Esports from a European law perspective

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Introduction

In recent legal literature, much has been written about esports already. Many articles try to provide a definition of "esports", designate the most important stakeholders and indicate the challenges the esports industry faces. In legal literature, it is often noted that the esports industry and competitions are barely regulated. Some legal experts even believe that esports, therefore, cannot be considered to be a sport.2

Authors also note that there are challenges regarding players' rights and try to explain these challenges. One of the challenges addressed in the legal literature about esports is that teams are contracting players as self-employed entities, rather than by means of an employment contract.[3] Teams most likely rather work with self-employed players due to the fact that their contracts provide the parties with more contractual freedom, as labor law does not apply to self-employed players and does not provide any restrictions.

For example, this way of contracting makes it easier for teams to terminate contracts (prematurely), as the labor law protection employees benefit from in this regard does not apply. In addition, it is often cheaper for teams to contract with self-employed players, because these legal relationships are governed by a more favorable tax regime and no social security contributions have to be paid. Whilst some esports players voluntarily render their services as self-employed players, in most cases, esports players unwillingly (and unknowingly) give up a lot of legal safeguards. After all, they do not automatically get the protection that national labor law offers and they will often not be insured, for example, in case of an illness.

Whether esports players are genuinely self-employed or whether they qualify as employees is not only important in connection with the protection they receive under national laws. From a private international law perspective, the delineation between employees and self-employed players is important. For example, when it has to be determined which court is competent to deal with a dispute with an international dimension[4] between an esports player and his team, or when a judge or arbitrator needs to establish which national law is applicable in the subsequent proceedings; this distinction will often be decisive in practice.

In this article, I will first take a closer look at the rules governing the competence of the courts in international disputes within the European Union. I will also address the possibility of arbitration for employment-related esports disputes. Next, I will assess which national law should be applied in international situations cases in front of national state courts and how arbitration could simplify answering questions relating to the applicable law.

Jurisdiction in international disputes

If a case is connected to the jurisdiction of more than one country, due to the fact that the conflicting parties are domiciled in two different EU member states ("international disputes"), national courts in Europe shall apply the Brussel I-bis regulation ("Brussel I-bis")[5] in order to establish whether or not they are competent to deal with a contractual dispute.

In the case of an international dispute, art. 4 of Brussel I-bis provides that one can lodge a claim in front of the national courts of the country in which the defendant is domiciled. This rule is to be considered as the general principle of Brussel I-bis. It is, therefore, the safest choice for the claimant to follow this rule as far as the competence of the court is concerned. However, the Brussel I-bis regulation contains more provisions in relation to the competence of national courts. In this respect, I should first mention art. 7, 8 and 9 of Brussel I-bis. In short, these provisions stipulate, amongst other things, that in matters related to a (service) contract a person domiciled in a member state of the European Union may also be sued in another member

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2 D. Segaar, "eSports en governance" in: Sport en Recht deel 23 (2019); other opinion: N. Poggenklaas, "Overeenkomsten in de eSports industrie" in: *Sport en Recht deel 23* (2019).

3 R. Branco Martins, "Esports: noodzaak tot een betere regulering" in: S. Jellinghaus and G. Hahn (eds.), *Capita Sportrecht* (Gompel&Svacina 2018).

4 The author especially refers to situations in which the conflicting parties domicile in two different countries.

5 Regulation (EU) no. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

state, if the place of the performance of the obligation(s) in question is in that other member state. This rule would be applicable if an esports player is self-employed.

The Brussel I-bis regulation furthermore contains specific legislation related to the competence in international disputes related to an employment contract. These specific rules, which prevail over any of the previously mentioned articles of Brussel I-bis, can be found in the fifth section of the regulation. As a general rule, an employer may be sued in the courts of the member state in which he is domiciled.[6] An employer may also be sued in the courts of another country, if he habitually carries out his work in or from that other country.[7] However, an employer may start legal proceedings *only* in the courts of the member state in which the employee is domiciled.[8] Lastly, it is worth mentioning that parties to a dispute may only depart from the provisions of the fifth section of the Brussel I-bis regulation by an agreement which is entered into *after* a dispute has arisen or if it grants the employee rights to sue his employer in other states than those indicated.[9] This means that, if the parties agreed on the jurisdiction of a court before a dispute arises, for example, a jurisdiction clause is included in the employment contract, this agreement is not valid. If a player would be self-employed a valid and binding jurisdiction clause, however, can be agreed upon.[10]

Considering the aforementioned, it can be concluded that it is important to determine if an esports player's contract is an employment contract or if the player is self-employed before lodging a claim in front of a national court. If the player's contract is qualified incorrectly by the party that lodges a claim, one could be confronted with the situation that the respective court is not competent to deal with the matter at hand.

