INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

Questionnaire concerning Business, Sports & Fraud

Sports Law Commission

International Business Law Commission

Commercial Fraud Commission

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Sports and Fraud: identifying the relevant framework

1. Are there specific legal forms for sports club (e.g. specific type of company structure, association, etc.) in your jurisdiction?

Sports clubs in the United Kingdom can take one of several legal forms; however, none are specific to the sector. The most common form is either an unincorporated association, or a company limited by guarantee.

Unincorporated association

An unincorporated association is a group of individuals, bound together by a constitution or rules containing rules for the club in question. These rules can be whatever the unincorporated association desires, and are open to change.

A committee will usually run an unincorporated association. Because an unincorporated association is not a legal entity, any contract of the club is entered into on behalf of the club, by a member of the club, or committee member.

As a result, members of the committee can be personally liable if the club breaches a contract, or if a claim is made against the club, in circumstances where the club has insufficient assets to meet the claim.

Where there is an uninsured accident or an employee, officer or player performs and act for which the club is liable then potentially the committee, or members will be liable. Members are jointly and severally liable for any of the clubs debts.

Because an unincorporated association does not have a separate legal identity from its members, any land or investments of the club are held by the members concerned, in their own name, and need to be transferred if a member leaves.

Company limited by guarantee

A sports club may take the form of a company: that is, where a corporate structure where the club has separate legal identity from its members. The club's constitution will be set out in the articles of association of this company.

The members of a sports club will usually elect directors, who will be re-elected in accordance with the company's articles. The directors take responsibility for running the club.

A company that has separate legal entity can enter into contracts and hold land in its own name. Moreover, land and investments can be held in the name of the club rather than the members. The company will be required to file accounts and details of directors to Companies House, the UK's registrar of companies.

A company limited by guarantee is a specific type of company where each member guarantees to pay a small amount if the club becomes insolvent (e.g. £1), rather than holding shares like a normal company.

As a result, the company will not pay any dividends to its members. This means that a company limited by guarantee will not be suitable for clubs seeking to turn over a profit for its members (as opposed to a profit for the club itself).

There are further incorporated club structures available to sports entities:

- Companies limited by shares. This shares the same features as a company limited by guarantee, except that shares in the company can be bought and sold, subject to restrictions in the articles of association. Such entities tend to not be used for sports clubs operating membership schemes because each time a member joins, a share has to be issued, and each time a member leaves, a share has to be transferred to someone else or redeemed.
- Community interest company (CIC) limited by shares. This special form of company, incorporated in the usual way, which has applied for Community Interest status. However, to qualify, it must be shown that the company is acting for the benefit of the community. Further, the CIC must comply with rules which restrict the way in which assets can be used (a so-called "asset lock").
- Charitable incorporated organisation (CIO). This is a new form of charitable company, which is becoming an increasingly popular vehicle for grassroots sports clubs. Formerly, charities which opted for a corporate structure were required to set up as a company limited by guarantee. This meant that they are subject to dual regulation by the Charity Commission and Companies House. CIOs, in contrast, are only regulated by the Charities Commission, reducing the administrative burden on those running it. Further advantages of charitable status attach, addressed below.

- Co-operative and community benefit society (CCBS) (previously referred to as 'industrial and provident societies'). A CCBS is an organisation which conducts an industry, business or trade. A CCBS can either be a co-operative, run for the benefit of its members, or a community benefit society, which is run for the benefit of the wider community. CCBS' are bodies corporate; however, they are not registered under the Companies Acts. Instead, the registering body is the Financial Conduct Authority (FCA)
- Charitable status. Unincorporated associations and companies limited by guarantee can hold charitable status. This provides certain tax advantages. For example, full exemption from tax on profits from membership fees, bank interest and investment income. Gift aid can be claimed on donations from companies as well as donations from individuals. Local authority business rate relief is afforded, and there is no inheritance tax payable on legacies left to charities. The body must register with the Charities Commission.
- Community amateur sports clubs (CASC). Introduced in 2002, the CASC scheme provided an option for sports clubs to register with Her Majesty's Revenue and Customs (HMRC) to receive 'charity type' tax reliefs, provided the club meets certain qualifying conditions, for example, the club is open to the whole community, and its main purpose is to provide facilities for, and promote participation in, certain eligible sports.

2. How are sports clubs / players grouped? Are they administrative bodies, associations, federations etc.? Please provide a few examples.

In the UK, each sport will have a national governing body (NGB), responsible for regulating the sport at a national level. This includes the development, implementation and enforcement of rules and regulations for each respective sport.

NGBs are recognised by Sport England (an executive non-departmental public body, sponsored by the Department for Culture, Media and Sport (DCMS)), and counterparts, Sport Northern Ireland, Sport Scotland and Sport Wales. These work alongside UK Sport, the body responsible for promoting sport across the UK.

The aim of the recognition process it to identify a lead NGB structure which governs a sport at UK, GB or home country level.

However, there are exceptions. For example, football in each of the home countries is regulated by a separate national Football Association. As a result, within the European governing body of football (UEFA), the UK is represented by four

countries: the English Football Association, the Irish Football Association, the Scotland Football Association and the Football Association of Wales.

NGBs are also responsible for organising national championships, usually in the form of league and cup competitions for team sports, and national and international competitions, resulting in a ranking for individual sports.

