Germany

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Publications

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AcP	Archiv für die civilistische Praxis (*law journal*)
AFG	Arbeitsförderungsgesetz (*Employment Promotion Act*)
AfP	Zeitschrift für Medien- und Kommunikationsrecht (*law journal*)
AG	Aktiengesellschaft (comparable to the English *public limited company*)
AGG	Allgemeines Gleichbehandlungsgesetz (*General Equal Treatment Act*)
ABlEG	Amtsblatt der Europäischen Gemeinschaften (*Official Journal of the European Communities*)
AMG	Arzneimittelgesetz (*Pharmaceutical Act*)
AO	Abgabenordnung (*Fiscal Code*)
AP	Arbeitsrechtliche Praxis (*Reference Guide of the* → BAG)
AR-Blattei SD	Arbeitsrecht-Blattei – Systematische Darstellungen (*loose-leaf booklet*)
ArbG	Arbeitsgericht (*Local Labour Court*)
ArbGG	Arbeitsgerichtsgesetz (*Labour Court Act*)
ArGV	Arbeitsgenehmigungsverordnung (*Labour Permit Regulation*)
AufenthG	Aufenthaltsgesetz (*Residence Act*)
AuR	Arbeit und Recht (*law journal*)
BA	Bundesagentur für Arbeit (*Federal Employment Office*)
BAG	Bundesarbeitsgericht (*Federal Labour Court*)
BAGE	Entscheidungen des Bundesarbeitsgerichts (*official collection of the decisions of the* → BAG)
BauGB	Baugesetzbuch (*Statutory Act on Construction and Building*)
BauNVO	Verordnung über die bauliche Nutzung der Grundstücke (*Regulation on the Structural Use of Land*)
BayImSchG	Bayerisches Immissionsschutzgesetz (*Bavarian Immission Control Act*)

List of Abbreviations

BayOblGZ	Entscheidungen des Bayerischen Obersten Landesgerichts in Zivilsachen (*decisions of the Bavarian High Court of Justice*)
BayPAG	Bayerisches Polizeiaufgabengesetz (*Bavarian Police Duties Act*)
BBiG	Berufsbildungsgesetz (*Vocational Training Act*)
BBL	Basketball Bundesliga (*German Basketball League*)
Bd.	Band (*volume)*
BeckRS	Beck-Rechtsprechung (*online jurisprudence database service provided by the publisher C.H.Beck, Munich*)
BetrVG	Betriebsverfassungsgesetz (*Works Constitution Act*)
BFH	Bundesfinanzhof (*Federal Finance Court*)
BGB	Bürgerliches Gesetzbuch (*German Civil Code*)
BGBl.	Bundesgesetzblatt (*Federal Law Gazette*)
BGH	Bundesgerichtshof (*Federal Court of Justice*)
BGHZ	Entscheidungen des Bundesgerichtshofs in Zivilsachen (*official collection of the decisions of the* → BGH)
BImSchG	Bundes-Immissionsschutzgesetz (*Federal Immission Control Act*)
BImSchV	Bundes-Immissionsschutzverordnung (*Federal Immission Control Regulation*)
BKA	Bundeskriminalamt (*Federal Criminal Police Office*)
BKAG	Gesetz über das Bundeskriminalamt und die Zusammenarbeit des Bundes und der Länder in kriminalpolizeilichen Angelegenheiten (*Act regarding the Federal Criminal Police Office and the Cooperation between the Federation and the Länder in matters concerning Criminal Investigations)*
BKartA	Bundeskartellamt (*Federal Cartel Office*)
BLSV	Bayerischer Landes-Sportverband (*Bavarian Sports Federation*)
BNatSchG	Bundes-Naturschutzgesetz (*Federal Nature Conservation Act*)
BSG	Bundessozialgericht (*Federal Social Court*)
BSGE	Entscheidungen des Bundessozialgerichts (*official collection of the decisions of the* → BSG)
BT-Drs.	Drucksachen des Deutschen Bundestages (*Official Records of the Bundestag*)
BtmG	Betäubungsmittelgesetz (*Narcotics Act*)
BVerfG	Bundesverfassungsgericht (*Federal Constitutional Court*)

BVerfGE	Entscheidungen des Bundesverfassungsgerichts (*official collection of the judgments of the* → BVerfG)
BVerwG	Bundesverwaltungsgericht (*Federal Administrative Court*)
BVerwGE	Entscheidungen des Bundesverwaltungsgerichts (*official collection of the judgments of the* → BVerwG)
BWaldG	Bundes-Waldgesetz (*Federal Forests Act*)
CaS	Causa Sport (*law journal*)
CAS/TAS	Court of Arbitration for Sport/Tribunal arbitral du sport (Lausanne)
cf.	confer, see
Ch.	Chapter
DAV	Deutscher Anwaltverein (*German Lawyer's Association*)
DB	Der Betrieb (*law journal*)
DFB	Deutscher Fußball-Bund (*German Football Federation*)
DFB-SpO	Spielordnung des → DFB (of 30 November 2009) (*Rules of the German Football Association*)
DFL	Deutsche Fußballliga (*German Football League*)
DHB	Deutscher Handballbund (*German Handball Association*)
DIS	Deutsche Institution für Schiedsgerichtsbarkeit e.V. (*German Institution of Arbitration*)
DLV	Deutscher Leichtathletik-Verband (*German Athletic Federation*)
DM	Deutsche Mark
DOSB	Deutscher Olympischer Sportbund (*German Olympic Sports Confederation*)
DÖV	Die öffentliche Verwaltung (*law journal*)
DSM	Deutsche Sport-Marketing GmbH (*a company arranged as a* → GmbH *which is a subsidiary of Stiftung Deutscher Sport, a public trust operated by the* → DOSB)
DStR	Deutsches Steuerrecht (*law journal*)
Dtld.	Deutschland (*Germany*)
DVBl	Deutsches Verwaltungsblatt (*law journal*)
EBLR	European Business Law Review
EC	European Community
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
ed.	Editor
eds.	Editors
EEA	European Economic Area
EEC	European Economic Community

List of Abbreviations

EFTA	European Free Trade Association
eG	eingetragene Genossenschaft (*registered co-operative*)
EGBGB	Einführungsgesetz zum Bürgerlichen Gesetzbuch (*Introductory Act to the German Civil Code*)
ErfK	Erfurter Kommentar zum Arbeitsrecht (*commentary on labour law*)
EU	European Union
EuR	Europarecht (*law journal*)
EuRAG	Gesetz über die Tätigkeit europäischer Rechtsanwälte in Deutschland (*European Laywers' Areas of Responsibility Act)*
EuZW	Europäische Zeitschrift für Wirtschaftsrecht (*law journal*)
EzA-SD	Entscheidungssammlung zum Arbeitsrecht – Schnelldienst (*law journal*)
e.V.	eingetragener Verein (*registered association*)
FAZ	Frankfurter Allgemeine Zeitung (*daily newspaper*)
FC	Fussballclub (*Football Club*)
FIFA	Fédération Internationale de Football Association
FIFAReg	FIFA Regulations on the Status and Transfer of Players
FIFARegSpV	FIFA Regulations on Player's Agents
FIS	Internationaler Ski Verband (*International Ski Federation*)
fn.	Footnote
FreizügigG/EU	Gesetz über die allgemeine Freizügigkeit von Unionsbürgern (*Law on the general freedom of movement of EU citizens*)
FS	Festschrift *(publication in honour of a particular person/event)*
GDP	Gross Domestic Product
GDR	German Democratic Republic
GeschmMG	Geschmacksmustergesetz (*Design Act*)
GewO	Gewerbeordnung (*Trade, Commerce and Industry Act*)
GG	Grundgesetz für die Bundesrepublik Deutschland (*Basic Law*)
GlüStV	Glücksspielstaatsvertrag (*Interstate Gambling Treaty*)
GmbH	Gesellschaft mit beschränkter Haftung (*form of company similar to the English limited liability company*)
GPSG	Geräte- und Produktsicherheitsgesetz (*Product and Equipment Safety Act*)
GRUR	Gewerblicher Rechtsschutz und Urheberrecht (*law journal*)

GRUR-Int	Gewerblicher Rechtsschutz und Urheberrecht. Internationaler Teil (*law journal*)
GSGV	Verordnung zum Geräte- und Produktsicherheitsgesetz (*Regulation relating to the Product and Equipment Safety Act)*
GVG	Gerichtsverfassungsgesetz (*Courts Constitution Act*)
GWB	Gesetz gegen Wettbewerbsbeschränkungen (*Act against Restraints on Competition*)
HB	Handelsblatt (*daily newspaper*)
HGB	Handelsgesetzbuch (*Commercial Code*)
IAAF	International Association of Athletics Federations
IASL	International Association of Sports Law
ICR	International Ski Competition Rules
id.	idem
i.e.	id est
IOC	International Olympic Committee
ISLA	International Sports Lawyers Association
ISU	International Skating Union
IPR	Internationales Privatrecht (*conflict of laws*)
InsO	Insolvenzordnung (*Insolvency Act*)
IWO	Internationale Skiwettkampfordnung (*International Ski Competition Rules*)
JA	Juristische Ausbildung (*law journal*)
JArbSchG	Jugendarbeitsschutzgesetz (*Youth Employment Protection Act*)
JuS	Juristische Schulung (*law journal*)
JZ	Juristische Zeitschrift (*law journal*)
KG	Kammergericht (*Berlin Higher Regional Court*)
KGaA	Kommanditgesellschaft auf Aktien
KSchG	Kündigungsschutzgesetz (*Protection against Dismissal Act*)
KUG	Kunsturheberrechtsgesetz (*Act on the Protection of Copyright in Works of Art and Photographs/ Art Copyright Act*)
l.c.	loco citato
LG	Landgericht (*regional court*)
LAG	Landesarbeitsgericht (*regional labour court*)
LAGE	Entscheidungen der Landesarbeitsgerichte (Loseblattsammlung von Lipke) (*loose-leaf collection of sentences of the regional labour courts*)
LKV	Landes-Kanu-Verband (*Land Canoe Federation*)
LO	Lizenzierungsordung Ligaverband der DFL (*Licencing Procedure for the League Association of the DFL*)
LOS	Lizenzierungsordnung Spieler der DFL (*Licencing Procedure for Players of the DFL*)

List of Abbreviations

LSV	Landessportverband (*State Sports Federation*)
MarkenG	Markengesetz (*Trademark Act*)
MarkenV	Markenverordnung (*Trademark Regulation*)
MDR	Monatsschrift für Deutsches Recht (*law journal*)
MMR	MultiMedia und Recht (*law journal*)
mn.	margin number
MüKo	Münchener Kommentar zum → BGB (*commentary on the German Civil Code*)
MüKoIPR	Münchener Kommentar zum → IPR (*commentary on conflict of laws*)
MüKoInsO	Münchener Kommentar zur Insolvenzordnung (*commentary on the Insolvency Code*)
MüKoZPO	Münchener Kommentar zur → ZPO (*commentary on the Civil Code of Procedure*)
MuSchG	Mutterschutzgesetz (*Maternity Protection Act*)
NachwG	Nachweisgesetz (*Act of Proof of Substantial Conditions Applicable to the Employment Relationship*)
NADA	National Anti-Doping Agency
no.	number
NOK	Nationales Olympisches Komitee für Deutschland (*German National Olympic Committee)*
NJOZ	Neue juristische Online-Zeitschrift (*online law journal*)
NJW	Neue Juristische Wochenschrift (*law journal*)
NJW-RR	Neue Juristische Wochenschrift – Rechtsprechungsreport (*law journal*)
NStZ	Neue Zeitschrift für Strafrecht (*law journal*)
NVwZ	Neue Zeitschrift für Verwaltungsrecht (*law journal*)
NVwZ-RR	Neue Zeitschrift für Verwaltungsrecht – Rechtsprechungsreport (*law journal*)
NZA	Neue Zeitschrift für Arbeitsrecht (*law journal*)
NZA-RR	Neue Zeitschrift für Arbeitsrecht – Rechtsprechungsreport (*law journal*)
NZG	Neue Zeitschrift für Gesellschaftsrecht (*law journal*)
NZI	Neue Zeitschrift für das Recht der Insolvenz und Sanierung (*law journal*)
OLG	Oberlandesgericht (*higher regional court*)
OlympSchG	Das Gesetz zum Schutz des olympischen Emblems und der olympischen Bezeichnungen (*Protection of the Olympic Emblem and the Olypmic Symbols Act*)
p.a.	per annum
PG	Prütting/Gehrlein, ZPO Kommentar (*commentary on the Civil Code of Procedure*)
PHBSportR	Praxishandbuch Sportrecht (see *Bibliography*)
ProdHaftG	Produkthaftungsgesetz (*Product Liability Act*)

RBerG	Rechtsberatungsgesetz (*Legal Advice Act*)
RdA	Recht der Arbeit (*law journal*)
RTP	Registered Testpools
RGBl.	Reichsgesetzblatt (*official gazette in which all acts of the old German Parliament (Reichstag) were published*)
RKB	Rad- und Kraftfahrerbund 'Solidarität' Deutschland 1896 e.V. (*German Bicycle and Motorist Association 'Solidarity')*
ROG	Raumordnungsgesetz (*Federal Planning Act*)
RStV	Staatsvertrag für Rundfunk und Telemedien (*State Broadcasting Treaty*)
RuS	Recht und Sport (*series*)
RuVo	Rechts- und Verfahrensordung (des → DFB) (Rules and Procedure of the DFB) (as of 30 March 2011)
SGB	Sozialgesetzbuch (*Social Security Code*; *roman numerals refer to the respective book*)
SchiedsVZ	Zeitschrift für Schiedsverfahren – German Arbitration Journal (*law journal*)
SportRPr	Sportrecht in der Praxis (see *Bibliography*)
Sp*u*Rt	Zeitschrift für Sport und Recht (*law journal*)
StAG	Staatsangehörigkeitsgesetz (*Citizenship Act*)
StAR-VwV	Allgemeine Verwaltungsvorschrift zum Staatsangehörigkeitsrecht (*General Administrative Regulations relating to the Citizenship Act*)
StGB	Strafgesetzbuch (*Criminal Code*)
StPO	Strafprozessordnung (*Code of Criminal Procedure*)
StVO	Straßenverkehrsordnung (*Road Traffic Regulations*)
SZ	Süddeutsche Zeitung (*daily newspaper*)
taz	die tageszeitung (*daily newspaper*)
TEC	Treaty on European Community
TzBfG	Gesetz über Teilzeitarbeit und befristete Arbeitsverträge Teilzeit- und Befristungsgesetz (*Part-Time Job and Fixed-Term Employment Contract's Act)*
TFEU	Treaty on the functioning of the EU
UEFA	Union of European Football Associations
UmwG	Umwandlungsgesetz (*Reorganization of Companies Act*)
UNESCO	United Nations Educational, Scientific and Cultural Organization
UrhG	Gesetz über Urheberrecht und verwandte Schutzrechte (*Copyright Act*)
UWG	Gesetz gegen den unlauteren Wettbewerb (*Unfair Competition Act*)
VersR	Zeitschrift für Versicherungsrecht, Haftungs- und Schadensersatzrecht (*law journal*)

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VersG	Versammlungsgesetz (*Public Assemblies Act*)
VMBl.	Ministerialblatt des Bundesministers der Verteidigung (*Administrative Directive of the Minister of Defence*)
VO	Verordnung (*Regulation*)
WADA	World Anti-Doping Agency
WADC	World Anti-Doping Code
WHG	Gesetz zur Ordnung des Wasserhaushaltes (*Federal Resources Act*)
WM	Wertpapiermitteilungen – Zeitschrift für Wirtschafts- und Bankrecht (*law journal*)
WRP	Wettbewerb in Recht und Praxis (*law journal*)
WuW	Wirtschaft und Wettbewerb (*law journal*)
ZAR	Zeitschrift für Ausländerrecht und Ausländerpolitik (*law journal*)
ZGR	Zeitschrift für Unternehmens- und Gesellschaftsrecht (*law journal*)
ZHR	Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht (*law journal*)
ZIP	Zeitschrift für Wirtschaftsrecht (*law journal*)
ZivilR	Zivilrecht
ZPO	Zivilprozessordnung (*Civil Procedure Code*)
ZRP	Zeitschrift für Rechtspolitik mit Rechtspolitischer Umschau (*law journal*)
ZUM	Zeitschrift für Urheber- und Medienrecht (*law journal*)
ZUM-RD	Zeitschrift für Urheber- und Medienrecht – Rechtsprechungsdienst (*law journal*)
ZWeR	Zeitschrift für Wirtschaftsrecht (*law journal*)

Acknowledgements

In Germany, sports law has a long and exciting tradition. 'The Appeals of Sports Law' (http://www.irut.jura.uni-erlangen.de/Forschung/Veroeffentlichungen/OnlineVersionFaszinationSportrecht/FaszinationSportrechtEnglisch.pdf) has become a catchword for this fascinating cross-sectional field of law and practice. Sports law has developed into such a broad topic that there is a pressing need for specialization in this area. With this in mind, we decided to split our contributions to this publication. Andreas Krause has written Part II (labour law). Klaus Vieweg is responsible for the other parts. He was supported by members of the German and International Sports Law Research Unit at the Institute of Law and Technology (IRuT) of the University of Erlangen-Nuremberg, namely Dr Barbara Buhr, Angelika Moser, Carolin Schwegler and Paul Staschik. The section on tax law was written by Dr Alex Steiner, a well-known expert in this field. Their support proved invaluable and deserves heartfelt gratitude.

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Klaus Vieweg & Andreas Krause

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General Introduction

Chapter 1. General Background: Sport and Sports Law

1. *Sport* has become an integral part of our society. However, it is neither clearly defined in common parlance nor in legal terminology.[1] The difficulties arise from the variety of sports in existence, as well as from its various manifestations. Sport is practiced not only as competitive sport regulated by the statutes of associations and federations, but also as unorganized recreational sport, and as activity intended to increase and maintain fitness and health. Despite this variety, these activities share similarities which can be of use in assisting and guiding the definition of sport: physical exercise, freedom of purpose, the comparison of performance, competition, equality of opportunity, conduct pursuant to consistent rules and organization.[2]

2. *Sports law* is also of increasing importance, particularly in Germany. Sport can no longer be said to fall outside the purview of the law. The continuing professionalization and commercialization of sports (as well as the increasing coverage of sport by the media) has led to sport becoming subject to general legal principles and regulation. In Germany, sport has the same economic relevance as agriculture, with a share of 1.4% of the gross domestic product.[3] This importance to the economy is not solely due to professional sport; amateur sports are also of considerable economic significance.[4] As sports have become more commercialized, the number and intensity of conflicts which occur in the field of sports have increased. These conflicts require legal regulation by means of contractual provisions, federation rules and state laws. This is one of the main reasons why sports have gained a stronger legal basis.

The function of sports law is to deal with the various manifestations and conflicts which may arise within social and economic networks of relationships in such a way

1. The term 'sports' can, for example, be found in Art. 6, 165 Treaty on the functioning of the EU; §§ 1, 5, 9, 40, 136 BauGB, §§ 52, 58, 67a AO.
2. Cf. Pfister, in: Fritzweiler/Pfister/Summerer, *Praxishandbuch Sportrecht* (PHBSportR-author), part 1, mn. 3; Ketteler, Sp*u*Rt 1997, 73 et seq.
3. This number is based on a survey by Mayer/Ahlert (2000). A sports-related GDP of approximately EUR 27 billion was calculated for 1998. By now, this share has probably increased considerably. Sport contributes to 3% of the gross domestic product of the EU Member States; cf. 12th Sports Report of the German Federal Government, BT-Drs. 17/2880, 103.
4. Thus, in German sports associations, EUR 6.7 billion is generated by volunteers annually; cf. Sports Development Report 2009/2010 of the German Sports University Cologne.

that the interests of both participants can be served, and that any conflicting interests are fairly balanced.

3. As regards the basic distinction in German law between private law and public law, one must differentiate between civil and the public sports law on a conceptual level. *Sports law in civil law* encompasses the relevant legal relationships in the area of sports under civil law, and thus governs the relationship between the parties involved, which is shaped by the private autonomy of those parties. The relationship between participants in the realm of sports and the state – in Germany this is interpreted not only as the Federal Republic, but also as the sixteen states (Bundesländer, referred to as Länder; singular – Land) – however, is subject to *sports law under public law*. This first became important at the end of the 1980s and the beginning of the 1990s when some states incorporated the state objective of 'promotion of sports' into their constitutions.[5] Apart from this, there are few specific sports regulations within sports law. Apart from the Act to Protect the Olympic Emblem and Olympic Symbols, these are mainly provisions under construction and planning, fiscal and social law.[6] The main focus is on the applicability of general provisions which are not concerned primarily with sports.

Sports law therefore comprises two sets of rules: on the one hand, the rules of the associations and federations (bodies based on the principle of private autonomy) which organize sports, and, on the other hand, the generally applicable legal rules set by state (and supranational) law. Upon consideration of this fact, it is clear that a material feature of German sports law is its *dualism*.[7] The solution of sports-specific legal issues often depends upon the dissolution of the tension between these two sets of rules.

4. The roots of both private sports law and public sports law are the *fundamental rights of the parties involved*. In general, the most important fundamental rights of the sportsperson are the right to general freedom of action (Article 2(1) Basic Law (GG)) and the right to freedom of profession (Article 12 GG). The fundamental right central to the organized exercise of sports is the freedom of association (Article 9(1) GG). By means of this right, autonomy is granted to associations and federations. In other words: It guarantees them the right to organize their internal structure themselves by means of statute, the independent exercise of their duties and the right to settle their matters by putting in place statutes and bodies of rules, as well as the autonomous application and implementation of these within their own areas of responsibility.

5. Cf. Steiner, *Der Sport auf dem Weg ins Verfassungsrecht*, in: Tettinger/Vieweg (eds.), Gegenwartsfragen des Sportrechts, Berlin 2004, 119 et seq.; id., *Von den Grundrechten im Sport zur Staatszielbestimmung 'Sportförderung'*, in: Tettinger/Vieweg (eds.), Gegenwartsfragen des Sportrechts, Berlin 2004, 143.
6. Cf. §§ 1, 5, 9, 40, 136 BauGB, §§ 52, 58, 67a AO.
7. Cf. Vieweg, *Faszination Sportrecht*, 2nd edition 2010, 18 et seq., accessible at http://www.irut.de/Forschung/Veroeffentlichungen/OnlineVersionFaszinationSportrecht/FaszinationSportrecht.pdf.

It is a particular characteristic of sports law that there are collisions between the basic rights of the associations and sports federations on the one hand, and the athletes on the other. This conflict has to be resolved using the principle of practical concordance and proportionality.[8]

8. For a detailed analysis, see BVerfGE 83, 130; 93, 1; Krogmann, *Grundrechte im Sport*, Berlin 1998; Di Fabio, in: Maunz/Dürig (eds.), *Kommentar zum Grundgesetz*, Art. 2 mn. 111 et seq., 233 et seq.; Vieweg, *Normsetzung und -anwendung deutscher und internationaler Verbände*, Berlin 1990, 192.

Chapter 2. Development of Sports Law

5. The development of sports law reflects both the development of sports in general and the development of law in Germany. In the 1990s, 'Sports and the Law'[9] became sports law.

In the 1930s, sports became of great importance in Germany, not least due to the Olympic Games in Berlin. In addition, sports were completely reorganized in the course of the so-called 'Gleichschaltung'.[10] This development also manifested itself in a large number of legal publications.[11]

6. Sports law has undergone a second burst of development since the mid-1960s.[12] The commercialization and professionalization of sports began with the football Bundesliga in 1963. The so-called Bundesliga-Skandal,[13] which occurred in the 1970/71 season, drew considerable public attention to specific legal sporting problems.[14] The first systematic treatment of sports law was undertaken by Eike Reschke, the chancellor of Cologne German Sports University, in the Handbook of Sports Law, edited in loose-leaf.[15]

The increased significance of sports law is also clear at symposia held in order to discuss sports law. Since 1975, annual conferences have been held by the Wuerttembergian Football Association, and the speeches and presentations delivered there are published in a special series.[16] The Sports Law Working Group of Constance – which has been known as the German Sports Law Association since 2005 – has hosted symposia since 1984, the speeches from which are published in the series 'Recht und Sport' ('Law and Sports').[17]

9. This was the title of a book by Stefan Nürck which was published in 1936 and also of an article by Klaus Vieweg, JuS 1983, 825 et seq.
10. Vieweg, *Gleichschaltung und Führerprinzip*, in: Salje (ed.), Recht und Unrecht im Nationalsozialismus, Münster 1985, 244 et seq.
11. Cf. references in Vieweg, *Gleichschaltung und Führerprinzip*, in: Salje (ed.), Recht und Unrecht im Nationalsozialismus, Münster 1985, 244 et seq.
12. The development of the sports described has led to a rise in the number of academic articles written about sports law since the mid-1960s. Cf. the works of Werner, *Sport und Recht*, Tübingen 1968; Reichert, *Grundriss des Sportrechts und Sporthaftungsrechts*, Neuwied am Rhein et al., 1968; Stern, *Die Grundrechte des Sportlers*, in: Schroeder/Kaufmann (eds.), Sport und Recht, Berlin, New York 1972; Schlosser, *Vereins- und Verbandsgerichtsbarkeit*, Munich 1972.
13. An excellent review and record of the scandal is included in a book by Rauball, *Bundesliga-Skandal*, Berlin/New York 1972.
14. Groundbreaking analysis and criticism by Westermann, *Verbandsstrafgewalt und das allgemeine Recht*, Bielefeld 1972; the monograph by Schlosser, *Vereins- und Verbandsgerichtsbarkeit*, Munich 1972 is also informative.
15. The Handbook of Sports Law is carried on by Ulrich Haas and Tanja Haug.
16. 'Schriftenreihe des Württembergischen Fußballverbandes', with subsequent series 'Schriften zum Sportrecht'.
17. 39 Volumes have been published; a record of these can be found on the homepage of the *Deutsche Vereinigung für Sportrecht* (DVSR).

7. A third wave of development began in the early 1990s. Sports law increasingly became the subject of professorial dissertations[18] which dealt in particular with issues of international sport. A sports law division was founded within the German Bar Association.[19] German legal professionals are heavily involved in the International Association of Sports Law (IASL, founded in 1992)[20] and in the International Sports Lawyers Association (ISLA).[21] Further series of publications have been published: 'Beiträge zum Sportrecht'('Contributions to Sports Law') (since 1998),[22] 'Recht im Sport' ('Law in Sports') (since 2008)[23] and the 'Schriftenreihe Causa Sport' ('Series Causa Sport') (since 2009).[24] Finally, the development of Sports law in Germany is propelled by specific sports law reviews. The first German professional journal for sports law appeared on the scene in 1994 in the form of the Zeitschrift für Sport und Recht (Sp*u*Rt). In 2004, 'Causa Sport' also came into being.

18. Vieweg, *Normsetzung und -anwendung deutscher und internationaler Verbände*, Berlin 1990; Adolphsen, *Internationale Dopingstrafen*, Tübingen 2003; Nolte, *Staatliche Verantwortung im Bereich Sport*, Tübingen 2004.
19. Information provided by DAV to the Sports Law Working Group are available at http://www.sportrecht-dav.de/.
20. http://iasl.org/pages/en.php.
21. http://isla-int.com/.
22. 39 volumes have been published in this series so far by the publisher Duncker & Humblot.
23. Edited by Richard Boorberg Verlag. 2 volumes have been published in this series so far.
24. Edited by Richard Boorberg Verlag. 4 volumes have been published in this series so far.

Chapter 3. Sources of Sports Law

8. The sources of sports law are diverse. The reason for this is that the aforementioned duality of law-making by associations on the one hand, and by the state on the other, is also apparent on an international level. Accordingly, sports law is comprised of four sets of rules which influence each other mutually. At international level, public law in the area of sports and the law of the European Union on the one hand, as well as regulations created by the statutes and systems of rules of the international sports organizations and the IOC on the other, are significant from a German point of view. At national level, the most important provisions are the (few) sports-specific federal laws and (many) general legal provisions, as well as the statutes and systems of rules of the national sports organizations. In addition there is – although not a legal source, strictly speaking – jurisprudence which must be observed. Accordingly, in addition to the decisions of the constitutional courts (in particular those of the Federal Constitutional Court) the jurisprudence of five branches of the German court system (Gerichtszweige) must be taken into account: the ordinary courts with civil and criminal jurisdiction, labour courts, administrative courts, social courts and financial courts.

The following account will give an overview of the four sources of sports law mentioned above, insofar as they are of relevance to the resolution of sports-related cases in Germany.

9. Sources of public international sports law can arise from public law. In particular, *public sports law* addresses the fight against apartheid[25] and other discrimination in the areas of sport,[26] peacekeeping during the Olympic Games[27] and the prevention and combating of violence,[28] the question on the acknowledgement of a 'right to sport'[29] as a human right and the prevention of doping[30] in sports.[31] Both the United Nations – acting through its general assembly, its security council or UNESCO – and the Council of Europe are increasingly willing to address issues of sports.

10. The law of the European Union is significant for international sports law.[32] The fact that European sport enjoys an essential role in contributing to integration is demonstrated by the creation of the European Sports forum by the European

25. Krumpholz, *Apartheid und Sport*, Munich 1991.
26. See generally Vieweg/Lettmaier, *Anti-discrimination law and policy*, in: Nafziger/Ross (eds.), Handbook on International Sports Law, 2011, 258 et seq.
27. Wax, *Internationales Sportrecht*, Berlin 2009, 227 et seq.
28. In this area, the European Convention on 'Spectator Violence and Misbehaviour at Sports Events and in particular at Football Matches' of the Council of Europe of Aug. 19, 1985 must be mentioned.
29. Wax, *Internationales Sportrecht*, Berlin 2009, 249 et seq.
30. Haas, in: Haas/Haug/Reschke (eds.), Handbuch des Sportrechts, B, Ch. 1, mn. 81. The 'European Anti-Doping Convention for Sport' of Nov. 16, 1989 on European level as well as the 'International Convention against Doping in Sports' of Oct. 19, 2005 on a global level are of major importance.
31. Cf. Wax, *Internationales Sportrecht*, Berlin 2009, 197 et seq. for a detailed account.
32. Instructive overview by Streinz, Sp*u*Rt 1998, 1 et seq., 45 et seq., 89 et seq.

Commission on 17 December 1991. This body gathers once a year to discuss relevant topics within European sports.[33] While neither the Treaty on the European Community, nor the Treaty on the European Union provided for the allocation of competences within the field of sports (the matter was, in fact, not mentioned at all), the EU is now provided with specific jurisdiction in the field of sports by Article 165 of the European Treaty of Lisbon which entered into force on 1 December 2009.[34] Article 165 Treaty on the functioning of the European Union (TFEU) equips the EU with a limited opportunity to act in order to promote fairness and openness in sporting competitions, to promote cooperation between those bodies responsible for sports, and to protect the physical and moral integrity of all those involved in sports. However, the impact of the European fundamental freedoms (which, according to the European Court of Justice,[35] are applicable to the extent that a sporting activity is part of an economic activity) on international sports law must not be underestimated. Due to the tight interlacing of economics and sports, many areas of sport fall within the scope of EU law. In addition to the principle of free movement of workers set out in Articles 45 et seq. – which can be regarded as one of the main regulations for individual professional athletes, not least because of the Bosman-case which was heard by the European Court of Justice[36] – free movement of services, freedom of establishment and the competition regulations pursuant to Articles 101, 102 TFEU[37] are gradually beginning to gain more relevance in the area of sports.[38] Freedom of association (guaranteed by Article 12(1) Charter of Fundamental Rights of the European Union) is also important for sports associations on the European level.[39]

11. Statutes and sets of rules set out by international sport organizations are also part of international sports law; for example, the Olympic Charta of the IOC or the rules of the FIFA. These are binding on subordinate national organizations and associations.[40] Their binding character arises either from the submission of the national associations or federations to international rules by contractual agreement,[41] or from

33. See de Kepper, *Die Europäische Union und der Sport,* in: Schimke (ed.), Sport in der Europäischen Union, RuS volume 19, Heidelberg 1996, 1 et seq. for an account of the relationship between the European Union and sports.
34. Haas, in: Haas/Haug/Reschke (eds.), Handbuch des Sportrechts, B, Ch. 1, mn. 84b.
35. EuGH (Walrave and Koch), 36/74, O.J. 1974, 1405, 1418.; EuGH (Meca-Medina and Majcen), C-519/04, EuZW 2006, 593, 595. Cf also Nolte, *Staats- und Europarecht*, in: Nolte/Horst (eds.), Handbuch Sportrecht, Schorndorf 2009, 34 et seq.
36. EuGH (Bosman), C-415/93, O.J. 1995, I-5040; for an instructive account, see Groß, *Eine unendliche Geschichte: Transferregelungen im lizenzierten Fußballsport*, Frankfurt a.M. 2004.
37. Cf. Nolte, *Staats- und Europarecht*, in: Nolte/Horst (eds.), Handbuch Sportrecht, Schorndorf 2009, 49 et seq.
38. Cf. Nolte, *Sport und Recht*, Schorndorf 2004, 39 et seq. State Aid Regulations are also applicable, see Nolte, *Staats- und Europarecht*, in: Nolte/Horst (eds.), Handbuch Sportrecht, Schorndorf 2009, 39 et seq.
39. Cf. Vieweg/Röthel, ZHR 166 2002, 6 et seq.
40. Regarding the question as to whether they form a lex sportiva which can be viewed as being legally valid and which is independent of statutory law, see Adolphsen, *Internationale Dopingstrafen*, Tübingen 2003, 628 et seq.
41. For instance, the contract for the host-nation of the football World Cup.

the sports associations' arrangement within a pyramid-shaped structure, as provided for in their bylaws.[42]

12. At *national level*, there is no special comprehensive statute for the area of sports in Germany. On surveying a cross-section of sports law, one finds that it is much more the case that the laws applicable to sports are a *multitude of individually enacted state regulations* which do not apply exclusively to sports. Under constitutional law, the most relevant provisions of the German Basic Law (*Grundgesetz* – GG) are Article 2(1) (general freedom of action), Article 9(1) (freedom of association), Article 12(1) (freedom of profession) and Article 14(1) GG (freedom of ownership). The legal relationships existing within sports associations and federations between these bodies and their members and the athletes involved in them, as well as between them and third parties, are regulated in particular by civil law provisions of the law of associations (§§ 21 et seq. BGB), contract law and the law of torts (sections 241 et seq., sections 823 et seq. BGB). Statutes which regulate the area of economic and financial law are also of increasing importance: GWB (Act against Restraints on Competition), UWG (Unfair Competition Act), UrhG (Copyright Act), MarkenG (Trademark Act).

In addition, certain provisions of public administrative law (perhaps in the context of the security of spectators and data protection) and of criminal law (particularly in the areas of doping and betting fraud) – play a role.

13. The primary sources of law on national level are – similarly to the international level – *the statutes and rules and regulations of the national sports organizations*. The rules and regulations are private law regulations which rank below statutes. They are binding upon the single federations or athletes as a result of that federation or athlete's submission by the body of rules and regulations, be this by means of a contract, or as a result of the member's position.[43]

42. For a detailed account, see Vieweg, *Normsetzung und -anwendung deutscher und internationaler Verbände*, Berlin 1990.
43. For a detailed account, see below Part I, Ch. 3, §5 I.

Part I. Organization of Sport

Chapter 1. General Issues

14. As regards the organization of sports, a distinction must be made between an organization established by public authorities and one – as is predominantly the case – established by private parties. *Public authorities* usually regulate the practice of sport in schools, universities, the federal armed forces and (federal or Land) police (as well as in prisons) on the basis of national laws. Due to the federal structure, the Land and the federal government are both partly in charge.[44] The organization by *private parties* is, on the whole, carried out by more than 90,000 associations, in a broad sense, including clubs, which are joined in the German Olympic Sports Confederation with more than 27 million individual members. Its distinguishing feature is a pyramid-shaped structure for each sports category (e.g., football association – football federation at Land level – German football association) and in a transsport regard (association – county federation – federation of Land – German Olympic Sports Confederation). Both pyramidal columns are brought together under the umbrella body of the German Olympic Sports Confederation (DOSB) which was established by the merger of the German Sport Federation and the National Olympic Committee in 2006. The pyramidal structure has been retained within the international sports associations and the International Olympic Committee. In the field of professional sports leagues (German Football League, German Basketball League, German Ice Hockey League, German Handball league), the options for the organizational structure is broadened by means of the alternatives available under company law (particularly the German GmbH, similar to an English private limited company).[45] Amateur sports performed in the gym also belong to the realm of privately organized sports, though these will not be discussed in any depth in this account.

15. The *legal regulation* of sports is characterized by its two 'tracks', or dualist nature.[46] There are few national regulations which expressly concern sports and its organization (e.g., sport in schools). Apart from these, the private sports organizations are provided with an extensive freedom by general laws, combined with the constitutionally-guaranteed autonomy of association pursuant to Article 9 and the

44. For a detailed account, see below Part I, Ch. 2, §2 II B.
45. For a detailed account, see below Part I, Ch. 3, §2 II.
46. Cf. Vieweg, *Faszination Sportrecht*, 2nd edition 2010, 18 et seq., available at http://www.irut.de/Forschung/Veroeffentlichungen/OnlineVersionFaszinationSportrecht/FaszinationSportrecht.pdf.

party autonomy guaranteed by Article 2(1) GG, to arrange their organizational regulations (possibility to self-regulate). This could be referred to as the 'opportunity to self-regulate'.[47]

The following national regulations will be discussed in detail: freedom of association, the promotion of sports, public order and security, tax law and mediation. The section on private regulation will deal with the organization of sports in Germany, the legal status of sport associations and federations, rules of sport, the relationship with national law, the penalties meted out by associations and federations, the association-member relationship, legal remedies against actions of the federation, liability aspects and safety regulations.

47. Vieweg, *Normsetzung und -anwendung deutscher und internationaler Verbände*, Berlin 1990, 182 et seq.

Chapter 2. Public Regulation

§1. Constitutional Guaranties and Warranties, Particularly Freedom of Association

16. Even though the Government does influence the practice of sports in many respects, the Basic Law does not provide any primary sports law regulations by, for instance, offering specific commitments or warranties. Although the introduction of a specific state objective 'promotion of sports' to the German Basic Law has been discussed for many years,[48] it does not seem to be capable of being realized as, under German law, there are very few laws which are specific to sports.[49] However, the Basic Law is of great significance for sports. Many of the regulations and principles contained therein gain particular significance in the area of sports as a result of the third-party effect of constitutional rights (*Drittwirkung*). This third-party effect, which can lead to basic rights being influenced by legal relations under civil law by means of blanket clauses, has been acknowledged by the Federal Constitutional Court[50] (*Bundesverfassungsgericht* – BVerfG) in its jurisprudence. In many cases, this leads to collisions between conflicting fundamental rights which must then be resolved by the achievement of a 'practical coherence'.[51] This ultimately amounts to a decision based on the principle of proportionality. In the field of sports, such collisions occur in particular between the freedom of associations (Article 9(1) GG) and the individual basic rights of athletes and other actors (Article 2(1), Article 12(1), Article 14(1) GG).

I. Constitutional Guarantees for Sports Associations and Federations: Freedom of Association, Article 9(1) GG

17. In Germany, more than 27 million athletes are arranged in more than 90,000 sport associations, in a broad sense, including clubs, and corresponding umbrella organizations on Land or federal level. The practice of sport in associations and federations is of an immense importance. Article 9(1) GG protects freedom of association and, accordingly, the right to gather for any purpose of personal choice in the form of associations, federations and communities of any kind.[52] It thereby guarantees the existence of a state-free collective of associations and federations. Any

48. Cf. Steiner, NJW 1991, 2729 et seq.; Humberg, ZRP 2007, 57 et seq.
49. Cf. SportRPr-Nolte, 2012, mn. 77; Steiner, NJW 1991, 2729 at 2730; Kirchhof, *Sport und Umwelt als Gegenstand des Verfassungsrechts und der Verfassungspolitik*, in: Kirchhof (ed.), Sport und Umwelt, Heidelberg 1992, 44 et seq.; Humberg, ZRP 2007, 57 et seq.
50. See BVerfGE 7, 198 at 204 et seq.; 25, 256 at 263; Herdegen, in: Maunz/Dürig (eds.), Kommentar zum Grundgesetz, Art. 1 III mn. 60 et seq.
51. BVerfGE 83, 130; 93, 1; SportRPr-Nolte, 2012, mn. 22; Di Fabio, in: Maunz/Dürig (eds.), Kommentar zum Grundgesetz, Art. 2 mn. 108 et seq., 233 et seq.; Vieweg, *Normsetzung und -anwendung deutscher und internationaler Verbände*, Berlin 1990, 192.
52. BVerfGE 13, 174 at 175; 38, 281 at 303.

person is free to establish a sports association or federation.[53] Furthermore, Article 9(1) GG contains an independent guarantee by the state to protect the state-free, autonomous organization of association- and federation-life so that sport associations and federations are guaranteed the capacity to develop independent, sport-related values and measures which arise out of their communities.[54] The autonomy of the federation encompasses all areas of association and federation practice of sport. The right to establish their own individual statutes and sets of rules for playing and for competitions, regulations in relation to the organization and administration, as well as regarding sports ethics means that associations and federations in Germany are a special breed. The autonomy of associations is not without its limits. In particular, it can collide with basic rights of others, for example these of the athletes.[55]

In addition to the guaranteed autonomy of associations and federations, Article 9 (1) GG protects the freedom of the individual athlete to join an association or federation, to omit from doing so and to resign from an association or federation (positive and negative freedom of association).[56] In this case, the basic right of association fulfils a double function: It guarantees sports associations and federations the right to perform such activities, and also ensures the right of each individual member of such associations to engage in sporting activities.[57]

II. Constitutional Guarantees for Individual Participants Involved in Sporting Activities, in Particular, Athletes

A. General Freedom of Action, Article 2(1) GG

18. Article 2(1) GG as a 'general basic right' of freedom of action includes the right to free development of personality and, hence, to mental, creative, economic and sporting activity.[58] Thus, Article 2(1) GG protects all individual athletes, independently of the type of sporting activity in which they engage, the level at which they perform, and the degree of perfection which they have achieved, independently of the effect of the sporting activity upon the public. Freedom of sporting activity is limited – as are all activities encompassed by Article 2(1) GG – by the 'barrier of constitutional order', i.e., the sum of all legal regulations which are substantively or materially in line with the German Basic Law.[59] Article 2(1) GG is a

53. Foreigners can call on Art. 2(1) GG in this respect. Due to the non-discrimination rule pursuant to Art. 18 TFEU and Art. 9(1) GG, citizens of the European Union must be provided with a comparable level of protection.
54. Steiner, *Staat, Sport und Verfassung*, in: Tettinger/Vieweg (eds.), Gegenwartsfragen des Sportrechts, Berlin 2004, 27 at 30 et seq.
55. Vieweg, *Normsetzung und -anwendung deutscher und internationaler Verbände*, Berlin 1990, 176 et seq.; for an account of collisions on European level cf. Vieweg/Röthel, ZHR 166 (2002), 6 et seq.
56. For more on freedom of association see BVerfGE 50, 290 at 353 et seq.
57. Thus, the prevailing opinion Scholz, in: Maunz/Dürig (eds.), Kommentar zum Grundgesetz, Art. 9, mn. 23; Vieweg, *Normsetzung und -anwendung deutscher und internationaler Verbände*, Berlin 1990, 151.
58. BVerfGE 6, 32 at 36 et seq.; 8, 328; BVerwGE 80, 137 at 152 et seq.
59. BVerfGE 6, 32 at 38.

'defensive basic right' which means that an athlete can assert his freedom to engage in the lawful practice of sport against the state. He can also assert it against associations and federations due to the third-party effect of constitutional rights.

B. Protection of Bodily Integrity, Article 2(2) Sentence 1 GG

19. The protection of general sporting activity is amended by Article 2(2) sentence 1 GG. This basic right guarantees the bodily integrity of all natural persons and, therefore, of athletes while practicing sports.[60] It is not possible to assert specific entitlements to benefits based on this basic right. However, the state is obliged to defend its citizens and protect them from unlawful attacks or detrimental behaviour by private individuals (duty to protect).[61] Hence, the freedom to practice sport is guaranteed by the right to bodily integrity.

C. Professional Freedom, Article 12(1) GG

20. In the course of the professionalization of sports, Article 12(1) – which guarantees freedom of profession, including the choice of profession and its exercise – has increased in importance for the individual athlete. According to its wording, the entitlement to freedom of profession applies to German citizens only, but due to the general rule of non-discrimination pursuant to Article 18 TFEU, the provision must be construed broadly and, thus, also covers citizens of the Union.[62] *Profession* is interpreted as any permitted activity which is not intended to be temporary and which serves to create and maintain a person's livelihood.[63] The scope of this basic right applies to professional athletes. Amateur athletes can also be included to a certain extent. A payment made by the association to the amateur sportsman which is classified as 'not insubstantial' – the making available of a car for an extended period of time, for instance – may result in the protection of Article 12(1) sentence 1 GG being invoked if the connection between the material goods and the form of sports practice is found to comply with the preconditions for finding that a certain payment to an athlete represents a permanent livelihood.[64]

Furthermore, amateur athletes can be affected by other aspects of the basic right to freedom of profession; as a precursor to free exercise of profession, the freedom to choose to engage in training for a particular profession falls into the material

60. BVerfGE 49, 89 at 140.
61. BVerfGE 53, 30 at 57.
62. Nolte, *Staats- und Europarecht*, in: Nolte/Horst (eds.), Handbuch Sportrecht, Schorndorf 2009, 18. In any case, European citizens are protected in the same way as Germans.
63. BVerfGE 105, 252 at 265.
64. Steiner, *Von den Grundrechten im Sport zur Staatszielbestimmung 'Sportförderung'*, in: Tettinger/Vieweg (eds.), Gegenwartsfragen des Sportrechts, Berlin 2004, 136 at 138; see also Neumann, *Sport auf öffentlichen Straßen, Wegen und Plätzen*, Berlin 2002, 47 et seq.

scope of Article 12(1) sentence 1 GG. The training of amateur athletes as a prerequisite to their entry into professional sports arena is, consequently, guaranteed by Article 12(1) sentence 1 GG.[65]

Professional sports in Germany are, inevitably, associated with sporting activity in associations or federations. The professional practice of sports is, therefore, not freely accessible in general but, rather, is subject to a non-governmental permit system.

Often, limitations to sporting activity arise out of sanctions imposed by the associations, for instance, doping bans. Consequently, most disputes with regard to the guarantee contained in Article 12(1) sentence 1 GG concern the relationship between associations and federations and professional athletes instead of the relationship between individuals and government intervention.[66] Article 12(1) sentence 1 GG's relationship to associations and federations must be considered within the scope of the so-called third-party effect.

D. Property, Article 14 GG

21. Due to the aforementioned commercialization of sports, proprietary rights (set out in Article 14 GG) are of increasing importance. They have a particular role to play in situations where federation rules and regulations limit the commercial use of objects within the sporting sector. One example of this is the infringement upon proprietary rights of a sponsor which occurs in cases where a federation has regulations regarding the use of advertising surfaces on sports, or where a federation places a ban on advertising particular products. The same applies to manufacturers of sporting products in cases where a sporting federation only allows the use of sporting products produced by a specific manufacturer. While the fundamental rights enumerated in the Basic Law have no direct application to the relationship between the federation and the sponsor (or, as the case may be, the manufacturer of sporting products), they are of relevance in terms of the third-party effect of fundamental rights and can influence legal relations under private law by means of general provisions.[67]

§2. Governmental Conditions and Permits

22. Assuming a broad interpretation of the term, this section sets out the statutory law and delegated legislation (untergesetzliche Regelungen) which directly or – through their facilitation of the practice of sport – indirectly concern the organization of sport.

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65. Steiner, *Amateurfußball und Grundrechte*, in: Tettinger/Vieweg (eds.), Gegenwartsfragen des Sportrechts, Berlin 2004, 9 at 24 et seq.
66. Cf. PHBSportR-Fritzweiler/von Coelln, part 1, mn. 17.
67. Part I, Ch. 2, §1.

I. Law of Associations, §§ 21 et seq. BGB

23. The *direct regulation of organization of sport* by the more than 90,000 associations, in a broad sense, including clubs, and federations is generally restricted to requirements for the establishment and the registration of associations pursuant to sections 21 et seq. BGB. The liberal arrangement of the German Civil Code (*Bürgerliches Gesetzbuch* – BGB) allows for the constitutionally-guaranteed autonomy of associations and, although the establishment of associations is basically freely permitted, there are several compulsory requirements:[68]

– The existence of an association, the purpose of which is non-economic.[69]
– A legal agreement regarding the rules and regulations which is sufficient pursuant to the requirements of §§ 57, 58, 59(3) BGB.
– Registration by the board of directors (*Vorstand*) (§ 59 BGB).
– At least seven members at the time of entry in the register (§ 56 BGB).

The 'association prohibition' set out in § 3 Association Act (*Vereinsgesetz* – VereinsG) relates primarily to political and religious associations and is, therefore, of no practical relevance to sports associations.

24. As to sports which are organized within schools and universities, all sixteen Länder have their own regulations.[70] The legislature has put specific regulations in place for sports which are organized within the armed forces or state police.[71]

II. The Support and Promotion of Sport

25. *Indirect regulation of the organization of sport* – by means of guidelines applying to the practice of sport – mainly focuses on the promotion of sports carried out on federal, Länder or local level according to the federal structure. The support is subject to conditions (e.g., active involvement in fighting against doping, accounting). In addition, permission of sport facilities and events plays an important role in the practice of sport. In this respect, security matters and noise control are at the very fore.

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68. These requirements apply for the registered non-profit association (*Idealverein*), cf. Hadding, in: Soergel, Kommentar zum BGB, 13th edition, Stuttgart 2000, Vor § 21 mn. 77.
69. For a more detailed account of this, see below Part I, Ch. 3, §2 I.
70. Thus, in Bavaria, school sport lessons are regulated by numerous regulations and directives of the Bavarian State Ministry for Education and Culture, e.g., by the Regulation Regarding the Security of Physical Education of 8 April 2003 (No. V.6-5 K 7405-3.26 816).
71. The provisions of procedure and application for the German Armed forces are regulated e.g., in the decree for 'Regelung für die Förderung von Spitzensportlerinnen und Spitzensportlern in der Bundeswehr' (Regulation Regarding the Funding of Top Athletes in the German Armed Forces), VMBl 2011, 27 et seq. from May 20, 2011.

A. Promotion of Sport as a Public Task

26. The public authorities are important promoters of sports, and the Federal Government, the Länder and the local authorities also contribute. In this regard, the Federal Government alone, which is responsible for the promotion of elite sports, provided EUR 842 million in total for this purpose between 2006 to 2009.[72] However, the Länder and local authorities make the major contribution to the public promotion of sports. The term 'sports promotion' refers to both the direct and indirect public support of sport. It can take many forms and can include, for example, the provision of sports facilities, the arrangement of competitions on public grounds or the enactment of supporting legislature. In Germany, the promotion of sports is deemed a *public task*, the existence of which is a precondition to the provision of public support. The Federal Constitutional Court[73] has already acknowledged that the maintenance and promotion of sports is a public task; it has stated that sports are an element of culture and are, therefore, to be regarded as one of the Government's cultural tasks. This conception is not disputed by public opinion.[74] It must be acknowledged that the government can only act if it observes the principle of subsidiarity. The concept of promotion connotes that privately organized sports bodies are in need of assistance. This does not, however, lead to an obligation on the government's part (under Article 3(1) GG) to cover any financial shortfalls or to promote equally all participants in the field of sports.[75]

B. Allocation of Authority and Appraisal of the Situation

1. Promotion of Sport by the Federal Authorities

27. The promotion of sports by the federal authorities[76] is limited to *elite sports*, as it has authority in this area alone. Administrative competence pursuant to Articles 30, 83 et seq. GG is generally vested in the Länder. The Länder determinations of state objectives are binding on the legislature of the Land alone, not on the federal legislature. There is no constitutional 'general provision' for the promotion of sport on the federal level. There are only limited allocations of competence to the federal authority in the area of sports.[77] Thus, the co-financing of local sport facilities can be regarded as an act of 'improving the local economic structure' pursuant to Article 91a (1) no. 1 GG. As regards the federal armed forces

72. 12th Sports Report issued by the Federal Government, BT-Drs. 17/2880, 13.
73. BVerfGE 35, 79 at 114; 36, 321 at 331.
74. Cf. Humberg, in: Haas/Haug/Reschke (eds.), Handbuch des Sportrechts, B, Ch. 7, mn. 3.
75. Steiner, DÖV 1983, 173, 175; Steiner, *Staatszielbestimmung 'Sportförderung'*, in: Tettinger/Vieweg (eds.), Gegenwartsfragen des Sportrechts, Berlin 2004, 136 at 142 et seq.
76. The Federal Government's financial promotion of sport amounted to nearly EUR 300 million in 2009. The promotion is carried out mainly by the Federal Ministry of the Interior, in whose area of competence the internal affairs of the Federal Republic of Germany fall; cf. 12th Sports Report issued by the German Federal Government, BT-Drs. 17/2880, 18.
77. Cf. PHBSportR-Fritzweiler/von Coelln, part 1, mn.42 et seq. (This, however, describes the legal position as it was before the federalism reform.)

(Article 87a GG) and federal agencies (Article 87 GG), e.g., federal police, the federal authorities promote elite sports by organizing sports companies[78] and business-oriented sports groups. The maintenance of international sporting relationships falls under Article 32(1) GG. In addition, the federal authority is equipped with an implied authority due to the nature of the matter in question (*Kompetenz kraft Natur der Sache)*.[79] As to the necessity of a representative of the whole state – both internally and externally – the Federal Government is the body with competence as regards the participation of German teams in the Olympic Games or in World or European Competitions, as well as the promotion of central, non-governmental sports organizations, e.g., the DOSB or national associations of sport. Thus, the provision of financial aid depends upon compliance with conditions which are defined anew in each individual case (e.g., active involvement in the fight against doping; accounting). Non-compliance can trigger an obligation to repay any monies received.[80] The assertion that federal authority *kraft Natur der Sache* can be derived in the area of so-called 'model support and promotion' (*Modellförderung)* on association level and in the area of talent scouting and talent promotion is often called into question.[81]

28. One of the many indications of *the State's enthusiasm for sports* is the legislation already in place. A multitude of regulations which set out the legal framework for the practice of sports is set out by the federal legislator. The Laws relating to the Promotion of Employment (*die Arbeitsförderungsgesetze*), for instance, along with the relevant immigration law is very generous in providing its approval for the issue of residence authorizations and residence permits to foreign athletes.[82] German naturalization law permits the naturalization process to take place as long as this occurs before the expiration of a general time limit, § 8 Act of Citizenship (*Staatsangehörigkeitsgesetz* – StAG), no. 8.1.3.5 Citizenship Administrative Regulations. Employment law sets out several provisions which exempt sporting events or sports print media from the prohibition on working on Sundays and public holidays. Sporting activity on public roads (e.g., marathons, cycle racing and skating competitions) is regulated by the Traffic Regulations (*Straßenverkehrsverordnung* – StVO). It is another matter in those areas of sport which touch on questions of environmental law.[83] Pursuant to Article 20a GG, environmental protection is a constitutionally-guaranteed state objective. In particular, the practice of sport in the

78. The provisions regarding procedure and application for the German Armed Forces are regulated in the decree for 'Regelung für die Förderung von Spitzensportlerinnen und Spitzensportlern in der Bundeswehr'(Regulation for the Funding of Top Athletes in the German Armed Forces), VMBl 2011, 27 et seq. from 20 May 2011 inter alia.
79. Cf. Humberg, in: Haas/Haug/Reschke (eds.), Handbuch des Sportrechts, B, Ch. 7, mn. 31 et seq.
80. As regards the quarrel between the *Deutsche Reiterliche Vereinigung* (German Equestrian Federation (FN)) and the Federal Ministry of Interior concerning a violation of the anti-doping rules, cf. FAZ from Oct. 7, 2010, 27 and Dec. 15, 2010, 27.
81. Tettinger, *Rechtsprobleme der Subventionierung des Sports*, in: Tettinger (ed.), Subventionierung des Sports, RuS 6, Heidelberg 1987, 33 at 42 et seq.
82. Foreigners from European states or from states that have a relevant partner agreement can, however, call upon the principles providing for worker mobility (Art. 45 TFEU) and freedom of establishment (Art. 49 et seq. TFEU).
83. See also Württembergischer Fußballverband e.V. (ed.), Umwelt, Sport und Recht, Stuttgart 2000.

great outdoors requires that any possible conflicting interests between sport and the environment be balanced and coordinated.

This conflict of interests – e.g., the use of bodies of water for the purpose of water sports, and mountains for that of climbing – is resolved in a multitude of provisions, e.g., in the relevant statutes governing the protection of nature, nature conservation, forestry and water.[84] However, sports are usually awarded the upper hand. There are special conditions in place for the construction of sports facilities. In such cases, especially those concerning the construction of large sports grounds, the federal provisions of the Federal Building Code (*Baugesetzbuch* – BauGB) and the Federal Land Use Regulation (*Verordnung über die bauliche Nutzung der Grundstücke* – BauNVO) and of the building regulations imposed by the Länder must be observed.[85] The Eighteenth Federal Immissions Control Regulation (*Bundesimmisionsschutzverordnung* – BImSchV), also known as the Sports Facilities Noise Regulation – *Sportanlagenlärmschutzverordnung*,[86] which was issued pursuant to § 23 Federal Immissions Control Act (*Bundesimmisionsschutzgesetz* – BimSchG) provides for specific permissible 'nuisance' guide levels for sporting events 'in favour of sports'.[87] The observance of the listed nuisance guide levels makes it more difficult for neighbours to obtain injunctions pursuant to § 1004 BGB, as the level of nuisance is considered insubstantial within the meaning of § 906 BGB. In practice, legal disputes taken by neighbours because of nuisance caused by noise from sports pitches occur quite frequently.[88]

§§ 14, 15, 15a, 15b, 27 Weapons Act (*Waffengesetz* – WaffG) contain special regulations regarding the authorization and use of weapons for shooting sports and target shooting.

2. Sports Sponsorship by the States

29. Based on the respective state objectives in the Länder constitutions, and as an emanation of cultural sovereignty pursuant to Articles 30, 70(1) GG, the states are particularly supportive of the building of sports facilities, of school and collegiate sports and of sports organizations. In providing this support, special attention is awarded to *popular sports*. In contrast to the Basic Law, all constitutions of the Länder[89] – with the exception of the Free and Hanseatic City of Hamburg – have

84. The communal regional administrative bodies are responsible for the implementation of law relating to these areas.
85. For details of the practical and legal problems, cf. Rotter, *Planungsrechtliche Fragen des Baus von Großsportanlagen*, Berlin 2011, passim.
86. BGBl. I 1991, 1588, 1790.
87. Cf. Dury, *Zivilrechtliche Abwehransprüche gegen von Sportanlagen ausgehende Emissionen*, in: Württembergischer Fußballverband e.V. (ed.), Umwelt, Sport und Recht, Stuttgart 2000, 33, 40 et seq.
88. As a result of the so-called 'Tennis Court Judgment' delivered by the Federal Court of Justice (BGH, NJW 1983, 751), there was a flood of lawsuits in the civil and the administrative courts. On this, cf. Vieweg, JZ 1987, 1104 et seq.; Peine, JuS 1987, 169 et seq.; Hagen, NVwZ 1991, 817 et seq.
89. Cf. Art. 3c(1) of the Constitution of Baden-Württemberg, Art. 140(3) of the Bavarian Constitution, Art. 32 of the Constitution of Berlin, Art. 35 of the Constitution of Brandenburg, Art. 36a of the Constitution of Bremen, Art. 62a of the Constitution of Hessen, Art. 16(1) of the Constitution of

implemented the promotion of sports as a state objective.[90] As to content, the above mentioned state objectives are arranged differently. The establishment of the state objective of 'promotion of sports' is designed to be executed by means of legislative measures.[91] It constitutes a direct constitutional legal title for all activities of the state that are of benefit to sports. However, it is not possible for individual claims to be derived from it. Moreover, the manner in which sports are promoted or supported is, first and foremost, a political decision. 'Support' encompasses competitive or recreational popular, disabled, company, school, collegiate and professional sports. Some states have passed sports promotion laws in order to implement the state objective of 'promotion of sports'.[92]

3. The Promotion of Sports by Local Authorities

30. Pursuant to Article 28(2) sentences 1, 2 GG, municipalities are entitled to govern themselves. The right to self-governance comprises 'all tasks which are related to the local community or are rooted in it'. These tasks include the provision of adequate opportunities to partake in sporting activities. For example, the municipalities and administrative districts promote sports by various means, including the construction of indoor aquatics centres, gyms and sport leisure facilities.[93] In this context, the growing tendency of local authorities to promote professional sport is often criticized.[94] A further development is that the municipalities do not only work together with other public bodies, but also seek the help of private parties in their promotion of sports. Local authorities regard so-called public-private partnerships as providing a chance to reduce their costs and administrative workloads, particularly in the field of sports facilities construction.[95]

§3. Public Safety

31. The public law component of sports becomes particularly relevant when sport takes place in a public space, or if the interests of third parties are affected. In this regard, *regulatory measures* can be imposed by public authorities pursuant to

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Mecklenburg-Vorpommern, Art. 6 of the Constitution of Niedersachsen, Art. 16(3) of the Constitution of Nordrhein-Westfalen, Art. 40(4) of the Constitution of Rheinland-Pfalz, Art. 34a of the Saarland Constitution, Art. 11(1) and (2) of the Constitution of Sachsen, Art. 36(1) and (3) of the Constitution of Sachsen-Anhalt, Art. 9(3) of the Constitution of Schleswig-Holstein as well as Art. 30(3) of the Constitution of the free state Thüringen.

90. It is notable that all of the Land constitutions of the former East German states have contained such a clause from the very beginning, cf. Humberg, in: Haas/Haug/Reschke (eds.), Handbuch des Sportrechts, B, Ch. 7, mn. 89 et seq.
91. Uhle, JuS 1996, 96 at 97.
92. Cf. the overview by Humberg, in: Haas/Haug/Reschke (eds.), Handbuch des Sportrechts, B, Ch. 7, mn. 89 et seq.
93. Cf. PHB Sportrecht-Fritzweiler/von Coelln, part 1, mn. 49.
94. See Steiner, NJW 1991, 2729 at 2732.
95. For more details on the financing of sport facilities, cf. Mohr, *Sportstättenbau und -vermarktung aus ökonomischer Sicht*, in: Schimke/Vieweg (eds.), Sportstätten, RuS 32, Stuttgart 2004, 15 at 22 et seq.

the relevant legislation. Public order laws of the Länder, public building and planning laws, control of immissions acts and regulations dealing with the protection of the environment and nature are of particular importance.

I. Public Order Measures

32. In the event of threats to legally-protected interests, there is a range of legislative measures that permit the competent authorities to intervene. Legal issues arise in determining the identity of the person who has caused the nuisance, particularly when dealing with major sports events or children's high-performance sports.

A. Major Sporting Events and Responsibility of Interference

33. Public order aspects are of particular relevance for major sporting events which attract large numbers of spectators, especially if violent groups of supporters are a problem.[96] If disorder occurs, the police are authorized and obliged to intervene pursuant to their repressive authority to prosecute perpetrators of crime within the meaning of §§ 163, 152(2) Code of Criminal Procedure (*Strafprozessordnung* – StPO). Intervention by public authorities is necessary in order to prevent disruption of the event, sometimes even before the disruption occurs. Measures to prevent danger must also be taken during and after the event. Measures taken by police and security services can be directed against the organizer or the spectators. However, the task of the police force must be kept separate from the task which is to be undertaken by the organizers through their own security staff. Not only must the organizer fulfil its legal duty to maintain safety under civil law,[97] but it is also subject to all relevant regulations relating to stadium safety and security, and to the conditions set out by the security service. The state police and security services are, in turn, in charge of monitoring compliance with these requirements.

34. Preventive danger defence is permitted under the relevant police- and regulatory laws[98] but presumes the taking of action against *the person causing interference*. Laws distinguish between tortfeasor (*Handlungsstörer*) and strict-liability tortfeasor (*Zustandsstörer*). The latter is someone who causes danger by his conduct, e.g., a rowdy fan (see e.g., Article 8 BayPAG (Bavarian Police Law)), whereas the former is in charge of the object from which the danger emanates (see e.g., Article 9 BayPAG – Bavarian Police Law). The organizer can be considered a strict-liability tortfeasor if it does not comply with its obligations to ensure the security of the venue where the event takes place under private or public law. With regard to

96. Cf. Walker (ed.), Hooliganismus – Verantwortlichkeit und Haftung für Zuschauerausschreitungen, Stuttgart 2009.
97. For more on this, cf. Walker, *Zivilrechtliche Haftung für Zuschauerausschreitungen*, in: Walker (ed.), Hooliganismus, Stuttgart 2009, 35 at 38 et seq.
98. For more on measures taken by the police in order to avert dangers, cf. Deusch, *Polizeiliche Gefahrenabwehr bei Sportgroßveranstaltungen*, Berlin 2005.

disruption which comes into being as a result of the actions of spectators, it is debatable whether or not the organizer can be regarded as a strict-liability tortfeasor in the sense of a so-called '*Zweckveranlasser'*.[99] The '*Zweckveranlasser'* acts lawfully, but his actions contribute to others becoming 'parties causing interference' (*Störer*) under police law.[100] With regard to spectators who cause interference, the possibility of the organizer being categorized as a *Zweckveranlasser* must be rejected. For one thing, the organizer itself is subjected to disturbance as a result of such incidents; furthermore, the mere fact that the organizer has facilitated the spectators' participation in the event by selling tickets to certain persons does not contribute to the actions of the spectators. It must, however, be noted that it is up to the organizer to check whether certain persons are subject to prohibitions from attending sporting events. Should he omit to do so, or should he fail to do so in accordance with the relevant regulations, he can be found to be in breach of his obligations to ensure security under private or public law.

Legal action against *parties who have not caused any interference* can only be taken in a very limited set of circumstances. Measures of preventive defence against danger can only be directed at uninvolved third parties if the tortfeasor or strict-liability tortfeasor cannot be found, and if other measures would not lead to a cessation of the danger (see e.g., Article 10 BayPAG). The relevant mechanisms for action are to be found in the police and security laws of the Länder which – in order to guarantee uniform interventions on federal territory – for the most part stem from the draft template for a uniform police law ('*Musterentwurf eines einheitlichen Polizeigesetzes*')[101] which was drawn up at a conference of the ministers of the interior in 1976/77.

35. Prior to a large event, information regarding fan groups can be obtained on location (e.g., Article 31 no. 1 BayPAG). Exchange of information occurs between the Federal Police authorities and those of the Länder (e.g., Article 40 BayPAG). Police laws permit long-term observation of particular persons or groups of persons (see Article 31 no.1, Article 30(2), (3) BayPAG). In addition, video surveillance is now permitted in public places and in stadiums in several Länder (see § 15a PolG NRW). Furthermore, the powers to verify identity (Articles 12, 13 BayPAG), expel persons from sporting grounds (Article 16 BayPAG) and detain offenders in police custody (Article 17 BayPAG) are particularly important with regard to fan groups at major sporting events.

All in all, it can be observed that there is an increasing tendency towards violence amongst fan groups which the State is currently attempting to tackle by means of an expansion of police authority. Since 1994, *so-called 'hooligan files'* have been available for consultation ('Datei Gewalttäter Sport', cf. Articles 38(2), 37(1) BayPAG) on Länder level. These list hooligans who have already committed crimes

99. Deusch, *Polizeiliche Gefahrenabwehr bei Sportgroßveranstaltungen*, Berlin 2005, 130 with further references.
100. Knemeyer, *Polizei- und Ordnungsrecht*, 11th edition 2007, mn. 251.
101. For more on this, see Knemeyer, *Polizei- und Ordnungsrecht*, 11th edition 2007, mn. 409.

at sporting events.[102] There are currently almost 13,000 persons registered in these files.[103] Against this background, the establishment of a nationwide central hooligan file is currently being discussed in Germany.[104] Again, this gives rise to questions regarding the acceptability of interference with the personal rights of an individual and protection by means of data security provisions. The Federal Administrative Court (BVerwG – *Bundesverwaltungsgericht*)[105] has held that the necessary legal basis for the hooligan file was created upon the enactment of the Federal Criminal Agency Data Regulation of 4 June 2010 (*BKA-Datenverordnung vom 4.6.2010*) in conjunction with § 7(6) Federal Criminal Agency Act (*BKAG*), and that collection of data is, therefore, lawful.

B. Children's High-Performance Sports

36. Even though it is generally the case for all categories of sports that the duty of the state to provide protection ends where the individual invokes his right to freedom of action pursuant to Article 2(1) sentence 1 GG – which is one of the fundamental rights[106] – interventions by the state in order to protect athletes are generally forbidden.[107] It is another matter in the area of children's high-performance sports.[108] The endangerment of children's health in high-performance sports falls under the responsibility of the State to protect its citizens' health pursuant to Article 2(2) GG. Children can only make their own sports-related decisions within very limited boundaries and the borders between endangerment of oneself and endangerment of others can become quite blurred.[109]

II. Public-Law Provisions Relating to Construction and Use

37. With regard to the establishment of a sports facility or the practice of sports by an individual, provisions under public law relating to construction and usage are of relevance.[110]

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102. The data obtained by the Länder within their own areas of competence is registered in a composite system by the Federal Criminal Police Office, to which all composite participants have access, cf. Spiecker gen. Döhmann/Kehr, DVBl 2011, 15 footnote 7.
103. BT-Drs 17/2803, 6.
104. Cf. PHBSportR-Fritzweiler, part 1, mn. 75.
105. BVerwG, NJW 2011, 405 et seq.; Spiecker gen. Döhmann/Kehr, DVBl 2011, 15 et seq.
106. See above Part I, Ch. 2, §1 II A.
107. Würtenberger, *Risiken des Sports – polizei- und ordnungsrechtliche Fragen*, in: Würtenberger (ed.), Risikosportarten, RuS 14, Heidelberg 1991, 31 at 33 et seq.
108. For general information on high-performance sport for children, cf. Walker (ed.), Kinder- und Jugendschutz im Sport, Stuttgart 2001.
109. BVerfGE, 39, 1 at 41 et seq.; 45, 187 at 254 et seq.; 46, 160 at 164; 49, 24 at 53; 88, 203 at 251 et seq.; Steiner, *Kinderhochleistungssport in Deutschland*, in: Tettinger/Vieweg (eds.), Gegenwartsfragen des Sportrechts, Berlin 2004, 154 at 156 et seq.
110. Cf. for example, Rotter, *Planungsrechtliche Fragen des Baus von Großsportanlagen*, Berlin 2011, passim.

If a private person or a legal entity wishes to establish a sports facility under public law, he must file an application for *planning permission* for the project. Such permission will be granted only if the project complies with the requirements of the Construction Planning Act (*Baugesetzbuch* – BauGB) pursuant to §§ 29 et seq. BauGB and the relevant provisions on construction regulations in the respective federal state. Moreover, attention must be paid to provisions relating to environmental and nature conservation. From a planning point of view, the matter is, in particular, one of compliance with the Federal Planning Act (§§ 2, 3, 5, 12(1) no. 12 ROG), Federal Building Act (§§ 1 (5), (6), 2(2) no. 5, 8, 9 BauGB), Federal Immissions Control Act (§§ 44(1), (2), 46, 47, 49 BImSchG), Federal Nature Conservation Law (§§ 5(1), 6(1), 12 et seq. BNatSchG) and the Federal Water Management Law (§§ 19, 36(1), (2), 36b(1) WHG). Therefore, *environmental law* has a special significance in German planning law. For example, an environmental compatibility check must be performed as part of the building regulatory planning procedure which assesses the impact of a building on people, animals and plants, soil, water, air, climate, landscape and on cultural and other material assets (cf. § 2(4) BauGB). In addition, the relevant implementation laws on Land level contain provisions which describe in detail the federal provision upon which they are based. These must be observed when establishing a sports facility. The conduct of individuals is regulated primarily by the Länder laws in the areas mentioned (see e.g., provisions of the BayImSchG (Bavarian Immissions Control Act)).

The *Federal Immissions Control Act* relates primarily to industrial plants and grounds intended for various other types of use (e.g., sports grounds) and, in particular, regulates the matter of which noise pollution limits must not be exceeded. Pursuant to § 3(5) BImSchG, the Act applies to production plants and other fixed-location facilities. Therefore, sports facilities such as football stadiums, tennis courts or fixed-location motorbike tracks are included within the scope of the immission control laws by implication. In this context, the limits contained in the Sports Facilities Noise Regulation of 18 July 1991[111] issued under § 23 BImSchG must be observed.

38. *The Road Traffic Regulation* governs the manner in which public roads may be used without affecting automobile traffic.[112] § 31 StVO establishes a general prohibition on sports and play on public roads. The provisions of road traffic regulation also deal with the manner in which public roads may be used for motorsports events. In order to hold a motorsports event, a permit must be obtained for each individual case. A motorsports event is defined as a race or a motorsports event pursuant to § 29 StVO. In terms of § 29(1) StVO, a race is defined as a competition using motorized vehicles which takes place at high speed.[113] The addressees of this rule are both organized promoters planning to hold a race and individuals who intend to do so. Races are generally forbidden but exceptions may be permitted under § 46(2) StVO. All other motorsports events require a permit pursuant to § 29(2) StVO. This

111. BGBl. I 1991, 1588, 1790.
112. Cf. Zörner, LKV 1996, 446 et seq.; Neumann, *Sport auf öffentlichen Straßen*, *Wegen und Plätzen*, Berlin 2002, 114.
113. Neumann, *Sport auf öffentlichen Straßen, Wegen und Plätzen*, Berlin 2002, 226.

also applies to other events held on public roads such as fun runs, marathons or bicycle racing.

39. Although many public law provisions limit *the rights of individual persons to engage in sporting activities*, many expressly allow for this. Pursuant to § 24(1) sentence 1 BWaldG and § 59(1) BNatSchG, everyone is permitted access to the countryside for recreational purposes. This includes physical activities. The 'public space' referred to in these provisions must be differentiated from public roads. The scope of use depends solely on the Public Road Acts enacted by the federal states. Thus, the Nature Conservation Acts and the Forestry Acts accept the use 'assigned' to a road by the relevant road maintenance authority.[114] Limitations upon this right can be found in the interventionist provisions of the respective statute (e.g., § 15(2) sentence 1 BNatSchG).

§4. Tax (By Dr Alex Steiner)

I. Introduction

40. The basic principles of the taxation of sport are to be found primarily in general legislation. The fiscal affairs of corporations involved in sport are generally regulated subject to the Corporate Tax Act[115] (*Körperschaftssteuergesetz* – KStG) and Commercial Tax Act[116] (*Gewerbesteuergesetz* – GewStG). If the corporation is non-profit, as are most sport associations, certain provisions of the general Tax Code[117] (*Abgabenordnung* – AO) must be adhered to. The general Tax Code also determines the general rules which must be observed in relation to the taxation of sport. Athletes themselves or partnerships involved in sports are taxed under Income Tax Act[118] (*Einkommenssteuergesetz* – EStG). References to 'sports' within the law of taxation are only to be found in exceptional cases or in cases of tax relief, some of which are stipulated in the form of guidelines (for income tax, payroll tax, corporate tax and commercial tax), circulars of the Federal Ministry of Finance or decrees. The Value-Added Tax Act[119] (*Umsatzsteuergesetz* – UStG), which is applicable to most revenue generated in the area of sports, adheres to the guidelines laid out under European law for taxability, tax exemptions and revenue which incurs a reduced tax rate.

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114. See Neumann, *Sport auf öffentlichen Straßen, Wegen und Plätzen*, Berlin 2002, 175.
115. Redrafted by announcement of Oct. 15, 2002, BGBl. (Federal Law Gazette) I 2002, 4144, last amendment by Art. 4 of Dec. 7, 2011, BGBl. I 2011, 2592.
116. Redrafted by announcement of Oct. 15, 2002, BGBl. I 2002, 4144, last amendment by Art. 5 of Dec. 7, 2011, BGBl. I 2011, 2592.
117. Redrafted by announcement of Oct. 1, 2002, BGBl. I 2002, 3866, BGBl I 2003, 61, last amendment by Art. 5 of July 21, 2012, BGBl. I 2012, 1566.
118. Redrafted by announcement of Oct. 8, 2009, BGBl. I 2009, 3366, 3862, last amendment by Art. 3 of May 8, 2012, BGBl. I 2012, 1030.
119. UStG, redrafted by announcement of Feb. 21, 2005, BGBl. I 2005, 386, last amendment by Art. 2 of May 8, 2012, BGBl. I 2012, 1030.

The first part will deal with the taxation of sports associations, which, in general, can be liable to pay tax under corporate tax law (II.). The second part will elaborate on the regulations as to income tax for natural persons, such as athletes or trainers (III.). Commercial tax plays only a minor role and will be addressed under IV. The keeping of records and documentation is very important in determining which transactions are subject to taxation (V.). The regulation of sponsorship is dealt with in VI. The final two parts of this account will expand upon other specific regulations (VII.) and the matter of Value-Added Tax (VIII.), respectively.

II. Taxation of Sports Associations

41. Most associations in Germany are registered associations (*eingetragene Vereine* – e.V.) within the meaning of §§ 21, 55 et seq. BGB. Legal forms such as the non-profit limited liability company (*Gesellschaft mit beschränkter Haftung* – GmbH) or the non-profit public limited company (*Aktiengesellschaft* – AG) are also possible (§ 1(1) no. 1 KStG, § 2(2) GewStG).[120] Each of these associations is a corporation within the meaning of § 1 KStG. As such, they are designed so that their primary object is not primarily commercial, and are therefore viewed as non-profit corporations, irrespective of their size (§ 52(2) no. 2 AO). The fact that the making of profit is not the primary object of these corporations means that they are exempted from paying both corporate tax (§ 1(1) no. 4 and 5 KStG) and commercial tax (§ 2(3) GewStG). Even so, any actions taken by these corporations which can be termed 'economic'[121] may be taxable. This is particularly true in the case of economic business activities (so-called '*wirtschaftlicher Geschäftsbetrieb*') engaged in by the corporation in question which do not meet the requirements for special-purpose businesses (so called '*Zweckbetrieb*') (§ 5(1) no. 9 sentence 2 KStG, § 3 no. 6 sentence 2 GewStG).

A. Non-profit Organizations: Exemptions from Taxation (Gemeinnützigkeit)

42. The ideal sports association (*Idealvereine oder -verbände*) pursues only those non-profitable purposes which are stated in its by-laws and is financed by income which is exempt from taxation. This income is derived from subscriptions and donations. The corporation uses it to pay its instructors, travelling costs and the rent due for sporting facilities, or money required for the maintenance of sporting facilities which it owns, as the case may be. In addition, the corporation is granted public funds for a specific purpose which may be used only for that specific purpose, e.g., in order to purchase sports equipment or to renew the protective fence of the facility.

If such funds do not suffice, only those occupational activities which are exempt from taxation to a limited extent are to be considered. Pursuant to no. 2 of section § 55(1) no. 1 Interpretation Aid to the AO (*Anwendungserlass zur AO* – AEAO),

120. Hüttemann, *Gemeinnützigkeit und Spendenrecht*, 18 et seq.
121. Steiner, *Steuerrecht im Sport*, mn. 75 et seq.

the association must not be viewed as a profit-generating economic business unless it deals with an area of professional sport.

Pursuant to § 14 AO, economic business is any independent and sustainable activity which is intended to generate economic advantages (usually earnings, but not necessarily intended to generate profit). Mere asset management does not play a role here. The management and exploitation (merchandizing) of a professional sports arena is a unique problem in the area of taxation.

43. The association can also avoid taxation of asset management if its economic business can be classified as a 'special-purpose business' (*Zweckbetrieb*) within the meaning of §§ 65 et seq. AO. As associations are not included in the group of corporations which are prohibited to undertake any kind of economic business, the characteristic 'special-purpose business' is very significant.[122]

There are really very few restraints on the form an economic business can take. To the extent that earnings can be combined with sports, the resulting corporation can take the form of an economic business.[123] The most common economic business is advertisement by means of jerseys, signs at the perimeter of the stadium or in the stadium itself, indirect product advertising, inclusion of the name of a company or product in the name of the association or the external merchandizing of complete sporting events.

B. Professional Sports Division in, or in Addition to, an Association

44. The outsourcing of an economic business to one (professional sports division) or more (independent sports grounds company) capital companies is a logical consequence of the commercialism of sports and the changes to tax and liability law which are involved. The establishment of such a capital company involves the taxation of all income of this company under corporate and commercial tax law. Thus, the outsourcing association also runs the risk of its income being subjected to corporate and commercial tax, and of profits generated from the purchase of assets becoming liable to tax, too. This is the case if it is to be presumed that the business division is due to a personal and factual linkage between the association and the capital company. This is particularly true when one considers that the association must hold 50%+1 votes of such a company, unless an exception is made for long-standing sponsorship relationships.[124]

122. BFH (Federal Fiscal Court), judgment of Jan. 1, 1984, I R 138/79 BStBl II 1984, 451; BFH, judgment of Apr. 10, 1991, I R 77/87 BStBl II 1992, 41.
123. Steiner, *Steuerrecht im Sport*, mn. 74 et seq.
124. Cf. on ownership of clubs to Part IV, Ch. 2, §4.

C. Consequences of Being Arranged as a Non-profit Organization (Gemeinnützigkeit)

45. Associations which are arranged as non-profit organizations are granted the privilege of being entitled to receive donations which are tax-deductible for the donor. This procedure is subject to strict regulation because of the immense fiscal risk, but apart from monetary benefits, benefits to the association can also take the form of benefits-in-kind or a claims expenses which are not actually collected,[125] such as actual wage entitlements, the conveying of premises as a gift or zero interest loans. A distinction must be drawn between donations and sponsorship.

D. Bookkeeping and Profit Assessment

46. The regulations relating to corporations apply to associations, i.e., pursuant to § 8(1), (2) KStG, the provisions of the Income Tax Act (EStG) are applicable.

Economic businesses must assess surplus or profit using the cash-basis method of accounting (§ 4(3) EStG) or by balancing their accounts (§ 4(1), (5) EStG). Sports associations must adhere to the general rules of accounting. In accordance with §§ 238 et seq. *Handelsgesetzbuch* (HGB), §§ 140, 141 AO, the sports association may be under an obligation to keep accounts for its economic business. If the association generates a yearly revenue amounting to more than EUR 500,000, or makes profits of more than EUR 50,000 from its total economic business, it is obliged to keep accounts, even if it is not a 'businessman' (*Kaufmann*, which, in the meaning of the HGB, includes firms). If no obligation to keep accounts exists, a record of its earnings and expenses in accordance with § 4(3) EStG is sufficient to prove that it has fulfilled its accounting obligations (§§ 27(3), 666, 259 BGB). There are, however, certain peculiarities which arise where the association is arranged as a non-profit organization.[126]

47. Expenses incurred by non-profit associations are more problematic as they usually have multiple causes, or because they cannot be clearly traced back to their cause; the association, however, generally wishes to reduce its tax burden. Therefore, there is a rebuttable presumption that the cause of the expenses is a non-profit enterprise, and is thus exempt from taxation; if necessary it must be split. Expenses which arise in conjunction with advertisement revenue are particularly problematic, as the association's sporting activities are related to the expenditure, but would also take place without advertisement as they are the object of the association. If the expenses cannot be ascertained exactly (as is generally the case), they must be estimated. The tax authorities allow a maximum amount of 15% of revenue generated from all comparable activities which would count towards the economic activities of the organization to be assessed as profit. Unpaid expenses arising from games such as instructors' fees, and those of trainers and referees, travelling costs, the rental of sporting facilities, cleaning, fees due to societies and expenses sporting

125. BFH, judgment of Apr. 18, 1978, VI R 147/75 BStBl 1979 II, 297.
126. Steiner, *Steuerrecht im Sport*, mn. 180 et seq., 227, 249.

equipment etc. are classified under expenses exempt from tax by the Federal Fiscal Court.

48. All activities engaged in by a sports association which are classified as economic activities (apart from special-purpose activities – *Zweckbetriebe*), form the sports association's economic activities. Any surplus generated is liable to be taxed, irrespective of its use. The manner in which any surplus is used – even if it is used in an area of the association which is tax-deductible – does not change the fact that the profits stem from the economic activities.[127] Management of losses is another matter.[128]

Revenue generated from these economic activities, and from other activities, must be totalled and must not exceed the exemption limit of EUR 35,000 (§ 64(3) AO). This limit is an exemption limit on gross income, not an exemption limit on net income or a neutral amount of exemption (*Freibetrag*). Thus, it is not a matter of offset expenses (gross income minus expenses = net income). In addition, where the limit is exceeded, it is not only the amount by which the limit is exceeded which is liable to corporate tax, but the whole economic activity. The basis of assessment is the difference between income and expenses.

Pursuant to § 24 sentence 1 KStG, an amount of EUR 5,000 is excluded when calculating the amount of tax payable by a corporation. This neutral amount of exemption is to be deducted from the profits. This also applies without exception to the economic activities engaged in by a sports association. The amount will not be reduced proportionally if the association has sources of income which are exempt from taxation. However, it is granted only once to the consolidated business. It applies to the economic activities of non-profit limited liability companies (§ 24 sentence 2 no. 1 KStG). The corporate tax rate is 15%; whereas the income tax rate rises on a progressive scale up to a maximum rate of 45%. Differences are partly balanced out by commercial tax.

Economic activities of non-profit organizations serve, first and foremost, to generate surpluses. Nonetheless, losses may not be ruled out and may be the consequence of a miscalculation. If so, the matter of coverage arises. Although the use of subscriptions is, in principle, not permitted, special allowances by members are allowed. It is expressly prohibited to continue to operate businesses which are operating at a permanent loss. These must be discontinued.

III. Sports and Income Tax

49. The benefits received by natural persons, such as athletes or trainers, are generally viewed as income, and therefore taxable under income tax law. Difficulties can arise in relation to the classification of the income. Athletes and trainers can, under certain circumstances, be classified as employees (1.), or as operators of businesses (2.).

127. BFH, judgment of Aug. 21, 1985, I R 60/80, BStBl 1986 II, 88.
128. Steiner, *Steuerrecht im Sport*, mn. 294 et seq.

A. The Association as Employer

1. The Term 'Employee'

50. It is up to the association to clarify the matter of who it wishes to engage as an employee. Employees of an association are any persons who have entered into an employment contract with the association and who work for the association in return for payment, § 1(2) LStDV (*Lohnsteuer-Durchführungsverordnung* – payroll tax executive order). Self-employed persons are not regarded as employees. Typical occupations of employees are those of managers, full-time trainers, groundskeepers, cashiers or stewards. Where instructors are engaged on a part-time basis, or persons are employed only for a short period of time, or temporarily, one must consider whether these persons receive a payment or a mere allowance for expenses. The reimbursement of travelling costs, postal charges or telephone bills suggests that the position is merely an honorary one.[129]

2. Payment and Expense Allowance

51. In the case of athletes, one must distinguish between professional athletes and amateur athletes. It is not only those athletes who receive money and (possibly) live on it (professional athletes) who are regarded as 'paid' athletes. Each and every benefit (criterion is § 8 EStG) awarded to the sportsmen is significant in this respect. The purely amateur athlete – a type which has become quite rare – is the only type which receives tax privileges. Sponsorship by the charity Stiftung 'Deutsche Sporthilfe' is another source of income (§ 22 EStG) which is generally granted in return for expenditure and, therefore, does not generally contribute to the tax burden.[130] The so-called contractual amateur is categorized as an employee. If, however, the athlete is merely remunerated for the expenses which he has incurred, this will not be regarded as remuneration in terms of an employment relationship. If a payment is made, the amount is not decisive. The limit by which the organization's status as non-profit is to be assessed (set at EUR 358 a month) is irrelevant for qualification under law regarding income tax. In cases of full-time trainers, one must examine the way in which the contract is drafted. Although some full-time trainers are self-employed, this is not always the case. If benefits are granted only occasionally, partly in cash, partly in kind, the trainer will be regarded as self-employed, or his income will be regarded as another type of income.[131] The matter of whether the association is an employer is to be determined by the manner, regularity and amount of the payments awarded to the athlete.[132] In the area of sports, variable levels of cash flow are more common than in other branches of the economy, which is the reason why further potential employers come into play (banks, public service).

129. Engelsing/Lüke, NWB 2008, 2437 at 2438; Fach 3, 15101 at 15102.
130. OFD Frankfurt/Main, ESt-Kartei § 2 card 8 and order of Apr. 4, 2006, 2255 A – 27 – St 218 Beck-Verw 074698.
131. Jachmann, Sp*u*Rt 1996, 185.
132. Enneking/Denk, DStR 1996, 450 at 451.

This employer can be a sponsor or an intermediate company structure. Each individual case must also be examined in the case of team sports. Cyclists are treated as a community of self-employed athletes in view of cycling's character as a team sport. Here, neither the team nor the sponsor which gives its name to the team is the cyclists' employer. This treatment of the matter is highly questionable and it is likely that changes will occur. Such changes would, however, not have retroactive effect.

3. Benefits-in-Kind

52. Pursuant to §§ 8(1), 19(1) no. 1 EStG, benefits-in-kind which are granted in return for work by the employer or by a third party[133] are included under the heading income generated from salaried employment. In addition to benefits-in-kind, this can also include discounts in price (§ 8(3) EStG) which the employer[134] (or a third party[135] at the employer's behest) gives to particular employees for products or services of the association because of the employment relationship (so-called employee discount).

