Sports Law & Taxation

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

Contents

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SEPTEMBER 2020

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

ISSN nr.: 2211-0895
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Preferred citation: *Sports, Law and Taxation (formerly GSLTR) 2020/3*, at page number(s)

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EDITORIAL

It is with much pleasure that we welcome readers to the September 2020 edition (citation: *SLT 2020/3*) of our ground-breaking journal *Sports Law and Taxation* (SLT) and on-line database www.sportsandtaxation.com.

Since our last issue, the coronavirus (COVID-19) pandemic, which has, sadly, continued to claim hundreds of thousands of lives around the world, not least in the United States – the latest global death total, at the time of writing, according to the World Health Organization, is 871,000 – once again has been dominating the sporting headlines around the world. However, there has been some easing of restrictions and the gradual resumption of several sports, including football and cricket, albeit under special conditions and protocols, including play without spectators.

The future of sport post COVID-19, whenever that might be, has been occupying the minds of sports administrators and policy makers, including the European Union Council, which has recently issued a detailed statement on the subject. In view of its importance, we are reproducing it in full in this Editorial. No doubt, this will provide much food for thought for sports administrators in Europe and beyond, given the fact that, globally speaking, Europe punches way above its weight in sporting terms, compared with the rest of the world.

As readers will see, the EU Council Statement is addressed to the member states, the European Commission and to the sport movement, and its text is as follows.

Brussels, 22 June 2020
(OR. en)

8926/20

SPORT 22
SAN 206
PROCIV 39
EMPL 324
SOC 412
FIN 386
SUSTDEV 73

OUTCOME OF PROCEEDINGS
From: General Secretariat of the Council
To: Delegations
No. prev. doc.: 8697/20
Subject: Conclusions of the Council and the Representatives of the Governments of the Member States meeting within the Council on the impact of the COVID- 19 pandemic and the recovery of the sport sector

Delegations will find in the annex the conclusions of the Council and the Representatives of the Governments of the Member States meeting within the Council on the impact of the COVID-19 pandemic and the recovery of the sport sector, approved by the Council by written procedure on 22 June 2020, in accordance with the first subparagraph of Article 12(1) of the Council's Rules of Procedure and Article 1 of Council Decision 2020/556.

These conclusions will be forwarded for publication in the Official Journal, as decided by the Committee of Permanent Representatives on 17 June 2020.

ANNEX

Conclusions of the Council and the Representatives of the Governments of the Member States meeting within the Council on the impact of the COVID-19 pandemic and the recovery of the sport sector

THE COUNCIL AND THE REPRESENTATIVES OF THE GOVERNMENTS OF THE MEMBER STATES MEETING WITHIN THE COUNCIL

RECALLING THAT:

1 The outbreak of the COVID-19 pandemic is having a huge impact across the world in terms of public health, economic activities, employment and social life.

2 In the fight against the COVID-19 pandemic, saving lives and protecting the health of our citizens, remains the first and utmost priority.

3 In order to stem the spread of the COVID-19, various measures have been introduced in Member States, depending on the stage of the epidemic and other specific circumstances. In cooperation with public authorities, there have been visible prompt reactions from the sport sector. The sport sector has contributed to the prevention of the spread of the virus in the early phase of the outbreak, through various measures and recommendations aiming at all relevant stakeholders, including sport organisations, clubs, athletes, coaches, sport staff and volunteers, as well as spectators and citizens.

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Image rights agreements in light of the football jurisprudence

BY ARNE AL[1]

Introduction

Branding plays a significant role in the so-called "commodification" of sport. Sports events, teams and individual sports persons are seen and treated as "commodities" to be commercialised, bought, sold and traded. This is particularly true in football – the world's favourite game and most lucrative sport.[2] Football players have an increasingly independent commercial value and seek additional income through their likeness. In line with this, football clubs are also searching to extend their commercial possibilities and are looking for a variety of ways to monetise and grow their revenue base.

It is not unusual that players and clubs sign additional agreements to the employment contract. These additional agreements are also related to the use and exploitation of the image rights or personality rights of the player. "Image rights", "publicity rights" and "personality rights" all refer more or less to the same rights. For the sake of ease, they are referred to in this article as "image rights". In a football context, image rights are simply the right that a player possesses to control, sell, license and otherwise monetise his or her likeness – that is, his or her image, name, nickname, voice, signature and all other characteristics unique to the player.

