

# Sports regulators and the potential for ‘breakaways’

The commercially lucrative aspect of sport presents regulators with the threat of breakaways by entities focused on profits, which may not be in the best interest of the sport. Simon Boyes, Director of the Centre for Sports Law at Nottingham Trent University, discusses the threat faced by sports regulators across different sports and asks whether rather than protecting traditional regulators the law may actually be providing a further obstacle to asserting any degree of control in preventing possible breakaways.



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Elite sport has a higher value than ever before. The media and sponsorship rights of many professional sports have grown vastly over the last fifteen to twenty years, in parallel with the growth in television platforms, and with the emergence and spread of new digital technologies. Football, in particular, is of such importance that Rupert Murdoch once described it as the “battering ram” with which he would enter the pay-TV market in the United Kingdom. Notably, for the period 2016 to 2019 the English Premier League secured a sum of £5.136 billion for domestic rights alone, with a further £3 billion of revenues being generated by the sale of overseas rights. The importance of football is also demonstrated by the ferocity with which BT Sport has entered into the market. Sponsorship is also prominent; by way of example, the London 2012 Olympic Games is estimated to have produced £700 million of sponsorship revenues, rising to in excess of £1.4 billion once worldwide revenues attracted by the International Olympic Committee are factored in.

Sports governing bodies - the regulators of sport - have certainly taken advantage of the economic opportunities available to them through media and sponsorship opportunities; very often the funds generated are deployed not only in support of the elite level, but also as a means of supporting grass-roots activities. Such opportunities also carry associated risks, however; they make the elite element of many sports attractive to ‘takeover’ by those primarily focused on profit, rather than on the best interest of a sport at all levels. The reality of many sports regulators is that they are not necessarily well-placed to operate in this new environment, seeking to balance the two extremes of participation - grass-roots and elite - which have grown substantially further apart in recent years. Many of these organisations have Victorian roots and were established as amateur, facilitative, rule-making organisations, rather than

the sophisticated corporate structures of the modern world. The result is that as elite sport becomes increasingly valuable it also attracts growing levels of interest from commercial operators wishing to profit from this economic potential.

Football is perhaps the most obvious sport in which these changes are likely to happen, but there are many earlier examples of instances of ‘breakaways’ forming in other sports. Perhaps the most famous of these is that of World Series Cricket, established by Australian entrepreneur Kerry Packer in 1977 as a means of creating a product for his Channel 9 broadcasting company. World Series Cricket which saw 34 of the world’s best cricketers contracted to participate in a series of ‘Super Tests.’ The venture ultimately lasted only two years, as a result of litigation (discussed below) and of Packer’s reconciliation with the Australian Cricket Board, but it is a good example of how interests from outside a sport may seek to ‘take’ and exploit the most commercially viable elements of a sport from the traditional regulator.


In other cases sports regulators have been able to contain threatened breakaways by making accommodations within their own regulatory regimes. The split in professional darts in 1993 was eventually resolved by an uneasy compromise which saw the ‘breakaway’ Professional Darts Council (‘PDC’) recognise the regulatory authority of the governing body, the World Darts Federation, whilst operating largely separately to it. That situation was, in significant part, fuelled by the commercial opportunities offered to the PDC through a deal with Sky Television. Similarly, Rugby League in the UK and, more substantially in Australia and New Zealand, has undergone a transformation with the introduction of SuperLeague and NRL respectively; ultimately a collaboration between the traditional regulators and broadcasters under the News Corporation banner. In football the

Premier League and Champions League ultimately represent the accommodation of the interests of ‘big’ clubs, and the concentration of revenues at the top level, albeit within existing regulatory structures. Arguably these developments amount to a ‘soft’ breakaway, with the interests of the elite level overriding other stakeholders within the sport. Indeed, the House of Commons Culture, Media and Sport Committee has criticised the predominance of the interests of the Premier League and its clubs in the decision-making structures of the Football Association (Football Governance Follow-Up: Volume 1. HC 509, p. 26). Similarly, UEFA absorbed into its structures the G14 Group of leading European club sides (now known as the European Club Association) as a means of averting the threat of a potential split.

All of this means that the regulators of sports with commercially attractive components, invariably the elite level or a part of it, find themselves increasingly vulnerable to the possibility of the breakaway of that aspect, either unilaterally or in conjunction with a commercial partner. This prospect has been heightened with the claim that a number of Europe’s top club sides met recently, with a view to discussing establishing a European Super League. In 2013 it was reported that Qatar planned to establish a bi-annual European club competition, the ‘Dream League,’ to be played in the summer months, as a challenger to UEFA’s Champions’ League and FIFA’s Club World Championship. The claim was denied and has not transpired but, along with the European Super League claims, gives succour to the notion that the possibility of such a venture might not be too far distant.

