The Sports Law Review

Second Edition

Editor
András Gurovits

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THE TRANSPORT FINANCE LAW REVIEW

THE SECURITIES LITIGATION REVIEW

THE LENDING AND SECURED FINANCE REVIEW

THE INTERNATIONAL TRADE LAW REVIEW

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CONTENTS

EDITOR'S PREFACE

This second edition of *The Sports Law Review* is intended as a practical, business-focused legal guide for all relevant stakeholder groups in the area of sports, including sports business entities, sports federations, sports clubs and athletes. Its goal is to provide an analysis of recent developments and their effects on the sports law sector in 20 jurisdictions. It will serve as a guidebook for practitioners as to how a selected range of legal topics is dealt with under various national laws. The guidance given herein will, of course, not substitute for any particular local law advice that a party may have to seek in connection with sports-related operations and activities. It puts specific emphasis on the most significant developments and decisions of the past year in the relevant jurisdictions that may be of interest for an international audience.

The *Sports Law Review* recognises that sports law is not a single legal topic, but rather a field of law that is related to a wide variety of legal areas, such as contract, corporate, intellectual property, civil procedure, arbitration and criminal law. In addition, it covers the local legal frameworks that allows sports federations and sports governing bodies to set-up their own internal statutes and regulations as well as to enforce these regulations in relation to their members and other affiliated persons. While the statutory laws of a particular jurisdiction apply, as a rule, only within the borders of that jurisdiction, such statutes and regulations, if enacted by international sports governing bodies, such as FIFA, UEFA, FIS, IIHF, IAAF and WADA have a worldwide reach. Sports lawyers who intend to act internationally or globally must, therefore, be familiar with these international private norms if and to the extent that they intend to advise federations, clubs and athletes that are affiliated with such sports governing bodies. In addition, they should also be familiar with relevant practice of the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland, as far as it acts as the supreme legal body in sport-related disputes. Likewise, these practitioners should have at least a basic understanding of the Swiss rules on domestic and international arbitration as Swiss law is the *lex arbitri* in CAS arbitration.

While sports law has an important international dimension, local laws remain relevant in respect of all matters not covered by the statutes and regulations of the sports governing bodies, as well as in respect of local mandatory provisions that may prevail over or invalidate certain provisions of regulations enacted by sports governing bodies.

Each chapter of this second edition will start by discussing the legal framework of the relevant jurisdiction permitting sports organisations, such as sports clubs and sports governing bodies (e.g., national and international sports federations), to establish themselves and determine their organisational structure, as well as their disciplinary and other internal proceedings. The section detailing the competence and organisation of sports governing bodies will explain the degree of autonomy that sports governing bodies enjoy in the jurisdiction, particularly in terms of organisational freedoms and the right to establish an internal judiciary system to regulate a particular sport in the relevant country. The purpose of the dispute resolution system section is to outline the judiciary system for sports matters in general, including those that have been dealt with at first instance by sports governing bodies. An overview of the most relevant issues in the context of the organisation of a sports event is provided in the next section and, subsequent to that, a discussion on the commercialisation of such events and sports rights will cover the kinds of event- or sports-related rights that can be exploited, including rights relating to sponsorship, broadcasting and merchandising. This section will further analyse ownership of the relevant rights and how these rights can be transferred.

Our authors then provide sections detailing the relationships between professional sports and labour law, antitrust law and taxation in their own countries. The section devoted to specific sports issues will discuss certain acts that may qualify not only as breaches of the rules and regulations of the sports governing bodies, but also as criminal offences under local law, such as doping, betting and match-fixing.

In the final sections of each chapter the authors provide a review of the year, outlining recent decisions of courts or arbitral tribunals in their respective jurisdictions that are of interest and relevance to practitioners and sports organisations in an international context, before they summarise their conclusions and the outlook for the coming period.

This second edition of *The Sports Law Review* covers 20 jurisdictions. Each chapter has been provided by renowned sports law practitioners in the relevant jurisdiction and as editor of this publication I would like to express my greatest respect for the skilful contributions of my esteemed colleagues. I trust also that each reader will find the work of these authors informative and will avail themselves at every opportunity of the valuable insights contained in these chapters.

András Gurovits
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Chapter 8

GERMANY

Dirk-Reiner Martens and Alexander Engelhard[1]

I ORGANISATION OF SPORTS CLUBS AND SPORTS GOVERNING BODIES

i Organisational form

Sports clubs and sports governing bodies in Germany are traditionally organised in the form of (registered, non-profit) associations according to Section 21 et seq. of the German Civil Code (BGB).

In order for an entity to qualify as an association, the following requirements need to be fulfilled:[2]

a at the time of its foundation, the entity must be a voluntary organisation of at least seven persons;[3]

b it must have a certain purpose that is not only temporary and is independent from any change of members of the association;

c it must have a corporate structure and a name; and

d it must be registered in a register of associations at the local court.

If the above-mentioned requirements are met, an association has legal personality, meaning it can acquire rights and obligations under the law.[4]

Entities involved in sports choose to organise in the form of an association for various reasons: the possibility to organise as an association is generally independent from the number

1 Dirk-Reiner Martens is the principal and Alexander Engelhard is an associate at Martens Rechtsanwälte.

2 Haas/Martens, *Sportrecht – Eine Einführung in die Praxis*, Schulthess 2011, p. 22.

3 Section 56 BGB.

4 Palandt, *Bürgerliches Gesetzbuch*: BGB, Section 21(1).

of members.[5] Financial risks for members are limited, since association members typically are not liable for debts accrued by an association.[6] Moreover, association members are generally equal and have the same voting rights in an association's general assembly, which is the prime decision-making body of the association.[7]

Under German law, associations enjoy a wide degree of autonomy to regulate their own affairs, including the right to draw up internal regulations and set up an internal dispute resolution mechanism.[8] If organised as non-profit associations according to Section 51 of the German Internal Revenue Code (AO), associations enjoy certain tax benefits. To be recognised as non-profit associations, organisations can still engage in secondary commercial activities (renting a stadium, selling tickets to a sport event, etc.) the financial return of which must be used to fund their non-profit activities.[9] However, if an association through sponsorship and merchandising generates a profit, it will regularly transfer its commercial activities onto a separate (commercial) legal entity.[10]

Because of the above, the German Football Association (DFB) in 1998 allowed the clubs of the German Bundesliga to spin-off their professional football departments as commercial companies.[11] Most clubs in the Bundesliga have made use of this possibility and have transformed their professional football departments into stock corporations (e.g., FC Bayern Munich (not listed)), limited liability companies (e.g., Bayer 04 Leverkusen Fußball GmbH) or partnerships limited by shares with a limited liability company as general partner (e.g., Borussia Dortmund GmbH & Co KGaA (listed)).

5 However, according to Section 73 BGB, the local court has to revoke the legal personality of an association if the number of members drops below three.

6 Exceptions apply in situations in which a member mixes funds of the association with his or her own funds and if the association is used in bad faith to escape personal liability. For more details, see Heermann, *Haftung im Sport*, Boorberg 2008, p. 95. See also Section I.iii, *infra*.

7 Section 32 BGB, according to which the affairs of the association, to the extent that they are not decided by the board or another organ of the association, are dealt with in a meeting of the members (i.e., the general assembly).

