athletes, sports administrators etc.), I do believe there is now a place for books that display more academic and theoretical rigour in their treatment of issues in order to provide guidance to judges and presiding officers who require less of the "Law 101" approach and more of an intellectually involved reflection on challenging issues of law.

Could you tell us a little more about your current research? What are the specific areas and issues that your forthcoming book focuses on?

I am writing a book (tentatively entitled Monopoly Games) for Netherlands-based law publisher, TMC Asser Press, which we hope to publish in early 2012. This book will critically and comprehensively examine commercial rights to sports mega-events (such as the Olympics, the FIFA, IRB and ICC World Cup events, and other major sporting events), and how the law is (ab)used to protect such rights primarily against ambush marketing. My focus is on sponsorship of these events (and sponsors' and event organisers' sponsorship and merchandising rights) rather than broadcasting rights arrangements.

Much has been written in recent years about ambush marketing, and I am trying to avoid a mere re-hashing of such existing work. I will, for example, not try to emulate the excellent work of English author and barrister Phillip Johnson, who has produced (and will shortly expand and update) a comprehensive and very informative guide on ambushing and rights protection for events. My objective is to produce something that, to the best of my knowledge, has not really been done to date, namely a work focused on policy rather than merely "black letter law" and which subjects the topic to in-depth and critical scrutiny. I will evaluate the model of commercial exploitation of events (the system of sponsorship exclusivity employed) as well as the ways in which the law is used to protect these rights against ambushing. I hope to bring some much-needed balance to the debate about ambushing, which to date has been significantly skewed in favour of the event organisers and sponsors and has largely condemned the "ambushers" through the use of pejorative language and questionable legal tactics. I feel this is needed because not all forms of "ambushing" should in fact provide legal remedies or be condemned as unethical or illegal conduct. I have a clear appreciation for the problems that event organisers face (especially in respect of issues such as IP infringement, internet piracy, etc.) and an empathy for these organisations' struggle to combat infringement of their rights, but also believe that law-makers have simply gone too far in recent years in protecting the commercial interests of organisers and sponsors, and I intend to shine a light on this trend.

My critical evaluation of the current state of the law is based on and will make use of in-depth discussion of the relevant legal principles. I will subject both the system of commercial exploitation of events as well as the relevant laws (especially in the form of the sui generis event legislation in various jurisdictions – I will include an overview of 10 jurisdictions) to scrutiny in terms of generally-applicable principles of IP law, competition (anti-trust) law and human rights law. I will further examine the sports mega-event as object of legal protection (i.e. what, exactly, is the law aiming to protect by means of such special legislation?) and will critically evaluate the justification for legal protection. I will examine some relevant recent developments and then also pose some suggestions for law reform.

While I hope that this book will be of interest to legal and marketing practitioners, corporate (sponsor) advisors, sports governing bodies, academics and students, I particularly hope that advisors to governments and law-makers in potential future host nations for these events will be able to take something of real value from it. To be honest, I actually just hope someone – anyone – will eventually buy the thing!

South Africa has been one of the few countries in the world that has used special interest legislation to tackle "ambush marketing". In your opinion, does the legislation achieve a good balance between commercial protection of sponsors and the public's rights to interact with the event?

No, I definitely do not believe that a good balance was attained with the SA legislation (specifically the provisions of section 15A of the Merchandise Marks Act). This last provision, in my view (and I believe there are others who would agree), is the single most stringent and far-reaching event protection provision currently to be found anywhere in the world. (I do not refer to it as an "anti-ambush marketing provision", simply because it prohibits so much more than "ambush marketing".) I argue in the book that the scope and implications of this provision actually exceed the very stringent and event organiser/sponsor-biased provisions of the "association rights" created in recent legislation from other jurisdictions (e.g. New Zealand and, of course, the 2012 London Olympics legislation). Sadly, in my view, South African authorities did not do enough to ensure that this legislative licence for ag-

gressive rights protection is not open to potential abuse, which is not in the wider public interest.

A major focus of the book (to which I will devote a whole chapter) is the proper demarcation of the legally protectable thematic space around sports mega-events. I will examine both what sponsors pay for (and should receive in return for their sponsorship fee), as well as the legitimacy of the special protection granted to organisers and sponsors in order to optimise exploitation of the potential commercial value of such thematic space. A key thread in this evaluation will be to determine what it is about these events that is actually deserving of legal protection. The public domain element of this thematic space is an ever-shrinking one in light of the legislative intervention by host governments and law-makers, and the "special interest legislation" (as you aptly refer to it) significantly skews the commercial playing field as well as the wider social and cultural dimension of the sports mega-event in favour of a generally small group of primarily large multinational corporations and monopolistic sports governing bodies (with narrow commercial interests which may easily ignore and impinge on wider societal goals and imperatives). I generally object to the "propertization" of all kinds of elements of events (such as organisers' persistent claims of "rights", some of which, frankly, do not exist in terms of general legal principles in most jurisdictions), and includes, *inter alia*, the worrying trend towards monopolisation of language re events. Somewhere during the past few decades the eminently public-centred sports mega-event became a private money-spinner *par excellence*. While developing nations continue to bid for the right (privilege?) to host these events, the mega-event has become a creature that does not necessarily bring with it the benefits that voters and tax-payers in these nations should be entitled to expect.

I am currently watching developments in various jurisdictions with interest for purposes of inclusion of discussion in the book. Brazil, specifically, promises to provide interesting insights into modern mega-event rights protection, and I am breathlessly awaiting developments especially in respect of the special laws that have or are to be passed for FIFA and the IOC's 2014 and 2016 events, respectively. I have managed to obtain the support of willing and very enthusiastic correspondents who have promised to help me cope with the language barrier (I am hopeless with Portuguese), although I have yet to find someone who can assist with translating FIFA-speak.

At the risk of displaying a lack of objectivity (and this I consciously try to avoid in the writing of the book – only time will tell whether I'll manage to pull it off), I strongly believe that the current model of commercial exploitation of events and the continuing trend of legal legitimisation and protection thereof has been insufficiently justified to date and, in fact, has not been subjected to proper scrutiny by the legal fraternity. I therefore call for radical law reform in this regard (with some specific suggestions that are currently still percolating at the back of my mind – watch this space).

If you were to compare the various anti-ambush marketing initiatives worldwide, in your opinion what has worked and what hasn't?

I tend to subscribe to the apparently growing consensus view of some marketing experts, such as (specifically) the outspoken Kim Skildum-Reid, namely that the most successful way to avoid or combat ambushing is by proper leveraging of sponsorship rights, rather than the prohibitive and potentially restrictive efforts at erecting legally reinforced walls around events. The answer may not lie (or not primarily, at least) in use of the sometimes blunt instrument of the law. I have strong objections against the conduct and track record of some of the major event organisers (such as FIFA) in respect of aggressive rights protection programmes which often display a marked lack of forethought or even common sense. Recent research suggests that some of the problems relating to the pejoratively characterised "ambushing" of events are probably more properly ascribable to marketing clutter caused by these very organisations, as a result of their efforts to ostensibly milk every last possible dollar from rights exploitation rather than providing fewer official sponsors with more "bang for their buck". The law-makers have, for the most part, not displayed a sufficient sense of sovereignty, of accountability to their domestic constituencies and of respect for the rule of law, and have compounded the problem through largely indiscriminate acceptance of the now standard, non-negotiable demands for special legal protection of events in the form of bid guarantees. The result is an environment where conduct by members of the public (tax-paying contributors to the hefty bills to host mega-events), which would otherwise not fall foul of normal and universally-accepted legal principles, has been outlawed in order to protect narrow commercial interests of sometimes dubious legitimacy in terms of legal principles. Ironically, while support for better leveraging of sponsorship rights as a primary means to deter and combat ambushing is gaining ground (although not yet sufficiently within the legal fraternity), the special laws passed for events may in fact deter sponsors from pursuing this route. The *sui generis* event legislation tends to provide a safety net whereby event organisers and sponsors may be growing lazy in respect of their rights exploitation and enforcement/protection efforts. Not only does this foster a tendency to automatically resort to the ubiquitous cease-and-desist letters, it also promotes a rigid attitude of "all rights reserved" (and the claiming of legal remedies for things that are/should not be protected by law). Such legislation may be fostering a culture of entitlement with very little basis in law.

The continuing trend for mega-events (of which the FIFA World Cup and Olympic Games are prime examples) to spawn sometimes ludicrous and widely-condemned incidents of very public *faux pas* in the form of overly-aggressive rights enforcement by event organisers is troubling, and cannot be good for the reputation of these events (or of the legal system) in the long run. As a South African I am embarrassed to have to point to the "Bavaria girls" debacle experienced here in June 2010. While this was a clear case of an orchestrated campaign to gain publicity for a brand (although I am loath to call it an "ambush" in the traditional sense of the word – as I will explain in the book), the response by both FIFA and the South African authorities was heavy-handed and lacked any sense of appreciation of the "bigger picture". While the widely reported public perception that such response back-fired will hopefully serve as food for thought for event organisers in future, I would like to see legislatures actively resisting calls for the type or level of protection that would facilitate such responses by event organisers.

What advice would you offer to an organiser of a major sporting event that is concerned with protecting the exclusivity of sponsor rights? What are the greatest

legal risks to an event and how might they be best managed?

Less can be more. Limit, to the extent necessary, the number of sponsors in order to reduce advertising clutter but ensure that those sponsors get exactly what they pay for and that you'll "have their backs" when their rights are threatened. While no event organiser has to date managed to prove or even make a really convincing argument that ambush marketing actually threatens the continued existence of their events (because, as they tend to claim, it threatens to alienate sponsors), I would suggest that such proper support for sponsors' contractual rights would negate this risk in most cases.

Allow, in the domestic context of the host nation, for more freedom for smaller firms to participate in the commercial opportunities that arise from the event, with an objective (and not a knee-jerk, over-protective) approach to inclusiveness. Rather work with the large sponsors to find ways of leveraging the publicity value of the event, to which such activities of smaller firms in fact contribute.

But also know that the historical fact of your status of event organiser and monopoly regulator of "the game" may not entitle you to claim all aspects of the event as your exclusive property. You will not be able to avoid all potential "ambushes", but you as organiser and your sponsors will be much happier if you realise and openly acknowledge this fact. When you enter the market of commercial exploitation of events you must accept that others also inhabit this market, and may have stronger pre-existing rights to pursue their trade. FIFA, for example, was recently forcibly reminded of this fact by the German federal Supreme Court in the final throes of its protracted litigation against confectionary maker Ferrero. You cannot, simultaneously, claim very substantial government and public support (financial and otherwise) in order to encamp in a particular country and then attempt to aggressively ring-fence nearly all possible ways of riding the wave of event publicity. The citizen and entrepreneur in the host nation do not want to have to pay a premium to be an extra in someone else's corporate marketing video. Show respect for the host nation and its people, and let your commercial footprint be a small one and not be redolent, primarily, of what may be perceived (rightly or wrongly) as selfish and crass commercialism.