If classification of income as salaried employment fails, income must be classified as income generated from commercial revenue, if there is any, or if the requirements for participation in general commercial dealings have not been fulfilled, or those relating to sustainability – as is, for example, the case with regard to once-off performances – the income will be taxable as another type within the meaning of § 22 no. 3 EStG.[136] Similar appraisals must be made in relation to other benefits which range over the full breadth of economic activities from clothing to the manufacture of buildings or furniture, to travelling services. These benefits will be included in the tax records of the athlete for taxation after a tax audit of the sponsor and all corresponding records required for inspection have occurred.

4. Procedural Questions

53. The obligations of the tax deduction procedure arise from §§ 38 et seq. EStG. There are special provisions which must be heeded in cases of persons who are only marginally employed,[137] part-time instructors[138] and part-time and temporary employees.[139] The non-profit quality of an organization has no effect on the payroll tax procedure. The athlete can be classified as the employer of his trainer or other employees. Consequently, he must fulfil all obligations which apply to employers with regard to his individual enterprise. In an individual case, the pay roll tax may be paid at a flat rate. As regards associations, consolidation will occur

133. Bornhaupt, BB 1999, 1532.
134. BFH, judgment of June 4, 1993, VI R 95/92, BStBl 1993 II, 687.
135. BFH, judgment of May 30, 2001, VI R 123/00, BStBl 2002 II, 230.
136. FG München (Munich Fiscal Court), judgment of Aug. 25, 2005, 1 K 3173/04, Sp*u*Rt 2006, 260.
137. Steiner, *Steuerrecht im Sport*, mn. 323.
138. Steiner, *Steuerrecht im Sport*, mn. 354.
139. Steiner, *Steuerrecht im Sport*, mn. 324, 404.

particularly in cases where there are temporary employees or employees involved in marginal employment (§ 40a EStG). A marginal occupation within the meaning of § 8(1) no. 1 SGB IV (a so-called 'mini-job') means that the employee does not earn more than EUR 400 a month (all employment in which the employee is engaged is included[140]). The employer is responsible for ensuring that all taxes and church taxes to be paid from employees' wages are properly registered with and paid in full to the finance authority (§ 34(1) AO, § 41a (1) sentence 1 no. 1 and 2, (2) sentence 1 EStG).

B. Athletes as Operators of Businesses

54. Athletes who do not fulfil the requirements necessary to be classified as an employee are generally classified as the operators of businesses (*Gewerbetreibende*) as they do not engage in any of the professions (catalogue professions – *Katalogberufe*) enumerated in § 18 EStG.[141] If they do not engage in sport themselves, catalogue professions will come under consideration. Physical education classes are, first and foremost, an educational activity (e.g., fitness trainer) within the meaning of § 18 EStG.[142] The imparting of knowledge and skills is to be broadly interpreted; anyone who wishes to learn aerobic sequences knows that this activity exercises both the mind and the body.

A commercial business or trade (*Gewerbebetrieb*) is an independent and sustainable activity, by means of which one intends to realize a profit, and which is deemed to be participation in general economic life, as long as the activity is not an activity in the area of agriculture or forestry, a freelance work (*freier Beruf*) or another type of self-employment, § 15(2) sentence 1 EStG. In this regard, profit does not include the reduction in income tax (§ 15(2) sentence 2 EStG). An activity is also classified as 'trade' if there is an intention to realize profit, and if this is at least a secondary aim (§ 15(2) sentence 3 EStG). Earnings from any advertising activities engaged in by the athlete which are not classified as part of his salary are, according to jurisprudence in this area, to be regarded as income arising out of trade.[143] If the advertising activity is exercised independently by the athlete and on a long-term basis, and if he intends to generate profit from the activity, he is not constrained by any directives. This is often the case with top athletes.

C. Special Facts Relating to Honorary Offices

55. Annual earnings up to a total amount of EUR 2,100 which are generated as a result of part-time work as an instructor, adviser or trainer, or of a comparable part-time activity, are exempt from the income tax liability (§ 3 no. 26 EStG).[144]

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140. Eilts, NWB Fach 27, 6677.
141. Enneking/Denk, DStR 1996, 450 at 451.
142. BFH, judgment of Jan. 13, 1994, IV R 79/92, BStBl 1994 II, 362.
143. BFH, judgment of Nov. 19, 1985, VIII R 104/85, BStBl 1986 II, 424.
144. For more details, see R 3.26 LStR 2011.

The activity must have as one of its purposes the promotion of non-profit objectives within the meaning of §§ 52 et seq. AO and must be exercised on the orders of, or on behalf of, a domestic corporate body under public law or an institution pursuant to §§ 5(1) no. 9 KStG, i.e., bodies which are of importance in the area of sports. Income from other activities engaged in on an honorary basis are exempt from tax, although, here, an upper limit of EUR 500 applies. The catalogue of activities is not restricted. The activities of cleaners, the waiters working at sports events and parents who wash sports kits all fall into the category of 'honorary offices'. It is sufficient if the activity indirectly promotes the non-profit purpose.

D. Business Partnerships (Personengesellschaften) in Sports

56. Business partnerships aim to generate profits as a group for persons who are individually taxable. In the area of sports, the business partnership is not a particularly attractive corporate form, as it does not provide any advantages in relation to tax to the individuals involved when compared with the taxation of individuals. This is because the earnings of each party are taxed individually. Thus, the business partnership does not lead to the creation of a new legal personality and the individuals who form the partnership are personally liable for any debts of the company. The most attractive aspect of the business partnership is probably the possibility of involving a third party in the economic activity (e.g., a stadium company). One possible example is a professional training group.

The business partnership is willingly, but unsuccessfully employed in order to feign the existence of an 'earnings community' (*Einkünftegemeinschaft*). The collaborative purchase of expensive goods for the purpose of leisure activities will not be assured success simply by arranging it as a dummy concern.[145] The collaborative purchase of airplanes, sports cars, horses or boats is still interpreted in a very restrictive manner.

E. Hobby (Liebhaberei)

57. In cases where there is no intention to generate profit, an activity can be classified as non-taxable under income tax law, i.e., as a so-called hobby (*Liebhaberei*). Any (especially negative) earnings generated are not relevant for tax purposes. A distinction in relation to the interests at stake must be made between athletes who wish to keep their earnings exempt from tax and taxable persons who want to ensure that activities in which they engage privately are tax-effective.[146] Even corporations which are able to generate profits from activities both commercial and non-commercial are taxable only if they act with the intention to make profit. An intention to generate a surplus is not required in order to be found liable to pay the corporate tax which is required of economic businesses.

145. Steiner, *Steuerrecht im Sport*, mn. 419 et seq.
146. BFH, judgment of Aug. 28, 1987, III R 273/88, BStBl (Federal Tax Gazette) 1988 II, 10.

IV. Commercial Tax

58. Income arising from trade earnings (§ 15 EStG, § 1 KStG) in sports are subject to commercial tax, irrespective of the legal form in which the company is organized. This generally amounts to up to 15% (base rate and multiplier specific to each municipality – *kommunale Hebesatzsteuer*); a relatively high rate. EUR 5,000 is excluded from the calculation (§ 11(1) sentence 3 no. 2 GewStG). Sports associations are subject to commercial tax only in relation to their economic business; their non-profit activities are exempt from commercial tax pursuant to § 3 no. 6 sentence 1 GewStG. As regards companies liable to pay income tax, EUR 24,500 is exempt from being subject to commercial tax (§ 11(1) sentence 3 no. 1 GewStG). Furthermore, it can often be set off against income tax pursuant to § 35 EStG. Commercial tax is not to be deducted as an operating expense (§ 4 (5b) EStG). Commercial tax is not applicable to earnings arising from self-employment (§ 18 EStG) or to salaried earnings (§ 19 EStG).[147]

V. The Obligation to Keep Records and Documentation

59. There are no special regulations as regards book keeping or documentation provisions under tax law. The only exception to this general rule is that of cases which involve a foreign element.[148] Athletes and 'sporting businessmen' must assess their surpluses or profits just as other taxable persons do by means of the cash method accounting (§ 4(3) EStG), or by balancing their books (§ 4(1),(5) EStG) as associations do for their trade or self-employed activities or economic businesses, respectively.[149] Furthermore, tax laws provide that special methods of bookkeeping must occur in specific fields of activity of the taxable person; for instance, associations which manage a restaurant in a sporting facility, or which market their fan memorabilia must comply with §§ 143 et seq. AO. In accordance with these provisions, goods received and outgoing goods must be recorded.

Unless the 'ideal area' (*ideeller Bereich*) of a sports association is concerned, specific operation expenses must be recorded pursuant to § 4(7) EStG. The documentation of gifts[150] and entertainment expenses[151] is of immense importance. Any deficits will have the consequence that operating expenses will not be deducted. In particular, it must be reasonable that the person concerned was provided with accommodation and/or refreshment or received a gift. For example, as the EUR 35 maximum limit stipulated in § 4(5) sentence 1 no. 1 EStG can be inspected only if full documentation is provided, it is possible that approval will be withheld, even in cases where gifts were made to recorded receivers, if there are indications that the relevant documentation is deficient and that additional benefits were received.

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147. For more on the classification of earnings, see Steiner, *Steuerrecht im Sport*, mn. 344 and 535, 693; for its significance in the area of criminal law, see mn. 804 et seq.
148. Steiner, *Steuerrecht im Sport*, mn. 509 et seq.
149. Steiner, *Steuerrecht im Sport*, mn. 267 et seq., 278 et seq.
150. Steiner, *Steuerrecht im Sport*, mn. 461, 463, 492, 572, 578 et seq., 587 et seq., 603 et seq.
151. Steiner, *Steuerrecht im Sport*, mn. 463, 481, 577, 580, 605.

In accordance with § 7a (8) EStG, any extraordinary rights require a more intensive manner of documentation. Recourse to special amortization requires special documentation of all information relating to the asset and to reasons for the increased amortization value. The employers must maintain wage accounts (§§ 41 EStG, 4 LStDV).[152] Management of the company must be documented as verification for tax relief for which the company is eligible due to its status as a non-profit organization, § 63(3) AO.[153] This is especially true in relation to benefits (donations and subscriptions) in favour of the association (§ 50(4) EStDV).[154] The uses to which funds are put must be recorded separately.[155]

The finance authority requires that a tax declaration be made by sport associations for each period of assessment; however, as a general rule, these declarations only have to be filed once every three years. Any breaches of the duty of documentation may lead to the company losing its classification as a non-profit organization. An additional consequence might be that the recipient of the benefit could be found to be accountable under § 10b(4) EStG.

VI. Regulations for Sponsors

60. Special regulations for sponsors are to be found in legislation, orders and jurisprudence; these are usually applicable to all kinds of sponsoring, even that which is not sports-related; however, all regulation of sponsoring is generally tailored toward sport because of its economic importance.

A. Sponsoring Order

1. Definition of Sponsoring

61. According to the Sponsoring Order[156] issued by the Federal Ministry of Finance, sponsoring (in the sense of tax law) means the granting of money or benefits in kind by companies for the purpose of funding persons, groups and/or organizations in the area of sports […], and by means of which the company's own aims in relation to advertisement or public relations are pursued. One must distinguish between sponsoring and pure advertising on the one hand, and public relations on the other. Sponsoring is generally performed on a contractual basis[157] between the sponsor and the association, sports federation and the athlete himself, or in a triangular constellation; it might, however, also take the form of a unilateral

152. Steiner, *Steuerrecht im Sport*, mn. 322 et seq.
153. Steiner, *Steuerrecht im Sport*, mn. 180.
154. Steiner, *Steuerrecht im Sport*, mn. 227.
155. Steiner, *Steuerrecht im Sport*, mn. 166, 174, 181, 295.
156. Decree of the Federal Ministry of Finance of Feb. 18, 1998, IV B 2-S 2144-40/98 IV B 7-S 0183-62/98 BStBl I 1998, 212.
157. For more on its form and content, see Part IV, Ch. 2, §2; Weiland, Sp*u*Rt 1997, 90; Schimke, Sp*u*Rt 1997, 160.

promise. The taxation of the recipient may depend upon the form which the sponsorship takes.

2. Treatment as Regards the Sponsor

62. Expenses incurred by the sponsor are operating expenses where the sponsor aims to achieve economic benefits for its company. These benefits generally relate to the protection and enhancement of its reputation,[158] or are geared toward promoting its products. In doing so, the distinction between expenses which arise out of personal reasons, e.g., pursuant to § 4(5) sentence 1 no. 7 EStG, must be made in a generous manner. Only in cases where the sponsor plays a role within the association, or is otherwise very closely associated with it, will the finance authority examine whether or not the sponsor is pursuing a 'sporting concept' which is 'reasonably'[159] proportionate to its 'advertising earnings'. In this context, a presumption of concealed distribution of profit from the company of the 'patron' (which has separate legal personality) can arise.[160]

The association can also have concealed distributions of profit which will only have an effect on taxation within the context of an economic activity, and which usually come into consideration only in cases where benefits are awarded to individual members.[161] The general preconditions[162] which apply in relation to corporations are also relevant in such cases.

3. Treatment as Regards the Recipient

63. Such benefits are, in principle, viewed as income by the recipient. They can take the form of income in the 'ideal area' (*ideeller Bereich*) of the association which are exempt from tax, or income from the area of asset management exempt from tax. In contrast to this, corporations, business partnerships and natural persons who are commercially active will be liable to pay tax on any benefits received. The manner in which any benefits received are taxed on the recipient's side does not, however, depend on the manner in which the respective expenses are treated by the sponsor. Small associations can opt for a lump taxation of this income at a rate of 15% of the income (§ 64(6) no. 1 AO; § 64 no. 28 AEAO).[163]

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158. BFH, judgment of Feb. 3, 1993, I R 37/91, BStBl 1993 II, 441 at 445.
159. Steiner, *Steuerrecht im Sport*, mn. 459 (§ 4(5) no. 7 EStG).
160. § 31(2) sentence 4 KStG.
161. Koss, NWB 2008, 2421 at 2428; Fach 2, 9809 at 9816.
162. Steiner, *Steuerrecht im Sport*, mn. 206, 342, 382 et seq., 461, 464, 583.
163. Steiner, *Steuerrecht im Sport*, mn. 284.

B. Assumption of Taxation by Business Associates

64. Initial contact with potential business partners and consequent conclusions of contracts frequently occur in the area of sport. § 37b EStG is a special provision, the application of which is not restricted to sports, but which is of particular significance for sponsors. According to this provision, a company may pay tax on behalf of another company, to which it awards a corresponding benefit-in-kind. It applies (in relation to the donor) to parties subject to income tax and corporate tax (natural persons, business partnerships, corporations and commercial operations). This is the case irrespective of the location of the donor's headquarters and independently of the donor's own obligations to pay tax. § 37b EStG regulates the effect of the tax deduction for recipients who are subject to domestic income or corporate tax (§ 31(1) sentence 1 KStG). The tax-deduction rate amounts to 30%. This amount is, however, subject to increase due to church taxes and the so-called solidarity tax (*Solidaritätsbeitrag*). The lump-sum tax forms part of the operating expenses and, thus, is to be classified quite favourably. The favourable treatment incurs an annual maximum amount of EUR 10,000 per person. Benefits-in-kind which excced this maximum amount, are to be taxed on behalf of the recipient with its own tax rate.

C. VIP-Lounges

65. The establishment of VIP-lounges in German sporting arenas has led to the special treatment of sponsors which is, in turn, advantageous for the associations. In addition to usual advertising benefits (e.g., advertisement by means of loudspeaker announcements, on video screens, in association magazines, etc.), the typical sponsorship package contains tickets for VIP-lounges and, possibly, food and other services for the taxable person or third parties (e.g., business associates, employees). Problems relating to the allocation of such benefits are tackled by means of a blanket solution under tax law which sets aside 40% for advertisement, 30% for food and services and 30% of the total amount for gifts.

VII. Other Specific Regulations

A. Accounting for Player Permits in Commercial and Professional Sports

66. The 'Bosman'[164] jurisprudence of the European Court of Justice and the 'Kienas'[165] jurisprudence of the BAG has led to a creeping devaluation of association players, as, upon expiration of the contract, players are entitled to change their association free of any transfer fee. Only those assets which have been acquired for a fee are capable of capitalization; self-manufactured assets, on the other hand, are

164. ECJ, judgment of Dec. 15, 1995, Case C-415/93 Coll. 1995, I-4921 -5082, Sp*u*Rt 1996, 59.
165. BAG (Federal Labour Court), judgment of Nov. 20, 1996, 5 AZR 518/95, NZA 1997, 647.

not. One cannot capitalize the future star of one's own youth team.[166] The basis for assessment is the transfer fee (= purchase price). This must be depreciated over the term of the contract. If the term of the contract is extended, depreciation will also be extended.[167] Partial depreciation for a weak performance is prohibited as there is no (assessable) continual decrease in value involved.[168] This is also true in cases of offers for players which are clearly far below the players' actual value, for the reason that the performance of 'asset players' can improve once more.[169] A partial depreciation 'up to 0' would be conceivable only in cases of occupational disability and the withdrawal from the contract associated with such disability. This, however, is not of great interest in this context because of the residual value which is due in any case.

B. Naming and Television Rights

67. In addition to the naming rights which occur by means of renting between the sponsor and the association, the exploitation of television rights is particularly lucrative in the area of commercial and professional sports. The use of such non-depreciable rights can also be transferred to a company owned by the association. An all-encompassing marketing right, assigned to a third party, is a depreciable immaterial asset which the purchasing company can depreciate over the operation life.

C. Player Lending

68. If a player is not released from an existing contractual relationship, but plays for another association during the term of his contract, the association 'loaning' the player in question (the 'lending' association) continues to pay his wages, and the 'borrowing' association pays the 'lending' association 'lending fee'. Such income is to be classified as commercial (§ 49(1) no. 2 letter f EStG). The tax deduction is 15% from the gross income and 30% from the net income (§ 50a (2) and (3) sentence 4 no. 1 EStG). Pursuant to § 8 no. 7 GewStG, 50% of the payments are to be recognized in determining the basis for assessment for commercial tax.

166. Cf. e.g., Swiss law: Handschin, Sp*u*Rt 2008, 49 at 51, with the restriction that UEFA's statutes does not allow for it.
167. Appeal rejected; BFH, judgment of Nov. 22, 2006, IX R 6/04 (an appeal had been lodged against judgment of Nürnberg Fiscal Court, judgment of Mar. 26, 2003, V 414/2000).
168. Decree of the Federal Ministry of Finance of Feb. 25, 2000, IV C 2 – S 2171 b – 14/00, BStBl 2000 I, 372.
169. BFH, judgment of Nov. 27, 1974, I R 123/73, BStBl 1973 II, 294.

D. International Sports

69. Specific regulations are put in place for big sporting events. These range from tax exemptions for whole events (Football World Cup 2006) to the special treatment of acts of sponsorship and supporting programmes. UEFA itself is – as are other federations – exempt from tax in Germany in spite of its significant income from association competitions, which is partially taxable.[170] There is no tax deduction at source (§ 50(4) EStG). Furthermore, taxes are not levied at source for the activities of foreign players, trainers and advisors in Germany (§ 50(7) EStG).

VIII. Value-Added Tax

70. The law relating to value-added tax has been more or less harmonized within Europe. Sports are subject to value-added tax in Germany in the same way that they are in every other European country. The so-called 'small business privilege' pursuant to § 21 UStG is of significance for small sports associations and athletes in marginal employment. This privilege provides companies with the option of exempting gross incomes of up to EUR 17,000 from value-added tax but involves the simultaneous loss of the entitlement to claim pre-tax deductions.

Another simplification is provided by the option of an average-rate taxation pursuant to § 23a UStG. Accordingly, the sporting organizations which are subject to taxation can save their pre-tax documentation and deduct a fixed percentage as pre-tax from its revenue. The treatment of members' subscriptions under German law has not yet been clarified. In this regard, the 'most favorable' principle applies. This was set out by the European Court of Justice in its 'Kennemer Golf & Country Club' judgment of 21 March 2002. In accordance with this principle, the company may elect to have recourse to either national law, or to the directive on the system of value added tax.[171]

§5. Dispute Settlement

71. The potential for conflict in sports is significant, not least because of professionalization and commercialization. It is estimated that there are approximately 450,000–850,000 legal disputes per year in Germany.[172] In the context of governmental statutory regulation, it is significant that associations can regulate the dispute settlement mechanism and arbitration (within the meaning of the ZPO – Code of Civil Procedure) as a result of their own freedom of association. If an internal

170. Decree of the Federal Ministry of Finance of Mar. 20, 2008, IV C 8 – S 2303/07/0009, BStBl 2008 I, 538.
171. ECJ, judgment of Mar. 21, 2002, Case C-174/00 'Kennemer Golf & Country Club', UR 2002, 320.
172. Steiner, *Autonomie des Sports*, in: Tettinger/Vieweg (eds.), Gegenwartsfragen des Sportrechts, Berlin 2004, 222 at 227.

review – e.g., by federation courts or sports tribunals – is required, their decision will be subject to review by state courts.[173]

72. *Arbitration* as a voluntary private jurisdiction based on mutual agreement is governed by §§ 1025 et seq. ZPO. On the basis of private autonomy, arbitral tribunals are vested with the competence to settle private law disputes in the place of state courts.[174] In addition to private arbitration agreements, statutory arbitration clauses within the meaning of § 1066 ZPO are of immense relevance in the area of sport.[175] Labour law disputes – for example between an association and an athlete – cannot be made subject to arbitration. These cases fall within the exclusive jurisdiction of labour courts (§§ 4, 101 Labour Court Act (ArbGG)).[176]

An arbitral award within the meaning of § 1055 ZPO is on a par with the legally binding judgment of a state court.[177] Pursuant to § 1059 ZPO, it can only be set aside at request of a state court in the event of a fundamental defect. This leads to a complete de facto exclusion of state courts. This will only be found to be in conformity with the fundamental right to effective legal protection – which flows from Article 19(4) GG – if the arbitral tribunal provides legal protection which is, in general, comparable to the protection provided by state courts. This requirement arises from the presumption that the arbitral tribunal consists of independent, impartial decision makers who have nothing to do with the association or organization in question.[178]

73. The voluntary conclusion of an arbitration agreement occurs in the form of a contractual agreement. It is debatable whether or not the submission of the athlete to an *arbitration clause* by means of certain provisions of the association or federation by-laws is sufficient, or if the arbitration agreement must be contained in a document (within the meaning of § 1031 ZPO) signed by both of the parties. According to the prevailing view, the admissibility of an arbitration clause contained within the by-laws of an association can be adduced from § 1066 ZPO; thus members of the association are, in principle, bound by such a clause.[179] In the event

173. For details, see Part I, Ch. 3 §7; see also Part II, Ch. 2, §5 regarding the dispute settlement concerning in particular labour law disputes.
174. Cf. PG-Prütting, ZPO Kommentar, § 1025 mn. 1.
175. Cf. BGH, NJW 1984, 1355 on the validity of an arbitration clause in the statutes of the associations; cf. in general Vollmer, *Satzungsmäßige Schiedsklauseln*, Bad Homburg 1970; Führungs-Akademie Berlin des Deutschen Sportbundes (ed.), Schiedsgerichte bei Dopingstreitigkeiten, 2003.
176. See Oschütz, *Probleme der Schiedsgerichtsbarkeit im Sport: arbeitsrechtliche Streitigkeiten und einstweiliger Rechtsschutz*, in: Haas (ed.), Schiedsgerichtsbarkeit im Sport, Stuttgart 2003, 43 et seq.
177. See PG-Prütting, ZPO Kommentar, § 1055 mn. 1 et seq.
178. Cf. for example § 32(3), (4) DOSB-Satzung. On the issue of the independence of the Court of Arbitration for Sport (CAS), see Oschütz, *Sportschiedsgerichtsbarkeit*, Berlin 2005, 98 et seq. with reference to the Swiss Federal Court.
179. BGH, NJW 2000, 1713 = Sp*u*Rt 2000, 153 with comment by Haas, Sp*u*Rt 2000, 139; BGH, NJW 2004, 2226 = Sp*u*Rt 2004, 159; cf. PHBSportR-Pfister/Summerer, part 2, mn. 285 as well.

of the multiple use of uniform agreements – e.g., agreements for athletes – the contractual arbitration agreement is a standard term to which §§ 305 et. seq. BGB is not applicable, but rather § 242 BGB.[180]

It is a general condition for any arbitration agreement that it be precise, which means that the legal relationship must be framed in exact terms (e.g., 'disputes arising from membership') and the tribunal which is called upon to make a decision must also be, at the very least, ascertainable.[181] Moreover, as an independent and impartial court, the tribunal must arrive at its decision on the basis of a fair trial. The arbitrators cannot belong to the association, whether directly or indirectly; otherwise they could be viewed as a representative body of the association.[182] The earlier limitation of arbitration in German antitrust law (cf. § 91 GWB old version), pursuant to which one could choose whether to take ones case before an arbitral tribunal or before a state court no longer exists.[183]

74. In addition to traditional dispute settlement by sports arbitration and arbitration within the meaning of the ZPO, other means of *alternative dispute settlement* in the area of sports must be considered; in particular, mediation.[184] The relevance of mediation in the area of sports is still relatively low. It is not suitable for all disputes (e.g., penalties). Mediation is deemed suitable for conflicts which fall into a personal area and which – particularly in the case of enduring relationships between the affected parties – should be settled in the mutual interest of both parties. Here, sports mediation is not an opponent of sport arbitration, but should enrich and supplement it, and fill in any existing gaps.[185]

180. Vieweg, *Normsetzung und -anwendung deutscher und internationaler Verbände*, Berlin 1990, 230 et seq.
181. The previous § 1026 ZPO contained a corresponding provision on certainty; see generally Schwab/Walter, *Schiedsgerichtsbarkeit*, 7th edition, Munich 2005, I 3 mn. 1a et seq.; PG-Prütting, ZPO Kommentar, § 1029 mn. 2 et seq.
182. Cf. PHBSportR-Pfister/Summerer, part 2, mn. 283; the BGH decides on the basis of the overall impression as to whether it is an arbitral tribunal or a tribunal of the association, see BGH, NJW 2004, 2226 = Sp*u*Rt 2004, 159.
183. See PG-Prütting, ZPO Kommentar, § 1025 mn. 10.
184. For more on mediation in sports, see the overview by Osmann, *Mediation im Sport*, in: Vieweg (ed.), Perspektiven des Sportrechts, Berlin 2005, 291 et seq.
185. Osmann, *Mediation im Sport*, in: Vieweg (ed.), Perspektiven des Sportrechts, Berlin 2005, 307.

Chapter 3. Private Regulation

75. Due to the autonomy of associations, which is guaranteed by both the Basic Law and ordinary legislation,[186] the main focus of regulation falls on the private sector. The following sections deal with sports organizations in Germany (§ 1), legal forms of sports federations and associations (§ 2), sport regulations and sets of rules of sport associations (§ 3), the relationship between the enactment of regulatory provisions by the federation and governmental law (§ 4), sanctions put in place by the associations and federations (§ 5), the relationship between association and members (§ 6), legal protection from judgments of associations and federations (§ 7), liability (§ 8) and regulations aimed at ensuring (public) security, in particular with regard to hooligans (§ 9).

§1. Sport Organizations in Germany: Structural Characteristics of Sports Organizations

76. Outside of schools or universities, sports are usually organized by clubs and associations.[187] It is hardly surprising, therefore, that the 'Deutsche Olympische Sportbund' (DOSB)[188] – *the umbrella organization for German sports* – has 27 million members in more than 90,000 gymnastics and sports clubs, which, for their part, are divided into a further 90 member organizations.[189]

I. Pyramid Formation

77. The organization of sports associations is marked by *the pyramidal organization of associations and federations* which have the status of registered associations as defined by § 21 BGB.[190] The pyramids are structured as follows: a sports association – a group of people interested in sports – is a corporate member both of the local sports association of the district, county or town, and of the district's or county's discipline-related federation. The discipline-related federations of the districts and counties, in turn, are members of the respective discipline-related federations of the Länder. The discipline-related federations for the various sports of the Länder are – as are the sports associations[191] and the local sports federations of the

186. For more on this topic, see above Part I, Ch. 2, §1 I.
187. Recreational and popular sports which are increasingly developing outside of any association structure are not taken into account; see PHBSportR-Summerer, part 2, mn. 1.
188. DOSB was founded on May 20, 2006. It represents the union of the two former umbrella organizations in German sports – Deutscher Sportbund (DSB) and Nationales Olympisches Komitee für Deutschland (NOK).
189. For a detailed account of the state of German sports associations, see the Development Report 2009/2010.
190. In some cases, the professional section of an association is outsourced to an external company, e.g., cf. FAZ, Apr. 25, 2009, 30 on FSV Frankfurt 1899 Fußball GmbH.
191. Thus, in Bavaria, for example, cf. § 4(1) statutes of BLSV.

districts, counties, and towns themselves[192] – united in the sports federations of the Länder, whose catchment areas are congruent with the borders of the Länder. In addition, the discipline-related federations of the Länder are members of their respective national umbrella federations (e.g., '*Deutscher Skiverband*' ['German Ski Federation']). Finally, these organizations and the sixteen sports federations of the Länder are ordinary member organizations of the DOSB.[193] The pyramidal structure is continued at the international level. The national discipline-related federations are united in European federations (e.g., UEFA) and international federations (e.g., FIFA, FIS). Finally, the International Olympic Committee (IOC) – an association set up in accordance with Swiss law – is responsible for the Olympic Games and represents world sports.

II. 'Ein-Platz-Prinzip'

78. A further distinguishing feature of the system of sports associations is the so-called '*Ein-Platz-Prinzip*' (literally 'one-place principle').[194] According to § 4 no. 2 DOSB-Aufnahmeordnung in conjunction with the statutes of the international umbrella organizations and the IOC, only one umbrella organization per sport can be admitted to the DOSB. Similarly, the 'Ein-Platz-Prinzip' is embodied in the statutes of the sports federations of the federal states. Thus, most sports associations, national and international ones alike, have a monopoly[195] as regards both the catchment area and the respective sport, which helps avoid conflicts of competence – for example, concerning the organization of championships. At the same time, the monopoly excludes associations not integrated into the system from the receiving public funds. This, in turn, can potentially lead to conflict. If nothing else, the consequence of this has been several disputes as to the granting of admission.[196] In this context, the RKB-Solidarität judgment of the Federal Court of Justice has gained special relevance.[197]

192. For example, in Baden-Württemberg, cf. § 4(1)a) statutes of LSV Baden-Württemberg.
193. Section 6(1) DOSB-statutes; the organization diagram is retrievable at www.dosb.de/de/organisation/organisation/.
194. The term 'Ein-Verbands-Prinzip' is used synonymously, cf. Vieweg, *Normsetzung und -anwendung deutscher und internationaler Verbände*, Berlin 1990, 61 et seq. For more discussion oft the term, cf. Scherrer/Ludwig (eds.), Sportrecht – Eine Begriffserläuterung, 2nd edition, Zürich 2010, 101.
195. Until 1933, there was a fragmentation of sports associations which is difficult to imagine today. About 300 sport federations – distinguished from each other by politics, ideology and religion – competed with each other. After 1933, all sport associations were incorporated in a united organization – the Deutsche Reichsbund für Leibesübungen (German League of the Reich for Physical Education). The tempting memory of the power of a united organization was the godfather of the reconstruction of the sport federation's structure after 1945. Cf. Lohbeck, *Das Recht der Sportverbände*, Dissertation Marburg 1971, 68 on this. For more on the international situation, cf. Vieweg, *Normsetzung und -anwendung deutscher und internationaler Verbände*, Berlin 1990, 57 et seq.
196. Vieweg, *Teilnahmerechte und -pflichten der Vereine und Verbände*, in: E. Deutsch (ed.), Teilnahme am Sport als Rechtsproblem, Heidelberg 1993, 23 et seq.; id., Hannamann, *Soziale und wirtschaftliche Machtpositionen im Sport*, in: Württembergischer Fußballverband e.V. (ed.), Sport, Kommerz und Wettbewerb, Stuttgart 1998, 49 et seq.
197. For further details, see below.

III. Tasks of the Various Sporting Associations

79. The *Deutsche Olympische Sportbund* (German Olympic Sports Confederation – DOSB) is the umbrella organization for German sports. Sixteen Länder federations, sixty-two discipline-related federations, twenty federations with special tasks, two IOC members and fifteen individual members belong to it. The DOSB basically performs functions of a co-coordinative or representative type. It is, among other things, in charge of national training centres and Olympic support centres. The DOSB provides financial aid in support of its members in international competitions.

Every sport in Germany belongs to a sports federation. Because of the hierarchical structure, these federations are divided into regional sports federations of the Land, district, county or town and discipline-related federations. At a local level, therefore, the athlete belongs directly to the respective *discipline-related association*. The discipline-related federal sports federations represent the sport in the worldwide federations, train the top sportsmen and are the organizers of German championships. Moreover, they are responsible for selecting athletes to participate in international competitions and in European and international championships, they maintain national training centres and national team coaches who are employed by the DOSB. Some of the largest German sports federations are the German Football Federation (*Deutsche Fußball-Bund* – DFB) with approximately 6.7 million members, the German Gymnastics Federation (*Deutsche Turner-Bund*), which has approximately 5.1 million members, the German Tennis Federation (*Deutsche Tennis Bund*) with 1.6 million members and the German Shooting Federation (*Deutsche Schützenbund*), which has approximately 1.4 million members.

Parallel to the professional division of sports associations, there is a multidisciplinary division of sports associations in each of the sixteen federal states into *sport associations of each state (Land)*. These sports federations of the Länder are responsible for multidisciplinary tasks such as the representation of the interests of sport associations at Land level, the promotion and training of licensed trainers, youth leaders and managers, and insurance coverage.

80. The German Foundation for Sports Assistance (*Stiftung Deutsche Sporthilfe*), which was brought into being in 1967 as a non-profit organization under private law, and which serves the purpose of providing both material and non-material support to top athletes, is located outside of the hierarchy of the DOSB. At any one time, the foundation provides support to about 3,800 athletes. In addition, it promotes schools and boarding schools which lay special emphasis on sports. The special-interest group, 'Freiburger Kreis e.V.', devotes itself to the promotion of sports. It was established in 1974 and currently encompasses 165 large sport associations with more than 650,000 members.

§2. Legal Forms of Sports Associations and Organizations

81. Most private sports organizations are *non-profit associations* within the meaning of §§ 21 et. seq. BGB. It is not only the 91,000 sports associations that are

privately organized; sports federations at Land and federal level are, too. Due to the continuing commercialization and professionalization of sports, an increasing number of corporations exist.

I. The Registered Association (Eingetragener Verein)

82. The traditionally-employed legal form of the organized group exercise of sport in Germany is the *registered non-profit association* (*eingetragener Idealverein*) as set out in § 21 BGB. This is – according to the definition – an association which is intended to persist for a long period of time, independent of the existence of members. It is a corporately-organized association of several people aimed at achieving an 'ideal common purpose', as defined by § 21 BGB.[198] It is entered in the register of associations (*Vereinsregister*) at the competent local court (*Amtsgericht*). It thereby acquires legal capacity and becomes a legal entity.[199] According to § 21 BGB the 'ideal' (i.e., non-profit) association is to be distinguished from the profit-making association (*wirtschaftlicher Verein*) set out in § 22 BGB which acquires legal capacity as a result of this being granted to it by the state. The profit-making association is not used as legal form by sports associations. Moreover, it must be distinguished from the unincorporated association (*nicht-rechtsfähiger Verein* – § 54 BGB). This form of legal entity plays a minor role in sport (e.g., bowling clubs among friends).

83. The *founding* of an association is free and requires – among other things – the drafting of by-laws for a registered association (*Vereinssatzung*). The by-laws must include the purpose of the association, its name and registered office, and must provide for entry into the register of associations, § 57(1) BGB. Moreover, pursuant to § 58 BGB, they should contain rules governing the organs of the association, the joining and withdrawal of members, the form of decision-making to be employed and the payment of contributions. If the association wishes to be treated as 'charitable' within the meaning of §§ 51 et seq. Tax Code (*Abgabenordnung* – AO) it must be possible to derive the status of charitable organization from the by-laws (§ 51(3) AO). According to the jurisprudence in this area, all essential basic decisions concerning the association's routine, especially those measures which burden the members, must be laid down in the by-laws.[200]

Entry in the register of associations establishes the legal capacity of the association (normative system).[201] Thus, it is legally independent of its members – individuals and public and private law entities. However, pursuant to § 56 BGB, entry into the register requires a minimum of seven members. The local court will revoke legal capacity ex officio if the number of members falls below three (§ 73 BGB).

198. Reichert, *Handbuch des Vereins- und Verbandsrechts*, 12th edition 2010, mn. 1 et seq.
199. Soergel-Hadding, Kommentar zum BGB, 13th edition 2000, Vor § 21, mn. 4.
200. BGHZ 47, 172 at 177; 88, 314 at 315; Weick, in: Staudinger §§ 21–79, 2005, § 25 mn. 7; Vieweg, *Normsetzung und -anwendung deutscher und internationaler Verbände*, Berlin 1990, 197 et seq.
201. Haas, in: Haas/Haug/Reschke (eds.), Handbuch des Sportrechts, B, Ch. 1, mn. 22.

Apart from this, the existence of the association does not depend on its membership.[202]

84. Under § 57(1) BGB, the required *name of the association* usually consists of a core name and additions to the name (e.g., FC Gelsenkirchen Schalke 04 e.V.).[203] It may contain fictitious names. It must be distinguishable from other names (§ 57(2) BGB), so as to ensure that mix-ups do not occur. If this is found not to be the case, entry in the register of associations will be denied (§ 60 BGB). Pursuant to § 18(2) German Commercial Code (*Handelsgesetzbuch* – HGB), the name must not give rise to misconceptions regarding type, size, age, meaning, purpose or any other essential condition of the association.[204] The name of an association is legally protected by § 12 BGB.[205] This protection includes signs and emblems if they contribute to the distinctiveness of the association.[206] If the name is used for business purposes, trademark protection pursuant to § 5 Trademark Act (*Markengesetz* – MarkenG) also applies.[207] The so-called domain name of an association on the internet is also protected.[208]

An association can only have one *seat* which, under § 57(1) BGB, must be noted in the by-laws. According to § 24 BGB, the administrative seat is considered as the founding seat if the articles of do not contain a corresponding provision.

85. The legal form of registered association can be found not only throughout the amateur sector but, frequently also in the case of professional associations. In spite of this, the *object* of the registered association may not be to conduct a commercial business operation, but rather must be of a purely non-material nature, § 21 BGB. Here, it is not the intended purpose of the association which is of relevance; rather, the purpose is ascertained de facto based on how the association is arranged. The criterion of demarcation for commercial business[209] is regarded as having been fulfilled if a sports association regularly and on a continual basis plays a commercial role on the market and thereby regularly performs services in return for payment. An operation is deemed to be 'in return for payment' if the association regularly supplies economic assets in the broadest sense of the term. This does not depend on whether or not the association is profiting.[210]

With regard to that definition, it can be assumed that nowadays, a large number of sports associations – particularly in the professional sector – behave similarly to medium-sized companies and that they should thus be denied the legal form of registered association. In the area of football in particular, vast amounts of revenue are generated as a result of broadcasting rights, perimeter and jersey advertising and the sale of fan merchandize etc. Commercial activities of this kind are not consistent

202. Soergel-Hadding, Kommentar zum BGB, 13th edition 2000, Vor § 21, mn. 44.
203. PHBSportR-Summerer, part 2, mn. 49.
204. Reichert, *Handbuch des Vereins- und Verbandsrechts*, 12th edition 2010, mn. 534 et seq.
205. Röhl, *Schutzrechte im Sport*, 2012, 172 et seq.
206. Cf. Soergel-Hadding, Kommentar zum BGB, 13th edition 2000, § 12 mn. 154.
207. Röhl, *Schutzrechte im Sport*, 2012, 80 et seq.
208. Palandt-Ellenberger, 70th edition 2011, § 12 mn. 14.
209. BGHZ 45, 395; 85, 84; Palandt-Ellenberger, 70th edition 2011, § 21 mn. 2 et seq.
210. Stöber, *Handbuch zum Vereinsrecht*, 9th edition 2004, mn. 50 et seq.

with the legal principle of a non-material association. An exception to the principle that a registered association may not pursue a commercial purpose exists only in the case of the so-called *Nebenzweck-Privileg* (literally, a secondary-purpose privilege).[211] An association will not lose benefit of the non-material purpose stipulated in its by-laws if the commercial activities performed by it are only secondary objects.[212] Textbook examples of such minor commercial operations are restaurants that belong to the association or alpine club huts. In the area of football in particular, though, the commercial operations generally exceed the boundaries of permitted secondary purposes. This development is partly referred to as an incorrect legal form (*Rechtsformverfehlung*).[213] Any associations found to have an incorrect legal form could lose their legal capacity pursuant to §§ 43, 44 BGB.[214] In practice, however, self-designation as a registered association is tolerated by the competent authorities, especially the courts of registration (*Registergerichte*). As a result of the increasing tendency of sports associations to engage in commercial activities and the concomitant problem of incorrect legal form, capital companies have become increasingly attractive as a new organizational form for professional associations. (cf. II.).

86. Every association has two essential *organs*; i.e., the executive board and the members (§§ 26(1), 32 BGB). The highest organ of every association is the *general meeting of members (Mitgliederversammlung)*. The members appoint the executive board of directors *(Vorstand* – § 27(1) BGB) and are responsible for any amendments to the by-laws, thus making them responsible for all policy matters concerning the association (§ 33 BGB). For this reason, the association has a structure which is basically democratic. The association is responsible for day-to-day management. However, even in this area the members in meeting are authorized to instruct the *executive board* (§§ 32, 27(3) in conjunction with § 665 BGB).[215] General meetings are called by the executive board and notification that the meetings will take place also includes a copy of the agenda (cf. §§ 36, 37 BGB). Usually, the general meeting reaches its decisions by means of a resolution which, in order to be successful, needs to achieve a majority of the votes cast, § 32(1) sentence 3 BGB. In order for an amendment to the by-laws to occur, there must be a majority of three-quarters of the votes, if this is not otherwise specified in the by-laws, § 33(1) BGB. In a general meeting, all association members possess the same number of votes, so that they each play an equal part in the association's decision-making process.

The executive board is responsible for managing the business of the association and represents the association externally (§ 26(2) BGB). It can consist of one or more persons (§ 26(1) sentence 2 BGB) and must not necessarily be made up of association members. If it consists of several persons, a chairperson (*Vorsitzender*) will usually be chosen. The by-laws usually set out the manner in which tasks and

211. BGHZ 85, 84 at 93; Soergel-Hadding, Kommentar zum BGB, 13th edition 2000, § 21 mn. 36.
212. BayOblGZ 1985, 283 at 285; MüKo-Reuter, 5th edition 2006, § 21 mn. 19.
213. Heckelmann, AcP 179, 1 et seq.; Segna, ZIP 1997, 1901 et seq.
214. For more on the problem, cf. PHBSportR-Summerer, part 2, mn. 54 et seq.
215. Stöber, *Handbuch zum Vereinsrecht*, 9th edition 2004, mn. 405.

areas of responsibility should be distributed among individual board members.[216] In general, all board members have the right to represent the association externally (§ 26(2) BGB). The by-laws can regulate this in a different manner. However, third parties must be notified of any limitations upon management authority (*Geschäftsführungsmacht*) or representative power (*Vertretungsmacht*). The requirement is fulfilled by noting this in the register of associations (§§ 26(1) sentence 2, 68, 70 BGB). Dismissal of the board before the end of term is possible upon the passing of a corresponding resolution by the members in general meeting, § 27(2) BGB. Liability of the executive board is regulated in accordance with § 31a BGB and is limited to gross negligence and intention for honorary board members.[217]

II. Alternative Legal Forms

87. In the area of professional sport, it now almost impossible to have licence player divisions (*Lizenzspielerabteilungen*) as part of an 'ideal' non-profit association within the meaning of § 21 BGB. This is due to the substantial economic activity that takes place in this area. This is also the case even if, in practice, it is partially true that the division has a non-material object. Furthermore, other legal forms, in particular *companies limited by shares (Rechtsformen aus dem Kapitalgesellschaftsrecht)*, offer numerous advantages compared with the registered association, especially as regards the development of economic activities. Therefore, a variety of sports associations have been glad of the opportunity to outsource their licence players department and reorganize it into another legal form which is facilitated by the Reorganization of Companies Act (*Umwandlungsgesetz* – UmwG). Under the UmwG, associations may be reorganized into GmbH, GmbH & Co KG, AG, KGaA as well as GmbH & Co KGaA.

In order to preserve the influence of the non-profit parent corporation, the German Football Association and the DFL German Soccer League GmbH (*DFL Deutsche Fußball-Liga GmbH*) each enacted a regulation in § 16c (2) and in § 8(2) of their respective by-laws, the result of which was that the decision of the members of the registered association regarding the choice of structure under company law requires a majority (the so-called 50+1-rule). The compatibility of the rule with legal – national and European – requirements has been the subject of heated discussion for many years.[218] As a result of the arbitral decision of 30 August 2011,[219] according to which the 50+1-rule does not apply to investors who have played an active role in the association for more than twenty years, the discussion came to an end, albeit one which is most likely temporary.

88. The Reorganization of Companies Act enables the creation of a *dual association- and league-organization* which enables the outsourcing of the licence

216. Reichert, *Handbuch des Vereins- und Verbandsrechts*, 12th edition 2010, mn. 2608 et seq.
217. For details, see below.
218. For more detail, see Part IV, Ch. 2, §4.
219. DFL-Schiedsgericht of the Aug. 30, 2011, Sp*u*Rt 2011, 259 et seq.

department of the sports association.[220] At local level, there occurs a separation between the non-profit-making registered association and the professional company. At federal level, there occurs a division between the specialized sports association in the non-profit area and the Federal League Society (*Bundesligagesellschaft*). Details of the relationship between the specialized sports association and the Federal League Society are regulated by so-called fundamental contracts (*Grundlagenverträge*). After these contracts have been concluded, the Federal League Society runs the corresponding professional league, while the specialized sports association organizes the amateur level, the cup competition and international matches, as well as attending to the national team. The most important dual-league-system following this model in German Sport is that of football: as the German Football Association (*Deutscher Fußball-Bund e.V.*, DFB) is responsible for the amateur level, the German soccer league's operating business is no longer performed by the DFB, but by the DFL, German Football League GmbH (*Deutsche Fußball Liga GmbH*), a 100% subsidiary of the Football League Association (*Fußball Ligaverband e.V.*). In addition, thirteen of the eighteen football associations are now organized as corporate enterprises. As well as that, the gaming operations of the German Ice Hockey League (DEL) are not performed by the German Ice Hockey Association (Deutscher Eishockey Bund, DEB), but by the outsourced DEL GmbH (Deutsche Eishockey Liga GmbH), and all hockey associations participating in the DEL are organized as corporate enterprises. Similar structures can be found in the professional leagues of handball (DHB, *Handball-Bundesliga e.V.* with *Handball-Bundesliga GmbH*) and basketball (DBB, *AG Basketball Bundesliga e.V.* with BBL GmbH). All professional leagues have similar licensing procedures. These licences are required in order to participate in the league.[221] Furthermore, a number of associations and federations have established marketing companies for the purpose of commercialization.

§3. Statues and Sets of Rules

89. The by-laws and sets of rules of German sports federations, as well as those of international sports associations are important sources of sports law. They form one of the two 'tracks' of the dual-track sports law. The potential for conflicts to occur has increased significantly in recent times, particularly as a result of commercialization and professionalization. There are plenty of situations which can give rise to conflicts between the parties concerned – these include not only athletes, but also associations and federations, functionaries, coaches, sponsors, players' agents and viewers, although each party shares with the others a common interest in the best possible conduct of the respective sports operations. This is only one of the many reasons which give rise to a pressing requirement for regulation. Consequently, the sets of rules have increased significantly in length and complexity; the DFB's statues and sets of rules for example comprise over 680 pages.[222]

220. For general information, cf. Balzer, ZIP 2001, 175 et seq.; Heermann, ZIP 1998, 1249 et seq.
221. For more detail, cf. Part I, Ch. 3, §5 IV.
222. Available at http://www.dfb.de/index.php?id=11003.

90. Due to their practical and legal relevance, as well as to their legal quality, *sporting rules* are of central importance. As the practical, most important manifestation of the autonomy of federations, they are established by the respective national or international sport federations in more or less comprehensive sport-type-specific sets of rules – such as the Official Athletics Regulations (*Amtliche Leichtathletik-Bestimmungen*[223]) or the International Handball Rules (*Internationale Hallenhandball-Regeln*[224]). These are rules that contain decisive competition regulations, and which concern the form of the associations, the relationship between the federations and their members, and the federations' authority.

91. Sporting rules have various complementary *functions*. First of all, they assist in typifying different types of sport by making specifications in a general abstract manner, e.g., regarding the competition site (playing field etc.), the aim of the game, the time to be spent playing, the number of players on a team, sporting equipment, sportswear, the manner in which players should move, and the athletes' appearance. It is this standardization that makes it possible for large-scale sporting competitions to take place. Sporting rules, the function of which is to facilitate competition, are supplemented by regulations that are intended to achieve equal opportunities between players, and also to prevent distortion of competition. The classification of weight lifters and boxers into weight classes, the ban on taking performance-enhancing medication (doping), the approval of certain sports equipment and materials, as well as the ban on certain motion techniques (such as takeoff using both legs in the high jump) serve that purpose.

The impact that sports equipment and materials can have on the performance of an athlete is illustrated particularly well by the example of swim- and ski-jump-suits. The athlete with the best material has a considerable competitive advantage over the other participants.[225] In order to assure equality of opportunity among the athletes, the federations generally set out concrete guidelines as regards the design of, and material used for the suits.

In order to guarantee equal opportunities[226] between competitive associations, there are rules that regulate the transfer of athletes from one association to the other, and address the possibility of making such transfer subject to payments. Increasingly, sporting rules serve the purpose of increasing the attractiveness of sport for viewers – and hence for broadcasters and sponsors – in order to increase the popularity of the type of sport and, in turn, the profit arising from television marketing

223. http://www.leichtathletik.de/.
224. http://www.ihf.info/TheGame/BylawsandRegulations/tabid/88/Default.aspx.
225. This is sometimes referred to as technology doping. Thus, the German swimmers felt disadvantaged during the 2008 Olympic Games as they were not allowed to wear the fastest swimsuit (Speedo) but instead had to wear swimsuits made by Adidas, the sponsor of the German Swimming Federation, see FAZ of Apr. 14, 2008, 31.
226. Equal opportunities is a basic principle of sports, cf. Adolphsen, *Internationale Dopingstrafen*, Tübingen 2003, 1; Vieweg/Müller, *Gleichbehandlung im Sport – Grundlagen und Grenzen*, in: Mannsen/Jachmann/Gröpl (eds.), Festschrift für Udo Steiner, Stuttgart et al. 2009, 889 et seq.; Vieweg, *Verbandsrechtliche Diskriminierungsverbote und Differenzierungsgebote*, in: Württembergischer Fußballverband e.V. (ed.), Minderheitenrechte im Sport, Baden-Baden 2005, 71 at 83 et seq.

and sponsoring. At the very least, the influence of certain sporting rules on the sporting goods and advertising market is important. Sporting rules create market preferences for regulation products and can sometimes even lead to the exclusion of non-regulation products from the marketplace. A further function of sporting rules is to ensure that disputes are avoided, or at least to ensure that the game and the competition are conducted in an orderly manner, in accordance with special rules of procedure and regulatory provisions. Finally, sporting rules are intended to protect the athletes themselves, their competitors and viewers from the dangers that participation in sports typically holds.

92. As regards their *practical and legal meaning*, an important initial observation is that sporting rules are rules of national or international sports federations – organized under private law – which rank below statutes.[227] Furthermore, sports federations are currently demanding that their bodies of rules be awarded global effect, i.e., that they be of equal application to all those who have submitted to the rules, and that they be obligatory in all areas of exercise of the particular organized sport in federations. In addition, it is significant that those sporting rules which contain general abstract codes of behaviour[228] – for instance, those which specify permitted or forbidden motion sequences with which the athletes must comply[229] – are often couched in very vague terms in order to avoid creating regulatory loopholes.

Thus, in soccer a 'forbidden play' or 'unsporting behaviour' occurs when an athlete 'is – in the referee's opinion – playing dangerously'.[230] In order to maintain the flow of the game, the authority responsible for the interpretation of such 'indefinite legal terminology in the law of associations' is often assigned to the referee based on the law of the federation.

93. The *legal character* of the bodies of rules established by the sport associations is both problematic and controversial. Their legal classification is important, as the matters of whether or not sporting rules are obligatory and actionable, the form of their relationship to state law, and upon the basis of which principles it must be interpreted depend upon legal classification. In any case, the bodies of rules of the sport associations do not constitute a special private law or even law enacted by the state.

Supporters of the '*Normtheorie*'[231] hold that sporting rules have an effect 'similar to legal norms', which means that §§ 133, 157 BGB and § 139 BGB are not used in the interpretation of sporting rules. According to the '*Normtheorie*', the by-laws of an association are an objective law which has its roots in the autonomy of associations and which comes about as a result of a complete act of creation and which applies to the members of the association from the moment they join. According to the '*Vertragstheorie*' (contractual theory) however, the by-laws are only a particular

227. Other references passim Pfister, Sp*u*Rt 1998, 221 at 222; Lukes, NJW 1972, 125 et seq.; Vieweg, *Normsetzung und -anwendung deutscher und internationaler Verbände*, Berlin 1990, 319 et seq.
228. Marburger, *Die Regeln der Technik im Recht*, Köln et al. 1979, 258 et seq.
229. E.g., rule 12 of DFB football rules; rule 8 of the international indoor handball rules.
230. Rule 12 DFB football rules.
231. Meyer-Cording, *Die Vereinsstrafe*, Tübingen 1957, 43; Erman-Westermann, 12th edition 2008, § 25 mn. 4; MüKo-Reuter, 5th edition 2009, § 25 mn. 9 et seq.

manifestation of the contract. Athletes who join the association after it has been founded submit themselves to the by-laws only upon their signing of the contract of admittance. The prevailing opinion and the jurisprudence in the area support the modified '*Normtheorie*', according to which the drafting of the by-laws is viewed as a contract, but the final version of the by-laws is granted the status of a legal norm.

§4. Relationship to State Law, in Particular the Ability of State Courts to Review Decisions of Federations

94. The authority of sports federations to create self-drafted sports law should not obscure the fact that their right to do so is limited by mandatory rules of state law. The autonomy of organizations under Article 9(1) GG is not without limits; it is curbed by the indispensable principles of constitutional law and the fundamental rights of third parties.[232] These make clear that federation law and state and European law do not exist in complete isolation of one another. With regard to the interaction between these three, the crucial issue is the scope of the review of decisions of the federations by state and European courts and, thus, the limitations of the power of the federations.[233] This matter is at the heart of the debate, not least because decisions by national and European courts affect the regulations of the federations and the method of decision-making engaged in by its organs, including the so-called sports courts. Three separate *forms of review* must be distinguished from one another: review of the content of federation law, review of facts and, finally, the review of the process of subsumption (i.e., the application of a norm to a particular set of facts) which led to the federation's decision.[234]

95. In the case of *associations and federations which do not have social or economic power*, the *courts*,[235] in their review of a penalty imposed by a federation, limit themselves to a review of whether the decision that led to the penalty is supported by the by-laws, whether the correct procedure has been complied with, whether the provisions of the by-laws are unlawful or contra bonos mores, whether the fact-finding is free of error and whether the penalty is manifestly unfair. In recent times, state courts have also begun to apply these criteria when reviewing other decisions of federations.[236]

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232. For more detail, see Vieweg, *Normsetzung und -anwendung deutscher und internationaler Verbände*, Berlin 1990, 182 et seq.: 'Chance zur Selbstregulierung'.
233. Röhricht, *Chancen und Grenzen von Sportgerichtsverfahren nach deutschem Recht*, in: Röhricht (ed.), Sportgerichtsbarkeit, Stuttgart et al. 1997, 19 et seq.
234. See also SportRPr-Adolphsen/Hoefer/Nolte, 2012, mn. 200 et seq.
235. BGHZ 21, 370 at 373; 47, 381 at 384 et seq.; 87, 337 at 343; 102, 265 at 273; OLG Frankfurt/M., NJW-RR 1986, 133 at 134; OLG München, NJWE-VHR 1996, 96 at 98 et seq.
236. So OLG Frankfurt, NJW 1992, 2576; LG Berlin causa sport (CaS) 2006, 73 et seq.; in addition to that, LG München I, Sp*u*Rt 2007, 124 et seq. in the context of non-selection of a coach for international competitions by the National Olympic Committee.

96. With regard to *associations and federations with social-economic power* – such as sports federations – the limited review of federation penalties by the courts has been criticized by legal experts since the end of the 1960s in view of the power of federations. The problem regarding the power of federations was brought into focus during the so-called Bundesliga scandal[237] in the early 1970s, as it became clear that decisions reached by the federation authorities – the sports courts of the DFB – concerning the exercise of profession and professional opportunities were made largely without regard to general legal principles.[238] The goal of bringing the power of federations and those individual interests worthy of legal protection closer together, which was commonly pursued by legal scholars, was thereupon adopted by the courts. Consequently, the courts adopted the objective – which was supported by many legal scholars – of joining collective power and individual interests. If one regards federation penalties and decisions reached by the federation which have negative effects on individual members as admissible in principle – not only for reasons of practicality, but also due to the federation's constitutionally-granted right to self-governance – one must address the risks concerning legal protection[239] connected with the federation's power.

First, the legal protection must include an extensive *review of the content*[240] of the federation regulations which are the basis for penalties imposed in sports and other decisions which have a negative effect on individuals. The approach to content review (i.e., a comprehensive weighing of interests made by the Federal Court of Justice in its RKB Solidaritäts-decision[241]) can, a fortiori, be applied to the internal affairs of an association and its members.[242] The issues of monopoly associations on the one hand, and dependence on its services on the other, will be discussed here. The Federal Court of Justice now reviews the content of a set of sports rules by direct reference to the criteria outlined in § 242 BGB.[243] General provisions set out by federations – such as 'unsporting behavior' – which serve as bases for legal penalties, and which would therefore be difficult to forego, should be reviewed by the courts in order to verify whether they can be brought into conformity with generally applicable law, and whether they contain a legally-permissible margin of

237. Cf. the informative documentation by Rauball, *Bundesliga-Skandal*, Berlin 1972, as well as the discussion by Hilpert, *Sportrecht und Sportrechtsprechung im In- und Ausland*, Berlin 2007, 209 et seq.
238. An overview of the attempts in the legal literature to dogmatically substantiate the judicial review of penalities by federations can be found in Vieweg, JuS 1983, 825 at 827 et seq.
239. Burmeister, DÖV 1978, 1 at 2, considers the factual deprivation of rights respectively the imposed waiver of rights to be typical for the system of sport federations.
240. BGH, NJW 1995, 583 at 587 = Sp*u*Rt, 1995, 43 et seq.; NJW 2004, 2226 at 2227; Vieweg, Sp*u*Rt 1995, 97 et seq.; id., *Zur Inhaltskontrolle von Verbandsnormen*, in: Leßmann/Großfeld/Vollmer (eds.), Festschrift für Rudolf Lukes, Köln/Berlin/Bonn/München 1989, 809 et seq.
241. BGHZ 63, 282 et seq. = NJW 1975, 771 et seq.
242. Nicklisch, *Inhaltskontrolle von Verbandsnormen*, Heidelberg 1982, 29; Reuter, ZGR 1980, 101 at 115 et seq.
243. BGHZ 128, 93 at 101 et seq. = NJW 1995, 583 at 585 = Sp*u*Rt 1995, 43 at 46 et seq.; see Vieweg, Sp*u*Rt 1995, 97 et seq.; OLG München, Sp*u*Rt 2001, 64 at 67; see Haas, causa sport 2004, 58; in general on the review of the content of rules of the federations Vieweg, *Normsetzung und -anwendung deutscher und internationaler Verbände*, Berlin 1990, 159 et seq.; id., *Zur Inhaltskontrolle von Verbandsnormen*, in: Leßmann/Großfeld/Vollmer (eds.), Festschrift für Rudolf Lukes, Köln et al. 1989, 809 et seq.

appreciation in relation to decision-making.[244] Second, a legal review of facts (*Tatsachenkontrolle)*[245] is necessary. This helps prevent athletes being denied their rights as a result of an incorrect finding of fact which occurs in spite of preventive measures of federation law. Thus, it must be taken into account, that in order to ensure a fluid style of play in games, some so-called factual decisions (*Tatsachenentscheidungen*)[246] – such as the calling of a foul in football – are to be made ad hoc and cannot be revised afterwards – even if proven incorrect by technical tools, e.g., a video evidence.[247] It is, on the other hand, debatable whether or not the effects of factual decisions which extend beyond a sporting competition – e.g., a long-term ban – can be made subject to review by the courts.[248] Third – and not least because of the possibility of evasion – a review of the subsumption employed (*Subsumtionskontrolle)* is required.[249] In this case, it is important to consider whether or not the organizations can be awarded a margin of appreciation[250] in their reaching of decisions regarding indefinite or vague terms contained in their rules and regulations.

97. The method of resolution outlined takes account of the fact that the interests of sport federation and member – this also includes members of associations which have close links to the federation – are not diametrically opposed to one another, but also have common ground. The *chance to achieve fair self-regulation of conflicts* with decisions which are based on proximity to and familiarity with the subject[251] by employing association law and the decision-making processes of federations (such as federation sports tribunals) remains protected. The state courts can exercise restraint in substituting the decisions of federation organs which are more competent in the field in question with their own, by respecting the association's prerogative to employ its own discretion and margins of appreciation (*Beurteilungs- bzw. Ermessensspielräume*). However, the 'competition' between state courts and European courts which could arise as a result of this system should lead to regulations and decisions being put in place by the federations which are acceptable to the athletes and associations concerned.

244. Cf. H.P.Westermann, *Die Verbandsstrafgewalt und das allgemeine Recht*, Bielefeld 1972, 104 et seq. with further reference.
245. BGH, JZ 1984, 180 at 187; on this topic Vieweg, JZ 1984, 167 at 170 et seq.
246. Cf. Vieweg, *Tatsachenentscheidungen im Sport – Konzeption und Korrektur*, in: Krähe/Vieweg (eds.), Schiedsrichter und Wettkampfrichter im Sport, Stuttgart et al. 2008, 53 et seq.; id., Crezelius/Hirte/Vieweg (eds.), Festschrift für Volker Röhricht, Köln 2005, 1255 et seq.; Hilpert, *Die Fehlentscheidungen der Fußballschiedsrichter*, Berlin 2010, passim.
247. Cf. Götze/Lauterbach, Sp*u*Rt 2003, 95 et seq., 145 et seq. on video evidence.
248. Cf. H.P. Westermann, *Die Verbandsstrafgewalt und das allgemeine Recht*, Bielefeld 1972, 107 et seq.
249. BGHZ 102, 265 at 276; Vieweg, JZ 1984, 167 et seq.; id., *Normsetzung und -anwendung deutscher und internationaler Verbände*, Berlin 1990, 238 et seq.
250. Vieweg, JZ 1984, 167 et seq.
251. Vieweg, *Normsetzung und -anwendung deutscher und internationaler Verbände*, Berlin 1990, 182 et seq.

Conversely, values of federation law and typical features of sports are taken into account in the private law interpretation of vague legal terms by state courts.[252] Here, particular attention must be devoted to the principle of fair play ('*fair-play Grundsatz*').[253] The principle of fair play is a special social value which is intrinsic to sport, and which, as one of the vague legal terms of private law, usually requires further elaboration. It goes beyond the principle of good faith referred to in § 242 BGB, and must therefore be awarded attention independently of this provision.

§5. Legal Relationship between the Association and Its Members

98. Upon attaining association membership, the complete set of rights and duties of the member in relation to the association is set out. The sources of these rights and duties are the by-laws, parallel legal norms and resolutions of the organs of the association. The basic decisions defining the day-to-day running of the association are part of the association's constitution within the meaning of § 25 BGB and, accordingly, must be regulated in the association's by-laws.[254] The rights and duties are acquired upon acquisition of membership – in the case of founding members, possibly as early as the foundation of the association. Acquisition of membership occurs by means of an application for admission to the association (§§ 145 et seq. BGB) from the person who wishes to become a member. Both natural and legal persons are capable of becoming members.[255] Special conditions found in the by-laws can be attached to the acquisition of a new memberships. Membership ends upon death, resignation (§ 39 BGB) or expulsion. Additional reasons for withdrawal from the association can be included in the by-laws (e.g., if a member does not pay his membership subscription in good time). Pursuant to § 38 BGB, membership is non-transferable and is not heritable. Another 'right awarded absolute protection' within the meaning of § 823(1) BGB is the protection of members of the association against interference from the association or by third parties, and the granting of damages in the event of any violation of this rule, on condition that the interference was directed against the membership per se.

In sports law, the following aspects have proven problematic: the various organizational levels of the federation on the one hand, and participation in the sporting federation's events on the other raise questions in relation to the type of membership and the binding effect of the associations' regulations (see I.). Here, the individual member's rights and duties (see II.) and the entitlement to become a member (*Aufnahmeanspruch)* are of particular relevance (see III.). This overview will culminate in an account of the licensing procedures which have been introduced into

252. Pfister, *Autonomie des Sports, sport-typisches Verhalten und staatliches Recht*, in: id. (ed.), *Festschrift Lorenz* 1990, 191 et seq.

253. The Karlsruher Erklärung zum Fair Play (Karlsruhe Declaration on Fair Play of Karlsruhe) of the Konstanzer Arbeitskreis für Sportrecht e.V. – Verein für deutsches und internationales Sportrecht of the Mar. 3, 1998 is instructive to this extent; cf. Württembergischer Fußballverband e.V. (ed.), Fairness-Gebot, Sportregeln und Rechtsnormen, Stuttgart 2004.

254. BGHZ 47, 172 at 177; 88, 314 at 316; Vieweg, *Normsetzung und -anwendung deutscher und internationaler Verbände*, Berlin 1990, 197 et seq.

255. Palandt-Ellenberger, 71st edition 2012, § 38 mn. 4.

commercialized and professionalized sports (see IV.), as well as the nomination of athletes (see V.). § 6 is devoted entirely to the main sanctions employed by associations and federations – due to their enormous potential for conflict.

I. Types of Membership and Binding Nature of Regulations Enacted by Federations

99. There are three main types of membership which should be distinguished from one another: direct (ordinary), extraordinary, and indirect membership.

100. Athletes with a relationship to the association are classified as *ordinary members*.[256] On becoming a member, the athlete is bound by the by-laws, as well as by any subsidiary rules of 'his' association. He has the rights and obligations of an ordinary member.

101. *Extraordinary membership*[257] is created primarily when a new member joins the association. It is similar to ordinary membership, but the association and the athlete generally have less rights and obligations towards each other. The extent of such rights and obligations is expressly regulated in the association's by-laws. Certain membership rights, such as participation in members' meetings and the minority right pursuant to § 37 BGB, cannot be waived.[258] There are various basic types of extraordinary membership; these include promotional member (*förderndes Mitglied*), youth member (*Jugendmitglied*), passive member (*passives Mitglied*), guest member (*Gastmitglied*) and honorary member (*Ehrenmitglied*).

102. As regards the athlete-sports federation relationship, athletes are generally classified as *indirect members*.[259] As the respective association which the athlete joins generally belongs to a regional federation governing a specific area (*Landesfachverband*), which, in turn, is a member of the respective federal sports federation governing a specific sport (*Sportfachverband* – umbrella organization), there may also exist rights and obligations with respect to the umbrella organization. In accordance with the *Gebot der mehrfachen Satzungsverankerung* (requirement that a principle be 'anchored' in the by-laws of all of respective federations and associations),[260] it is necessary that the higher-ranking sports federation stipulates which specific regulations will apply to the individual members in each case. Furthermore, the association to which the individual athlete belongs must set out provisions which make clear the manner in which the federation's regulations are to be applied.

256. PHBSportR-Summerer, part 2, mn. 105.
257. Reichert, *Vereins- und Verbandsrecht*, 12th edition 2010, mn. 751 et seq.
258. MüKo-Reuter, 5th edition 2006, § 38 mn. 9; Palandt-Ellenberger, 71st edition 2012, § 38 mn. 2.
259. For general information, cf. Heermann, NZG 1999, 325 et seq.; SportRPr-Adolphsen/Hoefer/Nolte, 2012, mn. 130 et seq.
260. For details, see BGHZ 28, 131 at 134; SportRPr-Adolphsen/Hoefer/Nolte, 2012, mn. 130 et seq.; Vieweg, *Normsetzung und -anwendung deutscher und internationaler Verbände*, Berlin 1990, 335 et seq.; Hohl, *Rechtliche Probleme der Nominierung von Leistungssportlern*, 1992, 64 et seq.

A complete enumeration of federation regulations in all subordinate by-laws is necessary (so-called *korporationsrechtliches Modell*).[261] The federal sports federations governing the individual sports must require of their affiliated regional federations by means of their by-laws that they abide by the regulations of the federal sports federations. In turn, the Land federations must oblige their (individual) members – the individual clubs – to abide by the regulations of the federal sports federations by setting this out in the by-laws. In doing so, it must be possible for the individual athlete to identify clearly the regulations to which he is obliged to submit in practice. Dynamic references (*dynamische Verweisungen*),[262] whose main characteristic is referral to the higher-ranking federation's by-laws, which can be updated periodically, are in breach of §§ 21, 33, 71 BGB. The association must expressly, and without leaving any gaps, allude to the specific higher-ranking regulation of the federation, naming the relevant provisions. The more serious the sanctions to be imposed in the event of a breach of the relevant regulation, the more precisely must its application be alluded to. Indirect membership is not membership in a legal sense,[263] but in some areas it corresponds to regular membership. The individual member of an association does not have the right to participate in the federation's general meeting, but is entitled to take part in sporting events hosted by the federation if it fulfils the admission requirements.[264] Conversely there may be an obligation to participate in the relevant events.[265]

103. Practical difficulties with the *Gebot der mehrfachen Satzungsankerung* are avoided if the higher-ranking regulations of the organization are enforced by means of *contractual agreements* between the federation and association, or federation and athlete, respectively.[266] Since the 'Reiter' judgment of the Federal Court of Justice,[267] conclusion of an agreement by behaviour implying an intent to do so is permitted: If the athlete registers for participation in a competition which takes place in accordance with the respective competition and disciplinary rules of the organizing federation, he implicitly declares that he accepts being bound by the code of conduct in place for the competition and the sanctions stipulated for breaching it by the federation responsible for the event. Another tactic which is, in practice, commonly employed in order to conclude an agreement by conduct which implies intent is the application by an athlete for a general permit to be selected or to play (nomination or participation permits), in accordance with which he agrees that, when playing, he will respect the regulations set out by the federation for the particular sport in which he engages and to be subjected to its sanctions if he breaches one of

261. BGHZ 28, 131 at 134; Vieweg, *Normsetzung und -anwendung deutscher und internationaler Verbände*, Berlin 1990, 335 et seq.
262. BGHZ 128, 93 at 100; Orth/Pommerening, Sp*u*Rt 2010, 222 et seq., 2011, 10 et seq.; Fenn, Sp*u*Rt 1997, 77 at 78; MüKo-Reuter, 6th edition 2011, Vor § 21 mn. 125.
263. Reichert, *Vereins- und Verbandsrecht*, 12th edition 2011, mn. 776.
264. PHBSportR-Summerer, part 2, mn. 106.
265. Vieweg, *Teilnahmerechte und -pflichten der Vereine und Verbände*, in: Deutsch (ed.), Teilnahme am Sport als Rechtsproblem, RuS 16, Heidelberg 1993, 23 et seq.
266. Heermann, NZG 1999, 325 at 327 et seq.
267. BGHZ 128, 93 at 96 et seq. = NJW 1995, 586; Vieweg, Sp*u*Rt 1995, 97 et seq.; Haas/Adolphsen, NJW 1995, 2146 et seq.

the regulations.[268] In practice, therefore, there are various ways in which a contractual agreement can be concluded:[269] the participation or nomination permit applied for when the athlete registers for a competition, the grant of a licence (e.g., athlete passport, rider's identification card, or playing permit), and the individual contractual agreement. However, the conclusion of an individual agreement is reserved for top sportspersons (e.g., Sebastian Vettel with the organizer of Formula 1). Upon conclusion of a participation or nomination contract, the athlete is bound by the regulations of the federation which are applicable at that particular point in time.[270] The agreement is considered a management service agreement (*Geschäftsbesorgungsvertrag*) within the meaning of § 675 BGB, containing strong reference to mandate law (*Auftragsrecht*) within the meaning of § 662 BGB.[271] The exact subject matter of the contract is to be ascertained by interpretation pursuant to §§ 133, 157 BGB. However, it refers only to the relationship between the athlete and the federation for the duration of the competition, and not to matters which take place outside of the event.[272] Therefore, athletes are not bound by doping regulations between competitions. Such gaps in the athletes' obligations can be avoided by the granting of a licence which must be applied for regularly.[273] Another precondition upon the application of federation law in this case is that the athlete should be able to inform himself of the subject matter of the federation regulations under reasonable circumstances. The DOSB has drafted a sample „athlete agreement' in order to present sporting federations with a model contract aimed at helping them codify the rights and responsibilities of individual athletes.[274] The athlete agreement[275] is primarily of relevance to athletes playing on representative teams and national squads and contains inter alia rules regarding the obligation upon athletes to participate in competitions and team events, dress code during national team commitments, exploitation of the athletes' image and audio rights and the jurisdiction of a court of arbitration.

268. BGHZ 128, 93 at 103 et seq. = NJW 1995, 586; Fenn, Sp*u*Rt 1997, 77 at 78 et seq.; Vieweg, Sp*u*Rt 1995, 97 at 99.
269. See also SportRPr-Kreißig, 2012, mn. 219 et seq.; Vieweg, *Faszination Sportrecht*, 2nd edition 2010, 14, retrievable at http://www.irut.de/Forschung/Veroeffentlichungen/OnlineVersion FaszinationSportrecht/FaszinationSportrecht.pdf.
270. Heermann, NZG 1999, 325 at 327.
271. Hohl, *Rechtliche Probleme der Nominierung von Leistungssportlern*, 1992, 204; Weiler, *Nominierung als Rechtsproblem – Bestandsaufnahme und Perspektiven*, in: Vieweg (ed.), Spektrum des Sportrechts, Berlin 2003, 105 et seq.
272. BGHZ 128, 93 at 100.
273. Vieweg, Sp*u*Rt 1995, 97 at 99.
274. Available on the web page of the DOSB (www.dosb.de); see in general SportRPr-Kreißig, 2012, mn. 223 et seq.
275. The athletes' contracts must be distinguished from the sports contracts of employment, see Part II.

II. Membership Rights and Duties in Concrete Terms

A. Membership Rights

104. The right to participate in the general meeting, the right to elect and be elected as well as the right to vote belong to the vital, so-called *Organschaftsrechte*.[276] They enable members to exercise their membership rights. So-called *Wertrechte* describe the benefits which arise as a result of participating in the realization of the association's object.[277] These include attendance at association events and receipt of the association magazine. The member's so-called *Schutzrechte*, protection rights, include the right not to be treated in an illegitimate or unethical manner.[278] Manifestations of this right include the right to be heard in disciplinary proceedings, the right to equal treatment with regard to provisions of the by-laws, disclosure requirements and mutual duties of care and loyalty.[279]

105. In the Skerry-Cruiser Judgment (the so-called *Schärenkreuzer-Urteil*) of 12 March 1990, the Federal Court of Justice[280] recognized membership as *another right* in terms of § 823(1) BGB. If membership rights are violated, the aggrieved party is entitled to claim damages on tortious grounds. This protection includes not only core membership, but also its various manifestations. Thus, undisturbed participation in competitions, as well as the right to enter supra-regional events, are protected if the athlete attains the necessary level of performance. In this regard, entitlement to participation (*Anwartschaft auf Teilnahme)* is often mentioned.[281] According to the Federal Court of Justice's Skerry-Cruiser Judgment, mandatory requirements for participation in a competition may be declared in two manners: either by announcing the event by means of an invitation to the competition, or by setting out specific internal selection guidelines. These guidelines must be sufficiently transparent and must clearly specify the selection criteria and the authorized decision-making body. This could be either an individual person (e.g., a trainer) or a larger selection committee. Selection establishes a contractual relationship between the athlete and the federation. This leads to a special contractual relationship which obliges the federation to treat its members and potential contracting partners equally. Consequently, the athlete is entitled to be selected pursuant to § 242 BGB in connection with Article 3(1) GG in connection with the Selection Guidelines (*Nominierungsrichtlinie*), unless the selection depends on the discretion granted to the selectors.

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276. Palandt-Ellenberger, 71st edition 2012, § 38 mn. 1a.
277. MüKo-Reuter, 5th edition 2006, § 38 mn. 31 et seq.
278. MüKo-Reuter, 5th edition 2006, § 38 mn. 31 et seq.
279. Cf. the decision by DLV-Rechtsausschuss, NJW 1992, 2588 et seq.; Vieweg, NJW 1992, 2539 et seq. on the application of this principles on doping.
280. BGHZ 110, 323 et seq.; Schmidt, JZ 1991, 157 et seq.
281. Deutsch, *Das 'sonstige Recht' des Sportlers aus der Vereinsmitgliedschaft*, in: Deutsch (ed.), Teilnahme am Sport als Rechtsproblem, RuS 16, Heidelberg 1993, 49 at 57 et seq.

B. The Duties of the Members

106. Payment of *membership fees* in order to provide financial support for the realization of the association's object is one of the essential duties of each member.[282] If a membership fee is mandatory, the obligation to pay it must be expressly set out in the by-laws. However, it is not necessary to set out a specific fee in the by-laws. Further duties arise for competitive athletes as individual members; failure to comply with these duties may be punished by means of association or federation penalties.[283]

The *duty of the member to demonstrate loyalty* towards his association requires him to support the association's object actively and to remain loyal to the association.[284] At competitions, for example, the athlete may not abandon the association without good reason. However, there arises no obligation to participate in competitions from the duty to remain loyal.[285] In order to ensure participation in a competition – particularly in event of great importance to the association – associations often try to induce the athletes to enter into corresponding contractual agreements. One example of such an agreement is provided by the aforementioned DOSB model 'athletes' agreement'.[286]

III. The Right of Admission

107. The issue as to whether a sports organization has a right of admission as a member to another sports organization becomes relevant in two distinct constellations: in the relationship between an athlete and an association, and in the relationship between a sports association and sports federation. The right of admission depends on the fulfilment of the prerequisites to admission set out in the by-laws, and is limited by the autonomy of associations and federations. This autonomy is guaranteed by Article 9(1) GG. It allows associations and federations to define their rules of admission themselves. The autonomy of federation granted by the GG and BGB is based on the premise that an abuse of the federation's power is made impossible by a self-regulatory mechanism: in particular, the voluntary character of membership.[287] As a consequence of the 'Ein-Platz-Prinzip', the system of sports associations is characterized by strong local and disciplinary monopolization. As a result, various conflict situations arise for those who depend on membership of the federation. If a monopoly organization, which, as a distributor of public funds, embodies the '*Ein-Platz-Prinzip*' in its statutes (for instance, the DOSB and its predecessor, the DSB), and if it has already admitted a sports association for a specific

282. Reichert, *Vereins- und Verbandsrecht*, 12th edition 2010, mn. 894 et seq.
283. For more detail, see Part I, Ch. 3, §6.
284. Waldner/Wörle-Himmel, in: Sauter/Schweyer/Waldner (eds.), Der eingetragene Verein, 19th edition 2010, mn. 348.
285. Vieweg, *Teilnahmerechte und -pflichten der Vereine und Verbände*, in: Deutsch (ed.), Teilnahme am Sport als Rechtsproblem, RuS 16, Heidelberg 1993, 23 at 39 et seq.
286. See Part I, Ch. 3, §5 I.
287. MüKo-Reuter, 5th edition 2006, Vor § 21 mn. 93; Leßmann, *Die öffentlichen Aufgaben und Funktionen privatrechtlicher Wirtschaftsverbände*, Köln et al. 1976, 262 et seq.

sporting field, conflict with competing associations in the same discipline is bound to arise. This is what happened in the case of the Rad- und Kraftfahrerbund Solidarität e.V. (RKB Solidarität), which resulted in the landmark ruling by the Federal Court of Justice[288] of the 2 December 1974.

DSB had refused to admit RKB Solidarität[289] as a member of the federation because of the 'Ein-Platz-Prinzip' which was embodied in its statutes, as cycling was already represented by the Bund Deutscher Radfahrer e.V. The Federal Court of Justice (*Bundesgerichtshof* – BGH) ruled that restrictions on admission to a federation with a monopoly are subject to judicial review. It based its review on a formula deduced from § 826 BGB and from elements of § 20(6) GWB (former § 27 GWB), according to which the refusal to admit an association must not unlawfully discriminate against the applicant vis-à-vis existing members. The key factor is a comprehensive consideration of the interests of both the monopoly federation and the applicant. The court found that RKB Solidarität had such a vital interest in profiting from the rights and benefits of membership that withholding those rights and advantages amounted to disadvantageous treatment. However, the court allowed that DSB had a countervailing legitimate interest in ensuring that decisions concerning entitlement to incentives and support be made within the individual disciplines (in accordance with the 'Ein-Platz-Prinzip') so that DSB could limit itself to ensuring interdisciplinary coordination. Therefore, the clause in the statutes prescribing the 'Ein-Platz-Prinzip' was – in principle – justified. The Federal Court of Justice, however, remanded the case to the trial court in order to enable it and both parties to the litigation to discuss the matter of how the 'Ein-Platz-Prinzip' and the principle of equal treatment of (similar) associations could be enhanced.[290] RKB Solidarität became an extraordinary member of DSB in 1977, being granted a special area of responsibility (*besondere Aufgabenstellung*).[291]

108. The Federal Court of Justice has confirmed its ruling on several occasions since.[292] Judges[293] and academics[294] have adopted the decision as far as its practical result is concerned. In the grounds for their decision, they partly draw on the formula provided by the Federal Court of Justice (derived from § 826 BGB and

288. BGHZ 63, 282 et seq. = NJW 1975, 771 et seq.
289. RKB Solidarität, rooted in the workers' sport movement, was the world's biggest cycling federation before 1933. It was re-established after World War II and attempted to obtain membership of the DSB.
290. BGHZ 63, 282 at 286, 291 et seq. = NJW 1975, 771 at 774 et seq.
291. Pursuant to § 5 no. 1 of the DSB statutes (now § 6(1), (2) of the DOSB statutes in conjunction with § 4 no. 3 DOSB-Aufnahmeordnung).
292. Cf. BGH, NJW-RR 1986, 583 et seq.; NJW 1999, 1326 et seq.
293. OLG Düsseldorf, NJW-RR 1987, 503 et seq.; OLG Stuttgart, NZG 2001, 997 at 998; OLG Frankfurt a.M., CaS 2009, 152 et seq. with critical analysis by Heermann; OLG München, Sp*u*Rt 2009, 251 et seq.
294. Nolte/Polzin, NZG 2001, 980; Friedrich, DStR 1994, 61 at 65; see also Vieweg, *Verbandsrechtliche Diskriminierungsverbote und Differenzierungsgebote*, in: Württembergischer Fußballverband e. V. (ed.), Minderheitenrechte im Sport, Baden-Baden 2005, 71 at 73 et seq.; id., *Vormitgliedschaftliche Rechtsverhältnisse eingetragener Verein*, in: Martinek et el. (eds.), FS-Reuter 2010, 395 et seq. (in particular, 404 et seq.).

§ 20(6) GWB (previously § 27 GWB))[295] on §§ 20(1), 33 GWB (previously §§ 26(2), 35 GWB),[296] and partly on the horizontal effect of fundamental rights.[297] In conclusion, the right of admission is defined as a customary law aspect of the principle of equal treatment[298] or as a type of self-commitment by associations by means of their by-laws.[299]

IV. Licensing Procedure

109. The membership of a sports federation by a sports association is also affected by the licensing procedure which is a requirement for sports associations of the relevant leagues,[300] and which is aimed at determining economic performance. From the perspective of the federations, the development of associations of the federal leagues (*Bundesligavereine*) into small- and medium-sized companies with significant sales figures requires regular monitoring of the professional organization and administration, as well as of economic performance in order to ensure liquidity, avoid insolvency, and to guarantee the continuation of games for the season.

In the area of football, the licensing procedure is conducted by the DFL on behalf of the Liga-Fußballverbands e.V. on the basis of §§ 7, 8 of the by-laws of the Ligaverband (*Satzung*-Ligaverband) in connection with the Licensing Regulation (*Lizenzierungsordnung*).[301] By means of licence, the associations of the federal league are granted full membership of the Ligaverband and, therefore, permission to participate in games. The procedure is initiated by means of written application. The licence is granted if the association fulfils the sporting, legal, personal and administrative, infrastructural, safety-related, media, technological and financial criteria stipulated by the Licensing Regulation (*Lizenzierungsordnung* – LO), see § 2 no. 1 LO. The association must inter alia agree to accept the regulations and decisions of the DFL and the DFB Ligaverband pursuant to § 4 no. 3 LO, and to sign the licensing contract (§ 4 no. 6 LO) which also includes the duty of the association to accept the regulations and decisions of the DFL and the DFB Ligaverband in § 2. With regard to the limits of the antitrust provision in section 20(2) GWB and the negative autonomy of association arising out of Article 9(1) GG, this duty of subjugation is

295. Cf. BGH, NJW 1999, 1326 et seq.; OLG Frankfurt, WRP 1983, 35 at 37; OLG Stuttgart, NZG 2001, 997 at 998; OLG Düsseldorf, Sp*u*Rt 2007, 26 et seq.; OLG München, Sp*u*Rt 2009, 251 at 251; MüKo-Reuter, 5th edition 2006, Vor § 21, mn. 114.
296. LG Frankfurt, cited in OLG Frankfurt, WRP 1983, 35 at 37.
297. Nicklisch, JZ 1976, 105 at 107 et seq.; Reichert, *Vereins- und Verbandsrecht*, Köln 12th edition 2010, mn. 1070; the decision of the German Federal Court of Justice, BGH, NZG 1999, 217 et seq. also tends towards this direction.
298. O. Werner, *Die Aufnahmepflicht privatrechtlicher Vereine und Verbände* (unpublished Habilitationsschrift), Göttingen 1982, 606 et seq.; Baecker, *Grenzen der Vereinsautonomie im deutschen Sportverbandswesen*, Berlin 1985, 74 et seq.
299. Grunewald, AcP 182 (1982), 181 at 184.
300. For a detailed account, see Vieweg/Neumann, *Zur Einführung: Probleme und Tendenzen des Lizenzierungsverfahrens*, in: Vieweg (ed.), Lizenzerteilung und -versagung im Sport, Stuttgart et al. 2005, 9 et seq.; Scherrer, *Probleme der Lizenzierung von Klubs im Ligasport*, in: Arter/Baddeley (eds.), Sport und Recht, Bern 2006, 119 et seq.
301. Accessible at http://static.bundesliga.de/media/native/dfl/ligastatut/lizenzierungsordnung_lo_2010-12-08_stand.pdf (accessed Dec. 10, 2012).

admissible under the precondition that the Ligaverband and the DFL do not discriminate against any association.[302] The procedure itself is generally conducted by the management of the DFL which is responsible for reaching decisions as to the granting or refusal of licences, § 11 no. 1, no. 2 LO. It is possible to file an appeal with the licensing committee against a refusal, § 11 no. 2 LO. As a precursor to this step, recourse may be had to the Permanent Court of Arbitration for Associations and Corporations of the Licence Leagues (*Ständiges Schiedsgericht für Vereine und Kapitalgesellschaften der Lizenzligen*) instead of a court of ordinary jurisdiction (§ 13 statutes *Ligaverband*).

V. Nomination

110. There is enormous practical and legal relevance attached to the nomination of athletes, particularly before large international competitions, such as the Olympic Games.[303] The matter of whether athletes can present themselves on an international stage (with corresponding media attention) can be of great commercial significance for them, as this can lead to offers of sponsorship and advertising contracts.

The extent to which an athlete can influence or force a federation to select him for a particular team or for a particular competition is debatable.[304] Each athlete must be treated equally by the sports federation and is, therefore, entitled to be considered in every instance in which a team is selected, or in which athletes are selected to participate in a competition, as long as no prohibition on his being selected has been imposed.[305] As a decision regarding nomination by the federation has legal validity, the criteria for nomination must be stipulated with sufficient certainty. In addition, the selection process must be transparent and well-documented (in particular, candidates must be notified of nomination criteria in good time, and the decision reached by the federation must be adequately justified), there must be a review of the subject matter of the nomination criteria (usually employing the fundamental rights of the athletes as a yardstick), the federation's decision must be found to rely on true facts and, insofar as the federation is awarded freedom of decision, the selectors' discretion must be employed properly.[306] Due to the particularly urgent nature of matters involving nomination, protection of the athletes' rights takes place primarily by means of injunctive relief under §§ 935 et seq. Civil Code of Procedure (*Zivilprozessordnung* – ZPO), as, once the competition has occurred,

302. PHBSportR-Summerer, part 2, mn. 78.
303. For a thorough discussion of the nomination of athletes, see Hohl, *Rechtliche Probleme der Nominierung von Leistungssportlern*, 1992.
304. See SportRPr-Niese, 2012, mn. 243 et seq.
305. Lambertz, Sp*u*Rt 2011, 17.
306. See Weiler, *Nominierung als Rechtsproblem*, in: Vieweg (ed.), Spektrum des Sportrechts, Berlin 2003, p. 105 et seq.

it is more or less futile for the athlete to continue to pursue nomination. If the failure to select a particular athlete was, indeed, unlawful, the athlete can also – under certain circumstances – claim damages from the federation.[307]

§6. Sanctions Imposed by Associations and Federations

111. The autonomy of associations and federations grants not only the authority to create regulations autonomously, but also the authority to ensure their acceptance by means of sanction, if necessary. In particular, consistent regulations and their acceptance are important in relation to sporting competitions. The imposition of sanctions for alleged breaches of the rules raises the 'classic' problem of association and federation sanctions. In Germany, it has been the subject of intense discussion in connection with cases of doping.[308] In particular, it concerns the legal nature and basis of sanctions, as well as the manner of making the sanction binding, the extent to which the regulatory authority is permitted to act, and the procedure of imposing sanctions.