Examples of NGBs in the UK include:

- Athletics. UK Athletics.
- Cycling: British Cycling.
- Sailing and yachting: The Royal Yachting Association.
- Judo: British Judo Association.

3. What is the relevant regulatory framework for sports associations/clubs/etc. in your jurisdiction? Is State legislation applicable or is self-regulation applicable? Please provide a few examples.

Sports associations are self-regulated. However, some associations subscribe to the Voluntary Code of Good Governance for the Sport and Recreation Sector, produced by the Sport and Recreation Alliance.[1]

Regulation can take the form of statutes, regulations and disciplinary codes, as well as the norms and provisions of domestic and international law.

Further, UK NGBs have powers, delegated from continental and international federations, to regulate their respective sports, for example, the scheduling of events, disciplinary matters and dispute resolution, as well as the commercial exploitation of the sport.

Participants within each sport must also typically receive official approval from its respective NGB to participate in the sport; this often means that sportspeople are only permitted to participate in events sanctioned by an NGB.

[1] http://www.sportandrecreation.org.uk/programmes-initiatives/boardroom/voluntary-code

Sports associations are further subject to different regulatory bodies, depending on their process of incorporation:

- If the club is incorporated as a company limited by guarantee or by shares, it is regulated by Companies House. A company limited by guarantee can also apply for charitable status. In which case, it is also regulated by the Charities Commission.
- If the club is incorporated as a CIC, it is regulated by the Office of the Regulator of Community Interest Companies.
- If the club is incorporated as a CCBS, it is regulated by the FCA.
- If the club is incorporated as a charitable incorporated organisation, it is regulated by the Charities Commission.
- If an unincorporated association gains charitable status, it falls to be regulated by the Charities Commission.

4. Are there any sport-specific risks that you may think of? Are there specific legislation for such risks? The following should be considered:

- **Finance in connection with donations or subventions, misappropriation of money**

Donations, subventions, misappropriation of money

There are very few sports-specific risks in the UK, which are unique to the field and no other sectors. In particular, the risks associated with subventions/subsidies in sport is one that has not been widely reported on.

However, certain discrete issues might be borne in mind. On the issue of donations, in 2013, the government made changes to the CASC tax scheme, enabling them to deduct in-full donations to a club from their tax bill, with a view to encouraging larger donations from corporations and local businesses.

However, many grassroots clubs have complained that concessions were not made to exempt clubs from pay-as-you-earn (PAYE) tax (a withholding tax on payments to employees). In the past, this has resulted in players, bar and ground staff volunteers

paying backdated fines on unpaid tax, as a result of donations to cricket clubs, which have fallen foul of the rule.[2]

Perhaps the most significant serious allegation of misappropriation of funds, in the sporting context, dates to 2009. This concerned an allegation that £19.8 million was distributed from a bank account of Sports England that executives stated they were, at the time, unaware of.[3]

Other financial risks

As sports clubs become increasingly innovative in their search for funding, the usual risks that attach to operating in the equity and private capital markets will apply

Sports clubs, for example, must be alive to the usual risks arising in equity deals, private placement securitisations, and bespoke financings. This may relate to stadium financing, player sale and lease back arrangements, factoring of Premier League distributions and factoring of receivables under sponsorship contracts.

Separately, well-paid athletes are often a target for financial professionals, who might convince their clients to invest in unsuitable products that do not reflect the short-term nature of the period during which athletes earn the majority of their income. This problem is compounded by the new powers delegated to HMRC under the Financial Act 2014 to make Accelerated or Partner Payment Notices (APNs or PPNs) in respect of monies deemed payable, in advance of a determination that it is in fact payable

To date, the courts have not been tolerant of attempts to circumvent the requirements to satisfy such a Notice. In June 2015 two individuals were refused an interim injunction to prevent HMRC from enforcing the Notices, even though the challenge to the legality of the Notices was as then undetermined (Eamonn Dunne and Vincent Gray v HMRC [2015] EWH). Further, in July 2015 a separate attempt to judicially review the lawfulness of the Notices was dismissed (Rowe & Ors v Revenue & Customs [2015] EWHC 2293).

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[2] http://www.telegraph.co.uk/finance/yourbusiness/10236283/Tax-relief-changes-are-simply-not-cricket-sports-clubs-warn-HMRC.html

[3] http://www.telegraph.co.uk/sport/columnists/paulkelso/5703012/Sport-England-facing-fraud-squad-probe.html

Coupled with the power to retrospectively declare investment vehicles to be tax avoidance schemes, there has been a recent wave of cases concerning professional athletes being aggressively pursued by HMRC, in relation to investment schemes that are claimed to be mis-sold, on account of the negligent or fraudulent advice of the parties surrounding the players – agents, financial advisors, and banks.

Given that the majority of these demands relate to investments made in the early 2000s, many of the athletes are retired, and are therefore in no position to satisfy the demands.

- **Decision making process: nepotism, corruption regarding election or selection of the site for a big sport event**

Nepotism

There has been a limited examination into the issue nepotism in sport in the UK. However, there have been two instances in recent years, where the issue has been reported on.