Arbitration in esports

Whilst the Brussel I-bis regulation contains compulsory rules with regard to the competence of civil courts, it does not prohibit parties to agree on arbitration.[11] Within sports, many disputes are resolved through arbitration, for example, at the Court of Arbitration for Sport ("CAS"). This is not very surprising, because arbitration has proved to be a very successful way of dispute resolution.[12] One of the key arguments for using arbitration is, of course, that arbitrators not only have the required legal knowledge but also have specific expertise in regard to the topic at hand (that is, sports).

In the sports industry, provisions in the statutes and regulations of (inter)national sports often "oblige" all actors within sports to lodge a claim in front of an internal dispute resolution organ and/or an arbitration tribunal instead of the national state courts. Considering the arguments raised in the cases of *Pechstein* and *Mutu*[13] one may question whether this "obligatory form" of arbitration is desirable. I will, however, not enter into that discussion. What I do want to mention (again) is that the esports industry is barely regulated.[14] A well-structured system with overarching international esports federations and national esports federations is not in place. This also means, inter alia, that there is no "obligatory form" of dispute resolution or arbitration within the esports industry.

In my experience, esports teams and esports players are not too keen on opting for arbitration by themselves. This does not come as a complete surprise to me. First of all, legal awareness within the esports industry is still relatively low. Furthermore, there are little options for teams and players in regard to choosing a fitting arbitrational tribunal. One of the best-known esports arbitration tribunals would be the Arbitration Court for Esports ("ACES") which is part of the World Esports Association ("WESA"). This organization, however, seems to be rather dormant, as the latest news on its website[15] is almost two years old at the time of writing this article. Furthermore, ACES does not seem to have its own list of arbitrators and decisions by ACES are not being published. Combined, these circumstances do not contribute to the esports industry's confidence in such arbitral courts.

In my professional opinion, it is a shame that there is no well-organized, active and transparent arbitral court for esports that takes into account the standards of art. 6 of the ECHR. I believe that the industry could benefit from having such an organization in place. In the first place, because this could solve difficult legal questions related to the civil courts' competence.

Applicable law in international disputes

In international disputes, questions can also arise in regard to which law is applicable. The Rome *I-regulation* ("Rome I")[16] applies in front of civil courts in situations involving a conflict of laws to contractual obligations and commercial

6 Art. 21 lid 1 sub a Brussel I-bis.

7 Art. 21 lid 2 sub b Brussel I-bis.

8 Art. 22 Brussel I-bis.

9 Art. 23 Brussel I-bis.

10 Art. 25 and 26 Brussel I-bis.

11 Art. 2 Brussel I-bis.

12 The number of cases in front of the CAS is raising on a yearly basis, from 371 cases in 2002 to almost 900 cases in 2020. The statistics: https://www.tas-cas.org/fileadmin/user_upload/CAS_statistics_2016_.pdf (accessed 9 March 2022).

13 European Court of Human Rights, 2 October 2018, cases 40575/10 and 67474/10 (*Mutu and Pechstein v. Switzerland*).

14 M. Lebbon, "An Australian Perspective On The Esports Industry And Its Core Legal Issues", in: *LawInSport*, available at www.lawinsport.com/topics/item/an-australian-perspective-on-the-esports-industry-and-its-core-legal-issues (accessed on 9 March 2022).

15 https://www.wesa.gg/news/ (accessed 9 March 2022).

16 Regulation (EC) no. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

matters.[17] Art. 3 of Rome I lays down the standard principle for all contracts: a contract shall be governed by the law chosen by the parties. In case the parties to a contract did not choose the law applicable to a contract, it shall determine which law is applicable based on art. 4 of Rome I. This art. 4, in short and insofar relevant for this article, stipulates that a contract will be governed by the law in which the service provider has his habitual residence.

