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In This Issue

Welcome to the second issue of *International News* for 2008.

We open this issue with a look at matters relating to China. Because private ownership of land does not exist as a concept in China, Cam Brockie looks at the ways in which foreign investors can obtain secure and enforceable rights to land. In addition, Michael House reviews two new legal approaches implemented by the United States that offer more effective tools to restrict unfairly priced Chinese imports.

Florian Vogel takes the lessons learned from recent corruption scandals in Europe and explains how any business can benefit from effective risk management systems.

Lowell Yoder and Rachel Aaronson explain the changes proposed by the U.S. Internal Revenue Service (IRS) to the definition of manufacturing in relation to “Subpart F income”. This is of great interest to any U.S.-based multinational corporation with significant non-U.S. production.

We move finally to securities. Steven Black looks at the first cases relating to downgrades on structured investment vehicles as a result of losses occurring from the subprime mortgage crash. Kate Lamburn explains how asset-backed securities require additional caution on the part of investors. To assess risk, investors must look through the structure to the underlying assets beyond, and to any originator or manager of those assets.

We turn then to our Focus On section on the international business of sport. Alasdair Bell kicks off the topic with an overview of the differences between the U.S. and UK approaches to the application of antitrust laws in the sector. In contrast to the United States, where capped salaries and the draft system regulate player movement and prevent the pre-eminence of certain teams, in Europe the dominant teams are the richest clubs, which have the money to buy the best players.

Graham Green runs with a similar theme in a discussion of the employment relationship between football players and their clubs in Europe. Issues such as severe sanctions, choice of arbitration forums, choice of applicable law and concerns over the nationality of players make sport an exceptional employment market.

In January 2008, the IRS confirmed that it is targeting professional athletes. John Lutz and Kumar Paul explain the ways in which the IRS is doing so and the precautions professional athletes should take.

Jennifer Mikulina and Cheng Tan examine exclusivity from the perspective of licensing and sponsorship agreements involving trade marks.

Rohan Massey then takes a look at the protection of sports broadcasting rights. With huge sums of money at stake, broadcasters and rights owners alike want to ensure that the value of their rights are protected by exclusivity. Finally, in our last article, Benoît Keane explores this issue in detail. Under the EU Television Without Frontiers Directive, EU Member States are allowed to draw up a list of “events of major importance to society” in that country which must be shown on free-to-air television. Benoît discusses a case being brought by the Fédération Internationale de Football Association (FIFA) and the Union of European Football Associations (UEFA) against the European Commission, arguing that the Commission was wrong to approve the United Kingdom’s list for 2008.

If you have any comments on this issue or would like to contribute to *International News*, please contact me at dryder@mwe.com.

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Land Use Rights in China

By Cam Brockie

As more foreign entities are attracted to China as an investment opportunity, the issue of obtaining secure and enforceable rights to land is an area of particular consideration.

“Private ownership of land does not exist as a concept in China.”

Private ownership of land does not exist as a concept in China. Instead, there are basically two distinct types of land ownership. The first is collectively owned land, commonly used to describe rural land that is owned jointly by groups of farmers as an agricultural collective. The second, state-owned land, is traditionally urban land used mainly for residential, infrastructural and industrial use. In order for a foreign entity to obtain a right to use a specific piece of state-owned land, users

need to hold either an allocated land use right (ALUR) or a granted land use right (GLUR).

Allocated Land Use Rights

An ALUR is a right to use a specific piece of land that has been offered by the government free of charge. While there is generally no specific charge to holders upon allocation, holders usually pay a small annual land use fee.

Holding an ALUR does not provide the holder with rights similar to that of a landowner:

- ALURs remain vested in the government, which means the holder does not enjoy the benefit of any appreciation in value attributable to the ALUR.
- Although an ALUR has an indefinite term, the government may reclaim it at any time in return for proper compensation to the owners of any buildings erected on the land.

The entitlement to recall an ALUR is not restricted to public interest needs, and an ALUR can be recalled for various reasons.

- ALURs cannot be transferred, mortgaged or otherwise disposed of without the land use right first being converted into a GLUR.

Conversion of an ALUR to a GLUR can only occur with approval from the relevant local government and upon payment to the local government of a specific premium for the land, based on an agreed price.

Where an entity holds an ALUR that has not been converted into a GLUR, either because the local government did not approve of the conversion or otherwise, it is still possible for the holder to transfer, lease or mortgage any buildings erected on the land. However, the holder must have a valid real estate certificate for the buildings, with any proceeds from relevant transactions first being applied to pay the land use right fee.