Clubs and players enter into a structure whereby a payment is made by the club in return for the right to exploit the player's image rights. Various disputes have arisen in relation to such agreements as governments are concerned that some sports clubs may be "disguising" salary as image rights payments, in order to reduce the overall tax burden for the player and the club. As this can have potentially significant tax benefits for both parties.[3]

It is not surprising that image rights agreements are also at stake in disputes between clubs and players. However, it follows from art. 22 lit. b of the FIFA Regulations for the Status and Transfer of Players ("RSTP") that the FIFA Dispute Resolution Chamber ("FIFA DRC") is only competent to hear disputes of an international dimension if the dispute is employment-related. It is, therefore, interesting to see when the FIFA DRC is competent to hear disputes in relation to (payments of) image rights agreements.[4]

In this article, the author will discuss the jurisprudence of the FIFA DRC in relation to image rights agreements and provide insights which elements the FIFA DRC deems crucial, in order to establish its competence to deal with disputes related to these (separate) agreements.

Jurisprudence of the FIFA DRC

In 2006, the FIFA DRC stressed, when verifying it could deal with claimed payment in connection with image rights deriving from a license agreement, that it had no competence to deal with disputes related to image rights and, therefore, the player had to be referred to the competent national tribunals.[5]

Furthermore, in 2009, the FIFA DRC declared itself incompetent to deal with a claim based on an additional agreement regarding the player's "image rights", since it did not have competence to rule on claims deriving from a contract regarding image rights.[6]

In these two cases, the argumentation of the FIFA DRC was quite strict as the FIFA DRC only referred to art. 22 RSTP (regarding the competence of FIFA) and art. 24 RSTP (regarding the competence of the FIFA DRC) and deemed itself incompetent.

In 2013, the FIFA DRC seemed to make a turn in its reasoning which was also more comprehensive. In cases as from 2013, the FIFA DRC verified, for formal reasons, whether it was competent to deal with claimed payments in connection to an image right agreement signed by a player and the club. While analysing whether it was competent to hear this part of the claim, the FIFA DRC, without entering into any discussion regarding the actual wording of the specific

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2 I. Blackshaw, *Sports Image Rights in Europe* (T.M.C. Asser Press 2005), p. 2.

3 Clubs and players create image rights companies which sometimes sign the image rights agreements on their behalf.

4 The findings can also be relevant in relation to sponsor contracts and scouting agreements.

5 DRC 25 August 2006, no. 86613.

6 DRC 12 March 2009, no. 39274.

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article of the image rights agreement, which undoubtedly defined the agreement as an image rights agreement, wished to highlight that said agreement contained further elements which led to believe that it was not in fact an image rights agreement but rather a separate agreement to the employment contract, *i.e.* directly linked to the services of the player as a football player. The FIFA DRC stated that as a general rule, if there are separate agreements, the FIFA DRC tends to consider the agreement on image rights as such and does not have the competence to deal with it.[7] However, such conclusion might be different if specific elements of the separate agreement suggest that it was in fact meant to be part of the actual employment relationship. In the cases at hand, such elements appeared to exist.[8] In another case in 2013 the club contested the competence of FIFA's deciding bodies, highlighting that the dispute was of a civil nature considering that the claim is based on an image rights agreement and not an employment-related dispute, thus escaping from the competence scope of art. 22 RSTP.[9] However, the FIFA DRC decided not to consider the image rights agreements as such, but determined that said agreement was in fact an additional agreement to the employment contract instead. The agreements contained *inter alia* stipulations regarding bonuses, the use of a vehicle, accommodation and flight tickets, which the FIFA DRC considered typical for employment contracts and not for image rights agreements. Consequently, the FIFA DRC established that it was in a position to take the image rights agreements into consideration when assessing the claim.