With that in mind, however, by all means enforce your generally-accepted and applicable existing legal rights, but don't demand special treatment under the laws of a host nation unless you can provide sufficient and reasoned motivation for this, bearing in mind that such protection often comes at great social, financial and other costs to others who inhabit that domain (which you are, after all, visiting temporarily).

More fundamentally, make sure that your very system of sponsorship exclusivity is above board and does not invite potential legal challenge. Ensure that fair opportunities for participation in cutting the commercial cake are provided and that more guests (both invited and uninvited – but only if well-behaved) are allowed at the table. Allow opportunities to a wide spectrum of potential commercial partners, and do not create the perception of perpetuating a closed shop where only the "big boys" are perceived to benefit from the event. With less aggressive enforcement against small "ambushers" as a largely PR-focused exercise, and principled action against the large commercial actors (who may be serial ambushers of events but are rarely if ever actually sued, compare Nike), may come a legitimisation of the concept and importance of commercial rights and the need for their protection in the public *zeitgeist.*

As for the risks to event organisers, recent events have again shown the dynamic nature of ambushing and of the legal implications. For example, I understand that the 2011 ICC Cricket World Cup has raised specific issues regarding the unauthorised commercial use of news footage of matches by the media, which has implicated practices of media accreditation. While this is not something new, the level of the problem appears to have been unprecedented, and may well lead to litigation in the near future. This just shows that only time will tell how future events will be affected. The viral internet marketing campaign and prevalence of social media, for example, will undoubtedly pose not only opportunities but also new risks to event organisers and sponsors. The large and prominent ambushing campaign, in the traditional sense of illegitimately associating a brand with an event by means of deceiving consumers and infringing use of organisers' IP, is largely a thing of the past. The "ambushers" have grown more sophisticated, and the event organisers and sponsors should follow suit. This does not, however, mean that these parties should lobby for more and more stringent "catch-all" laws to enclose "their" event in an artificially constructed bubble. Legal advisors should be more creative in finding ways in which existing laws can protect events without resorting to the political power of event organisers (and their hosting bid evaluators) and the economic power of multinational sponsors being used to demand dubious new event-specific laws.

Finally Andre, what do you consider the best thing about your job, and the worst? What advice would you offer to others considering academic careers in sports law?

One of the best things about my job as an academic is the ability to largely avoid the perils of the often mercenary nature of the legal profession. Please don't get me wrong, I am not condemning legal practitioners or what they do for a living (I am, after all, a lawyer). I personally prefer to be positioned outside the arena, however. The isolation of the "ivory tower" allows me to address legal issues with a view to critically evaluating the adequacy and legitimacy of laws and to (hopefully) make some useful contribution in suggesting changes where necessary, without being beholden to whoever pays the bills at the end of the day. (As an academic I am, in any event, so poorly paid that I can afford the luxury of not having that constant nagging feeling that I might be "selling out" by favouring the client over the legal principle!) Incidentally, the dangers inherent in what I refer to as the mercenary nature of the legal profession are well illustrated in the context of event commercial rights protection. Without pointing a finger at any specific individuals, a number of prominent legal specialists (such as IP lawyers) have in past years been unpopular in public discourse as a result of their aggressive efforts to protect the rights of their event organiser clients, and may have served to sully the name of the legal profession in the process (yes, I know, that's not the hardest thing to do!). One of FIFA's local lawyers for the 2010 World Cup in South Africa, for example, was quoted in the media as stating that "As a law firm you cannot hope for a better instruction". I am deeply concerned when the efforts resulting from such lucrative legal work may tend to obscure the primacy and importance of legal principles behind the veil of claims to rights for special private

interests in the corporate commercial context. I view the role of the academic as an extremely important counterpoint in this regard, which should provide some necessary checks and balances.

The worst part of the job, for me personally, is not having enough time to write, which is my first love. Academic and other duties always detract from the process, although I cannot really complain in light of the other freedoms that academic life provides. Teaching (and interaction with that sometimes strangest of life forms, the student) also helps me stay young at heart even while constantly adding the inevitable grey hairs.

My advice to anyone considering an academic career in sports law is to be bold. The fact that "sports law" as a discipline, in the early years of its development, was significantly concerned with the application of more general principles of law (from, e.g., contract, competition, employment, IP and administrative law), does not mean that we as academics should not consider the development of special principles that may lead to more satisfactory treatment of burning issues and questions. The (professional) sports industry has shown itself to be a unique one, which often displays atypical characteristics when viewed through the prism of general principles of law. I believe we should move away from simply applying general laws to a specific context, and to the pursuit of development of special laws that best reflect the realities of such context and the practical needs of its stakeholders and role-players. This, for me, is a very exciting prospect, and I hope to be able to contribute in some small part to this process in future.

Finland:

Comparative survey on VAT, sports and sports accommodations

by Kenneth Hellsten[1]

Introduction

Finland is one of the leading countries in Europe for physical activity. Around 64% of women and around 60% of men engage in physical activity and sports at least twice a week. In Finland, physical and sports activities are organized mainly by sports and physical exercise clubs (hereinafter only "sports club") and to a smaller extent by municipalities. There are around 9000 sports clubs in Finland. Most of the funding of the Finnish sports clubs comes directly from the members and the parents in form of e.g. membership and season fees. Besides, voluntary activities performed by the members and the parents constitute a significant source of finance. In this sense, voluntary activities form the basis of the Finnish sports culture.[2]

There are around 1000 team and individual sport athletes, who earn their principal income from sports (hereinafter "professional athletes") and about 1200 coaches, who earn at least half of their income from coaching in Finland. Less than 3% of the Finnish sports clubs have professional athletes.[3] The amount of money involved in the Finnish professional sports is a lot less than in professional sports in several other European countries. Of all the Finnish individual and team sports, the biggest money seems to be in ice hockey. During the last years, the annual revenues of the Finnish National Hockey League clubs have varied from around EUR 4 million to around EUR 8 million.[4]

The general VAT treatment of sports activities

VAT is regulated by the Value Added Tax Act[5] (hereinafter "VATA") and the Value Added Tax Decree[6] (hereinafter "VATD") in Finland. In accordance with the fundamental rule in Sec. 1 of the VATA, VAT is payable on the sales of goods and services in the conduct of business which take place in Finland. Business in this sense is any extrovert independent activity which includes a business risk and is carried out with intent to make a profit and on a continuous basis.[7] The general VAT rate in Sec. 84 of the VATA is 23%.

Under the main rule in Sec. 102 of the VATA, a person liable to VAT may deduct for the purposes of taxable business the VAT payable on goods or services purchased from another person liable to VAT. According to the Sec. 102 of the VATA, taxable business means an activity which by virtue of the VATA results in the liability to VAT for the seller of goods or services. In accordance with Sec. 117 of the VATA, in respect of goods or services which the person liable to VAT has acquired for or taken into use, which only partially entitles to deduction, the deduction may only be made for the part that the goods or services are used for this purpose.

Neither the VATA nor the VATD includes specific provisions on the VAT treatment of sports clubs, specific sport activities or specific sports. Thus, the VAT treatment is determined under the general provisions of the VATA. However, the VATA includes two special provisions, on the basis of which also a sports club can be either totally or partially exempted from VAT.[8] In addition, the VATA includes a special provision with respect to the sales of entry fees to sports events.[9] The VATA also includes a special provision with respect to the sale of services which create opportunities for physical exercise.[10]

VAT treatment of sports clubs operating for the public good

Due to a political decision organizations operating for the public good are given preferential treatment, in Finland, in income and value added taxation. In accordance to Sec. 4 of the VATA, a corporate body for promoting the public good referred to in the Finnish Income Tax Act[11] (hereinafter "ITA") is liable to VAT only to the extent that the income, which has been derived from its activity is regarded as taxable business revenue for the cor-

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2 The official homepage of the Finnish Sports Federation, www.sul.fi (visited 9 November 2011). The Finnish Sports Federation is the umbrella organisation for 132 member organisations, e.g.national sports federations, the Finnish Olympic Committee and sports for disabled sportsmen. The Finnish Sports Federation is a non-governmental sports federation for approximately 1,1 million Finns, 9000 sport clubs and other organisations.

3 www.sul.fi (visited 9.11.2011).

4 The official home page of the Finnish National Hockey League, www.sm-liiga.fi (visited 9 November 2011).

5 *Statute Book of Finland* 30.12.1993/1501. An up-to-date version of the VATA is available at www.finlex.fi (only in Finnish and Swedish).

6 *Statute Book of Finland* 21.1.1994/50. An up-to-date version of the VATD is available at www.finlex.fi (only in Finnish and Swedish).

7 See the Government Bill HE 88/1993 vp. This is available at www.finlex.fi (only in Finnish and Swedish). The term "business" is defined in neither the VATA nor the VATD.

8 These provisions are discussed in more detail in chapters 2.1 and 2.2.

9 This provision is discussed in more detail in chapter 2.3.

10 This provision is discussed in more detail in chapter 3.1.

11 *Statute Book of Finland* 30.12.1992/1535. An up-to-date version of the Finnish ITA is available at www.finlex.fi (only in Finnish and Swedish).

porate body, in accordance with the said Act.[12] However, under the Sec. 4 of the VATA, nevertheless, a corporate body for promoting the public good is liable to VAT for the taking of services consisting of the serving of food and beverages into private use and for the taking of services related to the holding of immovable property into private use.

In accordance with Sec. 22 of the ITA, an organization is classified as a corporate body for promoting the public good if it operates fully and only for the public good, in the material, spiritual, educational or social sense. Secondly, its activities are not directed to an exclusive group of people only. Finally, those involved in the organization do not gain financial benefits such as dividends, profits shares, high salaries or other compensation for participating in the activities of the organization.

In respect of organizations fulfilling all the above conditions, Sec. 23 of the ITA includes a list of different types of income that are not deemed as taxable business revenue and thus not liable for VAT in accordance with Sec. 4 of the VATA. Generally, such are incomes used to finance the operations for the public good and derived from e.g. membership and season fees, publication of membership bulletins as well as incomes derived from organizing of raffles, bingo (games), athletic competitions and diverse sales activity in connection to the foregoing activities.