In October 2014, Roy Keane, former Manchester United captain, accused Sir Alex Furguson, former Manchester United Manager, of nepotism, in relation to his son (who played for the club), brother (a club scout) and other son (who was involved in transactions for the club).[4]

More recently, in October 2015, Stuart Lancaster, head coach of England's rugby union team, was forced to deny allegations of nepotism in the selection process for the 2015 Rugby World Cup. This concerned allegations that Any Farrell, a member of England's coaching team, had pushed for his son, fly-half Andy Farrell, to the starting XV during the World Cup, over other prominent players.[5]

Corruption regarding election or selection process

In December 2014, the UK government introduced the UK Anti-Corruption Plan. Although not confined to election or selection processes, the Plan does outline the

4 http://www.thesundaytimes.co.uk/sto/sport/football/Premiership/article1470354.ece

5 http://www.skysports.com/rugby-union/news/12504/10020109/stuart-lancaster-says-nepotism-claims-against-andy-farrell-absolutely-incorrect

Government's strategy to detect, prosecute and prevent corruption across all industries, as well as outlining the Government's strategic direction, in relation to detecting, prosecuting, and preventing corruption in sport.[6]

As regards sport, the Plan contains three specific Actions:

- The DCMS is to set out the measures the UK is taking to combat corruption in sport including consideration of ongoing international initiatives.
- The Gambling Commission and DCMS are to implement the Sports Betting Integrity Action Plan (see below under 'online gambling').
- The Gambling Commission's improved reporting mechanism for sports corruption is to contribute to the Home Office's proposed single reporting mechanism for allegations of corruption.

- **Health-issues (doping)**

At a practical level, local decisions taken by the World Anti-Doping Agency are taken in the UK by the UK Anti-Doping Organisation (UKAD), an executive non-departmental body.

Anti-doping collection, results management and prosecution may be conducted by the sport, UKAD, or an applicable international sporting federation.

Prosecutions will typically be conducted through an independent tribunal system, and are ultimately appealable to the Court of Arbitration for Sport (CAS) in Lausanne.

The list of current sanctions imposed by UKAD reveals that the sports with the biggest risk of doping are rugby union and rugby league. There are 52 current sanctions, of which 28 are in relation to rugby players. Boxing, weightlifting, and cycling are the other most risk-prone sports, with 12 sanctions between them. The most common class of drug is anabolic agent – of the 52 sanctions, 32 are in relation to such drugs.[7]

[6] https://www.gov.uk/government/publications/uk-anti-corruption-plan

[7] http://www.ukad.org.uk/anti-doping-rule-violations/current-violations/

- **Competition: match fixing, etc.**

Match fixing

There is no specific criminal offence of match fixing in England and Wales, in statute or common law. Instead, and depending on the circumstances, allegations of match fixing may be dealt with under criminal offences such as cheating at gambling, bribery, conspiracy, fraud or theft.

In relation to the possibility of creating a criminal offence of match fixing, the Governance of Sport Bill, a Private Member's Bill put forward by Lord Moynihan, proposes an amendment to the Gambling Act 2005. This, if implemented, would strengthen the criminal law in relation to match fixing.

More specifically, the proposal will specify those types of conduct which constitute "cheating at gambling", and increase the current maximum sentence, under section 42 of the Gambling Act 2005, to ten years. However, it remains to be seen whether this provision will be introduced in the 2015-16 Parliamentary Session.

- **Online gambling**

In the UK, much like other European countries, the risks of online gambling go hand-in-hand with those of match-fixing. The sports at greatest risk in this regard are one-on-one sports like tennis, darts or snooker, as such sports are self-evidently the easiest to fix.

Steps have been taken to combat these emerging problems. In September 2015, the Sports Betting Integrity Forum (SBIF) published the Sports Betting Integrity Plan.[8] The plan sets out the expected focus on the various member groups of the SBIF in delivering actions to identify and control the risks associated with match-fixing and sports betting integrity.

The Gambling Commission (the UK regulatory body for most forms of gambling), for instance, is tasked with ensuring that:

[8] http://www.kwm.com/~/media/SjBerwin/Files/Knowledge/Insights/uk/2015/10/19/sbi-action-plan.ashx?la=en

- only operators suitable in terms of their integrity and competence will be licensed as sports betting operators and remain so; and
- operators identifying possible match fixing/corrupt activity report this promptly to the Commission and where appropriate, sports governing bodies.

The Gambling Commission also takes responsibility for the development and operation of the Sports Betting Intelligence Unit (SBIU), which collects information and develops intelligence about potentially corrupt betting activity involving sporting events occurring in Great Britain and/or which involve parties within Great Britain and/or involve a Gambling Commission licensed operator.

Further, licensed sports betting operators are encouraged to provide information on irregular betting and/or suspicious sports events promptly to the SBIU and to provide relevant sports governing bodies with sufficient information to conduct an investigation.

They should also include specific rules and provisions within their terms and conditions that highlight personal information may be shared with regulators of sports bodies where there is any suspicion of involvement in match fixing or a breach of sports regulations. The SBIF will review progress and report back, in due course.

The case for compliance

5. How are risks to be evaluated with regard to corruption, fraud and other white-collar crimes? Are there internal control systems? Transparency criteria? Compulsory controls by auditors / administrative?