Granted Land Use Rights

GLURs are the most common way foreign entities acquire rights to use state-owned land. As GLURs are actually purchased from the government, they have their own identifiable market value. This makes it possible to transfer, mortgage or otherwise dispose of GLURs. A GLUR, like any asset, can appreciate over time and, as the holder has acquired the GLUR in its own right, he or she is entitled to obtain the benefit of any increase in value. The government is contractually obliged not to recall GLURs prior to their expiry, except in exceptional circumstances, such as when a recall is seen to be necessary to serve the public interest. In the event of such a recall, proper compensation will be paid to the holder of the GLUR.

GLURs granted to foreign invested enterprises are granted for specific periods of time. The length of these periods varies depending on the intended use of the land. GLURs for residential use have a maximum term of 70 years. GLURs applied for industrial, educational, scientific or cultural use have a 50-year term; land use rights for commercial or tourism use have a 40-year term. It is possible to renew the period of a GLUR if it is due to expire.

“Holding an ALUR does not provide the holder with rights similar to that of a landowner.”

Renewal and Expiration of GLURs

Currently, the legislation provides that it is not necessary for a holder of a residential GLUR to apply for it to be renewed. Instead, the GLUR will be renewed automatically by the local government that granted the GLUR. However, for land applied to other uses, such as industrial or commercial, any holder of a GLUR who wishes to extend the term must apply to the local government for an extension at least one year before it is due to expire. It is expected that the approval process for an extension will involve the GLUR holder re-signing a contract with the local government and paying the relevant land premium. However, because of the relative infancy of China's land use right system, no GLUR has yet expired, so details on how land premiums will be determined are not yet known with any level of certainty.

If a GLUR was to expire without any application to renew the right being submitted, the GLUR and any buildings erected on it would automatically revert, free of charge, to the government, unless otherwise agreed in the purchase contract. This effectively suggests that, if a holder were to abandon the land for which he or she held a GLUR, there would be no specific requirement to leave the land in a certain way or to level any buildings. However, the holder of the GLUR is likely to be liable for any negative environmental impact that may have occurred prior to the expiration of the GLUR's term.

“GLURs are the most common way foreign entities acquire rights to use state-owned land.”

Acquisition of GLURs

Traditionally, foreign investors acquiring GLURs could expect to pay prices higher than those paid by their Chinese counterparts. However, during the early stage of China's opening up and economic reform, attempts were made by local governments to entice foreign investment. As a result, a foreign entity would enjoy favourable treatment in its quest to acquire a GLUR, particularly for industrial purposes. Such incentives are, however, no longer available in the major cities in the coastal areas, except in relation to a very few foreign investment projects that are highly encouraged by the Chinese Government. There has also been a recent trend in China to offer GLURs in tender processes or auctions at the same price to both domestic and foreign investors, but foreign investment in the real estate sector has recently been tightly controlled by the Government because of its concern regarding the overheated local realty market. Acquiring a land use right through a city's land bureau can give foreign investors additional comfort that the title is in order.

Verification of Rights to Land

As there is no country-wide or even regional land registration system, and obtaining documentary records of land transactions can be an arduous if not impossible task, verifying land rights in China can be difficult. However, land use and building ownership rights can be registered and certified by land administration departments at the county level. Therefore, if a foreign

entity is intending to receive land use rights from any Chinese entity, it should request land use rights certificates and building ownership certificates to verify the rights and to ensure that any real-property transactions are completed effectively under the laws of China. It is important that any such certificates are scrutinised carefully to ensure that the entity does in fact receive the type of right it had initially anticipated, as there have been cases where an entity anticipated receipt of a GLUR which instead turned out to be an ALUR. It is also vital that the purchase contract and evidence of the premium payment for a GLUR are examined to ensure the premium has been duly paid according to the contract. In the case of an ALUR, special attention should be paid to the written approval issued by the local land authorities outlining the detailed terms of the right.

Conclusion

While a foreign entity, just like its Chinese counterpart, is unable to acquire full ownership rights to land in China, it is still possible to obtain formal rights to use land and to assert ownership of buildings. However, foreign investors must be sure to conduct proper due diligence and ensure that they obtain the relevant documentation to verify any rights acquired.



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China Trade: Targeting Unfairly Priced Imports

By Michael House

The sharply increasing trade surplus enjoyed by the People's Republic of China in recent years has caused major trading partners to reconsider the legal means available to address increased competition from low-priced Chinese goods. Most nations have historically turned to anti-dumping remedies, sanctioned by the World Trade Organization (WTO), to combat these imports. Indeed, the WTO reported in July 2008 that, despite an overall worldwide decline in anti-dumping actions, products exported from China remained the most frequent subject of new anti-dumping measures, increasing in number since 2007.

Seeking to enhance the arsenal of remedies available, the United States has implemented two new legal approaches that serve as more effective tools to restrict unfair Chinese imports. The first of the new approaches represents a major departure from previously settled U.S. policy toward so-called "non-market economies" such as China.

“This watershed decision has given the U.S. Government a significant new tool to combat unfairly priced Chinese imports.”