The most common legal form of the Finnish sports clubs is the voluntary association[13] (Finnish: *aatteellinen yhdistys*, Swedish: *ideell förening*). Roughly 97% of the Finnish sports clubs are non-profit making.[14] As a rule, a non-profit making sports club with the legal form of an voluntary association is regarded as a corporate body for promoting the public good referred to in Sec. 22 of the ITA (hereinafter "corporate body for promoting the public good"). The majority of the Finnish sports clubs are exempted from VAT under Sec. 4 of the VATA. In the ruling KHO 1997:2 the Finnish Supreme Administrative Court (hereinafter "SAC")[15] stated that the activity concerning distribution of weekly business advertisements done as voluntary work by the members of a sports club was business referred to in Sec. 1 of the VATA. The income derived from that activity could not be deemed as taxable business revenue and was thus not taxable for VAT under Sec. 4 of the VATA.

In some situations, a sports club which is regarded as a corporate body for promoting the public good, can derive income deemed as taxable business revenue and thus (also) taxable for VAT according to the general provisions of the VATA. The ruling KHO 2008:84 by the SAC concerned a situation, where a hobby and competitive sports club, which was regarded as a corporate body for promoting the public good, had contracted with the city to run the cloakroom service in the city theater. According to the SAC, in respect to e.g. the amount of the income, the continuity of the activity, the intent to make profit and the principle of competitive neutrality, the activity was business referred to in Sec. 1 of the VATA. The SAC ruled that because the activity did not instantly benefit the objectives of the operations for the public good the income derived from that activity was thus taxable for VAT.

A sports club is not entitled to deduct input VAT on purchases of goods or services related to the activities, which are regarded as operations for the public good and not taxable for VAT under Sec. 4 of the VATA. In accordance with Sec. 12 of the VATA, a sports club which is regarded as a corporate body for promoting the public good, may on application be registered as a person liable to VAT. This requires that the activity of that sports club is regarded as business as intended in Sec. 1 of the VATA. According to the ruling KHO 15.3.1999 T 430 by the SAC, a corporate body for promoting the public good may not be registered as a person liable to VAT in relation to only some parts of its activities, which are regarded as business as intended in Sec. 1 of the VATA. Thus, it must be registered as a person liable for VAT for all its activities, which are regarded as business as intended in Sec. 1 of the VATA. If a sports club has been registered as a person liable to VAT, the club can deduct input VAT on purchases of goods and services according to the general provisions of the VATA for deduction of VAT.

In e.g. some Finnish national hockey, soccer and basketball league clubs, the first team and related activities are operated under an own entity, separate from the other activities, e.g. acitivities for juniors and amateurs (hereinafter "commercial sports club"). A typical legal form for a Finnish commercial sports club is the limited liablility company (Finnish: osakeyhtiö, Swedish: aktiebolag). As a rule, activity operated in the form of a limited liability company may not be regarded as an operation for the public good and is thus taxable to VAT according to the general provisions of the VATA.

VAT treatment of small-scaled activity

In accordance with Sec. 3 of the VATA, the seller is not liable to VAT if his turnover during a calendar year does not amount to more than EUR 8,500 unless he has been registered as a person liable to VAT at his own request. If the seller's accounting period is shorter or longer than 12 months, the turnover is proportioned for 12 months. Under Sec. 149a of the VATA, when the net sales for an accounting period do not exceed EUR 8,500, the seller gets relief on the whole VAT chargeable for that accounting period. A business with a turnover of between EUR 8,500 and EUR 22,500 in an accounting period gets a partial VAT relief under Sec. 149a of the VATA. This partial relief is gradual. The amount of the relief decreases as the turnover increases.

The above mentioned provisions apply also to sports clubs, regardless of e.g. the legal form of the club. According to Sec. 3 of the VATA, the provision in question does not apply to e.g. municipalities. A sports club which is totally exempted from VAT under Sec. 3 of the VATA, is not entitled to deduct input VAT on purchases of goods or services. In accordance with Sec. 12 of the VATA a sports club of which the turnover during a calendar year does not exceed EUR 8,500, can on application be registered as a person liable to VAT and thus get the right to deduct input VAT on

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12 In the Finnish income taxation, income which is regarded as business revenue is taxed under the provisions of the Business Income Tax Act (*Statute Book of Finland* 24.6.1968/360). An up-to-date version of the Finnish Business Income Tax Act is available at www.finlex.fi (only in Finnish and Swedish).

13 A voluntary association is an association founded by at least three private persons intending to join it as members or by an agreement of a corporation or foundation, and entered into the register of associations maintained by the National Board of Patents and Registration, the purpose of which is non-profit making.

14 www.sul.fi (visited 9 November 2011).

15 The SAC is the highest administrative court in the Finnish system including both civil and administrative courts. Its decisions are final. The jurisdiction of the SAC covers the legality of the decisions of government officials, e.g. the tax authorities. All published decisions handed down by the SAC are available at www.finlex.fi (only in Finnish and Swedish).

purchases of goods or services under the general provisions of the VATA for deduction of VAT. The registration requires that the activity of that sports club is regarded as business referred to in Sec. 1 of the VATA.

Reduced VAT on entrance fees to sports events

Organizing of sports events is taxable for VAT according to the general provisions of the VATA, if the activity in question is regarded as business as intended in Sec. 1 of the VATA. As described above, organizing of sports events by a corporate body for promoting the public good is generally totally exempted from VAT under Sec. 4 of the VATA.

To mitigate the consequences of the different VAT treatments with respect to sales of entry fees to commercial and non-commercial sports events the VATA includes a special provision. Under Sec. 85a of the VATA, the VAT to be paid is 9% of the taxable amount on the sales of entry fees to sports events. This provision is normally not applicable to sales of tickets which entitle its holder in addition to plain entrance and seat or standing room even to e.g. food and drink before, during or after the sports event in question. This kind of tickets, diverse so-called VIP-tickets, usually fall in under the general VAT rate of 23%.

VAT on sports accommodations and physical exercise services

Nationwide in Finland, there are around 30,000 different in- and outdoor sports accomondations, e.g. soccer, athletics and tennis fields and stadiums, ice stadiums and indoor sports halls. Up to around three quarters of the sports accomodations in Finland have been built and are upheld by local authorities, mainly municipalities or federations of municipalities. A significant part of the rest are owned by municipality controlled corporations or companies.[16] A smaller part of the sports accomodations in Finland are owned by diverse organizations and associations. Finnish sports clubs do not usually own sports accommodations, training centers, training fields or stadiums. The sports clubs hire the accommodations they need.

Only a small, but growing, number of sports accomodations is owned by private entrepreneurs. These privately owned sports accomodations, e.g. commercial fitness centers and gyms, are mostly in the larger population centres and cities. There seem to be only a couple of larger sports stadiums that are for the most part privately owned. Certain sports clubs hire these stadiums and use them as their home fields. These stadiums are financed to a significant degree by hiring them out for e.g. concerts, operas, dance performances, festivals, conferences, corporate events and other events.

Reduced VAT rate on physical exercise services

In accordance with Sec. 27 of the VATA, VAT is not payable on comparable rights in respect of immovable property. Under Sec. 29 of the VATA, notwithstanding the provisions of Sec. 27 of the VATA, VAT is payable on the occasional transfer of the right to use sports premises. According to Sec. 6 of the VATA, the State and the municipalities are liable to VAT for activities regarded as business as intended in Sec. 1 of the VATA. In accordance with Sec. 8 of the VATA, the provision also applies to a federation of municipalities.

When a municipality or a federation of municipalities sells rights to use sports accommodations, this activity is not generally regarded as business referred to in Sec. 1 of the VATA. Thus, the activity falls outside the scope of the VATA. If a corporate body for promoting the public good sells rights to use sports accommodations, this activity is generally exempted from VAT under Sec. 4 of the VATA. To mitigate the different VAT treatment in respect of fees charged for participation in non-commercial and commercial sports activities and selling of non-commercial and commercial services creating opportunities for physical exercise, e.g. selling of rights to use sports premises, the VATA includes a special provision. Under Sec. 85a of the VATA, the VAT to be paid is 9% of the taxable amount in respect of the sale of services which create opportunities for physical exercise. The provision is applicable to e.g. selling of rights to use diverse indoor sports halls, diverse outdoor sports fields and stadiums, if these are used to sports or sports activities. The provision may be applicable even if there is no transfer of the right to use specific premises. In addition, the provision is also applicable to e.g. fees charged for fitness center or gym use or fees charged for participation in diverse structured sports and physical exercise classes. By the same token, the provision is applicable to fees charged for participation in diverse sports activities organized by the municipalities, if the activity is deemed as business as intended in Sec. 1 of the VATA.

In the ruling KHO 2.7.1996 T 2237, the SAC ruled that structured belly dance classes are a service which creates opportunities for physical exercise referred to in Sec. 85a of the VATA. According to the ruling KHO 4.11.1997 T 2796 by the SAC, hiring out of a go-kart track including the go-karts is also a service that falls under Sec. 85a of the VATA. The ruling KHO 25.10.2002 T 2698 by the SAC concerned a situation where a company operated a ski school activity that included teaching of both downhill skiing and snowboarding. The SAC ruled that because the teaching, as a part of the sold service, had an essential significance for the customers, the sold service falls in its entirety under the general VAT rate.

The reduced VAT rate of 9% stipulated in Sec. 85a of the VATA is not applicable to e.g. hiring out or selling of sports equipment. Hiring out or selling of sports equipment, e.g. tennis rackets, ice skates and slalom or cross country ski boots or skis, falls in under the general VAT rate if the activity in question is deemed as business as intended in Sec. 1 of the VATA.

The right to deduct input VAT and VAT refund

The input VAT on purchases of goods or services related to organizing of sports activities and selling of rights to use sports accommodations is usually deductible under the general provisions for deduction of VAT, if the activity in question is deemed as business referred to in Sec. 1 of the VATA. If the activity is not deemed as business, there is no right to deduct VAT included in the acquisition related to that activity. A corporate body for promoting the public good which is exempted from VAT under Sec. 4 of the VATA, has no right to deduct input VAT on purchases of goods or services related to organizing of sports activities or selling of rights to use sports accommodations.

In accordance with Sec. 130 of the VATA, the municipalities and the federation of

[16] www.sul.fi (visited 9 November 2011).

municipalities are, under certain conditions, entitled to a refund of the input VAT on purchase of goods and services, which may not be deducted according to the general provisions for deduction of VAT. Thus the municipalities are in principle always entitled either to deduct the input VAT on purchases of goods or services related to sports accommodations or to get a refund on that input VAT.