Risk evaluation: corruption, fraud and other white collar crime

The UK's Anti-Corruption Plan addresses the issue of understanding and raising awareness of the risks from corruption, and has made calls for the National Crime Agency (NCA) to lead the assessment of bribery and corruption by organised crime.[9]

More specifically, the NCA will establish a new multi-agency intelligence team focused on serious corruption and bribery. The NCA's Economic Crime Command will provide strategic leadership and coordination to the law enforcement efforts to tackle domestic and international corruption and to give effect to sanctions put in place by the government.

Internal control systems

In September 2014, the Financial Reporting Council (FRC) issued guidance on internal controls, with a view to ensure that a company's management systems, accounting records, asset maintenance and compliance issues are operating correctly, entitled 'Guidance on Risk Management, Internal Control and Related Financial and Business Reporting.' (the 'revised Code'). Although not specific to the sports sector, it of relevance to all clubs that are incorporated as companies.

This revises, integrates and replaces previous editions of the FRC's 'Internal Control: Guidance for Directors on the Combined Code', known as 'The Turnball guidance',[10] and 'Going Concern and Liquidity Risk: Guidance for Directors of UK Companies'[11] and reflects changes made to the UK Corporate Governance Code.

It links the traditional Turnbull guidance on internal control with emerging good practice for risk management reflected in the conclusions of both the FRC's 'Boards and Risk' report[12] and the final recommendations of the 'Sharman Panel of Inquiry into Going Concern and Liquidity Risk.'[13]

The revised Code applies to accounting periods beginning on or after 1 October 2014. The key changes to the Code include:

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[9] Ibid n. 7 at para 3.1

[10] https://www.frc.org.uk/getattachment/5e4d12e4-a94f-4186-9d6f-19e17aeb5351/Turnbull-guidance-October-2005.aspx

[11] https://www.frc.org.uk/FRC-Documents/FRC/Going-Concern-and-Liquidity-Risk-Guidance-for-Dire.aspx

[12] https://www.frc.org.uk/FRC-Documents/FRC/Boards-and-Risk-A-Summary-of-Discussions-with-Comp.aspx

[13] https://www.frc.org.uk/Our-Work/Publications/FRC-Board/Sharman-Inquiry-Final-Report.pdf

- Companies should state whether they consider it appropriate to adopt the going concern basis of accounting and identify any material uncertainties to their ability to continue to do so.
- Companies should robustly assess their principal risks and explain how they are being managed or mitigated.
- Companies should state whether they believe they will be able to continue in operation and meet their liabilities taking account of their current position and principal risks, and specify the period covered by this statement and why they consider it appropriate. It is expected that the period assessed will be significantly longer than 12 months.
- Companies should monitor their risk management and internal control systems and, at least annually, carry out a review of their effectiveness, and report on that review in the annual report.
- Companies can choose where to put the risk and viability disclosures. If placed in the Strategic Report, directors will be covered by the "safe harbour" provisions in the Companies Act 2006. This is the provision that ensures that, as long as directors do not make a deliberately or recklessly untrue or misleading statement or dishonestly conceal a material fact by way of an omission, they will not be liable to compensate the company for any loss incurred by it in reliance on the report.

Transparency criteria

Sports organisations in the UK, including NGBs, all publish transparency and accountability criteria. To take just one example, Sports England, states that, in the context of its 2013-17 NGB funding, that "transparency and accountability is intrinsic to the way the Board, the CEO and the wider NGB operates".[14]

To this end, Sports England adds: "'The 'tone at the top' and the culture of the whole NGB is that of transparency of decision-making and process together with accountability for decisions and actions, including those in relation to delivery of

14 https://www.sportengland.org/media/74635/20120802-se-governance-strat-final-updatedfor-website_section-4-and-9.pdf

Sport England outcomes… All conflicts of interest, perceived or actual, are declared and robust procedures are in place to support this."[15]

Compulsory controls by auditors / administrative

In recent years, the audit committee has become one of the main pillars of the corporate governance system in British companies, and especially public companies. The audit committee is created with the aim of enhancing confidence in the integrity of an organisation's processes and procedures relating to internal control and corporate reporting.

Boards rely on audit committees to, among other things, review financial reporting and to appoint and provide oversight of the work of the external auditor. Audit committees can also play a key role in providing oversight of risk management. This function is, of course, equally applicable in the context of sports clubs that are incorporated.

The audit committee should review arrangements by which staff of the company may, in confidence, raise concerns about possible improprieties in matters of financial reporting or other matters.

Sports organisations are no exception. Sports England, for example, has an 'Audit, Risk and Governance' Committee. Its responsibilities, set out in its terms of reference, include advising the board and accounting officer on:

- the strategic processes for risk, control and governance and the Governance Statement;
- the accounting policies, the accounts, and the annual report of the organisation, including the process for review of the accounts prior to submission for audit, levels of error identified, and management's letter of representation to the external auditors;
- the planned activity and results of both internal and external audit;
- the adequacy of management response to issues identified by audit activity;

[15] Ibid

- assurances relating to the corporate governance requirements for the
- organisation;
- proposals for tendering for either internal audit services or for purchase of non-audit services from contractors who provide audit services;
- anti-fraud policies, whistle-blowing processes, and arrangements for special investigations;
- the Committee will also periodically review its own effectiveness and report the results of that review to the Board.