Sanctions imposed by associations and federations must be defined sufficiently precisely.[309] In principle, the members' meeting is responsible for the enforcement of regulatory power.[310] The power to issue orders is often assigned to other bodies or persons; in particular, to the referee if the case concerns the breach of a regulation during a competition, or to the 'sports courts' run by the body concerned. Furthermore, the association or federation is entitled to take action which stems from its right as an owner or occupier of premises to undisturbed possession (*allgemeines Hausrecht* – §§ 903, 1004 BGB).

Sanctions imposed by associations or federations are understood to be an *exercise of disciplinary authority under private law*,[311] to which the indispensable principles of the rule of law are applicable.

112. As regards its *legal basis*, subjugation to the authority of associations or federations has various dogmatic explanations: some which relate to the terms of the by-laws of the relevant body and some which relate to contract. One view which continues to prevail[312] assumes that decisions made unilaterally – especially sanctions imposed by federations – have their roots in the autonomy of the federation

307. For example, the former triple-jump world champion, Charles Friedek, sued the DOSB for damages amounting to EUR 120,000 (the amount he claimed he would have earned from sponsorship deals, had he participated in the Olympic Games). The DOSB had failed to select him for the 2008 Olympic Games. Although Friedek had fulfilled the Olympic requirements twice, as required by the Nomination Guidelines, he had done this in one single competition, and not in two. See FAZ July 31, 2008, 28. Cf. OLG Frankfurt NJW 2008, 2925 and LG Frankfurt CaS 2012, 67.
308. Vieweg, NJW 1992, 2539; Adolphsen, *Internationale Dopingstrafen*, Tübingen 2003; Nolte, *Staatliche Verantwortung im Bereich Sport*, Tübingen 2004.
309. Reichert, *Vereins- und Verbandsrecht*, 12th edition 2010, mn. 2887 et seq.; Palandt-Ellenberger, 71st edition 2012, § 25 mn. 13.
310. Reichert, *Vereins- und Verbandsrecht*, 12th edition 2010, mn. 2881.
311. See PHBSportR-Summerer, part 2, mn. 173 et seq.
312. BGHZ 21, 370 at 373; 128, 93 at 99; Palandt-Ellenberger, 71st edition 2012, § 25 mn. 7 et seq.; Pfister, *Autonomie des Sports, sporttypisches Verhalten und staatliches Recht*, in: id. (ed.),

(approach in accordance with by-laws). According to this theory, sanctions imposed by associations and federations would not only provide functional instruments to solve conflicts within the federation, but would also be a logical continuation to the self-regulation of associations and federations offered by the autonomy of federation within the social field encompassed by the object of the by-laws. Another view has it that[313] decisions reached unilaterally by associations or federations have their roots in a purely contractual construction (contractual approach). When joining the association, the member consents by means of contract to the association's regulations. The sanctions imposed upon the commission of certain conduct provided for therein are seen as contractual penalties pursuant to §§ 339 et. seq. BGB. In doubt, the specific sanction to be imposed in the individual case must be determined in accordance with the court's reasonable discretion pursuant to § 315 BGB.

113. The contractual construction is especially important in relation to the *scope of disciplinary authority*. It becomes particularly relevant if a federation imposes a penalty upon an athlete who is not a member of the sports federation, but rather of a sports association, and is therefore integrated only indirectly into the organizational pyramid.[314] An athlete who is a member of an association or – indirectly – of a federation may, upon corresponding construction of the articles, be made subject to its regulations and, thus, its power to issue orders.[315] If not, it is debatable whether or not the association or federation is entitled to take action against the athlete as a third party.[316] Here, it is problematic that the classic sanctions which can potentially be imposed by an association serve to restore its purpose internally, whereas sanctions imposed upon third parties have an external effect. A sanction upon non-members is, in principle, inadmissible,[317] but contractual subjugation of the association or federation to the disciplinary authority is possible.[318]

In a temporal sense, it is debatable whether or not the addressee must be subject to the disciplinary authority of the association or federation at the point in time at which the sanction is imposed, or whether it is sufficient that he is subject to the disciplinary authority at the time of the breach of the rules. The prevailing opinion[319] holds that the concerned person must be a member of the association or federation that exercises the disciplinary authority at the moment at which the sanction is imposed. If this is the case, the member can evade sanction by withdrawal from

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Festschrift für Werner Lorenz, Tübingen 1991, 171 at 180 et seq.; for an alternate view, see Vieweg, *Normsetzung und -anwendung deutscher und internationaler Verbände*, Berlin 1990, 147 et seq.

313. Soergel-Hadding, BGB, 13th edition 2000, § 25 mn. 37 et seq.; van Look, *Vereinsstrafen als Verbandsstrafen*, Berlin 1990, 107 et seq.
314. Cf. above, Part I, Ch. 3, §5 I.
315. Palandt-Ellenberger, 71st edition 2012, § 25 mn. 16; cf. also Part I, Ch. 3, §5 I.
316. MüKo-Reuter, 5th edition 2006, § 25 mn. 29.
317. Cf. BGHZ 28, 131 at 133; 29, 352 at 359. On the extension of federation powers, especially in this area, cf. Lukes, *Erstreckung der Vereinsgewalt auf Nichtmitglieder durch Rechtsgeschäft*, in: Hefermehl/Gmüh/Brox (eds.), Festschrift für Harry Westermann, Karlsruhe 1974, 325 at 334 et seq.
318. BGHZ 128, 93; Haas, in: Haas/Haug/Reschke (eds.), Handbuch des Sportrechts, B, Chapter 2, mn. 94a; Haas/Adolphsen, NJW 1996, 2351 at 2355.
319. BGHZ 28, 131 at 133; DStR 2003, 1087 at 1088; RGZ 122, 266 at 268 et seq.; Stöber, *Handbuch des Vereinsrechts*, 9th edition 2004, mn. 696, n. 5.

the association or federation. It remains to be seen whether these principles also apply where subjugation to the regulatory authority did not occur as a result of membership, but rather by means of contract. In the 'Reiter' judgment, delivered by Federal Court of Justice,[320] the court largely concluded that the imposition of penalties is also possible after contractual subjugation has ended.[321]

114. The main features of the *disciplinary procedure* by means of which the sanction is imposed, must, as a basic decision of the association or federation, be codified in the regulations of the association or federation concerned. The matter of which organ is responsible for the imposition of penalty must be defined. Here, the question arises as to whether the exercise of disciplinary power can be transferred to third parties. The transfer of exercise of power is, for the most part, seen as being generally precluded, as only the members are entitled to reach decisions regarding significant matters concerning the association.[322] The prevailing opinion proceeds on the basis of the transfer. The 'Reiter' judgment of the Federal Court of Justice is also to be interpreted on this basis. In its judgment, the court reveals that the authority of federations to organize a sports jurisdiction also includes the authority to transfer it to third-party institutions.[323] The procedure must satisfy fundamental constitutional requirements; in particular, the principle of the right to a fair hearing.[324]

115. The person affected by the sanction imposed by the association or the federation penalty is *materially entitled to the review of their decisions*, at least if the sanction imposed crosses a certain threshold of substantiality.[325] This entitlement is an inalienable part of the constitutionally-protected guarantee of justice.[326] Therefore, an external examination carried out by a body independent of the remitting committee cannot be refused.[327] In the event that an association or federation imposes an unlawful penalty, the athlete may be entitled to demand that the body refrain from imposing the penalty pursuant to §§ 823(1), 1004 BGB, and to damages arising from breach of the membership contract between association and athlete pursuant to § 280(1) BGB or pursuant to § 823(1) BGB, as well as damages and forbearance pursuant to the GWB (§§ 19 et seq. in conjunction with § 33 GWB).

Claims can be asserted before courts of ordinary jurisdiction. According to the federation's by-laws, however, the aggrieved party can be obliged to pursue the

320. BGHZ 128, 93 = NJW 1995, 583 = Sp*u*Rt, 1995, 43 et seq.
321. Haas, in: Haas/Haug/Reschke (eds.), Handbuch des Sportrechts, B, Ch. 2, mn. 96.
322. MüKo-Reuter, 5th edition 2006, § 25 mn. 47.
323. BGHZ 128, 93 = NJW 1995, 583 at 586; Hadding/van Look, ZGR 1996, 326 at 331; thus, in § 23 of its Anti-Doping-Code, the Deutsche Leichtathletik-Verband has transferred the power of discipline in doping cases to the DIS-Sportschiedsgericht.
324. Palandt-Ellenberger, 71st edition 2012, § 25 mn. 18.
325. Cf. in general Haas, in: Haas/Haug/Reschke (eds.), Handbuch des Sportrechts, B, Ch. 2, mn. 110 et seq.
326. BGHZ 29, 352 at 354; 36, 105 at 109; 47, 351 et seq.; 87, 337 et seq.; 102, 365 et seq.; Röthel/Vieweg, ZHR 2002, 6 at 12.
327. Röthel/Vieweg, ZHR 2002, 6 at 12; Haas/Prokop, JR 1998, 45.

matter before the courts of the sports federation first. This is referred to as a preliminary procedure, internal to the organization (*verbandsinternes Vorschaltverfahren*). The athlete concerned must be unsuccessful before the courts of the sports federation in order to gain access to the state courts (see §7).[328]

§7. Legal Protection against Decisions Reached Internally by Associations and Federations

116. Penalties imposed and other decisions reached by federations can – as demonstrated – affect the exercise of their profession by athletes and associations in many respects. If, for example, an athlete is banned from playing his sport for two years due to a violation of an anti-doping regulation, he will be deprived of his source of income for this period of time. The very existence of sports associations can also be threatened by decisions reached by federations, such as the refusal of licence due to a failure by the association to fulfil certain economic preconditions.[329] As to judicial review of the decisions of federations and associations, it is vital to distinguish between three possible types of redress proceedings:[330] those provided under the jurisdiction of federations (*Verbandsgerichtsbarkeit*), those provided under state jurisdiction (*staatliche Gerichtsbarkeit*) and those provided by means of arbitration (*Schiedsgerichtsbarkeit*).

117. The autonomy of sports federations and associations allows for the referral of internal disputes to *federation courts* (which are, in some cases, multi-tier in form) for settlement (e.g., the DFB-sports tribunal[331]). Here, the aim is prompt, adequate and professional decision-making employing the by-laws of the association or federation in question, or by individual agreement.[332] Thus, the decision-making competence of state courts is curtailed. In this manner, the sports jurisdiction has secured 'the right of first access' with regard to the enforcement and interpretation of federation regulations.[333] The jurisdiction of the approximately 1,000 federations in Germany is of crucial importance. About 450,000 to 800,000 disputes are brought before the approximately 800 sports tribunals annually. Of

328. BGHZ 29, 354 et seq.; OLG Düsseldorf, NJW-RR 1988, 1271 at 1272.
329. Vieweg/Neumann, *Zur Einführung: Probleme und Tenzenden des Lizenzierungsverfahrens*, in: Vieweg (ed.), Lizenzerteilung und -versagung im Sport, Stuttgart et al. 2005, 9 et seq.; Scherrer, *Probleme der Lizenzierung von Klubs im Ligasport*, in: Arter/Baddeley (eds.), Sport und Recht, Bern 2006, 199 et seq.
330. See also Part II, Ch. 2, §5 regarding the dispute settlement concerning in particular labour law disputes.
331. § 2 DFB-Rechts- und Verfahrensordnung. A good overview on the procedure before the DFB-Sportgericht is provided by the diagram by Hilpert, *Sportrecht und Sportrechtsprechung im In- und Ausland*, Berlin 2007, 84.
332. BGHZ 87, 337 at 345; Röhricht, *Chancen und Grenzen von Sportgerichtsverfahren nach deutschem Recht*, in: Röhricht (ed.), Sportgerichtsbarkeit, Stuttgart et al. 1997, 19 at 21.
333. Cf. Steiner, *Autonomie des Sports*, in: Tettinger/Vieweg (eds.), Gegenwartsfragen des Sportrechts, Berlin 2004, 222 at 227.

these, 340,000 are accounted for by football alone.[334] These figures emphasize the necessity for sports tribunals. Sports tribunals relieve state courts to a significant degree.[335] In addition, the federation has the opportunity to correct incorrect decisions within the context of self-regulation. The sports tribunal is an internal instrument which has precedence over other forms of dispute resolution. Recourse is to be had to the sports tribunal of the relevant federation before it is to be had to state courts, if this is stipulated in the federation's rules and regulations. Decisions are capable of review only insofar as they do not deal with factual decisions. As to decisions which are very common within sport (decisions which display '*Sport-Typizität'*), these are usually unchallengeable. The standard of review is the law as imposed upon itself by the federation in its by-laws. In general, the federation declares that it wishes to review a particular decision. Thus, the federation court has jurisdiction to declare the federation's final decision. Within the federation, a special organ is usually responsible for reaching decisions within the scope of the federation jurisdiction.

118. However, the freedom to regulate sport-specific affairs independently cannot be granted without restriction. Decisions made within the realm of sports law are no different from any other basic decisions reached within state law (and constitutional law in particular). Thus, a certain degree of external review by the state is necessary. Therefore, *the appeal to state courts* after exhaustion of all measures of internal review by the federation cannot be precluded by rules of the association or federation. This leads to the 'classic' issue as to whether and to what extent the decisions of federation courts are subject to judicial review upon exhaustion of internal review proceedings.[336]

119. One must differentiate between internal sports tribunals which are often referred to as arbitration courts and 'real' *arbitration courts* within the meaning of §§ 1025 et seq. ZPO which can replace state courts.[337] It is becoming more and more common for sports federations to attempt to completely exclude the possibility of judicial review by state courts (i.e., by 'real' arbitration courts within the meaning of §§ 1025 et seq. ZPO).[338] The federations' by-laws generally stipulate that the jurisdiction of state courts shall be replaced by that of independent sports arbitration courts – such as the *Deutsche Sportschiedsgericht* (German Sports Court

334. Steiner, *Autonomie des Sports*, in: Tettinger/Vieweg (eds.), Gegenwartsfragen des Sportrechts, Berlin 2004, 222 at 227; Hilpert, BayVBl 1988, 161.
335. Eilers, in: 100 Jahre DFB, 2nd edition 1999, 533; Steiner, *Autonomie des Sports*, in: Tettinger/Vieweg (eds.), Gegenwartsfragen des Sportrechts, Berlin 2004, 222 at 230.
336. Cf. Part I, Ch. 3, §7 for the possibilities of judicial review of association and federal penalties.
337. Cf. Part I, Ch. 2, §5; SportRPr-Adolphsen, 2012, mn. 1046 et seq.
338. E.g., by § 32(1) DOSB-Satzung; for details, cf. Monheim, *Sportlerrechte und Sportgerichte im Lichte des Rechtsstaatsprinzips – auf dem Weg zu einem Bundessportgericht*, Munich 2006, 134 et seq.; for general information as to the requirements of sports arbitration courts, see also PHBSportR-Summerer, part 2, mn. 280 et seq., as well as Führungs-Akademie des Deutschen Sportbundes e.V. (ed.), Schiedsgerichte bei Dopingstreitigkeiten, Frankfurt/M. 2003, passim.

of Arbitration) which was established on 1 January 2008[339] by the *Deutsche Institution für Schiedsgerichtsbarkeit e.V.* (German Institute for Arbitration e.V. – DIS). As their arbitral awards can only be repealed by state courts in the event of severe failings (cf. the list enumerated in § 1059 ZPO), an arbitration agreement leads to a de facto exclusion of state courts.[340] This will be found to be in compliance with the fundamental right of effective legal protection, as provided for by Article 19(4) GG, only if the arbitration court ensures a measure of legal protection which is basically comparable to that which is provided by the state courts. This requires that the decision-makers are independent, impartial and distinct from the association's component bodies.[341]

The *Deutsche Sportschiedsgericht* is a 'real' court of arbitration which aims to settle disputes connected to sports efficiently and independently without employing judicial review.[342] The DIS sports arbitration rules correspond to the current DIS arbitration rules which are employed in commercial disputes, but they are especially tailored to suit the particular requirements of sports, and can be referred to in any dispute in the field of sports. The decision-making body can be either a panel of three arbitrators or single arbitrator. The arbitrators' impartiality and independence is ensured by the imposition upon them of an obligation to disclose all relevant facts which might give rise to doubts as to their impartiality prior to arbitration.[343] Where such doubts arise, and where one of the parties objects, the DIS appointment committee must deliberate as to whether the arbitrator should be appointed.[344] Nowadays, the CAS *(Court of Arbitration for Sport)* is recognized as a 'real' arbitration court, even though it was originally established by the IOC. However, the CAS has since separated itself so that, today, the independence of its arbitrators can no longer be called into doubt.[345] In contrast, the DFB-sports tribunal, for example, is not a 'real' court of arbitration, but an organ of the federation.[346]

339. For extensive discussion of the Deutsche Sportschiedsgericht, see Mertens, Sp*u*Rt 2008, 140 et seq. and 180 et seq.; Bredow/Klich, CaS 2008, 45 et seq.; Fritzweiler, Sp*u*Rt 2008, 175 et seq.; Martens, SchiedsVZ 2009, 99 et seq.
340. However, this requires that the arbitration agreement is framed in sufficiently clear terms, cf. LG Dortmund GRUR-RR 2009, 117 at 118.
341. For example, cf. § 32(3), (4) DOSB-Satzung. On the issue of the independence of the Court of Arbitration for Sport (CAS) see Oschütz, *Sportschiedsgerichtsbarkeit*, Berlin 2005, 98 et seq. with reference to the Swiss Federal Court.
342. Bredow/Klich, CaS 2008, 45 at 50; SportRPr-Adolphsen, 2012, mn. 1116 et seq.
343. Cf. § 16 DIS-SportSchO.
344. For extensive discussion of this, see Bredow/Klich, CaS 2008, 45 at 47 et seq.
345. For a detailed discussion of this, see Oschütz, *Sportschiedsgerichtsbarkeit*, Berlin 2005, 130; PHBSportR-Pfister, part 6, mn. 165.
346. See the Rechts- und Verfahrensordnung of the DFB at http://www.dfb.de/uploads/media/07_Rechts-Verfahrensordnung_01.pdf (accessed Dec. 10, 2012).

§8. Liability Issues

I. The Basics of Liability

120. Sports tend to place people in physical proximity with each other, whether voluntarily or involuntarily. Professional sports, in particular, are characterized by a network of relationships between athletes, associations, federations, organizers, owners of venues, and spectators. Given the many points of contact, conflicts are bound to arise. It is hardly surprising, therefore, that the courts are swamped with cases which give rise to liability issues in a sporting context. The basic elements of liability can be found in various types of legal relationship with varying degrees of contractual liability (§§ 280 et seq. BGB), tortious liability (§§ 823 et seq. BGB) and strict liability (in particular, see § 833 BGB which is of particular relevance to sports involving animals).

121. Initially, these cases tended to feature ski accidents.[347] They usually raised issues of liability in tort. Liability pursuant to § 823(1) BGB requires the tortfeasor to have breached a duty of care. Since the standard of care expected of skiers has never been codified, the task of formulating an appropriate standard is left to the courts. The *FIS rules*[348] for skiers, first drawn up in 1967,[349] are helpful in this regard (not only for judges with no personal experience of skiing). As rules set by a private body, they are not legally binding. However, they are generally regarded as defining the applicable standard of care. The dogmatic justification advanced in support of this power to define the standard of care differs. Some point to the fact that the FIS rules are accepted by the general public as being the expected standard of care,[350] others go so far as to treat them as customary law.[351] As with the FIS rules, the rules of other sports federations concretize the applicable standard of care and, thus, modify the general principles of tort liability.[352] Liability issues surrounding sporting events have proven to be another field for litigation. Event organizers face comprehensive duties of care. Associations and federations may become liable to each other, and to their members, in contract or in tort. Finally, spectators, and

347. See e.g., OLG Karlsruhe, NJW 1959, 1589 et seq.; OLG Stuttgart, NJW 1964, 1859 et seq.; BGH, NJW 1972, 627 et seq.; more recently, OLG Hamm, NJW-RR 2001, 1537 et seq.; OLG München, NJW-RR 2002, 1542 et seq.; LG Ravensburg, Sp*u*Rt 2008, 39 et seq.; for a general account of Austrian and German jurisprudence involving skiing accidents, see Pichler/Fritzweiler, Sp*u*Rt 1999, 7 et seq.

348. Available at http://www.fis-ski.com/de/fisintern/allgemeineregelnfis/10fisregeln.html (accessed Dec. 10, 2012).

349. The FIS rules were amended in 1990 and 2002. For the 2002 update, see Pichler, Sp*u*Rt 2003, 1 et seq.

350. BGHZ 58, 40 at 43 et seq.; BGH, NJW 1987, 1947 at 1949; OLG München, Sp*u*Rt 1994, 35 at 36; Heermann/Götze, NJW 2003, 3253 at 3253 et seq.; MüKo-Wagner, BGB, 5th edition 2009, § 823 mn. 555.

351. OLG München, Sp*u*Rt 1994, 35 et seq.; OLG Hamm, Sp*u*Rt 2002, 18 at 19; OLG Brandenburg, MDR 2006, 1113 et seq.; Scheuer, DAR 1990, 121; Dambeck/Lehr, *Piste und Recht*, in: Schriftenreihe des Deutschen Skiverbandes (ed.), Kempten 1989, 47.

352. For a general discussion, see Scheffen, NJW 1990, 2658 et seq.; Pfister, *Autonomie des Sports, sporttypisches Verhalten und staatliches Recht*, in: id. (ed.), Festschrift für Werner Lorenz, Tübingen 1991, 186 et seq.

even third parties, may feature in liability scenarios. Arriving at a workable solution to these situations of conflict calls for sensitivity to the sporting context, since an application of general rules would frequently lead to unsatisfactory results.

II. Typical Cases

122. Traditionally, jurisprudence and legal scholars have classified the multitude of cases of liability in a systematic manner.[353]

A. Liability of Associations and Association Boards

123. *The liability of associations* is determined in accordance with general rules of liability: where the association has entered into a contract – with athletes, spectators, or sponsors – it may be liable pursuant to §§ 280 et seq. BGB for culpably (§ 276(1) BGB) breaching its contractual duties.[354] In this context, the association must answer for the culpable behaviour of its board members (§ 31 BGB)[355] and for the culpable behaviour of any other person it employs in the discharge of its contractual duties (§ 278 BGB). In practice, liability in tort tends to be more of a problem. The association owes a duty of care to all those who come into contact with it through its sporting activities. The duty varies depending on the type of sport in question and the size and the degree of professionalism of the event concerned. The volenti principle applies to all typical injuries.[356] These injuries fall outside of the association's sphere of responsibility (even if there is no contractual exclusion clause[357]). The dogmatic justification for this exclusion of liability differs. Some[358] point to the principle enshrined in § 254 BGB (volenti non fit injuria). Others modify the definition of negligence pursuant to § 276(1) BGB.[359] According to these scholars, certain types of behaviour should not be considered negligent based on a 'sports-specific interpretation' of the term negligence.[360] Other authors[361] do not consider this behaviour to be unlawful at all. The courts,[362] on the other hand, usually resort to the catch-all provision of § 242 BGB and accuse the tort victim of

353. E.g., cf. Scheffen, NJW 1990, 2658 et seq.; Vieweg, *Haftungsrecht*, in: Nolte/Horst (eds.), Handbuch Sportrecht, Schorndorf 2009, 123 at 128 et seq.; SportRPr-Adolphsen, 2012, mn. 704 et seq.
354. See Heermann, *Haftung im Sport*, Stuttgart 2008, 66.
355. This is controversial: some maintain that where contractual claims are concerned, the attribution of a duty of care is only permissible pursuant to § 278 BGB, see § 278 BGB and Staudinger-Weick, BGB, Berlin 2005, § 31 mn. 3; Flume, *Die Personengesellschaft*, Heidelberg 1977, 321 et seq.; MüKo-Reuter, 5th edition 2006, § 31 mn. 32.
356. BGH, NJW 1975, 109 et seq.; BGH, VersR 1984, 164 at 165.
357. On the possibilities of and limits upon contractual exclusions of liability, see Heermann, *Haftung im Sport*, Stuttgart 2008, 78 et seq.
358. OLG Köln, NJW 1962, 1110 et seq.; Friedrich, NJW 1966, 755 at 760 et seq.
359. Deutsch, VersR 1974, 1045 at 1048 et seq.; Fritzweiler, *Die Haftung des Sportlers bei Sportunfällen*, Munich 1978, 140 et seq.
360. See Lange, *Schadensersatz*, 3rd edition 2003, § 10 XV 4, 645 et seq.
361. Heermann, *Haftung im Sport*, Stuttgart 2008, 57 et seq.
362. See, e.g., BGHZ 63, 140 at 144 et seq.; see also Füllgraf, VersR 1983, 705 at 710.

inconsistent behaviour (venire contra factum proprium) if he voluntarily exposes himself to a risk of danger, and yet tries to recover damages once the risk has materialized. Atypical and concealed risks are an entirely different matter. Associations are required to take reasonable precautions against these.[363] An orientation regarding duties of care can be found in the relevant rules and regulations of sports associations (e.g., the International Ski Competition Rules – IWO[364]) or, more generally, in the relevant rules for accident prevention of the so-called *Verwaltungsberufsgenossenschaft* (German Accident Prevention and Insurance Association – VBG, Section Administration).

124. Where third parties are injured, a *board member may be found personally liable* along with the association.[365] Board members may also become liable to the association itself.[366] In this context the new provision contained in § 31a BGB must be observed, in accordance with which any honorary members of the board in an internal relationship to the association are responsible only where intention and/or gross negligence are present.[367] Conversely, there may be situations, where the association is found to be liable to its board members.[368]

B. Liability of Organizers

125. The above applies, mutatis mutandis, to the organizers of a sporting competition.[369] It is often difficult to resolve the preliminary issue of the identity of the organizer.[370] The organizer may, but need not, be the home association. 'Organizer' is defined by the courts[371] as someone who is responsible for preparing and conducting a game and who bears the financial risk. In its 'Europapokalheimspiele' ruling, the Federal Court of Justice[372] treated UEFA, rather than the DFB as (co-) organizer. This would lead to the classification of the DFL as co-organizer of the German soccer championships. Apart from owing contractual duties, organizers may owe a duty of care under tort. Thus, organizers must ensure that spectators are

363. Associations organizing competitions must take precautions in order to prevent hooliganism, see AG Koblenz, Sp*u*Rt 2006, 81. Trespassing must be prevented, see DFB-Sportgericht, Sp*u*Rt 2006, 87.
364. See Pichler, Sp*u*Rt 1994, 53 at 54 et seq.
365. For possible constellations, see Heermann, *Haftung im Sport*, Stuttgart 2008, 82 et seq.
366. LG Kaiserslautern, Sp*u*Rt 2006, 79 et seq.; Heermann, *Haftung im Sport*, Stuttgart 2008, 93 et seq.
367. Cf. to this Orth, Sp*u*Rt 2010, 2 et seq.
368. See Heermann, *Haftung im Sport*, Stuttgart 2008, 91 et seq.
369. For a detailed treatment of the matter, cf. Vieweg/Röhl, Sp*u*Rt 2010, 56 et seq.; see also Fellmer, MDR 1995, 541 et seq.
370. For more, see Hannamann, *Kartellverbot und Verhaltenskoordinationen im Sport*, Berlin 2001, 172 et seq.; Stopper, *Ligasport und Kartellrecht*, Konstanz 1997, 79 et seq.; id., Sp*u*Rt 1999, 188 et seq.
371. BGHZ 27, 264 at 266; BKartA, Sp*u*Rt 1995, 118 at 121.
372. BGHZ 137, 296 et seq.

not hit by stray ice hockey pucks[373] or footballs.[374] They may also have to intervene where spectators attack fellow spectators.[375]

C. *Liability of Federations*

126. Liability for unlawfully withholding or revoking a licence is especially relevant in this context.[376] If he does not hold a licence, an athlete cannot participate in a sports competition. For the applicant, the effect of being refused a licence, or of having an existing licence revoked, is equivalent to being placed under a (temporary) de facto ban: he is denied access to potential sources of revenue (television, sponsoring, marketing and spectators). This often threatens an athlete's livelihood, with the result that dispute as to the licence is almost bound to end up in court. If the court decides that the licence was unlawfully terminated or withheld, the damages awarded can be considerable.[377] In addition to being required to answer for their own culpable behaviour, sports associations or federations may become vicariously liable for the negligent acts of third parties (such as referees[378]).

D. *Liability of Athletes*

127. Liability issues typically arise where one competitor is injured through the act of a fellow competitor. These *'competitor-caused injuries'* (*Mitspielerverletzungen*) have come before the courts on several occasions over the past few decades.[379] The cases usually revolve around the question of how stringent a duty of care is owed by fellow competitors toward each other. The usual standard of care – that one is liable for any negligently-inflicted injury (§ 276(1) sentence 1 BGB) – does not really fit the context of sports. When it comes to the observance of the rules of the game, it seems inappropriate to make the person who causes the damage reimburse the victim for any injuries sustained. The rules of the sport – the FIS rules referred

373. BGH, NJW 1984, 801 at 802; OLG Celle, Sp*u*Rt 1997, 203 et seq., with an annotation by Blum.
374. OLG Schleswig-Holstein, Sp*u*Rt 1999, 244 et seq.
375. LG Gera, Sp*u*Rt 1997, 205 et seq.; LG München I, Sp*u*Rt 2006, 121 et seq.
376. For a detailed discussion, see Heermann, *Haftungsfragen bei Lizenzverfahren im Ligasport*, in: Heermann (ed.), Lizenzentzug und Haftungsfragen im Sport, Stuttgart 2005, 9 at 24 et seq.; Körner/Holzhäuser, CaS 2007, 3 et seq.; Scherrer, *Probleme der Lizenzierung von Klubs im Ligasport*, in: Arter/Baddeley (eds.), Sport und Recht, Bern 2006, 119 at 122 et seq.
377. In addition to the responsibility of the sports association, the auditor involved is generally also found to be liable, see Heermann, *Haftung im Sport*, Stuttgart 2008, 13 et seq., who also deals with additional third parties who may also be found liable.
378. In this context, see the 'Hoyzer' case, Eufe, Sp*u*Rt 2006, 12 et seq.; Eufe does not think that the DFB is answerable for the negligence of the referee. He says that the DFB should only have general liability for negligence in the area of its own selection and control.
379. See BGH, VersR 1957, 290 et seq.; later BGHZ 63, 140 et seq. = NJW 1975, 109 et seq.; BGHZ 154, 316 et seq. = NJW 2003, 2018 et seq.; OLG München, NJOZ 2009, 2268; OLG Karlsruhe, Sp*u*Rt 2012, 254 et seq.; OLG Karlsruhe, MDR 2012, 1413 et seq.

to above, for instance – serve to modify the applicable standard of care.[380] Generally, liability is also limited where the rule infringement is minor and is a typical risk of the sport: cases where athletes get carried away by zeal for the game, are momentarily inattentive, or are worn out by fatigue, for example.[381] It is only when it comes to the matter of a legal basis for limiting liability in such cases that there is a (considerable) divergence of views. While some point to the above-mentioned modification of the standard of care, others put forward doctrines such as consent,[382] volenti non fit iniuria (cf. § 254 BGB),[383] or abuse of process.[384][385] To sum up, competitors only become liable toward fellow competitors if they cross the 'unfairness' threshold.[386] The matter of where that threshold lies is a one that cannot be determined in the abstract, but has to be considered anew in each individual case,[387] taking due account of the special characteristics[388] of the sport concerned.

128. Similar limitations on liability apply where an *athlete injures a member of staff or a spectator*. Staff members and spectators voluntarily expose themselves to

380. Cf. Scheffen, NJW 1990, 2658 at 2659.
381. BGHZ 154, 316 at 324 et seq.; OLG Karlsruhe, NJW-RR 2004, 1257 et seq.; KG, Sp*u*Rt 2008, 76 et seq.; AG Düsseldorf, Sp*u*Rt 2007, 38; Palandt-Sprau, 71st edition 2012, § 823 mn. 217; for a divergent view regarding sailing regattas Müller-Stoy, VersR 2005, 1457 et seq.; Behrens/Rühle, NJW 2007, 2079 et seq.
382. The concept of consent, which would act as a defence, is dismissed by the BGH as an 'artificial assumption' which can, if need be, only be applied to extremely dangerous types of sports such as car racing; cf. BGH, NJW 1975, 109 at 110.
383. Nipperdey, NJW 1957, 1777 at 1779; Stoll, *Das Handeln auf eigene Gefahr*, Tübingen 1961, 260 et seq.; Deutsch, VersR 1974, 1045 at 1048 et seq.; Pichler, Sp*u*Rt 1997, 7 at 9.
384. BGHZ 34, 355 at 363; BGH, NJW 1975, 109 at 110.
385. Even though an express limitation of liability to cases of intention and gross negligence may be agreed upon in individual cases, there exists, nonetheless, the possibility of review in accordance with § 307 BGB in the case of combative sports and competitions with which the risk of considerable danger is associated. Cf. BGH, Sp*u*Rt 2009, 122 et seq. If one professional athlete injures another one, it is a question of work accident with the consequence that the liability is restricted to willful intent according to § 106(3) SGB VII, OLG Karlsruhe, MDR 2012, 1413 et seq.
386. OLG Hamm, Sp*u*Rt 2006, 38 et seq.; LG Freiburg, Sp*u*Rt 2006, 39 et seq.; OLG Hamburg, Sp*u*Rt 2006, 41 et seq. AG Düsseldorf, Sp*u*Rt 2007, 38 et seq. These principles have been of equal application to both contact and non-contact sports since the car race decision of the BGH (BGHZ 154, 316 et seq. = NJW 2003, 2018 et seq. = Sp*u*Rt 2004, 260 et seq.). The decisive issue is that the sport in question carries a high risk of injury, so that the risk of injury generally exists, even if no rules are broken or if the violation of the rules is only marginal. See Behrens/Rühle, NJW 2007, 2079 at 2080.
387. According to decisions of the BGH (Sp*u*Rt 2008, 119 et seq.), an exclusion of liability in the event of minor infringements of regulations does not come into play if and insofar as insurance protection exists. The existence of personal liability insurance does not, however, form a basis for claims – the injured party must always prove that the injuring party has undergone a breach of his duty of care. Cf. BGH, NJW 2010, 537 et seq.
388. E.g., boxing, a 'physical' sport, has a different standard of care than tennis, where there is no bodily contact with the competitor. For a discussion of the different types of liability, see Heermann, *Haftung im Sport*, Stuttgart 2008, 108 et seq. For an analysis of liability in Asian combative sports, cf. Günther, Sp*u*Rt 2008, 57 et seq.

a risk of injury and are therefore less deserving of legal protection than third parties. As against third parties, the ordinary rules of tortious liability apply.[389] Athletes may also become liable to associations, federations or sponsors.[390]

E. Liability of Spectators

129. Spectators may become liable when actively intervening in a game or other sports contest. One high-profile example is the case of Monica Seles, who was stabbed on the tennis court by a spectator using a 13-cm-long knife. A spectator who physically attacks and injures an athlete is liable in tort pursuant to §§ 823 et seq. BGB.[391] This liability is invoked not only by intentional, but also by negligent acts of spectators. The liability of spectators, unlike the liability of fellow athletes, is not limited, because attacks by spectators are not part of the typical risk athletes impliedly assume in agreeing to take part in a game.[392] Hooligans and 'streakers', too, must compensate third parties for any damage resulting from their unlawful behaviour.[393]

§9. Regulations Intended to Guarantee (Public) Safety, Particularly in Relation to Hooligans

130. In order to ensure that the public is protected from riots by spectators, the organizer of each event is placed under an obligation, along with the police and security forces.[394] The organizer is legally obliged to maintain safety precautions (within reasonable bounds) in order to ensure that violent attacks by or upon spectators are prevented.[395] If the organizer does not discharge this obligation satisfactorily, it will be held liable and ordered to pay damages[396] all personal injuries

389. For more on these problems, see Heermann, *Haftung im Sport*, Stuttgart 2008, 128 et seq.
390. For a comprehensive account, see Heermann, *Haftung im Sport*, Stuttgart 2008, 132 et seq.
391. It is a different matter in the case of the promoter's liability which was excluded in the Seles case due to a lack of foreseeability. LG Hamburg, NJW 1997, 2606 et seq.; Mohr, Sp*u*Rt 1997, 191 et seq.
392. For a similar view, see Heermann, *Haftung im Sport*, Stuttgart 2008, 225.
393. Thaler, *Hooliganismus und Sport*, in: Arter/Baddeley (eds.), Sport und Recht, Bern 2006, 245 at 261 et seq. In accordance with §§ 280(1), 631 BGB, hooligans must compensate third parties (e.g., an association) for any losses; see Rostock, Sp*u*Rt 2006, 83 et seq., LG Düsseldorf, Sp*u*Rt 2012, 161 et seq., Pommerening, Sp*u*Rt 2012, 187 et seq.; generally on the liability of spectators when trespassing unlawfully, AG Brake, Sp*u*Rt 1994, 205 et seq., annotated by Bär. As regards the admissibility of a stadium ban for (potential) hooligans extending across the Federal Republic, cf. BGH, Sp*u*Rt 2010, 28 et seq.
394. For more, see Part I, Ch. 2, §3 I A.
395. LG Gera, Sp*u*Rt 1997, 205 et seq.; LG München I, Sp*u*Rt 2006, 121 et seq.; Walker, *Zivilrechtliche Haftung für Zuschauerausschreitungen*, in: id. (ed.), Hooliganismus, Stuttgart 2009, 35 et seq. Due to recent outbreaks of violence in football stadiums by hooligans the DFL drafted a new safety concept which is critizised by fans, FAZ, Oct. 27, 2012, 30.
396. See Part I, Ch. 3, §8 II B.

caused by the spectator riots under tort, and – in relation to other spectators – contractually. In order to discharge its obligation to maintain adequate safety precautions, the organizer must draw up an adequate safety plan[397] for the sporting event, and must implement the plan by anchoring it in federation rules and regulations, and, as regards spectators, by means of contract (linked with ticket sales, for example). In doing so, the organizer must forbid the bringing of fireworks into the stadium by spectators, and it must be ensured that the ban is effectively enforced by means of corresponding inspections at points of entry. In addition to civil liability, associations to whom violent fans belong also face sanctions from their ruling federation. These extend from the placing of a ban on fans attending sporting events to a complete exclusion of the association from the competition.[398]

397. For more on the safety plan of the German Football Federation, see Spahn, *Die Sicherheitskonzeption des Deutschen Fussball-Bundes*, in: Walker (ed.), Hooliganismus, Stuttgart 2009, 9 et seq.
398. See Haas/Jansen, *Die verbandsrechtliche Verantwortlichkeit für Zuschauerausschreitungen im Fussball*, in: Arter/Baddeley (eds.), Sport und Recht, 5. Tagungsband, 2008, 129 et seq.

Part II. Sport and Employment

Chapter 1. General Issues

131. Sport is no longer merely a hobby as the etymological origin of the word (*disportare*, lat. amusement, distraction)[399] suggests. For many athletes, sport constitutes an economic livelihood.[400] One reason for this is, among other things, the pressure to perform which has developed as sports have become more and more commercialized[401] and which renders it impossible for professional athletes to pursue any other gainful employment outside of training.[402] Against this background, the rules which apply in the area of sport and employment are of considerable importance for the persons concerned. The rules of the federations and associations must be considered on the one hand and national regulations on the other. In the latter case, the question arises as to whether the (more) liberal regulations relating to freelance contracts or the social protection rules of employment law apply.[403] This matter has an effect on all areas of the sporting performance relationship, from its establishment, to the rights and obligations which apply during the relationship's existence (e.g., holiday entitlements, continued remuneration during sickness) to the provisions regulating its termination. The matter of whether the sporting service is provided and performed dependently or independently is also of importance for the area of social security law. Furthermore, the qualification of the legal relationship between the athlete and his/her employer as an employment relationship can result in the application of collective labour agreements and the *Betriebsverfassung* (statutory framework for the rights of employees at their place of work). Finally, fiscal aspects and the scope for excluding courts of national jurisdiction by courts of arbitration are also affected. In the following account only remunerated sports performance rendered by athletes, coaches and referees[404] in competitively organized sports will be considered. The area of amateur sports, as well as employment in the

399. Kirschenhofer, *Sport als Beruf,* 2002, 1.
400. Haas/Haug/Reschke (eds.), Handbuch des Sportrechts, A, mn. 3.
401. For more information on the commercialisation of football in Germany: Raupach, Sp*u*Rt 2008, 241.
402. See Gramlich, Sp*u*Rt 2000, 89 at 90.
403. For more information on professional football, see Hilpert, *Sportrecht und Sportrechtsprechung im In- und Ausland*, 2007, 180 et seq.; for a general overview, see Horst/Persch, in: Nolte/Horst (eds.), Handbuch Sportrecht, 2009, 153 at 155.
404. As regards the status of managers, physicians and custodians under employment law, see Wüterich/Breucker, *Arbeitsrecht im Sport*, 2006, mn. 128 et seq. and Adolphsen/Nolte/Lehner/Gerlinger/Wüterich/Breucker, *Sportrecht in der Praxis*, 2011, mn. 559 et seq.

industrial and services sector related to sports (e.g., producers of sporting goods and marketing companies), will be excluded from the purview of this part. It will set out the legal situation in relation to employment relationships and, in each case, the respective status of sports performance based on freelance contracts. Any relevant rules of sports federations concerning employment law will be considered by reviewing them on the basis of the national law.

Chapter 2. Public Regulation

132. Despite the strong influence of sports federations, these bodies must also submit to national law regulations.

§1. Classification of the Legal Character of Sports Performance Contracts

133. The classification of the legal character of sports performance contracts determines the severity of these regulations (see I.). The application of labour law often leads to stronger limitations being placed on private autonomy. This is reflected both in the contractual negotiations (see II.) and in the termination of the contract (see III.).

I. Application of German Employment Law in the Area of Sports

134. Persons active in the field of sports can obtain maximum benefit from employment law only if they can be defined as 'employees'. The problem with this basic 'all-or-nothing-principle' is that no positive legal definition of the term 'employee' exists.[405] § 84(1) sentence 2 *Handelsgesetzbuch* (Commercial Code, HGB) merely contains an indication of the criteria to be used in differentiating between dependent and independent work by asserting that in the domain of commercial agents, a person who is essentially able to regulate his activity and work hours freely qualifies as freelance contractor.[406] In addition to its significance in its direct area of application, this clause is also of general importance.[407]

A. The Term 'Employee'

135. Against this background, employees are defined as persons who, based on a private law contract, provide services to another party in a relationship of personal dependency with the other party. This definition is to be found both in the relevant jurisprudence and scholarly articles.[408] The purpose of the private law contract requirement is to exclude from the scope of application, inter alia, services that are rendered by public officials or within other public law relationships (e.g., civil servants, prisoners), or to fulfil family law maintenance obligations. As to the question of whether the work is performed in a relationship of personal dependency (*persönliche Abhängigkeit*) or not, it is important to assess the extent of the employer's authority to issue instructions (managerial authority – *Weisungsrecht*) as well

405. Schaub/Vogelsang, *Arbeitsrecht*, 14th edition 2011, § 8, mn. 1; MüKo/Müller-Glöge, 5th edition 2009, § 611 BGB, mn. 170.
406. MüKo/Müller-Glöge, 5th edition 2009, § 611 BGB, mn. 174.
407. BAG, NZA 2003, 662 at 663.
408. BAG, NJW 2004, 461 at 462; MüKo/Müller-Glöge, 5th edition 2009, § 611 BGB, mn. 171.

as the integration of the employee into the employer's company structure. The employer's managerial authority can apply to content, time and place of the work, § 106 sentence 1 *Gewerbeordnung* (Trade, Commerce and Industry Regulation Act, GewO).[409] The most distinctive feature of personal dependency is the employee's loss of sovereignty over his time. The classification is assessed using the typological method, in accordance with which all circumstances of the individual case are taken into consideration.[410] As regards legal classification as an employee, the intention of the parties plays only a minor role. In instances where the content of the contract differs from the actual performance, the latter takes precedence.[411] Due to the protective character of employment law, this applies only to cases where an employment contract is incorrectly dealt with as a freelance contract. Contrary to this, a freelance contract can be made subject to employment law where both parties agree to this.[412] But finally, if there are just as many reasons to assume an employment contract as a freelance contract, the classification depends on the intention of the parties as documented upon conclusion of the contract.[413]

B. Qualification of Athletes

136. In the following, the above-mentioned principles will be applied to athletes.

1. Sport as Work

137. First, the matter as to what extent sport can be qualified as 'work' in terms of employment law is debatable. In this context, 'work' must be understood in an economic sense, rather than in a physical one ('force multiplied by deflection').[414] Therefore, work should be interpreted as any performance of economic value, measured in accordance with the conventions of economic life.[415] Against this background, a sporting activity that is undertaken regularly for its own sake cannot be

409. MüKo/Müller-Glöge, 5th edition 2009, § 611 BGB, mn. 175; Schaub/Vogelsang, *Arbeitsrecht*, 14th edition 2011, § 8, mn. 24.
410. BAG, NZA 1999, 983 at 984; Preis, *Arbeitsrecht*, 3rd edition 2009, 50; MüKo/Müller-Glöge, 5th edition 2009, § 611 BGB, mn. 171; Ittmann, *Pflichten des Sportlers im Arbeitsverhältnis*, 2004, 22.
411. BAG, NZA 2003, 662 at 663; Preis, *Arbeitsrecht*, 3rd edition 2009, 64.
412. MüKo/Müller-Glöge, 5th edition 2009, § 611 BGB, mn. 173.
413. LAG Hamburg, Sp*u*Rt 2007, 217 at 218. However, this applies only if the contract's form is not aimed solely at circumventing the provisions of social protection law: BAGE 25, 505 at 513 = AP no. 12 to § 611 BGB Abhängigkeit.
414. MüKo/Müller-Glöge, 5th edition 2009, § 611 BGB, mn. 228; Preis, *Arbeitsrecht,* 3rd edition 2009, 57.
415. Preis, *Arbeitsrecht*, 3rd edition 2009, 57.

considered work.[416] If it is done for someone else in order to earn an economic livelihood with a club or other competition hosts, as is frequently the case in sports service contracts, it can be qualified as work in terms of law.[417]

2. Private Law Contract

138. A legal basis for the athlete's sports performance can be found in the athlete's membership of the club, governed by the law of associations or a specially concluded agreement under the law of obligations. However, the existence of a private law contract in employment law can be presumed only if the athlete is legally obliged to perform. This is usually not the case if the athlete is a mere member of a club;[418] in fact, membership in such cases must be regarded as a precondition for sports performance (e.g., authorization of the athlete to use club facilities).[419] Thus, in the area of unpaid amateur sports, the classification of the athlete as an employee is usually ruled out.[420] Contrary to this, however, an obligation to exercise sports in terms of a membership fee flowing from the rules of the club (§ 58 no. 2 *Bürgerliches Gesetzbuch*, Civil Code, BGB) is feasible. According to jurisprudence, the matter of whether the athlete is under any contractual obligation other than an obligation arising out of the club rules is of significance as, in principle, only in this case can it be presumed that an employment contract exists.[421] The existence of the latter is also suggested by the athlete being subject to an increase in the employer's managerial authority, or by typical employment contract measures, such as the fact that benefits are connected with the fulfilment of the sports performance duty.[422] If the athlete is merely compensated for expenses arising from the performance of sport (accommodation, board), this normally rebuts the presumption of the existence of a contractual obligation to perform.[423] If there is no agreement regarding salary, the existence of an employment relationship cannot be assumed.[424] A method

416. Ibid., 58.
417. BAG, AP no. 51 to § 611 BGB Abhängigkeit = DStR 1991, 290; Schaub/Vogelsang, *Arbeitsrecht*, 14th edition 2011, § 8, mn. 9; forthcoming Bepler, *Zum Beschäftigungsanspruch des Lizenzfußballers*, in: id. (ed.), Sportler, Arbeit und Statuten, 2000, 43 at 48; for professional football Küpperfahrenberg, *Die arbeitsrechtliche Stellung von Spielern und Trainern im Lizenzfußball*, 2004, 24; Kaske, *Das arbeitsrechtliche Direktionsrecht und die arbeitsrechtliche Treuepflicht im Berufssport*, 1983, 12.
418. BSG, Sp*u*Rt 2010, 172 at 173; see Richter/Klatt, DStR 2010, 450 at 452 et seq.
419. Gramlich, Sp*u*Rt 2000, 89 at 90.
420. MünchHdbArbR/Giesen, 3rd edition 2009, § 337, mn. 1.
421. BAG, NJW 2003, 161 at 162; Ittmann, *Pflichten des Sportlers im Arbeitsverhältnis*, 2004, 32; MünchHdbArbR/Gitter, 2nd edition 2000/2001, § 202, mn. 10.
422. BAG, AP no. 51 to § 611 BGB Abhängigkeit; Ittmann, *Pflichten des Sportlers im Arbeitsverhältnis,* 2004, 35.
423. Horst/Jacobs, RdA 2003, 215 at 219.
424. Grunsky, *Vertrags- und arbeitsrechtliche Probleme des Fußballtrainers im Amateur- und Profibereich*, in: Württembergischer Fußballverband (ed.), Rechtsverhältnisse der Trainer und Übungsleiter 1991, 48 at 51. If, on the other hand, it is certain that an employment contract or a freelance contract is concluded under private law, but no agreement is made regarding remuneration, § 612(1), (2) BGB inserts an agreement regarding the common remuneration if the service cannot, under the circumstances, be expected to be provided for free.

of interpretation prescribed by the law for such cases does not exist, as this depends on the circumstances of each individual case. Here, the matter of whether the payment is seen as a quid pro quo for the sports performance (in accordance with the parties' intentions) is decisive.[425] In the area of high-performance, competitive sport, this will be the case more frequently.[426] Finally, the conclusion of an employment contract is, of course, also possible if one is not a member of the club.[427]

In the area of football, the rules of the *Deutscher Fußballbund* (German Soccer Federation, DFB) distinguish between amateurs and professionals (in the latter case, between contractual players and license players), whereby the decisive criterion for classification is the conclusion of a contract which goes beyond membership, as well as the amount of financial benefit.[428] The classification of the legal relationship as an (additional) employment contract is (by nature) not determined by the rules of the DFB (or any other federation) but is subject to legal provisions.

3. Personal Dependency

139. Factors which lead to the presumption of the existence of a relationship of personal dependency are, as mentioned above,[429] in particular the employer's managerial authority to issue directions which is provided for in the contract, as well as the integration of the athlete into a business organization, the structure of which is arranged by the employer, and the loss of the employee's ability to allocate his time. Athletes playing team sports are often required to follow the directions of the employer. This is apparent in such areas as the preparation of the team by a club-appointed coach, selection for games, and tactical directions given by the coach.[430] In the case of top-level athletes who hold the foremost position within a team, this can be disputed because there is less of a possibility of impact.[431] This can be countered by arguing that sports clubs regard themselves as having complete authority to issue directions, particularly when hiring top-level athletes because of their 'value', and that the athlete is aware of this when the contract is established.[432]

425. Ittmann, *Pflichten des Sportlers im Arbeitsverhältnis*, 2004, 32.
426. See PHBSportR-Fritzweiler, part 3, mn. 14.
427. MünchHdbArbR/Gitter, 2nd edition 2000/2001, § 202, mn. 8.
428. 'Amateurs' (*Amateure*) receive only their proven expenses, as well as a flat maximum payment of below EUR 250 monthly. 'Contract players' (*Vertragsspieler*) receive a minimum remuneration of EUR 250 for sports performance, as well as compensation for expenses. 'License Players' (*Lizenzspieler*) additionally have a license contract with the league federation which runs the license leagues (Deutsche Fußball Liga), § 8 DFB-SpO. See Küpperfahrenberg, *Die arbeitsrechtliche Stellung von Spielern und Trainern im Lizenzfußball*, 2004, 17 et seq.; Wüterich/Breucker, *Arbeitsrecht im Sport*, 2006, mn. 113 et seq.; Adolphsen/Nolte/Lehner/Gerlinger/Wüterich/Breucker, *Sportrecht in der Praxis*, 2011, mn. 548 et seq.; Hilpert, *Sportrecht und Sportrechtsprechung im In- und Ausland*, 2007, 180 et seq.
429. Part II, Ch. 2, §1 I A.
430. Bepler, *Zum Beschäftigungsanspruch des Lizenzfußballers*, in: id. (ed.), Sportler, Arbeit und Statuten, 2000, 43 at 49; Ittmann, *Pflichten des Sportlers im Arbeitsverhältnis*, 2004, 23 et seq.
431. Fischer, Sp*u*Rt 1997, 181 at 182 et seq.
432. See Schneider, Sp*u*Rt 1996, 118.

Thus, it can usually be said that there is an agreement for the club to issue instructions in the area of team sports, and thus, that the athlete should be classified as an employee.[433] As they are not required to integrate themselves into a team, athletes performing individually have much more independence, which must be taken into account when interpreting the contract.[434] This can be assessed differently again in the case of individual sports that are sometimes organized in teams (e.g., ski-jumping), or when hiring someone to perform for a full season (e.g., tennis,[435] motor sports[436]). Again, it is necessary to consider the circumstances of the individual case in a comprehensive manner.[437]

The view that well-paid professional football players, for example, are not in need of the social protection of employment law has led to the conclusion in certain legal commentary that they should be legally classified as employees sui generis.[438] As a consequence, they would not, for example, be entitled to payment for holidays owed.[439] The fact that 'social protection' is needed (or is not needed, as the case may be) cannot, however, be regarded as a relevant factor. Otherwise, other persons who are sought after and, therefore, well-paid, but who are indisputably employees, would also have to be treated differently. In addition, this view gives rise to greater problems of differentiation than the 'personal-dependency test'.[440] Thus, personal dependency in the aforementioned sense must remain the criterion of differentiation.[441]

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433. Wüterich/Breucker, *Arbeitsrecht im Sport,* 2006, mn. 110; Horst/Jacobs, RdA 2003, 215 at 219; Teschner, NZA 2001, 1233 at 1234; Horst/Persch, in: Nolte/Horst (eds.), Handbuch Sportrecht, 2009, 153 at 161 et seq.; for license players in football Jungheim, RdA 2008, 223; Günther, Sp*u*Rt 2010, 50; MünchHdbArbR/Giesen, 3rd edition 2009, § 337, mn. 5.
434. PHBSportR-Fritzweiler, part 3, mn. 17; Oschütz, *Probleme der Schiedsgerichtsbarkeit im Sport: arbeitsrechtliche Streitigkeiten und einstweiliger Rechtsschutz*, in: Haas (ed.), Schiedsgerichtsbarkeit im Sport, 2003, 43 at 49; MünchHdbArbR/Gitter, 2nd edition 2000/2001, § 202, mn. 24. See e.g., LAG Hamburg, decision Sept. 7, 2005, reference number 4 Sa 33/05, refusing to acknowledge the personal dependency of a professional boxer due to a lack of agreements regarding content, execution, time, duration, and place of work performance; similarly, SG Dortmund, Sp*u*Rt 2011, 39 at 40 regarding a professional wrestler who can self-determine the content, time and place of the work performance. The decision related to the term 'employment relationship' under social security law, pursuant to § 7(1) SGB IV, but can also be considered in the case of the qualification as an employee in terms of labour law, see Part II, Ch. 2 §4.
435. See ArbG Bielefeld, NZA 1989, 966 at 967; further examples in Wüterich/Breucker, *Arbeitsrecht im Sport*, 2006, mn. 112.
436. BAG, NZA 2002, 963 = Sp*u*Rt 2003, 120.
437. Horst/Jacobs, RdA 2003, 215 at 219.
438. For a comprehensive account of this tendency in the discourse regarding the term 'employee' Menke, *Profisportler zwischen Arbeitsrecht und Unternehmertum*, 2006, 56 et seq.; likewise Beckmann, P.-W./Beckmann, J.F., Sp*u*Rt 2011, 236 at 240.
439. Bühler, Sp*u*Rt 1998, 143 et seq.; also Schimke/Menke, Sp*u*Rt 2007, 182.
440. Schimke/Menke are also aware of those problems in light of their question as to the point in time at which the player is no longer in need of social protection, Sp*u*Rt 2007, 182 at 184, fn. 40.
441. Adolphsen/Nolte/Lehner/Gerlinger/Wüterich/Breucker, *Sportrecht in der Praxis*, 2011, mn. 549.

4. Summary

140. In conclusion, employment law can, in principle, be applied to competitively organized sports because of its character as work if performance is based on a private law contract. This can, in any case, be assumed if the host or the sports club pays a sum of money in return for the sports performance which is in excess of mere expenses. The requirement of a relationship of personal dependency in order for the athlete to attain the status of employee is often fulfilled in the area of team sports; in the area of individual sports, the agreement is more likely to be interpreted as a freelance contract. Despite these rules of thumb, all relevant circumstances in each individual case should be taken into consideration at all times.

C. Classification of Coaches

141. The aforementioned principles must also be applied to coaches in order to determine whether they should be classified as employees or as freelance contractors. Consequently, the matter of whether or not the coach performs his services within a relationship of personal dependency is decisive. A sports club's authority to issue directions (i.e., managerial authority) may often come into conflict with the coach's need for a greater amount of independence. Nevertheless, as a general rule it is usually assumed that, when hiring a coach, the sports club will reserve the right to issue obligatory directions to the coach when dealing with matters of fundamental importance. Furthermore, it is generally accepted that personal responsibility and autonomy are consequences of the special classification of this type of employee, especially if he or she renders 'higher' services (*Dienste höherer Art*).[442] § 2(2) and (3) of the (non-binding) model contract set out by the DFB for licensed football coaches, for example, determines that the coach is head of training and has sole responsibility for the team line-up, but is otherwise subject to the directions issued by the club.[443] Moreover, depending on the coach's dependence on the facilities of the sports club,[444] the coach is usually integrated into the operational organization.[445] Thus, the assumption that one should generally classify the coach as an employee has much to recommend it.[446]

442. LSG Nordrhein-Westfalen, Sp*u*Rt 2008, 128 at 129 = DB 2007, 2324; LSG Rheinland-Pfalz, Sp*u*Rt 2008, 126 at 127 = CaS 2007, 42 at 44.
443. Busch, *Das Arbeitsverhältnis des Fußballtrainers*, 2006, 40 et seq.; Küpperfahrenberg, *Die arbeitsrechtliche Stellung von Spielern und Trainern im Lizenzfußball*, 2004, 184.
444. See Beathalter, *Das Ende befristeter Trainerverträge?*, in: Bepler (ed.), Sportler, Arbeit und Statuten, 2000, 27 at 31.
445. Busch, *Das Arbeitsverhältnis des Fußballtrainers*, 2006, 47.
446. BAG, NZA 2003, 611 at 612 = Sp*u*Rt 2003, 122 at 123; NZA 2000, 102 = Sp*u*Rt 1999, 254; further jurisprudence in Wüterich/Breucker, *Arbeitsrecht im Sport*, 2006, mn. 122; furthermore, at least for top class sports, Beathalter, *Das Ende befristeter Trainerverträge?*, in: Bepler (ed.), Sportler, Arbeit und Statuten, 2000, 33; Bauer/Pulz, Sp*u*Rt 2001, 56; Busch, *Das Arbeitsverhältnis des Fußballtrainers* 2006, 50; Borggräfe, Sp*u*Rt 2006, 233 at 234.

The matter of whether the coach's activity is merely a secondary occupation is irrelevant.[447] However, if the coach is generally free in his assessment of training, the legal relationship can in individual cases be classified as a freelance contract, even if the coach is subject to limitations as regards time[448] and place.[449,450]

D. Classification of Referees

142. Finally, one must assume that the general defining characteristics set out for the term 'employee' also apply to referees, who are essential to each competition. One characteristic of referees is the part-time nature of their job which, due to the rhythm of competitions, means that their service is required for only a few days each week.[451] Although this temporal schedule does not conflict in a fundamental manner with the assumption that the referee could be classified as an employee,[452] referees are not usually integrated into an operational organization, despite the rules of the association which are applied to them. It is frequently the case that a referee, after many years of activity, is also entitled and capable of offering his services freely on the market, thus excluding the existence of a relationship of personal dependency.[453] Therefore, the referee is, in general, to be classified as a freelance contractor, whose activity is co-determined by the rules of the association.[454]

E. Persons Similar to Employees

143. In addition to the category of employees, there is the category of 'persons similar to employees'. Only part of national employment law applies to this subgroup (holidays: § 2 *Bundesurlaubsgesetz* – Federal Holiday Act, BUrlG, industrial employment protection: § 2(3) sentence 3 *Arbeitsschutzgesetz* – Labour Safety Act, ArbSchG, collective labour agreements: § 12a *Tarifvertragsgesetz* – Collective Bargaining Agreements Act, TVG and the jurisdiction of the labour courts: § 5(1) sentence 1 *Arbeitsgerichtsgesetz* – Labour Court Code of Procedure, ArbGG). The members of this group, which is legally defined (in part)[455] in § 12a(1) no. 1 TVG, are distinguished not by their personal dependency on the beneficial owner of the service (i.e., the characteristic of being subject to directions and/or integration into an entrepreneurial organization), but rather, their economic dependency. An athlete who is active for several hosts and/or clubs is considered similar to an employee if

447. LSG Nordrhein-Westfalen, Sp*u*Rt 2008, 128 at 129 = DB 2007, 2324; LSG Rheinland-Pfalz, Sp*u*Rt 2008, 126 at 128 = CaS 2007, 42 at 45.
448. E.g., because of the training offered by the club to its members.
449. E.g., because of the necessity of using the club's swimming pool.
450. LAG Hamburg, Sp*u*Rt 2007, 217.
451. Kuhn, *Der Sportschiedsrichter zwischen bürgerlichem Recht und Verbandsrecht*, 2001, 77.
452. Hilpert, RdA 1997, 92 at 97.
453. Kuhn, *Der Sportschiedsrichter zwischen bürgerlichem Recht und Verbandsrecht*, 2001, 77 et seq.
454. Hilpert, RdA 1997, 92 at 97.
455. BAG, NZA 1991, 402 at 403; Krause, *Prüfe dein Wissen – Arbeitsrecht I*, 1st edition 2007, Case 42.

there is a greater amount of activity for one of them and if the remuneration thereby gained constitutes his main source of income.[456] In addition, the economically dependent person must be in need of social protection which is comparable to that needed by an employee when considering his overall social status.[457] This similarity to employees has to be taken into account in the area of individual sports in particular.[458]

F. Persons Employed for Vocational Training

144. The final group remaining to be mentioned is that of persons who are employed for vocational training, to which employment law rules apply in accordance with § 10(2) *Berufsbildungsgesetz* (Vocational Training Act, BBiG) as long as it is compatible with the spirit and purpose of the vocational training contract and vocational training law. This regulation deals only with state-approved qualified jobs. Until 2007, this did not include activities concerning sports, with the exception of jobs in the economic sector which are proximate to the area of sports (e.g., sports and fitness salesperson or sports events salesperson).[459] On 1 August 2008, the profession of 'sports expert' was approved by the state.[460] The training regulations envisage, inter alia, the planning and realization of training modules and the elaboration of mentoring concepts for athletes, in addition to the planning of sporting events. Athletic training, as such, remains within the area of responsibility of the sports associations. There are, for example, no 'registered football players'.

II. Establishment of Freelance Contracts and Employment Relationships

145. An array of questions can arise regarding freelance service contracts or employment contracts even as early as the point in time when the relationship is established.

A. Conclusion of a Private Law Contract

146. The freelance service contract and the employment contract are both established by means of a private law agreement which is, in principle, no different to other contracts. The contracting parties must have legal capacity: underage persons require the approval of their legal agents (§§ 107, 108(1) BGB) who are usually their parents. Moreover, the contract must not be in breach of the law (§ 134 BGB) or *contra bonos mores* (§ 138 BGB). There is no requirement that the contract takes

456. BAG, NZA 1999, 1175 at 1176.
457. BAGE 86, 178 at 183 = NZA 1997, 1126 at 1127 = NJW 1997, 2973 at 2974.
458. E.g., BAG, NZA 1999, 1175 at 1176; see also Oschütz, *Probleme der Schiedsgerichtsbarkeit im Sport: arbeitsrechtliche Streitigkeiten und einstweiliger Rechtsschutz*, in: Haas (ed.), Schiedsgerichtsbarkeit im Sport, 2003, 43 at 50 et seq.
459. Supplement No. 206a to Bundesanzeiger No. 206/2004 at Oct. 29, 2004, up to date Oct. 1, 2004.
460. Verordnung (Regulation) of July 4, 2009, BGBl. I-2007, 1242, with amendments.

a certain form; the contract can be concluded by action implying intention. Where the contract concerned is an employment contract, however, the employee is entitled to a record of all material contractual terms and conditions in written form, § 2 *Nachweisgesetz* (Act concerning Proof of Substantial Conditions Applicable to the Employment Relationship, NachwG). The requirement of written form may, nonetheless, arise from the rules of the sports federation, e.g., § 6 no. 1 *Lizenzordnung Spieler* (Player's License Regulation, LOS). This is legitimate because the interference with the players' and clubs' freedom of contract is minor.[461]

B. Information Rights of the Employer

147. In the context of contract negotiations, the negotiating parties usually have an interest in discovering any personal attributes of the other party that are of relevance to the planned collaboration. This gives rise to a question as to the extent to which employees, in particular athletes and coaches, are obliged to provide information voluntarily regarding circumstances which may be an impediment to employment from the point of view of the sports club. Furthermore, the question arises as to when the sports club is entitled to truthful answers, or rather, under which circumstances will even an applicant's lie have no legal consequences?

Circumstances that render performance of the sport impossible fall into the first category.[462] Suspensions from play or disabilities are examples of this. Below this threshold, due to the principle of equal treatment,[463] the athlete is obliged to provide correct information only in response to questions posed by the sports club and, in addition, when absence of disability is a genuine and decisive occupational requirement for the intended job, see § 8 *Allgemeines Gleichbehandlungsgesetz* (General Equal Treatment Act, AGG).[464] The issue of being granted the status of a severely disabled person in terms of *Neuntes Buch Sozialgesetzbuch* (Social Security Code, Book IX, SGB IX) under public law must be distinguished from this matter. According to earlier jurisprudence, asking whether the applicant had this status was unconditionally admissible, as substantial statutory obligations could arise for the employer if the prospective employee was recognized as being severely disabled.[465] Since the AGG[466] has come into force, this question is no longer admissible when the contract is being concluded,[467] as the matter of classification as a severely disabled person does not represent a genuine or decisive occupational requirement.[468]

Questions are generally admissible if their aim is legitimate, just and worthy of protection (*schutzwürdig*), as long as they do not make reference to any forbidden

461. Gramlich, Sp*u*Rt 2000, 89 at 93 regarding the co-extensive previous rule.
462. Preis, *Arbeitsrecht*, 3rd edition 2009, 241; Joussen, NZA 2007, 174 at 175.
463. See Part II, Ch. 2, §1 II C.
464. MüKo/Thüsing, 6th edition 2012, § 11 AGG, mn. 24.
465. BAG, NZA 1996, 371 at 372 = NJW 1996, 2323 at 2324.
466. See Part II, Ch. 2, §1 II C.
467. Conversely, the question is admissible *after* the conclusion of the contract, BAG, NZA 2012, 555; MüKo/Thüsing, 6th edition 2012, § 11 AGG, mn. 24.
468. MüKo/Thüsing, 6th edition 2012, § 11 AGG, mn. 24.

criteria of differentiation.[469] The closer the connection between the question and the job being applied for, the more likely this is to be the case.[470] This includes questions regarding one's career as an athlete,[471] illnesses or secondary employment, insofar as they could interfere with the athlete's performance. Any previous doping offences must be disclosed upon request, even if the term of suspension has already been served. §§ 51, 53 *Bundeszentralregistergesetz* (Federal Central Register Law, BZRG), pursuant to which an offender can declare that he has no criminal record after the period of time mentioned in the given provisions (also in contract negotiations),[472] cannot be applied directly or indirectly to doping suspensions, as they pertain to federally-imposed penalties and not to those authorized by the offender's own private submission to the rules and regulations of the sports federations.

If the applicant breaches the obligation upon him to disclose information, or if he does not provide a truthful response to an admissible question, the sports club is entitled to rescind the contract on the ground of wilful deceit pursuant to § 123(1) BGB. Moreover, the athlete may be liable for damages pursuant to §§ 280(1) sentence 1, 311(2) no. 1 BGB (*culpa in contrahendo*). In contrast, should the athlete be asked inadmissible questions, there is no ground for avoidance, nor can the impairment be regarded as unlawful. Inadmissibility can arise from the law (e.g., §§ 7(1), 3(1) sentence 2 AGG, which relates to questions in connection with pregnancy,[473] Article 9(3) GG regarding union membership), or as a result of a weighing-up of the club's right to information and the athlete's interest to protect his privacy having an unfavourable outcome for the sports club.[474] These principles can also be applied to the employee's right to information.

C. Prohibition of Discrimination

148. Finally, when entering into an employment or freelance service contract EU law provisions on the implementation of the principle of equal treatment as regards access to employment and self-employment[475] may be of significance (along with the prohibition of discrimination on grounds of nationality pursuant to Article 45 TFEU = ex-Article 39 TEC).[476] The principle of equal treatment also forbids discrimination in relation to any existing working relationship and its termination. The

469. MünchHdbArbR/Buchner, 3rd edition 2009, § 30, mn. 245; MüKo/Müller-Glöge, 5th edition 2009, § 611 BGB, mn. 619.
470. Preis, *Arbeitsrecht*, 3rd edition 2009, 242.
471. See Müko/Müller-Glöge, 5th edition 2009, § 611 BGB, mn. 619.
472. As to the employment contract in general, see MünchHdbArbR/Buchner, 3rd edition 2009, § 30, mn. 346.
473. Opposing view held by Wüterich/Breucker, *Arbeitsrecht im Sport*, 2006, mn. 149 in the event of impossibility of sports performance ab initio.
474. See Wüterich/Breucker, *Arbeitsrecht im Sport*, 2006, mn. 143 et seq. for a detailed discussion of the complete issue.
475. See the Council Directive 2006/54/EC, as well as the Council Directives 2000/43/EC and 2000/78/EC.
476. See Haas, in: Haas/Haug/Reschke (eds.), Handbuch des Sportrechts, B, Ch. 2, mn. 70; Preis, *Arbeitsrecht*, 3rd edition 2009, 242.

theoretical constellations are so varied that the problem can only be referred to briefly at this juncture.[477]

The council directives issued based on Article 19(1) TFEU = ex-Article 13(1) TEC oblige the Member States to prohibit discrimination on grounds of race, ethnic origin, sex, religion, belief, disability, age, or sexual orientation.

The AGG[478] is the instrument by which these directives are implemented into national law. In the area of sports, any distinction on grounds of sex,[479] religion,[480] age[481] or disability,[482] for example, may be relevant. The AGG prohibits direct and indirect discrimination on the grounds mentioned in Article 19(1) TFEU = ex-Article 13(1) TEC in the area of employment law and (in the context of gaining access to self-employment) freelance contracts, §§ 7, 3 and 2(1) no. 1 and 2 AGG. Thus, it is of broad application in the area of sports.[483] Under § 8(1) AGG, a discrimination on grounds which are, in general, forbidden is permitted as an exception if this ground constitutes a genuine and decisive occupational requirement.[484] In relation to discrimination on grounds of religion, belief or age, less stringent conditions apply pursuant to §§ 9, 10 AGG (in the context of religion, this is only in

477. As regards equal treatment in sports, see Vieweg, *Verbandsrechtliche Diskriminierungsverbote und Differenzierungsgebote*, in: Württembergischer Fußballverband (ed.), Minderheitenrechte im Sport, 2005, 71 et seq. and id./Müller, *Gleichbehandlung im Sport – Grundlagen und Grenzen*, in: Manssen/Jackmann/Gröpl (eds.), Nach geltendem Verfassungsrecht (liber amicorum Steiner 2009), 888 et seq. For an account of the AGG in sports, see Weichselgärtner, *AGG im Leistungssport*, 2011; Gutzeit, *Auswirkungen des AGG auf das Sportrecht*, in: Vieweg (ed.), Facetten des Sportrechts, 2009, 55 et seq.; Wüterich/Breucker, *Arbeitsrecht im Sport*, 2006, mn. 202 et seq.

478. Article 1 Statute of Aug. 14, 2006, BGBl. I-2006, 1897, with amendments.

479. For an account of the ban on *Birgit Prinz,* a player for the German women's national football team which had won the World Cup, to play on a men's team (*AC Perugia)* in the Italian first league, see Wüterich/Breucker, *Arbeitsrecht im Sport*, 2006, mn. 206. On gender segregation in sports, see Block, Sp*u*Rt 2012, 46 and Sp*u*Rt 2012, 99 et seq.

480. Thus, in relation to the religious obligation to fast during Ramadan, a possible indirect discrimination against Muslim athletes can be perceived in the contractual obligation to co-ordinate special diets and fasting with the club, see Günther, Sp*u*Rt 2010, 50 and Hoevels, *Islam und Arbeitsrecht*, 266 et seq. A conflict that arose from the warnings issued to three Muslim professional football players was somewhat mitigated by a legal opinion of Muslim scholars (Fatwa), according to which professional football players were allowed to break their fast, see Günther, Sp*u*Rt 2010, 194.

481. The minimum age limit for players permitted to play in the National Basketball Association in the USA serves as an example (see Süddeutsche Zeitung Aug. 1, 2005, 35; Die WELT Aug. 1, 2005, 22), as does the maximum age for referees in the area of professional football (see Berliner Zeitung Aug. 29, 2005, 13; Süddeutsche Zeitung June 20, 2005, 36).

482. For a hypothetical ruling of the 'Casey Martin' case under Art. 3(3) sentence 2 GG see Bröhmer, Sp*u*Rt 2002, 141 at 143 et seq.; Wüterich/Breucker, *Arbeitsrecht im Sport*, 2006, mn. 209 et seq.; unspecific Haas, in: Haas/Haug/Reschke (eds.), Handbuch des Sportrechts, B, Chapter 2, mn. 72.

483. Block, Sp*u*Rt 2012, 46.

484. The authorization of this exception is contained in Art. 14(2) Council Directive 2006/54/EC; Art. 4 Council Directive 2000/43/EC and Art. 4(1) Council Directive 2000/78/EC. It is based on the 'bona fide occupational qualification (defence)' which emanates from American law; see Zimmer/Sullivan/White, *Cases and Materials on Employment Discrimination*, 7th edition 2008, 171 et seq. and passim; in German legal commentary: Linsenmaier, Sonderbeilage zu (= cross-title to) RdA 2003, edition 5, 22 at 28; Wiedemann/Thüsing, NZA 2002, 1234 at 1237; Thüsing, RdA 2001, 319 at 320; Fenske, *Das Verbot der Altersdiskriminierung im US-amerikanischen Arbeitsrecht*, 1998, 144 et seq.

favour of religious communities).[485] Any measure which violates the prohibition of discrimination by an employer is invalid, § 7(2) AGG. The sub-constitutional prohibitions of discrimination on grounds of sex (§ 611a BGB) and disability (§ 81(2) SGB IX)[486] which applied until this point have been repealed by the AGG, but are still of application to unequal treatment which occurred prior to the day on which the AGG came into effect in accordance with § 33(1) AGG (18 August 2006).[487]

On a national constitutional level, the fundamental rights laid out by the *Grundgesetz* (Basic Constitutional Law, GG) which have an indirect effect on civil law[488] must be taken into consideration. They are to be considered particularly when interpreting the blanket clauses of §§ 138,[489] 242[490] BGB in the context of the judicial review of employment contracts[491] and of the by-laws of (at least) socially powerful organizations.[492] The sports governing federations in their function as 'placeholders' ('*Platzinhaber*') must be regarded as such.[493] The prohibitions of discrimination on grounds of sex (Article 3(2) GG), disability, faith as well as religious and political opinions (Article 3(3) GG) should also be mentioned in this context.[494] As a rule of thumb, due to the indirect effect of the fundamental rights contained in the *Grundgesetz*, a 'material reason' (*sachlicher Grund*) for distinctions made on the basis of certain criteria must be demonstrated.[495]

III. Termination of the Contractual Relationship

149. Freelance contracts and employment contracts can be terminated by regular notice (*ordentliche Kündigung*) and by termination for cause (*außerordentliche*

485. For general information on the implementation of the Equal Treatment directives into German law Bauer/Thüsing/Schunder, NZA 2006, 774, as well as id., NZA 2005, 32; Annuß, BB 2006, 1629; Reichold/Hahn/Heinrich, NZA 2005, 1270; Armbrüster, ZRP 2005, 41; Staudinger/Richardi/Fischinger, BGB, revised edition 2011, § 611 BGB, mn. 73 et seq.; Picker, *Antidiskriminierungsprogramme im freiheitlichen Privatrecht*, in: Lorenz (ed.), Karlsruher Forum 2004: Haftung wegen Diskriminierung nach derzeitigem und künftigem Recht, 2005, 7 et seq. with further references.
486. § 81(2) SGB IX (Social Security Code, Book IX) applied to disabled persons with a level of disability of at least 50 (§ 2(2) SGB IX) or, in some cases, 30 (§ 2(3) SGB IX); as regards application in line with the Council Directives, see Thüsing/Wege, NZA 2006, 136 et seq.
487. BT-Drs. 16/1780, 53.
488. BVerfGE 7, 198 at 205 et seq. = NJW 1958, 257 at 257 et seq.; BVerfGE 81, 242 at 255 et seq. = NZA 1990, 389 at 390 = NJW 1990, 1469 at 1470; BVerfGE 103, 89 at 100 = NJW 2001, 957 at 958; MüKo/Müller-Glöge, 5th edition 2009, § 611 BGB, mn. 278.
489. Unconscionable legal act.
490. Principle of utmost good faith.
491. MüKo/Müller-Glöge, 5th edition 2009, § 611 BGB, mn. 279.
492. For the extension of the judicial review to the content of the regulations of federations which do not have overt positions of power, see Vieweg, *Verbandsrechtliche Diskriminierungsverbote und Differenzierungsgebote*, in: Württembergischer Fußballverband (ed.), Minderheitenrechte im Sport, 2005, 71 at 82 and id., *Normsetzung und –anwendung deutscher und internationaler Verbände*, 1990, 229 et seq. (in particular 234 et seq.).
493. BGHZ 128, 93 at 101 = NJW 1995, 583 at 585 = Sp*u*Rt 1995, 43 at 46 with comment by Vieweg, Sp*u*Rt 1995, 97 et seq. See also Part I, Ch. 3, §1 II.
494. See Preis, *Arbeitsrecht*, 3rd edition 2009, 243.
495. Bröhmer, Sp*u*Rt 2002, 141 at 143.

Kündigung) due to the end of contractual term,[496] a termination agreement, or rescission by court (§ 9(1) *Kündigungsschutzgesetz* – Protection against Dismissal Act, KSchG). In high-performance sports, the termination of employment contracts is of minor importance only, since the sports club would lose a percentage of its capital in the form of transfer revenue as a result.[497] Moreover, sports performance contracts usually take the form of fixed-term contracts, which is why it is generally impossible to tender regular notice of termination during the term of the contract (§§ 620(2) BGB, 15(3), 21 *Teilzeit- und Befristungsgesetz* – Part-Time Job and Limited Employment Contract Act, TzBfG).[498] Thus, the sole possibility to terminate the contract unilaterally is often termination for cause, to which strict and demanding requirements apply. The avoidance of the employment contract for mistake, unlawful threat of harm, or wilful deceit pursuant to §§ 119 et seq. BGB is also possible, but is outside the scope of this article.[499]

A. Regular Notice of Termination

150. In freelance contracts it is possible to tender regular notice of termination within relatively short time limits without providing grounds pursuant to § 621 BGB. However, if the athlete is an employee, regular notice of termination within the scope of the KSchG also requires grounds; these can be personal or operational reasons, or can be based on the athlete's behaviour, § 1(2) KSchG.[500] Furthermore, in employment contracts, notice of termination to be tendered by the employer is subject to periods of notice which increase in accordance with the length of time for which the contract has been in existence (§ 622 BGB).[501] In addition, notice of termination of employment contracts (as opposed to freelance contracts) must be in written form (§ 623 BGB).[502]

B. Termination for Cause

151. If, in an exceptional case, the sports club needs to terminate the contract unilaterally, its only option is termination for cause for the reasons stated above.

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496. As regards the limitation of employment contracts, see Part II, Ch. 2, §1 III G.
497. Ittmann, *Pflichten des Sportlers im Arbeitsverhältnis*, 2004, 220.
498. Statute of Dec. 21, 2000, BGBl. I-2000, 1966, with amendments; Ittmann, *Pflichten des Sportlers im Arbeitsverhältnis*, 2004, 220; Teschner, NZA 2001, 1233 at 1234; Beckmann, P.-W./Beckmann, J.F., Sp*u*Rt 2011, 236.
499. See only Part II, Ch. 2, §1 II B.
500. See Part II, Ch. 2, §1 III C.
501. § 622(2) sentence 2 BGB provides that in calculating the duration of employment, time periods prior to completion of the twenty-fifth year of life of the employee are not taken into account. According to a decision of the European Court of Justice, this provision has to be disapplied by the courts, if need be, also between private parties, ECJ, C-555/07, NJW 2010, 427 = NZA 2010, 85 – Kücükdeveci. The BAG follows the ECJ, BAGE 135, 255 = NJW 2010, 3740 = NZA 2010, 1409.
502. As regards the regular notice of termination see MüKo/Hesse, 5th edition 2009, vor § 620 BGB, mn. 65.

1. Grounds for Termination

152. Termination for cause without period of notice of freelance and employment contracts is possible only for good reason, § 626(1) BGB. Such reason exists if the continuation of the contract until the end of the agreed term or of the period of regular notice cannot be expected of the party who wishes to terminate the contract. A two-step test must then be carried out; it must first be verified whether the ground provided is 'of itself' suitable to justify the termination. If this is found to be the case, a second step follows: the weighing-up of the right to terminate within a comprehensive balance of interests considering all the circumstances of the case.[503] In practice, only obviously impermissible grounds, such as grounds of race, sex or ties to unions, fail the first step.[504] Even though § 626(1) BGB generally requires that a 'good cause' be provided, the breakdown of reasons into person-based, personal and operational grounds for termination is carried over from the KSchG for the purpose of interpretation.[505] In this respect, one can refer to the remarks made regarding the KSchG providing that good cause can exist only if the ground is of notable importance. At the same time, the interests of the athlete in the continuance of the contract must be considered. Significant factors are, on the one hand, the duration of the contract, the age of the employee,[506] his culpability in the context of the ground for termination and the general absence of impairments in the employment contract; on the other hand, the severity of the breach of contract, any risk of the infringement recurring and the degree of disturbance of the company's operation are also relevant.[507] Since termination is not a penalty,[508] but a device used to avert future failures of the contractual relationship,[509] it must be examined according to the so-called *ultima ratio* principle whereupon the sports club can be expected to issue a prior warning or to relocate the athlete to another team or club department.[510] This is often the case where the grounds for dismissal are behaviour-based.[511]

503. Schaub/Linck, *Arbeitsrecht*, 14th edition 2011, § 127, mn. 41; MüKo/Henssler, 5th edition 2009, § 626 BGB, mn. 75.
504. MüKo/Henssler, 5th edition 2009, § 626 BGB, mn. 79; Schaub/Linck, *Arbeitsrecht*, 14th edition 2011, § 127, mn. 41 as regards the prohibition of discrimination.
505. MüKo/Henssler, 5th edition 2009, § 626 BGB, mn. 78.
506. However, consideration of the employee's age must not result in discrimination against him or other employees. As regards the prohibition of discrimination, see Part II, Ch. 2, §1 II C.
507. MüKo/Henssler, 5th edition 2009, § 626 BGB, mn. 81 et seq.
508. MüKo/Henssler, 5th edition 2009, § 626 BGB, mn. 72.
509. Krause, *Arbeitsrecht*, 2nd edition 2011, 241.
510. Adolphsen/Nolte/Lehner/Gerlinger/Wüterich/Breucker, *Sportrecht in der Praxis*, 2011, mn. 648.
511. BAG, NZA 1999, 708 at 710; MüKo/Henssler, 5th edition 2009, § 626 BGB, mn. 91.