Taking into account the above, a contract of a self-employed esports player will be governed by the law that the player and his team agreed on. In the absence of such a choice, the law of the country in which the player, being the service provider, resides will be applicable. However, if the esports player is an employee the aforementioned conclusions would be incorrect. Art. 8 and art. 9[18] of the Rome I regulation provide special rules prescribing the law that applies to employment contracts. Based on art. 8 para. 1 of the regulation:

"An individual employment contract shall be governed by the law chosen by the parties in accordance with Article 3. Such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable pursuant to paragraphs 2, 3 and 4 of this Article."

Art. 8 (para. 2) of Rome I stipulates that an employment contract shall be governed by the law of the country in which, *or from which*, the employee habitually carries out his work in performance of the contract. According to the same provision, the place in which the employee habitually carries out his work does not change if he is temporarily employed in another country. If the applicable law cannot be established by means of the place where the employee carries out his work, the law of the country where the place of business through which the employee was engaged is situated will apply. However, where it appears from the circumstances, as a whole, that the contract is more closely connected with a country other than that indicated in para. 2 or 3, the law of that other country shall apply.

Considering the aforementioned, one can draw the conclusion that employees receive a higher level of protection than workers that are self-employed. This is especially true if one realizes that a judge should compare the chosen law to the otherwise applicable law on each individual aspect and then apply the provisions which provide the best protection for the employee. An overall comparison will not suffice.[19] It is not always easy to apply the provisions of art. 8 Rome I correctly. In particular, determining the place where, or where from, the employee habitually carries out his work can be difficult. This also derives from case law in the international transportation sector. Case law, however, indicates that one should take into account *objective circumstances*, such as the place where the employee returns after a trip abroad, where the required working materials are located and how many hours he spends working in the different countries, in order to determine where or from where an employee normally works.[20]

In 2016, the Dutch court issued a notable ruling in this regard.[21] In that case, which revolved around an employee who worked mostly from his home which was located abroad, the court ruled that it was not the employee's *actual* workplace that should be considered, but the employee's *digital* workplace. The court concluded that working in the employer's digital environment was equivalent to working in the employer's office. This approach could be a godsend for employers in the esports industry where a great deal of work happens online. However, it remains to be seen whether the Dutch court's approach was correct. Unlike the Dutch court, the European Court of Justice seems to attach more value to where the employee is *actually* located.[22]

When addressing the question whether or not a case is "more closely connected" to another country, similar issues arise. Case law from the Dutch Supreme Court indicates that, with regard to the application of this provision, one should consider *"all circumstances"*,23 which by definition means it is up for debate whether or not a case is more closely connected to another country.

Taking into account that a lot of work involved around esports is conducted in an online environment, it can be quite hard to determine which law should apply to an esports player's employment contract. For example: a Belgian esports player is employed by a Dutch team and he continues to live in Belgium. Training, both physical and *in-game*, is conducted by the player from the player's home in Belgium. However, the player's trainers are all conducting their work from their office in The Netherlands. It could be argued that, based on the provisions of art. 8 Rome I, Belgian employment law applies. However, following the (criticized) reasoning of the Dutch court in 2016, one may also argue that Dutch law applies. And what happens if we would take into account that the esports player is participating solely in the Dutch FIFA competition, called the *edivisie*, for which he travels to The Netherlands during a couple of weekends

17 Art. 1 para. 1 Rome I.

18 I will leave art. 9 of the Rome I regulation undiscussed.

19 European Court of Justice, 15 July 2021, ECLI:EU:C:2021:600.

20 European Court of Justice, 15 March 2011, case C-29/10 (*Koelzsch*).

21 Rechtbank Den Haag, 10 May 2016, ECLI:NL:RBDHA:2016:5102.

22 Conclusion of A-G Saugmandsgaard Øe in Joined Cases C168/16 – and C169/16 – (*Nogueira and Others v. Ryanair*), ECLI:EU:C:2017:312, para. 99 et seq. (available at www.navigator.nl/document/id4fe613f31edd46708838c04f87c6c939?anchor=id-9ae0632f-f2e6-49d5-9c3c-e00ba35af897 (accessed 9 March 2022)) and CJEU 14 September 2017, C-168/16 and C-169/16 (*Nogueira and Others v. Ryanair*), ECLI:EU:C:2017:688, paragraphs 60 et seq. (available at www.navigator.nl/document/id4fe613f31edd46708838c04f87c6c939?anchor=id-23dbc8a0-66fe-4d32-9955-1f780ac9a0e9 (accessed 9 March 2022).