8 Article 9 of the Basic Law for the Federal Republic of Germany (GG) provides for the freedom of association.

9 See Haas/Martens, p. 34.

10 For more details see Lentze/Stopper, *Handbuch Fußball-Recht*, Erich Schmidt Verlag 2012, p. 795 et seq.

11 However, at the same time, provisions were put in place that required the majority of voting rights within such companies (i.e., >50 per cent) to be controlled by their parent member associations. For further information about the 50 + 1 rule, see Keidel/Engelhard, 'Football club ownership in Germany – Less Romantic than You Might Think', LawInSport.com 2015: www.lawinsport.com/articles/item/football-club-ownership-in-germany-less-romantic-than-you-might-think (last visited on 24 October 2016).

ii Corporate governance

The corporate governance of sport organisations in Germany is not subject to any sport-specific national laws, but is upheld through the interaction of civil, public and criminal laws as well as certain corporate governance guidelines of sport organisations such as the German Olympic Sports Confederation (DOSB).[12]

The relevant civil laws include provisions on the internal structure of associations,[13] their liability and that of their representatives.[14] Public laws provide for rules demanding the selfless activity of associations, the use of funds only for statutory purposes and not for the benefit of an association's officials, or that upon dissolution, the assets of an association may not be transferred to one of the association's officials but will have to be used for a specified common public interest.[15] Relevant criminal matters include:[16]

a insolvency offences: Section 283 et seq. of the Criminal Code (StGB) and Section 15a of the German Insolvency Code;
b misrepresentation offences: for example, Section 399 of the Stock Companies Act or Section 82 of the Limited Liability Company Act;
c breach of fiduciary trust: Section 266 StGB;
d commercial bribery: Sections 299 and 300 StGB;
e public bribery: Section 331 et seq. StGB;
f tax fraud: Section 370 AO; and
g illegal gambling: Section 284 StGB.[17]

Beyond the (general) legal framework set out above, in 2007 the DOSB passed the DOSB Corporate Governance Codex and the DOSB Code of Ethics.[18] The DOSB Corporate Governance Codex contains binding rules on issues such as conflicts of interest and transparency, and is applicable to the DOSB organs.[19] Compliance is supervised by the Good Governance Commissioner, who draws up an annual good governance report that is published on the DOSB website.

12 The DOSB is the non-governmental umbrella organisation of German sport. It was founded in 2006 as a result of a merger of the German Sports Confederation and the National Olympic Committee for Germany. The DOSB has 98 member organisations, including 16 regional sports confederations, 63 national (sport-governing) federations and 20 sport associations with particular tasks. For more information, see www.dosb.de (last visited on 24 October 2016).

13 For example, Sections 26 and 32 BGB.

14 See Section I.iii, *infra*.

15 Section 51 et seq. AO.

16 For more details, see Fritzweiler/Pfister/Summerer, *Praxishandbuch Sportrecht*, third edition 2014, p. 841 et seq.

17 See below Section VIII.ii, *infra*.

18 The current edition of the DOSB Corporate Governance Codex (2008) and the DOSB Ethics Code are available at www.dosb.de/de/organisation/wir-ueber-uns/good-governance (last visited on 24 October 2016).

19 In the preamble of the Codex, the DOSB suggests that its member associations implement similar regulations concerning the good governance of their respective organisations.

The DOSB Code of Ethics claims to define the overall conduct and dealings of German sport altogether and towards third parties. It is binding for volunteers, employees and members of the DOSB.[20]

iii Corporate liability

Associations are legally represented by their boards. If a board member, while acting for an association, causes damage to a third party, the association is liable for that damage according to Section 31 BGB.[21] This liability towards third parties cannot be ruled out in the statutes of an association.[22] Moreover, the German Federal Court of Justice (BGH) has extended the liability of associations to acts committed by managers and officials who are not board members (or who are not authorised to act on behalf of an association) as long as they had a meaningful and independent role within an association.[23]

The liability of an association does not supersede the liability of an individual committing an act that causes damage:[24] the association and the individual will be jointly liable for that damage.[25] According to the general rules of German contract or tort law, or both, such individual will be liable, *inter alia*, with regard to the failure to pay social security contributions or to timely file for the opening of insolvency proceedings.[26] Considering the far-reaching scenarios of individual liability in the sport association context, managers and officials should consider taking out directors and officers liability (D&O) insurance.[27]

II THE DISPUTE RESOLUTION SYSTEM

i Access to courts

As in many other legal systems, under German law, sports governing bodies are prohibited from preventing an athlete, club or other sports stakeholder from challenging a decision of

20 When compared with other ethics regulations in sport (e.g., the FIFA Code of Ethics), it can be seen to contain hardly any concrete and enforceable rules of conduct, but rather touches mostly on soft issues such as tolerance, sustainability and participation.

21 For more details see Heermann, p. 67.

22 *Id.,* p. 77.

23 *Id.*, p. 67; BGH, judgment of 30 October 1967 – VII ZR82/65.

24 *Id.*, p. 82.

25 Regarding the internal relationship between an association and an individual who committed the act in question, the association will be able to recoup damages from the individual according to Section 840(2) BGB. However, Section 31a BGB contains a liability privilege for an official towards the association and its members if an official earns less than €720 per year. In such a case, an official will only be liable if he or she acted intentionally or with gross negligence. See also OLG Nürnberg, order of 13 November 2015 – 12 W 1845/15.

26 For further examples, see Heermann, p. 83 et seq.

27 D&O liability insurance provides coverage to managers and officials to protect them from claims that may arise from the decisions and actions they take within the scope of their regular duties. Intentional and grossly negligent (illegal) acts are typically not covered under D&O policies.

such sports governing body before a state court or arbitral tribunal.[28] However, the rules and regulations of a sports governing body may prevent direct appeals against first instance decisions before a state court or arbitral tribunal if the sports governing body has an internal appeals body that may rectify the first instance decision. In practice, internal challenges against first instance decisions by sport organisations are hugely important, not least because of the enormous number of first instance decisions produced by sports governing bodies each year.[29]

As a result of the above, an athlete or club intending to appeal a decision of a sports governing body before a state court or arbitral tribunal must in general exhaust all (internal) legal remedies available to it prior to the appeal. Sports governing bodies are allowed to set reasonable time limits regarding an internal appeal that, if not observed by the appellant, may lead to the appealed decision becoming final and binding.[30] Only under rare circumstances may internal remedies be disregarded if an internal appeal would be unreasonable or a mere formality. This would be the case if the appeals body of a sports governing body declares that it will dismiss the appeal before the appeal proceedings have even started, if the appellant's right to be heard is violated or if the appeal body is constituted in an improper way.[31]

Once all (internal) legal remedies are exhausted, the question of whether a decision can be appealed before a state court depends on whether the parties have concluded a valid arbitration agreement. In cases where an arbitration agreement does not exist or is invalid, or where a dispute is not arbitrable, an appeal may be brought before a state court.[32]

The scope of review conducted by a state court will typically encompass the following aspects:[33]

a Was the athlete, club or other sports stakeholder covered by the scope of the governing body's jurisdiction and sanctioning regime?

b Was there a sufficient legal basis for the decision contained in the rules and regulations of the sports governing body?

c Were the procedural rules of the sports governing body respected?

d Were fundamental procedural rights observed?

e Was the decision legal in view of higher ranking legal principles?

f Did the decision-making body establish accurately the facts that form the basis of the decision?

g Was the decision legal in the sense that it was neither arbitrary nor unjust?

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28 See Haas/Martens, p. 119. Any provision to the contrary in the rules and regulations of a sports governing body would be invalid.

29 Hilpert, *Sportrecht und Sportrechtsprechung im In- und Ausland,* De Gruyter 2007, p. 19. In German football alone, an estimated 400,000 first instance proceedings are conducted annually.

30 See Haas/Martens, p. 121.

31 *Id.*, p. 121.

32 Regarding the requirements for a valid arbitration agreement and the question of arbitrability, see Section II.ii, *infra*.

33 See Fritzweiler/Pfister/Summerer, p. 276 et seq.

If the sports governing body in question can be considered a monopoly, the court will also assess whether the rules and regulations of the sports governing body itself are substantively adequate.[34]

Typical requests for relief brought before a state court include:[35]

a annulment of a disciplinary sanction;
b annulment of a sporting result;
c admission of an athlete or club into an association; and
d (preliminary) admission of an athlete into a competition.[36]

In light of the above, the BGH recently held that the Regional Football Association of Northern Germany was not allowed to order the relegation of the club SV Wilhelmshaven, as there was no sufficient basis for such disciplinary sanction in the rules and regulations of the governing body, despite the fact that the club had violated the FIFA Regulations on the Status and Transfer of Players.[37]

ii Sports arbitration

The legal framework applicable to arbitration proceedings conducted in Germany is set out in Section 1025 et seq. of the Code of Civil Procedure (ZPO).

Section 1031 ZPO provides that the parties need to agree to arbitration in writing, either in a document signed by both parties or by making reference in a contract to a document containing an arbitration clause.[38] The arbitration agreement must be sufficiently clear as to the scope of disputes that shall be submitted to arbitration.

An arbitration clause may also be contained in the statutes of an association.[39] One of the issues in this regard is that the arbitration agreement contained in the statutes of an association is usually not entered into voluntarily by the athletes or clubs affected by it. The

34 *Id.*, p. 280.

35 *Id.*, p. 265.