2. Form and Period of Notice

153. The termination for cause of a freelance contract does not have to take any particular form (as is the case for persons similar to employees[512]).[513] The termination of an employment contract must be declared in written form (see § 126 BGB) pursuant to § 623 BGB. In accordance with § 626(2) BGB, the employer has two weeks time to do so from the point of receiving notice of the facts which amount to the good cause. An adequate period of time to carry out investigations is not included when calculating the period of notice.[514]

3. Several Grounds for Termination

154. In the following section, several grounds for dismissal in the area of sports shall be highlighted by addressing the employment relationships of athletes and coaches.

a. Athletes

In the first group, particularly erratic behaviour can entitle an employer to terminate the athlete's contract for cause.

i. Doping

155. Doping offences (refusal to participate in doping tests[515] are also included under this heading) can constitute a good (behaviour-based) cause within the meaning of § 626(1) sentence 1 BGB, because a duty to refrain from doping[516] arises out of the employment contract (also in accordance with the regulations of the respective federation).[517] In order for a termination to be considered valid, a prior warning is generally not necessary.[518] The definition of doping under the terms of the contract arises from the rules of the federation in question which are often referred to in their entirety. Indeed, it is not necessary that the athlete is found to be at fault in order for a good cause to be made out, but an innocent act usually will not constitute a violation of the contract so gross that it would be unacceptable for the club to

512. See Part II, Ch. 2, §1 I E.
513. MüKo/Henssler, 5th edition 2009, § 623 BGB, mn. 6.
514. MüKo/Henssler, 5th edition 2009, § 626 BGB, mn. 297 et seq.
515. In the event that the violation of the athlete's bodily integrity would be insignificant, he is found to be under an obligation to submit to a gene-doping test, Persch, CaS 2011, 28 at 35.
516. See, for example, § 2a of the DFL model contract for licensed players according to PHBSportR-Fritzweiler, appendix C, 845 at 847; see also §§ 4 to 6 model contract for contract players (Version of April 2011, found under www.dfb.de/uploads/media/Mustervertrag_Vertragsspieler__04_2011_.pdf, accessed May 20, 2012) that refers to the rule of § 5 DFB-SpO, Horst/Jacobs, RdA 2003, 215 at 219; MünchHdbArbR/Gitter, 2nd edition 2000/2001, § 202, mn. 57a. As regards the compatibility of the doping prohibition with higher-ranking law see Part III, §5.
517. Teschner, NZA 2001, 1233 at 1234; MünchHdbArbR/Giesen, 3rd edition 2009, § 337, mn. 35.
518. Horst/Jacobs, RdA 2003, 215 at 221; Horst/Persch, in: Nolte/Horst (eds.), Handbuch Sportrecht, 2009, 153 at 180.

wait for the expiration of the agreed term of contract or of the period of ordinary notice.[519] The principle of strict liability contained in the World Anti-Doping Code (WADC)[520] does not change this because the WADC cannot be taken as a precedent for the question of what good cause is.[521] However, the fact that the athlete is aware of the provisions of the WADC and the principles contained therein can be taken into account to the athlete's disadvantage when performing the balancing of interests.[522]

Termination for cause can also be based on a serious suspicion of doping which is based on objective facts.[523] The suspicion must be so grave as to destroy the trust needed for the continuation of the working relationship between the athlete and a reasonable and just employer. Furthermore, the employer is required to do everything within his power to eliminate the suspicion; in particular, he is expected to give the employee an opportunity to make representations. The suspicious facts must lead to the conclusion that there is a high probability that a breach of duty has occurred.[524] In accordance with these requirements, termination for cause of the employment contract in the case of *Jan Ullrich* is likely to have had full effect.[525] On the other hand, a suspicion-based notice of termination can be justified if the athlete evidently does not try to assuade the suspicion.[526]

Finally, a person-based ground for termination is possible insofar as the commission of a doping offence suggests the absence of personal ability to fulfil contractual duties because of the damage caused to the exemplary image of sport.[527] In addition, it can be unreasonable for the club to wait until the end of the limitation period, if it has to fear grave disadvantages with respect to existing or prospective sponsoring contracts due to its employment of an athlete found guilty of doping.[528] However, if the club or one of its vicarious agents is involved in the doping offence, then measures arising from employment law on the athlete's account are excluded because of the prohibition of inconsistent behaviour.[529]

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519. Teschner, NZA 2001, 1233 at 1236.
520. See Netzle, Sp*u*Rt 2003, 186 at 188; Petri, Sp*u*Rt 2003, 183 at 184 and 230 at 232 et seq. as well as id., *Zur Inhaltskontrolle des WADC und des NADC*, in: Vieweg (ed.), Perspektiven des Sportrechts, 2005, 105 at 113 et seq.
521. See MüKo/Henssler, 5th edition 2009, § 623 BGB, mn 58.
522. See MüKo/Henssler, 5th edition 2009, § 623 BGB, mn 59; Ascheid/Preis/Schmidt/Dörner/Vossen, Großkommentar zum Kündigungsrecht, 4th edition 2011, § 626 BGB, mn. 15. See also § 6 model contract for contract players (Version of April 2011, found under www.dfb.de/uploads/media/Mustervertrag_Vertragsspieler__04_2011_.pdf, accessed: May 20, 2012).
523. Teschner, NZA 2001, 1233 at 1238.
524. As regards the so-called termination for suspicion (*Verdachtskündigung*), most recently BAG, NZA-RR 2011, 15 at 18.
525. Mertens, Sp*u*Rt 2006, 177 at 178 et seq.; Horst/Persch, in: Nolte/Horst (eds.), Handbuch Sportrecht, 2009, S. 153 at 182.
526. MünchHdbArbR/Giesen, 3rd edition 2009, § 337, mn. 35.
527. Teschner, NZA 2001, 1233 at 1237.
528. See Horst/Jacobs, RdA 2003, 215 at 220; Teschner, NZA 2001, 1233 at 1238; as regards the so-called oppression-based notice, see also Part II, Ch. 2, §1 III B 3 a vii.
529. MünchHdbArbR/Gitter, 2nd edition 2000/2001, § 202, mn. 57a; Adolphsen/Nolte/Lehner/Gerlinger/Wüterich/Breucker, *Sportrecht in der Praxis*, 2011, mn. 640.

ii. Ban

156. If a ban follows the doping offence (or is issued on other grounds) a person-based ground is usually accepted as existing 'inherently' on the first level of judicial review. The athlete is only excluded from participating in competitions. This, however, is usually the main interest of the club in an athlete.[530] In the balancing of interests, the length of the ban must be examined in relation to the length of the contract. The longer the period of time by which the latter exceeds the end of the ban, the less chance there is for a person-based ground to be proven.[531]

iii. License Revocation

157. When a licensed player has his license revoked, he is no longer permitted to work in the licensed league. If a reissue of license within the term of the contract is unlikely, the club generally cannot be expected to adhere to the contract.[532] Due to the mandatory character of § 626(1) BGB, a contractual clause that stipulates that the club has the right to terminate for cause without further verification in the case of a revocation of the player's license is still invalid, because it does not consider the circumstances of the individual case.[533] The revocation of the license of the sports club does arouse an interest of the club to terminate the employment contract with the licensed player, but an assumption that the revocation is good cause for termination for cause without notice within the meaning of § 626(1) BGB would transfer the operational risk that the sports club is supposed to bear onto the athletes.[534] This can be a different matter in cases where the player has caused the license revocation.[535]

iv. Refusal to Participate in Advertising Activity

158. When the athlete wears sports gear other than that produced by the outfitter of his sports club in order to fulfil a personal outfitter contract, this can often constitute a violation of a provision of the employment contract (see, for example, § 2 DFB model contract for contractual players)[536] and is, therefore, good cause for

530. This can be a different matter if an athlete is 'purchased' a priori primarily for reasons of his marketability, as in the case of *David Beckham*'s transfer from Manchester United to Real Madrid. In this case, however, a reason for dismissal relating to sponsoring contracts is easier to affirm.
531. See Teschner, NZA 2001, 1233 at 1237.
532. Walker, *Arbeitsrechtliche Folgen des Lizenzentzugs*, in: Heermann (ed.), Lizenzentzug und Haftungsfragen im Sport, 2005, 47 at 63; Arens/Scheffer, AR-Blattei SD 1480.2, mn. 366; for an alternative view, see Ittmann, *Pflichten des Sportlers im Arbeitsverhältnis*, 2004, 228.
533. Ittmann, *Pflichten des Sportlers im Arbeitsverhältnis*, 2004, 223.
534. Therefore, § 9(c) 6 of the former DFB model contract for licensed players was invalid, see Walker, *Arbeitsrechtliche Folgen des Lizenzentzugs*, in: Heermann (ed.), Lizenzentzug und Haftungsfragen im Sport, 2005, 57. However, the right to terminate the contract for cause with a socially-motivated phase-out period was considered. The new model contract for contract players (not licensed players, see Part II, Ch. 2, §1 I B 2) does not contain such a clause (Version of April 2011, found under www.dfb.de/uploads/media/Mustervertrag_Vertragsspieler__04_2011_.pdf, accessed May 20, 2012).
535. Adolphsen/Nolte/Lehner/Gerlinger/Wüterich/Breucker, *Sportrecht in der Praxis*, 2011, mn. 641.
536. Does not apply to licensed players, see Part II, Ch. 2, §1 I B 2. Version of April 2011, accessible at www.dfb.de/uploads/media/Mustervertrag_Vertragsspieler__04_2011_.pdf (accessed May 20, 2012).

the justification of person-based notice of dismissal per se (subject to the mandatory balancing of interests). Since the sports club cannot actually pick this player for the panel any longer, as to do so could lead to claims for indemnification by the club's outfitter, the considerations made regarding bans are to be taken into account.

v. Injury

159. In general, a shortfall of physical productivity caused by injuries constitutes a ground for dismissal per se. However, the balancing of interests pursuant to § 626(1) sentence 1 BGB may only result in the sports club's favour if it is completely impossible for the athlete to play.[537] However even in this case, it can usually be expected of the employer to wait until the end of the legal period of notice or for the expiration of the agreed limitation period. The club's obligation to continue paying remuneration can constitute good cause only in extreme cases, and only as an exception.[538] If the deterioration of the athlete's performance is dependent on factors which are merely physical, and if the athlete makes an effort to restore his previous level of performance, then the notice of dismissal is unjustified.[539]

vi. Private Behaviour

160. Strains on the relationship between the athlete and the sports club can also be brought about by the athlete's private behaviour. This may include conduct that potentially damages physical productivity (drug abuse, dangerous leisure activities) or comments on club business to uninvolved third parties, in particular to the press. In general, dismissal for private behaviour should only be justified with hesitance, in order to protect the athlete's general right of personality.[540] Acts of the athlete in his time off are only of importance if they affect his ability to work or other interests of the club.[541] Although an agreement to refrain from certain conduct during time off cannot waive the mandatory requirements of § 626(1) BGB, it is important, as it can demonstrate to the athlete the importance of certain rules and, in this respect, it can be taken into account when assessing, within the balance of interests, if the athlete is deserving of protection.[542]

537. Ittmann, *Pflichten des Sportlers im Arbeitsverhältnis*, 2004, 228; MüKo/Henssler, 5th edition 2009, § 626 BGB, mn. 202.
538. BAGE 96, 65 at 69 et seq. = NZA 2001, 219 at 220 = NJW 2001, 1229 at 1239; MüKo/Henssler, 5th edition 2009, § 611 BGB, mn. 199.
539. Ittmann, *Pflichten des Sportlers im Arbeitsverhältnis*, 2004, 227 et seq.
540. See MüKo/Henssler, 5th edition 2009, § 626 BGB, mn. 228.
541. Schaub/Linck, *Arbeitsrecht*, 14th edition 2011, § 127, mn. 81; MüKo/Henssler, 5th edition 2009, § 626 BGB, mn. 228.
542. See MüKo/Henssler, 5th edition 2009, § 626 BGB, mn. 59.

vii. Oppression-Based Notice (*Druckkündigung*)

161. Finally, the employer may, in certain situations, regard himself as being forced to terminate the contract because of the behaviour of third parties, so-called oppression-based notice (*Druckkündigung*). One example of this is a professional football player who, through his private behaviour,[543] incurs the wrath of the club fans to such an extent that sponsors threaten the club with termination of the sponsoring contracts. The employer, however, may not accommodate the third party's demands immediately. He must defend his employee[544] and try to dissuade the third party from continuing with his demands.[545] This applies, even in cases where the employer is legally obliged to the third party to terminate the contract with his employee.[546] The employer must also examine the reprovals of the third party, in particular by letting the employee make representations in his defence. Conversely, the employee must do everything that can be reasonably expected of him to resolve the conflict with the third party, for example he would be expected to apologize to the fans.[547]

b. Coaches

162. The remarks above concerning athletes are also of relevance to coaches and their freelance or employment contracts (participation in doping,[548] private behaviour that is harmful to the operational business, loss of the license of the coach or the sports club respectively[549] or assault against subordinates).[550]

In practice, a decline in performance plays a bigger role in the case of coaches. The most important ground for termination of coaching contracts is a lack of sporting success. In the event of a termination ex parte by the club, it is problematic that the party obliged to provide services, or rather, the employee, owes no success but only provision of the service.[551] Sporting failure is a risk of which the club is always

543. For example, if an athlete participates in an event organized by a club that is regarded as an 'archenemy' of his own club, or takes part in chants which insult the club which employs him, ArbG Berlin, Sp*u*Rt 2010, 168 with comment by Menke.
544. BAG, NZA 1987, 21 at 22 = NJW 1987, 211; MünchHdbArbR/Wank, 3rd edition 2009, § 98, mn. 103.
545. ArbG Berlin, Sp*u*Rt 2010, 168 at 169; Adolphsen/Nolte/Lehner/Gerlinger/Wüterich/Breucker, *Sportrecht in der Praxis*, 2011, mn. 665 et seq.
546. ArbG Berlin, Sp*u*Rt 2010, 168 at 169.
547. Menke, Sp*u*Rt 2010, 170; Adolphsen/Nolte/Lehner/Gerlinger/Wüterich/Breucker, *Sportrecht in der Praxis*, 2011, mn. 667.
548. Horst/Jacobs, RdA 2003, 215 at 220; Persch/Weber, Sp*u*Rt 2009, 144 at 145 et seq.
549. For more on these topics, see Busch, *Das Arbeitsverhältnis des Fußballtrainers*, 2006, 299 et seq.
550. ArbG Kiel, Sp*u*Rt 2010, 166. Since 24 of 25 players refused to cooperate any further with the coach after his assault on the goalkeeper, an oppression-based termination (see Part II, Ch. 2, §1 III B 3 a vii) should also have been possible here, Menke, Sp*u*Rt 2010, 167.
551. Busch, *Das Arbeitsverhältnis des Fußballtrainers*, 2006, 296; Staudinger/Richardi/Fischinger, BGB, revised edition 2011, Vorbemerkungen zu §§ 611 BGB ff., mn. 26; MüKo/Müller-Glöge, 5th edition 2009, § 611 BGB, mn. 22; Adolphsen/Nolte/Lehner/Gerlinger/Wüterich/Breucker, *Sportrecht in der Praxis*, 2011, mn. 645.

aware[552] and this is why notice of termination is usually thwarted by the requirement of social justification contained in § 1(1) KSchG.[553] Therefore, *a fortiori*, in light of § 626(1) BGB this ground cannot be valid. Moreover, due to the multitude of decisive factors, it is often difficult for the club to demonstrate and prove a causal connection between the deficient service or the lack of personal aptitude to be a coach, and the failure of the coached athlete.[554] Even if the club succeeds in proving this, it will be regarded as unreasonable for the club to wait until the end of the period only in exceptional cases (serious objective breaches).[555] All in all, failure on the part of the coach plays only a minor role as a ground for (a valid) dismissal.[556] Economic aspects (e.g., relegation to a lower league) are generally not suited to provide justification in relation to a termination for cause.[557]

c. Termination by the Athlete/Coach

163. Of course, the employee can also terminate the contract for cause. This is of particular importance in cases where the athlete wishes to transfer to another club, but his club disagrees.[558] Termination for cause will often be possible where the club is in continuous and considerable default of payment. A termination is more difficult to justify where the athlete is of the opinion that he has not been selected often enough.[559] Where differences relating to the focus and method of training and the athletes' equipment arise, the circumstances of each single case are decisive, § 626(1) BGB. However, there is usually no contractual obligation upon the club to provide certain equipment.[560] Ultimately, where grave differences between club and trainer arise, the parties are most likely to mutually terminate the contract.

4. Period for Filing an Action in Employment Relationships

164. In order to provide prompt assurance for the club as to whether the employment relationship has been terminated or not,[561] it is incumbent upon the employee under §§ 13(1) sentence 2, 4 sentence 1 KSchG to file a legal action against written notice of termination within three weeks of its receipt. Otherwise, according to §§ 13(1) sentence 2, 7 KSchG, the notice is considered legally effective (apart

552. Küpperfahrenberg, *Die arbeitsrechtliche Stellung von Spielern und Trainern im Lizenzfußball*, 2004, 197.
553. BAG, Sp*u*Rt 1996, 21 at 23; Bauer/Pulz, Sp*u*Rt 2001, 56.
554. Borggräfe, Sp*u*Rt 2006, 233 at 236.
555. Küpperfahrenberg, *Die arbeitsrechtliche Stellung von Spielern und Trainern im Lizenzfußball*, 2004, 197.
556. See Grunsky, *Vertrags- und arbeitsrechtliche Probleme des Fußballtrainers im Amateur- und Profibereich*, in: Württembergischer Fußballverband (ed.), Rechtsverhältnisse der Trainer und Übungsleiter, 1991, 48 at 56; Borggräfe, Sp*u*Rt 2006, 233 at 236.
557. Busch, *Das Arbeitsverhältnis des Fußballtrainers*, 2006, 298; as regards so-called relegation clauses, see Part II, Ch. 2, §1 III G 2 d.
558. See Part II, Ch. 2, §1 III J.
559. See Part II, Ch. 2, §2 III D 3.
560. See also Part II, Ch. 2, §2 III E 1.
561. MüKo/Hergenröder, 5th edition 2009, § 4 KSchG, mn. 2.

from a default of written form under § 126 BGB). This also applies to small enterprises in accordance with § 23(1) sentence 2 KSchG, where ordinary dismissals do not need to be socially justified as the number of employees is less than the required quorum.[562]

C. General Termination Protection under the KSchG

165. Under the KSchG, and contrary to the general rules of the BGB, the regular dismissal of an employee requires a ground ('social justification', § 1(1) KSchG).

1. Scope of Application

166. The KSchG requires a minimum number of employees in the club. For persons whose employment contract began prior to 1 January 2004, the minimum number required is five. For employment relationships which began after 31 December 2003, the minimum number is ten, § 23(1) sentences 1 and 2 KSchG. In the area of professional team sports at least, the KSchG is generally of application.[563] The temporal scope of application is established only after a 'waiting period' of six months. The date agreed upon for the first sports performance (e.g., first training session) is taken as the beginning of this 'waiting period'. Neither the conclusion of the employment contract nor the actual integration into the sporting organization is of relevance.[564] The requirement of social justification, however, does not apply to freelance contractors or to members of representative bodies of a legal entity (§ 14(1) KSchG).

2. Requirement of a Social Justification

167. As mentioned above, in the scope of application of the KSchG, the regular termination of an employment contract requires a social justification in terms of a behaviour-based, person-based, or operational ground, § 1(2) KSchG. A theoretically prime example of the first ground, but one which is of little relevance in practice, is a persistent refusal to work.[565] In general, a behaviour-based ground is made out where there exists an impairment of performance which is caused by the behaviour of the employee.[566] The employee must (consciously or unconsciously)[567] have breached a contractual obligation. Person-based grounds depend on the personal

562. See Part II, Ch. 2, §1 III C 1.
563. Borggräfe, Sp*u*Rt 2006, 233 at 234.
564. MüKo/Hergenröder, 5th edition 2009, § 1 KSchG, mn. 33.
565. As regards this matter, see MüKo/Hergenröder, 5th edition 2009, § 1 KSchG, mn. 229; Schaub/Linck, *Arbeitsrecht*, 14th edition 2011, § 133, mn. 20.
566. MünchHdbArbR/Berkowsky, 3rd edition 2009, § 114, mn. 3.
567. The culpability of the employee must be considered when performing the balancing of all relevant interests.

characteristics and abilities of the employee,[568] and thus have nothing to do with behaviour that can be controlled by the employee.[569] A long-term disease involving continued inability to work may be considered under this heading.[570] Termination for an operational ground is justified if the athelete's position no longer exists due to a corporate decision by the sports club,[571] and if there are no alternatives to the dismissal.[572,573] Furthermore, in the case of a dismissal for operational grounds, where there is more than one possible candidate for dismissal pursuant to § 1(3) sentence 1 KSchG, a selection must be made by reference to the criteria of age,[574] job tenure, support obligations and severe disability.[575]

In all other respects, and having regard to the grounds for the issue of termination for cause, it must be taken into account that the justification of regular terminations can be less difficult, insofar as the sports club is not obliged to explain the unacceptability of awaiting the possibility of a regular dismissal and the athlete is, in general, protected by a period of termination. Nevertheless, in the case of ordinary terminations, the *ultima ratio* principle must also be followed, according to which a dismissal is the ultimate remedy for any contract violations[576] and, therefore, transfer to another area of operations and a warning in cases of behaviour-based termination must generally be considered before this step is taken.[577] In sport, for example, an athlete may be transferred to an other team. It is also possible to stipulate an obligation on the part of the club to attempt to restore the ability of the athlete to perform before tendering person-based notice of termination based on the athlete's permanent inability to perform.[578] This can occur in cases where an illness is due to excessive fielding of the athlete by the sports club or other operational circumstances.[579]

568. Schaub/Linck, *Arbeitsrecht*, 14th edition 2011, § 131, mn. 1; MüKo/Hergenröder, 5th edition 2009, § 1 KSchG, mn. 129.
569. MüKo/Hergenröder, 5th edition 2009, § 1 KSchG, mn. 125.
570. Schaub/Schaub, *Arbeitsrecht*, 14th edition 2011, § 131, mn. 32; MüKo/Hergenröder, 5th edition 2009, § 1 KSchG, mn. 175 et seq.
571. MüKo/Hergenröder, 5th edition 2009, § 1 KSchG, mn. 285.
572. MüKo/Hergenröder, 5th edition 2009, § 1 KSchG, mn. 298.
573. See also Schaub/Linck, *Arbeitsrecht*, 14th edition 2011, § 134, mn. 1 et seq.
574. In the opinion of the BAG, having regard to age does not stand in opposition to the prohibition of discrimination on the grounds of age set out under EU law (see Part II, Ch. 2, §1 II C), as long as it is justified, based on legitimate objectives, AP § 1 KSchG 1969 Betriebsbedingte Kündigung no. 169 = NZA 2008, 405 at 407; BAGE 123, 160 at 172 = NZA 2008, 103 at 107; for another opinion, see Kaiser/Dahm, NZA 2010, 473.
575. See Thüsing/Wege, RdA 2005, 12 et seq.; Schaub/Linck, *Arbeitsrecht*, 14th edition 2011, § 135. "Severe disability" refers to the recognition as severly disabled person under public law (see Part II, Ch. 2, §1 II B).
576. See BAG, NJW 1981, 298 at 300; NZA 2005, 1289 at 1291.
577. MüKo/Hergenröder, 5th edition 2009, § 1 KSchG, mn. 93; Schaub/Linck, *Arbeitsrecht*, 14th edition 2011, § 133, mn. 4.
578. MüKo/Hergenröder, 5th edition 2009, § 1 KSchG, mn. 100.
579. See Eich, BB 1988, 197 at 205.

3. Period for Filing an Action in Employment Relationships

168. The period specified in § 4 sentence 1 KSchG[580] for filing an action also applies in cases of regular termination of employment contracts.

D. General Protection against Dismissal outside the KSchG

169. Outside of the scope of application of the KSchG, dismissals are also gauged against the general principle of utmost good faith pursuant to § 242 BGB, and that of *bonos mores* pursuant to § 138 BGB. Even if the application of the KSchG is not established due to the company falling below the necessary size, or a failure to fulfil the six months 'waiting period', the employer is not entitled to tender notice of dismissal arbitrarily. Occupational freedom, which is protected by Article 12(1) GG, is of particular relevance here for both employer and employee. This affects contractual relationships indirectly, by means of the aforementioned blanket clauses of §§ 138, 242 BGB.[581] In order to prevent the circumvention of the legal assessments of the KSchG, the invalidity of a termination can be made out only in extreme cases; for instance, dismissal on grounds of homosexuality[582] or for the refusal of advances.[583] § 242 BGB also grants a certain minimum level of social protection; for example, the dismissal for a minor error of an employee who had worked for years without giving cause for complaint must also be regarded as being invalid.[584] The ground for termination stated by the employer has to 'make sense' in some way.[585]

E. Dismissal Pending Change of Contract

170. The issue of dismissal pending a change of contract must also be dealt with. This is a possibility for the employer to change certain employment conditions unilaterally. The employer can cancel the employment contract on the condition that the employee rejects the continuation of the employment under the changed terms, or can tender unconditional notice of termination combined with an offer to conclude a new employment contract. Thus, it is, for example, possible that an athlete or coach is no longer employed in the license division, but rather in the amateur division of the sports club. To spare the employee the dilemma between simply accepting the will of the employer or putting his job at risk by refusing the altered conditions and subjecting himself to employment protection proceedings,[586] § 2 KSchG allows him to accept the offer under the social justification *proviso* of

580. See above, Part II, Ch. 2, §1 III B 4.
581. MüKo/Hergenröder, 5th edition 2009, Einleitung zum KSchG, mn. 15.
582. BAGE 77, 128 = NZA 1994, 1080.
583. Krause, *Arbeitsrecht*, 2nd edition 2011, 236.
584. BAG, NZA 2004, 1296; Krause, *Arbeitsrecht*, 2nd edition 2011, 268.
585. BAG, NZA 2004, 1296.
586. Krause, *Arbeitsrecht*, 2nd edition 2011, 310.

the alteration desired by the employer, which will subsequently be legally reviewed. If the alteration is found to be justified, the contract continues to exist under the altered conditions. Otherwise the contract returns to its original form. The court only has to review the social justification of the alteration to the contract,[587] which is generally easier to demonstrate than the social justification of a complete termination of the employment relationship. This also applies in the case of complete rejection of the alteration offered by the employee, as otherwise the employer would have to justify termination in a form which he did not intend.[588] However, the employer cannot achieve a milder test by making an offer which he has to have assumed the employee will not accept. The matter of whether it was fair to expect the employee to accept the offered alterations (i.e., if they were necessary) will also be reviewed.[589] A termination pending a change of contract in order to lower the employee's remuneration is possible only under very strict preconditions; for instance, if the existence of the club would be endangered by continued payment of the agreed remuneration. A decrease in remuneration may, for example, be necessary in the event of relegation to a lower league.[590] As regular termination is usually impossible in the area of sports due to time limitations, the only possibility here is a termination for cause pending change of contract, which is more difficult to justify.

F. Special Termination Protection

171. In addition to general termination protection pursuant to § 1(1) KSchG, German law contains a further set of specific restrictions on the termination of employment contracts. Freelance contracts do not fall under their scope of application.

The first provision which must be cited is § 9(1) *Mutterschutzgesetz* (Protection of the Working Mother Act, MuSchG), which prohibits the dismissal of a woman during pregnancy, or within four months of childbirth if the employer was aware of the pregnancy or childbirth, or if he was informed within two weeks of dismissal.

Furthermore, dismissal of a person recognized by the state as severely disabled[591] is subject to prior consent by the integration department in accordance with § 85 SGB IX.

Finally, in the scope of application of the *Betriebsverfassungsgesetz* (Works Constitution Act, BetrVG),[592] which allows the participation of employees in the management of the organization, prior to each dismissal, under § 102(1) sentence 1 BetrVG, the representative body (the so-called *Betriebsrat*, works council) has the

587. MüKo/Hergenröder, 5th edition 2009, § 2 KSchG, mn. 75.
588. MüKo/Hergenröder, 5th edition 2009, § 2 KSchG, mn. 70.
589. MüKo/Hergenröder, 5th edition 2009, § 2 KSchG, mn. 75; see also Staudinger/Neumann, BGB, revised edition 2011, Vorbemerkungen zu §§ 620 ff., mn. 59.
590. Busch, *Das Arbeitsverhältnis des Fußballtrainers*, 2006, 298 et seq.
591. A person is considered severely disabled if she has a level of disability of over 50 as set out in § 2(2) SGB IX.
592. *Betriebsverfassungsgesetz* (Works Constitution Act) of Jan. 15, 1972 as amended and promulgated on Sept. 25, 2001, BGBl. I-2001, 2518, with amendments.

right to make representations to the employer; otherwise the dismissal is invalid (§ 102(1) sentence 3 BetrVG). Members of works councils can be dismissed for good cause only, pursuant to §§ 15(1) sentence 1 KSchG, 626(1) BGB, and the tendering of notice to them, dealt with in § 103(1) BetrVG, requires not only the hearing, but also the consent of the works council. However, the regulations of the BetrVG are of no relevance in the area of license sports, since it appears that works councils do not (yet) exist in this arena.[593]

G. Stipulation of a Time Limit

172. As previously mentioned,[594] the expiration of a stipulated time limit plays a substantially greater role than notice of termination of the sport service contract. However, the stipulation of a time limit upon employment contracts in Germany is subject to the requirements of §§ 620(3) BGB; 14 et seq. TzBfG. These provisions of the TzBfG were introduced as a result of the Council Directive 1999/70/EC, and are intended to combat the abuse of successive fixed-term employment contracts.[595] Pursuant to § 3(1) sentence 1 TzBfG, this includes both temporary employment contracts (time-limited) and those entered for a specific purpose (purpose-limited). In accordance with § 21 TzBfG, the regulations of §§ 14 et seq. TzBfG also apply generally to employment contracts which are subject to a resolutive condition. Again, the TzBfG does not apply to the stipulation of a time limit upon freelance contracts, which is, in principle, possible in individual contracts without restrictions pursuant to § 620(1) BGB and subject to the principles of immorality and good faith only, §§ 138, 242 BGB. The TzBfG does not protect persons similar to employees[596] either.[597] In the following, after a brief general introduction, the extent to which these regulations are important for sport is elaborated.

1. Requirements of Permissible Stipulations of a Time Limit

173. The admissibility of a time limit must be reviewed in relation to material and formal provisions.

a. Material Ground

174. The stipulation of a time limit in an employment contract generally requires a material ground, § 14(1) sentence 1 TzBfG. § 14(1) sentence 2 TzBfG provides a list of permissible grounds for the stipulation of a time limit, of which, in sport, § 14(1) sentence 2 no. 4 TzBfG assumes the most prominent role (see below).

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593. Rüth, Sp*u*Rt 2005, 177 and below Part II, Ch. 3, §2 II A.
594. See above Part II, Ch. 2, §1 III.
595. Feuerborn, *Sachliche Gründe im Arbeitsrecht*, 2003, 459; MüKo/Hesse, 5th edition 2009, § 14 TzBfG, mn. 3.
596. Part II, Ch. 2, §1 I E.
597. MüKo/Hesse, 5th edition 2009, § 620 BGB, mn. 7.

This list is not exhaustive. The question as to whether a particular consideration can be classified as a material ground in terms of § 14(1) sentence 1 TzBfG must be answered based on a balancing of the employer's and the employee's interests relevant to the stipulation of a time limit, gauged in accordance with objective, generalizing criteria.[598] This question also aligns itself with the legal assessments of the KSchG[599] and with the question of whether the ground can be evaluated as resembling those enumerated in § 14(1) sentence 2 TzBfG.[600]

b. Stipulation of a Time Limit Without Requiring a Material Ground

175. As an exception, § 14(2) sentence 1 TzBfG allows the employer to set a time limit of up to two years without the inclusion of a material ground. In order to avoid an abuse of the provision by means of a series of successive time limits, however, § 14(2) sentence 2 TzBfG stipulates that a material ground for the time limit is only dispensable if a previous employment contract between that parties has ended not less than three years before the conclusion of the new contract.[601] If, however, a material ground exists, the repeated stipulation of a time limit beyond two years is possible, although the strictness of the test for a material ground increases as the duration does.[602] § 21 TzBfG stipulates that if a resolutive condition is agreed upon, the stipulation of a time limit without a material ground pursuant to § 14(2) TzBfG does not apply.[603] In these cases, therefore, a material ground must always be provided.[604]

c. Form

176. While the informal conclusion of an employment contract is also possible in principle, the stipulation of a time limit (and only of the time limit as such) pursuant to § 14(4) TzBfG must be in written form. It is not necessary to put the ground for the stipulation of the time limit in writing, as long as it is a 'calendar-limited' contract. As regards purpose-limited contracts, however, the purpose of the employment must be given, since the duration of the contract is otherwise undefinable.[605]

598. Feuerborn, *Sachliche Gründe im Arbeitsrecht*, 2003, 327.
599. Feuerborn, *Sachliche Gründe im Arbeitsrecht*, 2003, 457.
600. MünchHdbArbR/Wank, 3rd edition 2009, § 95, mn. 104.
601. BAG, NZA 2011, 905; cf. Höpfner, NZA 2011, 893 and Kuhnke, NJW 2011, 3131. Pursuant to the wording of the cited rule, a time limit without material ground is only permissible if there has been no employment contract between the parties 'before'. The result of the BAG is therefore remored from the telos of the rule.
602. MüKo/Hesse, 5th edition 2009, § 14 TzBfG, mn. 16.
603. Ascheid/Preis/Schmidt/Backhaus, Großkommentar zum Kündigungsrecht, 4th edition 2011, § 21 TzBfG, mn. 10.
604. ErfK/Müller-Glöge, 12th edition 2012, § 21 TzBfG, mn. 3.
605. MüKo/Hesse, 5th edition 2009, § 14 TzBfG, mn. 110.

2. Time-Limited Contracts with Athletes

177. A list of grounds relating to the admissibility of a stipulation of time-limits in athlete contracts is provided below.

a. Need of the Public for Variety

178. One might think of comparing the coach to the artistic director of a theatre. Here, it could be considered that a coach, similar to a director, must have the possibility of replacing participants in order to satisfy the spectators' need for variety.[606] As regards the performance of the athlete, the 'specific nature of the performance' (*Eigenart der Arbeitsleistung*), pursuant to § 14(1) sentence 2 no. 4 TzBfG would be the permissible ground for the stipulation of a time limit.[607] It can be countered, however, that sport differs from a theatre play due to the fact that variety is already present because of its momentum, and that the two cannot, therefore, be compared with one another.[608] Besides, sport fans are able to identify with the athletes to a greater extent than they are with actors (at least if 'their' sports club/athlete succeeds), which is proven by the marketing revenues in sport. This very potential of identification would be prevented by constant variation, which is another reason why the cases cannot be compared.[609] Indeed, the popularity of an athlete is one criterion for his value for the club. Nevertheless, motivation and the efficiency of the athlete are of significant importance,[610] so that the need of the public for variety (if it exists at all) must be given less weight in the balancing of interests.

b. Tactical Flexibility of the Coach/Club

179. Another 'specific nature of the performance' in sport according to § 14(1) sentence 2 no. 4 TzBfG could be the need to protect the tactical flexibility of the club/coach.[611] This is more likely to be the case in team sports than in individual sports. In the latter case, however (e.g., in motor sports) one could also imagine that the sports club (or rather, the racing team) would prefer to keep the option open to hire a driver whose driving is, depending on the circumstances of each individual case, aggressive or careful. As regards the question as to whether this argument is valid in the case of team sports, one must consider that the needs of the club are no longer of great significance if the player in question can adapt himself to various different strategies.[612] This concept can, at least rudimentarily, also be applied in the

606. Adolphsen/Nolte/Lehner/Gerlinger/Wüterich/Breucker, *Sportrecht in der Praxis*, 2011, mn. 630. § 14(1) sentence 2 no. 4 TzBfG includes the example of an artistic director in the explanatory memorandum, BT-Drs. 14/4374, 19.
607. MüKo/Hesse, 5th edition 2009, § 14 TzBfG, mn. 40; Schamberger, Sp*u*Rt 2002, 228 at 230.
608. Beckmann, P.-W./Beckmann, J.F., Sp*u*Rt 2011, 236 at 238 et seq.
609. Hausch, Sp*u*Rt 2003, 103.
610. LAG Düsseldorf, LAGE § 620 BGB Bedingung no. 5.
611. Schamberger, Sp*u*Rt 2002, 228 at 230; similarly Neuß, RdA 2003, 161 at 169.
612. Hausch, Sp*u*Rt 2003, 103 at 104.

case of individual athletes. Nevertheless, it is a characteristic of sporting performance that it depends significantly on the personality of the athlete, and that the creation of a 'harmonious' organization[613] can rarely be consistently achieved by implementing a policy that does not suit the athlete. This is exactly the matter taken into account by § 14(1) sentence 2 no. 4 TzBfG.[614]

c. The Athlete's Decreasing Ability to Perform

180. The athlete's decreasing ability to perform as he gets older is a possible permissible ground for the stipulation of a time limit. Since § 14(1) TzBfG adheres to the values laid out in the KSchG,[615] it is legally problematic that the performance owed by the employee hinges on both the work set by the employer by the exercise of his managerial authority, and on the personal, subjective capabilities of the employee.[616] The employee must complete the tasks assigned to him as competently as he can.[617] Interpreting the athlete's inevitable decrease in capacity as a ground in support of the stipulation of a time limit would defeat these principles. It is also important to note that it is difficult to measure the quality of work objectively, which is why it is almost impossible to conclude a contractual agreement based on quality. This may, however, be possible in track and field athletics if one observes the athlete's results. In the area of team sports, despite the abundance of statistics (especially in basketball or ice hockey), this is more difficult, as the circumstances relevant for the individual performance are affected by many factors which make the determination of an objective average more difficult. The *Landesarbeitsgericht Nürnberg* (Nuremberg Regional Labour Court, LAG) has, however, approved the presumption of deterioration in performance as a permissible reason for a time limit. According to the court, the parties to the employment contract are entitled to presume that the performance required of a football player in the first or second league will no longer be possible once he reaches the age of 34-and-a-half.[618] The court also held that 'professional football players over the age of 30 have passed their "performance peak" and are more injury-prone'. There, the time limit would be an advantage for the player because the club cannot give notice of termination for the duration of the contract.[619] This cannot be supported for the aforementioned reasons.[620]

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613. Neuß, RdA 2003, 161 at 169.
614. Neuß, RdA 2003, 161 at 169; the same conclusion is reached by MünchHdbArbR/Gitter, 2nd edition 2000/2001, § 202, mn. 90.
615. Feuerborn, *Sachliche Gründe im Arbeitsrecht*, 2003, 457.
616. Beckmann, P.-W./Beckmann, J.F., Sp*u*Rt 2011, 236 at 238 et seq.
617. BAG, NZA 2004, 784 at 786 = NJW 2004, 2545 at 2546 with additional references. If the employer demonstrates facts that show that the performance of the employee in question clearly falls short of that of comparable employees, thereby demonstrating that the employee has underachieved over an extended period of time, it must be assumed that the athlete is not fulfilling his potential. In this case, the employee is obliged to prove the opposite, BAG, l.c.
618. The ruling provides no information as to whether this assumption was based on objective facts at the time that the limitation was set out (e.g., injuries or a continuing inability to play).
619. LAG Nürnberg, Sp*u*Rt 2010, 33 at 34; Berkemeyer, Sp*u*Rt 2010, 8 at 9.
620. For an alternative view, see Adolphsen/Nolte/Lehner/Gerlinger/Wüterich/Breucker, *Sportrecht in der Praxis*, 2011, mn. 629.

The granting of permission for the stipulation of a time limit[621] is also problematic due to the prohibition of discrimination based on age[622] under EU law, which indirectly forbids inconsistent generalization. Even though physical fitness must be classified as a material and decisive requirement of being a professional athlete (see in this context § 8(1) AGG, and the comparatively mild possibility of justification in § 10 sentence 1 AGG, under which the only criterion of justification is the adequacy of means when following a legitimate purpose), it is innate not only to sport, but potentially any profession, that the physical ability of the employee will *eventually*, *at some point in time*, not suffice. In this respect, it is crucial that, in principle, the EU directive mentioned in principal excludes the possibility of a blanket statement which holds that the employee is no longer capable of delivering a sufficient performance once he has reached a certain age.[623] Careers are, in general, increasing in duration and sport is no exception. Nevertheless, some legal scholars are of the opinion that the guarantee that athletes beyond a certain age can no longer deliver a sufficient performance justifies the stipulation of a time limit for employment contracts.[624] In the author's view, this assumption must be based on concrete, objective facts at the time at which the limit is stipulated[625] so that the prohibition of discrimination on grounds of age is not violated.[626]

d. Relegation and License Revocation

181. It is also possible to create a clause which states that the employment contract will come to an end if the team is relegated to a lower league, or if the re-granting of a license to the club is refused. Such clauses are inconsistent with the TzBfG insofar as they shift the operating risk completely on to the athlete; a risk which the club itself generally has to bear.[627] This can be a different matter in some cases; for instance, if the clause was agreed on in the objective interest of the athlete, or if it was requested by him. It is necessary to examine whether the athlete would have agreed to conclude the contract had the clause not been inserted.[628]

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621. Similarly, Berkemeyer, Sp*u*Rt 2010, 8 at 9 and Beckmann, P.-W./Beckmann, J.F., Sp*u*Rt 2011, 236 at 240.
622. See ECJ, C-144/04, NZA 2005, 1345 = NJW 2005, 3695 – Mangold; ECJ, C-411/05, NZA 2007, 1219 = NJW 2007, 3339 – Palacios; BAG, NZA 2006, 1162 = BB 2006, 1858.
623. Schlachter, *Altersgrenzen angesichts des gemeinschaftsrechtlichen Verbots der Altersdiskriminierung*, in: Richardi/Reichold (eds.), Altersgrenzen und Alterssicherung im Arbeitsrecht, Gedenkschrift Blomeyer, 2003, 355 at 360; Linsenmaier, Sonderbeilage zu (= cross-title to) RdA 2003, edition 5, 22 at 31 et seq., who would only allow a generalised approach if dealing with certain occupations that carry particular risk for third parties.
624. Hausch, Sp*u*Rt 2003, 103 at 104.
625. In accordance with the established practice of the courts, and prevailing opinion in legal commentary, this is the decisive point in time, MünchHdbArbR/Wank, 3rd edition 2009, § 95, mn. 41.
626. Similarly, Berkemeyer, Sp*u*Rt 2010, 8 at 10.
627. BAG, NJW 1982, 788 at 790 on license revocation; LAG Düsseldorf, LAGE, § 620 BGB Bedingung no. 5 on relegation clauses; MünchHdbArbR/Gitter, 3rd edition 2009, § 202, mn. 91.
628. LAG Düsseldorf, Sp*u*Rt 2010, 260 at 261.

e. Summary

182. In the relevant jurisprudence and legal commentary, it is, for various reasons, held that the time- or purpose-based limitation of athletes' work contracts is possible. However, it remains necessary to examine the circumstances of each individual case.

3. Coaches

183. As the regulations of the KSchG normally prevent dismissal on grounds of sporting failure,[629] it is a frequent occurrence that contracts between the club and the coach are time-limited.[630] Here, too, it is debatable whether or not the stipulation of a time-limit can be regarded as being valid in light of the general requirement for a ground pursuant to § 14(1) sentence 1 TzBfG.

a. Deterioration

184. The most frequently stated material ground is so-called deterioration. This term relates to the fact that, after a certain period of time, the coach's ability to motivate the athletes entrusted to his care to deliver peak performances diminishes.[631] This can be due to the decreasing effect of certain motivational techniques, or to external factors; for example, public opinion.[632] Legally, the material ground is, again, linked to the 'characteristic of the performance' of the coach in § 14(1) sentence 2 no. 4 TzBfG.[633] The ground of deterioration is also acknowledged in the relevant jurisprudence, at least in principle.[634] However, limitation on grounds of deterioration is only possible if it is appropriate to prevent the risk of deterioration of the relationship between coaches and athletes. Accordingly, a limitation period of three years is not justified on grounds of deterioration if the retention period of the athletes under the coach's care is only two or three years, leading to a constant change of protégés for the coach.[635] This is also the case if the coach does not establish a personal relationship with the athlete, for example, a talent scout.[636]

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629. BAG, Sp*u*Rt 1996, 21 at 23; Bauer/Pulz, Sp*u*Rt 2001, 56; see above Part II, Ch. 2, §1 III B 3 b.
630. Dieterich, NZA 2000, 857 at 858.
631. For greater detail, see Busch, *Das Arbeitsverhältnis des Fußballtrainers*, 2006, 254 et seq.; Bauer/Pulz, Sp*u*Rt 2001, 56; Dieterich, NZA 2000, 857 at 858; Fenn, JZ 2000, 347 et seq.
632. Dieterich, NZA 2000, 857 at 858.
633. Bauer/Pulz, Sp*u*Rt 2001, 56; PHBSportR-Fritzweiler, part 3, mn. 69.
634. BAG, NZA 1999, 646 at 647 = Sp*u*Rt 1999, 253; NZA 2000, 102 at 102 et seq. = Sp*u*Rt 1999, 254; BAG, decision June 19, 1986, Sp*u*Rt 1996, 21 at 23; Fenn, JZ 2000, 347 at 352; as against this, see Beckmann, P.-W./Beckmann, J.F., Sp*u*Rt 2011, 236 at 238 et seq.
635. BAG, NZA 1999, 646 at 647 = Sp*u*Rt 1999, 253 at 254; see Busch, *Das Arbeitsverhältnis des Fußballtrainers*, 2006, 257; Adolphsen/Nolte/Lehner/Gerlinger/Wüterich/Breucker, *Sportrecht in der Praxis*, 2011, mn. 626. Similarly, Heising, *Der Bestandsschutz des Trainervertrags im Spitzensport*, 2006, 200 et. seq., who suggests that the time-limit should have legal effect only if the trainer is, in addition, granted an option to continue in his position if no deterioration should occur.
636. Persch/Weber, Sp*u*Rt 2009, 144 at 145, who, in general, deny that deterioration is a permissible ground for limitation.

b. Relegation Clauses

185. Coaching contracts often contain clauses which stipulate that the contract will only be valid if the team plays in the first or second league (so-called relegation clauses).[637] The provision of a material ground, as required by § 14(1) TzBfG, must be applied to this resolutive condition subsequent under § 21(1) TzBfG. From the club's perspective, the relegation clause enables it to part ways with the coach in cases of sporting failure. This is a contradiction to the fundamental orientation of labour law which provides that the employer has to bear the risk of a lack of 'success'.[638] According to some legal scholars, improper transfer of the burden of operational risk can lead to the relegation clause being found to be null and void in the case of both the coach[639] and the athlete.[640]

In the jurisprudence of the *Bundearbeitsgericht* (Federal Labour Court, BAG), this issue was, until now, viewed from a different perspective. From the coach's point of view, such a clause can be useful (and thus, according to legal scholars, effective) if his training of a third- or fourth-class team did not live up to his previous reputation and if he, therefore, faced a loss of reputation.[641] The actual ground for justification of the clause would be the coach's own request, which can be explicit[642] or assumed on the basis of objective evidence, e.g. which teams were previously supervised by the coach concerned, the level of success they achieved and the attention received by the coach in the sports media.[643]

c. Summary

186. Thus, the limitation of coaching contracts based on deterioration is, in principle, possible, while the resolutive condition of relegation of the team to a lower league is generally invalid, unless this clause was optional or proven to be in the interest of the coach.

H. Legitimacy of a Long-Term Contractual Obligation of the Athlete by the Club

187. Judicial review of limitations can be based not only on the athlete's interest in continued employment, but also on protection of his occupational mobility. Specifically, the question arises as to whether the trend for the long-term commitment of professional football players (and possibly other athletes), popular since the *Bosman* ruling,[644] is compatible with the mandatory provisions of labour law.

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637. BAG, NZA 2003, 611 at 612 = Sp*u*Rt 2003, 122 at 123.
638. Busch, *Das Arbeitsverhältnis des Fußballtrainers*, 2006, 254.
639. Busch, *Das Arbeitsverhältnis des Fußballtrainers*, 2006, 287 with further references; as regards athletes in general, see MünchHdbArbR/Gitter, 2nd edition 2000/2001, § 202, mn. 91.
640. See Part II, Ch. 2, §1 II B 3 a iii.
641. Busch, *Das Arbeitsverhältnis des Fußballtrainers*, 2006, 287 et seq.
642. BAG, NZA 2003, 611 at 613 = Sp*u*Rt 2003, 122 at 124; Adolphsen/Nolte/Lehner/Gerlinger/Wüterich/Breucker, *Sportrecht in der Praxis*, 2011, mn. 627.
643. BAG, NZA 2003, 611 at 615 = Sp*u*Rt 2003, 122 at 125.
644. ECJ, C-415/93, O.J. 1995-I, 4921 = NJW 1996, 505 = Sp*u*Rt 1996, 59.

§ 15(4) TzBfG (for employment contracts) and § 624 BGB[645] (for freelance contracts), which is identical in content, are helpful in this regard; pursuant to these provisions, contractual relationships for an agreed term of more than five years can be terminated after the expiration of this period by giving six months' notice. However, agreements of a shorter duration (of about three or four years) in accordance with § 138(1) BGB can also be found to be unconscionable.[646] Regard must be had to Article 12(1) GG (occupational freedom) which protects the interests of the (young) athlete as regards professional mobility on the one hand (e.g., for the purpose of, moving to a more successful club), and, on the other – particularly in team sports – the interest of the club in maintaining the composition of a team which it has worked hard to put together.[647] One possible reason to find the limitation void would be the club's insistence upon the limitation for the sole purpose of securing a transfer fee.[648]

Furthermore, clauses pursuant to which the employment contract is renewed for another year at the request of the club,[649] or renewed automatically after a certain number of games or appearances, must be mentioned.[650] These are invalid pursuant to § 134 BGB, as they breach § 622(6) BGB[651] since they enable the club to renew the contract unilaterally by arranging for the condition to be 'triggered' after a certain number of appearances, therefore binding the athlete for longer than the employer, regardless of his own wishes.[652] The jurisprudence in this area holds, in part, that such a clause is effective in law.[653] Another view deems that such clauses – as long as they are not part of a standard contract – in turn lead to a right of the athlete to opt for a renewal of the contract.[654,655] § 622(6) BGB does not apply to freelance contractors.[656]

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645. MüKo/Henssler, 5th edition 2009, § 624 BGB, mn. 3.
646. Staudinger/Preis, BGB, revised edition 2011, § 622 BGB, mn. 50; MüKo/Hesse, 5th edition 2009, § 622 BGB, mn. 88 et seq.; see BAG, AP no. 7 to § 611 BGB Treuepflicht.
647. Schamberger, Sp*u*Rt 2002, 228 at 232.
648. Schamberger, Sp*u*Rt 2002, 228 at 230 et seq.
649. ArbG Nürnberg, Sp*u*Rt 2007, 213 with dissenting comment by Lindhorst; of a similar opinion Menke, NJW 2007, 2820 at 2821 et seq.
650. Wertenbruch, Sp*u*Rt 2004, 134.
651. The regulation prohibits agreements which set out a longer notice period for the employee than for the employer.
652. Wertenbruch, Sp*u*Rt 2004, 134 at 135, 137; Lange, Sp*u*Rt 2011, 98 at 99.
653. ArbG Nürnberg, Sp*u*Rt 2007, 213 with dissenting comment by Lindhorst. The court denied that a violation of § 622(6) BGB had taken place, on the grounds that this provision regulates only the termination of the employment contract and does not rule the option of extending the term of the same. Bearing the purpose of the provision in mind (i.e., to avoid the unilateral commitment of the employee the contract), in the author's view, this argument should be rejected. See Kindler, NZA 2000, 744 et seq.
654. See Part II, Ch. 2, §2 II. If the contract is a standard-form contract, the clause will have no effect, pursuant to §307(1) BGB, ArbG Ulm, Sp*u*Rt 2009, 172 at 173.
655. ArbG Ulm, Sp*u*Rt 2009, 172 at 173: for a different view Adolphsen/Nolte/Lehner/Gerlinger/Wüterich/Breucker, *Sportrecht in der Praxis*, 2011, mn. 652; Lange, Sp*u*Rt 2011, 98 at 99.
656. See MüKo/Hesse, 5th edition 2009, § 622 BGB, mn. 6, 10.

I. Bankruptcy

188. Furthermore, in light of the commercialization of sport, bankruptcy[657] of an employer will continue to have an increasing effect on sports performance relationships. The contract is not affected by initiation of the insolvency procedure as such, § 108(1) sentence 1 *Insolvenzordnung* (Insolvency Code, InsO).[658] Any entitlements to remuneration which were gained prior to the initiation of the procedure must be paid out proportionally as so-called bankruptcy claims (*Insolvenzforderungen*, §§ 108(3), 38 InsO); those which were established after initiation must be paid out in advance from the insolvency estate as a so-called mass claim (*Masseforderungen*, § 55(2) sentence 2 InsO).[659] As regards the categorization of the entitlements established in the period before or after initiation of insolvency proceedings, problems – similar to those in cases regarding the calculation of claims for holiday pay or claims for continued pay in the event of injury[660] – can arise.[661] Upon initiation of insolvency proceedings, the insolvency administrator takes on the position of the employer, § 80(1) InsO.[662] § 113 sentence 2 InsO takes into account the particular circumstances of the contracting parties as it allows a period of up to three months for (mutual) ordinary notice of termination of the employment contract, leaving shorter (contractual or statutory) notice periods unaffected. § 113(1) InsO declares time-limits and contractual exclusions of termination void.[663] § 113 InsO itself, however, does not give any grounds for dismissal, which is why the provision relating to social justification contained in § 1 KSchG must be taken into account.[664] However, in these cases, dismissals based on operational grounds are generally likely to be possible. Furthermore, the athlete (and not the employer) is entitled to compensation for damages arising out of the untimely cancellation of the contract.[665] Finally, according to § 320 BGB, the athlete can refuse to participate in matches or training sessions if, for instance, the employer does not fulfil his obligation to remunerate him.[666]

If the employer is unable to remunerate the athlete, the athlete, as an employee, can apply for bankruptcy benefits (*Insolvenzgeld*) from the *Bundesagentur für Arbeit* (Federal Employment Office, BA) to cover a period of three months prior to bankruptcy, § 165(1) sentence 1 *Drittes Buch Sozialgesetzbuch* (Social Security

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657. As regards ascertaining the bankruptcy of a Football-Bundesliga-Club, see König/de Vries, Sp*u*Rt 2006, 96 at 97; also Zeuner/Nauen, NZI 2009, 213.
658. Walker, *Arbeitsrechtliche Folgen des Lizenzentzugs*, in: Heermann (ed.), Lizenzentzug und Haftungsfragen im Sport, 2005, 50; Stiller, NZA 2005, 330 at 331; MüKoInsO/Löwisch/Caspers, 2nd edition 2008, § 113, mn. 3.
659. Walker, *Arbeitsrechtliche Folgen des Lizenzentzugs*, in: Heermann (ed.), Lizenzentzug und Haftungsfragen im Sport, 2005, 52 et seq.; Kreißig, *Der Sportverein in Krise und Insolvenz*, 2004, 173.
660. See Part II, Ch. 2, §2 III D 4 and F 1 a.
661. Kreißig, *Der Sportverein in Krise und Insolvenz*, 2004, 178 et seq.
662. Kreißig, *Der Sportverein in Krise und Insolvenz*, 2004, 173.
663. MüKoInsO/Löwisch/Caspers, 2nd edition 2008, § 113, mn. 17.
664. MüKoInsO/Löwisch/Caspers, 2nd edition 2008, § 113, mn. 20; Kreißig, *Der Sportverein in Krise und Insolvenz*, 2004, 174.
665. For more details, see Walker, *Arbeitsrechtliche Folgen des Lizenzentzugs*, in: Heermann (ed.), Lizenzentzug und Haftungsfragen im Sport, 2005, 56 et seq. with additional references.
666. Kreißig, *Der Sportverein in Krise und Insolvenz*, 2004, 177 et seq.

Code, Book III, SGB III). Bankruptcy is usually taken to have begun with the initiation of the bankruptcy proceedings, or with the rejection of the petition for bankruptcy due to insufficient funds to bear the costs of the proceedings. For the aforementioned period, the BA pays the athlete's salary, which is, however, limited to the contribution assessment ceiling of the statutory pension scheme as gross amount, § 167(1) SGB III.[667]

J. Transfer

189. The transfer of the athlete is far more a ground for terminating the employment contract than a method of doing so. As part of the transfer, a cancellation agreement between the athlete and his former sports club is concluded[668] in order to enable the athlete to conclude a contract with his new club without incurring any penalties. Pursuant to § 623 BGB, the cancellation agreement for an employment contract must be in written form. The federations stipulate time restrictions by permitting transfers only at certain times; in football, for example, transfers can occur in the middle of the season, or at its end.[669] This is necessary in order to guarantee equal opportunities and the time-limits must, therefore, in general, be accepted.[670] As regards restrictions on professional mobility (transfer fees) the *Bosman* ruling[671] must be mentioned. This decision is already the central subject of numerous publications in German legal scholarship.[672] Therefore, it is only necessary to state that, on the whole, it has been met with approval.[673] On a national level, the ruling was followed by the decision of the *Bundesarbeitsgericht* (Federal Labour Court, BAG) regarding transfer fees in ice hockey. These were declared invalid in principle for the reasons laid out in the *Bosman* ruling.[674]

In response to this, a category of compensation (so-called training and promotion compensation) according to §§ 23a, 27, 28 *DFB-Spielordnung* (Game Regulation of

667. In 2012, this amounted to EUR 5,600 per month (western German states) and EUR 4,800 per month (eastern German states), § 3(1) no. 1 and (2) no. 1 Sozialversicherungs-Rechengrößenverordnung 2012 as of Dec. 2, 2011, BGBl. I-2011, 2421.
668. Küpperfahrenberg, *Die arbeitsrechtliche Stellung von Spielern und Trainern im Lizenzfußball*, 2004, 173; Bohnau, *Der Vereinswechsel des Berufsfußballspielers in arbeitsrechtlicher Betrachtung*, 2003, 105.
669. PHBSportR-Summerer, part 2, mn. 191.
670. ECJ, C-176-96, O.J. 2000-I, 2714 = Sp*u*Rt 2000, 151 at 153 = EuZW 2000, 375 at 379 with remarks by Röthel – Lehtonen; Haas, in: Haas/Haug/Reschke (eds.), Handbuch des Sportrechts, B, Ch. 2, mn. 65; PHBSportR-Summerer, part 2, mn. 191; Adolphsen/Nolte/Lehner/Gerlinger/Wüterich/Breucker, *Sportrecht in der Praxis*, 2011, mn. 644.
671. ECJ, C-415/93, O.J. 1995-I, 4921 = NJW 1996, 505 = Sp*u*Rt 1996, 59 – Bosman.
672. See e.g., Haas, in: Haas/Haug/Reschke (eds.), Handbuch des Sportrechts, B, Ch. 2, mn. 67; Kelber, NZA 2001, 11; Klingmüller/Wichert, Sp*u*Rt 2001, 1; Stopper, Sp*u*Rt 2000, 1; Fischer, Sp*u*Rt 1996, 34.
673. Bohnau, *Der Vereinswechsel des Berufsfußballspielers in arbeitsrechtlicher Betrachtung*, 2003, 93.
674. BAGE 84, 344 = NZA 1997, 647 = Sp*u*Rt 1997, 94, with review by Arens, Sp*u*Rt 1997, 126; see also Bohnau, *Der Vereinswechsel des Berufsfußballspielers in arbeitsrechtlicher Betrachtung*, 2003, 99 et seq. As regards international transfers, the latest state of affairs in football was reached by the acceptance of the FIFA transfer regulations by DFL in its license regulations and by DFB in its game regulations, see Part II, Ch. 2, §3 I B 2.

the DFB, DFB-SpO former edition) and §§ 16, 17 LOS (former edition), was introduced in German football.[675] Pursuant to these provisions, when an amateur was employed for the first time as a contract or a license player,[676] a compensation of between EUR 11,250 and EUR 50,000 had to be paid to his former club(s), depending on the age and league of the player, even after his contract with the old club had been terminated. However, § 23a DFB-SpO was declared invalid in the ruling of a superior court.[677] The interference with the player's freedom of exercise of profession, which was caused by the potentially deterrent effect of compensation, was not justified since the training compensation served only the economic interests of the sports club which the player was leaving and the alleged aim of supporting the training of younger players, which was purported in order to justify the validity of the clause, was not achieved due to the random nature of the benefits. This corresponds with the jurisprudence of the *Bundesgerichtshof* (Federal Court of Justice, BGH).[678] Even if amounts of this magnitude could have had less of a deterrent effect for licensed sports clubs, it had to be assumed that §§ 27, 28 DFB-SpO would not have stood up to judicial review.[679] Anticipating this result, the highest internal-federation court of the DFB declared these regulations, as well as §§ 16, 17 LOS, invalid.[680] Thus, there are no longer any mandatory compensation regulations in relation to licensed players. The league has, however, established a solidarity fund that, under certain circumstances, pays compensation.[681]

As a result of this jurisprudence, in order for admission to the (national)[682] transfer list to occur, the updated license regulations of the *Ligaverband e.V.* (League association, a corporate member of the DFB entrusted with the organization of the licensed leagues) essentially require only that the old contract of the player no longer exists, and that any possible objections of the old club have been rejected, § 4 no. 6 LOS.[683] The same applies when a contractual player is transferred to another club and remains a contractual player, § 23 no. 2 DFB-SpO.[684] Since the purpose of such clauses is to urge the athlete to remain loyal to his contract and to prevent competing clubs from trying to poach players, they will normally be

675. PHBSportR-Summerer, part 2, mn. 194.
676. For more on these terms, see Part II, Ch. 2, §1 I B 2.
677. OLG Oldenburg, Sp*u*Rt 2005, 164.
678. BGHZ 142, 304 = NJW 1999, 3552 = Sp*u*Rt 1999, 236 with comment by Arens; see Stopper, Sp*u*Rt 2000, 1 at 3; Karakaya/Ilkin, AuR 2002, 58 et seq.; summing up Nolte/Polzin, NZG 2001, 838 at 839; likewise BGH, NJW 2000, 1028 = Sp*u*Rt 2000, 19 at 20 regarding remuneration for training in ice hockey.
679. PHBSportR-Summerer, part 2, mn. 194.
680. Federal Court of the DFB, Sp*u*Rt 2006, 262. Compensation amounting to between EUR 250 and EUR 5,000 must be paid for the transfer of an amateur who is to retain amateur status at his new club if the player's previous club does not consent to the transfer. The consent of the old club is, however, not necessary if the transfer occurs between two seasons (July 1 until Aug. 31) and the player has not been selected to play in any obligatory matches until Nov. 1, § 16 no. 3.1 DFB-SpO.
681. Krämer, Sp*u*Rt 2011, 186 at 188.
682. For a discussion of the implications of immigration law for international transfers see Part II, Ch. 2, §3 I.
683. See Küpperfahrenberg, *Die arbeitsrechtliche Stellung von Spielern und Trainern im Lizenzfußball*, 2004, 171 et seq.
684. For a discussion of the division into licensed players, contractual players and amateurs, see Part II, Ch. 2, §1 I B 2.

regarded as being reasonable.[685] Should a termination for good cause occur, its legal effect must be undisputed, or, alternatively, ascertained by a court in a final and binding manner, § 8 no. 2 LOS. In relation to licensed players, § 8 no. 3 LOS provides that a (sporting) 'good cause' is usually made out, if, at the end of the season, the player has participated in maximum four official matches.[686] In the relevant legal commentary, it is assumed that the grounds of termination for the athlete are thus extended.[687] However, the provision is only one aspect of the balancing of interests pursuant to § 626(1) BGB, and cannot act as a substitute for it.[688] § 8 no. 3 LOS itself contains a proviso in favour of statutory provisions.

190. The agreement upon transfer fees is generally considered permissible in German legal commentary,[689] while the jurisprudence of the *Bundesarbeitsgericht* (Federal Labour Court, BAG) leaves the question open.[690] If the athlete transfers to a new club, without having validly terminated the old contract, the old sports club is entitled to tender notice of termination for cause and to assert a claim for damages pursuant to § 628(2) BGB.[691] Damages can arise as a result of costs incurred by borrowing a substitute player, for example, or as a result of lost sponsorship.[692] This regulation can be waived in the case of freelance contracts. However, in employment contracts, an infringement of § 622(6) BGB will usually be made out if § 628(2) BGB is waived, as the former provision forbids the restriction of employee terminations by reference to employer terminations.[693] The LOS of the *Ligaverband* does not contain regulations regarding invalid termination of the contract.[694] The matter of whether this contradicts the FIFA Regulations on the status and transfer of players (FIFAReg) is disputed in legal commentary.[695]

The latter, or rather its implementation into national federation rules (Article 1(1) FIFAReg), is applicable in relation to the transfer of football players[696] to a foreign

685. Haas, in: Haas/Haug/Reschke (eds.), Handbuch des Sportrechts, B, Ch. 2, mn. 68.
686. Breucker/Thumm/Wüterich, Sp*u*Rt 2008, 102 at 103; there may exist exceptions in cases where the failure to be selected is due to injury, age or position of the player (substitute goalkeeper).
687. Breucker/Thumm/Wüterich, Sp*u*Rt 2008, 102 at 103.
688. See Part II, Ch. 2, §1 III B 3 a i.
689. Bohnau, *Der Vereinswechsel des Berufsfußballspielers in arbeitsrechtlicher Betrachtung*, 2003, 106; Küpperfahrenberg, *Die arbeitsrechtliche Stellung von Spielern und Trainern im Lizenzfußball*, 2004, 173; Kelber, NZA 2001, 11 at 13, 16.
690. BAG, Sp*u*Rt 1997, 94 at 97; see, however, the judgment of OLG Düsseldorf, NJW-RR 2001, 1633 = Sp*u*Rt 2001, 246, which confirms that this is permissible.
691. Breucker/Thumm/Wüterich, Sp*u*Rt 2008, 102 at 105.
692. Rüsing/Schmülling, Sp*u*Rt 2001, 52 at 54.
693. Staudinger/Preis, BGB, revised edition 2011, § 628, mn. 35. However, the provision is applicable for both parties. It reads as follows: 'If notice of termination is prompted by the conduct of the other party in breach of contract, then the other party is obliged to compensate the damage arising from the dissolution of the service relationship.'
694. Breucker/Thumm/Wüterich, Sp*u*Rt 2008, 102 at 105.
695. For supporting arguments, see Breucker/Thumm/Wüterich, Sp*u*Rt 2008, 102 at 105; for opposing arguments, see Menke/Räker, Sp*u*Rt 2009, 45 at 46. In accordance with Art. 1(3) sentence 2 lit. b) FIFAReg the national federations 'shall include the basic principles' of Art. 17 FIFAReg in their national regulations. Since § 628(2) BGB provides a right to claim damages in the event of breach of contract, one has good reason to assume that the LOS does not infringe the FIFAReg, see also Art. 1(3) 1 FIFAReg.
696. The FIFAReg is not applicable to coaches, CAS/TAS, Sp*u*Rt 2009, 69 et seq.

club. The *Ligaverband* adopted the FIFAReg under § 15 LOS. As regards non-licensed football associations, the FIFAReg is of application according to § 20 DFB-SpO. By employing a gradual system in the case of premature termination of contract, the FIFAReg provides for sporting sanctions, as well as for the payment of compensation to the former club for the transferred player and/or his new club.[697] If the contract is terminated for 'good cause' (Article 14 FIFAReg), the transfer will not have consequences of any kind. Sporting sanctions are excluded under Article 15 sentence 3 FIFAReg if there is a 'sporting good cause'.[698] Article 16 FIFAReg, which prohibits, without differentiation, the unilateral termination of the contract during the course of a season, cannot exclude the right to tender notice of termination for cause.[699] Circumstances that render the continuation of the relationship untenable for one party can also occur during a season. According to general opinion the right to tender notice of termination for cause is not subject to the disposition of the parties.[700] As such, Article 16 FIFAReg is void under German law.[701] In cases of terminations for cause which are justified, there is no entitlement to compensation pursuant to Articles 16, 17 FIFAReg (see § 242 BGB[702] in conjunction with § 309 no. 6 BGB[703]). The opinion which currently receives the most support, i.e., that the compensation for training provided for in Article 20 FIFAReg does not have to be paid out in the event of a legally effective termination,[704] could change in the aftermath of the ruling of the ECJ[705] in the *Bernard* case.[706] However, the ECJ did not expressly approve the regulation, in spite of the demands of the parties to the proceedings to do so.[707]

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697. For a detailed discussion, see Jungheim, RdA 2008, 222 at 225 et seq.
698. For discussion of the FIFAReg., see Binder/Quirling, Sp*u*Rt 2005, 184 et seq.
699. The question of whether the player may play in official matches for an other club after effective termination of the contract is an other matter. In order to prevent distortion of competition, the system of transfer periods has been found to be legitimate, as long as the regulation is reasonable, ECJ, C-176-96, O.J. 2000-I, 2714 = Sp*u*Rt 2000, 151 at 153 = EuZW 2000, 375 at 379 with comment by Röthel – Lehtonen; similarly, Bohn, Sp*u*Rt 2009, 107 at 108.
700. BAG, NZA 1998, 771 at 773; Ascheid/Preis/Schmidt/Dörner/Vossen, Großkommentar zum Kündigungsrecht, 4th edition 2011, § 626 BGB, mn. 7.
701. For an uncritical view, see Jungheim, RdA 2008, 222 at 225.
702. For discussion of the review of sports federations' regulations by means of legal assessment of the standard terms, see Part II, Ch. 2, §2 II.
703. See Part II, Ch. 2, §2 III F 4. This applies despite the fact that under labour law, an obligation to render a service cannot be enforced compulsorily, § 888(3) ZPO, as a valid termination of contract extinguishes that obligation.
704. PHBSportR-Summerer, part 2, mn. 194, see also Part II, Ch. 2, §1 III J.
705. ECJ, Sp*u*Rt 2010, 110 = NJW 2010, 1733, see the comments by Eichel, EuR 2010, 685 and Persch, NZA 2010, 986 at 987 et seq.
706. The ECJ ruled that Art. 45 TFEU does not preclude a scheme which, in order to reach the objective of encouraging the recruitment and training of young players, guarantees compensation to the club which provided the training if, at the end of his training period, a young player signs a professional contract with a club in another Member State, provided that the scheme is suitable for ensuring that that objective is achieved and does not go beyond that which is necessary to attain it.
707. Eichel, EuR 2010, 685 at 649.

191. In the aftermath of the *Andy Webster* case, Article 17 FIFAReg received much attention from the sports media. According to the prevailing view, this regulation permitted the transfer of a player to a foreign club after the expiration of certain express time periods specified in Number 7 of the definitions.[708] This proposition does not go far enough in several respects. First, Article 17 FIFAReg imposes an obligation on the party in breach of the contract to pay compensation in accordance with specific criteria including, among other things, the player's remuneration and the time remaining on the existing contract.[709] There is no mention of a right of termination which overrides a longer contractual term.[710] Furthermore, the goal of creating stable contracts, which is one of the objectives of the FIFAReg (see Article 13 FIFAReg), would not be fulfilled. In addition, in its present form, Article 17 FIFAReg can be regarded as a contractual penalty regulation[711] and does not constitute a generalized payment of damages. The compensation does not cover claims for damages made out under § 280(1) BGB, which can be considerably higher than the compensation paid under Article 17 FIFAReg due to the marketing revenue lost by the club.[712] This can be viewed differently if the parties to the employment contract draw up an agreement relating to compensation pursuant to Article 17(1) FIFAReg.

192. To the extent that the FIFA Players' Status Committee issues provisional[713] International Transfer Certificates (Article 9 FIFAReg) in spite of a dispute regarding the effectiveness of the termination after the protected period,[714] as occurred in the case of *Tony Mario Sylva*, German legal scholars recommend the stipulation of

708. Berliner Morgenpost, Mar. 22, 2007, 27; Süddeutsche Zeitung, Mar. 23, 2007, 32; Frankfurter Rundschau, Mar. 23, 2007, 22. For further verification, see Jungheim, RdA 2008, 222. CAS ruled in favour of Andy Webster on Jan. 30, 2008, reference numbers CAS 2007/A/1298, CAS 2007/A/1299 und CAS 2007/A/1300, Sp*u*Rt 2008, 114.
709. For a detailed account, see CAS, Sp*u*Rt 2011, 155 – Morgan de Sanctis.
710. CAS, Sp*u*Rt 2008, 114 at 117 – Webster; CAS, Sp*u*Rt 2009, 157 at 159 – Matuzalem with comment by Räker; Breucker/Thumm/Wüterich, Sp*u*Rt 2008, 102 at 104; Menke/Räker, Sp*u*Rt 2009, 45 at 46; Bohn, Sp*u*Rt 2009, 107 at 109; Adolphsen/Nolte/Lehner/Gerlinger/Wüterich/Breucker, *Sportrecht in der Praxis*, 2011, mn. 596. Alternative opinion regarding the right of the football player to terminate his contract, Jungheim, RdA 2008, 222 at 228 et seq. The Matuzalem verdict was overturned by the *Schweizerisches Bundesgericht* (Swiss Supreme Court), Sp*u*Rt 2012, 109, with comment by Hofmann.
711. For an account of the former FIFAReg, see Oberthür, NZA 2003, 462 at 463.
712. For an alternative opinion, see Pfister, CaS 2008, 29 at 31, who argues that the parties to the employment contract would exclude other rights to damages by agreeing that the FIFAReg was applicable between them.
713. Until the final ruling.
714. Menke/Räker, Sp*u*Rt 2009, 45 at 47 et seq. criticize this; Bohn, Sp*u*Rt 2009, 107 at 110 does not refer to the *Sylva* ruling, but agrees to such a decision in the case of a breach of contract after expiry of the protective period. Bohn holds that after the protective period has expired, a termination without cause does not result in the imposition of sporting sanctions pursuant to Art. 17(3) FIFAReg. The refusal to issue a transfer certificate would, in his opinion, be a sanction. This could be countered by pointing out that Art. 8.2 no. 7 sentence 1 of Annex 3 to the FIFAReg forbids the issue of transfer certificates in cases of disputes regarding the effectiveness of a termination. This could have priority-ranking as lex specialis.

contractual penalties.[715] German national courts have also ruled in favour of the provisional issue of transfer certificates.[716] However, in both of the cited cases, courts found that the respective terminations were (almost)[717] certainly effective,[718] while the FIFA-Committee assumed that the effectiveness of the termination would only have to be examined in the main proceedings.[719] Some legal scholars consider it to be possible for the old club to assert a claim against the athlete in order to prevent him from playing for the new club. However, those of this opinion also hold that this would only be possible if the old and new clubs were in competition with each other.[720]

K. Business Transfer

193. The employment contracts of trainers and athletes can also be affected by the legal transfer of the relevant department of the club to, for example, a stock company[721] created especially for this purpose. In such cases § 613a(1) sentence 1 BGB, which is strongly influenced by EU Law,[722] determines that the new owner succeeds to the rights and duties under the employment relationships existing at the time of transfer.[723] In accordance with § 613a(6) sentence 1 BGB, the employee may object in writing to the transfer of the employment relationship.[724] Pursuant to

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715. Menke/Räker, Sp*u*Rt 2009, 45 at 48 et seq.; Bohn, Sp*u*Rt 2009, 107 at 109.
716. For example, LAG Berlin, Sp*u*Rt 2001, 32 = NZA 2001, 53; ArbG Leipzig, decision of Jan. 16, 2008, reference number 2 Ga 2/05, BeckRS 2010, 73449; Lange, Sp*u*Rt 2011, 98 at 101 et seq.
717. In the ArbG Leipzig decision of Jan. 16, 2008, reference number 2 Ga 2/05, BeckRS 2010, 73449, it was assumed that the termination was effective with a probability bordering on certainty. Due to the transfer periods (which were not elaborated on) the need for action was urgent.
718. LAG Berlin, Sp*u*Rt 2001, 32 at 34 = NZA 2001, 53 at 55.
719. Menke/Räker, Sp*u*Rt 2009, 45 at 47.
720. Klingmüller/Wichert, Sp*u*Rt 2001, 1 at 2 appealing on BAG, AP no. 7 to § 611 BGB Treuepflicht; Breucker/Thumm/Wüterich, Sp*u*Rt 2008, 102 at 103; Jungheim, RdA 2008, 222 at 232 with further reference.
721. For a general account, see Fuhrmann, *Ausgliederung der Berufsfußballabteilungen auf eine AG, GmbH oder eG?*, 1999; Pauli, CaS 2007, 298; as regards the transformation of the whole club, see Cario, *Vom Sportverein zur Sport-eG*, 2002.
722. See Council Directives 77/187/EEC, 98/50/EC and 2001/23/EC; MüKo/Müller-Glöge, 5th edition 2009, § 613 a BGB, mn. 1.
723. A business in the sense of labour law is, in principle, an organizational unit in which the employer alone, or together with his team, pursues a *work-related* purpose with the aid of tangible or intangible work equipment. The term 'business' (*Betrieb*) must be distinguished from the term 'enterprise' (*Unternehmen*), which represents an organizational unit for the pursuit of an *economic* or *non-profit* purpose. An enterprise can own one or more businesses; a business, however, cannot own an enterprise. For more on the term 'business', see BAG, NZA 1990, 977 at 978 = DB 1991, 500 at 501, as well as Preis, *Arbeitsrecht*, 3rd edition 2009, 110 et seq. and Feuerborn, RdA 2005, 377 at 379.
724. However, in these cases the rendering of notice of termination for operational reasons will usually be possible (which is impractical in cases where the club faces losing the transfer fee). Still, the seller of the business must continue to pay remuneration in accordance with § 615 sentence 1 BGB until the term of notice has expired. As opposed to this, the athlete must allow the offset of any earnings due from the purchaser of the business, which he has lost due to not working for the purchaser, provided that there was no material reason for his objection against the transfer of the

§ 324 *Umwandlungsgesetz*[725] (Regulation of the Transformation of Companies Act, UmwG) this also applies if an association changes its corporate form, or a part of it (e.g., if the license players department is spun off).[726] § 613a BGB does not apply to freelance contracts.

In the area of sports, a particularly problematic question arises as to when it is to be presumed that a business transfer has taken place. The departments of a club, the teams or individual athletes and/or the trainer could be defined as 'businesses' in this respect. According to the relevant case law, a business transfer occurs if a new legal entity takes over the running of an economic entity whilst retaining its identity. The matter of whether an essentially unmodified continuity of business by the new owner can be assumed depends on the circumstances of each individual case.[727] The acquisition of only one coach, who is to continue supervising the same training group, does not constitute a business transfer because, if the supervised athletes are members but not employees of the club, there is no *economic* entity involved.[728] In contrast to this, the acquisition of a football club's license player department by another legal entity can generally be classified as a business transfer.[729] In the jurisprudence, the lower courts regard the economic assets which make the operation of the sports club possible to be important criteria; this includes in particular player contracts, advertising and broadcasting rights, playing licenses[730] or the rights to the sports facilities.[731] In such cases, it must be taken into account that such legal positions are often assigned seasonally, and therefore, if the transfer occurs at the end of a season, it is possible that it will not be regarded as the takeover of an economic entity.[732]

§2. Fundamental Rights and Obligations Pertaining to the Sports Performance Relationship

194. Following on from the previous chapter, which dealt with the legal status of the professional athlete, the content of the sports performance contract will now be discussed. As sports performance contracts often constitute employment relationships, at least in the area of team sports, the focus in this section shall remain on

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employment relationship; for more on the employee's right of veto before the introduction of § 613a(6) BGB Siebold/Wichert, Sp*u*Rt 1999, 93 at 95.

725. *Umwandlungsgesetz* of Oct. 28, 1994 (BGBl. I-1993, 3210; I-1995, 428), with amendments.
726. Menke, *Profisportler zwischen Arbeitsrecht und Unternehmertum*, 2006, 127.
727. ECJ, C-392/92, O.J. I-1994, 1311 = NZA 1994, 545 = NJW 1994, 2343 – Schmidt (the term of 'economic entity' is cited only in the German version of the decision: '*wirtschaftliche Einheit*'); persistent line taken in the jurisprudence of the BAG; see NZA 2004, 845 at 846 with further references = Sp*u*Rt 2006, 255 at 256.
728. BAG, NZA 2004, 845 at 847 = Sp*u*Rt 2006, 255 at 257; Adolphsen/Nolte/Lehner/Gerlinger/Wüterich/Breucker, *Sportrecht in der Praxis*, 2011, mn. 701.
729. BAG, NZA 2003, 611 at 612 et seq. = Sp*u*Rt 2003, 122 at 124; see also Siebold/Wichert, Sp*u*Rt 1999, 93 et seq.
730. LAG Schleswig-Holstein, decision of Apr. 4, 2000, reference number 3 Sa 607/99, BeckRS 2000, 30819133.
731. LAG Düsseldorf, Sp*u*Rt 2000, 257 at 259 et seq., with comment by Fuhrmann/Pröpper.
732. LAG Düsseldorf, Sp*u*Rt 2000, 257.

employment contracts. Variations in the law regulating freelance contracts will be addressed accordingly.

I. A General Overview of the Structure of the Working Relationship Obligations

195. In accordance with German employment law, the content of an employment contract is divided into two areas. On the one hand the contract contains a core of rights and obligations which are either expressly defined or are implied by the conclusion of the contract or within an amending agreement. These rights and obligations are subject to the restraints of the law (§ 134 BGB) and *bonos mores* (*gute Sitten,* § 138 BGB).[733] If the contract contains standardized terms, these will be regulated by §§ 305 et seq. BGB[734] which ensure that the benefit acquired by the party to the contract who formulated the terms (i.e., the 'user') will be balanced out.[735] In this way, a further limitation is placed on private autonomy. This is especially the case in the area of team sports, where the adoption of a standard contract which has been set out by the federation is common.[736] On the other hand, it is clear that the multitude of possible sequences of events during the working day (in the area of sports, too) makes it impossible to agree on a conclusive list of duties (e.g., tactics, line-up, exchange, training methods etc.). For this reason, pursuant to § 106 sentence 1 GewO, the employer is entitled under the employment contract to set out the employee's obligations in relation to content, place and time, insofar as these conditions of employment are not regulated by the contract (so-called managerial authority). However, in line with the principle which restricts unilateral organizational power,[737] the employee's obligations can only be specified at the reasonably exercised discretion (*billiges Ermessen*) of the employer, § 106 sentence 1 GewO.[738]

In freelance contracts (which often deal with the participation of individual athletes in matches) the subject matter often develops from the sport itself[739] and a managerial authority pursuant of § 106 sentence 1 GewO does not exist.[740] Nevertheless, the agreement to allow a right of instruction does not exclude the existence of a freelance contract.[741] Again, in this respect, a comprehensive consideration of

733. Gramlich, Sp*u*Rt 2000, 89 at 93; Staudinger/Richardi/Fischinger, BGB, revised edition 2011, § 611 BGB, mn. 259 et seq.
734. See MüKo/Müller-Glöge, 5th edition 2009, § 611 BGB, mn. 43 et seq.; Staudinger/Richardi/Fischinger, BGB, revised edition 2011, § 611 BGB, mn. 383 et seq. and below Part II Ch. 2 §2 II.
735. MüKo/Basedow, 6th edition 2012, Vor § 305 BGB, mn. 5.
736. Ittmann, *Pflichten des Sportlers im Arbeitsverhältnis*, 2004, 40.
737. Krause, *Prüfe dein Wissen – Arbeitsrecht I*, 1st edition 2007, Case 64.
738. Staudinger/Richardi/Fischinger, BGB, revised edition 2011, § 611 BGB, mn. 453 et seq.; MüKo/Müller-Glöge, 5th edition 2009, § 611 BGB, mn. 436 et seq.
739. PHBSportR-Fritzweiler, part 3, mn. 20.
740. Landmann/Rohmer/Neumann, *Gewerbeordnung,* 16th edition 2012, *Band I, Vorbemerkungen zu Titel VII*, mn. 26.
741. Staudinger/Richardi/Fischinger, BGB, revised edition 2011, Vorbemerkungen zu §§ 611 ff., mn. 236.

all circumstances of the individual case (range of the right of instruction, integration into organization etc.) must be performed.

II. The Review of Standardized Contracts

196. In sport, as in every other sector of the economy, many contracts include standard terms and conditions. §§ 305 et seq. BGB attempt to balance the information and negotiation advantage which the party formulating these terms and conditions (i.e., the 'user') acquires from such contracts.[742] Since the modernization of the German law of contract in January 2002, standardized employment contracts are subject to review under §§ 305 et seq. BGB, in accordance with § 310(4) sentence 2 BGB.[743] These regulations assign a graduated valuation system to standard clauses. Thus, § 309 BGB contains clauses which, without further evaluation, are inadmissible in standard contracts.[744] The review of contractual clauses addressed in § 308 BGB requires judicial assessment, and this is allowed for by its use of indefinite legal terms. § 307(1), (2) BGB regulates – in a general manner – the inefficacy of terms which are found to unreasonably disadvantage the contractual partner of the standard contract user.[745] In employment law, there is a legal presumption that the employer is the user of the standard contract[746] (this is not relevant to freelance contracts). This presumption arises out of § 310(3) no. 1 BGB. In accordance with § 310(4) sentence 2 BGB however, an assessment of the special characteristics of employment law is necessary when reviewing standard contracts. For example, § 309 no. 6 BGB states that a provision by which the user is promised the payment of a contractual penalty for the event that the other party to the contract withdraws from the contract, is ineffective. However, due to the preclusion of compulsory enforcement of the requirement for job performance pursuant to § 888(3) *Zivilprozessordnung* (Code of Civil Procedure, ZPO), contractual penalties can, under certain limitations, be agreed upon in cases where the employee fails to 'take his office'.[747] §§ 305–306 BGB contain regulations which govern the insertion of standard conditions into the contract. For example, clauses that are so unusual that the other party to the contract with the user needs not to expect to

742. MüKo/Basedow, 6th edition 2012, vor § 305 BGB, mn. 5.
743. See Hauck, NZA 2006, 816. From Jan. 1, 2003 on, the new regulations apply also to employment contracts that were concluded before Jan. 1, 2002, Art. 229 § 5(1) sentence 2 EGBGB.
744. The effectiveness of clauses in individually negotiated contracts is not affected, MüKo/Wurmnest, 6th edition 2012, vor § 307 BGB, mn. 8. Conversely, §§ 307 et seq. BGB are only applicable if the clause has not already been declared ineffective by other statutory regulations (even in individual contracts), see e.g., § 309 BGB.
745. In accordance with the jurisprudence of the BAG, every infringement of a legally acknowledged interest of the employee which is not justified by the reasonable interests of the employer or which is not compensated for by equivalent benefits is viewed as being overly disadvantageous for the employee. Upon ascertaining that an unreasonable disadvantage has occurred, both sides must be considered, and the legally recognised interests of the contracting parties assessed. During this process, any legal positions protected by fundamental rights are also to be taken into account. The process requires a comprehensive acknowledgment of both positions, having in mind the principle of good faith, BAG, NZA 2006, 34 at 36 with further references.
746. BAG, NZA 2005, 1111 at 1115.
747. BAG, NZA 2006, 34 at 36; NZA 2004, 727 at 732; see also Part II, Ch. 2, § 2 III F 4.

encounter them do not form part of the contract (§ 305c(1) BGB); they are replaced by the provisions of statutory law, § 306(2) BGB.

In this context, in accordance with the jurisprudence of the *Bundesgerichtshof* (Federal Court of Justice, BGH), one characteristic of sports is that, as long as an athlete commits in a standard-form employment contract to acknowledge the respective federation rules, the regulations found in §§ 305 et seq. BGB cannot be applied. While the party to the contract imposing his own standard terms usually pursues, and gives priority to, his own interests by means of the standard-form, the application of a comprehensive set of rules for sport serves, according to this jurisprudence, not only the interests of the federation, but also the interests of the athlete because, without homogenous rules, the practice of organized sport would not be possible.[748] In this respect, when invoking §§ 307 et seq. BGB, one must always examine whether the reviewed regulations contained in the contract arise from the incorporated federation rules. In this case, the only control that remains is the basic principle of good faith pursuant to § 242 BGB.[749] Some legal scholars hold that the concept of harmonization of the mutual interests put forward by the BGH is not applicable if the character of the regulation under review is one of exchange rather than membership. This can be seen, for example, in the regulations which stipulate which sports equipment can be employed.[750] The differences between the concepts are, however, relativized by the fact that the courts bear the values contained in §§ 305 et seq. BGB in mind when considering § 242 BGB.[751]

III. Sports Performance Contracts for Athletes

197. In accordance with the general principles of contract law, performance obligations of employees are subdivided into main performance obligations (determining the character of the contract) and additional performance obligations (securing the fulfilment of the main performance obligations),[752] as well as (other) secondary obligations (obligations to take the rights, legal interests and other interests of the employer into account, § 241(2) BGB).[753]

748. BGHZ 128, 93 at 101 = NJW 1995, 583 at 585 = Sp*u*Rt 1995, 43 at 46, with comment by Vieweg, Sp*u*Rt 1995, 97; Orth/Pommerening, Sp*u*Rt 2011, 10 at 11, according to which sporting rules are *a priori objectively* not negotiable, and therefore cannot become part of the contract in the sense of standard-form contracts; Haas, in: Haas/Haug/Reschke (eds.), Handbuch des Sportrechts, B, Ch. 2, mn. 24 and 39, with further references.
749. BGHZ 128, 93 at 102 et seq. = NJW 1995, 583 at 585 = Sp*u*Rt 1995, 43 at 47 with comment by Vieweg, Sp*u*Rt 1995, 97 et seq.; see also BGH, NJW 2011, 139 at 141.
750. PHBSportR-Summerer, part 2, mn. 314.
751. BGHZ 128, 93 at 103 = NJW 1995, 583 at 585 = Sp*u*Rt 1995, 43 at 47, with comment by Vieweg, Sp*u*Rt 1995, 97 et seq.; PHBSportR-Summerer, part 2, mn. 317; Orth/Pommerening, Sp*u*Rt 2011, 10 at 11; similarly, Vieweg, NJW 1991, 1511 at 1516.
752. Ittmann, *Pflichten des Sportlers im Arbeitsverhältnis*, 2004, 105.
753. Ittmann, *Pflichten des Sportlers im Arbeitsverhältnis*, 2004, 42 et seq. This systemization must not be confused with the labour law systemization of the duties of the employment relationship, see Part II, Ch. 2, §2 I.

A. Main Performance Obligations of Athletes

198. The main performance obligations of the athlete are his sporting performance and his public relations activities.

1. Sporting Performance

199. According to the terms of various standard-form employment contracts which were used in licensed sport in the past,[754] the athlete is obliged to employ all of his energy and sporting ability without reservation for the club's benefit.[755] These clauses are considered to be invalid by some commentators because they are not clear and comprehensible enough (see § 307(1) sentence 2 BGB).[756] The courts have not had to deal with this matter yet.[757] Thus, special importance is attached to the interpretation of employment contracts and to the managerial authority of the employer. The most important obligation of the athlete to his club is the requirement to engage in sporting activity for the benefit of the club.[758] In principle, this activity contains the obligation to take part in all tournaments, conferences and training sessions[759] which are arranged by the club or, rather, those for which he is selected.[760] Furthermore, in the event that the athlete is not selected, he is obliged to keep himself ready for performance so that selection for a match is possible (especially by participating in training).[761] Limitations are set on the managerial authority of the club where it is possible that the athlete, in observing the instructions of a superior, might risk endangering his health: for example, if the condition of the sports facility is hazardous to health, or where excessive periods of training are expected of him.[762] The athlete must, however, tolerate and accept the imminent risk of injury in sport. For instance, he is expected to obey the instruction not to turn

754. The model contract for contract players (not licensed players, for the distinction see fn. 428), for example, provides only that the footballer shall 'play football in accordance with the regulations of § 1 no. 1 DFB-SpO', Version of April 2011, accessible at www.dfb.de/uploads/media/Mustervertrag_Vertragsspieler__04_2011_.pdf (accessed May 22, 2012).
755. See Ittmann, *Pflichten des Sportlers im Arbeitsverhältnis*, 2004, 62; PHBSportR-Fritzweiler, part 3, mn. 20. E.g., ArbG Berlin, Sp*u*Rt 2010, 168 or LAG Berlin, Sp*u*Rt 2005, 75. For example § 2 model contract for licensed players of the DFL, according to PHBSportR, appendix C, 845 at 846.
756. Ittmann, *Pflichten des Sportlers im Arbeitsverhältnis*, 2004, 65 et seq.; MünchHdbArbR/Giesen, 3rd edition 2009, § 337, mn. 13 are uncritical of such an obligation.
757. However, as to the legal validity of contractual penalties in the event of breach of such a clause, see Part II, Ch. 2, §2 III F 4.
758. Ittmann, *Pflichten des Sportlers im Arbeitsverhältnis*, 2004, 67 et seq.
759. MünchHdbArbR/Gitter, 2nd edition 2000/2001, § 202, mn. 46 et seq.; PHBSportR-Fritzweiler, part 3, mn. 21; Ittmann, *Pflichten des Sportlers im Arbeitsverhältnis*, 2004, 68, 80; Kaske, *Das arbeitsrechtliche Direktionsrecht und die arbeitsrechtliche Treuepflicht im Berufssport*, 1983, 46.
760. MünchHdbArbR/Giesen, 3rd edition 2009, § 337, mn. 17.
761. MünchHdbArbR/Giesen, 3rd edition 2009, § 337, mn. 17: He must behave in a way which justifies his selection.
762. Ittmann, *Pflichten des Sportlers im Arbeitsverhältnis*, 2004, 69 et seq.; PHBSportR-Fritzweiler, part 3, mn. 22; Kaske, *Das arbeitsrechtliche Direktionsrecht und die arbeitsrechtliche Treuepflicht im Berufssport*, 1983, 55 et seq.

away from the wall formed for a free kick.[763] Finally, there is also an obligation upon the athlete to perform in accordance with the sets of rules and arrangements of the federation which regulates the respective sporting activity; in particular, the rules of the game (contents of the work, § 106 sentence 1 GewO)[764] or the game schedule (time of the work, § 106 sentence 1 GewO).[765] Despite the basic autonomy of the federations, they are classified by the courts as being within the scope of national regulation of content review of contracts.[766]

2. Public Relations Activities

200. A further, and often central, obligation of the athlete is the performance of public relations activities for the club.[767] This includes the use of sport equipment manufactured by the association's sponsors and appearances at official events, and the use of the athlete's picture for advertising purposes. A contractual clause is typically used to regulate these activities, according to which the athlete will be obliged to 'wear the sports clothing provided by the club, in accordance with the club's instructions'[768] as well as participating and co-operating at all of the club's public displays, occasions, events and tributes.[769] These clauses are usually considered effective because of the relatively small interference with the athlete's privacy.[770]

B. Additional Performance Obligations on the Athlete

201. According to *Ittmann*'s[771] system of classification, the additional obligations on the athlete can be divided, as appropriate, into obligations concerning the promotion and maintenance of performance on one hand, and those concerning the exploitation of the personal rights of the athlete on the other.