VAT treatment of canteens operated by sports clubs

As a rule, the Finnish sports clubs do not own or run separate canteens or BBQ's with the exception of canteens and other similar sales activities during various sports events, e.g. on the stadium during the first team home games. These activities, which are normally relatively small-scaled, are run on a voluntary basis by the members of the clubs or the parents. Generally, in connection with the hire of a sports stadium, the sports club, as the renter, and the municipality or the federation of municipalities, as the hirer, agree on who has the right to run diverse sales activities, e.g. canteens, at the sports stadium and on which conditions.

If the canteen is run by a sports club regarded as a corporate body for promoting the public good and which has not been registered as a person liable to VAT, the VAT treatment of the income derived from that activity and the right to deduct input VAT is determined according to the provisions and principles described above in chapter 2.1. Whereas, income derived from canteens operated by commercial sports clubs are taxable to VAT according to the general provisions of the VATA.

Other VAT issues regarding sports activities and sports

Top individual professional athletes earn their income mainly through advertising, sponsorship, money prizes and sports grants awarded by the Ministry of Culture. Especially in relation to various sponsorship arrangements there may arise difficult VAT questions. According to Sec. 45 of the VATA, VAT is not payable on e.g. fees to performing artists, to other public performers or to sportsmen. In relation to some sponsorship arrangements falling in the scope of the VATA, the fee paid to an athlete for e.g. appearance on an event organized by a sponsor may be exempted from VAT under Sec. 45 of the VATA.

In the ruling KHO 16.3.2000 T 571 by the SAC a person A was e.g. running a horse management made up of both tending of foreign horses and brooding and breeding of own horses. The SAC ruled that these activities were taxable business referred to in Sec. 1 of the VATA. Whereas, according to the SAC, the horse race activity that A also operated, was not a taxable business referred to in Sec. 1 of the VATA, but a VAT exempted participation in a sports competition. According to the SAC, the income derived from the horse race activity was not taxable to VAT under Sec. 45 of the VATA. A had no right to deduct the input VAT on purchases of goods and services instantly related to the horse race activity. According to the SAC, all other input VAT was deductible, regardless of whether it was related to horses which participated in horse races or horses which do not participate in horse races.

The ruling KHO 31.1.1997 T 203 by the SAC concerned a company which operated a car racing sports activity. To finance the ordinary competition activity the company was selling advertising and announcement space on e.g. the sports cars and the driving suits. The selling of advertising and announcement space was business referred to in Sec. 1 of the VATA and the company thus had right to deduct input VAT on purchases of goods and services related to this taxable activity. The ordinary competition activity was not a business referred to in Sec. 1 of the VATA, but a VAT exempted participation in a sports competition. Thus, the company had no right to deduct VAT on purchases of goods and services related to e.g. the sports cars and the driving suits used in the competition activity.

Italy:

Comparative survey on VAT, sports and sports accommodations

by Francesca Nigro[1] and Marco Ettore[2]

Introduction

In Italy, there is no special VAT legislation in respect of sporting activities and sports accommodations, apart from some very specific cases which are considered in detail below.

As a general rule, considerations paid for sporting activities are subject to the ordinary 21% VAT rate, if such activities are offered by professional sports companies (such as football clubs).

Sporting activities offered by amateur sportsmen, professional athletes or by non-commercial sports associations are not subject to VAT since the amateur sportsman, the professional athlete and the non-commercial sports associations are not deemed to be VAT taxpayers.

Specific VAT rules are applicable in the event of assignment of the agreements relating to services rendered by professional athletes.[3]

General VAT treatment of sports activities

Considerations paid for sporting activities, if offered by an individual (either an amateur sportsman or a professional athlete), are not subject to VAT. Considerations paid for sporting activities offered by entities are subject to VAT only if that entity is a professional sports entity.

In fact, article 1 of the Italian VAT Code[4] states that the carrying on of a business or an art or profession may constitute a supply of services subject to VAT.

Bearing in mind the above, sporting activities are generally offered by the following individuals and entities to which the following VAT rules apply:

1 *Amateur sportsmen:* bearing in mind that the sporting activities are not offered on a regular basis, amateur sportsmen are deemed to be out of the scope of VAT, since art. 5 of the Italian VAT Code specifies that only arts and professions carried on regularly and habitually are considered subject to VAT (with the consequence that any occasional activity is not subject to VAT). This, of course, only applies for so long as the amateur sportsman does not carry on other activities which are subject to VAT and that could include within the scope of VAT the sporting activities (such as, for example, the execution of agreements for publicity purposes[5]).

2 *Professional athletes:* usually sports activities offered by professional athletes are legislated for by the agreements entered into by the athletes with the sports companies utilising their services and so must comply with the provisions of Law no 91/81. According to art. 3 of this law, sporting activities offered by professional athletes for a profit are governed by employment contracts and, therefore, give rise to income from employment. However, in the event that the sporting activities rendered by the professional athlete have one of the following characteristics, the agreement will imply an on-going collaboration[6] and an agreement of non-subordinate employment may be executed:

   a the sporting activity is offered within one or more connected sports events in a short period of time;
   b the sports athlete is not contractually bound regarding the training, attendance or any preparation for the sporting activity;
   c the sporting activities governed by the agreement, even if having a continuing feature, do not exceed eight hours a week or five days out of every month or thirty days out of each year.

As a general rule, on-going collaborations are not subject to VAT according to art. 5, para 1 of the Italian VAT Code[7]. This is the case, of course, as already explained in respect of amateur sportsmen, for as long as the professional athlete does not carry on other activities which are subject to VAT (and that could cause sporting activities to fall within the ambit of VAT). In fact, on this

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1 CBA Studio Legale e Tributario, Milan.
2 CBA Studio Legale e Tributario, Milan.
3 Law no. 91 of March 1981.
4 Presidential Decree no. 633/1972.
5 See the Ministerial Resolution no 255 dated 2 October 2009 in relation to the case of an artist and the decisions of the Provincial Tax Court of Bologna no. 1238, dated 10 October 1998 and the Regional Tax Court of Emilia Romagna no. 53 dated 17 May 2005, both related to the cases of sportsmen.
6 In fact, such activities do not give rise to income from self-employment since the abrogation by Law 342/2000 of such provision from art. 49 (now art. 53) of the Italian Tax Code regarding "Income from self-employment".
7 Art. 5 of the Italian Vat Code states: *"The exercise of arts or professions is deemed as a professional and habitual exercise, even if not exclusive, of any self-employment activity by individuals or by simple entities or associations with no legal status incorporated by individuals for the exercise in an associated capacity of the subject activities."*

matter, the jurisprudence maintains that that consideration obtained for sporting activities by a professional athlete is subject to VAT if they are connected to a sponsorship agreement of significant economic and commercial value.[8]

3 *Sports associations and amateur sports companies:* sports associations and amateur sports entities are considered non-commercial entities as long as their prevailing business purpose is the sports institutional aim. From a VAT point of view, sporting activities rendered by such entities are not subject to VAT, since such entities are not deemed to be VAT taxpayers (the consideration paid for such sporting activities is usually the membership fees which cover the costs incurred by the sports association). However, if they also offer commercial services in addition to the sporting activities, they will need to obtain a VAT code and such commercial services will be subject to VAT according to the ordinary rules applicable to the type of services concerned.

4 Professional sports companies: considering the commercial nature of such entities, sporting activities offered by them are subject to VAT at the ordinary rate of 21%. Specific rules are applicable to the assignment of agreements by these professional sports entities to other professional sports entities regarding the services rendered by the professional athletes employed by them. In fact, according to art. 5 of Law no. 91/81, such sales are subject to VAT at the ordinary 21% VAT rate. Once the agreement has expired, the athlete may enter into a new agreement with a new sports club. In that case, the new sports club will be obliged to indemnify the previous club. According to art. 15 of Law no. 91/81, such indemnity is treated as a VAT exempt transaction.

5 Finally, entrance tickets sold to the public to watch a sporting event are subject to the reduced 10% VAT rate if the price for the ticket does not exceed € 12,91.[9] Any other entrance ticket for sporting events is subject to the ordinary 21% VAT rate.

Sporting activities offered by an Italian individual/entity but performed abroad

The above rules are, of course, applicable to the cases in which the sporting activities in question are offered within the Italian territory to Italian resident customers. On the contrary, if the sporting activities are performed abroad, these services will be subject to VAT if the territoriality requirement provided by the relevant VAT provisions, combined with the above conditions, is met.

According to art. 7quinquies of the Italian VAT Code, sports services are subject to VAT in Italy if they are offered within the Italian territory.

This means that, whenever the relevant sports activities are performed abroad, regardless of the characteristics of the entity rendering the service, the transaction falls outside the scope of Italian VAT.

VAT on sports accommodations

As already explained, VAT is due in respect of sports accommodations to the extent that they are considered commercial enterprises. The most common cases of sports facilities, in practice, are municipalities and sports clubs.

– M*unicipalities:* municipalities, being public entities, are non-commercial entities. Therefore, any sporting activities offered by sports facilities managed at a public level are not subject to VAT. For more details, please refer to the comments regarding sports associations set out in the previous section.

– *Sports clubs:* sports clubs may be both sports non-profit associations or professional sports companies. For both categories of clubs, please refer to the comments regarding sports associations and professional sports companies set out in the previous section.

Based on the previous considerations, it is clear that, when sports activities are not subject to VAT because the entity providing the services is not a VAT taxpayer, input VAT on purchases is a non-recoverable cost and this may significantly increase the amount of costs incurred and proportionally decrease the margins of the profit & loss accounts of the sports associations involved. In fact, whenever the sports entity is not considered a VAT taxpayer, the burden of VAT is entirely sustained by it as with any other final consumer. Nevertheless, in the event that a non-commercial sports association also carries on transactions subject to VAT (for which a VAT code has been requested), input VAT of purchases related to the VAT transaction are recoverable according to the ordinary rules.

For the sake of completeness, please note that in Italy the use of intermediate vehicles in order to recover VAT (a practice sometimes used in other countries) is not feasible. In fact, such intermediate vehicles, which should have a commercial business purpose, would not be able to recover VAT on purchases if the activity actually (and not only theoretically) performed, and to which the purchases are connected, is not subject to VAT.

In this regard, it is also important to state that, even if in the Italian tax system there are no general anti-avoidance provisions concerning VAT, the European Court of Justice in some decisions denied the right to deduct VAT in relation to transactions structured primarily in order to obtain the tax deduction – in fact, without the implementation of the related structure, the entities involved would not have recovered any VAT.