36 A good example is the case of German triple jumper Charles Friedek, whose request for a (preliminary) nomination to participate in the 2008 Olympic Games was turned down by the Regional and the Higher Regional Court in Frankfurt (OLG Frankfurt, judgment of 30 July 2008 – 4 W 58/08, NJW 2008, 2925). On 13 October 2015, the BGH held that Friedek was entitled to damages from the DOSB for not nominating Friedek for the Games although he had fulfilled the nomination criteria. The case has been referred back to the previous instance to decide about the amount of damages to be paid (BGH, judgment of 13 October 2015 – II ZR 23/14).

37 See *NJW-Aktuell* 42/2016, p. 12.

38 Section 1031 ZPO also provides that an arbitration agreement in which a consumer is involved must be contained in a record or document signed by the parties. This is the case if the arbitration agreement relates to neither a commercial nor self-employed activity of the athlete.

39 Section 1066 ZPO; see also Musielak/Voit, *ZPO*, 12th edition 2015, paragraph 7. The arbitration clause must be contained in the statutes (and not in other (lower-ranking) regulations) of the association. Non-members are generally not bound by the arbitration clause in the statutes even if the association and the non-member conclude a contract that refers to the arbitration clause in the statutes.

argument was raised in the fiercely debated case of German speed skater Claudia Pechstein, who was seeking damages before a German state court against the International Skating Union (ISU) after she had been banned for doping by the governing body and had lost subsequent proceedings before the Court of Arbitration for Sport (CAS) in Lausanne and the Swiss Federal Tribunal. In the latest decision, the BGH confirmed that in sports matters, the need for international uniformity of decisions trumps the requirement of a 'voluntary' arbitration agreement.[40]

Sports disputes are arbitrable according to Section 1030 ZPO as long as they concern pecuniary matters.[41] Labour law-related disputes, for instance between a player and his or her club, are generally not arbitrable under German law.[42] Because the relationship between athletes in non-team sports and sports governing bodies rarely qualifies as an employment relationship, disputes between athletes and sports governing bodies are usually arbitrable.

A sports governing body is generally prohibited from excluding the right of an athlete or club to (also) seek preliminary measures before a state court.[43] Only in those cases where the arbitral tribunal can provide the same degree of legal protection (with regard to preliminary measures) as a state court may the arbitral rules prohibit resort to a state court for preliminary measures. This is the case, for instance, with regard to the German Court of Arbitration for Sport (DIS-Sport), a division of the German Institution for Arbitration (DIS), which has an on-call duty of arbitrators on any day of the week.[44]

The DIS-Sport,[45] which is the most important sports arbitral tribunal in Germany, was founded in 2008. It is based on a joint initiative of the German National Anti-Doping Agency (NADA) and the DIS. Disputes before the DIS-Sport include:

a breaches of anti-doping rules;

b disputes arising in the context of sports events;

c transfer disputes;

40 BGH, judgment of 7 June 2016 – KZR 6/15; Despina Mavromati, The Legality of the Arbitration Agreement in favour of CAS under German Civil and Competition Law – The Pechstein Ruling of the German Federal Tribunal (BGH) of 7 June 2016, published in *CAS Bulletin* 2016/1, p 40; see also OLG München, judgment of 15 January 2015 – U 1110/14 Kart, see also Duve/Rösch, *SchiedsVZ* 2014, 216. Ms Pechstein has lodged a constitutional complaint against the BGH decision before the German Federal Constitutional Court (BVerFG).

41 The term 'pecuniary matter' must be interpreted in a wider sense, and also includes claims for admission into a competition if the monetary interests of the athlete or club are also affected. Antitrust issues are also arbitrable.

42 Sections 4 and 101 of the Labour Court Act.

43 See Haas/Martens, p. 133.

44 *Id.*, p. 134.

45 The DIS-Sport is currently recognised by 50 German sports governing bodies, including the German Basketball Federation and the German Athletics Federation. For further information about the DIS-Sport, see the DIS website: www.dis-arb.de/em/57/content/about-the-dis-id46 (last visited on 25 October 2015); and the information provided by the National Anti-Doping Code at www.nada.de/fileadmin/user_upload/nada/Downloads/Regelwerke/080305_NADA_Informationsblatt_Schiedsgerichtsbarkeit.pdf (last visited on 24 October 2016).

d disputes regarding licensing and sponsoring agreements; and
e membership disputes.

The DIS-Sport may decide cases as a first instance tribunal or on appeal against a previous decision by a sports governing body, provided that the association has implemented a corresponding arbitration clause in its statutes.[46] In disputes regarding a breach of anti-doping rules, the DIS-Sport Arbitration Rules provide for a review of an arbitral award by the CAS.

iii Enforceability

An arbitral award has the same effect as a final and binding judgment by a state court,[47] and enforcement requires the arbitral award to be declared enforceable by a state court.[48] The recognition and enforcement of foreign arbitral awards is governed by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. It is worth mentioning that disciplinary (doping) decisions of an arbitral tribunal are 'self-enforcing', in that the sports governing body has the power to ensure that banned athletes are prevented from competing.

Arbitral awards may be challenged by means of an annulment claim.[49] The reasons for annulment of arbitral awards according to Section 1059 ZPO are limited primarily to procedural issues. An appeal that the award is 'wrong' will not be heard.

III ORGANISATION OF SPORTS EVENTS

i Relationship between organiser and spectator

The legal relationship between the organiser and the spectator is not subject to any sport-specific national laws, but rather to the law of the land, and is primarily defined by the ticketing contract concluded between the parties.[50] Apart from the general rights and obligations of the parties (the ticket holder being entitled to enter the venue and to follow the sports event from the assigned seat; the event organiser being entitled to receive the purchase price for the ticket), the ticketing contract will contain certain terms and conditions. The exact content of the terms and conditions will depend on the type of ticket that is purchased (e.g., a match-day or season ticket), but will usually include limitations on ticket transfer, liability and security, and filming and photography.

To validly include the organiser's terms and conditions in the ticketing contract, they must be brought to the attention of the purchaser before the ticket is bought.[51] Thus, printing the terms and conditions on the back of the ticket does not suffice if the ticket is handed out to the purchaser only after the ticketing contract is concluded. As a rule, a clearly visible

46 Section 1 DIS-Sport Arbitration Rules.
47 Section 1055 ZPO.
48 Section 1060 ZPO.
49 See Haas/Martens, p. 123.
50 For further details regarding ticketing see Lentze/Stopper, p. 833 ff.
51 Section 305 BGB.

notice about the terms and conditions at the place of purchase is required, or if the ticket is purchased online, the customer must agree to the terms and conditions prior to making the purchase.[52]

For security reasons, in order to ensure a widespread supply of tickets, and to prevent black-market trading and ticket speculations, organisers will regularly include a clause in the ticketing terms and conditions that allows ticket purchases for private use only.[53]

Regarding liability, the organiser will usually include a clause in the ticketing terms and conditions that will limit its liability and that of its legal representatives or agents to damages caused by intent or gross negligence.[54] However, damages caused to life, physical integrity or health, and those under product liability law or owing to fraudulent misrepresentation, will remain unaffected. Furthermore, the spectator will usually be prohibited from bringing fireworks, bottles, cans, intoxicants or pets into the stadium.[55]

Finally, the organiser will also stipulate in the ticketing terms and conditions that the use of cameras and other picture and film recording devices (e.g., smartphones) for commercial purposes is prohibited. At the same time, a spectator will consent to the free use of his or her image and voice in any type of media (e.g., for photographs, live broadcasts or other recordings by the organiser (or its agent) created in connection with the event).

ii Relationship between organiser and athletes or clubs

In Germany, the legal relationship between the organiser and the athlete or club is not subject to any sport-specific national laws. It can either be defined by membership (if the organiser is an association of which the athlete or club is a direct member), or through a licence or another private agreement between the parties.

Because professional athletes or clubs are often not direct members of the organiser (if indirect members, a mere reference to the rules and regulations of a higher ranking governing body can be problematic),[56] the athlete or club must submit to the rules and regulations of the organiser either by applying for and receiving a licence to participate in a certain competition or by concluding a participation agreement with the organiser.[57] The BGH has decided that Section 305 et seq. BGB, which regulate the inclusion of terms and conditions into private agreements, do not apply to agreements by which an athlete submits to the rules and regulations of a sports association.[58] It is sufficient that the applicable rules and regulations are provided to the athlete upon request.[59]

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52 See Lentze/Stopper, p. 852.