For more than 20 years, the United States consistently held that non-market economies (NMEs) could not—and should not—be subject to separate WTO disciplines on government subsidisation. This was premised on a simple but powerful idea: the theory and purpose of anti-subsidy rules, which address

distortions in a foreign market created by governments that confer benefits to specific industries, cannot apply to centrally planned economies under state control. Such non-market economies have no “market” to be distorted in the first place, so there is no sense to measuring how much a non-market economy might have been “distorted”.

In the last year, however, the United States shifted abruptly and decided that anti-subsidy actions, called countervailing duty (CVD) investigations under U.S. law, can be lawfully brought against China, despite China's continued designation as a non-market economy. In its investigation on coated free sheet paper from China, issued in late 2007, the U.S. Department of Commerce declared that “the Department has revisited its original decision not to apply the CVD law to NMEs and has determined that it will re-examine the economic and reform situation of the NME on a case-by-case basis to determine whether the Department can identify subsidies in that economy”.

This watershed decision has given the U.S. Government a significant new tool to combat unfairly priced Chinese imports. Indeed, the coated paper case opened the floodgates to a wave of new China actions. In the period since that decision, no less than 10 new U.S. anti-subsidy investigations have been either initiated or completed against Chinese imports. With the promise of this new remedy, on top of the more traditional anti-dumping action, U.S. domestic industries have every reason to file more cases.

The second new tool, while more technical, is potentially every bit as effective. In the same coated paper case that launched a new era in Chinese subsidy cases, the United States determined to apply a new “targeted dumping” analysis as an enhancement

to the typical anti-dumping case price calculations. In the companion anti-dumping action on coated paper from Korea, the U.S. Department of Commerce, for the first time in its history, determined that it had sufficient justification to lawfully analyse whether foreign exporters were “targeting” specific regions, customers or time periods in the U.S. market. Sales found to be “targeted” are subject to stricter benchmark prices and nearly always result in much larger dumping margins.

“Targeted dumping” investigations and anti-subsidy actions against China are highly controversial and have not yet been tested in court. The Chinese Government has adamantly argued that the new U.S. policies violate WTO rules. Ultimately, the legality of the new U.S. policies will be the subject of future WTO dispute rulings.



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Preventing Corruption: The Value of Internal Control Systems

By Florian Vogel

The importance of risk management is a key lesson learned from the recent corruption scandals in Europe. A company's management must take the appropriate steps to guard against risk.

In Germany, regardless of their level of involvement or ignorance, members of a company's management may still be liable for the fallout attached to corruption on the basis that they have neglected their duties to implement an internal corruption prevention system. Implementing, documenting and continuously reviewing an internal control system is key to mitigating management liability.

Under German law, management is specifically responsible for managing risk. This obligation has been laid out in detail in Section 91 of the German Stock Corporation Act (the Act) and applies to stock corporations as well as to limited liability entities. Most countries have similar regimes—the equivalent in the United States is Section 404 of the Sarbanes-Oxley Act. Unlike Sarbanes-Oxley, which has extensive and detailed requirements, Section 91 of the Act merely requires that management implement a programme for the early detection and control of risks that may significantly affect the company's financial position or profitability. Courts require that this internal control system comprise unambiguous responsibilities, reporting procedures and careful documentation. This documentation enables auditors to evaluate whether the control system is effective and also serves to communicate the system to the organisation.

In Germany, the law is not clear on exactly what internal control systems are required. According to the wording of the law, only

developments that endanger the further existence of the company, *i.e.*, developments that have a material impact on its financial position or profitability, must be monitored. Moreover, management has a certain amount of discretion in determining the scope of an internal control system.

Rules are different in each country or EU Member State, but recent developments in Europe will certainly lead to tightened management obligations in Germany. The Eighth Company Law Directive will oblige public companies to have an audit committee that, among other things, must monitor the effectiveness of the company's internal control systems, audits and risk management. Although it is not the intention of the German legislature to increase the requirements for internal control systems, the implementation of the new Directive will give internal control or risk management systems a more important role.

As a result of these legal changes, audit committees are likely to demand more stringent control systems to avoid being liable for failures. In setting up an effective control system, all companies, regardless of location, should conduct at least the following actions:

- Determine to which standards it must, or intends to, adhere, and document this decision unambiguously.
- Identify the various elements of the business. A clear business model is the first step towards creating an effective control system.
- Conduct a risk assessment for each element of the business. A risk and process-oriented approach to this assessment is most effective.

- Focus on a limited number of serious risks but also keep in mind the consequences of interaction between various operative risks.
- Ensure that the system allows for the passing of information to the relevant person, *e.g.*, operations management needs information different to what the supervisory board needs.
- Create uniform documentation that can be consistently implemented across the business. Documentation is vital as the failure to document what has been done to prevent corruption may make management vulnerable during litigation.
- Adhere to the system and continuously develop it. Continuous development is a key factor in an effective system as regular reviews help to cope with a changing environment and to prevent foreseeable disasters.