Considering that the European Court of Justice has the task of interpreting the EU law so that it is applied in the same way by all the member states, such EU position may not be ignored by Italian operators which, in the event of tax litigation, may have to deal with an Italian jurisprudence that, of late, commonly invokes the concept of "abuse of law" in order to disregard the tax advantages achieved by means of complex operations that have no valid business reasons.[11]

Canteen VAT arrangements (for sports clubs)

One of the most common supplies of services rendered by sports clubs is canteen services. In Italy, such activity is always subject to VAT, since it is commercial in nature.

As a general rule, the supply of food and beverages within a public commercial enterprise is subject to VAT at the reduced rate of 10% according to art. 16 of the Italian VAT Code and the annexed "Table B".

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8 See previous footnote.
9 See art. 6, para 11 of Law no 133/99.
10 See, for example, the decisions C-255/02 and C-223/03.

This means that, if the canteen service is rendered by a sports association which is deemed a non-commercial entity, the sports association will need to obtain a VAT code in order to invoice the canteen services and subject the supply of food and beverages to the 10% VAT rate.

There are no particular problems with regard to possible canteen services rendered by the professional sports clubs since they are always VAT taxpayers and, therefore, they already have a VAT code. The 10% VAT rate will also be applicable to these supplies.

VAT on the possible development of new fields or stadia by sports clubs

A further issue is that of the development of structures already owned by the sports club in question by means of new fields or stadia. Such developments are usually implemented by involving a third party retained to look after the building of the new sports areas.

Again, in such cases, the input VAT may be a significant issue, considering the high economic value involved in relation to these services and sales in general. Again, the VAT regime of these transactions needs to be analysed, making a distinction between sports clubs that are VAT tax payers and sports associations that are deemed non-commercial entities.

The sale of immovable property (or the building of them pursuant to a contract) has recently been regulated by the new provision of no. 8ter) of art. 10 of the Italian VAT Code.

According to the mentioned no. 8ter), sales and building of immovable property executed by VAT taxpayers for entities that are not VAT taxpayers are transactions subject to the ordinary 21% VAT rate.

On the contrary, sales and building of immovable property executed by VAT taxpayers entities for entities that are also VAT taxpayers are VAT exempt transactions pursuant to art. 10 of the Italian VAT Code.

In the circumstances, the issue of the recoverability of VAT is once again a question for the non-commercial sports association which will have to bear it integrally as a cost.

The above rules do not differ in case the building works are carried out beneath the surface of land which is already owned by the principal sports club.

[11] In this sense, the Italian Supreme Court defined all transactions lacking of economic reasons as a general "Abuse of Law". Moreover, in decision no. 30055 of 2008 the Supreme Court stated that: A general anti-avoidance principle exists in the Constitution of the Italian Republic under art. 53 with the consequence that *"the taxpayer is not allowed to benefit from undue advantages deriving from a distorted use of juridical instruments, even if they are not in contravention of any specific provision, suitable to obtain a tax advantage, without any reason economically appreciably different from the mere expectation of a tax saving"*. Similarly, another decision of the Regional Tax Court of Lombardy (see decision no. 85 dated 4 February 2008) recognised the significance of the above-mentioned art. 37bis of Presidential Decree no. 600/73 by asserting that also transactions not expressly listed in the mentioned provision, if aimed at achieving an undue saving of taxes and lacking of valid economic reasons, may be disregarded. The decision has been, however, strongly criticized by academics, since the purpose of the tax legislation was, in effect, to avoid a general anti-avoidance provision, since this could have been applied in an incorrect way and would have permitted the Tax Administration to abuse the law (in this regard, please see the Ministerial Relation to the Legislative Decree no. 358/1997 which introduced the mentioned provision). A recent decision of the Provincial Tax Court of Milan, on the contrary, did not agree with this position (see decision no. 54, dated 21 February 2011).

Poland:

Comparative survey on VAT, sports and sports accommodations

by Karolina Tetłak[1]

Introduction

The value added tax is governed in Poland by the Goods and Services Tax Act of 11 March 2004 (hereinafter "the VAT Act") and a series of statutory instruments (decrees) which implement EU regulations regarding VAT. Following the basic principles underlying the European VAT system, Polish law provides for a business-neutral, general (comprehensive), multi-stage, proportional tax on consumption. Pursuant to Article 5(1) of the VAT Act, the tax is levied, *inter alia*, on the supply of goods and services within the territory of Poland. The supply of goods is defined as a transfer of the right to dispose of goods as owner. The term "supply of services" means any transaction which does not constitute a supply of goods. For the purposes of the VAT Act, goods and services are classified on the basis of classifications compiled by the Central Statistical Office. The VAT Act sets a basic taxation rate at a level of 23%, as well as preferential rates of 8% and 5%.[2] There is also a range of tax exemptions. The appendices to the VAT Act specifying services exempt from taxation or imposing VAT rates lower than the basic rate are based on the statistical classification of goods and services.

General VAT treatment of sports activities

A broad scope of taxable events results in a wide range of activities in the world of sports being subject to VAT. The Polish VAT Act does not define the term "sport". However, there is a legal definition of sport in the Sport Act, under which sport is any form of physical activity which by casual or organized participation affects the creation or improvement of the physical and mental condition, development of social relations or achievement of sports results on any level.[3] The basic entity carrying out sporting activities is a sports club which takes the form of a legal person. Sporting activities are subject to VAT if they qualify as a supply for a consideration. The tax is not applicable to sporting activities carried out without any charges or fees. A given transaction may not qualify as a supply of goods if the condition of the transfer of the right to dispose of property as owner is not fulfilled, e.g. in the case where sporting equipment is rented out by a sports club, but it may still be covered by the catchall definition of the supply of services. The place of supply of sporting services is the place where the services are actually performed.[4]

Exemption and reduced rates applicable to sports activities

The services falling within the statistical classification group of services connected with sports, include services linked to sport:

- services linked to the activity of sports facilities,
- services linked to the activity of sports clubs,
- services linked to the activity of facilities serving the improvement of fitness,
- services linked to promoting sports and recreation events,
- services provided by sportsmen,
- services supporting activity connected with sports and recreation.

Under the general rules, the basic VAT rate is 23%. It applies to the provision of services connected with sports based on commercial principles, i.e. with the purpose of earning profits: activities of individual sportsmen or coaches, referee services, sports instruction and teaching for consideration, activities of sports clubs, transfer of players for consideration, etc. Sporting services can be performed by corporate bodies or by individuals carrying out business activity as sole traders or as a company. The general VAT treatment of such services is modified by an exemption and preferential rate applicable to certain services.

The VAT treatment of exempt sports activities has recently been changed in Poland. Until the end of 2010, appendix 4 item 11 to the VAT Act listed as VAT-exempt services connected with recreation and sport provided by entities that do not aim to systematically strive for earning profits and all profits that they nonetheless earn are spent on maintenance or improvement of supplied services. Excluded from the scope of this exemption were services connected with video tapes and all advertisement or promotional movies, services connected with the activities of stadiums and other sports venues, and entrance to sports events. The exemption was based on the statistical classifications of sports services rather than the wording of Article 132(1)(m) of the EU VAT Directive 2006/112/EC.

As of 1 January 2011 appendix 4 has been abolished and the exemption has been shifted to Article 43(1)(32) of the VAT Act. Pursuant to this provision, a tax exemption applies to services closely linked to sport or physical education provided by sports clubs, sports federations and federations of associations, and other legal persons whose statutory aim is acting for development and popularization of sport, provided that:

1 Doctoral candidate in tax law at the Faculty of Law and Administration, Warsaw University, and LL.M. graduate of Harvard University.
2 These rates are applicable from 1 January 2011 to 31 December 2013.
3 Article 2(1) of the Sport Act of 25 June 2010.
4 Article 27(2)(3)(a) of the VAT Act.

1 they are necessary for the organization and exercise of sports or organization of physical education and participation therein;
2 the entity providing such services is not oriented towards earning profits, and
3 they are provided to persons practicing sport or taking part in physical education.

The exemption does not apply to services connected with marketing and promotional activity; admission to sports events; chargeable services of running ships earmarked for sports and recreation; chargeable services of accommodation connected with sports and physical education; and services of renting out sports equipment and sports facilities for consideration.

The wording of the regulation providing a tax exemption has been brought closer to the wording of the EU VAT Directive 2006/112/EC. Poland has resigned the use of statistical classifications as the basis for the exemption. The present exemption is narrower and more restrictive than the previous one which only required the activity to be non-commercial, whereas now three criteria have to be fulfilled jointly and the services cannot fall within the exclusion. Certain doubts arise with respect to the scope of the new rules. Previous wording referred to "entities" – a term which covers individuals as well as organizations, whereas the present provision enumerates specific legal persons. As a result, individuals or local authorities engaged in sporting activities cannot be exempt from VAT. On the other hand, it is not clear whether the exemption covers services provided to sports clubs because it refers to persons practicing sport. Regardless of the unclear wording of Polish law, the decisions of the CJEU explain that the legal form of the recipient of services cannot affect the possibility to apply the exemption.[5] Therefore, services provided to entities such as sports clubs taking part in sports are exempt just as services provided directly to individuals. It has remained critical to the exemption that it is offered to not-for-profit organizations, so it applies on the condition that entities performing the activities do not systematically earn profits from such activities, and in case they do earn any profits, they use them wholly for continuation or improvement of provided services.

5 C-253/07 (Canterbury Hockey Club).
6 Items 185-186 of Appendix 3 to the VAT Act.
7 Item 179 of Appendix 3 to the VAT Act.

The services linked to sport that do not fulfil the conditions listed above are taxed at the basic 23% rate unless they qualify for a preferential rate. The reduced rate of 8% is applicable to admission to sports events and other services linked to recreation – exclusively with respect to admission.[6] The reduced rate also applies to services linked to the activity of sports facilities[7] which are not covered by the exemption. Such services include making a sports facility accessible for use consistent with its nature, e.g. for the purpose of sports, recreation or rehabilitation group exercise classes.

VAT on entrance tickets

The services linked to the admission to sports events are expressly excluded from the scope of the exemption for sports activities. However, the admission to sports facilities, such as entrance tickets to swimming pools or tennis fields, is not mentioned. As a result, the services linked to the activities of sports facilities run by taxpayers who are covered by the exemption for non-profit sports clubs are VAT free. The admission to sports facilities that is not covered by the exemption and admission to sports events is subject to VAT at the preferential rate of 8%. Other services linked to recreation as far as admission is concerned are also taxed at 8%.