6. How is compliance applied to sports-organization? What differences are there compared to the "traditional" business world?

Compliance department

Many sports associations have specific compliance departments, in some cases possessing wider powers than the "traditional" business world, encompassing welfare issues for example.

For example, in 2006, the Football Association was forced to disclose details of its compliance unit, in response to allegations made by the BBC Panorama programme.[16]

At the time, it was revealed that the department was comprised of five full time professionals, plus two administrators. The unit was comprised of an ex-police officer, a forensic accountant and a former investigator for the Inland Revenue.

It was reported that the compliance unit has functions wider than just investigating financial malpractice, focussing on off field responsibility, including agents, transfers and financial irregularities, doping control, gambling, racism and the importance of child protection.

Similarly, the compliance team for British Cycling has issued a policy on safeguarding and protecting vulnerable adults.[17]

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16 http://www.theguardian.com/football/2006/sep/22/sport.comment2

Corporate investigations

It is not possible to talk about compliance without considering the approach taken by companies to corporate investigations.

Generally speaking, sports organisations that have been incorporated as companies may be subject to a corporate investigation, undertaken by the Department of Business Innovation and Skills (BIS), the Financial Conduct Authority (FCA), the Competition and Markets Authority (CMA), or the Serious Fraud Office (SFO).

All companies in the UK are under a duty to maintain proper accounts under the Companies Act 2006. They also have monitoring stems and training embedded in company processes to eliminate compliance risks.

Where these systems are in place and are being adhered to from the board level down, an inexplicable accounting error or fraud should be swiftly apparent.

Following an investigation, a company will decide whether to make a report. Taking the SFO as our example, consideration should be given to the SFO protocol for self-reporting. In particular, the timing of the report may be crucial as an early engagement with the SFO may allow the company to gain an indication of its approach. The SFO may want to direct any further investigation and this will have an impact on the day-to-day running of the company and will be at the expense of the company.

The board may be advised to have financial information to hand so that representations can be made on their behalf, where necessary, about the impact of steps in the investigation. While this may be a board decision, it must be kept private and confidential where the investigation concerns individuals so there is no risk of compromising any subsequent action taken by the authorities against them.

The SFO will expect to be informed of any report at the same time as any overseas prosecuting agencies. It will analyse the report made in the context of any information which they already hold and they may decide to initiate a new enquiry or use the information to extend an ongoing investigation. Any personal data, including

[17]http://www.a5rangerscyclingclub.org.uk/files/Policy/British_Cycling_Safeguarding_and_Protecting_Vulnerable_Adults_Policy.pdf

contact details, will be processed and retained in accordance with the Data Protection Act 1998 (DPA 1998) and will only be disclosed under the terms of the DPA 1998 or by an order of the court.

7. Could you give examples of internal compliance process / internal decision-making processes?

Information on internal compliance processes and/or decision making processes for major sports associations are usually available online.

Further, the Sports and Recreation Alliance publishes a financial procedures manual, with a view to helping its 320 members to establish financial controls within each organisation to ensure accuracy, timeliness and completeness of financial data.

Although the Alliance states that there is no one model of a financial procedures manual, typical headings should include:

- trustees' financial responsibilities;
- controls on expenditure – who can spend what and with whose authority;
- controls on financial assets – for example, who records cheques received and who banks them;
- exercising budgetary control – who can spend how much, on what and what expenditure needs special permission;
- controls on human resources – who can recruit, for what roles and what permissions are needed; and
- controls on physical assets – for example, who can authorise the sale and lease of buildings or equipment.

The Alliance further publishes a model manual, using Rounders England, the association for sport of rounders in England, as its example. This manual includes rules relating to bank reconciliation, tendering procedures, authorising and reviewing expenditure invoices, and payments.[18]

<u>The issue of sanctions</u>

[18]Other examples are available. E.g. the Amateur Boxing Association of England: http://www.abae.co.uk/aba/index.cfm/about-us/compliance/

8. According to which provisions (e.g. criminal law, regulatory law, and administrative law, etc.) may a sports association be sanctioned in your jurisdiction?

Contractual relationship between athletes, clubs and sports federations

Even though sport in the UK possesses a public character, it is organised through private agreements. Consequently, the authority of a sports governing body to regulate its respective sport derives not from statute, but through private contractual agreements, rather than through judicial review.[19]

In such cases, the courts are reluctant to introduce a too formal measure of judicialisation into the formal processes adopted by domestic tribunals.[20]

A private law challenge to the decision of a sports disciplinary tribunal may be sustained where (a) breached its duty to act fairly in accordance with the principles of natural justice; or (b) that the disciplinary mechanism in question has acted in an arbitrary or capricious manner at odds with the substantive regulatory and procedural ambit of its rules.[21]

The available remedies depend on the nature of the right invoked by the claimant and are generally open after internal remedies are exhausted.[22] Traditionally, in common law, there is a primacy of damages.

However, in most sports cases, damages will not be a suitable solution as disciplinary sanctions often have an effect on the eligibility of an athlete or club to participate in competitions. Therefore, an injunction is often a more suitable remedy.