The above approach of the FIFA DRC was followed in 2014. On 17 January 2014, the FIFA DRC rendered a decision in a case were the agreement contained inter alia stipulations regarding bonuses and accommodation expenses. The stipulations were, in the eyes of the FIFA DRC, typical for employment contracts and not for image rights agreements.[10] The competence of the FIFA DRC to handle the image right agreement in that case was appealed before the Court of Arbitration for Sport ("CAS"). The CAS decided that, having regard to the nature of the provisions of the image rights agreement and, in particular, the specific wording *"This agreement is part of the employment agreement between the Parties dated 01/07/2010",* the FIFA DRC was correct to consider the image rights agreement as part of the employment contract and included the financial obligations in the image rights agreement in determining issues of compensation.[11]

The FIFA DRC followed the same approach in a case in 2015. The FIFA DRC considered that the image rights agreement was, in fact, meant to be part of the actual employment relationship referring to the specific article of the image rights agreement which stated that *"the parties agree that this agreement shall be an additional and inextricable part of the contract of employment dated 3/12/2012"*.[12]

The foregoing jurisprudence was set out in an award in 2016 were the FIFA DRC recalled that elements such as, for instance, stipulations regarding bonuses, the use of a car and accommodation, are typical for employment contracts and not for image rights agreements.[13] If an agreement contains such elements, it suggests that it was, in fact, meant to be part of the actual employment relationship and, therefore, the FIFA DRC would be competent to deal with disputes related to that agreement. Although, in this particular case the FIFA DRC established that such elements were not included in the image rights fees deriving from the agreement and, therefore, decided that, referring to art. 22 lit. b RSTP, it could not deal with the claim pertaining to the image rights.

In line with this jurisprudence, the same applies to image rights fees deriving from the employment contract. Even if the relevant clause undoubtedly defines the payments as relating to image rights fees, the FIFA DRC will not consider the "image rights" payment clause as such, but will determine that such payments are provided for as remuneration when the payments are provided for in the employment contract alongside provisions relating to other remuneration and appear to be annual bonuses.[14]

In an award of 6 December 2018, the claim of the player was based on two different agreements. The claim included an alleged outstanding amount which was provided for in an image rights agreement signed between the player and a company. The FIFA DRC recalled that it is only competent to deal with employment-related disputes, that is, disputes which are directly connected to an employment relationship between a player and a club.[15] As such, the FIFA DRC held again that it is, in principle, not competent to deal with claims arising from image rights agreements. Moreover, the FIFA DRC recalled that it tends to the concept of image rights as non-employment-related which fall, as a general rule, outside the scope of art. 22 RSTP. In this particular case, the FIFA DRC concluded that none of the specific elements, which can suggest that the agreement, in fact, was meant to be part of the actual employment relationship,

7 A similar analysis by the FIFA DRC can be expected with regard to other separate agreements, for example, scouting agreements. See in this regard DRC 10 April 2015, no. 04151183.

8 DRC 30 August 2013, no. 08133402 and DRC 31 October 2013, no. 10131180.

9 DRC 13 December 2013, no. 12131045.

10 DRC 17 January 2014, no. 114396.

11 CAS 2014/A/3597 *AC Omonia Nicosia v. Iago Bouzon Amoeda*, award of 22 August 2014.

12 DRC 10 April 2015, no. 04151073. See in addition: DRC 10 February 2015, no. 02151030 and DRC 28 March 2014, no. 03141211.

13 DRC 18 March 2016, no. 03161256.

14 DRC 17 June 2016, no. 06161109. See also DRC 15 February 2018, no. 02180548. See in this regard also CAS 2012/A/2932 *AEK Larnaca v. Jean Francisco Rodrigues*, para. award of 1 July 2013.

15 See for an opposite case, were the payments deriving from the image rights agreement should have been made to a company and not the player, FIFA DRC 9 May 2014, no. 05141730.

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were included in the image rights agreement. Conversely, the FIFA DRC put special emphasis on the fact that the image rights agreement provided in its preamble that:

"The Assignor and the Assignee have agreed that the Assignee shall be exclusively responsible for and have under its control all commercial and promotional rights relating to the Rights within the Territory."

In addition, the FIFA DRC noted that the club was not even a signatory to the image rights agreement and that the agreement did not create any rights or obligations between the player and the club. In other words, it was even questionable whether the club had standing to be sued in relation to claims arising from the agreement. Consequently, the FIFA DRC was of the unanimous opinion that it was not competent to entertain the claim of the player based on the image rights agreement.[16]

As can be concluded from the abovementioned jurisprudence of the FIFA DRC in relation to image rights agreements, the FIFA DRC states that, as a general rule, if there are separate agreements, the FIFA DRC tends to consider the agreement on image rights as such and does not have competence to deal with it.