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763. Ittmann, *Pflichten des Sportlers im Arbeitsverhältnis*, 2004, 70.
764. Gramlich, Sp*u*Rt 2000, 89 at 93.
765. Küpperfahrenberg, *Die arbeitsrechtliche Stellung von Spielern und Trainern im Lizenzfußball*, 2004, 122.
766. As regards the relationship between federation rules and State law, see Vieweg, *Normsetzung und -anwendung deutscher und internationaler Verbände*, 1990, 127 et seq.; Bohn, *Regel und Recht*, 2008, 32 et seq.; Part I, Ch. 3, §4 and above Part II, Ch. 2, §2 II.
767. PHBSportR-Fritzweiler, part 3, mn. 24; Ittmann, *Pflichten des Sportlers im Arbeitsverhältnis*, 2004, 86.
768. Ittmann, *Pflichten des Sportlers im Arbeitsverhältnis*, 2004, 92; see also Kaske, *Das arbeitsrechtliche Direktionsrecht und die arbeitsrechtliche Treuepflicht im Berufssport*, 1983, 70. See LAG Düsseldorf, Sp*u*Rt 2008, 213.
769. As is the case in football, ice hockey and basketball, see Ittmann, *Pflichten des Sportlers im Arbeitsverhältnis*, 2004, 86. See LAG Düsseldorf, Sp*u*Rt 2008, 213.
770. Kaske, *Das arbeitsrechtliche Direktionsrecht und die arbeitsrechtliche Treuepflicht im Berufssport*, 1983, 93 et seq. and 97 et seq. LG Frankfurt/Main, Sp*u*Rt 2009, 207 at 209 as regards the commercialization of the personal rights of football players by the DFL.
771. Ittmann, *Pflichten des Sportlers im Arbeitsverhältnis*, 2004, 104 et seq.

1. Promotion and Maintenance of Performance

202. Sports clubs have a vital interest in the promotion and maintenance of their athletes' performance. In order to ensure that this interest is upheld, particularly in the area of licensed sport, extensive regulations are inserted into employment contracts. For example, according to the *Deutsche Fußball Liga*'s (German Soccer League, DFL) model contract, professional footballers must follow instructions of the club which relate to a 'sporting way of life'.[772] In this context, problem can arise from clauses which regard the choice of the physician and the waiver of personal confidentiality.[773] The club would be permitted[774] such a right if adequate regard were had to the athlete's right to a free choice of doctor[775] (which is derived from the right to bodily integrity, and set out in a more concrete fashion in § 76(1) SGB V[776]): for example, the athlete's choice must not be made subject to the existence of a good cause. This view is justified by the fundamentally parallel nature of the interests of the athlete and the club in the athlete's health.[777] The courts have not dealt with this matter conclusively.[778] A standard-contract-release of the physician providing treatment from compliance with the obligation of professional confidentiality is compatible with § 307(1) BGB, since the association requires exact knowledge of the athlete's state of health, not only in its own interests, in order to plan training, for instance, but also in the athlete's interest. This applies even though information regarding certain illnesses that could endanger the latter's professional future.[779]

Employers in the world of sport also have an interest in (co-)arranging the athlete's free time, in order to ensure that his performance is not impaired in any way. It is common, therefore, to create a *veto* right for the club regarding ancillary activities of the athlete. Such clauses involve gross interferences with athletes' occupational freedom (Article 12(1) GG), since an athlete will often refrain from taking legal action against the club with the aim of gaining the club's permission in order to prevent possible disadvantages to himself.[780] They are, nevertheless, regarded as

772. Günther, Sp*u*Rt 2010, 50.
773. Ittmann, *Pflichten des Sportlers im Arbeitsverhältnis*, 2004, 107.
774. Adolphsen/Nolte/Lehner/Gerlinger/Wüterich/Breucker, *Sportrecht in der Praxis*, 2011, mn. 589.
775. Jarass/Pieroth, Grundgesetz, 11th edition 2011, Art. 2, mn. 31. The case law has to this point left open the matter of whether this right actually exists, BVerfGE 16, 286 at 303 et seq.; BVerwGE 60, 367 at 370.
776. Article 1 Statute of Dec. 20, 1988, BGBl. I-1988, 2477 at 2482, with amendments.
777. Ittmann, *Pflichten des Sportlers im Arbeitsverhältnis*, 2004, 109 et seq.; Kaske, *Das arbeitsrechtliche Direktionsrecht und die arbeitsrechtliche Treuepflicht im Berufssport*, 1983, 89 et seq.
778. BAG, NJW 1979, 1264; Rybak, *Das Rechtsverhältnis zwischen dem Lizenzfußballspieler und seinem Verein*, 1999, 102.
779. Rybak, *Das Rechtsverhältnis zwischen dem Lizenzfußballspieler und seinem Verein*, 1999, 105 et seq.; Ittmann, *Pflichten des Sportlers im Arbeitsverhältnis*, 2004, 109 et seq.; Kaske, *Das arbeitsrechtliche Direktionsrecht und die arbeitsrechtliche Treuepflicht im Berufssport*, 1983, 91 et seq. For an alternative view, see Adolphsen/Nolte/Lehner/Gerlinger/Wüterich/Breucker, *Sportrecht in der Praxis*, 2011, mn. 590 if a standardized contract is used.
780. Ittmann, *Pflichten des Sportlers im Arbeitsverhältnis*, 2004, 120; Rybak, *Das Rechtsverhältnis zwischen dem Lizenzfußballspieler und seinem Verein*, 1999, 142; different view PHBSportR-Fritzweiler, part 3, mn. 31.

being effective.[781] Similarly strict restrictions are placed on the athlete's lifestyle. These include a bedtime, a ban on drug-taking or night-time visits to discos, and participation in dangerous sports.[782] Contractual clauses such as these are, in principle, regarded as being effective when imposed on professional football players, despite the interferences with their private life.[783] They are generally justified by reference to the unusual character of the work in question.[784]

2. Exploitation of Athlete's Personal Rights

203. The marketing of the athlete's personality rights is one of the most important sources of income for sports employers, due to the immense identification potential of the athlete. Thus, there exists a huge interest in marketing these personality rights. In order to do so, it is necessary to obtain the athlete's permission. Furthermore, the clubs often wish to eliminate self-marketing by the athlete and/or to arrange it in such a manner that there is no interference with their own interests. The efficacy of such clauses in employment contracts will be dealt with at a later juncture.[785]

C. Secondary Obligations upon the Athlete

204. Finally, the athlete is obliged to take the legitimate interests of the club into account, in accordance with § 241(2) BGB. The main interest in this context is the upholding of the image of the club in public. Thus, sport contracts in, for example, football, ice hockey, volleyball and basketball sometimes contain clauses, according to which athletes (1) must not behave in a way which causes damage to the reputation of the association, (2) need the approval of the club for any statements to the media and (3) must avoid making statements which relate to the 'internal affairs of the club'.[786] The general behaviour rule (1), in accordance with § 307(1) sentence 2 BGB, is predominantly considered ineffective due to its lack of clarity.[787] The same applies to the prohibition of unauthorized statements to the media (2), since the club's interests in the avoidance of damage to their reputation can also be preserved by an obligation of temperance being placed on the athlete.

781. BAG, NZA 2002, 965 at 967.
782. PHBSportR-Fritzweiler, part 3, mn. 23; Ittmann, *Pflichten des Sportlers im Arbeitsverhältnis*, 2004, 126; Kaske, *Das arbeitsrechtliche Direktionsrecht und die arbeitsrechtliche Treuepflicht im Berufssport*, 1983, 145 et seq.
783. BAG, NZA 1986, 782 at 783 et seq.
784. Ittmann, *Pflichten des Sportlers im Arbeitsverhältnis*, 2004, 127.
785. See Part IV, Ch. 2, §2 III A.
786. Ittmann, *Pflichten des Sportlers im Arbeitsverhältnis*, 2004, 156.
787. Rybak, *Das Rechtsverhältnis zwischen dem Lizenzfußballspieler und seinem Verein*, 1999, 122 et seq.; Ittmann, *Pflichten des Sportlers im Arbeitsverhältnis*, 2004, 157.

The blanket ban (which, as its wording suggests, also includes the private life of the athlete) disproportionately impairs the athlete's right to freedom of speech (Article 5(1) GG).[788] If the obligation to secrecy about club affairs (3) is, by interpretation, limited to certain information that must remain confidential, then this obligation does not extend beyond professional secrecy,[789] which is, in any case, generally an inherent element of the employment relationship, and is thus effective.[790] Finally, the athlete is also obliged to refrain from doping and from any other such conduct in sport, even if he has not entered into any special agreement.[791]

D. Main Performance Obligations of the Employer

205. The obligations upon the sports club and/or organizer are just as interesting as those upon the athletes.

1. Persons Who Come into Consideration as Employer

206. First, it should be noted that, in sports, it is often the case that several corporate bodies come under consideration as employers. The employer of the athlete is, first and foremost, the sports club (and/or a capital company spun off and separated from it)[792] as one party to the contract.[793] Beyond that, the sport federation, which determines the organizational frame of the sporting activity, could also be classified as employer. In license football, the *Ligaverband e.V.* (a corporate member of the DFB entrusted with the organization of the licensed leagues), as a provider of player licenses, is capable of exercising direct influence on the work of license players, for example, by compiling game schedules.[794] The same applies to the DFB which has influence on the work performance due to its power to formulate the game rules, or its power to revoke a player's license, thus making it impossible for the player to fulfil his work obligations to the club.[795] The personal dependency of the athlete on the federation justifies his entitlement to protection

788. Rybak, *Das Rechtsverhältnis zwischen dem Lizenzfußballspieler und seinem Verein*, 1999, 124; Ittmann, *Pflichten des Sportlers im Arbeitsverhältnis*, 2004, 159.
789. Staudinger/Richardi/Fischinger, BGB, revised edition 2011, § 611 BGB, mn. 646; Schaub/Linck, *Arbeitsrecht*, 14th edition 2011, § 53, mn. 1.
790. Ittmann, *Pflichten des Sportlers im Arbeitsverhältnis*, 2004, 160 et seq.
791. MünchHdbArbR/Gitter, 2nd edition 2000/2001, § 202, mn. 56 et seq.
792. Wüterich/Breucker, *Arbeitsrecht im Sport*, 2006, mn. 99.
793. MüKo/Müller-Glöge, 5th edition 2009, § 611 BGB, mn. 231; Staudinger/Richardi/Fischinger, BGB, revised edition 2011, § 611 BGB, mn.
794. Küpperfahrenberg, *Die arbeitsrechtliche Stellung von Spielern und Trainern im Lizenzfußball*, 2004, 120.
795. Busch, *Das Arbeitsverhältnis des Fußballtrainers*, 2006, 88 et seq.; Küpperfahrenberg, *Die arbeitsrechtliche Stellung von Spielern und Trainern im Lizenzfußball*, 2004, 123; see also Oschütz, *Probleme der Schiedsgerichtsbarkeit im Sport: arbeitsrechtliche Streitigkeiten und einstweiliger Rechtsschutz*, in: Haas (ed.), Schiedsgerichtsbarkeit im Sport, 2003, 43 at 51 et seq.; Eggerstedt, *Probleme der Lizenz- und Schiedsgerichtsverträge im deutschen Berufsfußball*, 2008, 86 et seq.

under labour law,[796] even if the relationship based on sporting performance and remuneration exists only between the athlete and the club.[797] Furthermore, organizers and sponsors could also be considered to be employers. In relation to sporting performance, however, they usually do not have the status of an employer.[798] As the main obligations of the working relationship (payment, activities etc.) are always owed by the club, all further remarks will deal solely with the club's obligations.[799]

2. Payment

207. For the athlete, as for most other employees, the most important obligation owed by the employer is usually payment for performance. This can take different forms depending on the sport concerned. Some examples in individual sports are entry fees and/or bonuses paid out for winning; in team sports (especially during league competitions), monthly based salaries are often combined with achievement-dependent premiums.[800] The athlete's entitlement does not depend on whether or not the payments are in conformity with the relevant federation rules.[801] Problems regarding bonuses often occur if these are conditional upon specific requirements (winning a title) and there is dissent as to whether these conditions have been met. This is also the case as regards the calculation of holiday pay[802] and/or continued payment in the case of ill health.[803] One example of the former category was a case in which an athlete demanded payment of a 'title bonus' from his club. Although the title had been granted initially, it was later disallowed, as the federation had made an error on a point of law.[804] The court supported its dismissal of the athlete's case on the grounds that, under the terms of the employment contract, the bonus was to be paid if the title was 'won', and, as the title had been disallowed, this was not

796. Busch, *Das Arbeitsverhältnis des Fußballtrainers*, 2006, 105 et seq.; Küpperfahrenberg, *Die arbeitsrechtliche Stellung von Spielern und Trainern im Lizenzfußball*, 2004, 124. § 1(1) sentence 2 LOS of the DFL, in accordance with which the issue of a license does not establish an employment contract between the DFL and the player cannot alter this due to the mandatory character of labour law. For arguments opposing the classification of the federation as employer, see Adolphsen/Nolte/Lehner/Gerlinger/Wüterich/Breucker, *Sportrecht in der Praxis*, 2011, mn. 539.
797. So, too, Wüterich/Breucker, *Arbeitsrecht im Sport*, 2006, mn. 98.
798. Cf. Wüterich/Breucker, *Arbeitsrecht im Sport*, 2006, mn. 103. This must be distinguished from the question of whether there is an employment relationship in addition to the sports performance contract.
799. For more on the legal position before the restructuring of football by means of the spin-off of the licensed leagues in 2001 Buchner, RdA 1982, 1 et seq.; Arens/Scheffer, AR-Blattei SD 1480.2, mn. 133 et seq. (three-way relationships in license football).
800. PHBSportR-Fritzweiler, part 3, mn. 38.
801. BAGE 23, 171 = NJW 1971, 855 = DB 1971, 1580; PHBSportR-Fritzweiler, part 3, mn. 38.
802. See Part II, Ch. 2, §2 III D 4.
803. See Part II, Ch. 2, §2 III F 1 a.
804. The association had, after it had obtained consenting information from the EU Commission, appointed two non-EU-citizens, among them, the plaintiff. Afterwards this turned out to be a breach of the rules of the relevant competition.

the case.[805] These types of problems arise both in relation to employment and to freelance relationships.

3. Employment

208. The entitlement to be employed (*Beschäftigungsanspruch*)[806] is of particular importance for the athlete so that he can maintain his performance and popularity. It is regarded by commentators and by the courts as being derived predominantly from the general right of personality contained in Articles 2(1), 1(1) GG.[807] Consequently, it is generally the case that employees not only have an obligation, but also a right to carry out their work. This is particularly problematic in team sports where – for reasons relating to tactical flexibility and flexibility as regards human resources, and due to federations' regulations[808] – there is usually an excess of players.[809] However, each athlete knows that it is simply not possible for the club to use all of its players in every game.[810] The coach's directions as to who will be on the substitute bench are encompassed by the managerial authority of the club.[811] Nevertheless, the decision may not be based on irrelevant (and thus arbitrary) criteria, which could, under some circumstances, lead to an entitlement to be selected, or, at least, to compensation.[812] This is of particular importance for the athlete in relation to the payment of employment-dependent premiums. However, the athlete can generally demand to be allowed to participate in the training which has been stipulated in his contract.[813,814] These considerations are amended by § 8 no. 3(1) LOS, according to which licensed football players have the right to give notice

805. LAG Rheinland-Pfalz, Sp*u*Rt 2002, 74 at 75; critically hereto Adolphsen/Nolte/Lehner/Gerlinger/Wüterich/Breucker, *Sportrecht in der Praxis*, 2011, mn. 568.
806. MünchHdbArbR/Gitter, 2nd edition 2000/2001, § 202, mn. 53 and MünchHdbArbR/Giesen, 3rd edition 2009, § 337, mn. 17.
807. For a general account, see MüKo/Müller-Glöge, 5th edition 2009, § 611 BGB, mn. 973; Staudinger/Richardi/Fischinger, BGB, revised edition 2011, § 611 BGB, mn. 1041; BAGE 48, 122 = NJW 1985, 2968 = NZA 1985, 702; specifically for sport Ittmann, *Pflichten des Sportlers im Arbeitsverhältnis*, 2004, 72 et seq.; PHBSportR-Fritzweiler, part 3, mn. 37.
808. Thus, a wide scope for the exercise of discretion by the federations exists in order to ensure that federation autonomy is protected, Haas, in: Haas/Haug/Reschke (eds.), Handbuch des Sportrechts, B, Ch. 2, mn. 63; Ittmann, *Pflichten des Sportlers im Arbeitsverhältnis*, 2004, 74.
809. PHBSportR-Fritzweiler, part 3, mn. 37; MünchHdbArbR/Giesen, 3rd edition 2009, § 337, mn. 16.
810. See Ittmann, *Pflichten des Sportlers im Arbeitsverhältnis*, 2004, 74.
811. BAG, NJW 1986, 2904 at 2905; NZA 1993, 750 at 751; Sp*u*Rt 1997, 61 at 61 et seq.; MünchHdbArbR/Giesen, 3rd edition 2009, § 337, mn. 17; PHBSportR-Fritzweiler, part 3, mn. 37; Ittmann, *Pflichten des Sportlers im Arbeitsverhältnis*, 2004, 75.
812. MünchHdbArbR/Gitter, 2nd edition 2000/2001, § 202, mn. 54 et seq.
813. E.g., a licensed football player with a contract for the *Zweite Bundesliga* can request to participate in the training sessions of the A-Team, and does not have to agree to participate in the training sessions of the B-Team which plays in the sixth league, ArbG Münster, Sp*u*Rt 2011, 7, with dissenting comment by Fritzweiler.
814. BAG, NJW 1986, 2904 at 2905; MünchHdbArbR/Giesen, 3rd edition 2009, § 337, mn. 18; Ittmann, *Pflichten des Sportlers im Arbeitsverhältnis*, 2004, 75; PHBSportR-Fritzweiler, part 3, mn. 37.

(as long as this is not forbidden by law or the relevant jurisprudence)[815] if, by the end of the season, they have been selected for the team in no more than four official matches. Furthermore, in the event of evidence that an athlete has taken forbidden substances (i.e., doped), the club's interests can be found to have precedence over the athlete's entitlement to be employed by the club (if a ban has not made it factually impossible to select the athlete anyway).[816] In cases which concern freelance contracts with an individual athlete, the athlete can generally demand to perform at sporting events.[817]

4. Holidays

209. Furthermore, the club must grant the athlete (if he is an employee[818] or a person similar to an employee[819]) holidays. These are determined in accordance with § 3(1) BUrlG and amount to a minimum of twenty-four working days if the employee works a six-day week. In cases where the employee works a five-day week, holidays due are reduced accordingly to twenty days, and so on.[820] Employment contracts often contain additional regulations concerning holidays due. However, pursuant to § 13(1) BUrlG, these contractual regulations cannot deviate from the BUrlG if this will prove to be to the disadvantage of the employee.[821] Due to the payment structure in sports, the calculation of payment for holidays due in accordance with §§ 611(1) BGB, 11(1) sentence 1 BUrlG is often problematic. Particular problems can arise in relation to premiums paid to the sportsman in the last thirteen weeks before the beginning of a holiday period,[822] as it is not clear whether or not these are to be taken into account. In this regard, it is crucial to consider whether this wage component is based on performance, or is independent of it, i.e., whether a performance carried out in the relevant period should be compensated with *this* disputed wage or not.[823] The relevant jurisprudence affirms this as regards premiums which are paid to the player based on individual matches played or points

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815. As already stated, a binding agreement as regards permissible grounds for the tendering of notice is not possible due to the fact that priority is awarded to statute, see Part II, Ch. 2, §1 III B 3 i and vi.
816. MünchHdbArbR/Gitter, 2nd edition 2000/2001, § 202, mn. 49a; see also Horst/Jacobs, RdA 2003, 215 at 222 for the converse case of the doping of an athlete by his club.
817. PHBSportR-Fritzweiler, part 3, mn. 37; Adolphsen/Nolte/Lehner/Gerlinger/Wüterich/Breucker, *Sportrecht in der Praxis*, 2011, mn. 576.
818. For an elaboration on the classification of the athlete as 'employee *sui generis*' and the exclusion of the holiday entitlement, see Bühler, Sp*u*Rt 1998, 143 et seq.
819. § 2 sentence 1 BUrlG, compare Part II, Ch. 2, §1 I E. Freelance contracts are not encompassed by the BUrlG.
820. Schaub/Linck, *Arbeitsrecht*, 14th edition 2011, § 104, mn. 46.
821. The possibility of partially deviating from the BUrlG in collective labour agreements does not play a role in sports due to the absence of collective agreements, see MünchHdbArbR/Giesen, 3rd edition 2009, § 337, mn. 4.
822. Pursuant to § 11(1) sentence 1 BurlG, average remuneration for the last thirteen weeks before the beginning of the holidays is the point of reference for the calculation of payment during the holidays.
823. See Schaub/Linck, *Arbeitsrecht*, 14th edition 2011, § 104, mn. 127.

generated and/or league table place achieved.[824] The matter of which premiums the athlete had a right to claim in the relevant period is not relevant; rather, one must examine which premiums he actually received.[825] The legal situation is more problematic in the case of premiums which are to be paid after completing the tenth, twentieth, twenty-fifth and thirtieth official game, since these premiums are to be paid independently of whether the respective matches took place in the last thirteen weeks before the beginning of a holiday.[826] According to the jurisprudence of the BAG, these payments are, nevertheless, to be included in the calculation of holiday payments.[827] In addition, there are often contractual clauses, in accordance with which a part of the monthly salary is to be treated as an advance on holiday payments.[828] The ECJ has ruled that such clauses violate Directive 93/104/EC,[829] as the employee could be tempted to waive his right to holidays in certain cases, i.e., if he has acute financial problems.[830] However, the ECJ has also ruled that a violation of the directive can be prevented by using transparent calculation rules that clearly show how the actual monthly salary is worked out.[831]

E. Additional Performance Obligations of the Employer

210. The additional main performance obligations of the employer include ensuring that the athlete's health and personal rights are protected.

1. Protection against Damage to Health

211. Pursuant to § 618(1) BGB, the employer is obliged to ensure that the equipment supplied by him for the athlete's use does not endanger the athlete 'to the extent that the nature of the athlete's work permits'. This regulation also applies to freelance contracts.[832] In sports, this means that the club and/or sports organizer owes a duty to the athlete to the extent that he must aim to avoid any injury occurring to the athlete; for example, by providing the correct sports equipment.[833] The club is regarded as having fulfilled its obligations if it provides equipment which complies with the requirements of the *Geräte- und Produktsicherheitsgesetz*

824. BAG, NZA 1993, 750 at 751; Adolphsen/Nolte/Lehner/Gerlinger/Wüterich/Breucker, *Sportrecht in der Praxis*, 2011, mn. 573.
825. BAG, NZA 1993, 750 at 752.
826. Brömmekamp, Sp*u*Rt 1997, 50.
827. BAG, NJW 1997, 276; Adolphsen/Nolte/Lehner/Gerlinger/Wüterich/Breucker, *Sportrecht in der Praxis*, 2011, mn. 573; see for the issue in general Hilpert, RdA 1997, 92 at 97.
828. See Quirling, Sp*u*Rt 2007, 158.
829. ECJ, C-131/04, Sp*u*Rt 2007, 157 = AP no. 2 to Richtlinie 93/104/EG – Robinson-Steele.
830. Quirling, Sp*u*Rt 2007, 158.
831. Quirling, Sp*u*Rt 2007, 158 at 159.
832. MüKo/Henssler, 5th edition 2009, § 618 BGB, mn. 25.
833. Seiter, *Vertrags- und arbeitsrechtliche Probleme der Werbung durch Spitzensportler*, in: Grunsky (ed.), Werbetätigkeit und Sportvermarktung, 1985, 41 at 51.

(Devices and Product Safety Law, GPSG).[834] As regards protective equipment, regard must be had to the *Achte Verordnung zum GPSG* (a regulation emanating from § 4(1) sentence 1 GPSG[835]). § 2 of this regulation stipulates that protective equipment may only be put into circulation if it, when used in the intended manner, protects the lives and health of its users, without endangering the legally protected interests of others.[836] Sports equipment which is not protective equipment pursuant to § 4(2) GPSG must be constructed in a such a way that its intended use or foreseeable misuse does not endanger the safety and health of users or third parties. Furthermore, the club (through the coach) must organize training in such a way that the athletes' health is not endangered. In contrast to this, § 2(1) of the Rules Regarding Safety and Health Protection in Relation to the Use of Personal Protective Equipment at Work,[837] in conjunction with § 1(3) no. 5, which details scheduled exceptions to sports equipment, is not applicable to sports equipment. Aside from the legal guidelines, protective equipment is also dealt with by the sports federations.[838]

212. The *Arbeitszeitgesetz* (Working Time Act, ArbZG) is intended to protect employees from periods of work which are too long on a daily basis. The period may not exceed eight hours per working day. This can be extended to ten hours a day if the maximum of eight hours is not exceeded on average over a six-month period (§ 3 ArbZG). It is evident that these requirements are not met in professional sports.[839] Compliance with the requirements regarding protection of young workers under labour law came into focus upon the nomination of *Julian Draxler* (who was then 17 years old) in the DFB-Cup match between *1. FC Nürnberg* and *Schalke 04*. *Draxler* scored the decisive goal at 10:57 PM. According to § 14 *Jugendarbeitsschutzgesetz* (Youth labour protection act, JArbschG) persons between 15 an 18 years of age may not work after 10 PM.[840]

2. Protection of the Athlete's Personal Rights

213. The club has a vital interest in being allowed to use the image and name of the athlete for representative purposes. The matter of the extent to which the athlete

834. ErfK/Wank, 12th edition 2012, § 618 BGB, mn. 11; Staudinger/Oetker, BGB, revised edition 2011, § 618 BGB, mn. 158.
835. *Verordnung über das Inverkehrbringen von persönlichen Schutzausrüstungen* (Regulation Regarding the Use of Personal Protection Equipment) – 8. GSGV of June 10, 1992, BGBl. I-1992, 1019, with amendments; see Klindt, NVwZ 2004, 66.
836. Furthermore they must meet the requirements of appendix II to the Council Directive 89/686/EEC.
837. *Verordnung über Sicherheit und Gesundheitsschutz bei der Benutzung persönlicher Schutzausrüstungen bei der Arbeit* of Dec. 4, 1996, BGBl. I-1997, S. 1841, with amendments; see also Kollmer, NZA 1997, 138 at 140.
838. Klindt, NVwZ 2004, 66.
839. Adolphsen/Nolte/Lehner/Gerlinger/Wüterich/Breucker, *Sportrecht in der Praxis*, 2011, mn. 578.
840. For more detail, see Adolphsen/Nolte/Lehner/Gerlinger/Wüterich/Breucker, *Sportrecht in der Praxis*, 2011, mn. 581 et seq.; Heink, Sp*u*Rt 2011, 134 et seq.; Gutzeit/Vrban, Sp*u*Rt 2011, 60 et seq.

is obliged to participate in such activities will be addressed in another chapter.[841] At this juncture, it can, however, be stated that it is incumbent on the club to avoid any infringement of the athlete's personal rights. In particular, the club must not make the athlete look ridiculous or infringe on his privacy.[842]

F. Impairments of Performance in the Athlete's Employment Relationship

214. As in other areas of the economy, impairments of performance can also occur in sport performance relationships.

1. Impairments on the Athlete's Part

215. In sports, missed or substandard performances (in particular, due to an injury or playing ban) can have significant effects on the athlete's entitlement to remuneration or justify claims for damages of the club. According to the 'no work no wage' principle,[843] it is to be assumed that, in cases where performance is impossible, the athlete is not entitled to claim remuneration.[844] In the relevant 'problem areas' in sports, exceptions to this principle can arise from § 3(1) *Entgeltfortzahlungsgesetz* (Continued Remuneration Act, EFZG) (for employees) and § 616 BGB (for freelance contractors). For cases in which the athlete offers to perform but the club – unlawfully – does not accept (the so-called default in acceptance, *Annahmeverzug*, § 293 BGB), § 615 sentence 1 BGB applies, pursuant to which the person offering the service retains the entitlement to remuneration.[845]

a. Injury or Other Illnesses Leading to Inability to Perform

216. If the athlete is sick and/or gets injured so badly that he is unable to perform, the club must pay continued remuneration for six weeks after he has incurred injury or fallen ill, §§ 611(1) BGB in connection with 3(1) sentence 1 EFZG. This athlete is precluded from asserting such a claim if the illness is due to the athlete's own negligence. In such cases, negligence is not defined on the basis of the general principles of negligence on the part of the debtor towards the creditor (as laid down in § 276 BGB) because it does not relate to a breach of duty towards the employer, but one towards the athlete himself.[846] This duty is only regarded as having been

841. Part IV, Ch. 2, §2 III A.
842. MünchHdbArbR/Gitter, 2nd edition 2000/2001, § 202, mn. 66a; similarly MünchHdbArbR/Giesen, 3rd edition 2009, § 337, mn. 23.
843. MüKo/Müller-Glöge, 5th edition 2009, § 614 BGB, mn. 1; MüKo/Henssler, 5th edition 2009, § 615 BGB, mn. 1.
844. Ittmann, *Pflichten des Sportlers im Arbeitsverhältnis*, 2004, 183; Schaub/Linck, *Arbeitsrecht*, 14th edition 2011, § 51, mn. 9.
845. MüKo/Henssler, 5th edition 2009, § 615 BGB, mn. 1.
846. MüKo/Müller-Glöge, 5th edition 2009, § 3 EZFG, mn. 36.

breached if the illness is based on a gross violation of the personal interests of a reasonable man.[847] One classic example is the practice of dangerous sports such as kick-boxing,[848] or a particularly gross and careless violation of the established rules of sport.[849,850] If a professional athlete is injured while performing his contractual duties, culpability can only be made out in cases of evident self-overestimation, which is rarely proven.[851] The employee only has to bear the risks arising out of a gross violation of the rules. However, this should be dealt with in a restrictive manner, as the sport is performed in the club's interest, and even the fairest and most careful player is not immune to committing a violation of the rules in 'the heat of the moment.[852,853] Problems similar to those which arise in the calculation of holiday pay can also occur in relation to the calculation of the amount of continued payments during sickness.[854] In contrast to this, it is not the average earnings of the thirteen weeks prior to the beginning of the holiday which is to be taken as reference (reference principle),[855] but the amount of pay which the athlete would have earned during the time he was unable to work (loss of earnings principle),[856] § 4(1) EFZG. An *annual* premium, which depends on the number of official matches in which the player participated, cannot be considered in this context, as it is not based on a concrete timeframe, and so, does not represent remuneration for the period for which the employee was on sick leave.[857] In opposition to this, employment premiums which are agreed upon for specific matches can be taken into account, since these correspond to a specific performance.[858] A premium regulation which provides that, in the event of an injury, professional footballers are to be treated as if they had taken part in the matches which were played in these six weeks, relates only to illnesses or injuries which arise during the course of a match or training.[859]

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847. MüKo/Müller-Glöge, 5th edition 2009, § 3 EZFG, mn. 36; Schaub/Linck, *Arbeitsrecht*, 14th edition 2011, § 98, mn. 37.
848. ArbG Hagen, NZA 90, 311. After Günther, Sp*u*Rt 2008, 57 at 58 the decision contrasts the jurisprudence of the BAG, which in one case held that amateur boxing was not a 'dangerous sport' because there was constant supervision by a coach, decision of Dec. 1, 1976, reference number 5 AZR 601/75, AP no. 42 to § 1 LohnFG = BAGE 28, 248 at 252. As regards motocross, the BAG left the question open, but tended towards the opinion that it was a dangerous sport in this sense, AP LohnFG § 1 no. 18 = JZ 1972, 370 at 371. For an opposing view, see LAG Rheinland-Pfalz, Sp*u*Rt 2000, 115 at 117.
849. BAGE 36, 371 = NJW 1982, 1014.
850. Schaub/Linck, *Arbeitsrecht*, 14th edition 2011, § 98, mn. 42; see also Schwede, Sp*u*Rt 1996, 145 at 146.
851. MünchHdbArbR/Giesen, 3rd edition 2009, § 337, mn. 70.
852. Ittmann, *Pflichten des Sportlers im Arbeitsverhältnis*, 2004, 192.
853. See also MünchHdbArbR/Gitter, 2nd edition 2000/2001, § 202, mn. 70 et seq.
854. See Part II, Ch. 2, §2 III D 4.
855. Schaub/Linck, *Arbeitsrecht*, 14th edition 2011, § 104, mn. 117 et seq.
856. MüKo/Müller-Glöge, 5th edition 2009, § 4 EFZG, mn. 1; Schaub/Linck, *Arbeitsrecht*, 14th edition 2011, § 98, mn. 83; MünchHdbArbR/Giesen, 3rd edition 2009, § 337, mn. 32.
857. BAG, NJW 1986, 2904 at 2905; PHBSportR-Fritzweiler, part 3, mn. 38.
858. BAG, Sp*u*Rt 1997, 61 at 62; MünchHdbArbR/Gitter, 2nd edition 2000/2001, § 202, mn. 74; see also LAG Niedersachsen, NZA 1989, 469.
859. BAGE 93, 212 = NZA 2000, 771; for an overview of the subject, see Hilpert, RdA 1997, 92 at 97 et seq.

Freelance contractors are not protected by the EFZG (§ 1(2) EFZG e contrario) but are subject to § 616 sentence 1 BGB.[860] Pursuant to this provision, the athlete is not deprived of his claim to remuneration by the fact that he is prevented from performing services for a relatively trivial period of time for a reason in his person without fault on his part. The principles arising in relation to § 3(1) sentence 1 EFZG are also applied in these cases.[861] In determining the relevant period of time, the total duration of the service relationship will be compared to the period in which the athlete has not performed. An upper limit will usually be set at six weeks, although in special cases, the courts have regarded eight weeks as being acceptable.[862] In accordance with § 616 sentence 2 BGB, the athlete must allow to be credited against him the amount he receives for the period during which he is prevented under a health or accident insurance policy that exists on the basis of a statutory duty. Due to the fact that it can be waived (see § 619 BGB e contrario) § 616 BGB is not of great importance in practice.

b. Inability to Perform Due to a Ban

217. In practice, bans imposed on athletes for doping or for the infringement of other disciplinary regulations are also relevant, as in such cases, the athlete is not available to the club for selection for a match. According to the relevant jurisprudence, the law[863] does not provide for a decreased amount of remuneration in such cases, since the work of the athlete is not actually impossible, or impossible in law pursuant to § 275 BGB. The matter of the athlete's absence from work arises, rather, from the contractual penalties imposed by the federation as a third party, § 317 BGB.[864] If no further arrangements are made in the contract of employment, it is to be assumed, upon interpretation of the contract, that the athlete is still entitled to basic remuneration based on participation in training[865], as well as work representing the association (even if the latter is now of less value to the club – for instance, in a case where doping has been proven). If the association makes no use of an existing right of termination, then it cannot insist that the athlete applies for public assistance benefits for the duration of the ban.[866] In contrast to this, achievement-based premiums are no longer granted, since these are to be regarded as remuneration for playing in a game, under the terms of the contractual agreement.[867]

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860. MüKo/Henssler, 5th edition 2009, § 616 BGB, mn. 20.
861. MüKo/Henssler, 5th edition 2009, § 616 BGB, mn. 56.
862. MüKo/Henssler, 5th edition 2009, § 616 BGB, mn. 59.
863. In such cases, § 326(1) sentence 1 BGB, which generally regulates the effect of impossibility of performance on the obligation to provide consideration, has to be taken into account.
864. BAG, NJW 1980, 470 at 470 et seq. The court found that there was a partial impossibility relating to the participation in competition pursuant to § 275(3) BGB, which had the consequence of lowering remuneration in accordance with §§ 326(1) sentence 1, 441(3) BGB. Ittmann, *Pflichten des Sportlers im Arbeitsverhältnis*, 2004, 186 et seq.; for an alternative view, see Horst/Jacobs, RdA 2003, 215 at 222, according to whom a distinction between performance in training and in matches is not possible. This view results in a complete lapse of claims.
865. BAG, NJW 1980, 470 at 471.
866. BAG, NJW 1980, 470 at 471.
867. Ittmann, *Pflichten des Sportlers im Arbeitsverhältnis*, 2004, 187 et seq.

Due to the impossibility of the athlete performing, the club can suffer loss (which can be difficult to prove in team sports).[868] If the athlete is at fault, the club may be entitled to compensation in accordance with §§ 280(1) sentence 1, 283 sentence 1 BGB. The federation by-laws cannot be consulted in order to decide on the civil culpability, as they are specific to the playing of the game, and not to the exchange relationship between the club and the athlete.[869] Furthermore, in employment relationships, the basic principles regarding limitation of liability for employees must be taken into account. These specify that (grosso modo) intentional and grossly negligent breaches of contract lead to the athlete being obliged to compensate the club for the damage. Negligence allows for an apportionment of the damage, and slight negligence results in no claim.[870]

c. Bad Performance

218. Impossibility of performance must be distinguished from bad performance, which is the provision of a substandard performance by the athlete. It is important to note that the quality of a performance by an athlete in a team game is difficult to assess objectively.[871] In individual sports – in athletics, for instance – such assessment may be easier.[872] Independently of this, the regulations relating to freelance and/or employment contracts do not lead to a decrease in remuneration on the grounds of bad performance measured against the relevant norm; rather, the employee retains his claim for remuneration, even if he is at fault for giving (if ascertainable) a performance which, objectively, is lacking.[873] An exception applies only in cases where the athlete has acted intentionally.[874] If loss occurs, the employer can only assert claims to compensation (which are usually of little value due to the difficulty in proving a causal connection)[875] and eventually terminate the employment contract.[876]

2. Impairments on the Employer's Part

219. A delay in the payment of wages by the club, can, in accordance with the general rules, lead to claims for compensation for the loss caused by delay pursuant §§ 280(1) sentence 1, 280 (2), 286 BGB and, in particular, for the payment of interest in accordance with § 288(1) BGB. If the club breaches its obligations to provide

868. MünchHdbArbR/Gitter, 2nd edition 2000/2001, § 337, mn. 34.
869. MünchHdbArbR/Gitter, 2nd edition 2000/2001, § 202, mn. 81.
870. See BAG, NZA 1994, 1083 at 1084; MüKo/Henssler, 5th edition 2009, § 619a BGB, mn. 1 et seq. (especially mn. 25 et seq.); Staudinger/Richardi/Fischinger, BGB, revised edition 2011, § 619a BGB, mn. 28 et seq. (especially mn. 66 et seq.).
871. Ittmann, *Pflichten des Sportlers im Arbeitsverhältnis*, 2004, 192.
872. Hausch, Sp*u*Rt 2003, 103 at 104.
873. Schaub/Linck, *Arbeitsrecht*, 14th edition 2011, § 52, mn. 10.
874. See BAG, NJW 1970, 111.
875. Ittmann, *Pflichten des Sportlers im Arbeitsverhältnis*, 2004, 196.
876. Schaub/Linck, *Arbeitsrecht*, 14th edition 2011, § 52, mn. 10; Ittmann, *Pflichten des Sportlers im Arbeitsverhältnis* 2004, 189 and 192 et seq.; BAG, NJW 1970, 111; BGH, NJW 1982, 1532.

the employee with work[877] by arbitrary non-selection or unjustified exclusion from training, the athlete may be entitled to damages in accordance with §§ 280(1) sentence 1, 280(3), 281 (1) sentence 1 BGB.[878] Unlawful omission from selection can lead to the payment of the premium owed for participation in the match. Refusal to allow the athlete to participate in training can lead to an entitlement to compensation for the impairment of sporting ability (which is difficult to quantify). Claims for damages can also be granted in the event of non-fulfilment of obligations to provide safe working conditions in accordance with § 618 BGB.[879] Finally, the question as to who is liable in relation to damage arising from an inaccurate decision as to the possibility of selecting an athlete is quite interesting. Here, the club, the coach and the attending physician all come into consideration.[880]

Furthermore, injuries to property, body and health are not only considered in relation to contract law; tort law also applies in this case (§ 823 et seq. BGB). As regards bodily harm and/or death, it must be noted that the club, as the employer, is only liable if there is deliberate action on its part (§ 104(1) sentence 1 SGB VII); in all other cases, statutory accident insurance will indemnify for any material loss.[881]

3. Rights of Retention of the Contracting Parties

220. In accordance with § 320(1) sentence 1 BGB, both parties may refuse their part of the performance until the other party renders consideration, unless they are obliged to perform in advance. If one party has performed in part, consideration may not be refused to the extent that refusal, in the circumstances – in particular because the part in arrears is relatively trivial – would be bad faith, § 323(2) BGB.

4. Contractual Penalties

221. In practice, the breach of contractual obligations is regulated by the imposition of disciplinary measures, contractual penalties and the refusal to perform.[882] In sports, the most frequent reaction to a breach of contract by the athlete is the imposition of a contractual penalty. This is based on contractual clauses in relation to breaches of contractual obligations by the athlete, pursuant to which the club has the right "to impose contractual penalties on the player in accordance with § 315 BGB", and which specify the contractual penalties: "reproval, exclusion from club

877. See Part II, Ch. 2, §2 III D 3.
878. See for the former version of the BGB MünchHdbArbR/Gitter, 2nd edition 2000/2001, § 202, mn. 54 et seq.
879. See Part II, Ch. 2, §2 III E 1.
880. For more on this matter, see Jakob, Sp*u*Rt 2004, 105 et seq.
881. See Part II, Ch. 2, §4 II.
882. For further information on the disciplinary authority of the association, see Part I, Ch. 3, §6, for contractual penalties Part II, Ch. 2, §2 III F 4, and for the athlete's right to employment, Part II, Ch. 2, §2 III D 3.

events and the payment of fines up to a maximum of …".[883] Such clauses have been considered to be effective in past court decisions.[884] § 309 no. 6 BGB, which has been in effect since 1 January 2002, does not oppose the standard-form agreement of contractual penalties in sport either.[885] The contractual penalty regulation can, however, be ineffective because of the inadequacy of the maximum penalty. This is the case where a penalty amounting to a month's salary is imposed for not beginning to work, although the employee could terminate the employment contract with a two-week term of notice, and although the employer has no special interests which would justify a harsher punishment.[886] Furthermore, if a contractual penalty regulation does not exactly stipulate the behaviour which gives rise to the penalty, it is invalid, as this lack of clarity leads to an improper disadvantage for the employee in accordance with § 307(1) sentence 2 BGB.[887] However, in its earlier jurisprudence the *Bundesarbeitsgericht* (Federal Labour Court, BAG) pointed out that, when defining the necessary degree of certainty, the characteristics of sports (in that case, football) must be taken into account. This could lead to a less strict application of the rule.[888] In the sports-specific jurisprudence under §§ 307 et seq. BGB (there has been none from the BAG to date), it is debated whether or not a generally formulated contractual penalty clause in connection with a catalogue of obligations is sufficiently clear.[889] However, bearing in mind the forensic uncertainty which is ever present in this area, a penalty clause which refers to concrete, individually-formulated contractual duties,[890] and which balances out the corresponding penalties is likely to be effective.[891] In each case, a contractual penalty requires that the employee is actually culpable.[892] Independently of §§ 307 et seq. BGB, the validity of a contractual penalty agreement which, in the event of breach

883. Ittmann, *Pflichten des Sportlers im Arbeitsverhältnis*, 2004, 196; a similar clause was the subject matter of the decision of LAG Düsseldorf, Sp*u*Rt 2008, 213.
884. BAG, NZA 1986, 782.
885. See Schütz, Sp*u*Rt 2011, 54 at 56 and Part II, Ch. 2, §2 II.
886. BAG, NZA 2004, 727 at 733 et seq.
887. BAG, NZA 2005, 1053; Zundel, NZA 2006, 1237 at 1241; for the relevant matters in relation to the area of sports, see LAG Düsseldorf, Sp*u*Rt 2008, 213 at 214; Ittmann, *Pflichten des Sportlers im Arbeitsverhältnis*, 2004, 209 et seq.
888. BAG, AP no. 12 to § 339 BGB, extract in NZA 1986, 782 at 783; Schul/Wichert, Sp*u*Rt 2004, 229 at 233; and also in the jurisprudence of the LAG Berlin, Sp*u*Rt 2005, 75 at 76 = CaS 2005, 317 with comment by Schul/Wichert.
889. In support of this, see LAG Berlin, Sp*u*Rt 2005, 75; against this, referring to the BAG, LAG Düsseldorf, Sp*u*Rt 2008, 213 at 214.
890. For example, § 6 of the model contract for licensed footballers of the DFL, printed in PHBSportR appendix C, 845 at 850.
891. In a more recent decision, LAG Düsseldorf disapproved of the fact that the contentious contractual penalty clause did not refer to the agreed catalogue of obligations, and that the latter committed the player to participate in certain performances only 'in particular', Sp*u*Rt 2008, 213 at 214. These objections could be met by an according approach; see Schul/Wichert, 2004, 229 at 233. The remarks of the BAG in NZA 2006, 34 at 36 also support this result. There, it emphasized that the regulation under scrutiny did not refer to the catalogue of obligations contained in the employment contract only. The court did not, however, draw any corresponding conclusions.
892. Adolphsen/Nolte/Lehner/Gerlinger/Wüterich/Breucker, *Sportrecht in der Praxis*, 2011, mn. 619.

of contract, obliges the athlete to repay his entire earnings is regarded as immoral, and, therefore, in accordance with § 138(1) BGB, void.[893]

IV. Trainer Contracts

222. As in the case of the athlete, the legal basis of the trainer's activity is also of essential importance for him. In this respect, reference can be made to previous comments.

A. Performance Obligations of the Trainer

223. The trainer is obliged to prepare the athletes of the club technically, tactically and physically for competitions in accordance with the provisions of his employment or freelance contract.[894,895] For this purpose, it is usually the practice of the club to transfer its managerial authority to him.[896] Furthermore, he is responsible for the selection of the team. In spite of this, the performance obligation does not include the success of the athletes under the trainer's supervision.[897] To this extent, the club carries the risk of a lack of success. Furthermore, coaches are also usually obliged to participate in public relations activities.[898] Here, the principles concerning athletes are applicable.

B. Performance Obligations of the Club

224. The performance obligations of the club towards the trainer are not substantially different to those towards the athletes. Thus, the club is, in particular, obliged to pay the agreed remuneration and to employ the coach in accordance with the principles which apply to athletes. The withholding of salary premiums in cases of termination of contract is only permitted if, as set out in a standard-form contract, the reduction amounts to a maximum amount of 25% to 30% of the overall remuneration, and if the reasons for such a reduction are clearly stated in the contractual clause.[899] When weighing up the interests concerning the entitlement to work, however, it must be taken into consideration that the coach's remuneration is usually not dependent on his selection for a specific competition. If the coach has

893. LAG Köln, NZA-RR 1999, 350 = LAGE § 339 BGB no. 13; Adolphsen/Nolte/Lehner/Gerlinger/Wüterich/Breucker, *Sportrecht in der Praxis*, 2011, mn. 616.
894. As regards the qualification of these contracts see Part II, Ch. 2, §1 I C.
895. PHBSportR-Fritzweiler, part 3, mn. 66.
896. For more on license football, see Küpperfahrenberg, *Die arbeitsrechtliche Stellung von Spielern und Trainern im Lizenzfußball*, 2004, 184.
897. Staudinger/Richardi/Fischinger, BGB, revised edition 2011, Vorbemerkungen zu §§ 611 BGB ff., mn. 26; MüKo/Müller-Glöge, 5th edition 2009, § 611 BGB, mn. 22; Küpperfahrenberg, *Die arbeitsrechtliche Stellung von Spielern und Trainern im Lizenzfußball*, 2004, 197.
898. PHBSportR-Fritzweiler, part 3, mn. 66.
899. ArbG Paderborn, Sp*u*Rt 2011, 168 at 171 with comment by Menke; Korff, CaS 2011, 345.

no contractual entitlement to be selected for a certain competition, the club has a wide scope of discretion. It is not for the courts to replace the club's sport-related deliberations with their own. The only limit on the scope of discretion is the prohibition of arbitrary decisions.[900] Finally, the club is also obliged to create a working environment for the coach which does not endanger his physical integrity, § 618 BGB.

C. Impairment of Performance in the Trainer's Working Relationship

225. In considering impairments of performance in the coaching relationship, the earlier comments regarding athletes can be adverted to. There is particular potential for damage in the case of the selection of players who have been assessed as unfit by physicians.[901]

V. Referee Contracts

226. The referee is under an obligation to the federation to supervise the match correctly, in return for which he can demand payment of the remuneration which has been agreed upon, as well as payment of his expenses – for example, driving and accommodation costs – insofar as these have not already been taken into account in his remuneration.[902] As regards all other aspects of referee contracts, reference should be made to the previous remarks.

§3. Labour Market Regulation

227. Germany's labour market is, in principle, free. The state is particularly engaged in the area of placement and advanced training of unemployed persons.

Nevertheless, there are regulations which concern the entire labour market. In the area of sports in particular, regulations relating to the employment of foreign citizens on the one hand, and the admissibility of professional sport agencies on the other, are important. However, the state exerts no influence by means of its framing of education policy over admission to the area of the sports labour market, as no state-regulated qualification[903] is needed to enter it.[904]

Finally, measures imposed by the federations play a considerable role.

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900. LAG Hamm, Sp*u*Rt 2008, 215 at 216 = NZA-RR 2008, 464 at 465.
901. As to the liability of physicians for incorrect decisions regarding the ability of an athlete to participate in a game, see Jakob, Sp*u*Rt 2004, 105 et seq.
902. Kuhn, *Der Sportschiedsrichter zwischen bürgerlichem Recht und Verbandsrecht*, 2001, 73 et seq.
903. As, for example, that of the 'sports expert', see Part II, Ch. 2, §1 I F.
904. Heinemann, *Einführung in die Ökonomie des Sports*, 1995, 198.

I. The Employment of Foreign Athletes in Germany

228. Foreign athletes are widely employed in Germany. Therefore it is particularly pertinent whether, and to what extent, this is admissible under the rules of the federations and national law.

In the football Bundesliga, the percentage of foreign players employed rose from 21.1% to 60.6% between 1995/1996 and 2002/2003.[905] In contrast to this, a percentage of over 50% was achieved for the first time in the 2008/2009 season, according to the Fourth Annual Study of the FIFA.[906] The DFL states that the figure was 45% in September 2009.[907] Despite the declining figures, the relevance of the issue is clear.

A. National Measures

229. The regulations considered in the following are all linked to the term 'employment' in terms of § 7(1) SGB IV. This term must be distinguished from the labour law term 'employee' and usually also encompasses persons similar to employees.[908] § 7(4) SGB IV (version in force until 1 January 2003) set out a rebuttable presumption of dependent occupation in the sense of social security law if, inter alia, the athlete earned more than EUR 325 per month, worked continuously, was, essentially, in the employ of one employer only, and if the activity in which he engaged demonstrated none of the typical characteristics of entrepreneurial action, e.g., the independent sourcing of work material (in this case, for example, sports equipment). While this presumption no longer exists, it must nonetheless be assumed that it continues to determine the practice of social insurance institutions.[909] Since, in practice, athletes from foreign countries rarely plan to be self-employed once they are arrive in Germany, but are usually employed by clubs which are based in Germany, the following remarks are limited to the dependent employment of foreigners in Germany.[910] In this respect, one must distinguish between EU and non-EU citizens.

905. Raupach, Sp*u*Rt 2008, 241 at 244; Hintermeier/Rettberg, *Geld schießt Tore*, 2006, 52 et seq.
906. Focus Online of Aug. 31, 2009: 'Ausländische Spieler in Bundesliga in der Überzahl', accessible under www.focus.de/sport/fussball/bundesliga1/bundesliga-auslaendische-spieler-in-bundesliga-in-der-ueberzahl_aid_431314.html (accessed May 27, 2012).
907. Homepage of the DFL, www.bundesliga.de/de/dfl/fragen/ (accessed May 27, 2012).
908. See also fn. 968.
909. Bauer/Krets, NJW 2003, 537 at 544.
910. As regards independent sports performance in Germany, the mutually warranted benefits of employment, particularly in contracts under international law, are of importance because of § 21(2) AufenthG (see fn. 911) as, in these cases, a residence permit can be granted for the practice of a corresponding activity, see Renner/Röseler, *Ausländerrecht*, 9th edition 2011, Allgemeine Verwaltungsvorschrift zu § 21 AufenthG, 21.2. and mn. 8 et seq.

1. Non-EU Citizens

230. If a club wishes to engage a citizen of a non-EU country in Germany as an employee, then a residence title under § 4(1) *Aufenthaltsgesetz* (Residence Act, AufenthG)[911] granted by the public authority[912] responsible for aliens is required. This residence title can be an *Aufenthaltserlaubnis* (residence permit) according to § 7 AufenthG, a *Niederlassungserlaubnis* (domicile permit) pursuant to § 9 AufenthG or a *Daueraufenthaltserlaubnis-EG* (long-term residence permit EC) according to §§ 9a to 9c AufenthG.[913,914] In general, in order for a residence title to be granted, the authority must first be sure of the fact that the person in question is capable of earning her own livelihood and there should exist no ground for eviction (e.g., criminal convictions, §§ 53, 54 AufenthG), § 5(1) AufenthG. § 54 no. 3 AufenthG, which allows for eviction in cases of the cultivation, import or trade of narcotics pursuant to the *Betäubungsmittelgesetz* (Narcotics Act, BtMG),[915] is of particular relevance to sports because of the doping problem.

The residence permit may only authorize dependent employment if the *Bundesagentur für Arbeit* (Federal Employment Office, BA) has granted its consent, §§ 18, 39 AufenthG.[916] This consent will only be given, if it will not be disadvantageous to the German labour market and if no Germans, no aliens who are

911. *Aufenthaltsgesetz* (Immigration Act) as promulgated on Feb. 25, 2008 (BGBl.-I 2008, 162), with amendments.
912. In *Bavaria*, the responsibilities of the public authority with competence for non-nationals are performed by the local authorities, i.e., by urban districts (*kreisfreie Städte*), by the 'large district towns' (*große Kreisstädte*), and by the district offices (*Landratsämter*) pursuant to § 2 of the *Verordnung über die Zuständigkeiten zur Ausführung des Aufenthaltsgesetzes und ausländerrechtlicher Bestimmungen in anderen Gesetzen* (Regulation Regarding the Competencies of the Implementation of Residence Act and Other Provisions Relating to Foreigners) as of July 14, 2005 (Gesetz- und Verordnungsblatt 2005, 306), with amendments.
913. Koch, RdA 2006, 56 at 57. The conditions for the grant of a permanent residence permit pursuant to § 9 AufenthG in the case of the employment of a foreign athlete often cannot be proven. This is why the following explanation is limited to gainful employment with a residence permit. The same applies to the *Daueraufenthalterlaubnis-EG*, pursuant to which the 2003/109/EC directive was implemented. For more on the directive, see Jaufer, *Berufssport und Europarecht*, in: Hinteregger/Reißner (eds.), Sport als Arbeit, 2008, 63 at 94. If the athlete resides in Germany or the EU legally, for a minimum of five years, the aforementioned permits can be also granted under the proviso of further conditions that have substantial regard to the athlete's financial security and his language skills. For more detail on the implementation of the directive in Germany, see Welte, ZAR 2008, 263.
914. The granting of a visa as a title of residence in accordance with § 6 AufenthG cannot be elaborated on here. For further information on this topic, see Renner/Dienelt, *Ausländerrecht*, 9th edition 2011, § 6. Permission to engage in gainful employment can also be granted by means of a so-called *Schengen-Visa*, Renner/Dienelt, *Ausländerrecht*, 9th edition 2011, § 6 mn. 6. The regulations regarding residence and permanent establishment permits, § 6(3) sentence 2 AufenthG, apply to national visas. Furthermore, it is necessary to keep in mind that a residence permit will generally only be granted if the foreign national in question has entered the country in possession of the correct visa, § 5(2) AufenthG, which specifies the purpose of his stay. Various requirements apply to the granting of various visas, depending on the alleged purpose of the entry to the territory.
915. *Betäubungsmittelgesetz* (Narcotics Act) as promulgated on Mar. 1, 1994 (BGBl.-I 1994, 358), with amendments.
916. Staudinger/Richardi/Fischinger, BGB, revised edition 2011, § 611 BGB, mn. 251.

regarded as equal in law in matters of employment and no EU residents are available to perform the work in question. Due to the special profiles which are required by clubs in (team) sports, these requirements will often be met.[917] Furthermore, the employee may not be employed under working conditions which are comparably worse than those of German employees, § 39(2) AufenthG. According to § 18(5) AufenthG, there must be a concrete offer of employment, which is examined by the public authority responsible for aliens. An employment contract which is concluded without the required authorization is not invalid,[918] but can be cancelled due to the legal impossibility of the work performance.

As regards *the consent of the BA* concerning the grant of a residence title by the public authority responsible for aliens, exceptional regulations apply to the area of sports under certain circumstances.[919]

2. EU Citizens

231. In dealing with the employment of EU citizens, one must differentiate between citizens of those states which were members of the EU before 1 May 2004 ('old Member States') and the 'new Member States'. In principle, since the ruling of the ECJ in the cases *Walrave and Koch*[920] and *Donà*,[921] it is widely recognized that the EU law provisions relating to free movement of workers and freedom to provide services apply also in relation to sports, insofar as the sporting activity is an 'economic activity' pursuant to ex-Article 2 TEC,[922] which is similar to Article 3 TFEU.

a. Citizens of the 'Old' Member States

232. In accordance with § 1(2) no. 1 AufenthG, the *Freizügigkeitsgesetz/EU* (Freedom of Movement Act/EU, FreizügG/EU),[923] applies to citizens of EU Member States. These citizens do not require permission in order to engage in gainful employment or to offer an independent service. They obtain a certification of their right of residence ex officio pursuant to § 5(1) FreizügigG/EU. Citizens of the EFTA (European Free Trade Association) States in the European Economic Area (Iceland, Liechtenstein and Norway) have the same rights as EU citizens in this context.[924]

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917. Koch, RdA 2006, 56 et seq.
918. Staudinger/Richardi/Fischinger, BGB, revised edition 2011, § 611 BGB, mn. 252.
919. See Part II, Ch. 2, §3 I A 3.
920. EuGH, Rs. C-36/74, O.J. 1974-I, 1405 = NJW 1975, 1093.
921. EuGH, Rs. C-13/76, O.J. 1976-I, 1333.
922. Jaufer, *Berufssport und Europarecht*, in: Hinteregger/Reißner (eds.), Sport als Arbeit, 2008, 63 at 94 et seq.; Persch, NZA 2010, 986 at 987; see also the recent decision of the ECJ, C-325/08, Sp*u*Rt 2010, 110 at 111 – Bernard.
923. *Freizügigkeitsgesetz/EU* of July 30, 2004 (BGBl.-I 2004, 1950, 1986), with amendments.
924. Staudinger/Richardi/Fischinger, BGB, revised edition 2011, § 611 BGB, mn. 249.

b. Citizens of the 'New' Member States (Bulgaria, Romania and Croatia)

233. Until 30 April 2011, special regulations applied to the citizens of almost all states which joined the EU on 1 May 2004 (Czech Republic, Estonia, Latvia, Lithuania, Hungary, Poland, Slovenia, Slovakia). These special regulations will apply to citizens of Bulgaria and Romania (whose states joined the EU on 1st January 2007) until 1 January 2014. After this date, they will also be granted full freedom of movement.[925] Malta and Cyprus were excluded from these regulations for which reason their citizens have enjoyed a full right of free movement within the EU territory since 1 May 2004.[926] According to the regulations in the Membership Treaties, § 2(4) sentence 1 FreizügG/EU, citizens of Bulgaria and Romania do not require any permission in order to *reside* in Germany. They do, however, require permission from the BA in order to engage in *employment* in the form of a (time-limited) *Arbeitserlaubnis-EU* (EU-Work permit) or a *Arbeitsberechtigung-EU* (EU-Work entitlement) (unlimited by time) under § 284(2) SGB III.[927,928] These permissions are, in principle, subject to the same requirements as the BA's consent to an employment of a non-EU citizen.[929]

However, if an athlete's EU work permit has been in existence for a period of twelve months, the athlete has a right to be granted an EU Work entitlement, § 284(5) SGB III in conjunction with § 12a ArgV.[930,931]

These regulations will apply to the citizens of Croatia for at least two years from its accession to the EU.

3. Special Regulations for Professional Sports

234. A relaxation of the rules regarding the employment of foreigners can be made for professional athletes under specific conditions. If these conditions are not fulfilled, the general rules apply.

a. Non-EU Citizens

235. The granting of a residence permit which allows employment for professional athletes from non-EU countries under certain circumstances does not require the consent of the BA pursuant to § 39 AufenthG. The athletes must be over 16, the

925. Jaufer, *Berufssport und Europarecht*, in: Hinteregger/Reißner (eds.), Sport als Arbeit, 2008, 63 at 94 et seq.
926. Renner/Röseler, *Ausländerrecht*, 9th edition 2011, § 39 AufenthG, mn. 26.
927. Article 1 Statute Mar. 24, 1997, BGBl. I-1997, 594, with amendments.
928. Staudinger/Richardi/Fischinger, BGB, revised edition 2011, § 611 BGB, mn. 250.
929. Gagel/Bieback, SGB II/SGB III, 47th edition 2012, § 284 SGB III, mn. 69.
930. *Verordnung über die Arbeitsgenehmigung für ausländische Arbeitnehmer* (Work Permit Regulation) of Sept. 17, 1998, BGBl. I-1998, 2899, with amendments.
931. Gagel/Bieback, SGB II/SGB III, 47th edition 2012, § 284 SGB III, mn. 69.

club or the institution must pay a gross salary which is at least 50% of the contribution assessment ceiling of the statutory pension scheme,[932] and the German federation responsible for the relevant sport, together with the *Deutscher Olympischer Sportbund* (German Olympic Sports Confederation, DOSB), must confirm the athlete's qualification as a professional athlete or functional qualification as a coach, § 42(1) AufenthG in conjunction with § 7 no. 4 *Beschäftigungsverordnung* (Occupation regulation, BeschV).[933] Under the same conditions, the public authority responsible for aliens can permit a citizen of a non-EU country, who is already living in Germany with a residence title, to take on an occupation without the consent of the BA in accordance with § 42(1) AufenthG in conjunction with § 2 *Beschäftigungsverfahrensverordnnung* (Occupation Procedure Regulation, BeschVerfV).[934]

Furthermore, the consent of the BA is not required if the athlete retains his residence abroad, and if the duration of the employment does not exceed three months in a twelve-month period, § 42(1) AufenthG in conjunction with. § 7 no. 1 BeschV. This is the case, even if the aforementioned conditions of § 7 no. 4 BeschV have not been fulfilled.

Similarly, participants in international sporting events are exempt from the requirement for the consent of the BA, § 42(1) AufenthG in conjunction with § 12 BeschV (or in conjunction with § 2 BeschVerfV if the athlete is already resident in Germany), as long as the *Bundesregierung* (Federal Government) has issued a performance guarantee.

This relaxation of rules affects only *the BA's consent* regarding the foreigner's employment. The residence title itself is still necessary for all athletes who are citizens of non-EU countries and can be refused or annulled – for instance, in the event of the import of narcotics.[935]

b. Citizens of 'New' Member States (Bulgaria, Romania and Coratia)

236. The BeschV, which originally referred to members of non-EU countries only, now also applies to citizens of the 'new' Member States (i.e., Bulgarians, Romanians and Coratians)[936] pursuant to § 284(6) sentence 1 SGB III, since, for them, the BeschV is more beneficial than the SGB III regulation.[937] Consequently, the requirement of a work permit for these persons in accordance with § 284 SGB

932. In 2012, this amounts to EUR 67,200 per annum or EUR 5,600 per month (western German states) and EUR 57,600 per annum or EUR 4,800 per month (eastern German states), § 3(1) no. 1 and (2) no. 1 *Sozialversicherungs-Rechengrößenverordnung 2012* as of Dec. 2, 2011, BGBl. I-2011, 2421, in accordance with which the gross salary paid to the athlete must amount to at least EUR 33,600 per annum or EUR 2,800 per month in western and EUR 28,800 per annum or EUR 2,400 per month in eastern Germany.

933. *Verordnung über die Zulassung von neueinreisenden Ausländern zur Ausübung einer Beschäftigung* of Nov. 22, 2004, BGBl. I-2004, 2937, with amendments.

934. *Verordnung über das Verfahren und die Zulassung von im Inland lebenden Ausländern zur Ausübung einer Beschäftigung* of Nov. 22, 2004, BGBl. I-2004, 2934, with amendments.

935. Part II, Ch. 2, §3 I A 1.

936. See Part II, Ch. 2, §3 I A 2. Again, this does not apply to citizens of Malta and Cyprus; these citizens have enjoyed full freedom of movement within the EU as of May 1, 2004.

937. If the new EU citizen was legally resident in Germany prior to receiving employment, the relevant regulations of the BeschV apply by virtue of reference to § 2 BeschVerfV.

III is inapplicable, as, under the BeschV, the consent of the BA to grant a residence title under the AufenthG is on a par with the granting of a work permit or work entitlement under § 284 SGB III. In these cases, therefore, employment can be sought without the government's permission.

Nevertheless, it must be taken into consideration that the possibility of a EU citizen being deported from or refused entry to the country is not completely excluded. The employment of such measures is, pursuant to § 6(1) FreizügG/EU, based on Articles 45(3), 52(1) TFEU (ex-Articles 39(3), 46(1) TEC). Yet, pursuant to § 6(2) sentence 1 FreizügG/EU, a criminal conviction alone is not sufficient to justify such a decision. According to the European Court of Justice,[938] it is necessary to prove an actual threat to public order which affects a basic interest of society, § 6(2) sentences 2 and 3 FreizügG/EU. In the area of sports these conditions are usually not fulfilled.

B. Measures Taken by the Federations

237. The federations tend to intervene in the employment of foreign athletes by laying down of provisions relating to minimum numbers of 'home-grown' players and to transfer regulations. The latter influence the employment of foreign athletes in Germany, for example, by requiring a transfer certificate, as it is stipulated in Article 9 FIFAReg.[939] This is due to the fact that players usually start off in their own national federation, and that professional sports then often lead them abroad.[940]

The so-called Local Player or Homegrown[941] Regulations have an even more direct effect on the athlete's membership of a national federation. In the area of football, citizens of EU Member States may be employed on a national federation level without restriction.[942] Until 31 June 2006, a maximum number of four non-EU license players was allowed per club.[943] This restriction was lifted during the 2006/2007 season. However, an obligation was introduced which stated that at least twelve German players must be employed per club.[944] In addition, UEFA's Local

938. See ECJ, C-482/01 and C-493/01, O.J. 2004-I, 5257 = NVwZ 2004, 1099 at 1101 – Orfanopoulos & Oliveri, see Renner/Dienelt, *Ausländerrecht*, 9th edition 2011, Allgemeine Verwaltungsvorschrift zu § 6 FreizügG/EU, 6.1.1.1, 6.1.1.2., 6.2.0. and § 6 FreizügG/EU, mn. 3 et seq.

939. Regulations concerning Status and Transfer of Players of Dec. 18, 2004, in force since July 1, 2005, amended on Oct. 29, 2007. The unconditional nature of the issue of a transfer certificate pursuant to Art. 9 FIFAReg is strongly relativized by the administrative provisions of Annex 3 to the FIFAReg. In accordance with these provisions, the player's former federation does not have to issue the certificate if there is a contractual dispute between the player and the former club, Art. 8.2 no. 7 sentence 1 Annex 3 to the FIFAReg.

940. The transfer regulations are dealt with in Part II, Ch. 2, §1 III J.

941. Streinz, Sp*u*Rt 2008, 224.

942. § 5 no. 4 sub-section 1 LOS previous version.

943. § 5 no. 4 sub-section 2 LOS previous version.

944. In order to obtain a license for the *Bundesliga* or the *Zweite Bundesliga*, the clubs must commit to employ at least twelve license players who are German citizens, § 5 no. 4 *Lizenzordnung* (License Regulation, version of Dec. 6, 2011).

Player Rule was implemented, § 5a LOS.[945] According to this, at least four players who received their training with a German club were to be signed in the 2006/2007 season; in the 2007/2008 season, this number was raised to six, and in 2008/2009 to eight. Half of these locally-trained players had to have played at least three seasons for their club between the ages of 15 and 21, the other half had to have been entitled to play in the area governed by the *Deutscher Fußballbund* (German soccer federation, DFB) for at least three seasons.[946] A restriction of squad size is, however, not (yet) provided for.[947] Similar regulations were implemented in 2005 in basketball.[948] In the area of handball, there is no restriction upon the fielding of foreign players.[949] One reason for these changes could[950] be rulings of the ECJ which relate to the compatibility of restrictions placed on foreigners with various treaties of association of the EU and its Member States, as these agreements are not compatible with the restrictions.[951]

The case law regarding the Partnership Agreement with seventy-nine countries from the African, Caribbean and Pacific areas (ACP Agreement/Cotounou Agreement) could become particularly significant in this context.[952] Commentators refute the suggestion that the ACP Agreement has direct effect because of its quality as a development aid agreement, which, in their opinion, distinguishes it from association agreements like those in the *Kolpak* case.[953] The ECJ, however, did not have regard to this objection when considering the partnership agreement with Russia.[954] As regards the obligations of sport federations arising out of the agreement with Russia, the ECJ states that Article 23 of that agreement is similar to Article 38(1) of the Slovakia Agreement.[955] In view of the similarity between Article 38(1) of the Slovakia Agreement and Article 13(3) of the ACP Agreement, the ECJ would probably also declare this as being binding upon the sports federations.[956] However, it must be kept in mind that both agreements are only applicable to persons who are

945. Version of Dec. 21, 2005. PHBSportR-Summerer, part 2, mn. 196; Die WELT, Mar. 4, 2005, 28.
946. § 5a LOS (Version of Aug. 19, 2010).
947. Welt am Sonntag, Jan. 8, 2006, 22.
948. Süddeutsche Zeitung, May 30, 2005, 46.
949. Die WELT, Jan. 26, 2006, 28.
950. Süddeutsche Zeitung, Jan. 10, 2006, 27; Die WELT, Mar. 4, 2005, 28; Frankfurter Rundschau, Jan. 12, 2006, 26.
951. ECJ, C-438/00, O.J. 2003-I, 4135 = NZA 2003, 845 = Sp*u*Rt 2003, 153 – Kolpak (Slovakia); ECJ, C-265/03, EuZW 2005, 337 = Sp*u*Rt 2005, 155 – Simutenkov (Russia). The ECJ applied this jurisprudence analogously to Art. 37(1) of the Additional Protocol (1970) to the Association Agreement EEC-Turkey and decision 1/80 of the Association Council, C-152/08, O.J. 2008-I, 6294 = Sp*u*Rt 2009, 61 – Kahveci.
952. Official Bulletin EC 2000 no. L 317, 3 et seq.; see Brecht, *Arbeitnehmerfreizügigkeit im Cotonou-Abkommen*, 2008.
953. Kreis/Schmid, NZA 2003, 1013 at 1016 et seq.
954. ECJ, C-265/03, EuZW 2005, 337 at 338 = Sp*u*Rt 2005, 155 at 157 et seq. – Simutenkov (mn. 28 concerning the direct effect of this agreement and mn. 35 et seq. regarding the subjective binding effect on sport associations); PHBSportR-Summerer, part 7, mn. 105.
955. ECJ, C-265/03, EuZW 2005, 337 at 339 = Sp*u*Rt 2005, 155 at 157 – Simutenkov (mn. 34).
956. See also Streinz, Sp*u*Rt 2005, 158 at 159 with further references; for a direct effect of the agreement Brecht, *Arbeitnehmerfreizügigkeit im Cotonou-Abkommen*, 2008, 108.

already legally employed in a Member State. Thus, the agreements concern working conditions and conditions relating to the tendering of notice, but not to accession to the labour market.[957] Nevertheless, it can be assumed that measures put in place by the federations will facilitate a further 'opening' of the German sports labour market to citizens of non-EU countries.[958]

238. The 6+5 rule enacted by FIFA on 30 May 2008 gives rise to controversial issues, and there are many differing opinions to be found in German scholarly articles. *Streinz* holds that it is void because it represents a direct discrimination on grounds of nationality, Articles 18 and 45(2) TFEU (ex-Articles 12 and 39(2) TEC).[959] *Battis/Ingold/Kuhnert* believe that the regulation can be interpreted in conformity with EU law.[960] The EU Commission and the European Parliament regard the regulation as being contrary to EU law.[961]

II. Regulations Relating to Sports Agents in Germany

239. A further factor of relevance relating to the sports labour market is the activity of sports agents. This is dealt with by both national law and sports federation regulations.

A. National Measures

240. Regulations governing recruitment activities run by private persons are to be found in the SGB III, the GewO as well as in the *Rechtsberatungsgesetz* (Legal Advice Act, RBerG).[962] The RBerG has been replaced by the *Rechtsdienstleistungsgesetz* (Legal Service Act, RDG) on 1 July 2008.[963]

957. ECJ, C-438/00, NZA 2003, 845 at 846 = Sp*u*Rt 2003, 153 at 155 – Kolpak (mn. 42; see Weiß, Sp*u*Rt 2003, 157 at 158 and Jaufer, *Berufssport und Europarecht*, in: Hinteregger/Reißner (eds.), Sport als Arbeit, 2008, 63 at 86 et seq., 90; ECJ, C-265/03, EuZW 2005, 337 at 339 = Sp*u*Rt 2005, 155 at 158 – Simutenkov (mn. 37), see Streinz, Sp*u*Rt 2005, 158 at 159 and Jaufer, l.c., 90; CAS, Sp*u*Rt 2009, 119 at 121 – FC Midtjylland/FIFA; PHBSportR-Summerer, part 7, mn. 92; Brecht, *Arbeitnehmerfreizügigkeit im Cotonou-Abkommen*, 2008, 51.
958. See Holzke, Sp*u*Rt 2004, 1 et seq. and Engelbrecht, Sp*u*Rt 2005, 192 et seq.
959. Streinz, Sp*u*Rt 2008, 224 at 226 et seq.; likewise Hoppe/Frohn, CaS 2008, 251 at 259.
960. Battis/Ingold/Kuhnert, EuR 2010, 3 et seq. See also Battis/Fleiner/Pina/Ridola/Tsatsos, in: Institute for European Affairs (ed.), Rechtsgutachten zur Vereinbarkeit der '6+5-Regel' mit europäischem Gemeinschaftsrecht, 2008, 184 et seq. (available in many languages at www.inea-online.com; accessed May 27, 2012).
961. Streinz, Sp*u*Rt 2008, 224 regarding the affirmation of former Commissioner *Vladimír Špidla* of May 28, 2008 (IP/08/807) and the resolution of the European Parliament of May 8, 2008.
962. Statute of Dec. 13, 1935, RGBl. I-1935, 1478.
963. For a comprehensive discussion of the legal situation as it was until 2002, see Jungheim, *Berufsregelungen des Weltfußballverbandes für Spielervermittler*, 2002.

1. Provisions in the SGB III

241. Up until 1998, only the *Bundesagentur für Arbeit* was allowed to practice employment recruitment (Federal Employment Office, BA).[964] Until its suspension as of 27 March 2002,[965] § 291(1) SGB III required that the BA granted its approval to any person wishing to set up an employment agency.[966] Since that time, the SGB III (§ 296) contains only regulations relating to content and validity of recruitment contracts.[967]

The law differentiates between occupational counselling (*Berufsberatung*, § 30 SGB III) and employment recruitment (*Arbeitsvermittlung*, § 35 SGB III). Occupational counselling generally relates to advice and information. Employment recruitment relates to activities of the agent which are intended to establish an employment relationship between an athlete and a club.[968,969] It is characteristic of employment recruitment that the agent has a personal monetary interest. In order to ascertain whether a personal interest exists, it is usually necessary to examine each individual case.[970] This distinction is of importance, as the remuneration to be paid to an employment agent is regulated under § 296 SGB III and, in this case, no additional payment for occupational counselling in terms of § 30 SGB III is owed (§ 296(1) sentence 3 SGB III).[971]

First, the agency contract between athlete and agent must be in written form, in accordance with § 296(1) sentence 1 SGB III (see § 126 BGB); otherwise the contract will be regarded as invalid (§ 297 no. 1 SGB III).[972] Of special importance for the agent is the regulation which deals with remuneration paid by the athlete. Pursuant to § 2(1) sentence 2 of the *Vermittler-Vergütungsverordnung* (Agency Tariff Regulation) which is applicable to, inter alia, sport agents,[973] remuneration may not exceed 14% of the athlete's salary.[974,975] If the employment relationship lasts longer

964. Spellbrink/Eicher/Sienknecht, *Kasseler Handbuch des Arbeitsförderungsrechts*, 2003, § 25, mn. 96; Lampe/Müller, Sp*u*Rt 2003, 133; Wertenbruch, Sp*u*Rt 2009, 183.
965. Lampe/Müller, Sp*u*Rt 2003, 133.
966. Spellbrink/Eicher/Sienknecht, *Kasseler Handbuch des Arbeitsförderungsrechts*, 2003, § 25, mn. 99; Schloßer, NZA 2001, 16 at 17; Wertenbruch, NJW 1995, 223 about the former § 23(1) AFG.
967. Lampe/Müller, Sp*u*Rt 2003, 133 at 136; PHBSportR-Summerer, part 2, mn. 188.
968. 'Employment relationship' (*Beschäftigungsverhältnis*) is a term employed under the law of social security and, therefore, according to the prevailing opinion, must be distinguished from the employment law term 'employment relationship' (*Arbeitsverhältnis*), ErfK/Rolfs, 12th edition 2012, § 7 SGB IV, mn. 34 et seq. Pursuant to § 7(1) sentence 1 SGB IV, the term covers dependent work of any kind, *in particular*, work in an employment law 'employment relationship' (*Arbeitsverhältnis*), and can also include legal relationships similar to those involving employees under employment law principles, see Henssler/Willemsen/Kalb/Ricken, Arbeitsrecht Kommentar, 5th edition 2012, § 7 SGB IV, mn. 1, 3 et seq.
969. Lampe/Müller, Sp*u*Rt 2003, 133 at 135.
970. Lampe/Müller, Sp*u*Rt 2003, 133 at 134.
971. Lampe/Müller, Sp*u*Rt 2003, 133 at 136.
972. Spellbrink/Eicher/Sienknecht, *Kasseler Handbuch des Arbeitsförderungsrechts*, 2003, § 25, mn. 118.
973. Regulation of June 27, 2002, BGBl. I-2002, 2439, with amendments.
974. *Salary* refers to all ongoing and once-off payments which occur as part of an employment relationship, regardless of whether the person in receipt of these payments is entitled to them, under which terms or in what form these are paid, or whether it is received directly as reward for employment or in conjunction with employment, § 14 SGB IV.

than twelve months; however, only one annual salary is to be used as the basis for calculation.[976] This is the case, even if more than one agent is involved in the finding of the placement, § 2(3) of the regulation.[977] Thus, the amount which was previously[978] stipulated by FIFA – which amounted to 5% of the basic salary – is not contrary to the provisions of the regulation.[979] If the salary agreed upon violates the *Agency Tariff Regulation*, no remuneration is owed.[980] Furthermore, remuneration only has to be paid if an employment contract that leads to actual employment[981] is concluded, § 296(2) sentence 1 SGB III.[982] Under § 296(2) sentence 2 SGB III, the agent cannot demand advance payment.[983] Pursuant to § 296(1) sentence 3 SGB III, this also applies to services which are regarded as occupational counselling in terms of § 30 SGB III, but which are connected with the agency service. Services which are not covered by the terms of occupational counselling or employment recruitment are, however, not regulated by § 296 SGB III and thus, special remuneration may be payable for such services.[984] In addition, the agent is free to agree upon remuneration with the prospective employer.[985]

242. According to § 297 no. 4 SGB III, contracts which aim at ensuring that the athlete uses the services of one particular agent exclusively are invalid.[986] The matter of whether or not the entire agency contract is void is regulated by § 139 BGB.[987] In various scholarly articles, it has been debated whether or not § 297 no. 4 SGB III is contrary to a prohibition by a federation on contracting non-licensed agents, as this prohibition aims not to restrain competition, but rather

975. Kröninger, Sp*u*Rt 2004, 233 at 236. This would be violated by an agreement that provided 12% for the first year of the contract, and another 12% for the second, LG Heidelberg, Sp*u*Rt 2011, 37 at 38.
976. If the employment relationship lasts for a period of less than seven days, the agent may charge 18% of the salary. The value-added tax arising from the salary must be covered by this amount, § 2(2) of the Tariff Regulation.
977. Stopper/Holzhäuser, Sp*u*Rt 2011, 13 at 14; Lampe/Müller, Sp*u*Rt 2003, 133 at 136.
978. This percentage was proposed in the model agency contract of the FIFARegPA 2001. The new model contract leaves open the matter of the amount of the agent's salary, see Part II, Ch. 2, §3 II B.
979. PHBSportR-Summerer, part 2, mn. 189; similarly OLG Dresden, Sp*u*Rt 2004, 257 at 259.
980. There is also no reduction to the permitted salary, LG Heidelberg, Sp*u*Rt 2011, 37 at 38.
981. See fn. 968.
982. Therefore, in the area of (contractual) amateurs (see also fn. 428), a thorough assessment is necessary.
983. Spellbrink/Eicher/Sienknecht, *Kasseler Handbuch des Arbeitsförderungsrechts*, 2003, § 25, mn. 119.
984. Lampe/Müller, Sp*u*Rt 2003, 133 at 136.
985. Stopper/Holzhäuser, Sp*u*Rt 2011, 13 at 14.
986. OLG Hamm, Sp*u*Rt 2010, 207 at 208: In the event of the athlete replacing an agent, the first agent is not entitled to receive damages; Spellbrink/Eicher/Sienknecht, *Kasseler Handbuch des Arbeitsförderungsrechts*, 2003, § 25, mn. 126; Stopper/Holzhäuser, Sp*u*Rt 2011, 13 at 14 suggest amendments to the law, as professional footballers have a wide range of possible employers and therefore do not need to hire several agents in order to find a job; likewise Eicke/Jäger, CaS 2011, 257 at 263 et seq.
987. Stopper/Holzhäuser, Sp*u*Rt 2011, 13 at 14: It depends on whether or not the contract would have been entered into and acted upon even without the exclusivity clause. § 139 BGB reads as follows: 'If a part of a legal transaction is void, then the entire legal transaction is void, unless it is to be assumed that it would have been undertaken even without the void part.'

improve the quality of the sports agency business.[988] Independently of this issue, it is not possible to conclude a valid contract on the exclusive recruitment right offered as an option in the FIFA standard recruitment contract.

Pursuant to § 288a(1) sentence 1 SGB III, occupational counsellors can be prohibited from carrying on business by the BA if this is necessary in order to protect clients from being exploited in an improper fashion for purposes other than counselling.[989] Intentional or negligent infringements of the prohibition are prosecuted as regulatory offences and may be punished under § 404(2) no. 6, (3) SGB III with a fine of up to EUR 30,000 in each case. The same applies if the agent receives an advance payment which is found to be contrary to § 296(2) SGB III.

2. Provisions in the *Gewerbeordnung* (Trade, Commerce and Industry Regulation Act)

243. The sports agent does not require a permit under the *Gewerbeordnung* (Trade, Commerce and Industry Regulation Act, GewO). He is merely required to register his business, § 14 GewO.[990] However, the sports agent may be forbidden from operating (§ 35(1) sentence 1 GewO) if he proves himself to be 'unreliable' (*unzuverlässig*).[991] According to case law and commentators, a person can be found to be 'unreliable' if he is unable to guarantee that he will duly carry on his trade in the future, having regard to the entirety of his actions.[992] Some examples of this are the commission of particular offences[993] (e.g., fraud at the expense of the athlete involved, § 263 *Strafgesetzbuch* – Criminal Code, StGB) or the continuation of the business in spite of a lack of adequate economic capacity.[994] Infringements of the ban committed intentionally or negligently are prosecuted as regulatory offences and may be punished under § 146(1) no. 1 lit. a), (3) GewO with a fine of up to EUR 5,000 in each case.

3. Provisions in the *Rechtsdienstleistungsgesetz* (Legal Services Act)

244. Up until 30 June 2008, Article 1 § 1(1) sentence 1 RBerG was also of relevance to the matter of the permissibility of sports agents. Pursuant to this provision, only persons who had been granted the appropriate consent by the responsible

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988. PHBSportR-Summerer, part 2, mn. 189; for a different opinion, see Kathmann, *Rechtsfragen zur praktischen Anwendung des Spielervermittler-Reglements des Weltfussballverbandes FIFA*, in: Scherrer (ed.), Sportlervermittlung und Sportlermanagement, 2001, 110 at 122; Kröninger, Sp*u*Rt 2004, 233 at 234.
989. Spellbrink/Eicher/Sienknecht, *Kasseler Handbuch des Arbeitsförderungsrechts*, 2003, § 25, mn. 93.
990. Stopper/Holzhäuser, Sp*u*Rt 2011, 13.
991. Lampe/Müller, Sp*u*Rt 2003, 133 at 136.
992. BVerwG, NVwZ-RR 1996, 650; NVwZ 1995, 278 at 280; Landmann/Rohmer/Marcks, *Gewerbeordnung*, 61st edition 2012, Band I, § 35, mn. 29; Tettinger/Wank/Ennuschat, *Gewerbeordnung*, 8th edition 2011, § 35, mn. 27.
993. Tettinger/Wank/Ennuschat, *Gewerbeordnung*, 8th edition 2011, § 35, mn. 37 et seq.
994. Tettinger/Wank/Ennuschat, *Gewerbeordnung*, 8th edition 2011, § 35, mn. 63.

authority[995] were permitted to provide legal advice to others professionally. The RDG,[996] which has been in force since 1 July 2008, refers to the term 'legal service' (*Rechtsdienstleistung*) and distinguishes between legal services provided by registered (§§ 10 et seq. RDG) and non-registered persons (§§ 6 et seq. RDG). Infringements of the RDG may be punished under § 20 RDG as regulatory offences with a fine of up to EUR 5,000.

It is difficult to determine the extent to which the sport agent provides *legal* advice or services. His job covers not only the management of contract negotiations,[997] but also purely economic matters (e.g., advice concerning realistic expectations as regards remuneration) and matters concerning sports (advice relating to the choice of a coach or club). Independently of attempts to demarcate the various definitions,[998] there was, to a large extent, consensus that, under the RBerG, advice concerning legal matters (e.g., clarification of the legal status, details as to the drafting of contract)[999] as well as the management of contract negotiations[1000] on behalf of the athlete had to be subsumed under the term of 'legal matters'.[1001] It is expected that this view will also prevail under the RDG, since, pursuant to § 1(1) RDG, any activity that necessitates a legal examination of the individual case carried out on behalf of a third person constitutes a legal service. In actual contract negotiations, this is often the case.[1002]

Pursuant to Article 1 § 5 no. 1 RBerG, the provision of legal advice to others did not require permission if it was directly connected to a business deal (to which RBerG did not directly apply) of the agent's business enterprise and, thus, constituted a 'subordinate auxiliary activity' of an activity not requiring permission.[1003] Pursuant to § 5 RDG, legal services are permissible without registration if they are a subordinate aspect of another activity. The job of a sports agent can be regarded as being such an occupation. If the main significance of the sports agent's activity is attached to the economic arrangement of the contract, it can be assumed that the legal implementation in the contract would be such a subordinate activity. Some

995. Under § 11(1) of the 1st Executive Regulation for the RBerG (RGBl. I-1935, 1481), this was the President of the Regional Court (*Landgericht*) and, insofar as one exists, of the Local Court (*Amtsgericht*), in the district in which the legal advice is to be provided, see Chemnitz/Johnigk, *Rechtsberatungsgesetz*, 11th edition 2003, Art. 1 § 1, mn. 270.

996. RDG, Dec. 12, 2007 (BGBl. I-2007, 2840), with amendments.

997. Wertenbruch, NJW 1995, 223.

998. See Chemnitz/Johnigk, *Rechtsberatungsgesetz*, 11th edition 2003, Art 1 § 1, mn. 66 et seq.

999. Chemnitz/Johnigk, *Rechtsberatungsgesetz*, 11th edition 2003, Art 1 § 1, mn. 37 et seq.

1000. BGHZ 145, 265 at 269 et seq. = NJW 2001, 70 at 71; BGHZ 102, 128 at 130 = NJW 1988, 561; Wertenbruch, NJW 1995, 223 at 225.

1001. OLG Dresden, Sp*u*Rt 2004, 257 at 258; Schimke/Helmholz, Sp*u*Rt 2008, 189; Schloßer, NZA 2001, 16 at 17; Chemnitz/Johnigk, *Rechtsberatungsgesetz*, 11th edition 2003, Art 1 § 5, mn. 606.1; Wertenbruch, NJW 1995, 223 at 225.

1002. Grunewald/Römermann/Hirtz, *Rechtsdienstleistungsgesetz*, 1st edition 2008, § 5, mn. 157; Stopper/Holzhäuser, Sp*u*Rt 2011, 13 at 15; Wertenbruch, Sp*u*Rt 2009, 183 at 184; Schimke/Helmholz, Sp*u*Rt 2008, 189 at 190, however, they are of the opinion that the service is not subject to any consent, as long as the contract does not differ considerably from the model contract of the DFL or DFB, 192.