VAT on sports accommodations

Right to VAT refunds

Transactions concerning sports accommodations include the construction, reconstruction, renovation, improvements, repairs, purchase, sale or lease of sports facilities. Investments of this kind involve supplies of goods and services that may be subject to VAT depending on the circumstances of the transaction. Pursuant to Article 86(1) of the VAT Act, to the extent to which goods and services are used for carrying out taxable activities, the taxpayer has the right to reduce the amount of output VAT by the amount of input VAT. The amount of tax that can be deducted is the sums indicated on invoices regarding purchases of goods and services linked to taxable activities carried out by the taxpayer. As a result, the right to deduct input VAT in connection with sports accommodation depends on whether the goods and services purchased for the investment are used for purposes of taxable business.

Practice in Poland

Practice for municipalities

The promotion and development of physical culture belongs to the responsibilities of the local government. The investment in sports and recreation accommodations has been vested in municipalities and is financed from public funds of local governments, state donations and subsidies from the European Union. If the construction of sports fields, playgrounds or courts serves a public purpose and is intended to improve fitness by offering sports facilities to the public free of charge, the investment is not regarded as linked to any taxable activity of the municipality. Similarly, if the investment regards facilities made available free of charge to schools or other entities of public purpose, there is no link with VAT-able transactions. As a result, VAT input on goods and services acquired by the municipality in connection with the investment cannot be offset by the municipality. Such VAT amounts are treated as deductible expenses for the purposes of income tax, but there is no separate mechanism of refund under the VAT Act and the municipality is in fact treated as a final consumer of goods and services purchased. However, pursuant to Par. 23(1) of the decree of 27 April 2004 regarding the execution of certain provisions of the VAT Act, registered taxpayers who acquire goods and services or import goods using financial means received directly to a separate bank account containing exclusively means of non-refundable foreign assistance, have the right to deduct input tax, if it is not deductible for income tax purposes. This provision may be applicable to investments in sports facilities financed with European funds.

If the investment made by the municipality is linked to taxable activities, the municipality is treated as a taxpayer with respect to performed commercial transactions. This is the case when e.g. the municipality runs a swimming pool open to the public and charges an admission fee or when a stadium is rented out to a local sports club or businesses. In such situations the municipality, as an active taxpayer carrying out taxable business, has the right to deduct input VAT on goods and services acquired in connection with the investment.

Practice for sports clubs themselves

The treatment of sports accommodations used by sports clubs depends on whether

the sports club is an active taxpayer and is not covered by a tax exemption with respect to its activities. As already mentioned, Polish law follows the EU VAT Directive as far as the tax exemption for non-profit sports organization is concerned. If a sports club fulfils the conditions listed in Article 43(1)(32) of the VAT Act, it has no right to deduct input VAT because the purchases of goods and services are linked to non-taxable activities. It should be noted that the exemption is not applicable to services connected with marketing and promotional activity, admission to sports events, and services of renting out sports equipment and sports venues for consideration. Therefore, goods and services purchased in connection with such taxable transactions generate a deductible input tax.

Sports clubs with a commercial purpose do not qualify for the aforementioned exemption. If a professional sports club carries out a taxable business activity in the field of sport, the right to deduct input VAT is available with respect to purchases of goods and services used for the purpose of the activity subject to VAT. However, it is worth mentioning that Polish law provides another tax exemption that may be applicable to sports clubs with insignificant profits, even if their activity is of commercial nature. Namely, there is an automatic VAT exemption for small taxpayers whose turnover (the value of taxable sales) does not exceed 150,000 PLN per year. If a sports club qualifies for such exemption, it does not have the rights and obligations of a VAT taxpayer, including the right to deduct input tax.

Use of intermediate entities or vehicles

Since municipalities and non-profit sports clubs cannot deduct input tax paid with respect to goods and services used for purposes of non-taxable activities, they may in practice take advantage of tax-optimizing structures that would allow for VAT deduction. The structures involve the use of entities interposed in a chain of transactions in order to deduct tax. The most common scheme is the lease of sports facilities to an intermediary entity, whereby a municipality renting out sports accommodations to a local sports club is a VAT taxpayer and charges tax at a basic rate of 23%. The transaction is not covered by the exemption laid down in Article 43(1)(32) of the VAT Act because municipalities are not within the personal scope of the exemption. As a result, goods and services purchased for the purpose of construction, reconstruction, improvement or repair of sports facilities are regarded as acquired in connection with taxable activities (lease) and the tax input on such goods and services is deductible. It is sometimes even the case that the entity renting out the sports accommodation receives a subsidy from the municipality for the maintenance and use of the accommodation. If the subsidy does not affect prices at which the entity charges its customers, the amount of the subsidy is not subject to VAT. Another common scheme is to charge an admission fee on the use of sports facilities by consumers which is always treated as a taxable service. Therefore, any purchases with respect to such an activity allow for an input tax deduction.

The idea behind any scheme allowing for VAT deduction is to generate taxable activity or to interpose an entity that carries out business activity subject to VAT. Otherwise, construction of sports facilities by a municipality for the common and free use by local citizens or by a tax-exempt sports club is burdened with VAT. It should be emphasized that following the CJEU decisions on the abuse of European law, the tax authorities can examine the intentions behind taxable transactions and question any schemes whose main purpose is to take advantage of a tax privilege that would otherwise not be available.

Canteen VAT arrangements for sports clubs

Canteen services always subject to VAT

Under Polish law, services connected with food are VAT taxable at a reduced rate of 8%, excluding the sale of alcohol beverages, tea, coffee and mineral water, sparkling beverages, and unprocessed goods to which the basic rate of 23% applies. Gastronomic services provided by canteens are taxed at the rate of 8%. The notion of gastronomic services covers various activities such as giving out meals and drinks by restaurants, bars or buffets, and the preparation and serving of meals by canteens. Canteen services provided at a sports club by its personnel for sportsmen and club's employees may be classified as services connected with the activity of sports venues, provided that the canteen is not a separate business entity and its running is closely connected with the activities of the club. As a result, if all conditions of Article 43(1)(32) of the VAT Act are fulfilled, the canteen services may be tax exempt as part of the activities of a non-profit sports club. Pursuant to this provision, a tax exemption applies to services closely linked to sport or physical education provided by sports clubs, sports federations and federations of associations and other legal persons whose statutory aim is acting for development and popularization of sport, provided that:

1 they are necessary for organization and exercise of sports or organization of physical education and participation therein;
2 the entity providing such services is not oriented towards earning profits;
3 they are provided to persons practicing sport or taking part in physical education.

The most questionable with respect to canteens is condition 1, but nonetheless comprehensive services in the field of sport and recreation including the provision of gastronomic or catering services (sale of food) could be VAT exempt, if the organizer of the event does not sell tickets to the event, e.g. the organization of a sports competition for children, where the canteen services are a necessary part of the event. In general, however, the satisfaction of this condition is hardly ever accepted by the tax authorities. As a result, canteen services are generally subject to tax at 8% unless the taxpayer qualifies for the automatic exemption available to small taxpayers where the value of taxable canteen sales does not exceed 150,000 PLN. Qualifying taxpayers can opt out of the exemption if they prefer to be subject to tax. In such a case, the reduced 8% VAT rate is applicable to canteen services.

Practice in case of investments in canteens

Since canteen services are generally taxable, investments in canteens offer the right to deduct input tax. As already mentioned, input VAT is deductible where goods and services purchased are used for the purpose of taxable activities. The 8% VAT rate applicable to canteen services means that the construction, reconstruction, improvement, development or repair of a canteen allows for a reduction of output VAT by the amount of tax input on goods and services purchased in the process of such investments in the canteen. This is, however, not the case if the taxpayer running the canteen is exempt from VAT due

to a low level of taxable sales not exceeding 150,000 PLN.

VAT integration charges

Poland has not implemented Article 18(a) of the EU VAT Directive 2006/112/EC, pursuant to which member states may treat as a supply of goods for consideration the application by a taxable person for the purposes of his business of goods produced, constructed, extracted, processed, purchased or imported in the course of such business, where the VAT on such goods, had they been acquired from another taxable person, would not be wholly deductible. If implemented, the rule would result in taxation of goods developed by a taxpayer for the purpose of his activity, where the taxpayer does not have the right to deduct input tax. Under current Polish law, such activity does not amount to a taxable supply of goods and is outside the scope of VAT.

The sale of facilities by a sports club or municipality is covered by the general rules regarding the disposal of real estate, since there are no special rules regarding taxation of sports facilities. Pursuant to art. 43(1)(2) of the VAT Act, the supply of used goods is exempt from tax, provided that in respect to these goods the person supplying them did not have the right to reduce the amount of output tax by the amount of input tax. The exemption applies to used buildings and structures or parts thereof subject to lease or tenancy agreements, or similar contracts. Buildings and structures or parts thereof are regarded as used goods if at least 5 years had passed since the end of the year when the construction was finished. The exemption does not apply if prior to putting the building or structure or part thereof on record of assets or during use the expenditure on improvement amounted to at least 30% of the initial value, and the taxpayer:

1 had the right to reduce the amount of output tax by the amount of input tax on such expenditure;
2 used the goods for a period shorter than 5 years for the purpose of carrying out taxable activities.

Under the above provisions, if a sports club uses its facilities for more than 5 years and during this time does not make VAT-deductible investments in the facilities exceeding 30% of the initial value of the facilities, the supply of such facilities is VAT exempt. Moreover, the supply of unbuilt land other than building areas or areas destined for construction is exempt.

Other common VAT issues regarding sports in Poland

VAT on services of sportsmen

One of the most discussed VAT problems in the field of sport in Poland is whether a player of a sports club is a VAT taxpayer and whether the club can deduct input VAT indicated on invoices issued by the player when charging the club. The whole issue is linked to the definition of business activity which requires the activity to be independent. Article 15(3) of the VAT Act automatically excludes from the definition of taxable activity any activity giving rise to income from sport, if the persons carrying out such an activity are bound with legal bonds determining the conditions of exercising the activity, remuneration and responsibility towards third parties of the person commissioning the services. Under this rule, the qualification of a player as a VAT taxpayer depends on the nature and conditions of the legal relationship with the club. If the contract provides for the subordination of the player to the club he represents, the services performed by the player are not treated as an independent business activity. Because under sports law and internal regulations of sports governing bodies, sports clubs are responsible for actions of their players, sports clubs generally do not have the right to deduct input VAT charged by players. However, in practice it is very often the case that the tax authorities are inconsistent and allow players to register for VAT purposes and carry out taxable business activity.