However, such conclusion might be different if specific elements of the separate agreement suggest that it was, in fact, meant to be part of the actual employment relationship. In case the image rights agreement does not include any employment-related benefits payable to the player, that is, benefits in return of the player for his services rendered to the club, but solely includes payments on the basis of the use by the club of the player's image rights, the FIFA DRC will decide that it does not have competence to deal with it on the basis of art. 22 RSTP.[17]

CAS jurisprudence

As opposed to the FIFA DRC jurisprudence, it can be derived from the jurisprudence of the CAS that art. 22 lit. b RSTP is, in principle, not to be interpreted narrowly. The FIFA DRC and the CAS, when asked to intervene through an appeal, should rather take into consideration the nature and elements of the dispute, in light of the overall circumstances of the employment relations, for the sake of establishing whether the dispute is related to the employment relationship. The FIFA DRC indeed does not interpret its competence narrowly and would, in principle, consider itself competent to adjudicate on a claim based on an image rights agreement, if such additional agreement *"was in fact meant to be part of the actual employment relationship". The FIFA DRC chooses to use the wording "employment relationship"* which is a wider concept than employment agreements. However, following the CAS, the examination of additional agreements should be executed in a wider context, based on the question whether this additional agreement is meant to be part of the employment relationship and, as such, leads to an employment-related dispute. If there is indeed no link between a separate agreement and the actual employment relationship, a dispute arising out of the separate agreement can hardly be described as employment related.

The approach of the FIFA DRC was considered quite formalistic in the sense that it rightfully determines that the examples of connecting elements are present, failing which the FIFA DRC will not consider itself competent. Following the CAS, the FIFA DRC should look beyond the narrow examples given in its jurisprudence.[18] In an award of the CAS in 2015, were the player, the club and a company concluded an image rights agreement, the CAS emphasised that it deemed it crucial that the club was a party to that agreement and that the club was directly responsible for the payments deriving from the image rights agreement. Also, the wording of the employment contract and the image rights agreement were considered essential. In addition, the contractual proposal of the club was considered relevant as well, as it did not make reference to the fact that another company would be a party in the contractual arrangements. On this basis, the CAS found that the FIFA DRC was competent to adjudicate on the player's claim on the basis of the image rights agreement, despite the fact that the image rights agreement did not contain a specific arbitration clause.[19]

In an award of the FIFA DRC, dated 27 November 2014, which was appealed by the player before the CAS, the club, the player and a company also signed an image rights agreement. The FIFA DRC emphasised that the agreement did not create any rights or obligations for the latter and did not contain any employment-related elements. The FIFA DRC deemed it fit to stress that the image rights agreement did not make any reference to the employment agreement signed between the club and the player. As a consequence, the FIFA DRC concluded that it lacked competence to deal with the claim related to the image rights agreement.[20] On appeal, the CAS came to another conclusion than the FIFA DRC, as it concluded that the image rights agreement was signed by the club and the player, and the club undertook "full responsibility" to pay the player the amounts due deriving from the image rights agreement. Following the CAS it was, therefore, apparent that the image rights agreement was part of the employment contract between the club and the player and the company was merely brought in as a payment vehicle

16 DRC 6 December 2018, no. 12181902. The members of the Chamber felt also comforted with their conclusion considering that it would appear that the parties to said agreement agreed for the exclusive jurisdiction of the CAS.

17 See for example DRC 25 September 2014, no. 0914523.

18 CAS 2015/A/3923, *Fábio Rochemback v. Dalian Aerbin FC*, para. 74-86, award of 30 October 2015. In this case the player adduced 15 "connecting elements" from which it derived that the image rights agreement was meant to be part of the actual employment relationship, see para. 88 of the award.

19 CAS 2015/A/3923 *Fábio Rochemback v. Dalian Aerbin FC*, para. 91-96 and 108, award of 30 October 2015.

20 DRC 27 November 2014, no. 1114904.

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that would allow the club to minimize the tax impact.[21]

In another case in front of the CAS, the panel took into consideration that the player and the club signed an additional agreement besides the employment contract, and no separate image rights company was established by the player which concluded the contract with the club. The panel was of the opinion that the image rights agreement agreed upon between the parties, had nothing to do with image rights, but rather appeared to be an additional understanding to the employment contract agreed upon between the parties.[22]