Judicial review of legality of decision making body

Generally speaking, English courts have long demonstrated a reluctance to review disciplinary decisions of a sports body, except where there are egregious breaches of principles of fairness and proportionality.[23]

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[19] R. v Disciplinary Committee of the Jockey Club Ex p. Aga Khan [1993] 1 W.L.R. 909

[20] McInnes v Onslow Fane [1978] 1 W.L.R. 1520

[21] Flaherty v National Greyhound Racing Club Ltd [2005] EWCA Civ 1117; (2005) 102(37) L.S.G. 31

[22] A Lewis and J Taylor, Sport: Law and Practice (Tottel 2008) 292-93

[23] Calvin v Carr [1980] A.C. 574

Further, and despite the undisputed contractual basis of the relationship between athletes, clubs and sports federations, there has been a long-standing debate about whether sports federations are subject to the public law remedy of judicial review, under which the legality of the decision-making process of a body exercising a public function is reviewed, instead of the merits.

In Bradley v Jockey Club,[24] Graham Bradley, a successful steeplechase jockey, was charged with breaching the 'Racing Rules' for allegedly passing racing information to a gambler. The Jockey Club Disciplinary Committee imposed multiple sanctions, including disqualification for a period of eight years.

In that case, the court developed a so-called private law supervisory jurisdiction, in which it stated that it would ensure the primary decision maker had operated within lawful limits.[25] The court held that it exercises a "review function", very similar to that of the court on judicial review.

The essential concern is with the lawfulness of the decision taken: whether the procedure was fair, whether there was any error of law, whether the exercise of the judgment or discretion fell within the limits open to the decision maker, for example.

Accordingly, since the Bradley case, it can be argued that sports governing bodies owe broadly the same obligations as a matter of private law as they would if their decisions were susceptible to the public law remedy of judicial review.

9. Who may be sanctioned within the association (e.g. the association itself, the board, an employee)? Please provide examples of applicable sanctions in the recent years.

This depends on how the organisation is structured, as set out in question 1. Where a sports club is an unincorporated association, there is a risk of liability to members: the members of the governing committee have to enter into contracts in their own names. This means that the members of the committee could be personally liable if the club breaches a contract or if a claim of negligence is made against the club.

[24] Bradley v Jockey Club [2004] EWHC 2164 (QB)

[25] Ibid para 37

For sports clubs that are incorporated, in whatever form, this has the advantages of limited liability. This separate legal liability means that, if the company becomes insolvent or a claim is brought against it, the members will not be liable (unless they have broken company law).

A CASC needs to register with the Charities Commission, and is therefore at risk of an investigation into matters of charities law. Equally, sports organisations that have charitable status must comply with charity law, and any one holding an official function in this regard may be subject to sanctions imposed by the Charities Commission.

10. How do those sanctions interact with decisions from State courts? Is there a need for enforcement of the sanctions (i.e. is there a filter / exequatur process by State courts, as in arbitration)? Is there a possibility for State courts to consider a case also examined by a regulatory body, e.g. a federation (i.e. is there a risk of "double jeopardy")?

Generally speaking, sports regulatory bodies are generally free to bring and conduct their own disciplinary cases, regardless of the verdict of a criminal court.

Further, it is a well established fact in regulatory law that acquittal of criminal charges does not:

- preclude a regulatory or disciplinary body from bringing similar allegations against a respondent arising from the same facts as the criminal case; and
- preclude a regulatory or disciplinary panel from a finding of misconduct, despite the court finding similar charges not proved. [26]

The issue of the interplay between decisions of domestic courts, and sanctions imposed by sports associations, came to ahead in the case of Chelsea footballer, John Terry, in 2012-13.

In that case, Mr Terry was initially charged with a racially aggravated public order offence after complaints were made to the police that he had allegedly racially abused Queens Park Rangers' footballer, Anton Ferdinand, during a match between QPR and Chelsea on 23 October 2011. After a week-long trial, Mr Terry was acquitted by Westminster Magistrates' Court on 27 July 2012.

[26] See e.g. Bhatt v General Medical Council [2011] EWHC 783

The English Football Association charged Mr Terry with misconduct, specifically the use of abusive, insulting words and/or behaviour, including reference to Mr Ferdinand's skin colour and/or race, contrary to Association Rules E3(1) & E3(2). Mr Terry denied the charge and, in light of his acquittal by the criminal court of an offence on the same facts, challenged the jurisdiction of the FA to bring disciplinary proceedings against him.

Mr Terry argued that his acquittal by the court acted as a procedural bar to the FA's pursuit of a disciplinary case against him and that doing so was therefore an abuse of process. The FA's Regulatory Commission disagreed.

The Regulatory Commission found that as the FA is the governing and regulatory body of English football, there was a public interest in "a proper and effective system of regulation to investigate and discipline those who are subject to its Rules and Regulations", which protected victims of racial abuse, ensured such behaviour is shown to be unacceptable, and protected the reputation of the game.

Moreover, because of the different standards of proof in criminal and disciplinary proceedings (the FA proceedings required the civil standard of proof), there was no such bar in disciplinary allegations being brought against a respondent where the subject matter was identical to criminal proceedings of which the respondent was acquitted. Rather, such disciplinary proceedings were subject to the rules and regulations of the disciplinary body.