Taken to its extremes it could be imagined that a major media company or, perhaps, sovereign wealth fund, might act in conjunction with major clubs sides to form a ‘World League.’ Such a league would, undoubtedly, be of interest to a huge global audience





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and the prospect of seeing the world's best club teams face each other on a regular basis would likely grow media and sponsorship significantly beyond existing levels. Rather than operating in parallel with existing domestic and regional competitions, this sort of approach might lead to clubs splitting from the existing structures altogether. Taken together, enhanced incomes and the removal of demands on that income from other, less lucrative, parts of the game, provides a significant incentive for clubs and potential investors to actively consider such a move.

The difficulty faced by regulators is that, though they may at present have *de facto* monopoly over the regulation of their sport, they possess no *de jure* right to control and to regulate their sport. It is well settled that there is no intellectual property right in a sporting event itself; in *Victoria Park Racing v. Taylor* (1937) 58 CLR 479 the claimant was unable to establish a cause of action to prevent commentary on horseracing being broadcast from neighbouring land. Similarly, the BBC was unable to prevent a rival broadcaster carrying radio commentary of the Euro 2000 football tournament, based on television pictures, but broadcast as if live (*BBC v. Talksport* (2001) FSR 53). Most recently the Court of Justice of the European Union acknowledged the lack of a specific right in a sports event itself (Joined Cases C-403/08 and 429/08 *Football Association Premier League v. QC Leisure and Karen Murphy v. Media Protection Services Ltd* [2011] ECR I-9083). Any breakaway competition would be unlikely to be able to use the existing rules and regulations; these are likely to be copyright work. However, this seems unlikely to present an insurmountable

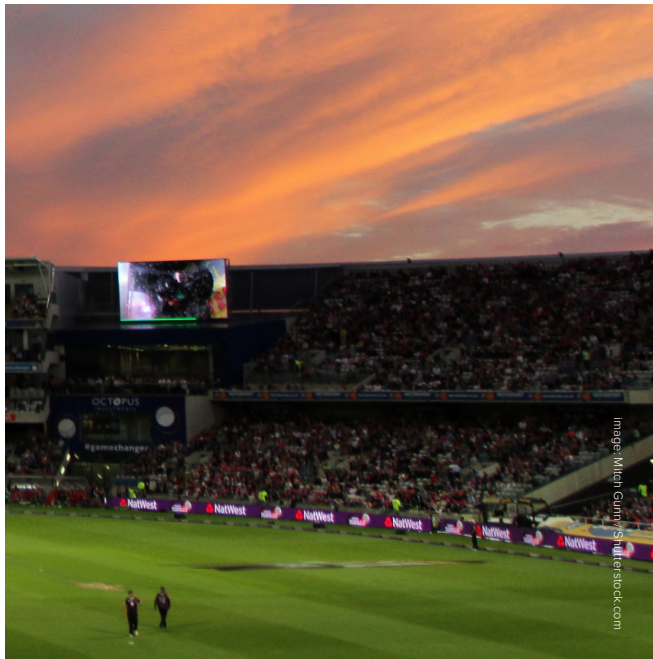
burden - World Series Cricket simply created its own regulations, thus avoiding any infringement of copyright. A remote possibility is that a regulator might be able to protect the format of the sport, as has been deployed in respect of television programmes. Again, however, small changes may be sufficient to negate this (as in *Green v. New Zealand Broadcasting Corp* [1989] 2 All ER 1056), and evidencing authorship, ownership and currency of any such right would be problematic for a sport such as football which has been codified for over 150 years.

While there may be no direct legal means by which sports regulators can prevent a breakaway, other possibilities are open to them. When Columbia split from FIFA for a brief period in the 1950s, many players from around the world took the lucrative opportunities available to them - instead of paying the players' existing clubs transfer fees, the Columbian clubs were able to take the players for free and spend those monies on remuneration. Players coming home after Columbia returned to the fold and were made the subject of swinging sanctions. The threat of exclusion from a sport for participation in 'unauthorised' activity is, then, one means by which a regulator might seek to influence players and, as a consequence, exercise indirect control over clubs.

This indirect approach was the one adopted by the International Cricket Council ('ICC') and Test and County Cricket Board ('TCCB' - now the 'ECB') in relation to Kerry Packer's breakaway World Series Cricket. The ICC amended its rules such that players participating in, or otherwise making themselves available for, an unsanctioned cricket match would be barred from participation in Test cricket. The TCCB followed suit,

imposing a similar restriction in respect of English first-class cricket. The bans were ultimately litigated by a number of players in *Greig v. Insole* [1978] 1 WLR 1520, who claimed that the restrictions were in restraint of trade and unlawful. In determining that case Slade J accepted the principle that imposing such limits on players was a legitimate and reasonable means of protecting the interests of cricket as a whole - recognising that the regulators were responsible for the welfare of the whole of the game, not simply the elite level. However, in this particular instance the bans had been imposed retrospectively which meant that they could not be reasonable and were, as a consequence, unlawful. This suggests a degree of control is available to regulators, however, it is indirect control. Were a World League to be sufficiently financially attractive to players, it might well be worth the risk of not being able to return to the mainstream game, and it would certainly be in the interests of any breakaway to ensure that the players were keen to participate in the competition.