53 For details see Section VIII.iv, *infra*.

54 In the case of a negligent breach of a principal obligation under the ticketing contract, liability will usually be limited to foreseeable damage, while in the case of a negligent breach of a secondary or collateral obligation, liability will be excluded entirely.

55 See also Section III.v, *infra*.

56 Unlike Swiss law, German law prohibits 'dynamic' referencing to future editions of the rules and regulations of another (higher-ranking) sports governing body. See Haas/Martens, p. 70.

57 *Id.*, p. 66 et seq.

58 BGH, judgment of 28 November 1994 – II ZR 11/94.

59 If the rules are changed by the organiser during the duration of the contract, the athlete has the right to withdraw from the contract if the rule change appears inappropriate and unacceptable. See Haas/Martens, p. 75.

As an example, German Olympic athletes ahead of the 2016 Rio Olympic Games had to sign the DOSB athlete's agreement[60] as well as the International Olympic Committee (IOC) entry form and eligibility conditions that, *inter alia*, also contained an arbitration agreement in favour of CAS.

Professional clubs usually submit to the regulations and the disciplinary powers of a sports governing body (e.g., a league) by concluding a licensing agreement with it. Typical licensing criteria will include sporting, legal, personnel and administrative, infrastructure and security, and media and financial aspects.[61]

iii Liability of the organiser

An organiser may be liable not only towards its contractual partners (including athletes and spectators) but also towards third parties under the general rules of German civil law. The relevant statutory provisions, the application of which may be influenced by disclaimers contained in athlete agreements, ticketing terms and conditions or other types of agreements, relate to, *inter alia*,[62] Section 280 et seq. BGB (damages for breach of contract) and Section 823 et seq. BGB (damages for unlawful conduct).

Besides claiming damages (which are generally restricted to compensation without the possibility to claim punitive damages[63]), an injured person may also seek injunctive relief against a continued violation of his or her rights.[64]

The most relevant criminal provisions applicable to organisers include Section 223 et seq. StGB (causing bodily harm) and Section 229 StGB (involuntary or negligent bodily harm); and Section 212 StGB (manslaughter) and Section 222 StGB (involuntary or negligent manslaughter).[65]

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60 The DOSB athlete's agreement for the 2016 Rio Olympic Games contained, *inter alia*, the following obligations for athletes: (a) recognition of the World Anti-Doping Code, the National Anti-Doping Code, the Olympic Charter and other regulations and fundamental documents; (b) acknowledgement of team orders and the DOSB's sole responsibility to nominate athletes; (c) acceptance of the DOSB dress code and the obligation to wear sponsor-related attire without changing or blocking any of the sponsors' logos subject to a contractual penalty; and (d) acknowledgement of the rules on advertisements in the Olympic Charter and the prohibition of any form of advertising during the Games. The DOSB athlete's agreement for the 2016 Rio Olympic Games is available at www.dosb.de/fileadmin/Bilder_allgemein/Veranstaltungen/Rio_2016/RIO_2016_Athletenvereinbarung_beschlossen_am_12.04.2016.pdf (last visited on 24 October 2016).

61 For more information on club licensing in the Bundesliga, see Lentze/Stopper, p. 665 et seq.

62 For more details on the civil liability of the organiser, see Heermann, p. 154 et seq.

63 Section 249 BGB.

64 See Heermann, p. 53.

65 AG Garmisch-Partenkirchen, judgment of 1 December 2009 – 3 Cs 11 Js 24093/08 (*Zugspitz-Lauf*). In this case, the court found that the organiser of an extreme run up Germany's highest mountain, Zugspitze, was not guilty of negligent manslaughter, although two of the participants had died of hypothermia during the race. The judge justified the acquittal by stating that the organiser had informed the participants about the weather on the Zugspitze and that the participants had put themselves at risk.

The criminal offences set out in Sections 223 and 229 StGB usually require a complaint by the victim for the prosecution to be initiated. However, the prosecution service may also initiate an investigation *ex officio* when there is sufficient public interest in the prosecution.

iv Liability of the athletes

The explanations and provisions set out in Section III.iii, *supra*, regarding the liability of the organiser also apply with regard to the liability of athletes, particularly Section 823(1) BGB (also Section 280 BGB in the context of a contractual agreement) as well as Sections 223 and 229 StGB. From a civil law and from a criminal law perspective, athletes must respect a general duty of care when exercising their sport, be it in a competition or in training.

A definition of the duty of care to be observed in an individual case will be based on the rules of the game of the respective sport.[66] Courts will use the rules of the game as a foundation when assessing whether a certain conduct was illegal and culpable. If an athlete complies with the rules of the game of his or her sport but nevertheless injures another athlete, the athlete will usually not be liable for any damage caused. In addition, in cases of only a slight violation of the rules of the game, liability will most often be denied. Courts will assess whether, in that particular moment, the athlete could have reasonably avoided the danger created for another athlete or third party. With regard to high-risk sports, such as boxing or other combat sports, liability is regularly denied not only in cases of compliance with the rules of the game but even in cases of slight negligence.[67] This far-reaching exemption from liability is justified by the fact that the injured person in general agrees to the dangers and injuries caused by that particular sport, or that the injured person acted at his or her own risk.

In cases where an athlete is liable and has to pay compensation, he or she must restore the position that would exist if the circumstance obliging him or her to pay damages had not occurred.[68] This may include lost earnings and a moderate compensation for immaterial damages (i.e., pain and suffering). When allocating the amount of compensation, any contributory negligence of the injured person will have to be taken into account.

v Liability of the spectators

The relevant statutory provisions concerning the liability of spectators can also be found in Section 823(1) BGB (as well as in Section 280 BGB if the spectator violates obligations under the ticketing contract), and Sections 223 and 229 StGB. If spectators invade the field of play, throw objects at athletes or physically assault athletes, they are generally liable and will have to pay compensation for damages caused according to Sections 280 BGB or 823(1) BGB, or both. A spectator cannot rely on the specific nature of sport in arguing that his or her conduct was not illegal or culpable, because spectators must behave in a way that does not increase risks for athletes in addition to those inherent to the sport itself.[69] The liability of spectators also extends to violations of property rights, personality rights and other rights protected under Section 823(1) BGB.

66 See Haas/Martens, p. 179. Where the sport does not provide for rules regarding on-field conduct, the duty of care is defined by comparing the conduct in question with that applied by a conscientious and considerate athlete.

67 See Haas/Martens, p. 183.

68 Section 249 BGB.

69 See Heermann, p. 225.

If a particular perpetrator cannot be identified from a specific group of spectators, Section 830(1) BGB provides that each of the persons involved will be liable for the damage caused.[70] A form of joint liability can even be found in criminal law, in Section 231 StGB, which allows punishment of a person for taking part in a brawl or an attack committed against one person by more than one person if the death of a person or his or her grievous bodily harm (Section 226 StGB) is caused by that brawl or attack. Violations of Section 231 StGB will be prosecuted *ex officio*.

vi Riot prevention

German law does not provide for any sport-specific national laws to prevent riots. In football, the rules and regulations of the DFB show a twofold approach: the DFB obliges Bundesliga clubs to employ a fan commissioner[71] and subsidises several fan projects. On the other hand, Section 9a of the DFB Disciplinary Code provides for the strict liability of clubs for the behaviour of their supporters and spectators.[72] The rules go as far as to provide that the home club and the away club are responsible for incidents of any kind in the stadium area before, during and after the game.

Under German law, clubs that are subject to a financial sanction on the basis of Section 9a of the DFB Disciplinary Code because of rioting spectators are able to take recourse against such spectators. In a recent judgment, the BGH held that spectators have a legal obligation not to interfere in the course of a sporting event. If, for example, a spectator violates such obligation by throwing a firecracker into the stands injuring seven people, that spectator is liable for the damage caused by his or her conduct, including a foreseeable financial sanction imposed on the responsible club pursuant to disciplinary regulations.[73] It must be clearly evidenced that a spectator is guilty of the alleged misconduct; more precisely, the club cannot take recourse against a spectator if it is not entirely clear that such spectator committed the offence in question.[74]

There is an ongoing debate in Germany about whether professional football clubs or the League should be held liable for the costs of police operations in connection with Bundesliga games. The reason that the debate has resurfaced in recent times was a change in the state law of Bremen, according to which administrative costs for police operations can now be claimed from the person or entity (e.g., an event organiser) in whose interest the operation took place.[75] However, for several different legal and practical reasons, the majority of states deem that such police operations should be paid for with taxpayers' money.[76]

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70 *Id.*, p. 225.