The court is reluctant to interfere with a disciplinary bodies' integrity and independence, despite a respondent's acquittal of criminal proceedings, and will do so only where "weighty circumstances" suggest this would be inappropriate.[27] The stress and prejudice a respondent might face by having to defend himself against similar allegations of which he has previously been acquitted have been previously ruled to be insufficiently 'weighty' in this sense.[3]

Mr Terry argued also that without new evidence which had not been put before the court, the FA would have an impermissible "second bite of the cherry" (implying double jeopardy) whilst only needing to rely on the lower, civil standard of proof. However, the Regulatory Commission considered that this was only the FA's "first

[27] [2004] EWHC 1858 (Admin)

bite" and stated, furthermore, that "the purpose of the criminal proceedings that were brought by the Crown was not to regulate football".

To this effect, the court and the Regulatory Commission each had open to them very different potential sanctions; a guilty verdict delivered by the former could only have been accompanied by a maximum fine of £2,000, yet the Regulatory Commission could (and did) impose a far more substantial fine totalling £220,000 and a four match ban on Mr Terry.

Arbitration

The domestic UK sports resolution body is Sport Resolutions (UK).[28]

Sports Resolutions' involvement in a given dispute is dependent on jurisdiction through the legal consent of the parties. This is achieved through the rules of the relevant sporting body allowing for recourse to Sport Resolutions, the contract or agreement in dispute containing a clause referring disputes to Sport Resolutions or the parties agreeing in writing to submit the dispute to Sport Resolutions for arbitration.

Arbitrations under the Sport Resolutions Arbitration Rules are governed by the Arbitration Act 1996 (the 'Arbitration Act') (r.15.2, Sport Resolutions Arbitration Rules).

Sport Resolutions operates both a Full Arbitration Procedure and an Appeal Arbitration Procedure. The Full Arbitration Procedure deals with first instance disputes, whilst the Appeal Arbitration Procedure deals with appeals in relation to decisions from sporting bodies.

The Appeal Arbitration Procedure, unless otherwise agreed, can only be used if the appellant has exhausted all other procedures available under the relevant applicable regulations.

Case studies: Online gambling, doping scandals and whistleblowing

[28] The rules of the CAS, the pre-eminent international sports resolution body, are not specific to the UK, they are beyond the scope of this response.

11. What are the legal consequences with regards to match-fixing in your jurisdiction? Please specify the relevant legal framework.

Further to the response in question 4, the relevant criminal law offences under which match-fixing may be prosecuted, are:

- gambling (namely sections 42 of the Gambling Act 2005);
- bribery (ss. 1 and 2 of the Bribery act 2010);
- conspiracy (s. 1 of the Criminal Law Act 1977);
- fraud (Fraud Act 2006); or
- theft (Theft Act 1968).

A recent successful criminal prosecution for match-fixing in England concerned three Pakistani cricketers, Salman Butt, Mohammed Amir and Mohammad Asif, who were convicted of conspiring with a sports agent that "no balls" would be bowled at specified times during a test match at Lord's in August 2010. The men were sentenced to between 6 months and 2 years' imprisonment for the offences.[29] Appeals made by all men were unsuccessful.

12. How is online gambling considered in your jurisdiction and how is it dealt with in case of fraud?

Online gambling comes within the term 'remote gambling', as defined by Section 4 Gambling Act 2005, and is regulated by the UK Gambling Commission (UKGC). An operator requires a relevant remote operating licence from the UKGC if it currently runs or wants to run a gambling service through remote services.

From 1 November 2014, gambling in the UK has been regulated at the point of consumption rather than the point of supply. This means that remote gambling operators now require a licence from the UKGC if their gambling facilities are used in Britain, even if no equipment is located here.

Further, from 1 December 2014, remote gambling operators have been liable to pay a remote gaming duty of 15% on their profits generated from UK customers, no

[29] (R. v Amir (Mohammad) [2011] EWCA Crim 2914; [2012] 2 Cr. App. R. (S.) 17; R. v Majeed (Mazhar) [2012] EWCA Crim 1186; [2013] 1 W.L.R. 1041)

matter where in the world the operator is situated. This is a significant change in the way the gambling industry is regulated, as previously around only 15% of remote gambling operators had a UKGC licence.

In addition, under the Gambling (Licensing and Advertising) Act 2014, only licensed operators are able to advertise their services to British consumers. The advertisement of gambling is unlawful if an operator does not hold the required licence from the UKGC for the gambling to take place as advertised.

A remote gambling operator will commit an offence if their remote gambling facilities are capable of being used in Great Britain and a remote operating licence is required for the gambling to take place as advertised, but the operator does not have the requisite licence.

How is online gambling dealt with in case of fraud?

The two main statutes providing for the prosecution of fraudulent gambling are the Fraud Act 2006 and the Gambling Act 2005.

Fraud

The Fraud Act 2006 introduces a statutory single offence of fraud which can be committed in three different ways: false representation (section 2); failure to disclose information when there is a legal duty to do so (section 3); abuse of position (section 4). Fraud is defined as dishonest conduct with the intention to make gain, cause a loss, or cause the risk of a loss to another.

In 2014, professional poker player, Darren Woods, was convicted in Sheffield Crown Court of nine counts of fraud by false representation.[30] Mr Woods is alleged to have opened numerous accounts in third party names, deceived an electronic payment service into paying him unwarranted bonuses and commission, and played online poker with control of more than one of the players.