Taxable and exempt activities of sports clubs

Due to the structure of the VAT exemption that excludes certain transactions from its scope, sports clubs and municipalities very often find themselves in a situation whereby the services they provide fall partly within the scope of the exemption. The basic rule is that input VAT is deductible only to the extent to which goods and services are used for carrying out taxable activities. The taxpayer should try to separate the amounts of input tax connected with transactions subject to VAT (e.g. admission to sports facilities) from those used for the purpose of exempt activities (e.g. where the municipality carries out its statutory task with the use of facilities by making it accessible for local citizens or schools). If such a separation of the amounts in respect to which the right to deduct is applicable is not possible, the tax is deductible on the basis of the proportion of sales, whereby the proportion of taxable activities in all activities determines the percentage of deductible input tax.

United Kingdom:

Comparative survey on VAT, sports and sports accommodations

by Jonathan Hawkes[1]

Introduction

This article follows on from a number of other articles already published in this journal dealing with this topic in regards to different EU countries. Readers will, referring to those earlier articles, have come to appreciate in regards to VAT law although all of the EU shares the same VAT directive there are some differences between the different member states as to how these pan-EU VAT rules are administered and sometimes even interpreted by the VAT authority of each country.

The fundamentals required to be considered in any VAT analysis and the impact of article 13 of the VAT Directive 2006/112/EC of 28 November 2006 ("the VAT Directive") are covered in some detail in the September 2011 issue of this journal. This also explains how certain pertinent points in the area of sports have been decided over time by the ECJ ("France: Sports services, accommodation and VAT- overview and recent developments" by Henri Bitar & Thomas Vanhee). Suffice to say this overview and summary applies equally to the VAT position in United Kingdom and so I hope the reader will excuse me for not restating these points here in detail.

General VAT treatment of sports activities

For the non-specialist reader and even for those of us who work in this area it is sometimes useful to take a step back and consider where we are and how we got here in terms of VAT in the areas of sports and sports accommodations. At the risk of stating the obvious at one level sport is big business and as such will be, in the normal course of events, subject to VAT just like any other business activity. There is nothing per se about sport that gives rise to a specific or favourable VAT treatment and so the questions to consider are as in all matters of VAT the status of the provider (are they a taxable person), the nature of the supply and the place of supply. Each of these specific questions has to be considered in turn and it is only then that one can safely decide upon the correct VAT treatment for a particular set of circumstances.

It is suggested that only by placing these questions in the wider context of the VAT Directive and its explicit and implicit objectives together with the basic elements or "nuts and bolts" of VAT that some kind of analytical framework can be developed. This will thereby allow for a better understanding of the issues that arise when one has to consider questions of VAT and sports.

Sport is unusual in the sense that it is such a broad and varied activity. As an example in football it covers areas and organisations that are clearly commercial such as the Premier League or a Premiership Club right down to the level of a local village football team. Similarly service providers can run the range from national chains of commercial gym operators and tennis clubs through local authorities and other public bodies right down to small groups of dedicated individuals running a local sports club for the love of their chosen sport and to encourage active participation in that sport.

At the individual level we can also have many different involvements with sport; we can be spectators at a major event such as next year's Olympics or active members of our local athletics club. Similarly there may be transactions that are superficially sports related but from a VAT perspective are not necessarily anything to do with sport when one considers the nature of the supply. Sports broadcasting and sponsorship, advertising and marketing are examples of activities that may be sports driven, feature sporting events or personalities and so on. As such they would seem to be closely linked with sport but from a VAT standpoint are governed by rules specific to the nature of the supply rather than the context or subject matter. A payment made to a football club in return for shirt sponsorship is dealt with under the VAT rules covering sponsorship and there are no special rules simply because it is linked to a sporting activity and organisation. Here due regard may also have to be given to the place of supply rules; it may be that in this age of sports globalisation situations arise where some sports related activities are outside the scope of VAT.

The ABC of VAT

So before considering the detailed issues in respect of VAT and sports let us briefly revisit the essentials of VAT. First of all we need to have a "Taxable Person" who is making "Taxable Supplies". As article 13 tells us this excludes states, regional and local government authorities and other bodies governed by public law. So if two identical swimming pools are operated in the same town, one by the local municipality and the other by a privately owned commercial organisation then following the Directive it would appear, on the face of it, that only the second pool is operated by a "Taxable Person".

This leads us onto another essential fact about VAT; which is that as consumers the general public are generally unaware as to the impact of VAT issues other than when a change in the VAT rate leads to a price increase. We pay an admission charge to use the local swimming pool but we do

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not consider if the sum we have paid is inclusive or exclusive of VAT. But this will be a concern for the commercial operator because they are, on the face of it, going to have to ensure that their charges factor in the net cost VAT. Potentially having to account for VAT makes the commercial operation less profitable overall than the municipal pool. The commercial operator will have to charge admission at the same level as their municipal competitor or charge more to cover the extra cost of VAT and in so doing risk having fewer customers.

This would appear to lead to a distortion of competition; and following the VAT Directive as sports facilities are not included in Annex I of the Directive there would appear to be a VAT problem. Readers will recall that Annex I lists out specified activities which, if they are undertaken by a public body, mean that the public body shall be considered a taxable person.

Domestic UK legislation

The body responsible for administration of VAT in the UK is now H M Revenue & Customs (HMRC). Whilst domestic legislation must always defer to European Law, the position adopted by HMRC is to consider the wording of the VAT Directive of only limited and narrow application. Article 13 applies to the activities of public authorities, but only those "activities or transactions in which they engage as public authorities". This is taken by HMRC to mean that in other areas such as the provision of leisure facilities, and including the operation of a swimming pool, the public authority will be treated as a taxable person making taxable supplies.

Specific UK legislation at Section 42 VAT Act 1994 (the Act) provides that where a "local authority" (defined at Section 96 (4) of the Act as broadly any district or local town or borough council i.e. a "public body") makes taxable supplies then it must register under the Act and regardless of the level of such supplies (my emphasis). For all other traders the registration threshold for VAT is currently GBP £73,000.

HMRC issue VAT notices which set out detailed guidance in respect of VAT and the HMRC interpretation of the law. VAT Notice 749 (April 2002): "Local Authorities and similar bodies" details the VAT treatment of letting facilities for sport or physical recreation undertaken by local authorities at paragraph 5.8.4.

> *"If a public authority charges members of the public for sporting or recreational facilities, it is not acting in its capacity as a public authority. It is not acting under a special legal regime applicable to it but rather under the same legal provisions as those that apply to private traders. The activity is business."*

So by virtue of a narrow interpretation of Article 13 and specific domestic legislation HMRC ensure that our local authority and commercial swimming pool operators are both considered as taxable persons. As such, both will have to register under the Act and they will each have to charge VAT on admission tickets and will be able to recover VAT on the cost of their purchases and other supplies.

The nature of the supply

Under Section 3 of the Act supplies of goods or services are usually charged at what is referred to as the "standard rate" of VAT which is currently 20%. Sections 29A, 30 and 31 of the Act provide for a reduced rate, zero-rating and exempt supplies. Supplies that are exempt are specifically listed at Schedule 9 of the Act as different "Groups" and include inter alia Group 10 Sport, sports competitions and physical education.

If a supply is exempt, then whilst VAT does not need to be charged as Output Tax it is also not possible to claim for any VAT input tax suffered in connection with the making of exempt supplies.

The point has already been made that UK legislation must effectively follow on from EU law and so we must look to Articles 131 and onwards of the VAT Directive for the origin of the UK law. These articles are contained at Title IX of the Directive which is divided into chapters. Chapter 2 lists out the first set of exemptions and is headed "Exemptions for certain activities in the public interest". So it is clearly set out in the Directive that the general public, in their capacity as consumers of goods and services, should not have to pay VAT on certain types of goods and services. The reason for this is also made clear because these goods and services are considered by the EU to be socially beneficial. As such these activities should be tax free and are therefore to be exempt from VAT.

This apparent benevolence and any clue as to there being an underlying social policy objective at work is notably absent from the wording and structure of the applicable domestic UK legislation. With reference to the relevant domestic UK law, the Act lacks any headings detailing *why* these exemptions from VAT exist. The exemptions are simply listed out in Part I of Schedule 9. The exemptions are not broken down into two parts ("Public Interest" and "Other") as in the case of the VAT Directive itself. This being the case the groups of exempt supplies as detailed at Schedule 9 appear to be an odd list being all mixed up together.

Article 132.1(m) states *that the supply of certain services closely linked to sport or physical education by non-profit-making organisations to persons taking part in sport or physical education* is to be an exempt supply. Paragraph 1(o) allows for the organisations making the supplies as detailed at (m) to treat their supplies of services and goods made in connection with fund raising events to also be treated as exempt supplies. Paragraph 2 of Article 132 allows for restrictions to the number of fund raising events or the money that is raised.

Article 133 allows for conditions to be made that must be satisfied in order for organisations to be granted exemption, but the wording of the article is permissive and not mandatory, i.e. *Member States my make*, and in contrast to the mandatory nature of the exemptions themselves, i.e. *Member States shall*. The UK has incorporated certain of these conditions set out at Article 133 into UK legislation. Therefore in order to qualify for exemption under the terms of the Act the organisation must:

- be non-profit making;
- "re-invest" surpluses from income generated by exempt supplies to maintain or improve its own sporting facilities or for the purposes of a not-for-profit organisation (this would include payments to a national governing body etc.);
- have in its constitution restrictions on the distribution of profits;
- not be subject to commercial influence;
- not be part of a wider commercial undertaking.

Provided that the sports organisation meets all of these criteria, then it will be considered as an "eligible body". From 1 January 2000 the exemption for sporting services can only apply to an "eligible body". Prior to this it applied to all non-profit making organisations.

See VAT Act 1994, Schedule 9, Group 10.

HMRC provides detailed guidance in Notice 701/45 Sport that was most recently updated in August 2011. This guidance makes it clear that restrictions on the distribution of profits must be incorporated into the constitution of the organisation. However the simple fact of having such a clause does not of itself conclusively prove the status of the organisation. HMRC will, if it is considered appropriate, enquire into this or any other aspect of the club or organisation to consider if it is indeed an "eligible body".

Notice 701/45 Sport includes a list of activities that are considered to fall within the definition of sports and physical education activities that qualify for exemption. This runs from aikido to yoga and any representations can be made to HMRC in respect of an activity that is not listed. HMRC will then consider if the activity is a sport within the meaning of the sports exemption. Doubtless this offer was taken up by the Baton Twirlers of Britain as that activity is on the list as a recognised sport!