Far from offering support to traditional regulators, it may be that the law provides a further obstacle in asserting any degree of control in preventing possible breakaways. In fact a regulator using its monopoly position to limit the development of new competitions might find itself falling foul of European Union competition law. In Case C-49/07, *Motosyklistiki Omospondia Ellados Npid v. Elliniko Dimosio (MOTOE)* [2008] ECR I-4863, the Court of Justice of the European Union indicated that a position of regulatory dominance on the part of a sports governing body must be exercised with care to avoid engaging in abuse. Nonetheless, Advocate General Kokott's Opinion offers some degree



of comfort, noting the public interest in the uniformity and fairness of the conduct and regulation of competitions, and that an overarching regulatory framework is in the general interest. The conclusion to be drawn from this is that a regulator might legitimately take action to protect these wider interests without abusing a position of dominance.

All of the above discussion relates to general principle; it does not take into account the particular contractual arrangements which may tie-in clubs to their existing competitions and structures. Nonetheless, the wealth of sport, in particular football, has the inevitable consequence that challenges to existing regulators and competitions will arise in the near future. The sums involved are now at a level where outside interests will find it almost irresistible to seek to exploit that immense commercial value. The result might not be the sort of clear-cut split envisioned in the 'World League' scenario, outlined above - it is likely to be a more complex arrangement, perhaps involving existing regulators in some form of compromise deal. The reality is that they will have little choice; if such a project gains traction there is likely little that can be done to restrict it from a legal point of view. Perhaps the most significant inhibitor on any breakaway at present is of a practical nature; the high-risks involved in leaving the existing regulatory architecture. Should a breakaway fail then clubs might find themselves excluded from existing structures, with no competition in which to play, and effectively out of business. Nonetheless we can expect to see more schemes like the 'Dream League' floated in the coming months and years and for one or more to come to fruition before too long.

## NEWS IN BRIEF

# CAS reduces Sharapova's doping ban as she was not an 'intentional cheater'

The Court of Arbitration for Sport ('CAS') issued its decision on 4 October 2016 in the arbitration procedure between Maria Sharapova and the International Tennis Federation ('ITF') reducing Sharapova's suspension to 15 months. The Panel found that Sharapova had committed an anti-doping rule violation and that while it was 'no significant fault,' Sharapova bore some degree of fault due to her failure to make sure that the substance contained in a product that she had been taking for a long period of time remained in compliance with the anti-doping rules.

"The CAS found the ITF decision was unduly harsh and inaccurately failed to measure her 'degree of fault.' The CAS Panel went to great lengths to point out that Sharapova was not an 'intentional cheater' but rather an athlete who unknowingly ingested a banned substance. The Panel then took the ITF and World Anti-Doping Agency's ('WADA') to task for failing to do more to warn Sharapova and other athletes when Meldonium was added to the 2016 Prohibited List," explains Paul Greene, Founder of Global Sports Advocates.

Sharapova was suspended for two years and had her results at the 2016 Australian Open disqualified after being found to have committed an anti-doping violation involving Meldonium in June. Meldonium was added to the WADA list of prohibited substances list on 1 January 2016 and in March 2016 Sharapova was informed that a sample she had provided in January 2016 had tested positive for the presence of Meldonium. Sharapova filed an appeal with CAS against the ITF's decision arguing that she did not take the banned substance to enhance her performance and that her period of ineligibility should be reduced on the basis of 'no significant fault.'

"It is an interesting decision, particularly with regard to the reasoning applied. The 'no significant fault' principle takes into consideration the principle of proportionality and WADA's intention is to allow adjudicating panels to reduce the degree of fault, when there is evidence that the athlete took the necessary steps to ensure that no prohibited substance entered their system. This obviously needs to be contrasted with the unconditional duty of athletes that they are responsible for what they use and the Panel's reasoning that an athlete relied on a third party or can delegate such duty to a third party, may be difficult to reconcile," said Dr Gregory Ioannidis, Senior Lecturer at Sheffield Hallam University. "Although different panels may interpret Sharapova's steps in a different light, the decision also sends a clear message to governing bodies to be more diligent in their efforts to notify athletes more appropriately and ensure that a substance only goes on the prohibited list when there is enough evidence of its performance enhancing effects."