Recent developments

In line with the jurisprudence of the CAS, the FIFA DRC also started to take additional elements, besides the given specific elements as set out in its previous jurisprudence, into account when deciding its competence in relation to the image rights agreement. The FIFA DRC set out further elements which can lead to believe that an image rights agreement is, in fact, not an image rights agreement per se, but rather a separate agreement to the employment contract, that is, directly linked to the services of the player, as a player. In the specific case, the FIFA DRC took into account, when establishing that the image rights agreement was, in fact, meant to be an integral part of the actual employment relationship, that the image rights agreement was signed by the same parties as the employment contract, came into force on the same day, the image rights agreement was automatically terminated upon termination of the employment contract and the image rights agreement provided for monthly payments in an amount almost three times as high as the regular salary of the player as per the employment contract.[23] In another recent decision, dated 20 February 2020, the FIFA DRC observed that the image rights agreement was linked to the employment contract, had the same term and could be terminated should the employment contract be terminated as well and, therefore, concluded that the image rights agreement was intricately linked to the employment contract.[24]

Lessons to learn

From the above-mentioned jurisprudence, it can further be derived that it is cardinal to indicate specific elements which indeed indicate that the separate agreement *"was in fact meant to be part of the actual employment relationship"*. Specific elements to include in separate agreements and to emphasis in the proceedings to demonstrate that the FIFA DRC is competent to hear the dispute are:

- provisions regarding bonuses;
- the use of a car and accommodation;
- whether the club is a party to the image rights agreement;
- whether the agreement was signed by the same parties as the employment contract;
- whether the dates when the agreements came into force are the same;
- if the term of the agreements is the same, whether the termination of the image rights agreement is subject to the termination of the employment contract; and
- whether the monthly payments relate to the regular salary of the player as per the employment contract.

In case the separate agreement contains elements as mentioned above, the FIFA DRC will consider the agreement to be part of the employment relationship and, as such, as an employment-related dispute and, therefore, consider itself competent to deal with it on the basis of art. 22 RSTP.

In addition, the proposal of the club can include elements which indicate that the agreement was meant to be part of the actual employment relationship. It is advised that the parties take these elements in consideration when drafting separate agreements to the employment contract in case they want the FIFA DRC to be competent to deal with disputes deriving or related to these agreements.

Although it falls outside the scope of this article, it is noteworthy to mention that the specific elements of the separate agreements can also be very interesting in relation to the mitigation of compensation, which is consistent with the principle of positive interest embodied in art. 17 para. 1 RSTP.[25] Image rights agreements can possibly be taken into account when calculating the mitigation of compensation as they could be considered as benefits due to the player under new contracts.[26]

21 CAS 2015/A/4039 *Nashat Akram v. Dalian Aerbin FC*, para. 71-72, award of 3 February 2016.

22 CAS 2014/A/3579 *Anorthosis Famagusta FC v. Emanuel Perrone*, para. 62, award of 11 May 2015. The conclusion by the panel was further supported by the fact that the parties of the two agreements are the same and also, the remuneration stipulated in the two contracts is similar. Furthermore, the image rights agreement did not explicitly regulate what the payments stipulated in this contract are for, apart from a general reference to image rights and *"activities organized by the Club and its commercial sponsors"*.

23 DRC 7 March 2019, no. 03191308.

24 DRC 20 February 2020, *Cherfa Sofyane v. Alki Oroklinis*.

25 This also follows from art. 337c of the Swiss Code of Obligations. The duty to mitigate damages is regarded in accordance with the general principle of fairness, which implies that, after a breach by the club, the player must act in good faith and seek for other employment, showing diligence and seriousness, with the overall aim of limiting the damages deriving from the breach and avoiding that a possible breach committed by the club could turn into an unjust enrichment for him. See CAS 2018/A/6029 *Akhisar Belediye Gençlik ve Spor Kulübü Derne i v. Marvin Renato Emnes*, award of 17 September 2019 with reference to CAS 2016/A/4852; CAS 2016/A/4769 and CAS 2016/A/4678.

26 See in this regard, for example, CAS 2014/A/3577 *FC Vojvodina v. Ralph Serginho Greene*, award of 8 May 2015.

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Concluding remarks

In light of the jurisprudence reviewed above, it can be concluded that the FIFA DRC nowadays examines the additional agreements signed between the player and the club in a wider context, based on the question whether the additional agreement was meant to be part of the employment relationship and, as such, is considered as an employment-related dispute.

Based on the wording of art. 22 lit b RSTP, the FIFA DRC is apparently not only competent to deal with employment disputes between a club and a player in the narrow meaning of the term, but also in disputes between clubs and players that are related to the employment contract.

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