71 Section 5 Letter h League Statutes – Licensing Regulation.

72 For more information, see Haslinger, *Zuschauerausschreitungen und Verbandsanktionen im Fußball*, Nomos 2010.

73 BGH, judgment of 22 September 2016 – VII ZR 14/16 overturning OLG Köln, judgment of 17 December 2015 – 7 U 54/15.

74 LG Karlsruhe, judgment of 29 May 2012 – 8 O 78/12.

75 Section 4 Fees and Contributions Act (Bremen).

76 For more information, see Böhm, Polizeikosten bei Fußballspielen, *NJW* 2015, p. 3,000; Klein, Fußballveranstaltungen und Polizeikosten – Die Verfassungsmäßigkeit einer kostenrechtlichen lex-Fußball in Bremen, *DVBl* 5/2015, p. 275.

IV COMMERCIALISATION OF SPORTS EVENTS

i Types of and ownership in rights

German law does not recognise a specific sports organiser right *per se*.[77] It also does not recognise genuine broadcasting, sponsorship or merchandising rights. The question of whether, in what form and to what extent such rights exist, and to whom they belong, let alone how they might be transferred, is extremely difficult to answer. In the end, an organiser will have to rely on several different laws and rights to protect its event and investments.[78]

Of central importance is the 'house right' set out in Sections 858 and 903 BGB.[79] Usually, the organiser of a sporting event is able to exercise the house right regarding the venue where the event is held, either because it owns the venue (e.g., a stadium or an arena) or because the venue owner has transferred the house right to the organiser for the time of the event. The house right allows the organiser to exclude unauthorised persons or media from the venue or to allow entry subject to specific contractual conditions. Other important rights derive from copyright law, competition law, trademark law and tort law.

With regard to transfer rights in team sports, these mainly derive from an existing employment relationship of a player and his or her club, and the protection of this contractual relationship under the law and relevant regulations of sports governing bodies.[80]

ii Rights protection

The difficulty of the protection of rights of a sports organiser under German law can be explained using the example of broadcasting rights.[81] In view of the absence of a genuine broadcasting right, the protection thereof derives from the house right, as well as copyright law, competition law and tort law principles.

House right

This right allows the organiser to regulate access to a venue in relation to spectators and third parties (including radio and TV broadcasters).[82] In a broadcasting deal, the organiser will waive its house right in relation to the broadcaster for the latter to produce a live feed from the sporting event in return for a fee paid by the broadcaster to the organiser. However, property rights cannot sufficiently prevent unauthorised filming of a sporting event from outside the venue (e.g., a high building next to the stadium or a drone).

Copyright law

Sporting events under German law are generally not protected by copyright law because they are not considered personal intellectual creations (Section 2(2) of the Copyright Act

77 For more information, see the legal opinion of Hilty/Henning-Bodewig, *Leistungsschutzrechte zugunsten von Sportveranstaltern?*, Boorberg 2007.

78 For latest recent assessment in the debate on the implementation of a sports organiser's right, see Heermann, Neues zum Leistungsschutzrecht für Sportveranstalter, *GRUR* 2015, 232.

79 See also Sections 859, 862 and 1004 BGB.

80 For example, Article 13 et seq. FIFA Regulations on the Status and Transfer of Players.

81 For more information on German law regarding broadcasting rights, see Lentze/Stopper, p. 107 et seq.

82 BGH, judgment of 8 November 2005 – KZR 37/03, *NJW* 2006, p. 377 (*Hörfunkrechte*).

(UrhG)). In addition, organisers and athletes are not protected by copyright law (Sections 73 and 81 UrhG are not applicable). Athletes are not considered theatrical performers. Rarely are they protected by the right to control their own image, because they are public figures in the sense of Sections 22 and 23 of the Art Copyright Act. Section 94 UrhG protects at least the (host) broadcaster once it delivers or has delivered the pictures of a sporting event.[83] Section 87(1) UrhG protects the TV channel that is airing the broadcast.[84]

Competition law

The Act against Unfair Competition (UWG) prohibits certain trade practices that are considered unfair, such as exploiting or taking credit for somebody else's work. The BGH has considered that Section 3 UWG could prevent third parties from unauthorised filming and broadcasting of a sporting event.[85]

Tort law

Finally, it has also been suggested that the organiser of a sporting event who has made a considerable investment in order to hold a sporting event, or an athlete who has invested a lot in training, enjoy protection under Section 823(1) BGB against the unpaid exploitation of their investment.[86]

iii Contractual provisions for exploitation of rights

Contracts in the field of sport rights are manifold. It is indispensable for a sports rights holder to stipulate the rights that are transferred to a licensee diligently. At the same time, it is essential to also properly structure and manage all rights contracts in order to avoid conflicting rights deals and tap the full commercial potential of the rights holder.

As to the content of sports rights contracts, parties are generally free to agree upon the relevant rights and obligations. Limits to the parties' contractual freedom are merely provided by certain legal prohibitions (Section 134 BGB) or public policy (Section 138 BGB).

Taking broadcasting as an example, the main obligation of an organiser will be to grant complete access to the venue to the broadcaster for all contractual purposes. In return, the licensee (i.e., the broadcaster) will pay a licensing fee. Other relevant items in a broadcasting agreement will deal, *inter alia*, with:

a exclusivity;
b sub-licensing;
c territory;
d production;
e duty to broadcast;
f contract duration and termination; and
g warranty and indemnification.[87]

83 See Lentze/Stopper, p. 111.

84 *Id.*

85 BGH, judgment of 28 October 2008 – I ZR 60/09, GRUR 2011, p. 426 (*Hartplatzhelden.de*).

86 See Lentze/Stopper, pp. 124, 125.

87 Schwartmann, *Praxishandbuch Medien-, IT- und Urheberrecht*, CF Müller 2011, p. 426 et seq.; see also Lentze/Stopper, p. 137 et seq. or Fritzweiler/Pfister/Summerer, p. 455 et seq.

Statutory provisions that need to be observed in sports broadcasting contracts include those of German and European antitrust law, especially Article 101 of the Treaty on the Functioning of the European Union (TFEU). In today's converged media landscape, broadcasting rights and other media rights will usually be split up into different rights packages to meet antitrust obligations.[88] Other relevant norms include the right to produce short news extracts[89] in Section 5 of the Interstate Broadcasting Treaty (RStV) or Section 4 RStV regarding 'listed events'.[90]

V PROFESSIONAL SPORTS AND LABOUR LAW

i Mandatory provisions

Employment relationships in sport are subject to the general rules of German labour law, including the following noteworthy provisions:

a Section 611 BGB, Article 1 and 2 GG: the athlete has a right to play and train according to the terms of his or her employment contract. Degradation of a first team player to the reserves or to a separate training group is most likely unlawful unless provided otherwise in the contract.[91]

b Section 616 BGB: the athlete can claim his or her salary, although temporarily unfit to play because of injury. Details are set out in the Continued Remuneration Act.

c Section 1 Federal Holiday Act: the athlete has a right to at least 24 business days of paid leave during the calendar year.[92]

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88 For more information, see Schwartmann, p. 414 et seq.; also Bundeskartellamt, decision of 12 January 2012 – B 6-114/10.

89 For more information, see Soldner/Engelhard, Kehrtwende im Recht zur Kurzberichterstattung? – Die Rechtsprechung des BVerfG auf dem Prüfstand, *Kommunikation und Recht*, p. 488.

90 Listed events are major sport events that need to be broadcasted on free-TV. In Germany, the list includes:
a the Summer and the Winter Olympic Games;
b the games of the German national team at the FIFA World Cup and the UEFA EURO;
c the semi-finals and final of the FIFA World Cup and the UEFA EURO, irrespective of the participation of the German national team;
d the semi-finals and final of the DFB Cup;
e home and away games of the German national football team; and
f the finals of the European club competitions (i.e., UEFA Champions League and UEFA Europa League) if a German team is playing.