1003. Chemnitz/Johnigk, *Rechtsberatungsgesetz*, 11th edition 2003, Art 1 § 5, mn. 514.

opinions in scholarly articles relating to the RBerG have refuted this assumption.[1004] The same tendency can also be observed in relation to the RDG.[1005] However, in the jurisprudence of the superior courts, this possibility was approved with reference to player contracts which were deemed not to be legally complicated.[1006] It can be surmised that the *Bundesgerichtshof* (Federal Court of Justice, BGH) would apply its reasoning in relation to legal advice in the case of brokerage contracts[1007] also to sports agents. It can therefore be assumed that the activity of sports agents does not require permission, also under the provisions of the RDG.[1008] On the whole, according to the relevant jurisprudence, the activity of sports agents does not violate the RDG, an assertion which is opposed by the majority of legal commentators.[1009] As for legal commentary relating to the broader area of sports *management* contracts, a distinction is made between activities which require a permit and other activities.[1010]

Agency services carried out for an athlete by a lawyer (*Rechtsanwalt*), or by family members of the athlete, insofar as the latter are not remunerated for their actions, do not require a permit, § 6(2) RDG. As far as this is concerned, the RDG is worded more strictly than Article 4(1) FIFARegPA, which does not differentiate between remunerated and non-remunerated agency services by family members. Likewise, lawyers from EU states (§ 1 *Gesetz über die Tätigkeit europäischer Rechtsanwälte in Deutschland*, European Lawyers' Activities in Germany Act, EuRAG)[1011] may offer temporary agency services in Germany, § 25(1) EuRAG.[1012]

1004. Wertenbruch, NJW 1995, 223 at 226 and NJW 1995, 3372; Johnigk, *Spielervermittler, Spielerberater und Rechtsberatungsgesetz*, in: Bepler (ed.), Sportler, Arbeit und Statuten, 2000, 121 at 132; Chemnitz/Johnigk, *Rechtsberatungsgesetz*, 11th edition 2003, Art 1 § 5, mn. 606.1, with further references; Kröninger, Sp*u*Rt 2004, 233 at 234; for an alternative opinion, see Schloßer, NZA 2001, 16 at 19; Löhr, NJW 1995, 2148 at 2149.
1005. Grunewald/Römermann/Hirtz, *Rechtsdienstleistungsgesetz*, 1st edition 2008, § 5, mn. 159; Wertenbruch, Sp*u*Rt 2009, 183 at 184; following Wertenbruch: Stopper/Holzhäuser, Sp*u*Rt 2011, 13 at 15; question left open by Schimke/Helmholz, Sp*u*Rt 2008, 189 at 190.
1006. OLG Dresden, Sp*u*Rt 2004, 257 at 258; mediative PHBSportR-Summerer, part 2, mn. 190.
1007. NJW 1974, 1328. Under private law, the agency contract is classified as a contract of brokerage pursuant to § 652 BGB, LG Heidelberg, Sp*u*Rt 2011, 37; Stopper/Holzhäuser, Sp*u*Rt 2011, 13. Id., in light of the usual practice of agents often working for the player and signing a contract with the club shortly before the conclusion of the deal, recommend that the agent signs a formal contract of resolution with the player. The reason for this is that, under certain circumstances, § 654 BGB leads to the lapse of the agent's right to remuneration if he acts for the other party to the contract, thereby breaching his (possible) contract with the player.
1008. See Kathmann, *Rechtsfragen zur praktischen Anwendung des Spielervermittler-Reglements des Weltfußballverbandes FIFA*, in: Scherrer (ed.), Sportlervermittlung und Sportlermanagement, 2001, 125 et seq. and Englisch, *Spielervermittlung und Spielerberatung nach DFB-Recht*, in: Württembergischer Fußballverband (ed.), Rechtsfragen zur Sportlervermittlung und des Sportlermanagements, 2003, 35 at 46.
1009. It is further disputed in legal commentary whether or not the agent's activity is lawful in terms of the RDG if he acts upon consultation with a registered lawyer (*Rechtsanwalt*). On this point, see Schimke/Helmholz, Sp*u*Rt 2008, 189 at 191. See also Stopper/Holzhäuser, Sp*u*Rt 2011, 13 at 15, whilst Wertenbruch opposes this solution for good reason on the basis of an historical interpretation of the RDG, Sp*u*Rt 2009, 183 at 185.
1010. Nasse, *Der Sportler-Manager-Vertrag*, 2010, 210.
1011. Statute of Mar. 9, 2000 (BGBl. I-2000, 182, 1349), with amendments. The appendix to § 1 EuRAG contains a list of the professional titles encompassed by the EuRAG.
1012. Wertenbruch, Sp*u*Rt 2009, 183 at 185.

4. Summary

245. The activity of the sports agent is not subject to the receipt of permission from the state. However, this occupation may be prohibited and be made subject to penalties if the agent is found to be 'unreliable' pursuant to § 35 GewO, and/or in the case of pure career counselling for the athlete's benefit, pursuant to § 288a (1) sentence 1 SGB III. In the current jurisprudence, the service of legally reviewing the athlete's contract does not require a permit pursuant to § 5 RDG. Finally, sports agents are subject to the regulations of the SGB III (which are, in part, enforced by means of criminal penalties) regarding the drafting of the contract and to the Agency Tariff Regulation.

B. Measures Imposed by the Federations

246. In addition to national measures relating to the regulation of players' agents in sports, there are also comprehensive bodies of regulations which have been put in place by the federations with the objective of combating excesses in this (very lucrative)[1013] branch of business.[1014] In the area of professional football, the FIFA Player's Agents Regulations of 29 October 2007[1015] (FIFARegPA)[1016] is decisive. Pursuant to Article 40 no. 2, Article 1(5) FIFARegPA, the national federations were obliged to implement the Regulation by 31 December 2009. The regulations concerning the loss and acquisition of the players' agent's licence had to be adopted by 1 January 2008.

The *Deutscher Fußballbund* (German Soccer Federation, DFB) has adopted the FIFA regulations in their entirety in its own regulations and has added supplementary provisions.[1017] It is not clear which version of the FIFARegPA is applicable in Germany. The current version of the DFB-SpO[1018] (§ 38) refers to the FIFA Regulations without specifying whether this is the 2001 version, or that of 2008.[1019] The DFB Implementations do not contain any transitional provisions. In practice,

1013. Eicke/Jäger, CaS 2011, 257 at 258. In the 2009/2010 season, the salaries paid to footballers' agents and consultants amounted to EUR 71.6 Million Euro, Stopper/Holzhäuser, Sp*u*Rt 2011, 13, referring to an article on Focus Online of Dec. 8, 2010, 'Liga zahlt Spielervermittlern 71,6 Millionen Euro', accessible at www.focus.de/sport/fussball/dfl-liga-zahlt-spielervermittlern-71-6-millionen-euro_aid_579895.html (accessed May 27, 2012).
1014. For more details on professional football, see Scherrer, Sp*u*Rt 2001, 171 at 172 on the RBerG.
1015. This replaced the regulation of Mar. 10, 2000 on Jan. 1, 2008. The old regulation came into force on Mar. 1 2001, Art. 28 FIFARegPA old version; as regards the former, see also Scherrer, Sp*u*Rt 2001, 171.
1016. For example, Brüschweiler, CaS 2008, 33 et seq.
1017. DFB-Regulation annexed to the DFB-SpO. For more on the previous version of the DFB-Regulation, see PHBSportR-Summerer, part 3, mn. 186; Scherrer, *Die Spielervermittler-Regelung des Weltfußballverbandes FIFA*, in: id. (ed.), Sportlervermittlung und Sportlermanagement, 2003, 95 at 106; Englisch, *Spielervermittlung und Spielerberatung nach DFB-Recht*, in: Württembergischer Fußballverband (ed.), Rechtsfragen zur Sportlervermittlung und des Sportlermanagements, 2003, 38.
1018. Version of Nov. 30, 2009.
1019. Until mid 2011, § 38 SpO contained express reference to the 2001 FIFA regulation, which compounded this uncertainty even more.

FIFARegPA 2008 is applied. Furthermore it is debatable whether or not the federations can really enforce punitive measures in cases where non-licensed agents have been consulted.[1020] According to the footnote on page 1 of the aforementioned regulation, the implementation of the regulations by the DFB must be approved by FIFA in order to come into force,[1021] which has, apparently, not yet occurred. Indeed, FIFA Regulations are, in principle, applicable to clubs and players per se pursuant to § 3 no. 1 *DFB-Satzung* (By-laws of the DFB). However, the caveat of FIFA's approval creates – at least an impression of – a state of uncertainty. This is intensified by the DFB-Regulation, which – conversely – provides in section 1 that the FIFARegPA is applicable. As measures taken by sports associations such as the DFB can be reviewed by national courts in order to examine their legal basis in the by-laws of the association, these inconsistencies should be clarified. As regards the efforts to abolish the obligation to obtain a license,[1022] it is doubtful if this will occur. One reason for the planned reform might be that 70%–75% of all transfers are carried out with non-licensed agents.[1023]

247. Essentially, in accordance with the current legal situation, a person who wishes to work as a player's agent must have a license issued to him by the DFB (sections II, I DFB-Regulation in conjunction with Article 3(1) FIFARegPA). This is problematic in terms of competition law, as players and clubs are prohibited from engaging the services of a non-licensed players' agent (section IX DFB-Regulation; Articles 33–36 FIFARegPA) and those who do so face disciplinary measures.[1024] The license will only be issued if the applicant has an impeccable reputation (Article 6 (1) FIFARegPA), and if he has passed a written examination (Article 8 FIFARegPA in conjunction with section 4 DFB-Regulation). In addition, the applicant must have a professional liability insurance (Article 9(1) FIFARegPA and appendix 2),[1025] and he is required to sign the Code of Professional Conduct for

1020. Pursuant to § 6b *Rechts- und Verfahrensordnung-DFB* (Laws and Proceedings Regulation of the DFB, RuVo-DFB, Version of Apr. 30 2011), players and associations who engage a non-licensed agent, or who attempt to do so, commit an 'unsporting' act. Pursuant to § 1 no. 4, in conjunction with § 44 no. 2 of the DFB by-laws (*DFB-Satzung*, Version of Sept. 30, 2000), such acts can lead to fines (of up to EUR 100,000 for players; for others, of up to EUR 250,000), the revocation of licences, or relegation to a lower league, Stopper/Holzhäuser, Sp*u*Rt 2011, 13 at 16.

1021. The same footnote is to be found in the earlier DFB implementation of FIFARegPA 2001 annexed to the SpO of Jan. 1, 2002.

1022. Stopper/Holzhäuser, Sp*u*Rt 2011, 13 at 16; Stopper, Sp*u*Rt 2010, 237; Reiter, Sp*u*Rt 2009, 239.

1023. Stopper/Holzhäuser, Sp*u*Rt 2011, 13 at 16; Stopper, Sp*u*Rt 2010, 237.

1024. Eicke/Jäger, CaS 2011, 257 at 258. Scherrer, Sp*u*Rt 2001, 171 at 172 and id., *Die Spielervermittler-Regelung des Weltfußballverbandes FIFA*, in: id. (ed.), Sportlervermittlung und Sportlermanagement, 2003, 96; in favour of a finding that the clause is null and void pursuant to § 297 no. 4 SGB III, cf. Kröninger, Sp*u*Rt 2004, 233 at 234. The European Court of First Instance held the FIFARegPA to be compatible with Art. 101 TFEU (ex-Article 81 TEC), O.J. 2005-II, 217 at 244 = Sp*u*Rt 2005, 102 at 104; more precisely, it held that the corresponding view of the European Commission was tenable; for a opinion in support of this, see Wertenbruch, Sp*u*Rt 2009, 183 at 186 and Vetter, Sp*u*Rt 2005, 233 at 235.

1025. The previous version of the DFB Regulations also stipulated that the guarantee had to amount to at least EUR 500,000, Englisch, *Spielervermittlung und Spielerberatung nach DFB-Recht*, in: Württembergischer Fußballverband (ed.), Rechtsfragen zur Sportlervermittlung und des Sportlermanagements, 2003, 41. The 2008 DFB-Regulation adopted this sum, sections III. 5. and IV. 2.

Players' Agents (Articles 24, 11 FIFARegPA and appendix 1 to it). Lawyers, as well as spouses, parents or siblings of players, do not need a license, Article 4 FIFARegPA. The issue of a license does not excuse the agent from complying with the provisions of law.[1026] This is also expressed by Article 2(1) sentence 3; 12 (1) sentence 3 FIFARegPA[1027] and § 5 of the standard agency contract (which is not compulsory according to Article 21 FIFARegPA) as well as by section VII of the DFB-Regulation.[1028] Pursuant to Article 19(1) FIFARegPA (and in accordance with § 296 (1) sentence 1 SGB III), the contract must be concluded in written form. Moreover, the amount of remuneration which is due to a players' agent is calculated according to Article 20(1) FIFARegPA, on the basis of the player's annual *basic* gross income, which is consistent with § 2 of the national Agency Tariff Regulation.[1029] The same applies to § 3 of the standard contract which, however, does not violate § 297 no. 4 SGB III[1030] only if further players' agents are admitted. Players' agents are not allowed to establish professional contacts with players who already have an agent, Article 22(1) FIFARegPA. Players can terminate the contract at any time without having to give reasons for doing so (§ 627(1) BGB),[1031] provided that the agent does not have a legitimate expectation of fixed earnings, and subject to the proviso that there is no agreement to the contrary in additional, individual contracts.[1032,1033] The agent is not forbidden to pursue his claims for remuneration before the national courts by no. 7 of the Code of Professional Conduct, which was found to be null and void by *AG Bottrop* (Bottrop Local Court) as, due to the market power of FIFA and DFB, the players' agent is virtually forced to sign this arbitration clause.[1034] The obligation upon the agent to repeat the agents' examination after five years, arising out of Article 17 no. 1 and

1026. Englisch, *Spielervermittlung und Spielerberatung nach DFB-Recht*, in: Württembergischer Fußballverband (ed.), Rechtsfragen zur Sportlervermittlung und des Sportlermanagements, 2003, 42; Scherrer, Sp*u*Rt 2001, 171 at 172.
1027. Scherrer, Sp*u*Rt 2001, 171.
1028. Under Art. 12(9) sentence 2 FIFARegPA 2001 use of the model contract was mandatory.
1029. See fn. 973.
1030. Englisch, *Spielervermittlung und Spielerberatung nach DFB-Recht*, in: Württembergischer Fußballverband (ed.), Rechtsfragen zur Sportlervermittlung und des Sportlermanagements, 2003, 42.
1031. LG Mönchengladbach, Sp*u*Rt 2011, 38 at 39.
1032. The exclusion of § 627(1) BGB is not possible in standardized contracts, LG Kleve, Sp*u*Rt 2010, 209 at 210.
1033. The possibility of tendering notice of termination pursuant to § 627(1) BGB can be precluded on an individual contract basis. The OLG Naumburg held that a two-year exclusion of § 627(1) BGB in a boxing management contract was legally effective, Sp*u*Rt 2009, 81 at 82. The question of whether or not this would be possible in a contract that contains provisions relating to work agency services is doubtful in light of the prohibition of exclusivity clauses. In any case, an exclusion of § 627(1) BGB for six years, even on the basis of an individual contract, limits the right to freedom of profession (Art. 12(1) GG) of the athlete (here: a boxer) to an inconceivable extent, and is, therefore, void, LG Kleve, Sp*u*Rt 2010, 209 at 210. The right to terminate without notice pursuant to § 626(1) BGB cannot be excluded under any circumstance.
1034. AG Bottrop, Sp*u*Rt 2009, 171 at 172; as regards the voluntary nature of arbitration clauses in sports, see Monheim, Sp*u*Rt 2008, 8 et seq.; for an opinion opposing the validity of the clause, see Adolphsen/Nolte/Lehner/Gerlinger/Rain, *Sportrecht in der Praxis*, 2011, mn. 412.

no. 2 FIFARegPA, is viewed as violation of Article 12(1) GG (Occupational freedom) in German legal commentary.[1035] The mere lack of a license does not lead to the agent being precluded from making a claim for remuneration.[1036]

Similar principles apply in the area of handball,[1037] although, in that sport, there is a personal interview instead of an examination (§ 6(2) Regulation of the Deutscher Handballbund – *German Handball Association*, DHB), and the remuneration may be calculated based on the total income of the player (§ 14(1) DHB-Regulation).

§4. Social Security

248. The national social security system of the Federal Republic of Germany is based on the insurance principle and is subdivided into five branches: health, pension, accidents, care and unemployment insurance. A central connecting factor is the term 'employment' as defined by § 7(1) SGB IV,[1038] as it is the most important condition for compulsory insurance, § 2(2) no. 1 SGB IV.[1039] When an athlete is classified as an employee under labour law, he is also, in principle, an 'employed person' under social security law.[1040] The basis for calculation of the employee's and employer's mandatory contribution is the wage, pursuant to § 14 SGB IV.[1041] Non-payment of a contribution which is due may result in criminal prosecution, for which reason, in case of doubt, the club should request a binding decision of the authorities regarding the status of the athlete as an 'employed person'.[1042] The following remarks should be regarded as an overview.[1043] An elaboration on the social care insurance will not be provided.

I. Statutory Health Insurance

249. Compulsory health insurance is regulated in the *Fünftes Buch Sozialgesetzbuch* (Social Security Code, Book V, SGB V).[1044] It pays the costs of out- and in-patient treatment in the event of illness and rehabilitation and covers the costs of sick benefits after the expiry of the claim for continued remuneration against the

1035. Wertenbruch, Sp*u*Rt 2009, 183 at 186 et seq., with the motivation that, in every profession, theoretical knowledge decreases as time passes, and that work agents are not required to take another professional examination.
1036. Adolphsen/Nolte/Lehner/Gerlinger/Rain, *Sportrecht in der Praxis*, 2011, mn. 407.
1037. DHB Regulations relating to licensing and engagement of players' agents of Nov. 21, 2009.
1038. See fn. 968.
1039. Rolfs, *Sport und Sozialversicherung*, 2001, 13; Menke/Reissinger, Sp*u*Rt 2012, 9 at 10.
1040. Leitherer (ed.), Kasseler Kommentar zum Sozialversicherungsrecht, 75th edition 2012, § 7 SGB IV, mn. 7.
1041. Rolfs, *Sport und Sozialversicherung*, 2001, 13.
1042. Menke/Reissinger, Sp*u*Rt 2012, 9.
1043. See in particular, Rolfs, *Sport und Sozialversicherung*, 2001, and Nolte, *Sport und Recht*, 2004, 202 et seq.
1044. Article 1 Statute of Dec. 20, 1988, BGBl. I-1988, 2477, with amendments.

employer.[1045] Sick benefits are payable for up to seventy-eight weeks, § 48(1) SGB V, and generally amount to 70% of the wage, § 47(1) sentence 1 SGB V. This obligation on the health insurance provider is reduced only if the insured person has deliberately caused the illness, § 52 SGB V.[1046] Gross negligence is not sufficient. Therefore, society also bears the costs of injuries arising from so-called high risk sports.[1047] In the area of professional sport examined here, compulsory health insurance is less important because dependently-employed athletes whose annual earnings exceed the amount of EUR 50,850 are exempt from compulsory insurance[1048] and have the option (but in the case of opt-out, also the duty) to insure themselves privately.[1049] In principle, however, top athletes are also legally obliged to take compulsory insurance according to § 7(1) SGB IV.[1050]

II. Statutory Accident Insurance

250. In the area of professional sports, statutory accident insurance, regulated in *Siebtes Buch Sozialgesetzbuch* (Social Security Code, Book VII, SGB VII),[1051] which grants protection against the consequences of industrial accidents and occupational illnesses,[1052] is more interesting.[1053] It is not only employed persons in the sense of social insurance, but also persons who are similar to employees[1054] and freelance contractors who work *in the same manner as* employees, who are insured.[1055] The latter can be the case if, for example, as an exception, an amateur athlete participates in a professional team's match.[1056] In contrast to health insurance, which also covers costs incurred by diseases that are contracted in athletes' free time, accident insurance covers the cost only if the cause for the illness or the damage is connected with professional activity.[1057] The reason for this is that the

1045. Rolfs, *Sport und Sozialversicherung*, 2001, 10.
1046. Mihm, Sp*u*Rt 1995, 18 at 20.
1047. Schwede, Sp*u*Rt 1996, 145; Nolte, *Sport und Recht*, 2004, 204; Rolfs, *Sport und Sozialversicherung*, 2001, 31.
1048. For the year 2012, pursuant to § 4(1) *Sozialversicherungs-Rechengrößenverordnung* 2012 as of Dec. 2, 2011, BGBl. I-2011, 2421. If the athlete exceeded an income of EUR 40,500 per annum on Dec. 31, 2001, the minimum wage required in order that he be exempted from compulsory insurance is EUR 45,900 per annum, respectively, § 4(2) *Sozialversicherungs-Rechengrößenverordnung* 2012.
1049. Rolfs, *Sport und Sozialversicherung*, 2001, 30; Ittmann, *Pflichten des Sportlers im Arbeitsverhältnis*, 2004, 175.
1050. Ittmann, *Pflichten des Sportlers im Arbeitsverhältnis*, 2004, 175.
1051. Article 1 Statute of Aug. 7, 1996, BGBl. I-1996, 1254, with amendments.
1052. Rolfs, *Sport und Sozialversicherung*, 2001, 48.
1053. Müller, CaS 2007, 12 at 21.
1054. See Part II, Ch. 2, §1 I E.
1055. This applies in the event that the independent worker carries out a type of service for the club that *could* be carried out *equally as well* by an employed person, BSG, Sp*u*Rt 2010, 172 at 173.
1056. Stadler, Sp*u*Rt 2010, 11 at 12.
1057. Rolfs, *Sport und Sozialversicherung*, 2001, 48. This can also be the case if the sporting activity is part of the employee's contractual obligations, and if he is excused from his original duties in order to practice the sport, BSG, Sp*u*Rt 2010, 170 at 171 et seq. The facts of the case related to a successful judoka who worked as tax and customs clerk and who was permitted to train during

insurance is financed solely by the employers according to § 150 SGB VII.[1058] There are thirty-five industrial and nine agrarian workers' compensation insurers as well as public insurers in many areas.[1059] In sports athletes are insured with the *Verwaltungs-Berufsgenossenschaft*.[1060] Industrial accidents (*Arbeitsunfälle*) are, in accordance with § 8(1) sentence 2 SGB VII, temporary occurrences which affect the body from the exterior, and which cause damage to the insured person's health, or which result in her death, and which occur as a result of an insured activity (in particular, the performance of the occupation, pursuant to § 2(1) SGB VII, and injuries incurred on the way to work, pursuant to § 8(2) no. 1 et seq. SGB VII). Thus, any injuries the athlete suffers in matches, training or on the occasion of other events organized by the club are covered by insurance.[1061] A particularly high level of physical exertion and involvement in a high-risk sport are irrelevant to the finding that a 'working accident' has occurred.[1062] Occupational illnesses (*Berufskrankheiten*) are, however, enumerated[1063] and include, inter alia, damages to the tendons,[1064] cartilage and vertebrae, as well as noise-induced loss of hearing (especially relevant in the case of motor sport).[1065,1066] The list also specifies the technical events which must have caused the illness.[1067] All in all, it can be assumed that sporting accidents as industrial accidents, and 'wear and tear' to the athlete's body as a cause for occupational illnesses, can give rise to a claim against the statutory accident insurance provider.[1068] If an accident which is also covered by health insurance occurs, the provider of statutory accident insurance is expected to pay, § 11(5) SGB V.[1069]

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her working hours. The employer allegedly wanted 'to use her to further the company's image'. According to the BSG, it is sufficient that the sport is of benefit to the employer at least *in part*.

1058. Rolfs, *Sport und Sozialversicherung* 2001, 48.
1059. Appendix 1 and 2 to § 114 SGB VII.
1060. Ittmann, *Pflichten des Sportlers im Arbeitsverhältnis*, 2004, 106; Gitter, Sp*u*Rt 1996, 148.
1061. Ittmann, *Pflichten des Sportlers im Arbeitsverhältnis*, 2004, 106.
1062. Nolte, *Sport und Recht*, 2004, 203.
1063. Nolte, *Sport und Recht*, 2004, 203; Müller, CaS 2007, 12 at 24.
1064. Nolte, *Sport und Recht*, 2004, at 203.
1065. Rolfs, *Sport und Sozialversicherung*, 2001, 57; Stadler, Sp*u*Rt 2010, 11 at 12.
1066. See Ittmann, *Pflichten des Sportlers im Arbeitsverhältnis*, 2004, 106.
1067. For example, permanent or recurring damage to tendons is viewed as an occupational illness only if this is caused by activities that strain the knee joint over years to an extent that is above average, No. 2102 *Berufskrankheiten-Verordnung* (Occupational Illnesses Regulation, Regulation of Oct. 31, 1997, BGBl. I-1997, 2623, with amendments). A similar state of affairs was, for instance, confirmed in the case of a licensed player who had been active in the football *Bundesliga* over a period of eleven years (LSG Hamburg, decision of July 18, 2006, reference number L 3 U 1/00, BeckRS 2009, 61664); or in the case of a professional handballer who had been playing professionally for fourteen years (LSG Schleswig-Holstein, decision of Feb. 21, 2007, reference number L 8 U 115/05, BeckRS 2007, 46920). Conversely, in another case, although the claimant's employment as a footballer had existed for several years, the necessary 'special occupational exposition to injury' was not held to have been proved conclusively, as the activity had consisted of only twelve hours a week (ten hours training and between one and two games, SG Hamburg, Sp*u*Rt 2010, 38 at 39; cf. Stadler, Sp*u*Rt 2010, 11 at 13.
1068. Gitter, Sp*u*Rt 1996, 148.
1069. Mihm, Sp*u*Rt 1995, 18.

III. Statutory Pension Insurance

251. The statutory pension scheme is regulated in the *Sechstes Buch Sozialgesetzbuch* (Social Security Code, Book VI, SGB VI),[1070] in accordance with which compulsory insurance (in contrast to health insurance) exists independently of the contribution assessment ceiling.[1071] The scheme also applies to certain groups of self-employed persons.[1072] It covers the risks of age, disability and, for the surviving dependants, death of an insured person, usually by the granting of a regular annuity.[1073] In the area of sport in particular, the grant of annuities in cases of reduced earning capacity is of interest, § 43 SGB VI.[1074] The earning capacity of the insured person is 'fully reduced' if he cannot work in *any* job[1075] for more than three hours per day under the usual conditions of the job market (*volle Erwerbsminderung*). It is 'partially reduced' if employment in any area is possible for three to six hours per day (*teilweise Erwerbsminderung*).[1076] Professional athletes under certain circumstances can claim an annuity from the statutory accident insurance in cases of reductions in earning capacity due to sport (*Verletztenrente*).[1077] If payments of statutory accident and pension insurance could occur simultaneously, both will generally be granted, however only up to a certain amount in order to avoid the injured party being doubly compensated, § 93(3) SGB VI.[1078]

IV. Statutory Unemployment Insurance

252. Finally, the German social system also covers the risk of becoming unemployed by means of statutory unemployment insurance as regulated in the SGB III. Essentially, only 'employed persons' as defined in § 7(1) SGB IV are liable to pay insurance deductions. The most important insurance benefit is unemployment compensation (*Arbeitslosengeld*), pursuant to §§ 136 et seq. SGB III, which amounts to 67% of the last net income received (for persons with at least one child, and 60% for other persons), § 149 SGB III. It is paid for a period of six to twenty-four months depending on the length of time for which insurance contributions have been made and the age of the insured employee, § 147 SGB III. 'Unemployed' in terms of the regulations relating to unemployment compensation is taken to mean, in accordance with § 138(1) SGB III, a person who is not in an employment relationship

1070. Article 1 Statute of Dec. 18, 1989, BGBl. I-1989, 2261 (correction in BGBl. I-1990, 1337), with amendments.
1071. Rolfs, *Sport und Sozialversicherung*, 2001, 40.
1072. Jakob/Katzer, Sp*u*Rt 2001, 143 et seq.; Rolfs, *Sport und Sozialversicherung*, 2001, 41 et seq.
1073. Rolfs, *Sport und Sozialversicherung*, 2001, 39.
1074. For more on the validity of the (abolished) distinction between annuity for reduced earning capacity and vocational disability pension, see Mihm, Sp*u*Rt 1995, 18 at 21.
1075. Statutory pension insurance makes no payments for the *vocational* disability of persons born after Jan. 1, 1961, Müller, CaS 2007, 12 at 21. For persons born before that date, there is no real vocational disability protection. However, only jobs which were acceptable to the insured party can be referred on to her.
1076. § 43 SGB VI; see Rolfs, *Sport und Sozialversicherung*, 2001, 45.
1077. See above Part II, Ch. 2, §4 II.
1078. Rolfs, *Sport und Sozialversicherung*, 2001, 46.

(unemployment), who attempts to end her unemployment (by her own efforts), and who is available for jobs that the *Bundesagentur für Arbeit* (Federal Employment Office, BA) attempts to find for her (availability). Specifically in relation to sport, the requirement of availability can be of relevance if the federation's transfer regulations oppose the employment of an athlete by a certain employer. However, it is stated in the relevant jurisprudence that, in this case, there are no legal obstacles to the employment of an athlete and, thus, to the criterion of availability, which is why the lack of approval from the former sports club does not stand in opposition to the claim for unemployment compensation.[1079]

§5. Dispute Settlement in Sports

253. The tendency within sports to solve 'internal' sport conflicts in private courts rather than national courts is not just a characteristic of German sports. In Germany, this is permitted due to the fundamental right of freedom of association (Article 9 GG) and is elaborated on in Part I, Chapter 2, §1 I. At this juncture, the issue of interest is the area of conflict between the freedom of association, which is generally granted, and the regulations of labour law pertaining to social protection. In such cases, the matters of the extent to which the jurisdiction of these sports courts can supersede the national courts, and of whether, and in which respects, the legal measures laid down by these courts are subject to review by the national courts, are interesting.[1080] Furthermore, a summary of the system of national (labour) jurisdiction will be provided.[1081]

I. Dealing with Labour Law Disputes before Association Courts and Courts of Arbitration

254. In considering the private solution of conflicts, a distinction must be made between association courts (as internal organs of the association) and genuine courts of arbitration. Only the latter are capable of partly superseding national jurisdiction.

1079. BSGE 65, 204 = NZA 1990, 246 which deals with a claim for reimbursement by the BA against a sports club (which requires that the payment of unemployment benefit was legitimate); Rolfs, *Sport und Sozialversicherung*, 2001, 65; Müller, CaS 2007, 12 at 26.

1080. See also Part I, Ch. 2, §5 and Part I, Ch. 3, §7, which concerns the legal protection generally available against decisions reached internally by associations and federations.

1081. As to the possibility to review the rulings of courts of arbitration and referees, see Krähe, *Zur Überprüfbarkeit von Kampfrichterentscheidungen* and Vieweg, *Tatsachenentscheidungen im Sport – Konzeption und Korrektur*, both in: id. (eds.), Schiedsrichter und Wettkampfrichter im Sport, 2008, 9 et seq. and 53 et seq.

A. Jurisdiction of the Club and/or Federation

255. As stated above,[1082] due to the freedom of association which arises from Article 9 GG, associations have the right to entrust their own institutions with the solution of association-internal conflicts. This is not particularly problematic as the verdict of a representative body of the federation takes place before reference to the national courts, but does not preclude the national courts from acting (as opposed to the courts of arbitration in terms of §§ 1025 et seq. ZPO). The obligation to first (unsuccessfully) take legal action at internal association/federation level before issuing a claim before a national court, which delays access to the national court, is accepted as a commensurate expression of the associations' autonomy.[1083] It is also not forbidden a priori to deal with cases pertaining to labour law internally.[1084] The athletes can submit to internal club and/or federation jurisdiction by means of their membership of the club[1085] or as parties to a contract containing such a clause.[1086] Interim legal measures by national courts cannot be excluded by the jurisdiction of the club/federation.[1087]

B. Courts of Arbitration

256. Courts of arbitration, as defined under §§ 1025 et seq. ZPO, may not, however, be internal bodies of the club, but qualify only if they are independent of the club as regards their organization, personnel and their economic operation.[1088] These requirements are met by the *Deutsches Sportschiedsgericht* (German Court of Arbitration for Sports), which was established on 1 January 2008,[1089] or the *Schiedsgericht der Deutschen Eishockey Liga* (Court of Arbitration of the German Ice Hockey League), for example.[1090]

The specific characteristics of disputes pertaining to labour law, when compared to other disputes, are legally based on the mere possibility of arbitration. While, in general, every proprietary claim can be the subject of arbitration proceedings,[1091] § 1030(1) sentence 1 ZPO in conjunction with §§ 4, 101 ArbGG sets restrictions

1082. Part I, Ch. 2, §1 I.
1083. BGHZ 47, 172 at 174; LG Kassel, Sp*u*Rt 2011, 76 at 77; Reichert, *Handbuch des Vereins- und Verbandsrechts*, 12th edition 2010, mn. 3188.
1084. Reichert, *Handbuch des Vereins- und Verbandsrechts*, 12th edition 2010, mn. 3013 et seq.
1085. Reichert, *Handbuch des Vereins- und Verbandsrechts*, 12th edition 2010, mn. 3017.
1086. BGHZ 128, 93 at 104; Reichert, *Handbuch des Vereins- und Verbandsrechts*, 12th edition 2010, mn. 3022.
1087. LG Cottbus, Sp*u*Rt 2008, 36 at 37.
1088. BGH, Sp*u*Rt 2004, 159 at 161 = NJW 2004, 2224 at 2227; OLG München, Sp*u*Rt 2012, 22 at 24; Reichert, *Handbuch des Vereins- und Verbandsrechts*, 12th edition 2010, mn. 5284 and above Part I, Ch. 3, §7.
1089. It is run by the *Deutsche Institution für Schiedgerichtsbarkeit e.V.* in Cologne, see Klich, Sp*u*Rt 2007, 236 et seq.; Fritzweiler, Sp*u*Rt 2008, 175 et seq.; Mertens, Sp*u*Rt 2008, 140 et seq. and 180 et seq.
1090. OLG München, Sp*u*Rt 2012, 22.
1091. Zöller/Geimer, ZPO, 12th edition 2012, § 1030 ZPO, mn. 1.

on the objective possibility of arbitration for claims arising out of the employment contract.[1092] Arbitration proceedings are only permitted if the arbitration agreement forms an express part of a collective labour agreement, § 101(2) sentence 1 ArbGG. It is also crucial, however, that this applies only to certain, specifically enumerated occupational groups (actors, film technicians, artists among others). Professional athletes are not included in this.[1093] Therefore, it is generally impossible to agree upon an arbitral clause in terms of §§ 1025 et seq. ZPO for disputes relating to (sport) employment contracts.[1094] One, somewhat controversial view states that this is also the case as regards the relationship between an athlete and the federation,[1095] since the latter also performs the functions of an employer.[1096] On a national level, therefore, the question of judicial review of arbitral awards by the state courts does not arise in relation to employment contracts (in sport).[1097]

257. In cases which have an international context, however, and which involve a choice of law (in this case, Swiss law) which allows arbitral agreements in labour disputes, it should, according to one view, be possible to assume that the CAS/TAS has jurisdiction for matters which also pertain to labour law, even if the employment contract itself is subject to German law.[1098] This seems to be consistent with the jurisprudence of the *Bundesarbeitsgericht* (Federal Labour Court, BAG), which considers § 101(2) ArbGG to be applicable only if German law is the applicable procedural statute, and ascribes only implied, but not essential, importance to the employment contract statute in determining the procedural statute.[1099] However, it must be noted that an arbitral award from the CAS/TAS (classified as a foreign arbitral award, due to the CAS/TAS being based in Switzerland, § 1043(1) ZPO) would require acknowledgement pursuant to § 1061 ZPO[1100] in conjunction with the UN

1092. Zöller/Geimer, ZPO, 12th edition 2012, § 1030 ZPO, mn. 1a.
1093. Grunsky, *Arbeitsgerichtsgesetz*, 7th edition 1995, § 101, mn. 6; Germelmann/Matthes/Prütting/Müller-Glöge/Germelmann, ArbGG, 5th edition 2004, § 101, mn. 20; Oschütz, *Probleme der Schiedsgerichtsbarkeit im Sport: arbeitsrechtliche Streitigkeiten und einstweiliger Rechtsschutz*, in: Haas (ed.), Schiedsgerichtsbarkeit im Sport, 2003, 43 at 47; for an argument opposing the exclusive character of the norm, and in support of an analagous application to athletes, see Klose/Zimmermann, *Tarifvertrag als Regelungsinstrument: Perspektive für den deutschen Sport*, in: Bepler (ed.), Sportler, Arbeit und Statuten, 2000, 138 and Adolphsen/Nolte/Lehner/Gerlinger/Wüterich/Breucker, *Sportrecht in der Praxis*, 2011, mn. 511.
1094. Krähe, Sp*u*Rt 2004, 204.
1095. Buchner, RdA 1982, 1 at 9; for a different view Haas, in: Haas/Haug/Reschke (eds.), Handbuch des Sportrechts, B, Ch. 2, mn. 162 with more remarks.
1096. See Part II, Ch. 2, §2 III D 1.
1097. Wüterich/Breucker, *Arbeitsrecht im Sport*, 2006, mn. 88. This was also set out by the Sports Law Commission against Doping (ReSpoDo) which suggested amendments in this respect, see Hauptmann, Sp*u*Rt 2005, 198 at 199 et seq.
1098. Krähe, Sp*u*Rt 2004, 204 at 205.
1099. BAG, DB 1975, 63 at 64 = AP no. 7 to § 38 ZPO Internationale Zuständigkeit, with commentary by E. Lorenz; Germelmann/Matthes/Prütting/Müller-Glöge/Germelmann, ArbGG, 5th edition 2004, § 4, mn. 3a.
1100. Although § 101(3) ArbGG excludes §§ 1025 et seq. ZPO in labour law disputes, this does not apply to § 1061 ZPO due to the absence of a regulation pertaining to foreign arbitral awards in §§ 101 et seq. ArbGG, and due to the international law obligations of the Federal Republic of Germany, see Birk, *Internationale private Schiedsgerichtsbarkeit in Arbeitssachen*, in:

Convention,[1101] in order to become enforceable in Germany.[1102] Furthermore, acknowledgement would have to be denied pursuant to §§ 4, 101(2) ArbGG in conjunction with Article 5(2) lit. a) UN Convention, which allows for the denial of acknowledgement if this is opposed by national law. By consequence, in the author's view, German labour courts with international jurisdiction[1103] would have to ignore an arbitral clause in this respect.[1104]

If one disagrees with this opinion, it must be considered whether or not the acknowledgement or enforcement of arbitral awards in labour matters generally contradicts the *ordre public* and, thus, can be denied application pursuant to Article 5(2) lit. b) of the UN Convention. This has not yet been decided by the BAG. In this respect, the *ordre public international*, which is decisive according to the relevant jurisprudence,[1105] is infringed only if the arbitral proceedings show a clear deficit[1106] as regards the basic principles of governmental and economic life, or if the arbitral award or result of the arbitral proceedings in that individual case, conflicts with the fundamental goals of German regulations and the concept of justice expressed therein so severely that, from a German point of view, it seems intolerable.[1107] The fact that § 101(2) ArbGG is mandatory law does not, of itself, result in an infringement of the *ordre public international* in this sense.[1108] As regards this, acknowledgement would be, as a rule, granted. According to a contentious view often voiced in legal commentary,[1109] foreign arbitral awards are not subject to any

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Waldner/Künzl (eds.), Erlanger Festschrift für Schwab, 1990, 305 at 323 et seq. regarding the relationship to the previous regulation of § 1044 ZPO, former edition.

1101. UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, dated June 10, 1958, BGBl. II-1961, 121.
1102. The German-Swiss Convention on the Mutual Recognition and Enforcement of Arbitral Awards of Nov. 2nd, 1929 in conjunction with § 1061(1) sentence 2 ZPO does not prevent the application of the UN Convention on Swiss Arbitral Awards, Schwab/Walther, *Schiedsgerichtsbarkeit*, 7th edition 2005, Ch. 59, mn. 1.
1103. This is the case where the employer or employee works or resides in Germany, §§ 13, 12, 17(1), 23 ZPO, as well as Regulation 44/2001/EC of Dec. 22, 2002 (when applicable), and Art. 5(1) of the Lugano Convention, Pfister, Sp*u*Rt 2006, 137 at 138.
1104. For a discussion of the issue in its entirety, see Pfister, Sp*u*Rt 2006, 137 at 138 et seq., with further references. According to Birk, *Internationale private Schiedsgerichtsbarkeit in Arbeitssachen*, in: Waldner/Künzl (eds.), Erlanger Festschrift für Schwab, 1990, 326, the Federal Republic of Germany does not make use of this authorization. However, Art. 5(2) no. 2 lit. a) UN Convention is not designed as an executable contractual option of the contracting country, but as an ipso iure valid objection that must be considered ex officio by the court; in this sense see Musielak/Voit, ZPO, 9th edition 2012, § 1061, mn. 21.
1105. Some of the legal commentary denies the existence of a distinction between *ordre public international* and *ordre public intern*, see Tyrolt, *Sportschiedsgerichtsbarkeit und zwingendes staatliches Recht*, 2007, 123.
1106. BGH, NJW 1987, 3027 at 3028.
1107. BGH, NJW 1998, 2358. Although this decision pertains to the acknowledgement of rulings by foreign public courts, the acknowledgement of arbitral awards is not subject to stricter criteria, BGH, NJW 1987, 3027 at 3028.
1108. BGH, NJW 1987, 3027 at 3028; for a general account of the mandatory legal provisions, see Tyrolt, *Sportschiedsgerichtsbarkeit und zwingendes staatliches Recht*, 2007, 120.
1109. For discussion of the previous provision of § 1044 ZPO, former edition, see Birk, *Internationale private Schiedsgerichtsbarkeit in Arbeitssachen*, in: Waldner/Künzl (eds.), Erlanger Festschrift für Schwab, 1990, 326; for an alternative view, see Gamillscheg, *Internationales Arbeitsrecht*, 1959, 391.

further judicial review pursuant to § 110 ArbGG once they have been acknowledged.[1110] In the event that no acknowledgement of the award is requested by the winning party, the other party to the arbitral proceedings can apply to the national courts for a declaration that the award is unlawful or file a suit for the claim denied by the court of arbitration, for example to be admitted to a competition.[1111]

Freelance contracts are not encompassed by the regulation § 101 ArbGG, which is why the agreement of a court of arbitration with the consequences stated above[1112] remains possible in this area.

C. Interim Legal Measures

258. Interim legal measures (which are of particular relevance in the area of sport) can also be granted by a court of arbitration, as long as no agreement to the contrary has been entered into, § 1041(1) ZPO. The possibility of the complete contractual exclusion of national jurisdiction in this respect is, for the most part, rejected,[1113] in particular in the relevant case law,[1114] by reference to § 1033 ZPO and to the greater effectiveness of interim national court orders, since the enforcement of provisional measures of the court of arbitration can only be permitted by the competent national court pursuant to § 1042(2) sentence 1 ZPO.[1115]

According to the prevailing view, the exclusion of the jurisdiction of national courts for interim measures would – if it is held to be possible at all – have to be agreed upon expressly. A clause that refers 'all disputes' to a court of arbitration is not sufficient.[1116] The exclusion of national courts from granting interim measures

1110. The higher regional court (*Oberlandesgericht*) in the district where the defendant resides, has his habitual residence, or where his assets are located, § 1062(1) no. 4, (2) ZPO.
1111. Tyrolt, *Sportschiedsgerichtsbarkeit und zwingendes staatliches Recht*, 2007, 107 et seq.
1112. Part I, Ch. 2, §5.
1113. Musielak/Voit, ZPO, 9th edition 2012, § 1033, mn. 3; MüKoZPO/Münch, § 1033, mn. 18, 3rd edition 2008; Cherkeh/Schroeder, Sp*u*Rt 2007, 101 at 102 et seq. on the basis of a historical interpretation of § 1033 ZPO; Wolf, DB 1999, 1101 at 1103; for an alternative view, Oschütz, *Probleme der Schiedsgerichtsbarkeit im Sport: arbeitsrechtliche Streitigkeiten und einstweiliger Rechtsschutz*, in: Haas (ed.), Schiedsgerichtsbarkeit im Sport, 2003, 43 at 53 et seq.; Schlosser, SchiedsVZ 2009, 84 at 87; Adolphsen, Sp*u*Rt 2000, 159; Zöller/Geimer, ZPO, 12th edition 2012, § 1033, mn. 6; Hilpert, Sp*u*Rt 2007, 223 at 225; Mertens, Sp*u*Rt 2008, 180 at 183 points out the danger of contrasting decisions as regards the co-existence of national and arbitration courts; for an alternative opinion, see Haas, in: Haas/Haug/Reschke (eds.), Handbuch des Sportrechts, B, Ch. 2, mn. 220.
1114. OLG Nürnberg, SchiedsVZ 2005, 50 at 51; OLG Frankfurt/Main, Sp*u*Rt 2003, 79 at 80 = NJW-RR 2003, 498 at 499 (motivation is printed in NJW-RR only); LG Berlin, CaS 2006, 73 at 74, with opposing commentary by Weber, CaS 2006, 283 at 284; LG München, Sp*u*Rt 2000, 155 at 156; LAG Köln, NZA-RR 2002, 547 at 548; OLG München, Sp*u*Rt 2001, 64 at 65 = NJW-RR 2001, 711 at 712 left the question open, but tended towards regarding the exclusion of national jurisdiction as being legally ineffective. Regarding the legal situation before the regulations came into force, see BGH, WM 1957, 932 at 934; OLG München, Sp*u*Rt 1994, 89 at 90 with remarks Schimke and Sp*u*Rt 1995, 131 at 133; LG Düsseldorf, NJW-RR 1990, 832.
1115. See e.g., OLG Frankfurt/Main, NJW-RR 2001, 1078 = Sp*u*Rt 2001, 198.
1116. LG Wiesbaden, decision of Dec. 18, 2009, reference number 13 O 59/09, BeckRS 2011, 03364, mn. 23.

could, if at all, be accomplished by excluding the international jurisdiction of German courts.[1117]

II. National Jurisdiction

259. Another type of dichotomy between labour disputes and conflicts in freelance contracts exists on the level of national jurisdiction.

A. Labour Court Jurisdiction

260. In the area of employment contracts, the labour courts (*Gerichte für Arbeitssachen*) are called upon to solve conflicts. Labour court proceedings differ from ordinary court proceedings in, inter alia, the appointment of lay judges from the sphere of employers and employees. Furthermore, trade unions and employers associations may appear on behalf of the parties. Finally, labour court proceedings are strongly focussed on the conclusion of amicable agreements[1118] and an accelerated termination of the proceeding.

1. Legal Access to the Labour Courts

261. As regards disputes relating to the existence of an employment contract or claims deriving from it, legal action can be taken to the labour courts pursuant to § 2(1) no. 3 lit. a) and b) ArbGG. This applies even if the contract was, for all intents and purposes, a freelance relationship, but was formally classified as an employment contract.[1119]

2. Competence

262. Pursuant to § 8(1) ArbGG, the *Arbeitsgericht* (local labour court, ArbG) is the court of first instance. Its decision can be appealed before the *Landesarbeitsgericht* (regional labour court, LAG), § 64(1) ArbGG. Under certain conditions, these judgments can, in turn, be appealed to the *Bundesarbeitsgericht* (Federal Labour Court, BAG), § 72(1) ArbGG.[1120]

1117. OLG Nürnberg, SchiedsVZ 2005, 50 at 51: Agreement upon an arbitration clause in an international contract that provides for a foreign arbitration location (here: Geneva) as the relevant jurisdiction for the solution of any legal disputes, and for the application of foreign (here: Swiss) law.
1118. Junker, *Grundkurs Arbeitsrecht*, 10th edition 2011, mn. 836.
1119. LAG Hamm, Sp*u*Rt 2006, 127 at 128.
1120. For more on the possibility of taking legal action and jurisdiction, see Hromadka/Maschmann, *Arbeitsrecht*, *Band 2*, *Kollektivarbeitsrecht und Arbeitsstreitigkeiten*, 5th edition 2010, § 21, mn. 13 et seq.

3. Local Jurisdiction

263. As of 1 April 2008, local jurisdiction arises from § 48(1a) ArbGG (venue of the place of work).[1121] Pursuant to this, the labour court in whose district the employee usually works (or has worked) has jurisdiction. Prior to 1 April 2008, this was the case pursuant to §§ 46(2) ArbGG in conjunction with 29 ZPO, which pertains to the place of performance.[1122] The place of performance of the employment contract is generally the establishment where the employee is employed.[1123] Even if the employee is deployed outside of the company – as is, for example, the case in the event of external matches – the place from which the service is performed is of significance in accordance with § 48(1a) sentence 2 ArbGG. In sport, this is generally the place at which training usually takes place. §§ 46(2) sentence 1 ArbGG in conjunction with 29 ZPO is applicable, as well as § 48(1a) ArbGG.

Furthermore, employers and employees can be sued in the courts situated nearest to their places of residence, §§ 46(2) sentence 1 ArbGG; 12, 13 ZPO; 7(1) BGB. If the employer is a legal entity, the employee can sue it at the place of its registered seat, § 17(1) ZPO.

B. Ordinary Courts

264. For disputes relating to freelance contracts, the ordinary courts have jurisdiction in accordance with the general rule of § 13 *Gerichtsverfassungsgesetz* (Courts Constitution Act, GVG). A suit must be filed with the *Amtsgericht* (local court) for claims of up to EUR 5,000, §§ 71(1), 23(1) GVG. If the amount in dispute exceeds EUR 5,000, then the *Landgericht* (regional court) has competence pursuant to § 71(1) GVG.[1124] As is the case in relation to the labour courts, the legal remedies of *Berufung* (appeal on points of fact and law, §§ 511 et seq. ZPO) and of *Revision* (appeal on points of law, §§ 542 et seq. ZPO) are available. As regards local jurisdiction, the comments made above also apply here (with exception of § 48(1a) ArbGG).

III. Applicable Law

265. The aforementioned matters must be considered separately from the determination of the substantive labour law which is to be applied by the court (of arbitration). In principle, the parties are free to choose the legal system which

1121. Germelmann/Matthes/Prütting/Müller-Glöge/Schlewing/Germelmann, ArbGG, 5th edition 2004, § 48, mn. 34.
1122. Hromadka/Maschmann, *Arbeitsrecht*, *Band 2*, *Kollektivarbeitsrecht und Arbeitsstreitigkeiten*, 5th edition 2010, § 21, mn. 39.
1123. Germelmann/Matthes/Prütting/Müller-Glöge/Schlewing/Germelmann, ArbGG, 5th edition 2004, § 48, mn. 42.
1124. Reichert, *Handbuch des Vereins- und Verbandsrechts*, 12th edition 2010, mn. 3192.

should be applicable, Article 8(1) sentence 1 EC-Regulation 593/2008 (Rome-I-Regulation).[1125] A (tacit) choice of material law can also be made out in arbitration clauses regarding the TAS/CAS.[1126] However, German legal commentary correctly dismisses[1127] cases of fabricated forum selection such as *Ribèry*.[1128] Furthermore, it is doubtful whether referring to the regulations of a sports federation (even if it is a world federation such as FIFA) can be regarded as a choice of law in accordance with international private law.[1129] In German legal commentary, such a clause is regarded as a referral to standardized terms of contract.[1130]

In employment contracts which have foreign elements[1131] that were drafted before 18 December 2009, reference must be made to Article 30(1) EGBGB (old version). Here, it was stated that if the employment relationship is most closely related to the laws of Germany,[1132] the employee should receive the protection of the compulsory labour law regulations[1133] and any choice of law contrary to this had to be disregarded.[1134] Article 8(1) sentence 1 Rome-I-Regulation is applicable to employment contracts which were drafted after 17 December 2009.[1135] The essential content of Article 30(1) EGBGB continues to apply.[1136] The relevant regulations deal, inter alia, with protection against unfair dismissal, salary payment and owed holiday.[1137] If the regulations which apply in the chosen jurisdiction are more favourable for the employee, they remain applicable.[1138] If the case lacks a foreign

1125. MüKo/Martiny, 5th edition 2010, Art. 8 VO (EG) 593/2008, mn. 25; Adolphsen/Nolte/Lehner/Gerlinger/Wüterich/Breucker, *Sportrecht in der Praxis*, 2011, mn. 521. Before the Rome-I-Regulation came into force the same applied according to Article 27(1) of the former version of the *Einführungsgesetz zum BGB* (Introductory Act to the Civil Code, EGBGB).
1126. MüKo/Martiny, 5th edition 2010, Art. 3 VO (EG) 593/2008, mn. 51.
1127. Netzle, Sp*u*Rt 2007, 206; for an account of the application of Swiss law in the award of CAS of Aug. 4, 1999, reference number 96/161 – International Triathlon Union (ITU)/Pacific Sports Corp. Pfister, Sp*u*Rt 2008, 1 at 5.
1128. French footballer agreed with a Turkish club that all legal relations would be regulated under Turkish law. However, as the parties would have given priority to the FIFA-Regulations, or rather, would have brought the case before the CAS, the dispute would have been settled in accordance with Swiss law as it would have to be applied subsidiarily to the FIFA-Regulations by the CAS, Sp*u*Rt 2007, 202 at 204 with comment by Netzle.
1129. Adolphsen/Nolte/Lehner/Gerlinger/Wüterich/Breucker, *Sportrecht in der Praxis*, 2011, mn. 523.
1130. Netzle, Sp*u*Rt 2007, 206 refers to the ruling of the *Schweizerisches Bundesgericht* (Swiss Federal Court of Justice) in Sp*u*Rt 2007, 159. For more on the classification of federation regulations as standard terms in the sense of §§ 305 BGB et seq., see Part II, Ch. 2, §2 II.
1131. Some examples of such an element are the nationality of the athlete, membership of a club in a foreign federation, or place of work.
1132. Pursuant to Art. 30(2) EGBGB, this was generally the case if the habitual place of work is in Germany, or if the athlete was hired by a German branch office of the employer.
1133. It is not sufficient for a legal provision to be mandatory in order to be qualified law in the sense of Art. 30(2) EGBGB previous version. It must be a regulation that aims to protect the employee from the employer, MüKo/Martiny, 5th edition 2010, Art. 8 VO (EG) 593/2008, mn. 34.
1134. See LAG Hessen, NJOZ 2001, 45 at 51.
1135. BT-Drs. 16/12104, 10.
1136. MüKo/Martiny, 5th edition 2010, Art. 8 VO (EG) 593/2008, mn. 1.
1137. MüKo/Martiny, 5th edition 2010, Art. 8 VO (EG) 593/2008, mn. 37.
1138. Adolphsen/Nolte/Lehner/Gerlinger/Wüterich/Breucker, *Sportrecht in der Praxis*, 2011, mn. 525. This would be the regulation that best suits the athlete's wishes, MüKo/Martiny, 5th edition 2010, Art. 8 VO (EG) 593/2008, mn. 41.

element (Article 3(3) Rome-I-Regulation),[1139] or, in the case of mandatory international law (Article 9(2) Rome-I-Regulation),[1140] a comparison as regards favourability is not undertaken.[1141] Mandatory international legal provisions are, for instance, public law regulations regarding maximum working hours, mass dismissals or regulations preventing accidents,[1142] and also the prohibition of discrimination pursuant to the AGG.[1143]

1139. This affects all mandatory regulations. It is, however, a different matter than that of Art. 8(1) sentence 2 Rome-I-Regulation (MüKo/Martiny, 5th edition 2010, Art. 8 VO (EG) 593/2008, mn. 34), as it does not depend on the protective character of the regulation, MüKo/Martiny, 5th edition 2010, Art. 8 VO (EG) 593/2008, mn. 41.
1140. This relates to cases where the choice of law and the objective link to the applicable law lead to a jurisdiction which is not the lex fori in accordance the general rules of international private law. However, there must still exist a link to Germany, ErfK/Schlachter, 12th edition 2012, Art. 3, 8 and 9 Rome-I-Regulation, mn. 21.
1141. ErfK/Schlachter, 12th edition 2012, Art. 3, 8 und 9 Rome-I-Regulation, mn. 21; MüKo/Martiny, 5th edition 2010, Art. 8 VO (EG) 593/2008, mn. 42 et seq.
1142. MüKo/Martiny, 5th edition 2010, Art. 8 VO (EG) 593/2008, mn. 120 et seq.
1143. ErfK/Schlachter, 12th edition 2012, Art. 3, 8 und 9 Rome-I-Regulation, mn. 21. See Part II, Ch. 2, §1 II C.

Chapter 3. Private Regulation Through Collective Bargaining

266. In addition to the norms of sports federations, the second main area of private norm setting is collective labour law.

§1. Systematization

267. German collective labour law is usually divided into coalition law, collective labour agreement and labour dispute law on the one hand, and the law of co-determination on the other.[1144]

While coalition law concerns the question of whether, and to what extent, a private association can rely on the protection provided by the fundamental right of collective bargaining pursuant to Article 9(3) GG, collective agreement law concerns the statutory framework for coalitions in order to permit them to pursue their own purposes. The subject of labour dispute law is self-evident. In this area, unions and employers' associations as well as individual employers take on the roles of social partners.

The right of co-determination is subdivided into operational co-determination[1145] on the one hand (which in this form exists only in Germany), and co-determination of financial matters[1146] on the other. While, in principle, operational co-determination concerns questions of order in the actual place of work, company co-determination gives the employee a certain level of influence on the entrepreneurial decision-making process of the employer. The works council (*Betriebsrat*) and the employer are social partners for operational co-determination, whilst company co-determination (only relevant at corporations with a large number of employees[1147]) is implemented through the representation of the employees by the supervisory body of the corporation and through the creation of a special body, the *Wirtschaftsausschuss* (Finance Committee), according to §§ 106 et seq. BetrVG.[1148]

§2. Collective Labour Law in Sport

268. Collective labour law plays a far smaller role in sports than the regulations of the federations do.

1144. See Krause, *Arbeitsrecht*, 2nd edition 2011, 42; Horst/Persch, in: Nolte/Horst (eds.), Handbuch Sportrecht, 2009, 153 at 158 et seq.
1145. Regulated in the Works Constitution Act (fn. 592).
1146. Primarily regulated in the *Mitbestimmungsgesetz* (Co-determination Act, May 4, 1976, BGBl. I-1976, 1153), in the *Montan-Mitbestimmungsgesetz* (Montan Co-determination Act, May 21, 1951, BGBl. I-1951, 347) and in the *Drittelbeteiligungsgesetz* (One-Third Participation Act, May 18, 2004, BGBl. I-2004, 974), all with amendments.
1147. The Co-determination Act requires an average of more than 2000 employees (§ 1(1) no. 2), the One-Third Participation Act (in general) an average of more than 500 (§ 1(1)).
1148. For more on the system of collective labour law, cf. Hromadka/Maschmann, *Arbeitsrecht*, *Band 2*, *Kollektivarbeitsrecht und Arbeitsstreitigkeiten*, 5th edition 2010, § 11, mn. 1 et seq.

I. Collective Labour Agreement and Labour Dispute Law

269. In the area of sports in Germany, the regulation of working conditions by means of collective labour agreements is of little importance.[1149] As far as is ascertainable, and apart from merely professional associations, representatives of the interests of employees which can be characterized as *unions* exist only in ice hockey,[1150] basketball,[1151] and football.[1152,1153] In their role as employers, none of the sports federations have set themselves the statutory goal of carrying out the tasks of an employers' association.[1154] But, theoretically, the collective labour agreement could also be a possible regulation device in sports.[1155] Individual clubs, acting as employers,[1156] can also be party to collective labour agreements, § 2(1) TVG.[1157] Thus, labour disputes which occur with the intention of forcing negotiations about a collective labour agreement would also be covered by the legal system.[1158] On a practical level, the law relating to labour disputes is not relevant in the area of sports. A strike by professional athletes has never occurred in Germany.[1159] It is unlikely that fans would be very sympathetic to a strike due to the high salaries paid in professional sport.[1160] A maximum remuneration limit such as the salary caps that have been put in place in the USA does not seem necessary[1161] and, in view of the fact that individual agreements which are more advantageous for the employee are

1149. Adolphsen/Nolte/Lehner/Gerlinger/Wüterich/Breucker, *Sportrecht in der Praxis*, 2011, mn. 510. Klose/Zimmermann, *Tarifvertrag als Regelungsinstrument: Perspektive für den deutschen Sport*, in: Bepler (ed.), Sportler, Arbeit und Statuten, 2000, 138; Rüth, *Kollektives Arbeitsrecht im Sport*, 2003, 119. Apparently, in the history of German licensed sports, there has been only one collective labour agreement which was concluded between the DAG (*Deutsche Angestelltengewerkschaft*, former union) and *FC Bayern München*, Rüth, *Kollektives Arbeitsrecht im Sport*, 2003, 129 et seq.

1150. *Vereinigung der Eishockeyspieler* (Association of Ice Hockey Players), see Schneider, Sp*u*Rt 1996, 118 at 119.

1151. *Vereinigung der Basketball Vertragsspieler* (Association of Contractual Basketball Players), see Klose/Zimmermann, *Tarifvertrag als Regelungsinstrument: Perspektive für den deutschen Sport*, in: Bepler (ed.), Sportler, Arbeit und Statuten, 2000, 149 et seq.

1152. *Vereinigung der Vertragsfußballspieler*, Rüth, Sp*u*Rt 2005, 177; Pröpper, NZA 2001, 1346 et seq.

1153. See Rüth, *Kollektives Arbeitsrecht im Sport*, 2003, 130 et seq.; Korff, CaS 2011, 44 at 46 et seq.

1154. Klose/Zimmermann, *Tarifvertrag als Regelungsinstrument: Perspektive für den deutschen Sport*, in: Bepler (ed.), Sportler, Arbeit und Statuten, 2000, 157.

1155. Korff, CaS 2011, 44 at 48 et seq.; for discussion of possible areas of application, see Heink, CaS 2011, 37; Rüth, *Kollektives Arbeitsrecht im Sport*, 2003, 166 et seq.

1156. See above Part II, Ch. 2, §2 III D 1.

1157. Rüth, *Kollektives Arbeitsrecht im Sport*, 2003, 153.

1158. Schneider, Sp*u*Rt 1996, 118 at 120; Klose/Zimmermann, *Tarifvertrag als Regelungsinstrument: Perspektive für den deutschen Sport*, in: Bepler (ed.), Sportler, Arbeit und Statuten, 2000, 174; PHBSportR-Fritzweiler, part 3, mn. 54.

1159. Klose/Zimmermann, *Tarifvertrag als Regelungsinstrument: Perspektive für den deutschen Sport*, in: Bepler (ed.), Sportler, Arbeit und Statuten, 2000, 153.

1160. Fischer, Sp*u*Rt 2004, 251 at 252; Klose/Zimmermann, *Tarifvertrag als Regelungsinstrument: Perspektive für den deutschen Sport*, in: Bepler (ed.), Sportler, Arbeit und Statuten, 2000, 174; For more on collective labour law in sport, see Walker, *Arbeitsrechtliche Mitbestimmung im professionellen Mannschaftssport*, in: id. (ed.), Mitbestimmung im Sport, 2001, 11 at 12 et seq.

1161. PHBSportR-Fritzweiler, part 3, 53.

awarded priority over collective agreements (§ 4(3) TVG), they would, according to the prevalent opinion, be invalid in any case.[1162]

II. Right of Co-determination

270. Co-determination of the employees takes place, as already mentioned, both on workplace level and company level.

A. Works Constitution Law (Betriebsverfassungsrecht)

271. It is possible to elect a works council (*Betriebsrat*) in companies that normally have five or more permanent employees with voting rights, including three who are eligible, § 1(2) BetrVG. All employees of the establishment who are 18 years of age or over have voting rights, § 7 sentence 1 BetrVG. All employees with voting rights who have been employed for six months are eligible to be elected to the works council, § 8(1) sentence 1 BetrVG. Rights of co-determination of relevance to sport arise out of § 87(1) no. 1 BetrVG (concerning order in the establishment, which is relevant, inter alia, in relation to suitable work clothing[1163] and monetary fines, which are similar to contractual penalties imposed by the company (so-called *Betriebsbußen*),[1164] § 87(1) no. 2 BetrVG (commencement, termination and distribution of working hours), § 87(1) no. 10 and 11 BetrVG (remuneration arrrangements and bonus rates), as well as from § 99 BetrVG (requirement for consent of the works council in the events of recruitment, grading, regrading and internal transfer).[1165] However, an acceptance of the latter in a team sport would seem like a huge interference with the autonomy (of association) of the sports club. Therefore, according to legal commentators, a restriction of the right of co-determination under works constitution law is necessary, due to the characteristics of professional sport.[1166] However, since there are barely any works councils in professional sports,[1167] no jurisprudence exists in relation to this matter. It has merely been determined by the *Bundesarbeitsgericht* (Federal Labour Court, BAG) that sport federations do not benefit from the exception which applies to non-profit

1162. See Rüth, Sp*u*Rt 2003, 137 at 141; for more detail, see Fikentscher, *Mitbestimmung im Sport*, 2002, 290 et seq.*;* for an alternative view, see Lange, Sp*u*Rt 2010, 234 at 235 et seq., who points out that collective labour agreements can also contain clauses which are disadvantageous for the employees; for a discussion in terms of competition law, see Bahners, Sp*u*Rt 2003, 142.

1163. Hromadka/Maschmann, *Arbeitsrecht*, *Band 2*, *Kollektivarbeitsrecht und Arbeitsstreitigkeiten*, 5th edition 2010, § 16, mn. 447.

1164. For more on the separation of monetary fines from contractual penalties, see Schul/Wichert, Sp*u*Rt 2004, 229 et seq.

1165. See Rüth, Sp*u*Rt 2005, 177 at 178 et seq.; Walker, *Arbeitsrechtliche Mitbestimmung im professionellen Mannschaftssport*, in: id. (ed.), Mitbestimmung im Sport, 2001, 28 et seq.; for an account dealing with professional football in particular, see Kania, Sp*u*Rt 1994, 121 et seq.; Fikentscher, *Mitbestimmung im Sport*, 2002, 249 et seq.

1166. Rüth, Sp*u*Rt 2005, 177 at 179; Walker, *Arbeitsrechtliche Mitbestimmung im professionellen Mannschaftssport*, in: id. (ed.), Mitbestimmung im Sport, 2001, 38 et seq.

1167. Korff, CaS 2011, 44 at 45; Rüth, Sp*u*Rt 2005, 177.

organizations and religious communities (e.g., newspapers, companies run by religious communities) pursuant to § 118(1) BetrVG.[1168] According to this provision, the BetrVG does not apply to these companies and establishments, insofar as their application would not be in keeping with the specific nature of the company or establishment.

On an internal-federation level, the athletes often take part in decision-making in their capacity as 'active representatives', 'councils of active athletes' or 'athlete commissions' which are provided for in the statutes, in particular in relation to issues relating to remuneration and selection.[1169]

B. Co-determination on Financial Matters

272. Co-determination on financial matters does not play any practical role in sports, in spite of the increasing outsourcing of license-sport-departments in stock companies. The reason for this is that the number of employees of such companies is usually too low.[1170] As far as can be ascertained, there is no jurisprudence relating to this area, nor do the relevant sports law publications contain any remarks on this issue.[1171]

1168. BAGE 91, 144 = NZA 1999, 1347 = Sp*u*Rt 1999, 249; Fikentscher, *Mitbestimmung im Sport*, 2002, 264 et seq.; PHBSportR-Fritzweiler, part 3, mn. 51.

1169. PHBSportR-Fritzweiler, part 3, mn. 51 and 55; for a detailed account, see Fikentscher, *Vereinsrechtliche Mitbestimmung der Athleten und ihrer Vertreter*, in: Walker (ed.), Mitbestimmung im Sport, 2001, 43 at 48 et seq. and id., *Mitbestimmung im Sport*, 2002, 175 et seq.

1170. Fikentscher, *Mitbestimmung im Sport*, 2002, 39. See also fn. 1147.

1171. Walker, *Arbeitsrechtliche Mitbestimmung im professionellen Mannschaftssport*, in: id. (ed.), Mitbestimmung im Sport, 2001, Fikentscher, *Mitbestimmung im Sport*, 2002, 39; Merkel, *Der Sport im kollektiven Arbeitsrecht*, 2003; Rüth, *Kollektives Arbeitsrecht im Sport*, 2003.

Part III. Doping

273. There is hardly another topic that – for decades – has raised the tempers of sports enthusiasts as much as the problem of how to combat doping.[1172] Over the years, the efforts of national and international sports associations have created a complicated patchwork of competences, methods of control and analysis, lists of prohibited substances, sanctions and remedies. The instructive 'Krabbe'' 'Baumann', 'Ullrich' and 'Pechstein' cases (of particular relevance to Germany) may serve as examples.[1173]

§1. The History of Doping in Germany

274. The cases of *Krabbe I-III* turned into a marathon series of legal disputes, which extended over ten years. It was as a result of this set of disputes that a German athlete was, for the first time, awarded damages as a result of a doping ban.[1174]

The *Krabbe I* case dealt with the two-time world champion sprinter, Katrin Krabbe, who, during a training camp in Stellenbosch (Republic of South Africa) in January 1992, underwent a doping inspection which was carried out by the South African Athletics Association at the request of the German Athletics Association (DLV). She was subsequently suspended for four years by the executive board of the DLV, as a result of its findings that a doping offence had occurred. These findings were based on the fact that three athletes had had identical urine samples. The legal committee of the DLV, however, reversed the suspension for four reasons:[1175] first, a lack of competence on the part of the executive board of the DLV; second, the absence of a statutory basis; third, the insufficient basis of evidence; and finally, the disproportionate nature of the period of suspension. The arbitration panel of the IAAF, on the other hand, had serious reservations about the correctness of the legal committee's decision, but did not find evidence of any serious breaches of the IAAF's rules and regulations or of the procedural guidelines for doping control.

1172. For a general account of the cases, see the transcript of the symposium Vieweg (ed.), Doping – Realität und Recht, Berlin 1998.
1173. See Hilpert, *Sportrecht und Sportrechtsprechung im In- und Ausland*, Berlin 2007, 326 et seq. for a list of all doping offenders.
1174. Führungs-Akademie des Deutschen Sportbundes e.V. (ed.), Schiedsgerichte bei Dopingstreitigkeiten, Frankfurt/M. 2003, 211 et seq. gives a chronological account of the Krabbe Cases I-III; Pfister, Sp*u*Rt 1995, 201 et seq., 250 et seq.; Summerer, Sp*u*Rt 2002, 233 et seq.; Petri, *Die Dopingsanktion*, Berlin 2004, 7 et seq.
1175. The decision of the legal committee is published in NJW 1992, 2588 et seq.

The *Krabbe II* case began with a positive doping test in an out-of-competition inspection on 22/23 July 1992. On 14 August 1992, the executive board of the DLV suspended Krabbe, who admitted to having used an asthma drug called 'Spiropent' containing Clenbuterol. This substance was not expressly listed as a doping substance, but as the doping list was open-ended so that similar drugs would be covered, it was unclear whether Clenbuterol should be considered a doping substance. On 26 March 1993, the legal committee of the DLV suspended Krabbe for one year, rejecting the allegation that she had committed a doping offence, but instead ruling that the incident was one of drug misuse. In the terms of the DLV's rules, the legal committee treated this drug misuse as 'unsportsmanlike conduct'.

In the *Krabbe III* case, the IAAF Council returned to the Krabbe II case and, on 22 August 1993, imposed national and international suspensions on the athlete for a further two years because of the pharmacological similarity of Clenbuterol to anabolic steroids. The DLV then again rejected contentions that Krabbe had committed a doping offence, but held that, pursuant to IAAF rule 53.1 (viii), the athlete had committed acts which were likely to bring the sport into disrepute. This decision was affirmed by the arbitration panel of the IAAF. Krabbe subsequently sued the DLV and the IAAF for damages. Although the Landgericht Munich I[1176] held that, as co-debtors, the DLV and the IAAF were liable for any future loss in earning caused by their suspension of Krabbe, the OLG Munich[1177] decided that the twelve-month suspension imposed by the DLV as a result of unsportsmanlike conduct was valid. It further ruled that the extension of the suspension declared by the IAAF was invalid because there was no statutory basis for the imposition of a suspension in so-called 'non-doping cases' and, furthermore, a period of suspension of more than two years contravened the constitutional principle of proportionality. As a result, the IAAF, was found to be liable for the damages caused by the suspension. The DLV, however, was not required to pay damages. The lawsuit continued before the court of first instance (Landgericht Munich I), which finally ruled that the IAAF should pay 1,200,000 DM in damages plus 4% interest due to lost entry fees, prize money and sponsorship money.[1178] The IAAF appealed the decision to *Oberlandesgericht München* (Munich Higher Regional Court). No decision was ever reached, however, as the IAAF and Krabbe reached a settlement on 19 April 2002.

Not only is the Krabbe case of fundamental importance within the context of the doping debate, but it is also of significance for the matter of the judicial review of federation penalties and decisions. The most important consequences of the proceedings were: first, the requirement that the federations exercise careful regulation of the doping inspection process; second, the maximum time-limit for bans imposed as a result of first-time doping offences (a result of the principle of proportionality); and third, the possibility of damages for erroneous doping penalties.

275. No less important is the case of the long-distance runner and Olympic champion, *Dieter Baumann*, who achieved fame during 'the toothpaste affair' of

1176. LG München I, Sp*u*Rt 1995, 161 et seq.
1177. OLG München, Sp*u*Rt 1996, 133.
1178. LG München I, Sp*u*Rt 2001, 238.

1999.[1179] In that year, Baumann tested positive for Nandrolon and was consequently suspended by the DLV. Although *Landgericht Darmstadt* (Darmstadt Regional Court) and *Oberlandesgericht Frankfurt* (Frankfurt Higher Regional Court) dismissed Baumann's application for interim relief, which would have led to the lifting of the suspension, the DLV legal committee did lift the suspension in June 2000 as a result of traces of Norandrostendion being found in the athlete's toothpaste, and because of the fact that samples of his hair showed no traces of the drug.[1180] The IAAF, however, did not agree with this reasoning, and, in September 2000, banned the athlete for two years. The challenge to this ban which was made before the CAS was unsuccessful, as was Baumann's attempt to claim damages before *Oberlandesgericht Stuttgart* (Stuttgart Higher Regional Court).[1181]

276. The entanglement of cyclist and Tour de France winner, *Jan Ullrich*, in the Fuentes doping scandal also attracted much attention from the public. Since at least 2003, the team's former doctor, Eufemio Fuentes, had distributed illegal, performance-enhancing drugs to top cyclists as part of an international doping network, and, in addition, had helped athletes to perform autologous blood doping. As a result of their involvement in the doping scandal, fifty-eight cyclists were excluded from participation in the 2006 Tour de France.[1182] One of the suspects was Jan Ullrich, although he denied to his then cycling team, Telekom T-Mobile, that he had been involved in the scandal. In spite of a lack of positive evidence to support the accusations, Ullrich's contract was terminated for cause. The team stated that, as a result of the incriminating circumstantial evidence, it required that he prove his innocence and he had not succeeded in doing so.[1183] Although Ullrich announced that he was taking legal action against Telekom T-Mobile for its termination of his contract, he eventually agreed to a premature rescission of his contract. The main point of public interest was the investigations of *Staatsanwaltschaft Bonn* (Bonn Department of Public Prosecution) against Ullrich which were based on the suspicion that he had committed fraud against his former employer, Telekom T-Mobile, as, in an affidavit which he had given, he denied having had any contact with Fuentes. During the preliminary proceedings, however, a sample of blood in Fuentes's possession was found to be a perfect DNA-match for Ullrich.[1184] Eventually, the preliminary proceedings was discontinued in April 2008 after a six-figure donation (in euro) was made to a charitable organization. One of the reasons given was that, due to the 'doping mentality' prevalent in professional cycling, the cyclists' level of guilt was to be classified as low.[1185]

1179. Haug, Sp*u*Rt 2000, 238; Adolphsen, Sp*u*Rt 2000, 97 et seq.; Petri, *Die Dopingsanktion*, Berlin 2004, 15 et seq.
1180. LG Darmstadt, Sp*u*Rt 2001, 114; OLG Frankfurt, Sp*u*Rt 2001, 159; DLV-Rechtsausschuss, Sp*u*Rt 2000, 206.
1181. LG Stuttgart, Sp*u*Rt 2002, 245.
1182. Cf. FAZ, July 1, 2006, 45.
1183. Cf. FAZ, July 22, 2006, 32.
1184. FAZ, Apr. 4, 2007, 29.
1185. FAZ, Apr. 15, 2008, 30.

277. The most recent incident in German doping history is the case of the ice speed skater, *Claudia Pechstein*.[1186] In its judgment of 25 November 2009,[1187] the CAS accepted the ban of several years imposed on the skater by the International Skating Union (ISU), which was initially based on indirect proof of blood doping; the athlete had elevated levels of reticulocytes in her blood. The Swiss Federal Court of Justice[1188] initially allowed an application for interim relief by Pechstein who, by means of an interim injunction, was allowed to take part in the qualification round for the Olympic Games in Vancouver 2010. In the end, however, the court dismissed the complaint against the arbitration tribunal's decision in the main trial on 10 February 2010.[1189] The appeal against the decision of the CAS was also rejected by the Swiss Federal Court of Justice on 28 September 2010, thus confirming the ban once and for all, although Pechstein produced an assessment by an expert which certified that she had a hereditary blood abnormality. The doping proceedings also had ramifications for Pechstein's career with the federal police. Her release from service for the purposes of training and sports promotion was revoked. In August 2010, however, a disciplinary proceedings for suspicion of blood doping was discontinued.[1190]

278. One particularly dark chapter of German sporting history is the *doping which was* systematically carried out in the former German Democratic Republic.[1191] From the 1970s onwards, a pervasive, state-controlled and prescribed doping system was put in place. Within the framework of this system, not only were doping measures financed, but special research was also carried out.[1192] The doping substances were tested on countless athletes without their knowledge and led to considerable health problems. After the reunification of Germany, the victims of doping received a meagre sum of money as aid on the basis of the Doping Victims Aid Act of 24 August 2002.[1193] In general, however, victims of doping cannot claim damages.[1194] Thus, in a judgment which was later confirmed by *Oberlandesgericht Dresden* (Dresden Higher Regional Court),[1195] *Landgericht Dresden* (Dresden Regional Court) rejected a suit for damages against two doctors from the former GDR and against the Federal Republic of Germany. The incidence and methods of doping which occurred in West Germany during the same period of time have not yet been comprehensively examined.[1196]

1186. For more on procedural history to this point, see CaS 2010, 3 et seq. with further comments, Reissinger.
1187. CAS 2009/A/1912, Sp*u*Rt 2010, 71 with further comments. Emanuel, Sp*u*Rt 2010, 77 et seq.
1188. Schweizer Bundesgericht CaS 2009, 368 et seq.
1189. FAZ, Feb. 2, 2010, 28.
1190. FAZ, Nov. 6, 2010, 30 und Jan. 7, 2012, 28; for a general account of possible consequences of a doping offence in the area of public service employment law, see Persch, CaS 2011, 267 et seq.
1191. Cf. PHBSportR-Summerer, part 2, margin 250 et seq.
1192. Berendonk, *Doping*, Hamburg 1992, 89 et seq.
1193. BGBl. I 3410.
1194. Cf. Lehner/Freibüchler, Sp*u*Rt 1995, 2 et seq.
1195. OLG Dresden, Sp*u*Rt 1997, 132.
1196. Cf. the study conducted by Spitzer, *Doping in Deutschland von 1950 bis heute*, September 2011; FAZ, Oct. 2, 2010, 32.

§2. Harmonization of the Fight against Doping and Current Problems

279. In Germany, two top national organizations are responsible for the battle against doping: the DOSB and the *National Anti-Doping Agency* (NADA, founded in 2003).[1197] WADA and the WADC mark an important step towards harmonization of international doping regulations. Both have great influence over the anti-doping regulations enacted by German sports federations, which have been harmonized with the international provisions. Although in former times, the guidelines of the German Sports Federation (DSB, now DOSB) imposed sanctions for a doping offence only if the athlete was actually at fault and provided for bans of various lengths which were to be imposed depending on degree of culpability and the type of sport, the harmonization of these guidelines with the WADC has led to the internationally-recognized strict-liability principle being imposed in Germany. The validity of imposing the strict-liability principle in Germany, however, continues to be controversial, as doping sanctions infringe upon the fundamental rights of athletes, which raises the question of whether the principle of proportionality is being adequately observed.[1198] Yet a comparison on international level of the various disciplines showed that substantial differences in regulations remain, especially with regard to doping controls during training. Furthermore, not all sports organizations have accepted the WADA Code as binding.[1199]

280. There is a huge amount of legal scholarly articles dealing with the doping problem.[1200] In view of the current developments, further discussions at national and international level are sure to follow:[1201] In the 2008 Tour de France, Stefan Schumacher received a positive result in his doping test.[1202] This was also the case for Patrik Sinkewitz and Alexander Winokurow during the 2007 Tour de France, as well as the suspension of Michael Rasmussen, who at that point was in the lead and Floyd Landis' doping confession, who was stripped of his 2006 tour victory as a consequence.[1203] As to horseriding, Isabell Werth and Christian Ahlmann have also both had positive doping tests. The 'Pechstein' case is a further example. Two of the most pressing questions in Germany are whether sports fraud should become

1197. PHBSportR-Summerer, part 2 margin 212.
1198. See Petri, *Die Dopingsanktion*, Berlin 2004, 208 et seq.
1199. A list of all national and international sports associations that accept the WADA Code (as the German sport associations do) is to be found at http://www.wada-ama.org/en/dynamic.ch2?page Category.id=270.
1200. The bibliographies of these works provide proof of this. Adolphsen, *Internationale Dopingstrafen*, Tübingen 2003, 707–745; Petri, *Die Dopingsanktion*, Berlin 2004, 403–423; Vieweg/Siekmann (eds.), Legal Comparison and the Harmonisation of Doping Rules, Berlin 2007, 683–709.
1201. Peter Danckert, then chairman of the Bundestag-Sportausschuss, was sceptical towards the issue of public funding for top athletes, cf. SZ, July 20, 2007, 27.
1202. FAZ, Oct. 15, 2008, 30. Bernhard Kohl is also at the centre of the affair concerning the Vienna Bloodbank controlled by the blood plasma manufacturer, Humanplasma, which is said to have been requested by biathletes, long-distance runners and cyclists to assist their doping attempts, cf. FAZ, Apr. 2009, 27.
1203. FAZ, May 21, 2010, 30.

a criminal offence (see § 6) and whether the so-called 'athlete location requirements' of the WADC violate the athletes' personal freedom (see § 4).

§3. The Aims of the Ban on Doping

281. The ban on doping has three aims: equal opportunities and fair play,[1204] protection of athletes' health,[1205] and continued respect for sport.[1206]

§4. Anti-doping Measures

282. The most important tool in the fight against doping is the establishment of a comprehensive system of control and inspection.[1207] In order to do this, both 'in-competition' and 'out-of-competition' controls are necessary. 'In-competition' controls have been carried out at national level since 1968. Rigorous 'out-of-competition' controls were introduced in 1990. Since its establishment in 2003, the National Anti-Doping Agency has been responsible for organizing anti-doping controls in Germany. The number of in-competition controls in 2011 was approximately 5,100 per year, and that of out-of-competition controls, about 8,000.[1208] Athletes are selected either systematically or at random and asked for a blood or urine sample. They generally receive no prior warning.

283. A problem may arise if the athlete is not available, which in the past occurred in up to 20% of cases in spite of extensive reporting obligations.[1209] For this reason, detailed notification requirements for athletes (so-called 'Athlete Whereabout Requirements') were introduced on 1 January 2009 in the new

1204. Equal opportunity in competition is also endangered by so-called techno-doping. This term encompasses any increase in the performance of the human body brought about by means of technical assistance. In particular, the case of Oscar Pistorius, an athlete who has had both of his lower legs amputated, caused quite a stir. Although a biomechanical assessment by Brüggemann et al. (see Sports Technology 2008, No. 4/5, 220–227) confirmed that the carbon prosthetics employed by the athlete did grant him clear advantages over healthy runners, the CAS lifted a starting ban imposed by the IAAF in relation to the 2008 Olympic Games in Peking based on this assessment, cf. CAS, Sp*u*Rt 2008, 152 et seq. CAS did not appear to be convinced of the existence of a 'metabolic advantage' for the athlete. Krähe is particularly critical of this decision, cf. Sp*u*Rt 2008, 149. Cf. Schild, CaS 2008, 128 et seq.
1205. Birgit Dressel (participant in a combined competition), and shot-putter Ralf Reichenbach died after having doped in 1987 and 1988, respectively. See Linck, NJW 1987, 2545 et seq.
1206. When doping scandals continually occur, the loss of credibility for the sport concerned can, in the worst case scenario, be so far-reaching that spectators and sponsors abandon the sport permanently; for example, the decisions of both Gerolsteiner and Telekom to discontinue their involvement with cycling due to countless cases of doping, cf. FAZ, Sept. 5, 2007, 17 and FAZ, Nov. 28, 2007, 32.
1207. See Digel, *Ist das Dopingproblem lösbar?* in: Digel/Dickhuth (ed.), Doping im Sport, Tübingen 2002, 9 et seq.
1208. Cf. NADA-Jahresstatistik 2011 at http://www.nada-bonn.de.
1209. SZ, Aug. 28, 2006, 2.

WADC.[1210] Pursuant to Fig. 11.1.3, all top-level athletes who are part of the 'registered test pool'[1211] must disclose in advance where they are resident and where they will be training in the following year, as well as the competitions in which they intend participating. The National Anti-Doping Organization or, depending on the circumstances, the international sports association concerned must be notified immediately of any changes, no matter how minor. Furthermore, Fig. 11.1.4 places an obligation upon the athletes to provide a window of sixty minutes per day in each quarter, during which they must make themselves available for doping tests at a particular place. Any infringements of the notification requirements contained in the WADA Code can result in severe penalties (e.g., a ban from competing) for the athletes. In light of the massive infringement of the athletes' personal freedom at play here, not to mention matters of data privacy law, it is often asserted that the WADA provisions are legally impermissible.[1212] A multitude of international sports associations – FIFA and UEFA amongst others – rejected the system of notification required by WADA as being disproportionate.[1213]

284. The analytical procedures used by accredited laboratories have progressively become more accurate over the years. In some instances, athletes who did not expect to be found out have been convicted, either because of the time lapse which had occurred since taking the drug, or because they had taken a 'masking' substance. Still, the pressure to keep up with new developments continues as doping analysts confront new and harder-to-trace drugs.[1214]

§5. Sanctions

285. Sanctions for doping offences are imposed by the national or international sports association responsible for the case in question. In general, there are no sanctions imposed by state agencies. The sanctions available to sports organizations are (1) disqualification of the athlete concerned and (2) forfeiture. Fines[1215] – which can be substantial – can also be imposed, as well as bans, the duration of which depends

1210. See SportRPr-Lehner, 2012, mn. 1449 et seq.
1211. The matter of which athletes are included in the RTP is decided by the international sports bodies and national anti-doping organizations, cf. Fig. 11.2 WADA Code as well as Art. 5.2 NADA Code.
1212. For example, by Musiol, Sp*u*Rt 2009, 90 et seq.; Korff, Sp*u*Rt 2009, 94 et seq.; Schaar in: FAZ, Mar. 4, 2009, 28. Cf. general discussion of the topic Niewalda, *Dopingkontrollen im Konflikt mit allgemeinem Persönlichkeitsrecht und Datenschutz*, Berlin 2011; Nolte, however, regards the regulations as being permissible in principle, see Nolte, CaS 2010, 309.
1213. Cf. FAZ, Feb. 19, 2009, 28 and HB, Mar. 26, 2009, 20.
1214. For example, a limited method of proving that gene-doping has taken place became available in 2009, cf. FAZ, Mar. 21, 2009, 27. The indirect proof of doping by abnormal blood values – as in the case of Pechstein – has been fiercely debated, cf. FAZ, July 06, 2009, 19.
1215. The Tour de France 2007 cyclists had to sign a declaration by UCI that they would pay a fine of one year's earnings in addition to the usual suspensions in the event that they were found to have committed a doping offence. On the validity of a declaration of obligation, cf. Babners/Schöne, Sp*u*Rt 2007, 227 et seq. On fines for doping in sponsoring contracts, see Nesemann, NJW 2007, 2083 et seq. Romanian footballer Adrian Mutu had to pay a of 17.2 million Euro to his former club, FC Chelsea, due to cocaine abuse. This punishment was confirmed by both CAS (judgment

on whether the athlete involved is a first time or a repeat offender. In this context, problems are posed by the need to ensure proportionality between the doping offence and its punishment, and by the question of whether fault is a necessary element of liability.[1216]

An athlete may appeal the imposition of a sanction to the internal review system of the sports organization concerned, or to a court of arbitration such as, for instance, CAS. The possibility of recourse to the state courts is increasingly being prevented by arbitration clauses.[1217]

§6. Anti-doping Code?

286. Doubts concerning the efficacy of leaving the fight against doping in the hands of sports organizations have led to calls for legislative intervention. There was – and still is – disagreement as to whether the regulation of the subject matter previously contained in §§ 6a(1), 95(1) no. 2a of the Drug Act (AMG) was sufficient[1218] or whether 'sports fraud' should be considered a crime[1219] (§ 263 of the Criminal Code, criminalizing fraud is commonly[1220] believed not to apply to this situation). Critics[1221] of the proposal worry about an undue curtailment of the

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of July 31, 2009 – file no. CAS 2008/A/1644) and the Swiss Federal Supreme Court (judgment of June 10, 2010 – file no. 4 A 458/ 2009).