Finally due regard needs to be made of the provisions prohibiting exemption where the sports club or organisation is subject to commercial influence or is part of a wider commercial undertaking. HMRC not only consider the current position but will look back for up to three years when checking if salaries or bonus payments were made based on the gross income or profits of the club or if goods or services were purchased from an officer or shadow officer of the club at an overvalue. These rules extend to persons connected to such officers or shadow officers and intermediaries. HMRC have imported various definitions from direct tax legislation into these VAT rules and this indicates the anti-avoidance motive behind the legislation.

The consequences of exemption

On the assumption that the various conditions and as detailed above are met, then sporting and physical education services will be exempt from VAT. This exemption will cover the provision of certain sporting and physical education services and the grant of a right to enter a competition by an eligible body. It will also cover the grant of a right to enter a competition in sport or physical recreation provided the consideration for the grant consists of money which will be allocated entirely to prizes. Here there is no requirement for the organiser to be an eligible body in order for the supply to be exempt.

Both the directive and so by default UK law require that it is only those activities that are "closely linked" to the actual sports activity which may be exempt. In addition to this linkage and as required by Article 132.1(m) under UK law the VAT Act 1994 Schedule 9 Group 10 Item No. 3 requires the supply of services to be *essential to sport or physical education in which the individual is taking part,* thereby incorporating Article 134(a) of the Directive.

Notice 701/45 Sport sets out HMRC's views as to what supplies are to be considered closely linked and essential. These are as follows:-

– playing, competing, refereeing, umpiring, judging, coaching or training;
– use of changing rooms, showers and playing equipment together with storage of equipment essential to the sporting activity;
– match fees charged by an "eligible body" for use of the playing facilities;
– where they are applicable (e.g. flying/sailing/yachting/motor sports etc.) mooring, hangarage and use of workshop facilities.

But the following are not considered to be closely linked and essential:

– attending events as a spectator;
– being involved in the administration of the sports organisation;
– the supply of parts or the services of an engineer (e.g. flying/sailing/yachting/motor sports etc.)

So if a local motor sports club organised a race at which spectators (even if they were members) were charged an admission, then this would be a taxable supply and subject to standard rate VAT.

In addition to the type of activities that will be considered as potentially exempt due regard must also be given to the "consumer" of those services. In the case of a members club such as a golf club, then services must be supplied to individuals taking part in the sporting activity. Membership must be for at least three months duration. Any services of whatever nature supplied to non-members will follow the basic VAT rule for the nature of the supply and exemption cannot be in point. If the club has no membership scheme, then services must again be supplied to individuals that are taking part in the sporting activity.

The UK legislation contains notes specific to each of the groups in Schedule 9 and Note (1) to Group 10 specifically excludes the supply by an eligible body of services relating to residential accommodation, catering or transport. With regards to each of these sorts of supply the basic rules of UK VAT must be considered and the rules pertinent to each will apply. As such residential accommodation is likely to fall within the exemption for supplies of land, catering will be standard rated and transport may qualify for zero-rating or be standard rated depending upon the exact circumstances.

Canteens etc. VAT arrangements

It will be appreciated therefore that the great majority of sporting clubs and most obviously those with an element of social provision such as a canteen or bar or similar will be making supplies that are a mixture of exempt and standard rated. These so called "mixed supplies" can cause a potential VAT problem. Where they are supplied by a club or association, then due regard must be given to the guidance HMRC have issued in Notice 701/5 Clubs and Associations. Essentially one must ascertain if there is a single supply or multiple supplies. The strict legal position is that a single supply is made where one component of the supply is the principal component to which all the other components are ancillary, integral or incidental. Where there is a single supply the entire transaction must be treated as having the VAT liability of the principal component. If there are multiple supplies, then each component will take its own liability and if a single composite charge is levied (a membership fee or monthly subscription for example), then this has to be apportioned.

Sports clubs or organisations that are considered to be making a single exempt supply following the above rules could be disadvantaged. This would be on the basis of their not being able to recover any input tax on components of the exempt single supply. If these components would be standard rated if they were treated as a separate supply, then in the normal way VAT input would be claimed. By extra statutory concession where non-profit

making bodies are affected in this way they may still apportion a composite subscription between the various elements and as if there had been multiple supplies. This allows for the recovery of input tax or an element of such tax where under the strict letter of the law such tax would be irrecoverable. See ESC 3.35 VAT.

VAT on sports accommodations and other land related issues

As a basic starting point and following Article 135(j), (k) and (l) of the directive,UK VAT law treats most transactions involving land and buildings as being exempt from VAT. See Schedule 9 Group 1-Land of VAT Act 1994. A supply of land is made when there is an outright sale, but also where there is a lease or a letting of land. It is possible for the taxable person who makes the supply to opt to tax. If there is such an option, then the supply will be treated as being a standard rated supply.

If the sports club or organisation owns the land that it is situated on and sells this land to relocate to different premises, then in respect of this transaction the starting point, as above, is that there has been an exempt supply. Readers will appreciate that VAT issues often require an analysis along the chain of the transaction to ascertain the most appropriate VAT planning and outcomes. Continuing the example of the sports club that is relocating let us assume that the club has already located their new site. It is important to consider the VAT status of this new land.

If the seller of "new land" has opted to tax, then the sports club will be charged VAT on their purchase. This represents an additional cost to the club, but subject to the status of the purchaser of the sports club's current land it may be possible to reduce this VAT burden. If the sports club land is being sold to a property developer who is going to build residential housing, then the property developer will be making zero rated supplies for VAT purposes. As such they will be able to recover any input VAT they suffer, which would allow for the sports club to opt to tax their supply of land to the property developer. An option to tax relates to the land itself rather than the trader and so this would not automatically impact on the sports clubs status. If the land transaction resulted in a substantial profit and this was not all reinvested in the new site or otherwise expended on the provision of sports etc. by the sports club, then a separate point might arise with regards to the "not-for-profit" status of the club.

Any sports club or organisation should also ensure that land transactions do not fall foul of the commercial influence provisions where land is made available to the club via a director, shadow director etc. In these circumstances the grant of any form of rights to occupy the land which is or is expected to become land used in connection with or for sports, must broadly be wholly gratuitous or if there is consideration it should be for only a nominal amount. This also applies to any disposal of land to the sports club made by a director, shadow director etc.

In regards to an existing site, then the supply by a club to its members of the playing area such as a court or pitch or green fees for a golf club will be an exempt supply. Similarly, if some other "eligible body" such as a sports centre makes these supplies, then they will be exempt. But even here one must consider all of the services that are being provided and analyse them in terms of VAT and supplies. If the members club or the sports centre charges separately for car parking, then this would be a standard rated supply.

If the sports club does not have facilities of its own and is obliged to rent them on a session by session basis, then the land owner will be making a standard rated supply and would have to charge VAT. However, provided that the supply is of sports facilities (land designed or adapted for the playing of any sport or taking part in physical recreation) and the period of letting is either for 24 hours or for a series of at least 10 or more sessions, then the supply may be exempt. If the club would not be able to recover the VAT on the rent it pays, then this additional cost would have to be passed on and so the exemption would obviously be an attractive saving.

With regards to any construction activities undertaken by the sports club such as building new sports facilities or new changing rooms etc., then these supplies are likely to be standard rated. There is the technical possibility of zero rating the construction of new buildings that are going to be used by a charity for "relevant charitable purposes". These are as distinct to any business purpose that a charity may undertake and as such it is difficult to see how this could be reconciled with the activities associated with a typical members club, i.e. the provision of sporting facilities paid for by a subscription etc. which are very much in the nature of a business rather than a charitable purpose.

There is also provision for zero rating a building that is to be used as or is analogous to a "village hall". But here HMRC guidance clarifies that this cannot extend to buildings or structures such as community amateur sports clubs or those used by members clubs. Zero rating will only extend to a building such as a sports pavilion or community sports centre where there is a high degree of community involvement in the building's operation and activities and a wide variety of uses are put to the building which can include sporting ones. This requirement for community involvement would be negated by the requirement of membership and as a requirement to being able to use and enjoy the building.

See Notice 708 Customs Building and Construction.

Fundraising and VAT

The UK VAT regime allows for an exemption from VAT in respect of certain fundraising activities carried out by charities and other qualifying bodies that include inter alia any body that is an "eligible body" for the purposes of Schedule 9 Group 10 of VAT Act 1994 and whose principal purpose is the provision of facilities for persons to take part in sport or physical education. In so doing it follows Article 132.1(o) of the directive.

Such fundraising activities would include by way of example a ball or a concert with a paying audience, a sporting event, an auction of brought in goods (auctions of donated goods are zero rated), a fireworks display or a Christmas bazaar etc. To prevent any distortion of competition such events are limited to no more than 15 per year at any one location and must not be part of the normal social or administrative calendar of the club. If they are, then HMRC consider that such events are not fund raising events.

Such events must be organised for and promoted as being for the purpose of raising funds. If it is requested, then evidence to support the fund raising nature of an event should be readily available and publicity and tickets etc. should clearly state that the event is "fund raising for"/is "in aid of" or similar.

Any sports club that does undertake such fundraising would need to consider if these activities were within the definition of "trade" and if so income tax or corporation tax might be due on any profits. Whilst by concession a charity or voluntary organisation that qualifies for the VAT exemption on fundraising is automatically exempted from direct taxes, this does not extend to any other qualifying body such as a members club.

See HMRC Help Sheet re Fundraising for Charities and qualifying bodies.

Conclusions

It will be appreciated from the foregoing that the UK follows the VAT Directive closely and there is an obvious and direct linkage as between UK VAT law in the area of sports and EU legislation.

The great majority of activity that is sports related is subject to VAT in the normal way and it is only in the areas of direct participation in sport or the encouragement of such participation by national bodies that the possibility of VAT exemption arises.

The whole area of VAT and property related transactions is complicated by the default UK position of exempting all land and property transactions but allowing for an option to tax.

Building and construction works in the areas of sports will typically be standard rated and the favourable treatment for charities and community buildings that can allow for zero rating is unlikely to be available to sports clubs and organisations.

As HMRC make clear in Notice 701/45 Sport:

> *"There are no special rules on goods and services supplied to sports bodies… you might not be able to reclaim all or any of the VAT you incur. We strongly suggest that you budget for any irrecoverable VAT when considering your future expenditure, particularly when undertaking major projects."*