[30] http://www.gamblingcommission.gov.uk/docs/Humberside-online-poker-fraud.doc

In March 2015 the director of the online gambling company '666 Bet' was arrested, and their licence suspended by the Gambling Commission, in a £21m fraud investigation.[31] The case is ongoing.

Cheating

Fraudulent behaviour in online gambling is also caught within the broad reach of section 42 Gambling Act 2005 and the offence of cheating. A person commits the offence if he cheats at gambling, or does anything for the purpose of enabling or assisting another person to cheat at gambling, and it is immaterial whether a person who cheats improves his chances of winning anything, or wins anything (section 42 (1)(2)). This offence is punishable by imprisonment or a fine or both: section 42 (3)).

The offence is committed the moment when anything is done for the purpose of enabling or assisting anyone else to cheat at gambling. In the 2010 test cricket match-fixing scandal, set out in Question 11, above, Mazhar Majeed was convicted of offences, including conspiracy to cheat at gambling, contrary to section 42 of the Gambling Act 2005.[32]

The fact that the gambling took place abroad was of no consequence in that case, because it was held that the offence of cheating is committed at the moment of the arrangement to cheat, not when the gambling takes place. What this case shows, therefore, is that the offence has little to do with the regulation of gambling; it simply creates an offence of cheating, and is sufficiently wide to encompass fraud in online gambling.

13. Are any measures foreseen in your jurisdiction for the protection of "whistle-blowers"?

Currently, workers are protected from retaliation at work through the Public Interest Disclosure Act 1998 (PIDA), in circumstances where they "blow the whistle" (or make what's legally known as a "public interest disclosure").

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[31] http://www.independent.co.uk/news/uk/crime/online-gambling-companys-director-arrested-in-21m-fraud-investigation-10141491.html

[32] Supra n. 13

PIDA incorporates the so-called whistleblowing provisions into the Employment Rights Act 1996 (ERA), with the intention of preventing workers who have made a "protected disclosure" from reprisal. Further amendments have been made through the Enterprise and Regulatory Reform Act 2013.

Generally speaking, whistleblowing provisions protect workers, defined to include employees, contractors and even agency workers. The protection is the right to not be disadvantaged or victimised by an employer, on the basis of having blown the whistle, resulting in, for example, a dismissal, a denied promotion, or allocation of unpopular tasks.

In June 2014, the UK government issued a response to the Department for Business, Innovation and Skills, entitled 'Whistleblowing framework: call for evidence', in which it highlighted that financial incentives for whistleblowers (which are used widely in the United States, for example) should not be ruled out in all cases.

To this end, the UK Anti-Corruption Plain stated a renewed commitment to exploring whether more can be done to incentivise and support whistleblowers in cases of bribery and corruption.

14. How is confidential information treated in your jurisdiction? Any risks for whistle-blowers?

How is confidential information treated in your jurisdiction?

It is an implied term in all contracts of employment that employers and employees owe one another a duty of trust and confidence.[33]

The broad principle is that a duty of confidence arises when confidential information comes to the knowledge of a person, in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others.[34]

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[33] Malik v Bank of Credit and Commerce International SA (In Liquidation) [1998] A.C. 20

[34] As to these requirements, see: Saltman Engineering Co Ltd v Campbell Engineering Co Ltd (1948) 65 RPC 203 (CA); Coco v A N Clark (Engineers) Ltd [1969] RPC 41 at page 47 (Megarry J); Attorney-General v Guardian Newspapers Ltd (No 2) [1988] 3 All ER 545 [HL) (the Spycatcher case) at pages 648–9 per Lord Griffiths; and Douglas v Hello! (No 3) [2008] 1 AC 1 at paragraph 111

As addressed at Question 13, the primary protection for whistleblowers is the Public Interest Disclosure Act 1998 as incorporated into the Employment Rights Act 1996, and as amended by the Enterprise and Regulatory Reform Act 2013.

Protection for whistleblowers

Where the employee breaches the duty of confidence and doesn't meet the requirements set out in section 43 of the ERA 1996 (and thereby enjoy protection as a whistelblower), the breach typically entitles the employer to dismiss without notice.

Further, the employee might be liable for damages for breach of contract, breach of confidence, defamation, or malicious falsehood.

Should the employer pursue the employee through the civil courts for breach of confidence, the employee might avail himself of certain defences, including the Public Interest Defence and cessation of obligations.

Public Interest Defence

In cases where there is a clear public interest that information should be more widely known, the court will not hold a defendant to a specific undertaking not to disclose it.[35] The defence covers, but is not limited to, matters carried out or contemplated in breach of the country's security, or in breach of the law, including statutory duty, and fraud.[36]

Cessation of Obligations

This defence arises where the obligation to maintain confidence has ceased. This might be by agreement or release,[37] or by the information entering the public domain.[38] This defence is, however, rarely applied to whistleblowing cases.

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35 Hubbard v Vosper [1972] 2 Q.B. 84

36 Beloff v Pressdram Ltd [1973] 1 All E.R. 241

37 Ackroyds (London) Ltd v Islington Plastics Ltd [1962] R.P.C. 97

38 Att Gen v Blake [1998] Ch. 439, CA

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