1216. See Petri, *Die Dopingsanktion*, Berlin 2004, 208 et seq.

1217. For a thorough account, see Soek, *Die prozessualen Garantien des Athleten in einem Dopingverfahren*, in: Röhricht/Vieweg (eds.), Doping-Forum, Stuttgart 2000, 35 et seq.; Soek, *The Strict Liability Principle and the Human Rights of Athletes in Doping Cases*, The Hague 2006, 325 et seq.

1218. Linck, NJW 1987, 2545 at 2551; Heger, JA 2003, 76 at 79 et seq.; Prokop, Sp*u*Rt 2006, 192 et seq.; for a detailed account of the preconditions to imposing a penalty under AMG and BtMG, see Schild, *Sportstrafrecht*, Baden-Baden 2002, 169 et seq. In favour of bringing doping offenders within the UWG regime, Frisinger/Summerer, GRUR 2007, 554 et seq.

1219. Cf. Greco, GA 2010, 622 et seq.; Beukelmann, NJW-Spezial 2010, 56 et seq.; Rössner, *Doping aus kriminologischer Sicht – brauchen wir ein Anti-Dopinggesetz?*, in: Digel/Dickhuth (eds.), Doping im Sport, Tübingen 2002, 118 at 125 et seq.; Fritzweiler, Sp*u*Rt 1998, at 234 et seq.; on making self-doping a crime, Heger, Sp*u*Rt 2007, 234 et seq.; see also Cherkeh/Momsen, NJW 2001, 1745 et seq. In favour of an anti-doping law and of penalizing offenders Peter Danckert, former chairman of the sports committee of the German Bundestag, Clemens Prokop, DLV president, and Helmut Digel, honorary president of the DLV, SZ, July 29/30, 2006, 35; SZ, Aug. 3, 2006, 32; SZ, Aug. 5/6, 2006, 36. The matter was dealt with more intensively by the ReSpoDo, which was founded in June 2004. A summary of its final report may be accessed at http://www.dosb.de/fileadmin/fm-dosb/downloads/dosb/endfassung_abschlussbericht.pdf.

1220. According to Schild, *Doping in strafrechtlicher Sicht*, in: Schild (ed.), Rechtliche Fragen des Dopings, Heidelberg 1986, 13 at 28, there is no relevant deceit involved; contra Otto, Sp*u*Rt 1994, 10 at 15; Schneider-Grohe, *Doping,* Lübeck 1979, 148; Hilpert, *Sportrecht und Sportrechtsprechung im In- und Ausland*, Berlin 2007, 321 et seq. For more detail on possible fraud scenarios, Cherkeh/Momsen, NJW 2001, 1745 at 1748 et seq.; Heger, JA 2003, 76 at 80 et seq. and Ackermann, *Strafrechtliche Aspekte des Pferdeleistungssports*, Berlin 2007.

1221. Thomas Bach, president of the DOSB, sees no need for the imposition of further measures in the fight against doping. Academics, too, are, for the most part, not in favour of penalizing doping; see, e.g., Dury, Sp*u*Rt 2005, 137 et seq.; Jahn, Sp*u*Rt 2005, 141 et seq.; Fröhmcke, FoR 2003, 52 et seq.; Krähe, Sp*u*Rt 2006, 194 et seq.; Heger, Sp*u*Rt 2007, 153 et seq., takes a more differentiated view but also disapproves of penalizing out-of-competition doping.

autonomy of sports organizations, a conflict with the traditional principle of strict liability, and an undesirable criminalization of athletes. They also point out that the proposed legislation would probably not be of much use in practice (because of the heavy workload of policemen and public prosecutors) and that the relevant sections of the AMG already make it possible for police and prosecuting authorities to intervene. They believe that a tightening-up of the drug laws would be sufficient to render the fight against doping more effective. The legislature agreed and confined itself to an amendment of §§ 6a(1), (2), (2a), 95 (1) no. 2b, (3) of the Drug Act. The statute[1222] imposes penalties of up to ten years for the commercial trafficking of doping substances. The mere fact of possession of certain common – and especially dangerous – doping substances may result in penalties if the amounts found far exceed those needed for private consumption.[1223]

This statutory provision does not go far enough for many: the Bavarian State Government is particular dissatisfied with it. In 2010 and in 2012, it prepared new bills with the aim of combating doping and corruption in sport.[1224] Not only does the draft provide that possession of and dealing in doping substances will be penalized, but also envisages sanctions for athletes who participate in competitions under the influence of doping substances and for acceptance of bribes, as well as for anyone who bribes participants, trainers or referees. It remains to be seen if the proposed legislation will lead to improvements in this field.[1225] The impact of the Drug Act on the combating of doping was evaluated in 2012 on behalf of the Federal Government and the measures which have been taken were, for the most part, considered effective.[1226]

1222. The German Bundestag passed the law on July 5, and it was published in the Bundesgesetzblatt on the Oct. 10, 2007. Thus, the more stringent rules against doping came into force on Nov. 1, 2007.

1223. In relation to the punishment of blood doping in accordance with the amended AMG, cf. Reuther, Sp*u*Rt 2008, 145 et seq.

1224. The draft is printed in Sp*u*Rt 2010, 104 et seq. It has attracted support (König, Sp*u*Rt 2010, 106 et seq.; Wegmann, CaS 2010, 242 et seq.) as well as opposition (Kudlich, Sp*u*Rt 2010, 108 et seq.; Beukelmann, NJW-Spezial 2010, 56 et seq.); Bannenberg, Sp*u*Rt 2007, 155 et seq. also follows the same line as the Bavarian State Government. She calls for the creation of a § 298a StGB in order to combat 'sports fraud'.

1225. For the many questions arising in this context, see Vieweg, Sp*u*Rt 2004, 194 at 195 et seq.

1226. See the Bericht der Bundesregierung zur Evaluation des Gesetzes zur Verbesserung der Bekämpfung des Dopings im Sport (available at http://www.bmi.bund.de/SharedDocs/Downloads/DE/Themen/Politik_Gesellschaft/Sport/bekaempfung_doping_sport.pdf;jsessionid=F496F678F404C1EE649C18AE018E9A18.2_cid231?__blob=publicationFile) (accessed Dec. 10, 2012).

Part IV. Sport and Commerce

Chapter 1. General Issues

287. The development of modern sports can be described using the keywords commercialization and professionalization. These defining characteristics must be regarded in the context of the various technological advances which have occurred in recent years, particularly in the context of the development of the media. As to the economy, sports have immense economic potential. This is all the more obvious when one considers the distinct markets that have developed, especially those for broadcasting rights, sponsorships and merchandizing.

In Germany, more than 27 million individuals are members of sports clubs.[1227] More than 44 million people are interested in football.[1228] This explains why almost EUR 5.5 billion was spent on advertising, sponsoring and media rights in the field of amateur and professional sports in 2010.[1229] The rapid increase of media revenues in the 1st and 2nd Bundesliga from an annual sum of approximately EUR 0.41 million in the first season (1962/63) to EUR 610.71 million in the 2009/2010 season makes this development clear.[1230] The sports-related GDP amounted to an estimated EUR 33 billion in 2010.[1231] This is approximately 1.4% of the entire GDP.[1232]

1227. Cf. Vieweg, *Faszination Sportrecht*, 7 et seq.
1228. Cf. DFB-Fußballstudie, accessible at http://www.imspiel-magazin.de/pdf/Marktforschungsstudiepdf (accessed Mar. 19, 2012).
1229. Research report 'Bedeutung des Spitzen- und Breitensports im Bereich Werbung, Sponsoring und Medienrechte', 71, accessible at http://www.bmwi.de/BMWi/Redaktion/PDF/B/bedeutung-des-spitzen-und-breitensports-langfassung,property=pdf,bereich=bmwi,sprache=de,rwb=true.pdf (accessed Mar. 19, 2012).
1230. Cf. Bundesliga-Report 2011, 50 et seq. and HB, Jan. 28, 2010, 31.
1231. For a thorough account of the Gross Value Added and the Gross Domestic Product in the area of sports for 1999, see Nolte, *Staatliche Verantwortung im Bereich Sport*, 28 et seq.; on the outlook for the future, see Röhl, *Schutzreche im Sport*, 14; Bitkom, 3, accessible at http://www.bitkom.org/files/documents/BITKOM_MMTS-PK_Praesentation_30-01-07.pdf (accessed Mar. 19, 2012).
1232. Meyer/Ahlert, *Die ökonomischen Perspektiven des Sports*, 182 et seq. Approximately 110,000 people are employed in the area of German professional football. Money generated by licence football makes up about 0.2% of the GDP. Cf. HB Apr. 14, 2010, 26.

Chapter 2. Public and Private Regulation

288. In the following account, these developments will be addressed and media and broadcasting rights will be examined in detail, along with sponsorship, merchandizing and the ownership of clubs. Due to the close connections which exist between statutory and public law regulations on the one hand, and between contractual regulations and regulations based on the autonomy of associations on the other, no distinction between public and private regulation will be made; rather, these matters will be discussed in the relevant context.

§1. Media and Television Rights

I. General

289. The term '*Rundfunk*' (broadcasting) is defined in § 1(1) 1 half-sentence 2 of the State Broadcasting Treaty (*Rundfunkstaatsvertrag* – RStV) and encompasses both television and radio broadcasting.

The focus of the commercial exploitation of sports still is on the field of television. For this reason, the term '*Fernsehsportarten*' ('television sports') is commonly used. It describes sports which are considered particularly attractive to the public; including – besides football – athletics, Formula One, boxing, ice hockey, biathlons, ski jumping and handball. It is of particular note that the revenue garnered from the commercial exploitation of television rights for football events is increasing rapidly; while clubs paid television broadcasters for providing live football coverage during the 1960s, the revenue earned by the DFL from marketing the media rights during the 2011/2012 season amounted to EUR 546.2 million.

Furthermore, in the field of new media, new forms of media coverage are constantly being developed, which have enormous market potential. In recent times, live tickers and audiovisual reporting on internet platforms such as 'hartplatzhelden.de' have given rise to legal issues.

The following account will provide an overview of the relevant issues in the area of television and audio broadcasting rights, media coverage and new media.

II. Television Rights

290. The term 'television rights' refers to the entitlement to exploit commercially the audiovisual rights to sporting events. In addition to the legal nature and legal basis of television rights, potential holders of these rights and rights which may accrue to sportspersons will be examined. Legal issues arising in the context of contractual provisions regarding television rights, the boundaries upon the exercise of these rights and the requirements under broadcasting law will also be discussed.

A. Legal Nature and Basis

291. One particular difficulty encountered in ascertaining the legal nature of television rights is that there is no express legal regulation in this area.[1233]

The general consensus is that television rights are not positively-assigned rights, but rather represent consent to encroachments by others which the organizer could have prohibited due to the agglomeration of legal positions which he holds.[1234]

Thus, it is of fundamental importance for any party whose actions could infringe the organizer's rights to obtain his consent of the organizer.

292. It is of particular note that no distinct protection is available to the organizer under copyright law. Although the organizer decides on the external course to be taken by the sporting event, it would have to be proven that a sporting event constituted a 'personal intellectual creation' within the meaning of § 2(2) of the Copyright Act (*Urheberrechtsgesetz* – UrhG) in order for it to be awarded copyright protection as a 'creation'. The organizer can – at best – exert his influence over the competition by stipulating the rules which are to apply. This framework is established primarily in order to facilitate optimal commercial exploitation of the sporting event and therefore it does not possess the requisite, above-average level of intellectual content.[1235] Neither is protection under neighbouring rights provided by § 81 UrhG as, in general, sporting performances cannot be awarded protection under copyright law.[1236] Sporting performances may require maximum levels of physical prowess, feature a high degree of technical perfection, and, in the case of team sports, ingenious tactics,[1237] however, as sporting performances are not expressions of the thoughts, opinions or emotions of the sportsperson in an artistic manner,[1238] sportspersons cannot invoke the protection of performances provided under §§ 73 UrhG et seq. Even if the sportsperson's performance is based on a choreographed work which is protected by copyright, the performance itself will generally be found to lack any intrinsic artistic merit of its own. However, the need for the

1233. For an account of the endeavours to introduce a new ancillary copyright, see Hilty/Henning-Bodewig, *Leistungsschutzrechte zugunsten von Sportveranstaltern?*, Stuttgart, Munich et al., 2007.

1234. Cf. in particular BGH, NJW 1990, 2815, at 2817 – *Sportübertragungen*; Hannamann, *Kartellverbot und Verhaltenskoordinationen im Sport*, Berlin, 2000, 170 et seq.; BGHZ 187, 255 mn. 21 – Hartplatzhelden.

1235. Helbig, *Die Verwertung von Sportereignissen im Fernsehen*, München 2005, 35; Hilty/Henning-Bodewig, *Leistungsschutzrechte zugunsten von Sportveranstaltern?*, Stuttgart, Munich et al., 2007, 44.

1236. BGH, ZUM 1990, 519 at 522; Schricker-Loewenheim, *Urheberrecht*, 2nd edition, Munich 1999, § 2 mn. 129, 130; Röhl, *Schutzrechte im Sport*, 2012, 261.

1237. Wandtke/Bullinger-Bullinger, Urheberrecht, Praxiskommentar zum Urheberrecht, Munich 2002, § 2 UrhG mn. 77.

1238. Wandtke, ZUM 1991, 115 at 118; although some commentators hold that it is otherwise in the case of depictions which posess an artistic, dance-like quality which outweighs the athletic element, this proposition is rejected, as even in such cases, the competitive, sporting aspect outweighs the artistic element, cf. Röhl, *Schutzrechte im Sport*, 2012, 261.

introduction of a new ancillary copyright for the benefit of organizers of sporting events continues to be the subject of lively and controversial debate.[1239]

293. The event organizer retains all powers awarded to him by virtue of his rights of ownership and possession of the venue. According to a persistent line of jurisprudence and the predominant point of view among academics, every organizer, as the holder of rights which entitle him to undisturbed possession, is empowered to regulate entry to any event as he pleases due to the principle of private autonomy. Thus, an organizer may make entry to an event contingent upon certain requirements or a fee.[1240] The organizer's right to undisturbed possession arises out of §§ 858, 903, 1004 BGB and is an emanation of the fundamental rights contained in Articles 13(1), 14(1) GG. The power to regulate entry to sporting events under private law and to decide who may attend, and under what conditions, is a consequence of the rights relating to defence and expulsion which are awarded to the owner or possessor of a venue. The right of the organizer to undisturbed possession is, however, limited by the indirect third-party effect of fundamental rights.[1241] The primary shortcoming of this construction is the fact that the right to undisturbed possession is a preventive instrument to be used prior to the recording of any media coverage and does not provide a protection mechanism against the exploitation of any unlawfully acquired information.[1242]

294. Defensive claims available to the organizer under competition law are sometimes taken into account, especially in cases of passing off[1243] by third-party providers pursuant to § 4 no. 9 UWG (*Gesetz gegen den unlauteren Wettbewerb*; Unfair Competition Act). Furthermore, in exceptional cases, it appears that recourse may be had to the instrument of the 'simple obstacle' in the form of the 'taking advantage of the accomplishment of a third party'.[1244] Recourse may be had either to the general clause of § 3 UWG[1245] or to an analogy to § 4 no. 9 UWG.[1246]

295. Furthermore, ancillary copyright may arise from the right to establish and carry out commercial operations (*Recht am eingerichteten und ausgeübten Gewerbebetrieb)*, which is acknowledged as a special right within the meaning of § 823(1)

1239. Cf. Hilty/Henning-Bodewig, *Leistungsschutzrechte zugunsten von Sportveranstaltern?*, Stuttgart, Munich et al., 2007.
1240. BGH, NJW 1990, 2815 at 2817 – *Sportübertragungen*; Westerhold, ZIP 1996, 264 at 266; Röhl, Sp*u*Rt 2011, 147; PHBSportR-Summerer, 355, mn. 73.
1241. Cf. BGH, NJW 2010, 534 at 535.
1242. See Röhl, Sp*u*Rt 2011, 147; for alternative points of view, see the criticism by Stopper, Sp*u*Rt 1999, 188 at 190; Lochmann, *Die Einräumung von Fernsehübertragungsrechten an Sportveranstaltungen*, Tübingen 2005, 135, 140; PHBSportR-Summerer, 357, mn. 79; Waldhauser, *Die Fernsehrechte des Sportveranstalters*, Berlin 1999, 71.
1243. Cf. Röhl, *Schutzrechte im Sport*, 2012, 280 et seq.; Maume, MMR 2008, 797 at 799.
1244. Hilty/Henning-Bodewig, *Leistungsschutzrechte zugunsten von Sportveranstaltern?* Stuttgart, Munich et al., 2007, 51 et seq.
1245. Hilty/Henning-Bodewig, *Leistungsschutzrechte zugunsten von Sportveranstaltern?* Stuttgart, Munich et al., 2007, 51 et seq.
1246. Röhl, *Schutzrechte im Sport*, 2012, 291.

BGB.[1247] This tortious protection is, however, subsidiary to the above-mentioned ancillary copyright arising from competition law.[1248]

B. Holders of Rights

296. The organizer is the holder of the television rights. The matters relating to responsibility for the administrative and financial aspects of the event, assumption of responsibility for the preparation and execution, and assumption of liability must therefore be closely examined.[1249] The relevant parties are those who are involved in the organization of events such as championships or leagues; usually a sports association or a sports federation.

297. In the landmark ruling in the *Europapokalheimspiele* case, the Federal Court of Justice[1250] emphasized that the clubs responsible for organizing football games provide 'essential financial contributions' for the marketing of television rights, as well as the necessary 'administrative work on-site'. The club employs the players, coaches, advisers and managers, whose work leads to the creation of the competition which attracts the spectators. It carries out the necessary administrative work on-site; i.e., it prepares the stadium, allocates spaces for cameras, arranges ticket sales and advertising and works with the police and local traffic police in facilitating the entry and exit of spectators to and from the grounds.

Conversely, the court ruled[1251] that the DFB performed no comparable administrative work in the organization of European cup games. Although it scheduled matches, allocated playing permits and arranged transfers of players, these actions only provided an administrative framework. Its cooperation was limited to tasks which were aimed at coordinating the championships, and which did not facilitate the broadcasting of football games, but rather, were aimed solely at ensuring that they were marketed in a better and more uniform manner. The BGH did not address the question of whether UEFA, which created the European Championships, could be viewed as being involved in the work performed by the associations, based on the fact that, over the years, it has, by means of countless individual measures, organized and managed the Championships and ensured that the Championships are held in high regard by spectators. If this is, indeed, the case, then UEFA could also be entitled to participate in the marketing of the games which occur during the competition.

298. Until 2001, the DFB was responsible for all decisive administrative tasks regarding the *Bundesliga*, at which point the *Deutsche Fußball Liga* (DFL; German

1247. Cf. Waldhauser, *Die Fernsehrechte des Sportveranstalters*, Berlin 1999, 157; Haas/Reimann, Sp*u*Rt 1999, 182 at 187.
1248. Palandt-Sprau, 71st edition 2012, Einf. v. § 823 mn. 9; Hilty/Henning-Bodewig, *Leistungsschutzrechte zugunsten von Sportveranstaltern?,* Stuttgart, Munich et al., 2007, 46.
1249. BGH, GRUR 1958, 549 at 551, BGH, GRUR 1956, 515 at 516.
1250. BGH, NJW 1998, 756 at 758.
1251. BGH, NJW 1998, 756 at 758.

Football League) assumed responsibility. These tasks include inter alia the compilation of a framework schedule, including international competition dates, the regulation of various events, and the rescheduling of matches. By means of the administrative framework created by the DFL/DFB, the entertainment value and the economic significance of the Bundesliga has increased.[1252] The costs and financial risk are borne by the associations alone.[1253] There are many varying opinions as regards the consequences of this state of affairs. One point of view is that the relevant home club should be viewed as the sole organizer, even for Bundesliga matches.[1254] Another regards the assumption of financial risk as just one of many conditions placed upon the associations and regards the DFL – and possibly even the DFB – as a co-organizer of Bundesliga games.[1255] Even during DFB-cup games, the relevant associations involved, which bear the costs of the event and split the profits generated from the sale of tickets, will be seen as organizers.

299. It must, however, be noted that the DFB also has a considerable level of involvement in DFB cup games. It ensures that the matches take place in a neutral venue and takes a share in the costs and profits. To this extent, the DFB can be regarded as a co-organizer.[1256]

300. It is quite another matter in the case of international matches; here, the DFB has sole responsibility for the administration and costs, and is therefore regarded as the organizer.

301. Furthermore, any sportspersons whose images are broadcast have a right to codetermination as regards the audiovisual media coverage under §§ 22, 23 KUG (*Kunsturhebergesetz*; Act on the Protection of Copyright in Works of Art and Photographs). To this extent, a corresponding assignment of rights must occur, either by means of contract or in the by-laws of the association.[1257]

C. Contractual Provisions

1. Type of Contract

302. From a legal viewpoint, the permission granted by the organizer to broadcast a sporting event on television is not an assignment of rights, but rather a consent to encroachments upon these rights which the organizer, because of the legal position which he has acquired (rights of ownership and possession of the venue, rights arising from the business which he has established and runs, § 1 UWG), could

1252. Mestmäcker, *Die Vergabe von Fernsehrechten an internationalen Wettbewerbsspielen deutscher Lizenzligavereine*, in: Vieweg (ed.), Vermarktungsrechte im Sport, Berlin 2000, 64.
1253. KG (Berlin Appellate Court), Nov. 8, 1995, WuW/ E OLG 5565 at 5573.
1254. KG, Nov. 8, 1995, WuW/ E OLG 5565 at 5573.
1255. PHBSportR-Summerer, 361, mn. 87 (with further references); Martinek/Semler/Habermeier/Flohr-Summerer, *Formularsammlung Vertriebsrecht*, Munich 2010, § 53 mn. 47.
1256. Wertenbruch, ZIP 1996, 1417 at 1421.
1257. For a more detailed account, see Part IV, Ch. 2, §3 II C 1.

prevent.[1258] The contract is a licence agreement, which is similar to a licence, and which is classified primarily as a bilateral contract sui generis with elements of contracts of sale, lease and tenancy agreements.[1259]

303. The marketing of sporting events, particularly where the sporting event is a large one, is frequently undertaken by engaging a *sports rights agency*. The agency acquires the permits from the original holder of the rights in a so-called buy-out contract and concludes independent contracts with inter alia broadcasters. In other cases, the agency is active only as an intermediary (so-called agency agreement). The licensing contracts in such cases are concluded between the original holder of the rights and the commercial user.[1260]

2. Primary Obligations and Subject of the Contract

304. The primary obligation of the event organizer, or the party granting the licence, is to allow the team who has been awarded the right to record the event full access to the event and the possibility to record at the event venue and to broadcast the event.[1261] The contract entered into between the parties can relate to a particular sporting event or a series of events. In the same way, the venue and times at which the event takes place, as well as the manner of production must be agreed upon.

305. In the area of rights of exploitation, one must differentiate between rights of first use, rights of second use and so on, as well as rights relating to news reporting. In addition, depending on the period of time which has elapsed since the event, it is also common to distinguish between immediate (live) and delayed broadcast.[1262]

The type of broadcast must also be determined, i.e., whether the footage is to be broadcast via antenna, satellite, cable, pay TV or pay per view. Where doubts arise as to the identity of the party entitled to the neighbouring rights in the areas of sponsorship, advertising and merchandizing, it is generally the case that rights which have not been expressly assigned to the licensee remain with the licensor in accordance with the general *Zweckübertragungsgrundsatz* (a principle pursuant to which no more rights are transferred than are necessary to achieve the object of the contract under the law of obligations) which is laid out in § 31(5) UrhG.[1263]

306. In return, the party acquiring the rights of use agrees to pay the amount stipulated in the licence. An obligation to broadcast will exist only if a particular

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1258. BGH, NJW 1990, 2815 at 2817.
1259. Waldhauser, *Die Fernsehrechte des Sportveranstalters*, Berlin 1999, 237; PHBSportR-Summerer, 383, mn. 144.
1260. Geissinger, *'Vorteil Agentur' Verwertung von Rechten an Sportveranstaltungen aus der Sicht großer Rechtevermarkter*, in: Fritzweiler (ed.), Sportmarketing und Recht, Basel 2003, 108.
1261. Waldhauser, *Die Fernsehrechte des Sportveranstalters*, Berlin 1999, 232.
1262. Hannamann, *Kartellverbot und Verhaltenskoordinationen im Sport*, Berlin 2000, 137.
1263. Schricker/Loewenheim-Schricker/Loewenheim, *Urheberrecht*, 4th ed., Munich 2010, § 31 mn. 64 et seq.

place, content and time for transmission were clearly stipulated in the contract. Furthermore, additional performance obligations relating to the quality of the broadcasting signal or in relation to promotional activities prior to the broadcast (e.g., in the form of a trailer) are often agreed upon.[1264]

3. Exclusivity Agreements

307. The assignment of a 'comprehensive right to broadcast' for a particular sporting event also obliges the event organizer not to grant rights to record and broadcast the sporting event to any other broadcaster (real exclusivity), or, in some cases, to assign only rights of second use to third parties (false exclusivity).[1265] These exclusive rights can be limited in terms of time, place and content. For reasons pertaining to advertising, the event organizer is generally interested in the event being broadcast to as many viewers and by as many types of media as possible. The majority of agreements are 'false exclusivity' agreements. Exclusivity does not necessarily mean that certain broadcasters are excluded from broadcasting the event; rather, that those broadcasters who have entered into the agreements are permitted to broadcast the event before others.[1266]

308. So-called competition protection clauses are usually included in the agreements governing the assignment of simple rights of use. In their mildest form, these prevent the licensor from granting further licenses to the licensee's competitors. Even if no express agreement has been reached, this duty is usually derived from the licensing agreement as a subsidiary duty pursuant to § 241(2) BGB.[1267]

D. Legal Limitations on the Marketing of Television Rights

309. There are, however, limitations upon the free allocation of rights by an organizer under antitrust law and the provisions of the Interstate Broadcasting Agreement.

1264. Osterwalder, *Übertragungsrechte an Sportveranstaltungen*, Munich et al. 2004, 272.
1265. Waldhauser, *Die Fernsehrechte des Sportveranstalters*, Berlin 1999, 233.
1266. Osterwalder, *Übertragungsrechte an Sportveranstaltungen*, Bern 2004, 274.
1267. Pfister, *Vermarktung von Rechten durch Vertrag und Satzung*, in: Fritzweiler (ed.), Sportmarketing und Recht, Basel 2003, 78 et seq.

1. Limitations under Antitrust Law

310. Antitrust law has taken on an important role in the area of professional sport due to increasing commercialization and monopolization; in the area of football, for example.[1268] The courts have ruled out the possibility of creating an exception for sport which could be based on its 'ideal' (i.e. non-profit) determination of goals and its social, cultural and educational significance. The assignment of exclusive rights and possible abuses by the federations due to their positions of power are two of the problems which arise in connection with the assignment of television rights, especially in cases where the allocation of rights is centralized. A cartel can be the subject of litigation under both national and European antitrust law.[1269] Articles 101, 102 TFEU will only have precedence in situations where the contract or the behaviour which the parties have agreed upon could interfere with trade between the Member States. The requirements of this so-called 'interstate' clause are, however, fulfilled in cases where television rights are marketed, as there could be a demand from foreign broadcasters.[1270]

a. Centralized Marketing (Horizontal Limitations on Competition)

311. There are *two basic models* in the area of the marketing of broadcasting rights. *Decentralized marketing* is the process by which the organizer allocates the rights himself. In the case of *centralized marketing*, the allocation of rights is overseen by the federation with authority in that area. In the area of German football, the DFL markets the broadcasting rights to the football Bundesliga centrally, in accordance with the by-laws of the DFB. The broadcasting rights to DFB cup games are marketed by the DFB alone.[1271]

This would appear to be problematic in light of the cartel prohibition laid out in § 1 GWB and in Article 101 TFEU. These provisions prohibit cartels which come into being as a result of agreements between companies, resolutions by associations of undertakings and types of behaviour which have been agreed upon between several parties and which produce, or aim at producing, an obstacle to, a limitation on or falsification of competition.

1268. Cf. Schürnbrand, ZWeR 2005, 396 et seq.; for a basic account, see Hannamann, *Kartellverbot und Verhaltenskoordinationen im Sport*, Berlin 2000.

1269. German legal provisions were largely brought in line with the European provisions by means of the 7th amendment to the GWB. Cf. Emmerich, *Kartellrech*t, 11th edition, Munich 2008, 267 mn. 1.

1270. Wertenbruch, ZIP 1996, 1417 at 1418; for an account of the relationship between national and European antitrust law in the area of sport, cf. Spindler in: Adolphsen/Nolte/Lehner/Gerlinger (eds.), Sportrecht in der Praxis, Stuttgart 2012, 451, mn. 1821 et seq.

1271. In the same way, World Cup and European Championship games are marketed centrally by UEFA.

312. As potential 'providers' of sporting events in return for remuneration, *associations can be viewed as undertakings*.[1272] The sports federations, such as the DFB for example, are to be classified as *associations of undertakings*.[1273]

The decision to market television rights in a centralized manner is an *agreement* within the meaning of antitrust law, as the associations are bound by the by-laws of the DFL to abide by this decision.[1274]

313. *Limitations on competition* which are prohibited by antitrust law include types of behaviour which have been agreed upon by several parties if this behaviour aims to prevent, limit or falsify competition, or succeeds in doing so. In order to answer this question, the relevant market must first be verified – although the materially relevant market of all broadcasting rights, which in the view of the other party, i.e., the broadcaster, are transferable – is encompassed.

The substantial price differences for television rights indicates that particular types of sports are more interesting than others to the viewers, and thus for the broadcasters. For this reason, as regards broadcasting rights for 'premium' football, the European Commission[1275] has stipulated that 'premium' football cannot be substituted by another type of sport or by football which does not reach the 'premium' standard. Thus, there exists an individual market for the marketing of television rights for premium football. In the case of centralized marketing, any competition existing between providers as a result of their common characteristic as organizers is completely removed.[1276] Popular associations would generate more profit by marketing their home game rights individually than by taking a share of the profits (set out in the Bundesliga contract) which they receive from the total income.[1277]

314. Furthermore, the limitation on competition must have a *noticeable* effect.[1278] According to the 'de minimis' Commission notice[1279] and the Bagatelle notice released by the Federal Cartel Office (*Bundeskartellamt*),[1280] this would require a market share of 10% in cases of horizontal agreements (i.e., agreements between competitors).

The associations and the DFL have a natural market share of 100% between them, meaning that the requirement of a 'noticeable effect' is fulfilled. On the other hand, this limitation does not apply to 'block exemption regulations', such as the

1272. BGH, NJW 1998, 756 at 757; ECJ, July 18, 2006 C-519/04 P; ECJ, July 1, 2008 – C-49/07.
1273. BGH, NJW 1998, 756 at 758; Stopper/Lentze-Stopper, Handbuch Fußball-Recht, Berlin 2012, 315 mn. 9.
1274. Cf. Heermann, WRP 2012, 132 at 136.
1275. Commission Decision of Mar. 22, 2006 – COMP C-2/38.173 – O.J. C 7/18 of Jan. 12, 2008.
1276. Hannamann/Vieweg, *Soziale und wirtschaftliche Machtpositionen im Sport* in: Württembergischer Fußballverband e.V. (ed.) No. 40, Sport, Kommerz und Wettbewerb, Gerlingen 1998, 67; Schroeder, Sp*u*Rt 2006, 1 at 4.
1277. Sauer, Sp*u*Rt 2004, 93 at 94.
1278. BGH, ZIP 1994, 61 at 64 et seq.
1279. Commission Decision, No. C 368/13, cited in 2001 O.J.
1280. BKartA, Notice No. 18/2007 regarding the failure to comply with cooperation agreements which are not very significant in relation to the restraint of competition ('Bagatellbekanntmachung') of Mar. 13, 2007, accessible at www.Bundeskartellamt.de (accessed Jan. 27, 2012).

centralized marketing agreement, in relation to which competition has been completely extinguished.[1281]

315. An unwritten exception to the offence outlined in § 1 GWB and in Article 101 TFEU is based on the so-called '*immanence theory'*. This theory, which is similar to the American *rule of reason*,[1282] restricts the application of these legal provisions according to their objectives (*Tatbestandsreduktion*) and reflects the fact that measures which limit competition can have both negative and positive effects. A measure which limits competition per se can be excluded from the ambit of the offence by performing a weighing-up of interests. The immanence theory is not applicable where there is no recognizable interest as regards the functioning of the market for an agreement between parties restricting competition.[1283]

This threshold is exceeded in the area of the centralized marketing of television rights for sport, as the functioning of the sporting competition is not affected by the broadcasting of the events per se.[1284]

Although it is countered that collective marketing could even out any financial inequalities between individual associations by guaranteeing financially weaker teams that all of their games will be broadcast, and thus guaranteeing them a share in advertising income,[1285] financial equality does not always result in equal opportunities in the area of sport.[1286] No final conclusion has been drawn as to whether the increasing financial power of the best teams would put an end to exciting competition. Analyses demonstrate that there is a weak consistency in the placement of teams in league tables. The position of the best teams fluctuates in spite of the substantial financial disparities which exist between them and other teams. Apart from that, the aim of evening out economic power could also be achieved by establishing a 'solidarity fund'.[1287]

316. A purposive interpretation of the provision so that it is not actually applied could be possible under the auspices of a *syndicate*. According to the principle developed by the Federal Court of Justice,[1288] cases in which several independent undertakings cooperate and pool their economic potential by coordinating their

1281. Schroeder, Sp*u*Rt 2006, 1 at 4
1282. For a detailed account of this and of the Single Entity Theory, see Hannamann, *Kartellverbot und Verhaltenskoordinationen im Sport*, Berlin 2000, 351 et seq., 367 et seq.
1283. Loewenheim/Meessen/Riesenkampff-Nordemann, *Kartellrecht*, 2nd edition, Munich 2009, § 1 GWB mn. 241.
1284. BGH, NJW 1998, 756 at 759; Loewenheim/Meessen/Riesenkampff-Nordemann, *Kartellrecht*, 2nd edition, München 2009, § 1 GWB mn. 242.
1285. Cf. Röhl, *Schutzrechte im Sport*, 2012, 15; Damm, *Sportberichterstattung und Sportrechte*, 36 et seq.
1286. Loewenheim/Meessen/Riesenkampff-Nordemann, *Kartellrecht*, 2nd edition, Munich 2009, § 1 GWB mn. 242.
1287. Möschel/Weihs, *Die zentrale Vermarktung von Sportübertragungsrechten*, in: Vieweg (ed.), Das Sportereignis, Ökonomische und rechtliche Fragen der Sportübertragungsrechte, Stuttgart et al. 2000, 30 et seq.; Schürnbrand, ZWeR 2005, 396 at 409.
1288. BGH, WuW/E DE-R, 876 at 878; PHBSportR-Summerer, 364, mn. 94.

negotiations with the broadcasters simultaneously are not infringements of the competition provisions if these are the only means by which such independent undertakings can hope to achieve a share in the market. However, in light of the way in which modern day associations are structured, the efficient independent marketing of rights by the associations should be just as viable.[1289]

317. A final important element in the assessment of centralized marketing is the legal exception of § 2(1) GWB and Article 101(3) TFEU. This provides an *exemption* from the cartel prohibition if centralized marketing supports economic development by allowing adequate participation by the consumer, if it is unavoidable, and if it does not facilitate the complete suppression of competition.

318. The *support of economic progress* occurs where the agreement leads to objective advantages for the economy which aim to even out the associated disadvantages.[1290] One advantage of centralized marketing is that there is only one individual point of contact for the sale of Bundesliga products. Thus, transaction costs are reduced due to the fact that the associations do not have to establish any additional departments and the media undertakings do not have to conduct multiple series of negotiations.[1291] An equal division of income also supports equality of opportunity among the associations which, in turn, supports sporting competition.[1292] The bundling of rights also leads to a particularly attractive 'package' offer from the point of view of the spectator, which, in addition to live transmissions of individual games, also includes recaps of the whole day. Thus, it is ensured that the sport in question and its trademarked image are constantly presented in a high-quality manner.[1293] A further advantage is the financing of amateur and recreational sports from the profits generated by centralized marketing. This could be seen as indirect support for economic development, as the Bundesliga clubs ultimately profit from intense and wide-ranging youth development programmes.[1294]

319. Furthermore, importance should be attached to a *reasonable level of participation by the consumer*, who in this context is not only the television viewer as the receiver of the broadcast, but also the broadcaster as the purchaser of the broadcasting rights.[1295] While it is a possibility that the viewer will not have access to as many live transmissions on free TV as they would on, for example, pay per view,[1296] the above-mentioned advantage is more important, i.e., that the viewer can watch the Bundesliga as a whole and follow it during the entire competition, and

1289. Loewenheim/Meessen/Riesenkampf-Nordemann, *Kartellrecht*, 2nd edition, Munich 2009, § 1 GWB mn. 242; similarly rejected by BGH, NJW 1998, 756 at 759.
1290. ECR. 1980, 3125 at 3143 et seq.
1291. 2003 O.J., No. L 291/36 mn. 143 et seq. - UEFA-Champions' League.
1292. Wertenbruch, ZIP 1996, 1417 at 1423.
1293. WuW/ E EU-V, 889 mn. 154 et seq.
1294. Heermann, Sp*u*Rt 1999, 11 at 15.
1295. Wertenbruch, ZIP 1996, 1417 at 1424; cf. Immenga/Mestmäcker-Fuchs, *Wettbewerbsrecht*, 4th edition, Munich 2007, § 2 mn. 91.
1296. Sauer, Sp*u*Rt 2004, 94 at 97.

the increasing attractiveness of the league competition. By means of the unified allocation of licences, the broadcasters are forced to pay for games which are less interesting. However, the advantage of this type of allocation is that there is an element of security for the broadcaster in planning its schedule, as quotas and refinancing possibilities do not depend on the sporting success of individual teams.[1297]

To this extent, it is significant that prompt coverage of the highlights is guaranteed by the free TV channels. This was the reasoning used by the Federal Cartel Office (*Bundeskartellamt*)[1298] justifying the denial of centralized rights allocation to a pay TV provider which had been planned for the seasons between 2009 and 2013. In that case, coverage of the highlights would only have been provided on Saturdays at 10 p.m. The Federal Cartel Office ruled that this would not provide the consumer with a reasonable share of the advantages and, thus, did not allow it.

320. According to the EU Commission,[1299] the centralized marketing of television rights for the games of a complete league, such as, for example, the first or second Bundesliga involving the 'bundling' of organizers' rights and the centralized marketing of these rights is also *essential* for the provision of a product of uniform quality ('*Ligabetrieb*') and its efficient marketing by means of a uniform point of contract for the party acquiring the rights.

321. In this respect, however, there should be no *suppression of competition*. In order to abate concerns relating to the ability to be exempted, the Commission can exert influence upon the conditions of the central market by declaring a voluntary undertaking of commitment to be binding pursuant to Article 9 VO 1/2003. Similarly, the Federal Cartel Office can declare a voluntary declaration to be binding in accordance with Article 5 sentence 2 VO 1/2003. For this reason, doubts were initially expressed by the Commission as to the centralized allocation by the DFL of broadcasting rights to the first and second Bundesliga in the 2006/2007 season, primarily because of the configuration of the allocation procedure. The Commission ultimately put a stop to the procedure after it declared binding an undertaking of commitment by the DFL which stipulated that all allocations of rights had to be regulated in a transparent manner, free of discrimination.[1300] The Federal Cartel Office[1301] also resorted to this by means of an undertaking of commitment as regards the conditions upon the central allocation of rights for the games of the first

1297. Wertenbruch, ZIP 1996, 1417 at 1424; Sauer, Sp*u*Rt 2004, 94, 97.
1298. Press release of the Federal Cartel Office of July 17, 2008, accessible at www.bundeskartellamt.de (accessed Jan. 27, 2012).
1299. 2003 O.J. L 291/36 mn. 174 et seq. - UEFA-Championsleague.
1300. Commission Decision of Jan. 19, 2005, DG COMP/C-2/37.214; Notice published pursuant to Art. 19(3) of Council Regulation No. 17 in Case COMP/C.2/37.214 – Joint selling of the media rights to the German Bundesliga – (2003/D 261/07), for a thorough account of this, see Körber, in: Adolphsen/Nolte/Lehner/Gerlinger (eds.), Sportrecht in der Praxis, Stuttgart 2012, 610, mn. 2537 et seq.
1301. Press release of the Federal Cartel Office of Jan. 13, 2011, accessible at www.bundeskartellamt.de (accessed Jan. 27, 2012).

and second football Bundesliga during the 2013/2014 season. It declared an undertaking of commitment for the DFL to be binding. The undertaking set out a transparent and discrimination-free procedure for the DFL in the allocation of twenty-three 'packages' of rights and also included a comprehensive duty of documentation of the allocation procedure. The Federal Cartel Office also stated that it saw no reason to intervene against centralized marketing.

b. Exclusive Agreements (Vertical Restrictions on Competition)

322. The allocation of exclusive rights facilitates the optimum exploitation of the event. Exclusivity is, of itself, not contrary to competition. It can, however, be an infringement of antitrust law under § 1 GWB, Article 101(1) TFEU if either its duration or its scope is disproportionate. In an exclusive contract, the licensor commits not to assign any rights not encompassed by the contract to other broadcasting companies. Thus, competition is restricted from the 'demand' perspective.[1302]

323. The Federal Court of Justice[1303] has declared antitrust law to be applicable. It has stated that its application does not restrict exclusivity from being viewed as particularly valuable in the economic competition for viewing figures and advertising profits between television broadcasters, and that it is only in this way that the large amount of capital expenditure could be redeemed. It also stated that the public law mandate to provide basic necessities for the people did not lead to an improved position in relation to the admissibility of exclusive agreements, as this was not prohibited by the dual broadcasting system or by Article 5 GG.

324. Exclusive broadcasting rights which relate to only one or a few sporting events, or to a season, are to be viewed as an immaterial restriction upon market access.[1304] In the case of a larger number of future sporting events, which extend over a period of time amounting to many years, the matter of admissibility under antitrust law must be decided after a comprehensive weighing-up of interests has been conducted.[1305] On the one hand, the sporting organizer bound by the contract hopes to achieve the maximum financial gain possible,[1306] and certainty in planning future sporting events.[1307] On the other hand, television broadcasters are interested in increasing their viewing figures as well as the income generated from advertising. However, the third-party companies who are excluded as a result of the contract also have an interest in taking part in the economic competition for television rights. In particular, regard must be had to the obligation to observe the mandate to

1302. Agreements undertaken in reciprocal contracts in which the parties to the contract are on different levels of trade are now dealt with in § 1 GWB; in the past, § 16 No. 2 GWB of the old version of the statute was the relevant provision.
1303. BGH, ZUM 1990, 519 at 522.
1304. PHBSportR-Summerer, 353, mn. 67.
1305. Roth, AfP 1989, 515 at 521 et seq.
1306. Waldhauser, *Die Fernsehrechte des Sportveranstalters*, Berlin 1999, 279 et seq.
1307. BGH, NJW 1990, 2815 at 2820.

provide for the basic requirements of the people in relation to public broadcasters.[1308] It is, however, of consequence that exclusive agreements are an emanation of freedom of contract which has its roots in §§ 241, 311 BGB. Regard must also be had to the knock-on effects of Article 5(1) GG, as sporting events fulfil an important social function.[1309] However, there is only a limited risk of suppression or falsification of information, or of manipulation of opinion in exclusive contracts regarding television rights. For one thing, transmission is certain, as the parties entitled to the exclusive rights intend to use the rights for which they have paid so much. For another, it not often possible to manipulate content in sports reporting. It usually involves events which actually occurred and which could not be presented in a substantially different manner by other television broadcasters. Furthermore, the viewer can consider for himself whether or not the statements made are true, and can form his own opinion.[1310]

Due to the preponderance of marketing possibilities open to the event organizer, in particular in relation to large events, the weighing-up of interests usually falls in favour of freedom of contract. The restrictions placed upon the excluded television broadcasters are of little significance insofar as alternatives in the form of other sporting events exist. The number and significance of the sporting events, as well as the duration for which the parties are bound by contract, are decisive.[1311]

c. Abuse of Market Power

325. The practice of linking the granting of a right to a particular undertaking *(Koppelungspraxis)* which is common in many types of sports can lead to an abuse of market power pursuant to § 19 GWB or Article 102 TFEU and is an infringement of the prohibition of unfair restrictions pursuant to § 20 GWB. Linking is a practice by means of which the federation only agrees to grant an organizer permission to conduct an event under the condition that a portion of the income generated by the sale of rights of use will be given to the federation, or that a substantial amount of the income generated from the exploitation of the event will be transferred to the federation.[1312] Linking within the meaning of antitrust law only occurs in cases where the allocation of hosting rights to sporting events by the sporting federation to an association or a federation is viewed as a commercial benefit. While the financial contribution was originally the expression of an internal decision, it also serves as a condition of entry to the market. With regard to the antitrust law aim of keeping the market open, the allocation of hosting rights can be seen as a financial benefit.[1313]

1308. Roth, AfP 1989, 515 at 522.
1309. Cf. Part IV, Ch. 2, §1 II D 2 a.
1310. Waldhauser, *Die Fernsehrechte des Sportveranstalters*, Berlin 1999, 282.
1311. Roth, AfP 1989, 525 at 522; Waldhauser, *Die Fernsehrechte des Sportveranstalters*, Berlin 1999, 285.
1312. Hannamann/Vieweg, *Soziale und wirtschaftliche Machtpositionen im Sport*, in: Württembergischer Fußballverband e.V. (ed.) No. 40, Sport, Kommerz und Wettbewerb, Gerlingen 1998, 58.
1313. Hannamann/Vieweg, *Soziale und wirtschaftliche Machtpositionen im Sport*, in: Württembergischer Fußballverband e.V. (ed.) No. 40, Sport, Kommerz und Wettbewerb, Gerlingen 1998, 62.

It is easy for the federation to impose such restrictions, as, due to the 'one-place principle', it has a monopoly in its particular field of sport and in its region.[1314] Due to the federation's by-laws, the subordinate associations and athletes can be forbidden (under threat of punishment) to participate in events which have not been authorized. If the federation refuses to grant permission to hold an event, there will be no participants. In principle, the income generated from exploitation rights must remain with the host associations. Any restrictions upon financing goals can, however, be justified, insofar as they guarantee the repayment of the federation's administrative costs. By adhering to such restrictions, the associations fulfil the generally applicable mutual duties of support and consideration which apply only in the area of sport. Conversely, restrictions imposed for general financing interests cannot be justified.

326. A further barrier arises from the relationship between direct and indirect members as a result of the association law principle of equal treatment.

327. Restrictions of associations in the exploitation of television rights often take the form of time-limited provisions, restrictions upon scope, voting obligations, or the stipulation of a minimum price. In such cases, the federation itself is not active in the market for television rights as a provider or as a consumer (so-called third market problem). In these cases, it has been called into question whether §§ 19, 20 GWB can actually be applied.[1315] As the federation can exert pressure by threatening to impose bans on participation, however, it assumes a position of control over access to the market, and thus steers the market to some extent. Due to this influence, one could regard the federation as dominating the market, even if it does not participate in the exploitation of rights itself.[1316]

2. Limits Arising Out of the Interstate Broadcasting Agreement

a. Right to Broadcast Condensed Reports, § 5 RStV

328. The power of disposal of the organizer is further limited by the right to broadcast condensed reports (*Kurzberichterstattung*). Pursuant to § 5(1) sentence 1 RStV, every licensed broadcaster in Europe – both public and private – is entitled to provide information nearly free of charge about events and occurrences which are open to the public and of general interest. Pursuant to § 5(4) sentence 1 RStV, the right to report is restricted to reporting.[1317] The preamble to the statute states only that information about the event can be presented, but provides no details of its

1314. Hannamann/Vieweg, *Soziale und wirtschaftliche Machtpositionen im Sport*, in: Württembergischer Fußballverband e.V. (ed.) No. 40, Sport, Kommerz und Wettbewerb, Gerlingen 1998, 69.
1315. BGH, NJW-RR 1988, 1069 at 1070 et seq.; Langen/Bunte-Schultz, *Kommentar zum deutschen und europäischen Kartellrecht*, 9th edition Neuwied et al. 2001, § 20 mn. 119.
1316. Hannamann/Vieweg, *Soziale und wirtschaftliche Machtpositionen im Sport*, in: Württembergischer Fußballverband e.V. (ed.) No. 40, Sport, Kommerz und Wettbewerb, Gerlingen 1998, 70 et seq.
1317. Cf. Körber, in: Adolphsen/Nolte/Lehner/Gerlinger (eds.), Sportrecht in der Praxis, Stuttgart 2012, 629, mn. 2633.

entertainment value. This does not mean, however, that the right to broadcast condensed reports must be limited to a factual representation of the game; rather, occurrences which are merely incidental to the result – such as, for example, players' outbursts – can have an informative character.[1318]

329. The permissible duration is stipulated in § 5(4) sentence 2 RStV. There, it is stated that it is the duration of time which is necessary in order to convey the informative content of the event. The upper limit for short events which occur regularly, such as football Bundesliga games, is ninety seconds per game. In relation to other events, the preamble refers to a duration of three minutes per report as being adequate.[1319] Pursuant to § 5(1) sentence 2 RStV, the right encompasses a right of access, an entitlement to broadcast condensed, direct excerpts from the event, and to record and provide assessment of the event.

330. In return, the event organizer can demand a small amount of remuneration for permitting the reporting of events which are professionally organized, pursuant to § 5(7) RStV.

331. The Federal Constitutional Court[1320] confirmed that this right to report was in conformity with the constitution. Although it conceded that it limited the fundamental rights of the organizer, freedom of profession (Article 12(1) GG), the inviolability of the home (Article 13 GG) and the general rights of personality of active athletes (Article 1(1), (2) GG), this limitation was constitutional, as it was based on sensible deliberations as to public welfare. The reporting of these events guaranteed a broad and sufficient source of information regarding events which were of general interest. It prevented any one party from holding a monopoly on information and guaranteed that the reports had a varied and pluralist nature. The informative function of television was not limited to political information, but also included sporting events of particular relevance, as these fulfilled a vital role in society because sports provided members of the general public with the opportunity to identify with the society in which they lived – both on a local, and on a national level. In addition, it provoked communication among the general public.

b. Protection List, § 4 RStV

332. In order to ensure that broad access to sporting events of particular relevance is not hindered by the allocation of exclusive rights to pay TV channels, the Interstate Broadcasting Agreement has been augmented in Germany by the *Zweite Fernsehrichtlinie* (Revised Television Directive)[1321] by means of the addition of the

1318. Waldhauser, *Die Fernsehrechte des Sportveranstalters*, Berlin 1999, 303.
1319. Cf. preamble printed in Hartstein/Ring/Kreile/Dörr/Stettner, RStV, 2012 edition, § 5, 2 et seq.
1320. BVerfGE 97, 228 et seq. = NJW 1998, 1627 – Kurzberichterstattung.
1321. On July 30, 1997, the Revised Television Directive of the European Community came into force. Pursuant to Article 3, the Member States may formulate a list of events which must be made available unencrypted, either directly or with a time delay. Due to the Convention on Cross-Border Television of May 5, 1980, in force in Germany since 1994, the legislator was obliged to examine

current § 4.[1322] In accordance with this, transmission by pay TV channels is only permissible if the television broadcaster itself, or a third party, facilitates the transmission of a television programme which is freely available and accessible to the general public at the same time, or, insofar as this is rendered impossible due to individual, simultaneous events, at a slightly later point in time. This must be subject to reasonable conditions. Only programmes which can be viewed in more than two-thirds of households are to be classified as accessible to the general public. The Summer and Winter Olympic Games, the Football World Cup, World and European Championships, all games in which teams or athletes representing Germany participate, and, independently of that, the opening game, semi-final and final of the DFB Cup, home and away games of the German national team and the finals of the European Football Association Championships which include German teams (Champions' League, UEFA Cup) are all included.

333. The need for and constitutionality of a German 'protection list' has always been, and still is, the subject of much criticism.[1323] Many maintain that the list is an infringement of the freedom of profession of sports event organizers and intermediaries pursuant to Article 12 GG. The infringement arises from the fact that the organizer or intermediary cannot exploit the broadcasting rights in accordance with purely commercial criteria. The matter of whether the organizer's opportunity to assign the television broadcasting rights to another party is a legally-protected proprietary interest within the meaning of Article 14 GG, or simply an expectation of profit which is not elaborated upon, has not yet been specifically addressed by the courts.[1324]

The prevailing opinion bases the justification of this in the communicative function of television. Sporting events of particular relevance are also included under the state's duty to broadcast events of public interest. According to the Federal Constitutional Court,[1325] sport offers the opportunity for members of the public to identify with the other members of the society in which they live on both a local and national level and encourages communication among members of the public. The central importance of sport to public welfare justifies the free and unhindered provision of information to any interested parties.[1326] Another point of view is that the list regulation is disproportionate.[1327] On the one hand, regard must be had to the right to report. Due to the fact that the interest in information exceeds this, the legislator could have obliged the holders of the rights to broadcast the events on free

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legal measures in order to ensure that the right of the public to information would not be jeopardized by a broadcaster exercising its exclusive rights to broadcast events of major interest for the public in such a way that a material portion of the public in one or more of the states party to the convention would not have the opportunity to view the event on television.

1322. Formerly § 5a RStV.

1323. Wetzel/Wichert, Sp*u*Rt 2001, 228 at 229.

1324. BVerfG, Sp*u*Rt 1998, 116 at 120, This matter is contentious among legal academics. For a survey of the arguments against the applicability of Art 14 GG, see Tettinger, Sp*u*Rt 1998, 109 at 111; Wetzel, Sp*u*Rt 2001, 228 at 229; in support of the applicability of Art 14 GG, see Summerer, Sp*u*Rt 2006, 55 at 58.

1325. BVerfG, Sp*u*Rt 1998, 116 at 119.

1326. Ladeur, Sp*u*Rt 1998, 54 at 61; Bröcker/Neun, ZUM 1998, 766 at 779.

1327. Wetzel/Wichert, Sp*u*Rt 2001, 228 at 230 et seq.

TV at a later point in time rather than simultaneously (or, in some cases, almost simultaneously).[1328] Against this, however, one can argue that neither condensed reports of a sporting event nor the broadcasting of the event at a later point in time enables viewers to participate together in the tension and excitement which is intrinsic to the game, and which is a part of its communicative function, and are therefore not equally well-suited. Most commentators are in agreement that the extension of this catalogue of events would be impermissible, as the conformity of the current § 4 RStV with the constitution turns on its character as a narrowly-framed provision, which must be preserved at all costs in order to ensure that competing interests are treated fairly and even-handedly.[1329]

c. Advertisement

334. The Interstate Broadcasting Agreement contains inter alia requirements in relation to the labelling of advertisements and their duration.

Pursuant to § 7(2) RStV, advertisements and those parties advertising their products may not influence the programme in terms of content. The requirements relating to the separation and labelling of advertisements laid out in § 7(3) RStV stipulate that advertisements must be unambiguously recognizable as such. They must be clearly separated from other parts of the programme using optical and acoustic methods.[1330] The requirement to separate advertisements from the rest of the television programme protects not only the independence of the programme's content and the broadcaster's neutrality in relation to competition on the free market, but also the viewer's interest in a television broadcast with which there has been no interference.[1331]

335. In accordance with § 7(7) sentence 1 1st and 2nd variations RStV,[1332] stealth advertising (*Schleichwerbung*) and product placement are impermissible. A legal definition of stealth advertising is set out in § 2(2) no. 8 RStV. It provides that stealth advertising relates to any mention or portrayal of products, services, names, trademarks or any actions by the manufacturer of a product or the provider of a service in broadcasts if these are intended by the organizer to be used for the purpose of advertising and if, due to the organizer's failure to identify them as such, the general public could err as to their actual purpose. The mention or portrayal of a product can be regarded as being for advertising purposes if remuneration or a similar mutual performance is provided in return. In contrast to this, the old edition of the

1328. Wetzel/Wichert, Sp*u*Rt 2001, 228 at 231.
1329. Bröcker/Neun, ZUM 1998, 766 at 779; Waldhauser, *Die Fernsehrechte des Sportveranstalters*, Berlin 1999, 310 et seq.
1330. The requirement to keep advertisements and editorial content separate also applies to the print media.
1331. Greffinius/Fikentscher, ZUM 1992, 526 at 528.
1332. The provisions relating to stealth advertising and product placement were fleshed out in the Advertising Directive for Regional Broadcasting Corporations, which was published on the basis of § 46 RStV.

RStV provided that any such action or measure could be viewed as being misleading, and, therefore, as stealth advertising, if no sufficient attempt was made to identify it as advertising.[1333]

Pursuant to § 2(2) no. 11 RStV, product placement is defined as the integration of a named product in a broadcast in order to increase profits.[1334]

However, product placement can be admissible under § 7(7) sentence 2–6 RStV. This is a distinct liberalization of the older version of the Interstate Broadcasting Agreement.

336. The Interstate Broadcasting Agreement also sets out special requirements for virtual advertising which has only recently become possible by virtue of digital mixed technology. Pursuant to § 7(6) RStV, virtual advertising, i.e., advertising placed onto the television screen by means of digital mixed technology, and which can be arranged differently for viewers in different countries, is permissible on condition that the viewers are informed at the beginning and the end of the relevant programme, and that any advertisements which exist at the location from which the event is being broadcast are replaced (e.g., the concealment of sideline advertising).

337. §§ 16, 45 RStV are decisive as to the duration of the advertisement. The upper limit of twelve minutes per hour may not be exceeded, whether by privately-owned television channels (pursuant to § 45(1) RStV), or by public television channels (§ 16(1) RStV).

338. Article 13 of the EC 1989 Television Directive forbids any form of television advertising of cigarettes or of any other tobacco product. This prohibition on advertising tobacco products was not implemented in Germany, but has nonetheless had effect in Germany since 1 November 1994[1335] due to Article 15(1) of the European Treaty on Transfrontier Television. Pursuant to EU Directive 2003/33/EC, the advertising of cigarettes and tobacco products is also to be prohibited in magazines, newspapers and on the internet. The deadline for transposing the directive was 31 July 2005. This was initially not adhered to in Germany and legal action was taken by the Federal Government against this directive in the European Court of Justice. In November 2006, Germany finally implemented the directive and codified the comprehensive advertising ban in the *Tabakgesetz* (Tobacco Act). The legal action by the Federal Government taken in order to have the directive annulled was also unsuccessful.[1336]

d. Sponsoring

339. § 8 RStV regulates the admissibility of the sponsorship of broadcasts[1337] in the same way for public and for private broadcasters. As of 1 January 2013, it has,

1333. Holzgraefe, MMR 2011, 221 at 224.
1334. Holzgraefe, MMR 2011, 221 at 224.
1335. PHBSportR-Summerer, 344, mn. 30.
1336. ECJ, JZ 2007, 458 et seq.
1337. For more on sponsorship, see Part IV, Ch. 2, §2 I.

however, been supplemented by § 16(6) RStV, which relates to the sponsorship of public broadcasters. As this is not a case of advertising in order to sell a product, the general advertising regulations are usually suppressed by § 8 RStV.[1338]

340. In accordance with § 8(1) RStV, a reference (which is of acceptably short duration) must be made to any provision of finance by a sponsor at the beginning and end of programmes which are completely or partly sponsored. In addition to the sponsor's name, its company logo, a brand, a symbol or the sponsor, a reference to its products or services or a corresponding distinctive symbol could be displayed. The reference can also be made by means of a moving image. Repetition of the reference to the sponsor during the programme is also permissible, insofar as this does not constitute continuous advertisement, i.e., viewers are not urged to buy the sponsor's product, or that of a third party, cf. § 8(3) RStV.[1339] Advertising effects, which go beyond informing the viewer are subject to the fundamental prohibition of advertising in programmes and are in violation of § 8(2) RStV, as this could lead to the impermissible influencing of the content of the broadcast by the sponsor.

341. Advertising at the event venue – sponsorship of the event – is, on the other hand, not encompassed by § 8(2) RStV, as in that case, there is no direct relationship between the event sponsor and the broadcaster. An analogous application of § 8 RStV is not possible, as this must be narrowly interpreted as an exception from the ban on advertising during the programme. Thus, sponsorship of the event is subject to the general advertising regulations.[1340] There is also no requirement for disclosure in cases where the identity of the event sponsor is superimposed.[1341] If, however, there is a so-called double sponsorship of the event, in which the event sponsor is also the sponsor of the event's title, § 8 RStV is of application.[1342]

342. Title sponsorship occurs where the parties agree upon the event being named after the sponsor in return for the sponsor's financial support of the event. The requirement that advertising be kept separate from the event and the prohibition on stealth advertising contained in § 7 (3, 7) RStV is also of application here. The special requirement that the public be informed must, however, be taken into account. Members of the public could be falsely informed if the sponsor's title were omitted if the sponsor is known and facilitates the identification of the event.[1343] The naming of the event title is, therefore, regarded as being unavoidable, even in cases where the event is renamed.

343. Specifically in relation to sports, displays by computer manufacturers are usually included in broadcasts of sporting events in order to inform the public of the number of goals scored or of the passage of time. Its legal permissibility can be

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1338. Jessen, *Rechtsfragen der Vermarktung von Sportereignissen im deutschen und englischen Recht*, Aachen 1997, 45.
1339. ECJ, EBLR 1997, 173 at 175, Greffenius/Fikentscher, ZUM 1992, 526 at 535.
1340. Greffenius/Fikentscher, ZUM 1992, 526 at 533 fn. 74.
1341. BGH, NJW 1992, 2089 at 2091.
1342. PHBSportR-Summerer, 347, mn. 42.
1343. Greffenius/Fikentscher, ZUM 1992, 526 at 534.

examined under the auspice of the ban on stealth advertising contained in § 8(3) RStV. The regulations relating to the sponsorship of programmes are of application as it is primarily the broadcasters who benefit financially from the free provision of the computer hardware and software.[1344] The matter of whether the displays are impermissible 'special' references (within the meaning of § 8(3) RStV) is decided by considering whether there is a link with the content of the programme or a justification based on the programme. The information displayed (time, result, evaluations) is linked to the content of the programme, but not with the identification itself, as it is irrelevant who compiles the information.[1345] Thus, the displays are generally found to infringe § 8 RStV. In practice, however, they are not objected to, as the advertising character of the display is recognizable by the viewer.[1346]

344. Upon entry into force of the new § 16(6) RStV on 1 January 2013, sponsorship will not be permitted after 8 pm or on Sundays or public holidays in programmes shown by public broadcasters. An exception will be made for the broadcast of large events within the meaning of § 4(2) RStV. These include the Summer and Winter Olympic Games and European Championship and World Cup games in which Germany participates.

3. Legal Consequences of Infringement

345. An infringement of these media law provisions can lead to a finding of inadmissibility under advertising law in accordance with §§ 3, 4 no. 11 UWG and can provide competitors with claims for forbearance and compensation (fault-based) against the broadcaster or the advertisers pursuant to §§ 8, 9 UWG. An unfair business act within the meaning of §§ 3(1), 2(1) no. 1 UWG is proven by evidence of the undertaking of a contractual or financial agreement, the payment of remuneration and a lack of editorial or journalistic justification.[1347]

III. Special Characteristics of Radio Reporting

346. For many years, the broadcasters who transmitted radio report from the stadium did not have to pay a fee. Then, following the example of other European countries,[1348] the lucrative marketing of reporting was opened up into the field of radio for the associations. This led to a controversy, the centre of which was the question as to whether the freedom to broadcast (pursuant to Article 5(1)

1344. Greffenius/Fikentscher, ZUM 1992, 526 at 538.
1345. Jessen, *Rechtsfragen der Vermarktung von Sportereignissen im deutschen und englischen Recht*, Aachen 1997, 83.
1346. PHBSportR-Summerer, 347, mn. 43.
1347. Jessen, *Rechtsfragen der Vermarktung von Sportereignissen im deutschen und englischen Recht*, Aachen 1997, 89.
1348. The possibility to exploit the area of radio reporting commercially is common in Italy, the Netherlands and France among other countries; cf. Summerer/Wichert, Sp*u*Rt 2006, 55 at 59.

sentence 2 GG) also encompasses the right to report live by radio during an event, or whether an increased amount of remuneration can be demanded for this.[1349]

The Federal Court of Justice[1350] decided that the organizer is, in principle, not prevented from making radio reports from the stadium subject to a special fee. The legal basis of the so-called radio rights are based on the rights of ownership and possession of the venue pursuant to §§ 858, 903, 1004 BGB. These rights emanate from the ownership and possession of the stadium.[1351] They go beyond a mere regulatory function and facilitates – in principle – free decision-making as to who may enter the venue and who will be turned away. A 'radio right', in the sense of an exclusive authority to make reports on radio about the event from the venue, is not connected with this per se. It does, however, include the right to allow entry for specific purposes or to make entry subject to the payment of a fee.[1352]

347. The ruling of the Federal Court of Justice does not clarify whether the obligation to pay a fee can also be based on §§ 3, 4 UWG because of the unfairness of the exploitation of the work of others or on § 823(1) BGB because of interference with an established business operation. The former is overwhelmingly rejected as, if one ignores the background noise, the radio reporter is active on a personal level in 'creating' the report.[1353] On the other hand, the objection is sometimes made that the event organizer bears the costs, the entrepreneurial risk and the organizational work, that the reporter's output depends on the services of the organizer and that he acts only as an intermediary.[1354]

348. There are no provisions of antitrust law which oppose the exploitation of radio rights in such a way. The stipulation of a fee is not an inadmissible obstacle or discrimination in the context of antitrust law (§§ 19(1), 20(1) GWB).[1355] A radio reporter who reports from the stadium 'uses' the event more intensively than a normal spectator or representative of the press.

349. Neither can § 6(2)*Versammlungsgesetz* (VersG, Act Regulating Public Meetings) be regarded as a legal basis for a right to the free reporting of sporting events. Based on the narrow definition of a public meeting, which contains a reference to democracy, a sporting event is not a public meeting within the meaning of the law, as it lacks the common aim to form and express public opinion.[1356]

1349. For a detailed account, see von Coelln, Sp*u*Rt 2006, 134 et seq. and 185 et seq.; Fikentscher, Sp*u*Rt 2002, 186 et seq.; Kirschenhofer, ZUM 2006, 15 et seq.; also Nemeczek, GRUR 2011, 292 at 294.
1350. BGH, Sp*u*Rt 2006, 73 = NJW 2006, 377 et seq. – Hörfunkrechte.
1351. Cf. supra Part IV, Ch. 2, §1 II A.
1352. BGH, NJW 2006, 377 at 380.
1353. Cf. Wertenbruch, Sp*u*Rt 2001, 185 at 187; Fikentscher, Sp*u*Rt 2002, 186 at 187; von Coelln, Sp*u*Rt 2006, 134 at 135.
1354. Schmid-Petersen, Sp*u*Rt 2003, 234 at 237.
1355. BGH, Sp*u*Rt 2006, 73 at 75 = NJW 2006, 377 at 378 et seq.
1356. Cf. von Coelln, Sp*u*Rt 2006, 134 at 136.

350. The right to broadcast condensed reports within the meaning of § 5 RStV could be the closest material legal basis. According to its wording and the official explanatory statement for the provision,[1357] it applies solely in favour of television broadcasters. No analogous application is possible as the legislator consciously avoided including radio.[1358]

However, many legal commentators regard a right to broadcast condensed radio reports as being supported by constitutional law.[1359] This is based on the fact that the 'admission problem' as regards public events should be assessed in the same way in relation to radio and television, and that the right to broadcast condensed radio reports can be regarded as a less serious interference than the right to broadcast condensed reports on television, due to its lesser commercial value and the fact that radio broadcasting is, by its nature, less technically complex, and therefore less arduous, than televisual broadcasting. The informative news character of condensed radio reports could be guaranteed by ensuring that the reporter refrains from making impulsive observations and confines himself to a factual description of the event.[1360] However, as long as the legislator does not act, there is no general, free right of entry for radio reporters for the purpose of broadcasting condensed reports.

IV. Special Features of Newspaper Reports

351. Reports of sporting events which are composed purely of pictures and text do not generally affect copyright or neighbouring rights. Nor do they constitute infringements of §§ 22, 23 KUG or of competition law.[1361] However, the organizer can have recourse to his rights of ownership and possession of the venue against the press (§§ 858, 903, 1004 BGB).

Accordingly, the reporting of sporting events by the print media in words and pictures is permitted, even without a special agreement with the organizer. It is not permissible to make the authorization of a reporter subject to the payment of a special fee. The organizer may, however, demand that a print media reporter buy a ticket for the event based on the former party's rights of ownership and possession of the venue.[1362]

The organizer may not refuse to admit individual press representatives because of, for instance, negative reports.[1363] Some commentators are of the opinion that there could even exist an 'obligation to contract' (*Kontrahierungszwang*) arising out of § 826 BGB.[1364]

1357. Preamble to § 4 RStV 1991 (now § 5 RStV), printed in Hartstein/Ring/Kreile/Dörr/Stettner, RStV, 2012 edition, § 5, 2 et seq.
1358. Von Coelln, Sp*u*Rt 2006, 134 at 137.
1359. Cf. von Coelln, Sp*u*Rt 2006, 134 at 137 and 185 et seq., who, from a simple statutory law viewpoint, doubts that rights of ownership and possession will actually help their holder to acquire radio broadcasting rights.
1360. Winter, Sp*u*Rt 2004, 98 at 101.
1361. Röhl, *Schutzrechte im Sport*, 353.
1362. Röhl, *Schutzrechte im Sport*, 353 fn. 1188.
1363. OLG Köln, NJW-RR 2001, 1051 at 1052.
1364. Kübler, *Massenmedien und öffentliche Veranstaltungen*, 70; Stober, AfP 1981, 389 at 395.

The organizer is not permitted to influence the content of reports. At most, the organizer's rights of ownership and possession permit him to place restrictions on the type of reporting, e.g., as regards the transmission of pictures on the internet.[1365]

In the lead-up to a sporting event, the print media's reporting encompasses the printing of the main elements of the programme. On the other hand, programmes for sporting events may only be distributed with the organizer's permission, as the organizer has a right to decide for itself the type of advertising he wishes to employ for the event.[1366] Otherwise, the danger would arise that inaccurate information as to the programme could be attributed to the organizer.[1367]

V. Sport and 'New Media'

352. In Germany, 'new media' such as the internet are playing an increasingly important role in the field of sports. Although there are many benefits for sports associated with the internet (easier, faster and more reasonably-priced access to information in text, video and audio forms), there are also new types of risks and conflicts, which lead to corresponding legal issues.[1368]

A. Internet TV

353. In the past few years, the audiovisual reporting of sporting events via the internet has led to an increasing amount of litigation.

354. The case involving the video portal *Hartplatzhelden.de* was particularly controversial. The site was financed by advertising and contained amateur videos of amateur games which could be viewed free of charge.[1369] Wuerttemberg Football Federation regarded the site as an unfair imitation of its protected performances pursuant to § 4 no. 9 UWG. It maintained that it, as event organizer, possessed all rights of use relating to films and photographs of the game. The Federal Court of Justice,[1370] however, rejected the federation's claim at final instance, as the performance – consisting of the organization and execution of the football games – did not require protection under the UWG. The production of the videos was, rather, an independent performance linked to the game. Football associations that wanted to

1365. Röhl, *Schutzrechte im Sport,* 2012, 352 et seq.
1366. PHBSportR-Summerer, 348, mn. 50.
1367. BGH, GRUR 1958, 549 at 551.
1368. See Vieweg, Sp*u*Rt 2009, 221.
1369. Cf. Koch/Krämer, Sp*u*Rt 2009, 224; On the admissibility of non-authorized internet broadcasts of chess competitions, see Röhl, Sp*u*Rt 2011, 147.
1370. BGH, Sp*u*Rt 2010, 158 – Hartplatzhelden.de; for an instructive account, see Heermann, CaS 2011, 165 et seq.; Ohly, GRUR 2010, 487 et seq.; Peifer, GRUR-Prax 2011, 181 et seq.; Körber/Ess, WRP 2011, 697 et seq.; the rulings at the lower instances were different, see LG Stuttgart, Sp*u*Rt 2008, 166 et seq. and OLG Stuttgart, Sp*u*Rt 2009, 252 et seq. See also Ehmann, GRUR Int 2009, 659 et seq.

forbid this could have recourse to their rights of ownership and possession and could prohibit the filming of games by spectators.

355. The desire of FC Bayern Munich AG to grant permission to media representatives to attend their press conferences only if they agreed that they would not distribute videos of the conference via internet TV also led to conflict.[1371]

Munich Higher Regional Court[1372] ruled that the decision in dispute as to the granting of authorization could be based on the rights of ownership and possession held by FC Bayern Munich AG over the media centre. From an antitrust law perspective in particular, the regulation was not permissible. Although FC Bayern Munich AG held a monopoly over the admission of press representatives to FC Bayern Munich's Bundesliga games and press conferences, the requirement as to authorization was not a type of factual, unfounded discrimination. Finally, the video reporting of press conferences was only shown on television if it related to large tournaments, while comprehensive video reports of press conferences of all Bundesliga teams were generally shown only via internet. This justified a differentiation according to the court.

B. The Online Publication of Federation Sanctions and Opinion Portals

356. The online publication of federation sanctions has also led to legal problems, in particular in relation to the tense relationship between federation autonomy, pursuant to Article 9(1) GG, and freedom of opinion, pursuant to Article 5(1) GG, on the one hand, and the individual legal interests of the members on the other, in particular the general rights of personality pursuant to Article 2(1) in conjunction with Article 1(1) GG.[1373] The courts which have addressed the problem have generally regarded the publication of sanctions as being unproblematic.[1374] However, in order to ensure compliance with the principle of proportionality and the constitutional principle of practical concordance, a password on the federation's homepage and differentiated treatment depending on the gravity of the wrongdoing and the prominence of the penalized athlete was necessary.[1375]

Conversely, the internet also provides a forum for the criticism of associations, trainers, athletes and referees. One example of this was a so-called *'hate forum'* in which insults of referees were published and which was the subject of a federation decision.[1376]

1371. OLG München, CaS 3/2010, 262.
1372. OLG München, CaS 3/2010, 262 at 264 et seq.
1373. For more on the problem of the 'electronic stigma', see Vieweg/Röhl, Sp*u*Rt 2009, 192.
1374. OLG Karlsruhe, Sp*u*Rt 2009, 204; LG Hamburg, Sp*u*Rt 2009, 205; according to OLG Hamburg, CaS 2010, 145 et seq. it is, however, necessary to stipulate the timeframe of the internet broadcast in advance, cf. note by Borchers, CaS 2010, 148 et seq.
1375. Cf. Vieweg/Röhl, Sp*u*Rt 2009, 192 at 195.
1376. Regional Legal Panel of the Westphalian Handball Federation Sp*u*Rt 2009, 262 – Hass-Forum.

C. Live Ticker

357. Sports reporting by means of a live ticker describes the method by which information about a live sporting event is transmitted during the event by means of mobile phone or by internet.[1377]

Insofar as the reporter providing the information by live ticker is located in the stadium, the organizer can have recourse to his rights of ownership and possession. However, according to the jurisprudence, an increased fee for the right to report by live ticker will only be granted if the reporter uses the stadium infrastructure more 'intensively' than a normal spectator.[1378]

If reporting of the game occurs from outside the stadium, for example, if the reporter is watching a live transmission on television, the organizer's rights of ownership and possession are of no consequence. In this context, the possibility of having recourse to prohibitions arising from the principles of fair competition (i.e., a violation of §§ 3, 4 no. 9 UWG) has been discussed, but is generally rejected.[1379]

D. Social Media Marketing

358. In the past few years, social networks such as Facebook, YouTube, Google+ and Twitter have established themselves as advertising channels which must be taken seriously by companies and professional sports due to the enormous social relevance of social networks.[1380] However, it must be acknowledged that there are many complex legal problems associated with this new form of advertising, as the legal implications of social media marketing go above and beyond advertising law in its usual sense.

The potential customer is actively drawn into the advertisement and is encouraged to contribute comments on, or photos of, for instance, an athlete. Here, regard must be had to rights of personality, trademark rights and copyright. Furthermore, stealth advertising or advertising messages which have been sent despite the fact that the receiver has not requested them can constitute infringements of competition law. The extent to which the strict legal regulation of e-mail marketing (§ 7 UWG) also applies to social media marketing has not yet been ruled upon by a court.[1381]

Commercial profiles such as the Facebook page of a professional football club are subject to the *Telemediengesetz* (Telemedia Act) and must comply with its provisions (e.g., displaying company information).

1377. Röhl, *Schutzrechte im Sport*, 2012, 347.
1378. Stopper/Lentze-Kuhn, Handbuch Fußball-Recht, Berlin 2012, 117.
1379. Schwartmann-Frey, *Praxishandbuch Medien-, IT- und Urheberrecht*, Heidelberg 2011, 339 mn. 48; Röhl, *Schutzrechte im Sport*, 2012, 349 et seq.
1380. For an instructive account, see Hamacher/Robak, Sponsors 3/2011, 58 et seq.
1381. Hamacher/Robak, Sponsors 3/2011, 59.

E. Ticket Sales

359. In Germany, tickets for Bundesliga football games are generally sold by the organizing clubs directly to the end customer for a fixed price. This occurs via diverse channels of distribution, e.g. authorized ticket offices, internet and call centres. Provisions of the general terms and conditions aim to prevent the non-authorized selling-on of tickets outside of this direct channel of distribution.[1382] In spite of this, the trade in football tickets on the so-called ticket black market (non-authorized second market) has risen steadily in the past number of years.[1383]

360. In the *bundesligakarte.de* ruling, the Federal Court of Justice[1384] dealt with this problem.[1385] The internet site, bundesligakarte.de, offered tickets for almost all football games in the Bundesliga at elevated prices. The operators acquired the tickets both directly from the organizers (without identifying themselves as commercial buyers) and from private parties. The Federal Court of Justice allowed the club's claim in part. In cases of the direct acquisition of entry tickets from a club through a ticket seller without revealing the intention to sell on the tickets, the club was entitled to demand forbearance by the website under competition law pursuant to §§ 3, 4 no. 10, 8(1) UWG. However, if the dealers had acquired the tickets from third parties (including private persons), the club had no claim under the German law of unfair competition, as in that case, there existed no particular circumstances which would substantiate the unfairness, i.e., the intention to exploit a third-party breach of contract.

361. The same applies to the selling-on of tickets via an online platform for selling tickets on the so-called 'grey market'.[1386] In these cases, the trading of tickets on ticket exchanges and online platforms is facilitated for third parties by a commercial supplier. It has been held by the courts[1387] that ticket platforms are not legally obliged to exclude trade by users who have acquired their tickets by concealing their intention to sell on the tickets. The possibility of being held to be involved in a breach of contract does not arise, as the operators of the platform do

1382. In the same way, the general terms and conditions of the HSV (Hamburger Sportverein) forbade 'any commercial selling-on of tickets acquired without prior consent of the event organizer'; for more on prohibitions on selling on football tickets in general terms and conditions, Wiegand, CaS 2008, 198 et seq.

1383. For more on the possibility of preventing the selling-on of tickets, see Neuhöfer/Schmidt, Sp*u*Rt 2010, 5 et seq.

1384. BGH, NJW 2009, 1504 – bundesligakarten.de.

1385. See Holzhäuser, CaS 2009, 51 et seq.; Holzhäuser, Sp*u*Rt 2011, 106 et seq.; Holzhäuser, W*ettbewerbsrechtliche Zulässigkeit des gewerblichen Weiterverkaufs von Fußballtickets*, in: Vieweg (ed.), Facetten des Sportrechts, Berlin 2009, 179; Nesemann, NJW 2010, 1703 at 1705.

1386. Cf. Holzhäuser, Sp*u*Rt 2011, 106 et seq.; for a comparison with the British situation, see Holzhäuser, Sp*u*Rt 2011, 106 at 108.

1387. OLG Düsseldorf, Sp*u*Rt 2011, 122 et seq.; the court of previous instance, OLG Düsseldorf, Sp*u*Rt 2011, 122 et seq., forbade the platform provider pursuant to §§ 8 para. 1, 3 no. 1, 3, 4 no. 10 UWG from providing third parties with the opportunity to sell tickets which the third parties had acquired officially from associations by concealing their intention to sell them on.

not have access to the offers placed by users on the site before they are published. This means that no infringement of competition law can be established.

§2. Sponsoring

I. Term, Forms and Economic Importance

362. The *term* 'sponsorship' is used in reference to various constructions. There is no general legal definition. The definitions provided in Article 1 d) EU-television broadcasting directive 89/552/EEC[1388] and in § 2 (II) no. 9 and § 8 of the Länder Broadcasting Treaty (*Rundfunkstaatsvertrag*) are not conclusive, as it encompasses the sponsoring of programmes only, and excludes the sponsoring of events.[1389]

In general, sponsorship is understood to mean the provision of financial assistance to persons, organizations or events by granting funds, materials and services in order to achieve entrepreneurial objectives in the area of marketing communications.[1390] To this end, a sponsorship agreement is concluded. The sponsored party profits in particular from its receipt of funds. The sponsoring party, on the other hand, expects additional income thanks to a so-called 'positive image transfer' and the increase or stabilization in recognition of the company, or rather of its services, goods or brands.[1391]

363. There are various *forms* of sponsorship: A differentiation must be made between sponsorship and traditional advertising, public relations and patronage.[1392] While, traditionally, a patron funds a club or a sportsperson for altruistic reasons and, in general, acts on a merely voluntary basis, a sponsor has entrepreneurial marketing and/or communication objectives and, therefore, concludes a sponsorship agreement with the sponsored federation, club or sportsperson.

A distinction should be drawn between the sponsorship of a single sportsperson, a sports team and a sports event. While the sponsoring of an individual sportsperson is associated with both traditional product advertising and shirt advertising, the sponsoring of sport teams is mainly carried out by means of shirt advertising. The service provided in return by sport organizers often consists of perimeter or title advertisement. Depending on the duration of the event, the sponsorship can be permanent, or event sponsorship.[1393] Programme sponsoring is dominated by the medium of television. This is due in particular to a loosening-up of the Länder

1388. Amended by Directives 97/36/EG und 2007/65/EG.
1389. Weiand, *Kultur- und Sportsponsoring im deutschen Recht*, Berlin 1993, 46.
1390. Cf. Bruhn/Mehlinger, *Rechtliche Gestaltung des Sponsoring*, Band I, München 1992, 5; Vieweg, Sp*u*Rt 1994, 6 et seq.
1391. For a thorough discussion of sponsors' objectives, see Weiand, *Der Sponsoringvertrag*, München 1999, 5 et seq.; Wegner, *Der Sportsponsoringvertrag*, Baden-Baden 1992 (Volume I) and 1999 (Volume II). See also Raupach, Sp*u*Rt 2008, 241 at 245.
1392. For a thorough discussion of this, see Weiand, *Kultur- und Sportsponsoring im deutschen Recht*, Berlin 1993, 31 et seq.; Scholz, *Was ist Sponsoring?*, in: Württembergischer Fußballverband e. V. (ed.), Sponsoring im Sport, Gerlingen 1997, 7.
1393. PHBSportR-Fritzweiler/Pfister, part 3, mn. 75; Vieweg, Sp*u*Rt 1994, 6 at 7.

Broadcasting Treaty (*Rundfunkstaatsvertrag*) and the increased cost of broadcasting programmes which would be difficult to finance without the revenue generated by sponsorship.[1394]

364. Sponsorship is one of the *most important means of acquiring financial capital* in the area of commercial sport.[1395] Compared to traditional advertising, sponsorship has the advantage of appearing multi-dimensional and more closely related to a sporting event than other types of advertising as it does not occur during commercial breaks or in advertisement spots and, thus, gives spectators impression of that they are experiencing the product.[1396] For this very reason, sponsoring in sports has gained importance. Next to revenues of ticket sales, broadcasting rights and merchandizing, the acquisition of funding through sponsorship is one of the major means of income for sports event organizers.[1397] Adidas, for instance, has provided the uniform league ball for the First and Second Football Bundesliga since the 2010/11 season and will pay the thirty-six professional football clubs EUR 25 million over a term of five years for this. Before the 2006 FIFA World Cup, which was held in Germany, fifteen companies each paid the FIFA up to EUR 45 million in order to become so-called 'official partners'.[1398]

365. The Länder Broadcasting Treaty Directive, which in Article 7 contains provisions relating to advertising, and in Article 8, to programme sponsoring in the context of sports coverage, has considerable influence over sponsorship on television.[1399] On the basis of the Länder Broadcasting Treaty Directive the media authorities of the Länder (*Landesmedienanstalten*) have issued a common policy on advertising, on the separation of advertisement and sports programmes, and on sponsorship in television and radio broadcasting. This common policy applies to public service broadcasters (especially ARD and ZDF) by limiting the extent and duration of advertising or, sometimes, completely banning it for certain periods of time. The opportunities open to sponsors to advertise or to draw attention to the sponsorship in the context of sports coverage influences the value of the sponsorship commitment and, thus, the sponsoring revenue which the sports organizer receives. To this point, sponsorship has widely been excluded from the restrictions imposed by the Länder Broadcasting Treaty. However, the Fifteenth Amendment to the Länder Broadcasting Treaty (*Rundfunkänderungs-Staatsvertrag*), which came into force on 1 January 2013, introduces restrictions which are much more far-reaching. In the future, there will be a general prohibition on sponsorship during sporting events after 8 pm, as well as on Sundays and on holidays. The only exceptions to this sponsorship prohibition are made for major events such as Olympic Games, the football World Cup or European Championships.

1394. Mehlinger, Sp*u*Rt 1996, 54 at 55.
1395. This opinion is held by Scherrer, CaS 2009, 278.
1396. Sohns, Sponsors 2/2007, 18.
1397. See also Vieweg, *Faszination Sportrecht*, 2nd edition 2010, 34 et seq., accessible at: http://www.irut.de/Forschung/Veroeffentlichungen/OnlineVersionFaszinationSportrecht/FaszinationSportrecht.pdf
1398. Hamacher, Sp*u*Rt 2005, 55.
1399. See in detail Part IV, Ch. 2, §1 II D 2.

366. The permissibility of gambling and the opportunities for advertising it are also of great relevance in the field of sponsoring.[1400] The Länder Treaty on Games of Chance of 1 January 2008[1401] (*Glücksspielstaatsvertrag)* provides for a state monopoly on gambling. Sanctions under criminal law are set out in § 284 German Criminal Code (StGB). Accordingly, until recently, private providers of sports betting services were not allowed to advertise on shirts in Germany; acting as a shirt sponsor for a club, for instance, was not permitted. On 9 September 2010, however, the ECJ,[1402] ruled that the prohibition of private sports betting services set out in the State Treaty on Games of Chance is not in compliance with the principle of free movement of service pursuant to Articles 49, 56 TFEU. As German courts subsequently held that some parts of the prohibition of private sports betting services are effective, there is a high degree of legal uncertainty in this area.[1403] A new State Treaty on Games of Chance,[1404] which was to come into effect on 1 January 2012, failed because the EU Commission considered it to be an infringement of the principle of free movement of service. Consequently, the Land Schleswig-Holstein decided to open the sports betting market for private providers in its sovereign territory by means of the Games of Chance Act which came into effect on 1 March 2012.[1405] It remains to be seen how this sector will continue to develop.[1406]

II. The Sponsorship Agreement

367. The sponsorship agreement is a bilateral agreement. It has only developed in recent decades, which is why it is not expressly regulated by the German Civil Code (*Bürgerliches Gesetzbuch* – BGB). The sponsorship agreement is a contract sui generis which consists of elements of purchase, lease, service and performance contracts.[1407] As the sponsorship agreement is not regulated by statute, there are elements of various types of contracts (including contracts of sale and tenancy, as well as contracts for services and contracts for work) used (below A.). The main performance obligation on the sponsored party is the granting of the right of use; the main performance obligation on the sponsoring party is the contribution of money (below B.). If the contractual obligations of either party are not fulfilled, there may be legal consequences arising from non-performance (below C.).

1400. Cf. in particular Lentze, in: Stopper/Lentze (eds.), Handbuch Fußballrecht, Berlin 2012, Ch. 2 mn. 61 et seq.
1401. This treaty was enacted as a result of a 2006 decision of the Federal Court of Justice (NJW 2006, 1261 et seq.). The court held that the state monopoly on gambling which existed at that time was not compatible with the right to freedom of profession contained in Art. 12(1) GG.
1402. ECJ, Sp*u*Rt 2010, 238 et seq., 243 et seq., 247 et seq.
1403. See Lentze, in: Stopper/Lentze (eds.), Handbuch Fußball-Recht, Berlin 2012, Ch. 2 mn. 65.
1404. For more on this, see Summerer, Sp*u*Rt 2011, 58 et seq.
1405. Lentze, in: Stopper/Lentze (eds.), Handbuch Fußball-Recht, Berlin 2012, Ch. 2 mn. 68.
1406. Cf. Summerer, Sp*u*Rt 2011, 58 et seq.
1407. Vieweg, Sp*u*Rt 1994, 73 at 74; see also SportRPr-Körber, 2012, mn. 2279 et seq.