91 See ArbG Mannheim, judgment of 28 August 2013 – 10 Ga 3/13.

92 Regarding the time when an athlete is able to take leave, the template DFB player contract provides that leave shall only be taken during the period in which no competitive matches are taking place, and shall always require the club's prior express approval. An English version of the template employment contract for footballers provided by the DFB can be found at www.dfb.de/fileadmin/_dfbdam/31698-Mustervertrag_Vertragsspieler_englisch__07.2014_.pdf (last visited on 24 October 2016).

d Section 14 et seq. of the Act on Part-Time Work and Fixed-Term Employment Contracts (TzBfG): most athletes will have fixed-term contracts. According to Section 14(1) TzBfG, fixed-term contracts are only permissible if justified by an objective reason; otherwise, fixed-term contracts are only acceptable for up to two years. A fixed-term contract may not be renewed more than three times. However, it is widely accepted that athletes' contracts can be fixed-term because of the specificities of sport, including the necessity for clubs to restructure a team after each season. Accordingly a controversial decision by the Labour Court of Mainz that a 36-year-old goalkeeper should be reinstated permanently with his former club after the court had found that the specificity of sport was insufficient to justify the fixed-term contract with the player, was recently overturned on appeal.[93]

e Section 15 TzBfG: under German law, (justified) fixed-term contracts are valid for a duration of up to five years.[94] This also applies to fixed-term contracts with unilateral extension options, which are generally legal under German law. While a labour court in Ulm held in 2008 that a unilateral extension option in a player contract was invalid because it would constitute an excessive commitment for the player,[95] the Federal Labour Court in 2013 held that a four-year fixed-term contract of a youth player with a one-year unilateral extension option was valid under German law.[96]

f Section 626 BGB: a party to an employment contract (permanent or fixed-term) may terminate said contract unilaterally (without a required notice period) if there is a compelling reason, meaning that the party terminating the contract cannot reasonably be expected to continue the employment relationship.

g Tax and social security law provisions: the employer is obliged to withhold and pay income tax as well as social security contributions for his or her employees.

ii Free movement of athletes

After the *Bosman* decision of 1995,[97] and in light of the freedom of movement for workers stipulated in Article 45 TFEU (ex Article 39), German football has abandoned rules that used to limit the number of foreign EU players able to appear in Bundesliga matches. Since then, foreign EU players as well as players from other UEFA members can be transferred and fielded without limitation. However, Section 5 No. 4 of the Bundesliga Club Licensing Regulations requires that clubs have at least 12 German nationals on the squad. Because the overall squad size is not limited, the rule seems to comply with Article 45 TFEU.[98] Moreover, Section 5b of the Player Licensing Regulations obliges Bundesliga clubs to have eight locally

93 LAG Rheinland-Pfalz, judgment of 17 February 2016 – 4 Sa 202/15; overturned ArbG Mainz, judgment of 19 March 2015 – 3 Ca 1197/14.

94 Section 15(4) TzBfG.

95 ArbG Ulm, judgment of 14 November 2008 – 3 Ca 244/08.

96 Federal Labour Court, judgment of 25 April 2013, 8 AZR 453/12.

97 CJEU, judgment of 15 December 1995 – C-415/93 (*Bosman*).

98 See Fritzweiler/Pfister/Summerer, p. 729.

trained players[99] on their squad, of which four must be directly trained by the club. Because the local player rule fosters youth development and applies irrespectively of the nationality of locally trained players, it is also deemed compatible with European law.[100]

Other German league sports, including basketball and handball, have also dropped foreign player rules, while the clubs of the professional ice hockey league, DEL, have agreed not to register more than nine foreign players per season. Basketball has introduced a domestic player rule that every team needs to have at least six German players on their squad.[101]

iii Application of employment rules of sports governing bodies

German law generally allows that employment-related provisions in the statutes or regulations of (international) sports governing bodies be incorporated into employment agreements with athletes.

In football player contracts, for instance, the parties will make reference to the statutes, rules and regulations of the DFB, and will accept to submit to the decisions and the jurisdiction of the DFB and the League. Furthermore, players are also asked to acknowledge as binding the anti-doping regulations issued by the DFB, UEFA and FIFA as well as the World Anti-Doping Agency and NADA Codes.

It should be noted that in those sports in which a player must obtain a playing licence in order to participate in league competition, the revocation of said licence does not *per se* affect the validity of the employment contract.[102]

VI SPORTS AND ANTITRUST LAW

Besides the relevance of antitrust law regarding broadcasting rights (see Section IV.iii, *supra*), antitrust law plays an increasingly important role in sports in general.[103]

The purpose of German and European antitrust law is to protect competition against market restrictions caused by undertakings or associations of undertakings (including sports governing bodies). It does so by prohibiting the abuse of a dominant market position (Section 18 et seq. Act against Restraints of Competition and Article 102 TFEU) and prohibiting restrictive behaviour between undertakings (Section 1 GWB; Article 101 TFEU). Infringements of antitrust laws can lead to fines and compensation claims. In addition,

99 Locally trained players are either trained 'by the club' or 'by the federation'. A player trained 'by the club' is a player who, in three seasons or years between the ages of 15 and 21, was eligible to play for the club. A player trained 'by the federation' is a player who, in three seasons or years between the ages of 15 and 21, was eligible to play for a club affiliated to the DFB.

100 See Fritzweiler/Pfister/Summerer, p. 729. See also Streinz, 6+5'-Regel oder Homegrown-Regel – was ist mit dem EG Recht vereinbar?, *SpuRt* 2008, p. 224.

101 See Fritzweiler/Pfister/Summerer, p. 729.

102 *Id.*, p. 302.

103 For an overview of antitrust law issues regarding sport in Germany, see Stancke, Pechstein und der aktuelle Stand des Sportkartellrechts, *SpuRt* 2015, p. 46.

the Federal Cartel Office or the European Commission may prohibit the conclusion of a respective agreement altogether. Finally, agreements or statutes infringing antitrust law are also invalid according to Article 101(2) TFEU and Section 134 BGB.[104]

The Higher Regional Court in Frankfurt (OLG Frankfurt) recently confirmed again that the conduct of sports governing bodies falls within the scope of Article 101(1) TFEU if it does relate to an economic activity and not merely to the practice of sport. If such conduct has a restrictive effect the question is whether it is necessary and proportionate, and, in particular, whether it is appropriate for the purpose of protecting the integrity and functioning of the respective sporting competition.[105]

In the much debated decision of the Higher Regional Court of Munich in the *Pechstein* case,[106] the judges had held that the arbitration agreement between Pechstein and the ISU was invalid because the ISU – having a monopoly on the market for speed skating competitions – had abused its market power by requiring the athlete to consent to an arbitration agreement in favour of the CAS, because the latter operated on a closed list of arbitrators appointed by the International Council of Arbitration for Sport (ICAS), a body dominated by representatives of sports associations.[107] In 2016, the decision was ultimately overturned by the BGH, which found that the CAS was a 'genuine' court of arbitration and that the CAS Code contained sufficient guarantees for preserving the rights of athletes even if arbitrators had to be selected by the parties from a closed list prepared by the ICAS. According to the BGH, the influence of sports federations did not reach a degree that the federations had a controlling influence over the composition of the list of arbitrators. Also, the list of arbitrators did include a sufficient number of neutral persons who were independent. The Court also held that sports federations and athletes were generally not in opposing 'camps' guided by opposing interests in the fight against doping in sport.[108]

Another recent case involving antitrust law was the dispute between several German handball clubs and the International Handball Federation (IHF) and the German Handball Federation (DHB). In a first instance decision, the Regional Court of Dortmund[109] had accepted the claim of the clubs against IHF and DHB, ruling that the player release rules of the sports governing bodies (i.e., the obligation of clubs to release players for national team games without being entitled to compensation) infringed German and European antitrust laws. After said rules were changed in favour of the clubs the Higher Regional Court of

104 *Id.*, p. 46.

105 OLG Frankfurt, judgment of 2 February 2016 – 11 U 70/15 (Kart).

106 OLG München, judgment of 15 January 2015 – U 1110/14 Kart; *SchiedsVZ* 2015, p 40.

107 *Id.*, p 44. Regarding the criticism raised against CAS, see Duve/Troshchenovych, Seven steps to reforming the Court of Arbitration for Sport, *World Sports Law Report*, Vol. 13 Issue 4, April 2015. The Court's approach to assess the arbitration agreement in light of antitrust law had been criticised for different reasons. See, for instance, Duve/Rösch, Ist das deutsche Kartellrecht mehr wert als alle Olympiasiege?, *SchiedsVZ* 2015, p. 69.