23 Hoge Raad, 23 November 2018, ECLI:NLHR:2018:2165 (*Silo Tank*).

per year? Does that have any effect on the place where the player habitually carries out his work change? I do not think so. However, it could be argued that playing matches in the Dutch *edivisie* is the most important part of all the obligations of the player. As a result, one may conclude that Dutch law should apply, because the contract is more closely connected to The Netherlands than it is to Belgium.

Discussions about the designation of the applicable law become even more complex when there is a "triangular relationship of employment". This is frequently the case in esports. Esports players are often contracted by a team and then (temporarily) "loaned" to, for instance, a professional soccer club.[24] If, in such a situation, there is also an international aspect (for example, a German player is made available by a German team to a French professional soccer club), the Directive concerning the posting of workers in the framework of the provision of services[25] may also play an important role in determining the applicable law. In this example, there is a good chance that German law will continue to apply, but that the esports player would be entitled to the so-called "core" labor rights and conditions of the country in which the player *actually* works.

The effect of arbitration

If esports teams and players would choose for arbitration more often, difficult questions related to the applicable law may be avoided all together. Depending on the law of the seat of an arbitral tribunal, the (procedural) rules of the arbitral tribunal may contain provisions regarding the law applicable to the merits of a case. Art. R45 of the CAS Code of Sports-related Arbitration, which stipulates that the law chosen by the parties should apply and, in the absence of such choice, Swiss law will be applicable, is a perfect example of this. Furthermore, in arbitration the arbitrators may apply the *ex aequo* et bono principle if the involved parties agree to this. This would leave even more room for the arbitrators to take into account esport-specific practices and circumstances. An overarching governing body that includes a dispute resolution mechanism, for example, similar to the procedure in front of FIFA and CAS, would even be better, because this overarching governing body may create its own rules and regulations for esports players' contracts. This may, also considering the specific expertise that arbitrators may, or should have, lead to a higher level of support of the rendered awards within the esports industry itself.

The qualification of esports player contracts

As extensively discussed above, the way in which a contract qualifies can impact both matters of jurisdiction and applicable law. In this regard, I would like to point out that the terms *"employment contract", "employer"* and *"employee"* may have different meanings depending on the context or a specific regulation. It *could*, for example, therefore, be possible that a contract would be considered as a self-employment contract in Germany, whereas the same contract would be considered an employment contract in The Netherlands. However, in the context of European law the aforementioned terms are explained rather unambiguously. The European Court of Justice even expressly stated that these terms in Brussel I-bis and Rome are the same.[26] Considering this and taking into account the criteria that the European Court of Justice applies when qualifying an agreement,[27] I believe it is safe to say that most esports players' contracts should be considered as an employment agreement under Rome I and Brussel I-bis. However, for now it remains important to determine what kind of contract is in place on a case-by-case basis.

Conclusion

Considering all the above, I wish to underline the importance of legal awareness in the esports industry. Furthermore, I believe that arbitration could be beneficial to the industry as a whole. First of all, because claims may be lodged in front of a court with specific expertise and second because it may be easier to determine what law is applicable. This should lead to a slightly higher level of legal certainty and/or awards that are better supported by the esports community itself. Last but not least, having an authoritative esports arbitration court may be a step in the right direction in order to regulate better the industry. Having said that, for now the international (European) esports industry will have to deal with difficult questions related to international private law before lodging a claim in front of a state court.

24 Lucio Mazzei and Luca Viola, *"Esports In Italy: Key Labour Issues & Why A Uniform Legal Framework Is Vital For Its Success"*, in: *LawInSport*, 8 December 2021,available at www.lawinsport.com/topics/item/esports-in-italy-key-labour-issues-why-a-uniform-legal-framework-is-vital-for-its-success (accessed on 9 March 2022).

25 EU 2018/957.

26 European Court of Justice, 28 January 2015, C-375/13, ECLI:EU:C:2015:37, *Harald Kolassa v. Barclays Bank*., available at www.navigator.nl/document/idde5af661a44d438e9c0f83c49b86cba7?anchor=id-bd523a52-cff8-419a-a0f5-554bb40b3699 (accessed 9 March 2022).

27 European Court of Justice, 16 July 2020, C-610/18, ECLI:EU:C:2020:565 (*AFMB*).