A. Content of Sponsorship Agreements

368. The content of sponsorship agreements can vary.[1408] As this type of contract is not regulated by statute, the obligations owed by both parties should be described in detail by contract. The event agreement should in particular provide for performance obligations related to advertising and set out the entitlements of each party. It should also contain details of the sports event, the type of sponsorship (especially exclusivity), the permitted means of advertisement, remuneration, contingency insurance and the term of the contract. Similarly, arrangements should be made for any impairment of performance that could occur.[1409] Due to the various complex possible forms which the contracts may have, national and international professional sports federations often delegate the negotiation and the conclusion of contracts to marketing companies which act as the link between sports and the economy.[1410] For instance, the *Deutsche Sport-Marketing GmbH* (DSM) exploits the rights of the *Deutsche Olympischer Sport Bund*.[1411]

369. Due to the increasing economic dependence on sponsors, there is the danger that sponsors could influence activities of the association considerably, particularly in cases where the admittance to the association's administrative board is a condition upon the provision of sponsorship. For this reason, it is also important to come to an agreement on the leadership of the association, in particular, the organization, support of and care for athletes and employment policies.[1412] Difficulties may also arise if the assignment of all marketing rights is made a condition of the provision of sponsorship, as in such cases, associations lose their economic independence.[1413]

B. Main Performance Obligations

370. The main performance obligation on the sponsored party is advertising by means of the passive granting of the right of use of personal rights, of the rights to a sports activity, or to a sporting event.[1414] The performance of the sponsored party can involve granting the right to use a person or an association for merchandizing (so-called *cross-licensing*[1415]). The rationale upon which the contract is based gives rise to a general obligation to promote the sponsoring party through the sporting

1408. A good introduction to the forms of contract which may be drafted is contained in Partikel, *Formularbuch für Sportverträge*, 2nd edition 2006, 278 et seq.
1409. Vieweg, Sp*u*Rt 1994, 73 at 74; Bruhn/Mehlinger, *Rechtliche Gestaltung des Sponsoring*, Band I, München 1992, 19 et seq.
1410. PHBSportR-Fritzweiler/Pfister, part 3, mn. 76.
1411. www.dsm-olympia.de/
1412. Krause, *Grenzen und Gefahren des Sponsorings für den Sport*, in: Württembergischer Fußballverband e.V. (ed.) No. 39, Sponsoring im Sport, Gerlingen 1997, 71.
1413. Reichert, *Sponsoring und nationales Sportverbandsrecht*, in: Vieweg (ed.), Sponsoring im Sport, Stuttgart et al., 1996, 51.
1414. PHBSportR-Fritzweiler/Pfister, part 3, mn. 73 et seq.
1415. Cf. Merchandizing Part IV, Ch. 2, §3 II.

activity, by presenting the name of the sponsor – or its products – to the consumer. Permission to do so is only required insofar as the sponsored party is actually legally protected.

371. Due to its lack of artistic merit, sporting performance itself is not generally awarded copyright protection under § 2 of the *Urheberrechtsgesetz* (UrhG, Copyright Act), nor is it granted any neighbouring rights under § 73 UrhG. The *athlete* does, however, have a right to a name pursuant to § 12 BGB (German Civil Code), a right to his own voice as part of the general personal rights and a right to his own image, which arises from Article 1(1), 2(1) GG (Basic Law) and which is fleshed out in §§ 22 et seq. KUG (*Kunsturhebergesetz*; Art Copyright Act).[1416] Although many athletes may be regarded as public figures pursuant to § 23(1) no. 1 KUG, however, the athletes' consent to use their image is, nonetheless, necessary as the pictures are to be used for commercial purposes. The right to autonomous decision-making regarding the exploitation of individual aspects of one's personality and the right to one's own economic development arise out of Article 2(1), 1(1) GG. Both rights have their own particular meaning for professional athletes in relation to freedom of profession (set out in Article 12 GG), as they are just as much a part of the athlete's profession as the practice of sport itself due to the advertising opportunities which are open to celebrities.[1417]

Some examples of distinct rights of *associations and federations* are the right to a name in accordance with § 12 BGB and other rights and legally-protected interests which arise out of the personal rights. In addition, one must mention the right of ownership (e.g., of advertising spaces and objects belonging to the particular organization). In addition, the autonomy of associations and federations encompasses the power to exploit any activities of the association or federation commercially. This is generally provided for by the enactment and application of rules and regulations by the body in question.[1418]

While the event itself is not granted protection under § 81 UrhG, the *organizer* – as the sponsored party – has the right to a name in accordance with § 12 BGB and, possibly, trademark protection under § 3 MarkenG (*Markengesetz*; Trademark Act), as well as rights of ownership relating to the sporting areas and information stands.

372. By granting rights of use or, as the case may be, the right to infringe upon the above-mentioned rights, the sponsored party fulfils its contractual obligation. On the other hand, there is generally no agreement to maintain athletic performance, or to behave confidently in the media. These requirements may, however, have come to be regarded as 'bases of the transaction' within the meaning of § 313 BGB.[1419] Equally, no particular grade of success (e.g., an increase in name recognition) is owed to the sponsoring party.[1420]

1416. For a detailed discussion of the individual rights in this area, see Röhl, *Schutzrechte im Sport*, 2012, 355 et seq., 414 et seq., 430 et seq. and Part IV, Ch. 2, §3 II C.
1417. Bruhn/Mehlinger, *Rechtliche Gestaltung des Sponsoring,* Vol. II, Munich, 1999, 13 et seq.
1418. Vieweg, *Sponsoring und internationale Sportverbände*, in: Vieweg (ed.), Sponsoring im Sport, Stuttgart et al. 1996, 78.
1419. PHBSportR-Fritzweiler/Pfister, part 3, mn. 97.
1420. Cf. Part IV, Ch. 2, §2 II C.

373. The *contribution made in return by the sponsor* is the making available of funds, equipment, knowledge or organizational services.[1421]

C. Non-performance

374. Sponsoring has become increasingly dependent upon the performance level of an athlete or association, upon the image of the sport concerned ('clean sport' v. doping and suspicion of doping), the activity of the federation in relation to popular sport, and on effective and spectacular presentation on television (with consequences such as the raising of risk e.g., in skiing).[1422]

375. If the obligations, or, as the case may be, expectations of the sponsor are not fulfilled by the sponsored party, there may be legal consequences in the form of claims for damages for impossibility, malperformance, default of the debtor, or ancillary breaches of obligation in accordance with §§ 280 BGB et seq. A *breach of obligation on the part of the sponsored party* can in particular be proven if the sponsored party does not participate in advertising or in competitions. There is no entitlement to damages, however, if the sponsored party is not responsible for his non-participation.[1423] Some possible examples might be that the competition did not take place or that the sponsored party could not participate due to injuries. Damages may, however, be awarded if the athlete was made subject to a ban due to doping offences.

Damages for non-performance or, as the case may be, defects in performance may also be awarded if the sponsored party is found to be in breach of prohibitions or constraints on advertising if these were permissible. On the other hand, there is no obligation to assume particular risks in order to attract media attention, e.g., if a downhill skiing race takes place in spite of bad weather conditions for the sole reason that the particular time will result in a larger audience for advertisements.[1424]

Furthermore, there is generally no contractual obligation upon the sponsored party to maintain sporting prowess for the sponsor's benefit. This, however, is generally understood by both parties to be an implied term of the transaction.[1425] In the event that the athlete (or team, as the case may be) experiences a reduction in sporting prowess (e.g., relegation), the contract will generally be amended or, in exceptional circumstances, recission of contract in accordance with § 313 BGB on grounds of frustration of contract or a termination for cause in accordance with § 314 BGB. Cases in which the sponsored party's unusual private life or awkward public appearances lead to negative headlines in the media are to be handled in the same way.

1421. Scholz, *Was ist Sponsoring?* in: Württembergischer Fußballverband e. V. (ed.), Sponsoring im Sport, Gerlingen 1997, 6.
1422. Vieweg, Sp*u*Rt 1994, 6 at 7.
1423. PHBSportR-Fritzweiler/Pfister, part 3, mn. 125.
1424. Vieweg, Sp*u*Rt 1994, 73 at 76.
1425. PHBSportR-Fritzweiler/Pfister, part 3, mn. 97.

In the case of serious breaches of contract, the sponsor may also be entitled to exercise a termination for cause pursuant to section § 314 BGB, e.g. in the event of doping offences.[1426] The matter of whether a 'cause' or ground for termination exists should be considered by carrying out a comprehensive weighing-up of interests.[1427]

376. A *breach of duty by a sponsor* can take the form of non-payment of the contractually stipulated sum of money which it owes to the sponsored party. The sponsoring company must justify any changes in its marketing strategy. If the sponsor's name becomes involved in a public discussion which could be damaging to the athlete, or which could interfere with his image or market potential, the sponsored party is entitled to terminate the sponsorship contract for cause.[1428]

377. Furthermore, it remains open to the parties to stipulate legal consequences arising out of non-performance in the case of injuries, illness or a decrease in sporting prowess. Limitations of liability, declarations of release or contractual penalties may also be agreed upon by contract. Regulations as to the refund of any benefits in the event of defects in performance should also be included.[1429]

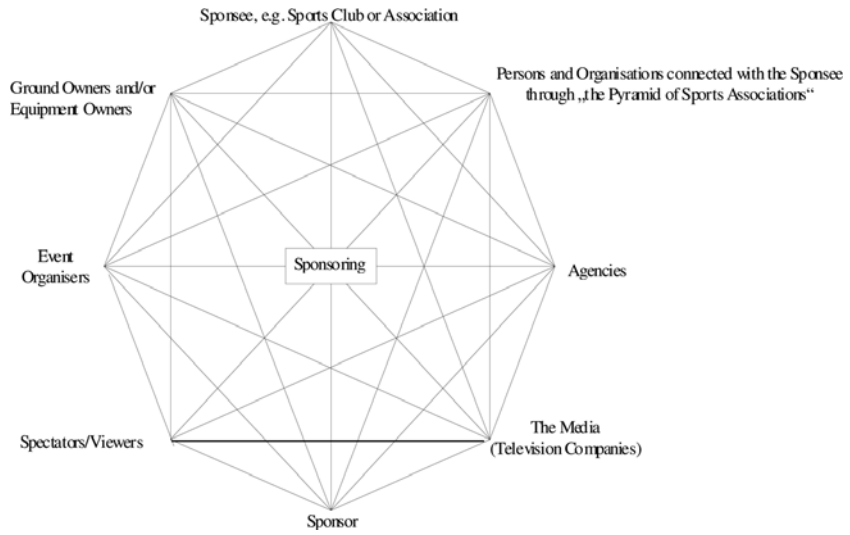
Further typical agreements relate to the mutual obligation to maintain confidentiality and to inform the contractual partner of any material circumstances which are of relevance to the contract, as well as the limitation upon the sponsored party to be associated only with the sponsor.[1430]

378. The matter of the extent to which athletes (and associations) are obliged to remain loyal to the sponsor is also an interesting question. A mutual duty to ensure good conduct and loyalty does exist.[1431] One example of this is the argument concerning swimsuits between German swimmers and the German Swimming Federation (DSV) during the 25 m European Championships of 2008. Several athletes were extremely critical of the swimsuits provided by the team outfitter, Adidas, maintaining that the suits granted no competitive advantage in competition, whereupon Adidas terminated its contract to outfit the German team with DSV for cause.[1432]

1426. Cf. Humberg, JR 2005, 271 et seq.; Weiand, Sp*u*Rt 1997, 90 at 92. On the possibility of stipulating contractual penalties in cases of doping offences, cf. Nesemann, NJW 2007, 2083 et seq.
1427. Lentze, in: Stopper/Lentze (eds.), Handbuch Fußball-Recht, Berlin 2012, Ch. 2 mn. 39. Sponsors often try to make the sponsored sports association take responsibility for the behaviour of its fans. Thus, they argue in favour of contractual penalties or in favour of the possibility to terminate the sponsorship agreement if fans riot, claiming that any reports in the media which are critical of the association are also harmful for their own image.
1428. Cf. Herb, *Rechtsfragen des Sport-Sponsorings aus der Sicht eines Unternehmens – unter besonderer Berücksichtigung des Sportmarketing-Konzeptes der Daimler-Benz AG* in: Württembergischer Fußballverband e. V. (ed.) No. 40, Sport, Kommerz und Wettbewerb, Gerlingen 1998, 97.
1429. Herb, *Rechtsfragen des Sport-Sponsorings aus der Sicht eines Unternehmens – unter besonderer Berücksichtigung des Sportmarketing-Konzeptes der Daimler-Benz AG* in: Württembergischer Fußballverband e. V. (ed.) No. 40, Sport, Kommerz und Wettbewerb, Gerlingen 1998, 95 at 97.
1430. Weiand, Sp*u*Rt 1997, 90 at 92.
1431. Cf. Weiand, Sp*u*Rt 1997, 90 at 92.
1432. Cf. FAZ, Dec. 16, 2008, 32.

III. Conflicts of Interest

379. In spite of the common interest of the parties to the sponsorship contract in the success of a sponsored sporting event and in a high level of sporting prowess being displayed, there is potential for an abundance of conflicts of interest between the sponsors, the sponsored parties and those parties who are contractually or administratively connected to them, the owners of sports facilities and sports equipment, event organizers, spectators, agents and the media.[1433] The relationship between the sponsored athletes (or, as the case may be, association) and the federations to which they must answer has particular potential for conflict. The multitude of situations giving rise to conflict is demonstrated by the following diagram:



A. Sponsored Party – Federation

380. Part of the body of rules and regulations of sports federations concerns the placing of *limitations* upon the athletes in relation to *marketing themselves*.[1434] The reason for this is usually to be found in contracts between the federations and a general outfitter, the clothing and equipment of which must be used by the representatives.[1435] While the federations compete with other sporting federations in

1433. See also Vieweg, *Faszination Sportrecht*, 35 et seq., accessible at http://irut.de/Forschung/Veroeffentlichungen/OnlineVersionFaszinationSportrecht/FaszinationSportrecht.pdf
1434. Cf. e.g., point 4.2.1. DOSB Sample Athlete Agreement (*Muster-Athletenvereinbarung*), by which the athlete agrees to wear the official clothing of the federation while appearing for the national team and further agrees to refrain from, or to limit, his wearing of items from or logos of his own sponsors.
1435. PHBSportR-Summerer, part 2, mn. 199.

attracting and winning sponsors, many athletes engage in competing marketing concepts.[1436] In doing so, they earn a considerable amount of income from sponsorship. Conflict arises mainly in relation to the prohibitions imposed by the regulations of sports federations or by contract in the event of individual sponsorship contracts, a share in the profits generated from the sponsorship contract and the obligations upon athletes to cooperate in the fulfilment of the contract (obligation to participate, obligation to advertise, interviews, signing, social events).[1437]

381. The resolution of such conflicts occurs in the context of the review of federation regulations as regards the *reasonableness of their content*.[1438] They are reviewed under the auspice of the principle of good faith pursuant to § 242 BGB, which requires a comprehensive weighing-up of interests. The starting point is the ability of the federations to invoke the autonomy of federations as laid out in Article 9(1) GG. The interest of sports federations in sole marketing rights could be based particularly on the fact that they, themselves, may not infringe upon the regulations of an international federation to which they are subordinate, that the highest possible profits are only to be attained if the federation has exclusive rights, that the federations need funds to finance the development of young players or training facilities, or that they do not want to be economically dependent on the changing levels of success of individual athletes.

As regards the athletes, it must be noted that, in accordance with freedom of profession pursuant to Article 12 GG, they themselves can decide matters relating to the commercial exploitation of their activities, and that they have an interest in being allowed to participate in competitions if they refuse to actively participate in advertising activities of the federation.[1439] The right to do so arises from the personal rights of the athlete pursuant to Articles 1(1), 2(1) GG. As both parties contribute equally to the marketing success of the sporting event, it can be concluded that the federation and the athlete should also participate equally in its financial exploitation and should, in general, be free to engage in any reasonable form of advertisement for sporting events.[1440]

382. The federation can generally make certain limitations upon the athlete's rights a condition of that athlete's admittance as a participant to competitions. In return, however, the athlete must receive financial reward. If the federation permits advertising by athletes, the federation must be entitled to limit any advertising measures to a particular amount, insofar as this is reasonable in relation to the security and facility of the practice of sport and equal treatment of individual advertisers is assured. If the federation forbids individual advertising by the athletes, the athletes

1436. Cherkeh, Sp*u*Rt 2004, 89 at 90.
1437. Cherkeh, Sp*u*Rt 2004, 89 at 91.
1438. See Part I, Ch. 3, §5.
1439. Vieweg, Sp*u*Rt 1994, 73 at 76.
1440. Vieweg, *Innehabung und Durchsetzung sponsoringrelevanter Rechte – Das Dilemma der Athleten im kommerzialisierten Sport*, in: Württembergischer Fußballverband e.V. (ed.) No. 39, Sponsoring im Sport, Gerlingen 1997, 36.

must be compensated or granted a share in the profits generated by the federation by means of advertising so that the athlete's performance is not exploited.[1441]

The situation also becomes critical where, for instance, appointment to the national team is conditional upon the athlete's concluding a so-called athlete or selection contract, which only permits clothing provided by the federation or outfitter, or which obliges the athlete to abide by the terms of all sponsorship contracts entered into by the federation. The matter of whether a general prohibition on individual advertising is permissible in this context, and of what amounts to a reasonable share of the federation's advertising profits is hotly debated.[1442] In such cases, it should also be taken into consideration whether or not an offence under competition law has been committed.[1443]

383. Advertising obligations, prohibitions and limitations are generally not permissible in the athlete's private life. Here, the general personal rights of the athlete hold more sway, unless the advertising is for a competing company[1444] or if the advertisement would damage the federation's image.[1445] In the case of competitions organized by other federations, the athletes may not be made subject to any advertising limitations,[1446] as the federation cannot claim a personal interest in such events. It would also be an impermissible limitation if athletes were allowed to participate only in events organized by the federation's sponsor.

384. Limitations upon federation regulations which regulate sponsorship can also in addition arise from *antitrust law*.[1447] The definition of a company under antitrust law applies to every business transaction and also applies to sporting federations if professional competitions are organized in the traditional sense.[1448] Federations which organize professional sports are also regarded as companies. In the context of major sports events for their sport, federations dominate the market due to the '*Ein-Platz-Prinzip*'.

Thus, the limitation of advertising space on jerseys stipulated in federation rules and regulations during sporting events could be regarded as a cartel pursuant to § 1 GWB (Act against Restraints on Competition) or Article 101(1) Treaty on the Functioning of the European Union, as these limitations constrain competition for sponsors between athletes, event organizers and the federation.[1449] The size, length and

1441. Hoffmann, Sp*u*Rt 1996, 73 at 75.
1442. Cherkeh, Sp*u*Rt 2004, 89 at 91.
1443. See Lentze, in: Stopper/Lentze (eds.), Handbuch Fußball-Recht, Berlin 2012, Ch. 2 mn. 10.
1444. Reichert, *Sponsoring und nationales Sportverbandsrecht*, in: Vieweg (ed.), Sponsoring im Sport, Stuttgart et al. 1996, 50.
1445. Lentze, in: Stopper/Lentze (eds.), Handbuch Fußball-Recht, Berlin 2012, Ch. 2 mn. 40.
1446. PHBSportR-Summerer, part 2, mn. 204 et seq.; Reichert, *Sponsoring und nationales Sportverbandsrecht*, in: Vieweg (ed.), Sponsoring im Sport, Stuttgart et al. 1996, 50.
1447. Bergmann provides a good overview in Sp*u*Rt 2009, 102 et seq.; see also Part IV, Ch. 2, §1 II D 1.
1448. BGHZ 101, 100 at 102; for a thorough discussion of the questions concerning sport sponsoring Heermann, WRP 2009, 285 et seq.
1449. Hannamann/Vieweg, *Soziale und wirtschaftliche Machtpositionen im Sport*, in: Württembergischer Fußballverband e.V. (ed.) No. 40, Sport, Kommerz und Wettbewerb, Gerlingen 1998, 57.

'reach' of the advertisement on the advertising space are actually material parameters of competition for potential sponsored parties. Insofar the aims followed are not in breach of antitrust law, such regulations are not covered by the prohibition on cartels due to the theory of immanence (*Immanenztheorie)*.[1450] To this extent, the federations are granted a certain margin of appreciation which arises from the autonomy of federations.

If it is a condition of qualification to participate in a competition that no advertising contracts are entered into with third parties, this can constitute an infringement of § 1 GWB, Article 101(1) Treaty on the Functioning of the European Union.[1451] Vertical restrictions on competition in bilateral contracts are also covered by § 1 GWB. This stipulates that, within the context of permission to participate in a sporting event, there must be an economically relevant performance. This is the case if admittance to the competition is subject to payment, e.g., if a considerable admission fee must be paid to the organizer or federation.[1452]

385. In cases where regulations of sports federations prohibit or limit advertising, § 20 GWB may apply, to the effect that these regulations may be declared null and void for reasons of discrimination or unreasonable hindrance. Thus, federations may not hinder clubs unfairly or without just reason.[1453] This obligation, however, arises out of the principle of equal treatment under the law of associations in any case.

386. In this context, the provisions of the UWG, and thus the *principles of fair competition*, could also become relevant. Inducing the sponsored party to breach existing obligations to third parties also counts as an instance of unfair competition within the meaning of § 3 UWG. The provision stipulates, however, that the federation must be aware of the sponsorship obligations of the sponsored party which are already in existence.

B. Sports Association – Federation

387. The conflicts mentioned under I. also emerge in the relationship between sport associations and the sports federations to which they are subordinate.

Consequently, it was held by an arbitration tribunal in the so-called Krombacher Bierstreit judgment that neither the obligation to promote the federation's objectives nor the duty of loyalty under the law of associations gives rise to an obligation to assent to a general sponsorship contract if the federation in question, in this case the German Ice Hockey Federation, is capable of continuing its economic existence in the absence of such a contract. Furthermore, the obligation of loyalty towards

1450. See above, Part IV, Ch. 2, §1 II D 1 a.

1451. For a general discussion of the problems related to exclusive commitments, see Heermann, CaS 2009, 226 et seq.

1452. Hannaman/Vieweg, *Soziale und wirtschaftliche Machtpositionen im Sport*, in: Württembergischer Fußballverband e.V. (ed.) No. 40, Sport, Kommerz und Wettbewerb, Gerlingen 1998, 57 at 62.

1453. PHBSportR-Summerer, part 2, mn. 204; Reichert, *Sponsoring und nationales Sportverbandsrecht*, in: Vieweg (ed.), Sponsoring im Sport, Stuttgart et al. 1996, 39.

other associations does not permit an infringement of the self-governance of the associations.[1454]

388. Consequently, any obligation placed upon an association requires the express consent of the association, or as the case may be, a commitment by the association in its rules and regulations. As regards the *content control* of the rules and regulations, special regard must be had to the constitutionally-protected activity of the association pursuant to Article 9(1) GG.[1455] In this way, the autonomy of the association and the federation are on a par with each other. The prohibition upon using elements of the name of the sponsor in the name of the club may, therefore, be inadmissible as choice of name is part of the constitutionally-protected freedom of activity of the association pursuant to Article 9(1) GG.[1456] The same holds for a general prohibition on advertising or merchandizing.[1457]

C. Other Conflicts of Interests

389. The sponsored party and the *proprietor of sports facilities* can also come into conflict with each other in connection with the authorization of commercial references to the sponsor and a potential investment by the owner, e.g., increased rent for the facilities. As regards the relationship between the organizer and the sponsored party, conflicts may arise as a result of the sponsored party and the organizer having entered into competing marketing contracts. In this case, the question arises as to whether the organizer is permitted, as a condition on participation, to prohibit the athlete from displaying his own sponsorship, or to oblige the athlete to act as an advertising medium. In these cases, too, the question of whether this is permissible requires a thorough weighing-up of interests.

390. Further conflicts can occur between sports federations and *outfitters*. Limits upon the federation rules and regulations which govern sponsoring may also be set under *antitrust law*. Abuse of a dominant market position could gain relevance in connection with sponsoring under § 19 GWB or Article 102 TFEU, as sport federations possess a monopolistic position as regards their respective sports as a result of the *Ein-Platz-Prinzip*.[1458] The establishment of so-called outfitter pools, in particular where only those specific producers approved by the federation are admitted to an event, must be critically examined. Technical restrictions imposed for reasons of game and safety techniques, or for compelling reasons regarding the organization of training are not objectionable as they serve to improve the safety and equality of opportunity for the athletes.[1459] On the other hand, it is problematic if only a

1454. Court of Arbitration for the German Ice Hockey Federation, Sp*u*Rt 1994, 258 at 262 et seq.
1455. BVerfGE 30, 227 at 241 et seq.
1456. BVerfGE 30, 227 at 241 et seq.
1457. Reichert, *Sponsoring und nationales Sportverbandsrecht*, in: Vieweg (ed.), Sponsoring im Sport, Stuttgart et al. 1996, 31, 38.
1458. BGHZ 101, 100 at 102.
1459. Schürnbrand, ZWeR 2005, 396 at 412.

few outfitters or only one specific outfitter is admitted despite the fact that no technical differences exist between its products and those of the excluded producers.[1460] The higher the admission fee, the more limited the allocation of places, and the longer the period of time for which the restriction is valid, the more difficult it will be to gain entry to the market, and the faster the threshold to the abuse of market power will be exceeded. The choice of one particular producer is only permissible if it is the only way to guarantee that all participating athletes will have equal opportunities. If the association confines itself to an admission procedure by which it verifies the conformity of the products to its regulations, this procedure must be conducted in a manner which is free of discrimination and accessible to all outfitters using appropriate selection criteria.[1461]

391. As regards *the media*, especially television companies and institutions, disputes can arise as to whether a certain event is to be broadcasted and the manner in which the broadcast should take place – the most common points of contention usually concern the permissibility of advertisements or references to sponsors and the time and duration of the broadcast. Athletes have a valid interest in competitions being held at times which are conducive to producing optimum performances and in receiving authorization to display advertisements on their bodies. On the other hand, competition times which are aimed at achieving maximum television audiences could have a positive effect on the athletes' advertisement contracts. As regards the influence of the Länder Broadcasting Treaty on sponsoring in media, see above Part IV, Chapter 2, §2 I.

392. In addition, conflicts can occur *between sponsors*; in particular between the sponsor of the event and the sponsor of the television channel, especially in the case of major sporting events where separate, competing companies sponsor the event and the television channel which broadcasts the sporting event. For this reason, all forms of communication specific to sporting events are generally 'bundled' together into one single concept if this is at all possible.[1462]

IV. The Enforcement of Rights Relevant to Sponsorship

393. Reasons for the filing of claims by athletes can, on the one hand, relate to the protection against infringements of their personal rights and, on the other, to obtaining a share in profits generated by sponsorship. Injunctive relief and claims for damages (arising out of §§ 280(1), 823 BGB in connection with § 1004 BGB, § 33 GWB, or Articles 101, 102 TFEU in connection with §§ 823(2), 1004 BGB analogue and §§ 8, 9 UWG) can be sought in cases where athletes believe that their personal rights have been encroached upon. If admittance to competition is made

1460. Hannaman/Vieweg, *Soziale und wirtschaftliche Machtpositionen im Sport*, in: Württembergischer Fußballverband e.V. (ed.) No. 40, Sport, Kommerz und Wettbewerb, Gerlingen 1998, 58.
1461. Schürnbrand, ZWeR 2005, 396 at 412.
1462. Klooz, *Sportsponsoring – ein etabliertes Instrument der Unternehmenskommunikation*, in: Vieweg (ed.), Sponsoring im Sport, Stuttgart et al. 1996, 21 et seq.

conditional upon certain obligations or limitations related to advertising, however, the enforcement of the athlete's individual rights will be difficult in light of time pressure, psychological strain prior to competition and the national or international power of the relevant federation.

394. As regards obtaining a share in profits generated from sponsorship, § 743 BGB or – under the law of unjust enrichment – §§ 812(1) 1 2nd alternative, 818(2) BGB can provide bases for claims, as the sports event is viewed as a co-operative effort, the realization of which is contributed to by all stakeholders involved. Consequently, all stakeholders are entitled to a corresponding share in the revenue generated by the event's commercial exploitation (i.e., sponsorship).[1463] The law provides for an action by stages under § 254 Code of Civil Procedure, during which the athlete, at the first stage, can demand information as to any financial arrangements between the sponsor and the sponsored party and, at the second, can file a claim demanding a share in all income generated by sponsorship, or take legal issue with certain monetary conditions on admission to competition.[1464]

In the event that measures taken before the competition are unsuccessful, the athlete is free to claim damages subsequent to the competition based on the abovementioned provisions.

V. Naming Rights

395. The number of cases in which so-called naming rights are awarded to a sponsor has increased greatly in recent years, in particular in relation to football stadia and large sporting arenas or halls.[1465] There is a long tradition of commercial names for sporting facilities in the US; in Germany, however, this is a comparatively new phenomenon. In addition to the immense profits which can be generated from the awarding of naming rights by the operators and owners of sporting facilities, the renaming of stadia also involves risks, such as, for example, the resistance by the fans of established clubs.[1466]

396. In Germany, names are protected under section 12 BGB and the naming rights of sporting facilities are, in principle, held by the owner, i.e., the city or the sporting club.[1467] The matter of the legal quality of contracts governing naming rights is controversial. As it does not concern the use of the previous name by the sponsor, but rather the renaming of the sports facility, naming rights contracts are

1463. Vieweg, *Sponsoring und internationale Sportverbände*, in: id. (ed.), Sponsoring im Sport, Stuttgart et al. 1996, 87.
1464. Vieweg, Sp*u*Rt 1994, 73 at 76.
1465. For an instructive account, see Wittneben, Sp*u*Rt 2011, 151; Wittneben, GRUR 2006, 814 et seq.; Humberg, JR 2005, 89 et seq.; Klingmüller, Sp*u*Rt 2002, 59 et seq.
1466. Wittneben, GRUR 2006, 814 at 815.
1467. See also Klingmüller, Sp*u*Rt 2002, 59 at 60.

partly classified as the sale of rights in accordance with §§ 433, 453 BGB.[1468] Usually, however, the parties involved wish to transfer or, as the case may be, acquire naming rights for a limited period of time and a sale of rights is not generally subject to a limitation period. For this reason, there is much to be said for classifying the naming rights contract as a lease contract (*Pachtvertrag*).

This means that the owner of the name allows the sponsor to choose the name of the sporting facility itself, as well as to take advantage of any commercial benefits of the marketing.

In addition to the scope of the broadcasting and the sponsor's specific rights, a name rights contract typically includes competition clauses, as it is usually in the sponsor's interest to prevent the owner of the name from providing advertising space to its competitors.[1469]

In addition to the renaming of sporting facilities, name sponsorship is also becoming important in other areas; for instance, the naming of a league.[1470]

VI. Ambush Marketing

397. Ambush marketing describes any type of behaviour by a company which is not authorized by a sports event organizer, and which is aimed at making the company appear to be associated with a sporting event, without making any contribution to it in order to benefit from it.[1471] This kind of associative advertising often occurs in combination with Olympic Games or football world championships as advertising rights for these events are especially expensive.[1472] Association may arise, not only with the event itself, but also with the official sponsors.[1473]

As the aim of ambush marketing is to harm regular sponsors, it is usually necessary to take legal action.

1468. Klingmüller also comes to the same conclusion in Sp*u*Rt 2002, 59 at 60; Wittneben, GRUR 2006, 814 at 816; Humberg, JR 2005, 89 at 91.
1469. See also Wittneben, GRUR 2006, 814 at 817.
1470. An example for this is the Toyota's name sponsorship of the handball Bundesliga, which has been officially known as TOYOTA Handball-Bundesliga since the 2007/08 season, see FAZ of Aug. 17, 2007. By contrast, the German football Bundesliga has not yet found a name sponsor. Deutsche Telekom AG purchased an option to the naming rights starting in the season of 2007/08 but allowed it to lapse unused, SZ Feb. 16, 2007, 15 and 28.
1471. Heermann, CaS 2010, 134; more approaches to definition et al. Körber/Mann, GRUR 2008, 737 et seq.; Müller, Sp*u*Rt 2006, 101 at 101 et seq.; Berberich, Sp*u*Rt 2006, 181; Netzle, Sp*u*Rt 1996, 86; for an extensive account of ambush marketing Melwitz, *Der Schutz von Sportgroßveranstaltungen gegen Ambush Marketing*, Tübingen 2008; Fehrmann, *Der Schutz exklusiver Sponsoringrechte bei Sportgroßveranstaltungen gegen Ambush Marketing*, Düsseldorf 2008. An overview of the literature dealing with ambush marketing is provided by Thaler, CaS 2008, 81 et seq.
1472. Netzle, Sp*u*Rt 1996, 86.
1473. For more, see Müller, Sp*u*Rt 2006, 101 at 103. During the 1994 Olympic Games in Lillehammer, for example, the credit card company, Visa, was the official sponsor. In the lead-up to the games, its competitor, American Express ran an advertising campaign which had the slogan: 'If you're travelling to Norway this winter, you'll need a passport but you don't need a visa.', see Schwarzer, CaS 2010, 323 at 325.

398. The use of trademarked features, or of elements which could be mistaken for trademarked features, in the course of ambush marketing is dealt with in Germany under trademark law, especially by reference to §§ 13, 14 MarkenG. Insofar as claims can be based on an intention to mislead that section of the public at whom the advertisement is directed, recourse may be had to competition law provisions (§§ 3, 4, 5 UWG) which relate to anti-competitive restraints and exploitation of professional performance provided that such intentions do not fall within the scope of trademark law.[1474]

Prior to the 2010 Football World Cup in South Africa, the Federal Court of Justice held that claims for cancellation which had been asserted by FIFA against the confectionary company, Ferrero, which sold its confectionary containing pictures of players from the various national teams, referring to 'SOUTH AFRICA 2010', were invalid under both trademark and competition law, and thus strengthened the possibility of associative advertising.[1475] It rejected the assertion that there was a risk that the trademark in dispute, 'SOUTH AFRICA 2010', would be confused with the registered trademark 'South Africa 2010', as neither was very distinctive and, therefore, the scope of protection which should be awarded to them was narrow.[1476] Moreover, there was no intent to mislead within the meaning of § 5(1), (2) no. 4 UWG, as any reasonably informed consumer would differentiate between the advertising of a sponsor and other commercial marketing during the Football World Cup.[1477]

VII. Hospitality

399. Hospitality measures can be important sponsorship instruments.[1478] These are invitations for sporting events issued by sponsors to political elected representatives and affiliates. Usually, sponsors cover travel and accommodation costs and provide a full entertainment programme. Such invitations can involve immense risks. It is, for instance, a contentious matter as to whether the company is permitted to classify their expenditure on the hospitality measures as tax-reducing business expenditure, and as to whether those invited are required to declare the invitation – or rather, its value – as a monetary benefit when filing their tax returns.[1479] On the other hand, problems may arise in the area of criminal law in relation to bribery offences: sponsors who invite public officials to sporting events may be liable to prosecution pursuant to §§ 331 et seq. StGB. Even if private business parties are invited, culpability pursuant to § 229 StGB may be an issue (passive and active bribery). The line between bribery and admissible behaviour in an effort to maintain contacts is not clear, but rather, in the majority of cases, quite

1474. See BGH, I ZR 183/07, mn. 40 = CaS 2010, 127 at 131.
1475. For a more extensive treatment of trademark protection, see Part IV §3 III A 1 c.
1476. BGH, I ZR 183/07, mn. 27 = CaS 2010, 127 at 129.
1477. BGH, I ZR 183/07, mn. 45 = CaS 2010, 127 at 131; critical to this Schwarzer, CaS 2010, 323 at 324 et seq.
1478. Cf. Staschik, Sp*u*Rt 2010, 187 et seq.; id., *Rechtliche Grenzen der Kontaktpflege im Sport*, in: Vieweg (ed.), Akzente des Sportrechts, Berlin 2012, 123 et seq.; Oediger, SPONSORs 3/2009, 34.
1479. Cf. Part I, Ch. 2, §4 and Alvermann, Sp*u*Rt 2010, 146 et seq.

blurry. In its judgment of 14 October 2008, the BGH took a stance on this difficulty for the first time and set guidelines which must be adhered to when putting hospitality measures into action.[1480]

§3. MERCHANDIZING

I. Definition, Function, Commercial Importance

400. The *definition* of merchandizing encompasses any measures involved in the marketing of events or any occurrences which are ancillary to the primary exploitation of the product, and which arise outside of the actual sphere of activity in question. These measures are taken by the manufacturer in order to increase the sales of its goods.[1481] In short, merchandizing can be defined as the marketing, under license, names and motifs in particular.[1482] In the field of sports, this means that names, pictures and logos can be added to products which actually have very little to do with sport (e.g., t-shirts, bed linen, keyrings).[1483]

401. The *function* of merchandizing is to make a connection between everyday items and sport in order to capitalize on and generate profit from the public's fascination with sport. The manufacturer of the product hopes that the positive image transfer will result in an increase in sales of his product. For this reason, the popularity of a sporting event or of a sporting personality can be used, not only for sponsorship, but also in order to generate profits for other products.[1484]

402. The main *parties involved* in merchandizing are the licensor, as owner of the legally-protected interest (in the area of sports, this can be a sports personality – usually an athlete or a coach – or an event organizer), and the licensee (i.e., the user of the merchandizing rights).

403. The *commercial importance* of merchandizing is immense and is still growing. In 2010, German football fans spent EUR 129.7 million on fan items and merchandize.[1485] As licenses are quite expensive, however, the parties concerned often try to gain the benefits of merchandizing without concluding a corresponding contract.[1486] In this context, the question often arises as to whether the parties concerned are entitled to lay claim to trademark rights, and if so, to which ones.

1480. Cf. Staschik, Sp*u*Rt 2010, 187 et seq.; Hamacher/Robak, DB 2008, 2747 et seq.; Paster/Sättele, NStZ 2008, 366 et seq.
1481. Röhl, *Schutzrechte im Sport*, 2012, 354; Tännler/Haug, CaS 2007, 138 at 142; Ruijsenaars, GRUR-Int. 1994, 309 at 311 et seq.
1482. Cf. Schertz, ZUM 2003, 631 at 631 et seq., for further approaches to defining merchandising.
1483. Röhl, *Schutzrechte im Sport*, 2012, 354.
1484. Tännler/Haug, CaS 2007, 138 at 142.
1485. European Football Merchandising Report of Sport + Markt and PR Marketing, http://sportundmarkt.de, quoted after Stopper/Lentze, Handbuch Fußball-Recht, Berlin 2012, 186.
1486. Röhl, *Schutzrechte im Sport*, 2012, 354 et seq.

II. Merchandizing Contracts

This account will provide a description of the various types of merchandizing contracts (A.) as well as the content of these contracts (B.); subsequently, the possible types of trademark will be outlined (C.).

A. Types of Contract

404. The merchandizing contract[1487] contains elements of various types of contract, including contracts concerning trademark and copyright, and sometimes even licensing agreements which concern the right of personality (*Persönlichkeitsrechtslizenzvertrag*), and which entail the granting of a licence. In Germany, there are *three typical forms of merchandizing contract* in existence in practice.[1488]

405. In the *standard merchandizing licensing agreement*, the rights owner, as licensee, transfers the rights of use to the merchandizing object to the licensor for a specific use. Two subtypes exist: A *manufacturer's contract* (*Herstellervertrag*) can be taken to exist if a product licence for use of the object is granted. Conversely, an *advertising or sales contract* (*Werbe- oder Händlervertrag*) is understood to exist if the use of the object is set out in advertising material, such as advertising brochures. In general, the standard merchandizing licensing agreement is a time-limited transferral of rights in return for a recurring fee. For this reason, the provisions of the law of tenancy are applicable if doubts arise. As the holder of the rights usually concludes contracts with multiple licensees, the provisions of the law relating to general terms and conditions (§§ 305 BGB et seq.) also apply.[1489]

406. The *merchandizing agency agreement*, on the other hand, is concluded between the holder of the rights and the merchandizing agency. The licensor transfers the exclusive use of the merchandizing rights to an agency and grants its express consent for the rights to be transferred to third-party licensees (holders of single licenses) within the context of a standard merchandizing license agreement.[1490] In these brokerage agreements, regard may be had to the provisions relating to brokerage and sales representation agreements for purposes of interpretation.[1491]

1487. For more on the merchandizing contract, see Wandtke/Bullinger-Wandtke/Grunert, *Urheberrecht*, 3rd edition 2009, Vor §§ 31 ff. mn. 89 et seq.; for a comprehensive account, see Pfaff/Osterrieth-Büchner, *Lizenzverträge*, 3rd edition, Munich 2010, mn. 1138 et seq.; for the foundations of merchandizing, see Schertz, *Merchandising*, Munich 1997.

1488. See Loewenheim-Schertz, *Handbuch des Urheberrechts*, 2nd edition, Munich 2010, § 79 mn. 28; Schertz, ZUM 2003, 631 at 639.

1489. See Pfaff/Osterrieth-Büchner, *Lizenzverträge* 3rd edition, Munich 2010, mn. 1169; Loewenheim-Schertz, *Handbuch des Urheberrechts*, 2nd edition, Munich 2010, § 79 mn. 29; Schertz, ZUM 2003, 631 at 639.

1490. Cf. BGH, ZUM 1987, 460 – *Nena*.

1491. Loewenheim-Schertz, *Handbuch des Urheberrechts*, 2nd edition, Munich 2010, § 79 mn. 30; Schertz, ZUM 2003, 631 at 639 et seq.

407. Furthermore, *merchandizing provisions may also be found within other types of exploitation contract*. In the field of art especially, it has become common to transfer merchandizing rights due to the enormous financial potential.[1492] It is also possible to include such provisions in a sponsorship contract (so-called cross licensing).[1493] However, in cases where legal positions protected by copyright or neighbouring rights are concerned, and where no express provision has been put in place, the merchandizing rights remain under the control of the holder of the rights in accordance with the *Zweckuebertragungsregel* (the transfer of purpose rule) contained in § 31(5) UrhG (Copyright Act), which states that the scope of the rights should be determined in accordance with the purpose which was envisaged when the rights were granted. The same applies to the transfer of rights of personality.[1494]

B. Subject Matter of Merchandizing Contracts

408. As is also the case with sponsorship contracts, it also makes sense to stipulate the type and purpose of the allocation of rights as clearly as possible when concluding merchandizing contracts which are not in written form. The parties to the contract and the subject of the contract should be recorded. In doing so, the merchandizing object should be referred to as specifically as possible, rather than merely providing a general description (e.g., sports article).[1495] In order to prevent disputes concerning the rights of the licensor, ownership of the rights is often acknowledged by the licensee, or, alternatively, a corresponding exclusion of liability clause is inserted into the contract. Allocation of rights can occur by the granting of usage rights, or by a transfer (in the case of non-transferrable rights, by granting permission under the law of obligations).[1496]

409. The licensee can put regulations in place which govern the sale of the items which are the subject of the contract. In addition, the licensee may include provisions which allow him the possibility to exercise quality control, or to reserve approval.[1497] Furthermore, it is often agreed that the licensor will be named as such on the article, or in commercials. To the extent that this labelling might lead to liability being incurred on the part of the manufacturer (pursuant to § 4(1) sentence 2 ProdHaftG (Product Liability Act)), an exclusion of liability or an exemption from liability for the licensor is usually agreed upon. In return, the value of the licensee's interest or an advance payment is often designated as the amount

1492. Cf. Loewenheim-Schertz, *Handbuch des Urheberrechts*, 2nd edition, Munich 2010, § 79 mn. 31; Schertz, ZUM 2003, 631 at 640.
1493. See *supra* Part IV, Ch. 2, §2 II.
1494. Cf. Schricker/Loewenheim-Schricker/Loewenheim, *Urheberrecht*, 4th edition, Munich 2010, § 31 mn. 64 et seq.; Loewenheim-Schertz, *Handbuch des Urheberrechts*, 2nd edition, Munich 2010, § 79 mn. 32; Schertz, ZUM 2003, 631 at 640.
1495. Cf. Pfaff/Osterrieth-Büchner, *Lizenzverträge*, 3rd edition, Munich 2010, mn. 1159 et seq.; Loewenheim-Schertz, *Handbuch des Urheberrechts*, 2nd edition, Munich 2010, § 79 mn. 35; Schertz, ZUM 2003, 631 at 640 et seq.
1496. Loewenheim-Schertz, *Handbuch des Urheberrechts*, 2nd edition, Munich 2010, § 79 mn. 38 et seq.; Schertz, *Merchandising*, Munich 1997, mn. 395.
1497. See also Ehlgen, ZUM-Sonderheft 1996, 1008 at 1012, 1014.

of the guarantee.[1498] In addition, the licensee can be allocated rights of inspection of books and accounts, so that he may check whether he is entitled to assert a claim.[1499]

In stipulating the contractual term, regard must be had to the fact that marketing success may not occur for quite some time after the contract has been concluded. However, in order to avoid being bound for a lengthy period of time by a fruitless contract, provisions which apply to impairments of performance (particularly to summary terminations of contract) should be included.[1500]

C. Trademark Rights of Athletes and Coaches

410. As is the case regarding their own individual personal traits, athletes and coaches are entitled to trademark their image, name or voice. The marketing of these by third parties is allowed without first obtaining consent, insofar as no legal provisions to the contrary exist.

It must be noted, however, that the restrictions placed upon athletes as regards 'self-marketing' are much stricter in German association sport than they are in, for example, the USA.[1501] §§ 2 and 3 of the DFB's standard contract, for instance, stipulates that every player must relinquish to his club his entitlement to exploit his personality rights, to the extent that this concerns the contractual relationship which exists between the club and player.[1502]

1. Image

a. Protection under the Kunsturheberrechtsgesetz (Art Copyright Act)

411. If the image concerned is of a sporting personality, protection may exist under the *Kunsturheberrechtsgesetz* (KUG). Pursuant to § 22 sentence 1 KUG, images of a person may be distributed or displayed in public only with the permission of the person pictured. Image is defined as any portrayal of a person which depicts his outer appearance in a manner which a third party could recognize.[1503] This encompasses all forms of merchandizing which depict images of a real person, for example photographs on t-shirts, cups and bed linen.[1504]

1498. Ehlgen, ZUM-Sonderheft 1996, 1008 at 1014.
1499. Loewenheim- Schertz, *Handbuch des Urheberrechts*, 2nd edition, Munich 2010, § 79 mn. 47; Schertz, ZUM 2003, 631 at 642 et seq.
1500. Cf. Loewenheim- Schertz, *Handbuch des Urheberrechts*, 2nd edition, Munich 2010, § 79 mn. 50; Schertz, ZUM 2003, 631 at 643.
1501. SZ, Jan. 13/14, 2007, 37: the English football professional David Beckham was able to market his image rights by himself after he transferred from Real Madrid to the US club L.A. Galaxy.
1502. See the standard contract at http://www.dfb.de/uploads/media/Mustervertrag_Vertragsspieler 04_2011_.pdf (retrieved Jan. 20, 2012); cf. Röhl, *Schutzrechte im Sport*, 2012, 356.
1503. Schricker/Loewenheim-Götting, *Urheberrecht*, 4th edition, Munich 2010, § 60/§ 22 KUG mn. 14; Schertz, *Merchandising*, Munich 1997, mn. 311. 64; on distinctive characteristics other than facial features, e.g., the recognisability of a formula 1 driver in his car, cf. Nolte, CaS 2005, 246 at 247; Röhl, *Schutzrechte im Sport*, 2012, 360.
1504. See Loewenheim-Schertz, *Handbuch des Urheberrechts*, 2nd edition, München 2010, § 79 mn. 26.

412. Pursuant to § 23(1) KUG, the distribution or display of an image may be permissible, even without the person's consent. Sports personalities are generally viewed as public figures[1505] within the meaning of § 23(1) no. 1 KUG[1506] if they participate in events in which the general public is interested.[1507] However, this provision applies only insofar as it does not infringe upon an existing legal right of the person depicted (§ 23(2) KUG). If this is found to be the case, a comprehensive weighing-up of interests must be performed, with the interest of the general public in information on one side, and the personal interests of the individual on the other.[1508] The result of this weighing-up of interests is often dissatisfactory for the athlete, as most sporting events will take place, regardless of whether an individual player participates or not.[1509]

413. It is quite another matter if the image does not have an informative purpose, but is rather to be used for commercial or advertising purposes.[1510] It is, however, difficult to make a clear distinction between informative and advertising purposes. The more obvious it is that the image is intended for advertising purposes, the more vital it is that the subject's consent be obtained. Merchandizing measures in which the image plays a decisive role in assessing the product's worth are deemed to be purely for commercial purposes. In such a case, no legitimate interest of the public in information can be alleged. The most problematic cases are, therefore, those in which no clear distinction between merchandizing and the imparting information can be drawn.

414. In the *Ligaspieler* ruling, the Federal Court of Justice declared the commercial sale of trading cards impermissible if the consent of the players had not been obtained. The cards displayed the portraits of football players from the Bundesliga and could be stuck into an album.[1511] In that case, the court stated that

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1505. The traditional distinction between absolute and relative public figures is a consequence of the ECHR ruling NJW 2004, 2647 et seq. – *Caroline von Hannover* and the subsequent decisions by the BGH (e.g., BGHZ 158, 218 et seq. = GRUR 2004, 592 et seq. = NJW 2004, 1795 et seq. – Charlotte Casiraghi I; GRUR 2008, 1024 et seq. = NJW 2008, 3138 et seq. – Shopping mit Putzfrau auf Mallorca; GRUR 2009, 665 et seq. = NJW 2009, 1502 et seq. – Sabine Christiansen mit Begleiter; GRUR 2010, 173 et seq. – Kinder eines ehemaligen Fußballprofis; NJW 2011, 746 et seq. – Rosenball in Monaco). This was abandoned in favour of a stronger focus on the contemporary context of the image.
1506. In the field of merchandising, the exemptions set out in § 23(1) no. 2-4 KUG play only a minor role.
1507. For more, see PHBSportR-Summerer, part 4, mn. 125; For a general account, see Schricker/Loewenheim-Götting, *Urheberrecht*, 4th edition, Munich 2010, § 60/§ 23 KUG mn. 6 et seq.
1508. For more on the distinction between § 23(1) no. 1 KUG and § 23(2) KUG, cf. Schricker/Loewenheim-Götting, *Urheberrecht*, 4th edition, Munich 2010, § 60/§ 23 KUG mn. 109 et seq.
1509. PHBSportR-Summerer, part 4, mn. 125.
1510. Schricker/Loewenheim-Götting, *Urheberrecht*, 4th edition, Munich 2010, § 60/§ 23 KUG mn. 15 et seq.; For an account of the requirement of consent BGH, GRUR 1956, 427 et seq. – Paul Dahlke; BGH, NJW 1996, 593 – Bob Dylan.
1511. BGH, GRUR 1968, 652 – Ligaspieler; also OLG München, ZUM 1985, 448 et sec., though this decision dealt with unauthorized distribution of collector cards which did not feature portraits, but pictures of tackles from Bundesliga matches; for a more detailed account, see Schricker/Loewenheim-Götting, *Urheberrecht*, 4th edition, Munich 2010, § 60/§ 23 KUG mn. 19.

the dissemination of information was not the primary aim of the cards; rather, the company was using the pictures in order to exploit commercially the passion of children for swapping and collecting. Furthermore, the legitimate commercial interest of the players pictured in collecting a share of the profits generated by the exploitation of their images had been infringed upon.[1512]

Similarly, the depiction of a player's back in the advertising brochure of a television manufacturer,[1513] as well as the use of an athlete as a character in a computer game,[1514] were treated as infringements of those athletes' rights. Although the depiction of an athlete in a computer game involved an element of 'distance' from the athlete, in that a depiction of the athlete as a realistically drawn cartoon figure was used rather than a photograph, this was sufficient if the person could be clearly identified due to the surrounding circumstances: for example, because he was referred to by the name of the athlete concerned.[1515]

415. The Federal Court of Justice ruled differently in its '*Football Calendar*' decision.[1516] In that case, the use of a large picture of Franz Beckenbauer for the cover of a football calendar without first obtaining his consent was deemed permissible. The picture showed Beckenbauer in the middle of a tackle which occurred during an international match. The court stated that the picture fulfilled the 'information requirement', as the scene provided information and was connected with the informative concept behind the calendar. The public's right to free information was awarded precedence over the interest of the person pictured to earn profit from the picture's publication.[1517] In the same way, it was permissible for Boris Becker's picture to appear on the cover of a tennis textbook without his prior consent.[1518] Thus, if an image is placed on the front cover of a book or a magazine with edited content which has a material connection to the person pictured, the informative objective will be deemed to outweigh any other considerations and there is no requirement to obtain consent.[1519]

416. In the context of freedom of the press, the Federal Court of Justice ruled against the *Frankfurter Allgemeine Sonntagszeitung* (a German national Sunday newspaper) in the *Boris Becker* case.[1520] Before the first issue appeared, a sample copy of the Frankfurter Allgemeine Sonntagszeitung was published as part of an advertising campaign with a portrait of Boris Becker on its cover and the headline 'The faltering favourite' and the sub-heading 'Boris Becker's endeavours to remain

1512. BGH, GRUR 1968, 652 at 653 et seq. – Ligaspieler; cf. Röhl, *Schutzrechte im Sport*, 2012, 378.
1513. BGH, GRUR 1979, 732 at 733 et seq. – Fußballtor.
1514. LG Hamburg, Sp*u*Rt 2004, 26 et seq.
1515. LG Hamburg, Sp*u*Rt 2004, 26 at 27 et seq.
1516. BGH, GRUR 1979, 425 – Fussballkalender.
1517. BGH, GRUR 1979, 425 at 427 – Fussballkalender; in this regard, see also Schricker/Loewenheim-Götting, *Urheberrecht*, 4th edition, Munich 2010, § 60/§ 23 KUG mn. 19.
1518. OLG Frankfurt/M., NJW 1989, 402 at 403 – *Boris Becker*; Schricker/Loewenheim-Götting, *Urheberrecht*, 4th edition, Munich 2010, § 60/§ 23 KUG mn. 18.
1519. Schricker/Loewenheim-Götting, *Urheberrecht*, 4th edition, Munich 2010, § 22 KUG/§ 60 UrhG mn. 18.
1520. BGH, I ZR 65/07 – Der strauchelnde Liebling = GRUR 2010, 546 et seq.; for more on press coverage of celebrities in general, see Stender-Vorwachs, NJW 2009, 334 et seq.

on the road to success (…)'. The Federal Court of Justice ruled that the publication of the sample copy without editorial content and without consent was permissible. The advertisement with the picture served only to inform the public of the composition and the subject matter of a new newspaper. Neither the advertising value nor the image of Boris Becker was exploited disproportionately. It was only after the first issue appeared that the newspaper was no longer permitted to advertise with the sample copy and therefore had to pay a fictive license fee.

417. An action taken by *Jürgen Klinsmann* against the newspaper 'taz' was equally unsuccessful. In Easter 2009, the newspaper published a montage of photos in which the former FC Bayern coach was depicted as the crucified Christ under the headline 'Always look on the bright side of life'. Under the pictures were the words 'From Germany's superstar to Bayern's scapegoat: sonny boy Jürgen Klinsmann messes up one game after another. Why the fallen saviour is now facing crucifixion.' Munich Regional Court[1521] rejected the suit, even though the publication did infringe on Klinsmann's rights of personality, this infringement was not unlawful because freedom of the press (as set out in Article 5(1) sentence 2 GG) and the overwhelming interest of the public in the image outweighed the private interests of the individual pictured.

418. It must also be noted that consent may by *implied*; for instance, if the sportsperson opts to take part in a photo shoot. Thus, in the case of dressage rider, Nicole Uphoff, it was held that a sportsperson who takes part in a photo shoot must expect that the photographer will prepare the pictures for publication in specialist journals. Consenting to the pictures being used for advertising purposes includes an implicit consent to the pictures being published in further magazines. A revocation of consent is only possible if a fundamental change has occurred in relation to (external) living arrangements or (internal) attitude.[1522] Within the context of the restrictive interpretation of § 23 KUG, the freedom to publish an image can only be granted in particularly limited circumstances; for example, if commercial products were made in such a way that they had regard to public welfare concerns which were worthy of protection.

b. Protection of Rights of Personality under Private Law

419. In principle, no supplementary protection of the person pictured is necessary. As a *lex specialis*, the special legislative provisions of §§ 22, 23 KUG take precedence over the general protection arising out of § 823(1) BGB in connection with Articles 2 (1), 1(1) GG.[1523] The general rights of personality only come into consideration when an element of a sportsperson's personality for which has not been expressly regulated (such as, for example, the sportsperson's gestures) is marketed by a third party. It would, for example, be a violation of a sportsperson's rights of

1521. LG München, ZUM-RD 2009, 409 et seq.; OLG München, ZUM-RD 2009, 551 et seq., approved this view.
1522. LG Oldenburg, Sp*u*Rt 2004, 29 at 30 et seq.
1523. Röhl, *Schutzrechte im Sport*, 2012, 385.

personality if his person were to be made into the submissive tool of a gamer, who could steer the game character as he wished and make the character perform absurd or nonsensical actions, such as making the character continuously score own goals.[1524]

c. Trademark Protection

420. Trademark law is of growing importance in the area of the non-consensual use of images, and also in the context of merchandizing. Within the framework of business transactions, it sets out conditions under which injunctions and damages may be granted (§§ 14, 15 MarkenG (Trademark Act)) and provides a claim for any unlawfully trademarked items to be destroyed pursuant to § 18 MarkenG. In order to assert these claims, it must be possible for the object in question to be protected under trademark law.

In accordance with § 3 MarkenG, symbols of any kind which are intended to distinguish the goods or services of a company from those of other companies can be awarded protection. The prevalent opinion holds that the image of a person is always generally distinguishable within the meaning of § 3(1) MarkenG. Symbols which are generally distinguishable are sometimes denied the quality of general distinctiveness if the symbol is intended to be used for merchandizing purposes.[1525] However, as the existence of this quality of 'general distinctiveness' is only rejected if the symbol does not serve to aid identification of a product, and as – for example – fashion labels distinguish their products from those of other companies by advertising with the image of a well-known sportsperson, 'image brands' (*Konterfeimarken*) are also 'generally distinguishable'.[1526]

The actual intended purpose is of no relevance at this stage; rather, this question only becomes relevant within the context of absolute obstacles to protection pursuant to § 8 MarkenG. Often, no such obstacles exist. As long as the image to be registered as a trademark is of an athlete who is still alive, or who has died only recently, individual distinctiveness (pursuant to § 8(2) no. 1 MarkenG) and the absence of a necessity to keep a particular symbol free for trade (pursuant to § 8(2) no. 2 MarkenG) can be affirmed.[1527]

d. Protection under Competition Law and Copyright Law

421. In the event that a picture of a sportsperson is exploited without his consent, the sportsperson in question cannot, in principle, rely on any entitlement arising out of the law against unfair competition (§§ 3 et seq. UWG, *Gesetz gegen unlauteren Wettwerb*; Unfair Competition Act). The system of protection under

1524. LG Hamburg, Sp*u*Rt 2004, 26 at 28.

1525. See e.g., Bayreuther, WRP 1997, 820 et seq.; Schertz, *Merchandising*, Munich 1997, mn. 163 et seq.; this is primarily based on the assumption that images on merchandising products are used by the customer mainly to show their affinity for a natural or legal person – in contrast to the distinguishing function, which does not apply here – this function is not protected by the Trademark Act.

1526. For more details, cf. Röhl, *Schutzrechte im Sport*, 2012, 387 et seq.

1527. For a similar opinion, see Röhl, *Schutzrechte im Sport*, 2012, 413.

§§ 22, 23 KUG is awarded precedence over any claims arising out of business practices which could lead to confusion (§ 5 UWG), as well as over the supplementary competition law-related performance protection provisions (§§ 3, 4 nos. 9 and 10 UWG).

Equally, the Copyright Act does not provide any protection against the unlawful use of images.[1528]

2. Name

422. In Germany, the names of sporting personalities are protected primarily pursuant to § 12 BGB under the auspices of the 'special' rights of personality. One's name is one's most distinctive identifying characteristic and serves to distinguish one person from another when spoken to. It is an expression of individuality and has a regulatory function.[1529] Both the real name and the pseudonym – or nickname – are protected, as well as the separate first or last name of the sportsperson under certain circumstances.[1530] Thus, Munich Regional Court I (LG München I) ruled that the protection of names pursuant to § 12 BGB also extended to *Schweini*, the nickname of professional footballer, *Bastian Schweinsteiger*.[1531]

The commercial use of a name can lead to the assumption that there is a licensing relationship between the owner of the name and the party using it. This is, in principle, sufficient to establish that an unauthorized appropriation of a name within the meaning of § 12 BGB has occurred. It is another matter if the services or products advertised can somehow be attributed to the person whose name is used, or if he intends to lend his name to the services or products. In order for this to apply, however, there are some special criteria which must be observed.[1532]

423. In addition, recourse may be had to general rights of personality pursuant to § 823(1) BGB in connection with Articles 2(1), 1(1) GG. The name may also be registered as a trademark, §§ 3, 4 no. 1 MarkenG. Claims arising out of competition law pursuant to § 3 (in connection with § 4 or § 5) UWG and the copyright law protection of creative works in accordance with § 2(1) no. 1, (2) UrhG, on the other hand, do not come under consideration.[1533]

1528. See Röhl, *Schutzrechte im Sport*, 2012, 359.
1529. Palandt-Ellenberger, BGB, 71st edition, Munich 2012, § 12 mn. 1; BVerfG, GRUR 2007, 79 – maxem.de.
1530. Cf. Palandt-Ellenberger, BGB, 71st edition, Munich 2012, § 12 mn. 7; Röhl, *Schutzrechte im Sport*, 2012, 430.
1531. LG München I, GRUR-RR 2007, 214 – Schweini; for a more restrictive interpretation, cf. OLG Hamburg, GRUR 2002, 450 – Quick Nick: in the case of Formula One driver, Nick Heidfeld, the court decided that the nickname Quick Nick could not be awarded protection until the bearer of the name made use of it; however, the requirements for the usage are not stringent.
1532. BGH, GRUR 1959, 430 at 431 – Caterina Valente.
1533. For a detailed account, see Röhl, *Schutzrechte im Sport*, 2012, 414 et seq.

3. Voice

424. The voice of a sports personality is also a personal characteristic which is suitable for marketing purposes. Distinctive voices which are easily recognizable are especially suitable for commercial use, even if no visual images are provided. Thus, it is technically possible to cut out and edit individual words of interviews or TV appearances. Voice imitation is also problematic. Here, a distinction is drawn between undisguised and covert imitation. In the case of undisguised imitation, the public knows that the voice they are hearing is not that of the person being imitated. In the case of covert imitation, however, one receives the impression that the voice is actually that of the person in question. It is therefore unclear whether or not the consent of the person concerned is always necessary, or whether it is legally permissible for a voice to be used without first obtaining consent.

425. Although voices are not protected by §§ 22, 23 KUG, or by § 12 BGB, provisions which can be compared to a 'special' right of personality, an un-named 'special' right of personality is applicable here as a 'miscellaneous right' within the meaning of § 823(1) BGB.[1534] Undisguised and covert imitation, especially, are encompassed by this right, meaning that, in principle, these forms of exploitation require the permission of the person concerned.[1535]

In addition, recourse may be had to the general right of personality pursuant to § 823 (1) BGB in conjunction with Articles 2 (1), 1(1) GG, particularly in cases of undisguised imitation.[1536] In such cases, a comprehensive weighing-up of interests must be performed between the concerns of the actual 'owner' of the voice in relation to his rights of personality, and the interests of the imitator.

426. Furthermore, protection of the voice is also possible under trademark law. However, it has not been possible to register the 'voice brand' as a particular type of 'audio brand' since § 11(2) MarkenV (Trademark Ordinance) was tightened up.[1537] Vocal utterances can be protected as trademarks acquired by use, only if they have acquired a reputation on the market.[1538] Similarly to other types of trademarks, no absolute obstacles to protection (under § 8(2) MarkenG) may be attached to 'use trademarks' within the meaning of § 4 no. 2 MarkenG.

1534. Schierholz, *Schutz der menschlichen Stimme gegen Übernahme und Nachahmung*, Baden-Baden 1998; an analagous application of § 22 KUG is discussed and partially supported, cf. e.g., Lausen, ZUM 1997, 86 at 90; for an extensive account of the protection which can apply to voices, see Röhl, *Schutzrechte im Sport*, 2012, 430 et seq.
1535. Röhl, *Schutzrechte im Sport*, 2012, 454.
1536. Schierholz, *Schutz der menschlichen Stimme gegen Übernahme und Nachahmung*, Baden-Baden 1998, 93 et seq.
1537. It has been possible to register audio brands with the *Deutsche Patent- und Markenamt* (DPMA) pursuant to § 3(1) MarkenG since Jan. 1, 1995. The DPMA has, however, generally interpreted the judgment of the ECJ, GRUR 2004, 54 – Shield Mark/Kist, to the effect that sonogram images are inadmissable. This has led to a tightening-up of § 11(2) MarkenV.
1538. For details of the decisive criteria as to when the necessary market reputation has been attained, see BGH, GRUR 2004, 331 at 332 – Westie-Kopf.

Conversely, the owner of the voice may not sue in an attempt to prevent the unauthorized use of his voice under either copyright or competition law.[1539]

D. Trademark Rights Applying to the Sports Event Organizer

427. It is not only sports personalities who can market themselves for profit; among the wide variety of interests which sports event organizers can trademark in order to prevent their use by third parties are the names of their companies, event names, sport-related symbols, event songs and anthems, as well as jingles and slogans. Furthermore, the following section will deal briefly with the legislation which was enacted in order to protect the Olympic emblem and Olympic symbols.

1. Organizer name

428. Legal persons – including associations and federations – can invoke the protection of name provision pursuant to § 12 BGB in order to protect an organizer's name.[1540] In such cases, recourse may also be had to the general right of personality pursuant to Articles 2 (1), 1(1)[1541] GG if a 'special' legislative protection is denied. In accordance with this provision, an association or federation name that is used in a way which does not lead to a risk of confusion can nonetheless be viewed as an infringement of the general right of personality, and can therefore give rise to claims to damages and injunctions pursuant to §§ 1004, 823(1) BGB. Many associations and federations in Germany have registered their names with the German Patent and Trademark Office.[1542] Thus, protection of the organizer name under trademark law as a 'product mark' (§ 3(1) MarkenG) and as a trade name (§ 5(2) MarkenG)[1543] is also possible.

2. Event Names

429. In principle, event names are generally distinctive pursuant to § 3(1) MarkenG and can, accordingly, be entered in the register.[1544] It is also possible to

1539. Cf. Röhl, *Schutzrechte im Sport*, 2012, 431 et seq. and 453 et seq.
1540. Palandt-Ellenberger, BGB, 71st edition, Munich 2012, § 12 mn. 9; PHBSportR-Fritzweiler/Pfister, part 3, mn. 80.
1541. BGH, GRUR 1981, 846 at 847 – Rennsportgemeinschaft.
1542. Examples of relevant word brands: FCB (Register-no. 39518310) and FC Bayern (Register-no. 39518308) registered by FC Bayern München; 1. FC Nürnberg (Register-no. 30604770) registered by 1. FC Nürnberg Football Club; DFB (Register-no. 30523036) registered by Deutscher Fußball-Bund.
1543. Large associations and federations fulfil the necessary requirements in order to qualify as enterprises. Any independent, permanent commercial undertaking which is not a purely private enterprise will qualify.
1544. Similarly BGH, I ZR 183/07, mn. 33 = CaS 2010, 127.

protect product brands and company logos, as well as titles of works under *trademark law*[1545] (§ 5(1), (3) MarkenG). Problems relating to absolute obstacles to protection may arise (§ 8(2) MarkenG). In many cases, event names do not possess the requisite quality of individual distinctiveness in order to be used in conjunction with certain categories of product (§ 8(2) no. 1 MarkenG). Furthermore, it is often the case that there is a necessity to keep a particular name free for trade (§ 8(2) no. 2 MarkenG).[1546] Finally, trademarks which are applied for may not be entered in the register, pursuant to § 8(2) no. 10 MarkenG.

430. Two judgments in particular have pointed out the problems which can arise in the context of trademarking event names. Both of these judgments were delivered by the Federal Court of Justice and concerned the Football World Cup. Prior to the *2006 World Cup* in Germany, the Federal Court of Justice carried out a review of two 'word brands' – 'Fußball WM 2006' and 'WM 2006' – which had been registered by FIFA. The confectionary manufacturer 'Fererro' wanted to use these words for a collector card offer and viewed the trademarks registered by FIFA as an obstacle to its marketing of countless products, such as jams, cocoa, sugar, biscuits, ice-cream and other confectionery.[1547] The Federal Court of Justice held largely in favour of the confectionery manufacturer and determined that the trademark 'FUSSBALL WM 2006' could not be registered as a trademark.[1548] The product brand was not distinctive within the meaning of § 8(2) no. 1 MarkenG. It was, rather, a description of a sporting event commonly used in everyday speech. The fact that FIFA was the organizer of the 2006 Football World Cup in Germany was no reason for the public to assume that the manufacture of any products which displayed 'FUSSBALL WM 2006' on their labels was overseen by FIFA, or that FIFA could be held responsible for the quality of the products, as would be the case for the manufacturer of the products. Due to the clear reference to the Football World Cup in Germany, this was also the case for products which, because of their nature or intended use, did not have a direct connection to the event.[1549]

It was another matter in the case of the product brand 'WM 2006'. The Federal Court of Justice rejected the proposition that this could be registered as trademark in relation to some of the products and services for which the product brand had been entered into the register. It had no clear descriptive function. Although it was intended simply to describe the sporting event when used in conjunction with the Football World Cup, this was not the case for other products. It was, therefore, possible to distinguish products which had no connection with the World Cup from those that did, and thus, the product brand 'WM 2006' did possess a quality of distinctiveness.[1550]

1545. BGH, I ZR 183/07, mn. 33 = CaS 2010, 130.
1546. For a detailed account, see Röhl, *Schutzrechte im Sport*, 2012, 490 et seq.
1547. For a corresponding decision of Landgericht Hamburg, see LG Hamburg, NJOZ 2006, 1498 et seq.
1548. BGH, GRUR 2006, 850 et seq. = NJW 2006, 3002 et seq. = Sp*u*Rt 2007, 119 et seq. – FUSSBALL WM 2006.
1549. BGH, Sp*u*Rt 2007, 119 at 123 et seq. – FUSSBALL WM 2006.
1550. BGH, I ZB 97/05 (BeckRS 2006 09470) – WM 2006.

431. In the context of the *2010 Football World Cup* in South Africa, too, the Federal Court of Justice was also required to rule on a dispute between FIFA and Ferrero. The subject of the dispute was trademarks which had already been registered, or which were pending registration, such as 'Südafrika 2010', which were partly identical and partly just similar to the FIFA trademarks which had been registered before them. In this case, too, the Federal Court of Justice rejected the proposition that there was a danger of confusing the plaintiff's trademark and the trademark which was pending registration, 'Südafrika 2010'. In doing so, it also rejected the existence of a relative obstacle to protection pursuant to § 9(1) MarkenG. The function of the plaintiff's trademark was primarily descriptive, and thus, possessed only a weak distinctive character, and a very narrow scope of protection.[1551] Due to this narrow scope of protection, the minute differences between the trademarks in dispute sufficed to ensure that the scope of protection of the plaintiff's trademark was not infringed upon.[1552]

432. These decisions highlight the difficulties associated with event names in the area of trademark law. In general, only individualized event names, such as, for example, 'FIFA WM 2006' may be registered as trademarks for products and services which are directly connected to the event. Furthermore, even names which have been heavily abbreviated can, under certain circumstances, be registered for products and services which have no connection to the event concerned.

433. *Competition law* offers a more effective protection against the unlawful commercial use of event names, in particular by means of the UWG Amendment (Unfair Competition Act Amendment) 2008. In addition to the prohibitions which had been enshrined in §§ 3–5 UWG until 2008, the so-called 'black list' was also added. No. 13 on the black list – in conjunction with unfair advertising measures – can be of significance under certain circumstances. The newly-created measures to prevent confusion (*Irreführungsschutz*) set out in § 5(1) sentence 2 no. 1 and 4, (2) UWG can also be used to prevent the unauthorized use of event names by third parties in individual cases. Furthermore, supplementary neighbouring rights contained in § 4 no. 9 UWG may also be invoked under the auspices of (indirect) deception as to the origin of the product, passing off and obstruction. In individual cases, it is also possible that a targeted obstruction of the organizer or a rival could occur, § 4 no. 10 UWG. Recourse to the general clause of § 3 UWG in addition to the abovementioned provisions is only possible as an exception.[1553]

3. Sport-Related Symbols

434. Every sports association has its own traditional emblem which serves primarily as an object of individualization for the fans. Special logos and mascots are

1551. BGH, I ZR 183/07 = CaS 2010, 127 at 129 – SOUTH AFRICA 2010; for more information, see Heermann, CaS 2010, 134 et seq.
1552. BGH, I ZR 183/07 = CaS 2010, 127 at 130 – SOUTH AFRICA 2010.
1553. For a more detailed account, see Röhl, *Schutzrechte im Sport*, 2012, 520 et seq. and 537.

also developed for sporting events. In addition, there are many sporting symbols such as medals, pictograms or trophies. Due to the considerable commercial significance of advertising using sport-related symbols, organizers and other concerned parties have a significant interest in trying to prevent their unauthorized use in order to guarantee the exclusivity necessary to instate a profit-generating licensing procedure.

435. Sport-related symbols must first be considered under the heading of *copyright law*. Emblems, logos and similar symbols can be protected as works of visual or applied art pursuant to § 2(1) no. 4 UrhG. In order for a symbol to be encompassed by this provision, it must involve intellectual creativity peculiar to its author (§ 2(2) UrhG). The so-called 'level of originality' is the decisive factor. A symbol must be created in a sufficiently individual way in order to be regarded as a 'work' within the meaning of § 2(1) no. 4 UrhG.[1554] The requisite level of individuality is deemed not to have been achieved if the design of the symbol relies primarily on traditional elements.[1555] Achieving protection under copyright law for the symbol of the Olympic rings proved problematic. Although this symbol is regarded as a work of applied art within the meaning of § 2(1) no. 4 UrhG,[1556] no express assignment of the rights to the symbol had occurred between its French creator, *Pierre de Coubertin* and the IOC, and proving an implicit assignment of rights would have led to difficulties for the IOC.[1557] Quite apart from that, copyright in Germany expires seventy years after the author's death, § 64(1) UrhG. Thus, copyright protection for the Olympic symbol would have ended by 31 December 2007 at the latest.

436. For the most part, sport-related symbols are awarded comprehensive protection under *trademark law*; they may be regarded as product marks within the meaning of § 3(1) MarkenG, and as company logos pursuant to § 5(2) MarkenG. It must be examined in each individual case if there is any absolute obstacle to protection in accordance with § 8(2) MarkenG which would prevent the trademark being registered.

1554. In principle, the so-called *'kleine Münze'* (protection given for a minimum level of individuality) is also protected under copyright law, however, the BGH requires that works of applied (not of visual) art must clearly exceed that of handicrafts and other everyday items: e.g., BGH, GRUR 1985, 1041 at 1047 – Inkasso-Programm; consequently, the matter of whether seemingly similar sport-related items can be awarded copyright protection can often be decided differently, depending on whether the individual item is a work of visual art, or of applied art; cf. Röhl, *Schutzrechte im Sport*, 535.
1555. For example, the use of an historical crest in the design of an association's logo, Bayreuther, WRP 1997, 820 at 823 et seq.
1556. Heermann is of the same opinion, see Heermann, *Gewerbliche Schutzrechte an olympischen Symbolen*, 2003, 3 (http://www.sportrecht.org/Publikationen/PHAthen030522.pdf); for a diverging opinion, see e.g., Knudsen, GRUR 2003, 751 at 752.
1557. Cf. Heermann, *Gewerbliche Schutzrechte an olympischen Symbolen*, 2003, 4 (http://www.sportrecht.org/Publikationen/PHAthen030522.pdf); Röhl, *Schutzrechte im Sport*, 2012, 538 et seq.

437. In addition, sports symbols such as logos, emblems and mascots, as well as jerseys and trophies may be protected under *design patent law*.[1558] Design patent law affords protection to new and unique patterns, see § 2(1) GeschmMG (*Geschmacksmustergesetz*; Design Patent Act). There is a legal definition of the central term 'pattern' in § 1 no. 1 GeschmMG.

A 'new' pattern within the meaning of § 2(2) GeschmMG is defined as any pattern which does not already exist, or to which similar patterns do not already exist. A pattern is understood to be 'unique' if, on observing the pattern, the overall impression elicited from an informed user can be distinguished from the overall impression elicited by another pattern which is already accessible to the public.[1559]

438. The unauthorized use of sports symbols is classified as a business transaction within the meaning of § 2(1) no. 1 UWG. Since the UWG amendment came into force in 2008, the protection of *competition law* can be invoked along with that of copyright, trademark and design patent law, as long as this does not involve the undermining of any special legal values.[1560] Here, regard must be had to the prohibitions contained in the so-called 'black list' (appendix to § 3(3) UWG), the provision to prevent confusion (§§ 3, 5 UWG) and the supplementary protection awarded by neighbouring rights (§§ 3, 4 no. 9 UWG). Recourse may not, however, be had to any supplementary private law protection awarded by neighbouring rights under § 823(1) BGB.[1561]

4. The Act to Protect the Olympic Emblem and Olympic Symbols (*Gesetz zum Schutz des olympischen Emblems und der olympischen Bezeichnungen* –OlympSchG)

439. The existing lacunae in legal protection – in particular, the difficulties which arise in relation to event names and the problems in connection with copyright law and the Olympic rings – prompted the German legislative to pass an act in 2004 which aims at protecting the Olympic emblem and other Olympic symbols (OlympSchG).[1562] The primary reason for the new legislation was that the general

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1558. Cf. Furth, *Ambush Marketing – Eine rechtsvergleichende Untersuchung im Lichte des deutschen und US-amerikanischen Rechts*, Köln 2009, 51.

1559. Cf. Röhl, *Schutzrechte im Sport*, 2012, 563.

1560. Cf. Fezer, GRUR 2009, 451 at 454 et seq.; von Nussbaum/Ruess, MarkenR 2009, 233 at 236; Jonas/Hamacher, WRP 2009, 535 at 535 et seq.; Kiethe/Groeschke, WRP 2009, 1343 at 1345; Büscher, GRUR 2009, 230 at 236.

1561. For a general overview, see BGH, GRUR 1999, 161 at 162 – MAC DOG; GRUR 2002, 340 at 342 – Fabergé; GRUR 2002, 622 at 623 – shell.de.

1562. In its guidelines for competitors, the International Olympic Committee (IOC) stiplulates that, in the future, the Olympic Games may only be held in states in which the Olympic emblems and other Olympic-related objects are awarded protection; in order to fulfil these requirements for Leipzig's application to host the 2012 Olympics (which later failed), the legislator felt compelled to act; for more on the criticism that the OlympSchG is unconstitutional LG Darmstadt Sp*u*Rt 2006, 164 et seq.; Knudsen, GRUR 2003, 750 at 753 with additional references; Degenhart, AfP 2006, 103 et seq.; Furth, *Ambush Marketing – Eine rechtsvergleichende Untersuchung im Lichte des deutschen und US-amerikanischen Rechts*, Köln 2009, 60 et seq.

protective legal provisions could not guarantee the exclusivity desired for the Olympic symbols by the IOC and NOK.

Both the Olympic emblem and the Olympic terms are encompassed by the special legal protection afforded by the act (§ 1(1) OlympSchG). The Olympic emblem is legally defined in § 1(2) OlympSchG as the symbol of the International Olympic Committee (IOC), consisting of five inter-connected rings (the Olympic rings). A further clarification is set out in appendix 1, where it is emphasized that it is of no consequence whether the rings are depicted in several colours, or just one. 'Olympiade', 'Olympia' and 'olympisch' are described as Olympic terms and, as such, are protected under the act, see § 1(3) OlympSchG. Other corresponding combinations of words[1563] or translations in other languages also enjoy protection. The most important legal difference between the Olympic emblem and the Olympic terms is that, the former is guaranteed complete identity protection, while the latter is protected only in cases where there is a risk of confusion.

The holders of exclusive rights emanating from the OlympSchG are also set out in the statute: they are listed as the International Olympic Committee (IOC) and the (German) National Olympic Committee (NOK)[1564] under § 2. Their position is comparable to that of co-holders of a trademark. The rights of third parties which were in existence before 13 August 2003 persist.

The OlympSchG, with its very broadly defined objects of protection, provides a suitable foundation for the provision of a high level of exclusivity for potential sponsors of the Olympic Games.[1565]

5. Event Songs and Association Anthems

440. So-called 'event songs' and (association) anthems are often created and sung during sporting events. They are very often composed, not by associations and federations, but rather, by well-known artists, who also possess rights to these songs (copyright, in particular). The organizer is entitled only to simple rights of use.[1566]

6. Jingles

441. Event jingles can be registered in the trademark register as product brands pursuant to § 3(1) MarkenG, and are thus protected under trademark law. Protection under competition law, on the other hand, is only of secondary importance. Even if they have been generated by a computer, jingles are works of music within the meaning of § 2(1) no. 2, (2) UrhG. Musicians and singers who have contributed to

1563. As further examples, the preamble to the law also refers to 'sailing Olympics', Olympic team' or 'Olympic concept', cf. BT-Drs. 15/1669, 9.

1564. The NOK has since fused with the *Deutscher Sportbund* (DSB; German Sporting Federation). The rights assigned to the NOK are now exercised by the DOSB, insofar as the latter is carrying out duties of the former NOK, cf. Nieder/Rauscher, Sp*u*Rt 2006, 237 at 239, who – correctly – advocate that § 2 OlympSchG be amended.

1565. Cf. Röhl, *Schutzrechte im Sport*, 2012, 143 et seq., 512 et seq., 571 et seq.

1566. Röhl, *Schutzrechte im Sport*, 2012, 591 et seq.

the production of the jingle possess neighbouring rights, arising from § 73 UrhG, which are rights in rem and which can be transferred. Thus, pursuant to § 73 UrhG, associations and federations can take action against the unauthorized use of jingles by third parties.[1567]

7. Slogans

442. In principle, event slogans can also be granted protection under trademark law if they are entered into the trademark register. However, in practice, this is the exception rather than the rule. In the context of event slogans, competition law can be significant. § 5(1) sentence 2 no. 1 and 4 UWG in particular (statements which may lead to confusion as to the origin of the product, or as to the area within which the sponsorship is taking place), as well as § 4 no. 9 b) UWG (passing off).[1568] As protection under competition law can, under certain circumstances, be more extensive than the protection offered by trademark law, competition law may offer protection to slogans which would not be granted protection under trademark law due to the fact that they are not individually distinctive (§ 8(2) no. 1 MarkenG) or because the symbol must be kept free for trade (§ 8(2) no. 2 MarkenG).[1569]

§4. Ownership of Clubs

443. Due to the increasing commercialization of sport, there is an ever-growing body of companies and private persons who wish to invest in both football clubs and in other sporting associations in order to generate an extra source of income, to guarantee that they will acquire merchandizing and TV marketing rights, or even simply for their own personal interests.[1570] This provides a possible source of income for football clubs, though it is often met with disapproval. Fans and supporters of the association are often concerned that investors will attempt to influence the decision-making process within the association in a way which would be contrary to the club's tradition. It is also often feared that investors who have shares in numerous associations could attempt to exert their influence on the outcome of matches in a strategic and unsporting manner.

1567. Röhl, *Schutzrechte im Sport*, 2012, 594 et seq.
1568. Röhl, *Schutzrechte im Sport*, 2012, 617 et seq.
1569. Röhl, *Schutzrechte im Sport*, 2012, 626.
1570. Cf. Weiler, *Multi-Club Ownership: Rechtstatsächliche Bestandaufnahme und kartellrechtliche Fragestellungen*, in: Vieweg (ed.), Perspektiven des Sportrechts, Berlin 2005, 174 at 179; id., *Mehrfachbeteiligungen an Sportkapitalgesellschaften*, Berlin 2006, passim.

444. The federations have reacted to this problem. Per regulation,[1571] UEFA has stipulated that investors may not have stakes in multiple associations.[1572] CAS confirmed this regulation in its AEK Athen and Slavia Prag / UEFA decision.[1573] In Germany, the federations responsible for the most commercialized and professionalized types of sports – football, basketball, handball, ice hockey – had not put any regulations in place concerning multiple participation until recently.[1574]

445. In Germany, football associations have been allowed to organize themselves in such a way that their professional divisions are incorporated as companies limited by shares.[1575] The associations then acquire the licence necessary to participate in the Bundesliga through these companies.[1576] This facilitates the financing of the associations by external investors. However, DFB and Ligaverband place limitations upon such participation in their by-laws by imposing a so-called '50%+1' rule (§ 8(2) Ligaverband By-laws and § 16 c)(2) DFB By-laws). Pursuant to this rule, the parent association must remain in possession of at least 50%+1 of the voting shares in the shareholders' meeting in order to receive the licence necessary to participate in the league. The aim of the provision is to guarantee that non-commercial associations will have a decisive influence on any decisions affecting the association.

The legal admissibility of such regulation of investment is extremely contentious under both European and German law.[1577] Opponents of the '50%+1' rule view it as a clear obstacle to competition.[1578] They say that, in its current form, the rule is disproportionate as, from the outset and without exception, it prevents potential investors from acquiring an isolated majority share in an association. Opponents

1571. UEFA Europa League Regulations 2009/10, Art. 3. As to legally relevant facts, see Weiler, *Mehrfachbeteiligungen an Sportkapitalgesellschaften*, Berlin 2006, 132 et seq.

1572. Cf. Weiler, *Multi-Club Ownership: Rechtstatsächliche Bestandaufnahme und kartellrechtliche Fragestellungen*, in: Vieweg (ed.), Perspektiven des Sportrechts, Berlin 2005; id., Sp*u*Rt 2007, 133 et seq.; id., *Mehrfachbeteiligungen an Sportkapitalgesellschaften*, Berlin 2006, passim.

1573. *AEK Athen and Slavia Prag v. UEFA*, CAS decision of Aug. 20, 1999, published in Yearbook Comm. Arbitration XXV 2000, 393 et seq.

1574. As to legally relevant facts, see Weiler, *Mehrfachbeteiligungen an Sportkapitalgesellschaften*, Berlin 2006, 132 et seq.

1575. In Germany, the *Gesellschaft mit beschränkter Haftung* (GmbH; similar to the English private limited company), the *Kommanditgesellschaft auf Aktien* (KGaA; a partnership with its own legal personality in which at least one partner is liable without limitation to the creditors of the partnership (general partner) and the remaining partners participate in the original capital, which is split into shares, without being personally liable for the liabilities of the partnership) and the *Aktiengesellschaft* (AG; similar to the English public limited company) are all acknowledged as being special types of Societas Europaea (SE). For a more detailed account, see Part I, Ch. 3, §2 II.

1576. See also Hovemann/Wieschemann, Sp*u*Rt 2009, 187.

1577. Cf. Ouart, Sp*u*Rt 2010, 54 et seq.; id., WRP 2010, 85 et seq.; Verse, CaS 2010, 28 et seq.; Deutscher, Sp*u*Rt 2009, 97 et seq.; Hovemann/Wieschemann, Sp*u*Rt 2009, 187 et seq.; Stopper, WRP 2009, 413 et seq.; Klees, EuZW 2008, 391 et seq.; Lammert, Sp*u*Rt 2008, 137 et seq.; Summerer, Sp*u*Rt 2008, 234 et seq.; Heermann, CaS 2007, 426 et seq.; Vieweg, *Faszination Sportrecht*, 2nd edition 2010, 31 et seq., accessible at http://www.irut.de/Forschung/Veroeffentlichungen/OnlineVersionFaszinationSportrecht/FaszinationSportrecht.pdf.

1578. Ouart, WRP 2010, 85 et seq.; Deutscher, Sp*u*Rt 2009, 97 et seq.; Stopper, WRP 2009, 413 et seq.; Klees, EuZW 2008, 391 et seq.; Heermann, CaS 2007, 426 et seq.

contend that the regulation infringes upon the European principle of freedom of competition[1579] (Article 101 TFEU) (free movement of capital). Another point of view has it that any attempt to abolish the limitations placed upon majority participation would be unlawful and supports the existence of a claim to uphold the *status quo* which can be enforced by the courts.[1580] Furthermore, supporters of the rule are of the opinion that the very fact that the '50%+1' rule originates in the by-laws of the sports federations – which facilitate the making of sports policy decisions which protect the integrity and credibility of competition within the German leagues, and prevent professional football from being turned into a 'plaything for investors' – endorses the proposition that it is in conformity with competition law.[1581]

In light of the considerable doubts as to the compatibility of the limitation of isolated majority participation with EU law, the Bundesliga association Hannover 96 filed a complaint against the '50%+1' rule with the DFL arbitration panel.[1582] On 30 August 2011,[1583] the panel ruled that while the '50%+1' rule was compatible with EU law on a preliminary examination, to the extent that the exceptions made for two Bundesliga associations (Bayer 04 Leverkusen with the investor Bayer AG and VFL Wolfsburg AG with the investor Volkswagen AG) did not apply to other associations, it infringed upon the association law principle of equal treatment. Thus, the '50%+1' rule did not apply to investors who had been active within the association for more than twenty years. In this way, the discussion was concluded, albeit prematurely.

1579. The German Act against Restraints on Competition (GWB) is subsidiary to this.
1580. Hovemann/Wieschemann, Sp*u*Rt 2009, 187 et seq.
1581. Summerer, Sp*u*Rt 2008, 234 et seq.; Verse, CaS 2010, 28 et seq.
1582. The DFB arbitration panel, on the other hand, confirmed the '50%+1' rule on Aug. 30, 2011. The 'Leverkusen and Wolfsburg Law' was abolished, meaning that, in the future, all participants in the Bundesliga will have the chance to assign the majority of the capital and a majority of voting rights to investors or patrons who have been active in the association for more than 20 years. In its grounds for judgment, the arbitration panel emphasized that the '50%+1' rule was essentially compatible with both European and German law. Cf. FAZ Aug. 31, 2011, 26.
1583. DFL-Schiedsgericht Aug. 30, 2011, Sp*u*Rt 2011, 259 et seq.

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