108 BGH, judgment of 7 June 2016 – KZR 6/15. See also IX, *infra*.

109 LG Dortmund, decision of 14 May 2014 – 8 O 46/13.

Düsseldorf[110] set aside the first instance decision, finding, *inter alia*, that the claim of the clubs was no longer admissible, but also stating *in obiter* that the rules of the IHF and the DHB did not violate German and European antitrust laws.[111]

In June 2016, the Regional Court of Munich had ordered a temporary injunction against the International Basketball Federation (FIBA) and FIBA Europe, prohibiting the governing bodies from sanctioning national Basketball associations, leagues and clubs for the participation of clubs in the Euroleague, a competition organised by the private company Euroleague Commercial Assets.[112] The Court later lifted the temporary injunction for procedural reasons after FIBA Europe had filed an objection against the injunction.[113]

VII SPORTS AND TAXATION

Athletes residing in Germany (Section 8 AO) and those who have a usual residence in Germany (i.e., more than six months in the year, with short-term interruptions not being considered) (Section 9 AO) are subject to pay income tax according to Section 1(1) of the Income Tax Code (EStG). The different categories of income mentioned in Section 2(1) EStG and Sections 13 to 24 EStG are divided into different sources, including:

a commercial income (Section 15 EStG);
b self-employed income (Section 18 EStG);
c income from employment (Section 19 EStG); and
d other income (Section 22 EStG).

The taxable income from each of the above-mentioned sources is subject to different rules that will determine when, how and to what extent income tax is to be paid.[114]

Athletes residing in Germany and those who have a usual residence in Germany are subject to tax on their worldwide income. Double taxation of income earned abroad (e.g., by taking part in a competition in a foreign country) that is also subject to tax in the respective country is usually avoided on the basis of Section 34c EStG or a double taxation treaty.[115]

110 OLG Düsseldorf, decision of 15 July 2015 – VI-U(KART) 13/14.

111 One of the findings concerned the notion of 'agreement' or 'decision' in the sense of Article 101 TFEU. In this regard, the Court found that the decision of the IHF to adopt the contested regulations would not qualify as an 'agreement' or 'decision' within the meaning of Article 101 TFEU. The regulations would not aim to coordinate the behaviour of the member associations or the clubs concerning the marketing of league games. Their objective would be to ensure high-performing national teams and therefore to organise attractive competitions. The regulations would not lead to a relevant restriction of competition on the market of marketing league games.

112 LG München, 1 HK O 8126/16.

113 For more information, see www.fiba.com/news/fiba-europe-welcomes-munich-court-decision-to-cancel-temporary-injunction (last visited on 24 October 2016).

114 For more information, see Fritzweiler/Pfister/Summerer, p. 916.

115 See Adolphsen/Nolte/Lehner/Gerlinger, *Sportrecht in der Praxis*, Kohlhammer 2012, p. 505 et seq.

The taxation of sports governing bodies and sports clubs depends on their legal status and form (i.e., whether they are organised as registered, non-profit associations or as commercial companies).[116]

Foreign athletes and clubs who do not reside in Germany are subject to tax, only with regard to income that has a special domestic connection to Germany (Section 49 EStG). In that case, entities making payments to foreign athletes or clubs may have to withhold tax according to Sections 50 and 50a EStG.[117]

VIII SPECIFIC SPORTS ISSUES

i Doping

Until recently, Germany did not have any specific anti-doping criminal laws, with the exception of Sections 6a and 95 of the Medicinal Products Act, which prohibit distributing, prescribing or administering medicinal products to others for the purpose of doping as well as the purchase or possession of doping substances in quantities above a certain amount. Other criminal laws that apply to scenarios involving doping include Sections 212 StGB (manslaughter), 223 and 229 StGB (causing bodily harm, negligent bodily harm), Section 263 StGB (fraud) and Section 29 BtMG (illegal handling of narcotics).

There have been hardly any criminal proceedings regarding doping in Germany. The most famous case involved German cyclist Jan Ullrich, who was subject to a criminal investigation between 2006 and 2008 after he had obtained and used doping substances from Spanish sports medic, Eufemiano Fuentes.[118]

Because the above-mentioned legal framework supposedly failed to properly tackle the issue of doping in sport (mainly because the undertaking of doping as such was not subject to criminal liability), in 2016, the government implemented a new Anti-Doping Act (AntiDopG).[119] The law, which consolidates the above-mentioned provisions from different codifications, foresees prison terms for elite athletes (amateur athletes will not be affected),[120] coaches, officials and doctors who are caught, *inter alia*, using, administering or being in possession of doping substances.[121] Culprits could be imprisoned for up to three years. An offender who endangers a large number of people or who exposes someone to the risk of serious injury or death may face a prison term of up to 10 years.[122]

116 *Id.*; see also Section I.i, *supra*.

117 *Id.*, p. 517 et seq.

118 The investigation was mainly concerned with the question of whether Ullrich acted fraudulently in relation to his former employer, Team Telekom, by engaging in doping despite an express provision in his employment contract not to do so. However, because the prosecution was not able to establish that Ullrich's employer was truly unaware of his conduct and the parties had reached a settlement in a parallel civil proceeding, the case was abandoned according to Section 153a Criminal Procedural Code before it went to trial. Ullrich also had to make a substantial payment to end the criminal proceeding.

119 AntiDopG, in force since 1 January 2016, available at https://www.gesetze-im-internet.de/bundesrecht/antidopg/gesamt.pdf (last visited on 24 October 2016).

120 Section 4(7) AntiDopG.

121 Section 4(1) and (2) AntiDopG.

122 Section 4(4) AntiDopG.

The new law has been heavily criticised by legal scholars, athletes and anti-doping experts alike.[123] Until 1 June 2016, 14 criminal complaints have been lodged with the public prosecution offices on the basis of the new law.[124]

ii Betting

According to Section 284 StGB, providing unlicensed gambling and betting services is a criminal offence in Germany that can be sanctioned with a prison sentence of up to five years. Section 285 StGB provides that a person participating in unlicensed gambling shall be liable to imprisonment for up to six months or subject to a fine.[125]

Until recently, Germany had implemented a state monopoly on gambling through the Interstate Treaty on Gambling. However, in 2010, the Court of Justice of the European Union (CJEU) decided that this state monopoly on gambling violated European law and thus needed to be reformed.[126] The shortcomings of the existing system should have been resolved by the First Amendment to the Interstate Treaty on Gambling, which abolished the old state monopoly and replaced it with a new licensing system for private gambling and betting providers. Under the amended Treaty, online gambling remains illegal in Germany.[127] After the entry into force of the amended Treaty in 2012, licences should have been granted to a maximum of 20 private gambling and betting providers for an experimental phase of seven years. [128]

The Higher Administrative Court of Hessen recently decided that the new licensing system is illegal because it is non-transparent and undemocratic.[129] In February 2016, the CJEU ruled that a sports betting operator in Germany could not be charged under Section 284 StGB for providing customers with the opportunity to use a betting machine or computer offering bets by an Austrian betting provider without a German betting licence.[130] In April 2016, a local administrative court in Hessen decided that there was no justification

123 Steiner, Deutschland als Antidopingstaat, *ZRP* 2015, 51; Matthias Jahn, Noch mehr Risiken als Nebenwirkungen – der Anti-Doping-Gesetzentwurf der Bundesregierung aus Sicht des Strafverfassungsrechts, *SpuRt* 2015, 149.

124 For more information, see www.sueddeutsche.de/news/politik/sportpolitik-nada-chefin-zu-russland---was-muss-noch-passieren-dpa.urn-newsml-dpa-com-20090101-160601-99-145589 (last visited 24 October 2016).

125 See AG München, judgment of 26 September 2014 – 1115 Cs 254 Js 176411/13, in which the Court held that participation in gambling licensed in another EU country (without being licensed in Germany) is illegal.

126 CJEU, decisions of 8 September 2010 – C-409/06, C-316/07, C-46/08.

127 Section 4(4) First Amendment to the Interstate Treaty on Gambling.

128 The single-handed approach by the state, Schleswig-Holstein, which issued temporary licences to several private gambling and betting providers, was stopped in 2013. Those providers that were able to obtain a licence may continue to use it for a grace period in Schleswig-Holstein only.

129 VGH Hessen, decision of 16 October 2015 – 8 B 1028/15.

130 CJEU, decision of 4 February 2016, C-336/14.

for the limitation to merely 20 licences, ordering that a sports betting provider should be granted a licence irrespective of the fact that already 20 licensees had been selected at the time.[131]

iii Manipulation

Currently German law does not provide for a sport-specific criminal provision outlawing match-fixing. However, match-fixing has been punished under Section 263 StGB, according to which a person committing fraud shall be liable to imprisonment of up to 10 years.[132]

Section 263 StGB was applied in the famous *Hoyzer* case in 2005, which involved Robert Hoyzer, the German referee who confessed to fixing and betting on matches in the second Bundesliga, the DFB Cup (DFB Pokal) and the Regional League.[133] At the time, the courts found that the referee's conduct (intentionally making wrong calls in order to achieve a certain result that he or his accomplices had betted on) damaged the sports betting provider through shifting the odds, also considering that the sports betting provider would not have concluded a betting contract with Hoyzer or his accomplices had it known that an intentional manipulation of the matches in question would take place.[134] The Court's arguments used in the *Hoyzer* case have been applied and developed further in subsequent match-fixing cases.[135]

It should be noted that match-fixing cases in Germany that resulted in convictions have all been related to sports betting. Indeed, the current legal framework does not address match-fixing if it is not related to betting (e.g., for sporting purposes only).[136] This is why, after signing the Council of Europe Convention on the Manipulation of Sports Competitions[137] in 2014, the German government recently presented two new draft criminal provisions specifically dealing with the manipulation of sports competitions. Section 265c StGB defines sports betting fraud as an agreement to manipulate a sporting competition on which bets have been placed. Section 265d StGB applies to the manipulation of 'high-class' professional sporting competitions, even if a connection to betting cannot be established. Both criminal provisions stipulate a prison sentence of up to three years, in very serious cases of up to five years.[138]

131 VG Wiesbaden, judgment of 15 April 2016 – 5 K 1431/14 WI.

132 Section 263(3) StGB. Section 263 StGB defines fraud as causing or maintaining an error or distorting or suppressing true facts with the intention to obtain for oneself or a third person an unlawful material benefit by damaging the assets of another person.

133 BGH, judgment of 15 December 2006 – 5 StR 181/06; *NJW* 2007, p. 782.

134 For further information, see Fritzweiler/Pfister/Summerer, p. 829 et seq. Hoyzer and his accomplices were sentenced to two and three years' imprisonment, respectively.

135 BGH, judgment of 20 December 2012 – 4 StR 55/12; *NJW* 2013, p. 883.

136 See Fritzweiler/Pfister/Summerer, p. 841.

137 More information is provided on the Council of Europe website: www.coe.int/en/web/conventions/full-list/-/conventions/treaty/215 (last visited on 24 October 2016).

138 For more information see https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/DE/Strafbarkeit_Sportwettbetrug_und_Manipulation_berufssportlicher_Wettbewerbe.html (last visited on 24 October 2016).

iv Grey market sales

As mentioned in Section III.i, *supra*,, ticketing terms and conditions will usually contain a clause that allows a ticket purchase for private use only. As a result, the purchase of tickets for the purpose of commercial resale (i.e., with profit) are prohibited unless there is prior consent by the organiser.[139] Likewise, organisers tend to prohibit the unauthorised commercial use of tickets for advertisement purposes, as giveaways or as a part of hospitality or travel packages. If the organiser establishes that a purchase or resale of tickets occurred for commercial purposes without the consent of the organiser, it may refuse the ticket holder from entering the sporting venue and may even claim a contractual penalty.[140]

At the same time, sports governing bodies and clubs have created a secondary ticket market to allow ticket holders to transfer tickets they no longer need. The Higher Regional Court of Hamburg pointed out in a recent decision that clubs have to make sure that their justification to hinder ticket transfers (e.g., security reasons, widespread supply of tickets, preserving a socially balanced pricing structure) must not be undermined by the clubs' intention to earn money on the secondary ticket market by participating in the sale of tickets far above face value.[141]

IX THE YEAR IN REVIEW

2016 has been an exciting year for sports law in Germany with the arrival of the AntiDopG and several noteworthy decisions in sports-related cases, the most relevant of which have been set out in this chapter. The case that overshadowed the entire (German) sports law scene also in 2016 was the *Pechstein* case.[142] The BGH judgment in relation to this case has been criticised by some, but praised by many others.[143] The significance of the BGH decision for international sports dispute resolution provided through the CAS cannot be overestimated. The judgment underlines the utmost importance of a uniform international arbitration system in international sport as provided by the CAS. It confirms that the CAS is a genuine arbitral tribunal and that arbitration agreements in favour of CAS are valid. Sport governing bodies are allowed to demand that athletes sign arbitration agreements in favour of CAS as a precondition for their participation in sporting competition. It is not far-fetched to assume that had Ms Pechstein prevailed this would have severely eroded the legitimacy of CAS worldwide and would have possibly invited athletes of other nationalities to challenge their arbitration agreements in favour of CAS as well.

139 BGH, judgment of 11 September 2008 – I ZR 74/06, *NJW* 2009, 1504 (bundesligakarten.de).

140 AG Hamburg, judgment of 8 October 2014 – 23 a C 90/14.

141 OLG Hamburg, judgment 13 June 2013 – 3 U 31/10. A legal analysis of the case is provided in *MMR* 2014, 595.

142 BGH, judgment of 7 June 2016 – KZR 6/15. See Sections II.ii and VI, *supra*.

143 For example, a critical assessment of the decision is provided by Heermann, Die Sportschiedsgerichtsbarkeit nach dem Pechstein-Urteil des BGH, *NJW* 2016, 2224. The judgement is endorsed by Mavromati, The Legality of the Arbitration Agreement in favour of CAS under German Civil and Competition Law – The Pechstein Ruling of the German Federal Tribunal (BGH) of 7 June 2016, published in *CAS Bulletin* 2016/1, p. 40.

X OUTLOOK AND CONCLUSIONS

The outlook for 2017 remains the same as for 2016: antitrust law will continue to play a major role in sports law in Germany and elsewhere in Europe, and it will substantially influence the way sport is organised.

For 2017, the entering into force of two new criminal provisions on the manipulation of sports competitions is expected, as well as an adjustment of the German Interstate Treaty on Gambling.

Appendix 1

ABOUT THE AUTHORS

DIRK-REINER MARTENS

Martens Rechtsanwälte

Dr Dirk-Reiner Martens is the principal of Martens Rechtsanwälte, which he founded in 2009. Before that, he was a partner of a major international commercial law firm for over 35 years.

His special interest is national and international arbitration: since 2000, he has acted in more than 180 proceedings relating to commercial law or sports law, either as a party-appointed arbitrator or president of the tribunal.

In 2007, he established the Basketball Arbitral Tribunal (BAT), a means of speedy and cost-effective dispute resolution between professional players, agents and clubs. Since the BAT was set up, more than 900 cases have been brought before it. The BAT is administered by Martens Rechtsanwälte. Building on the BAT success story, in 2015 Dr Martens launched the Court of Innovative Arbitration (COIA), which applies some of the key features of the BAT to commercial arbitration.

ALEXANDER ENGELHARD

Martens Rechtsanwälte

Alexander Engelhard, MA, is a dispute resolution and commercial lawyer with a focus on advising clients on contentious and non-contentious issues in sport. He regularly represents clients before judicial bodies of sport associations, the Court of Arbitration for Sport as well as state courts. In addition to acting as legal counsel and ad hoc clerk in national and international arbitration proceedings, he advises clients on the drafting of rules and contracts, particularly those falling within the scope of copyright law and media law.

Before joining Martens Lawyers in 2013, Mr Engelhard was a trainee in the dispute resolution department of Freshfields Bruckhaus Deringer in Frankfurt and worked for the German Federal Foreign Office in Berlin. He holds a legal degree from the University of Heidelberg and a diploma in German and international arbitration from the University of

Frankfurt. After qualifying as a lawyer, he obtained a joint MA degree in sports management from universities in England, Italy and Switzerland. He is a member of various arbitration and sports-related organisations.

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