Finally, it is worth remembering that in Germany, in the absence of documentation of a mandatory internal control system, the general assembly's vote of approval of the actions of management may be void.



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Favourable New Guidance for Satisfying the Subpart F Manufacturing Exception

By Lowell Yoder and Rachel Aaronson

Income of foreign companies is not subject generally to U.S. tax. However, income of certain companies that are controlled by U.S. persons, known as controlled foreign corporations (CFCs), is subject to U.S. tax if it falls into a category known as Subpart F income. Sales income is potentially Subpart F income. However, if the CFC manufactures the property it sells, it qualifies for the “manufacturing exception”, and its sales income is not considered Subpart F income. In February 2008, the Internal Revenue Service (IRS) released proposed regulations that expand the definition of manufacturing for purposes of the manufacturing exception.

Subpart F Sales Income

Subpart F sales income is defined generally

as income derived by a CFC in connection with the purchase and sale of personal property involving a related person. In general, a related person will be considered to be involved with a sale if he or she is either selling or buying the property. Without a related party transaction, the CFC’s sales income is generally not Subpart F income. Multinational companies can reduce their U.S. tax burden by structuring their sales transactions to avoid creating Subpart F income.

Manufacturing Exception

Subpart F income does not include income from the sale of products manufactured by the CFC, even if there is a related party transaction. The current regulations define manufacturing as the physical transformation, conversion or assembly of purchased property. Specifically, purchased property is considered to be manufactured if any of the following is true:

- The property is substantially transformed (*e.g.*, steel rods converted into screws).
- The production operations are substantial in nature and generally considered to constitute manufacturing (*e.g.*, assembly of automobiles).
- Conversion costs are 20 per cent or more of costs of goods sold.

Minor assembly and packaging do not qualify as manufacturing. The U.S. Tax Court, however, has broadly interpreted this definition of manufacturing.

For example, assume that a multinational company includes a U.S. corporate parent that owns an Irish subsidiary (IrishCo). IrishCo would be considered a CFC and therefore would be subject to Subpart F. IrishCo manufactures products and sells them to a related distributor. If IrishCo’s



manufacturing activity meets the definition of physical manufacturing, it qualifies for the manufacturing exception and its sales income is not Subpart F income.

Contract Manufacturing

Rather than physically manufacturing property through their own employees, some CFCs hire a contract manufacturer. In typical contract manufacturing arrangements, a CFC principal hires a contract manufacturer to physically manufacture products on its behalf. The CFC principal controls the manufacturing process, provides significant intellectual property, bears most of the risks and derives the entrepreneurial profit.

Contract manufacturing relationships can be structured not to trigger Subpart F income by avoiding a related party transaction. For example, assume a Swiss principal, a CFC (SwissCo), hires an unrelated contract manufacturer that manufactures a product on its behalf. SwissCo purchases the product from the contract manufacturer and sells it to unrelated customers. SwissCo's income is not Subpart F income because it does not purchase from or sell to a related party.

“The current regulations define manufacturing as the physical transformation, conversion or assembly of purchased property.”

Substantial Contribution

If the CFC cannot avoid a related party transaction and does not physically manufacture the property itself, it can still avoid Subpart F income by qualifying for the new definition of manufacturing under the proposed regulations. This rule provides that a CFC that does not physically manufacture the product will be considered to be manufacturing if it “substantially contributes” to the manufacturing through activities engaged in by its employees.

A prerequisite for application of this new definition is that the raw materials purchased by a CFC must be physically manufactured into finished products before the sale of the property. There is no requirement concerning whose employees actually perform the physical manufacturing. There also is no requirement that the CFC control the parties engaged in the physical manufacturing.

Once it is determined that the product is physically manufactured by someone other than the CFC while the CFC controls the product, then a determination is made concerning whether the CFC satisfies the new non-physical definition of manufacturing. Specifically, a CFC principal will be considered to be manufacturing the property it sells if it, acting through its own employees, makes a “substantial contribution” to the manufacture of the property sold. Relevant factors taken into account in determining whether a substantial contribution has been made include but are not limited to: (i) oversight and direction of the physical manufacturing activities or process (including management of risk of loss); (ii) control of raw materials, work-in-process and finished goods; (iii) management of logistics; (iv) materials and vendor selection; (v) quality control; and (vi) direction of the development, protection and use of intellectual property required in manufacturing the product.

The weight given to any particular activity varies, based on the facts and circumstances of the particular business. The presence or absence of any particular activity, or of a particular number of activities, is not determinative. In addition, the fact that other persons contribute to the manufacture of the property does not necessarily prevent the CFC from satisfying the substantial contribution test through the activities of its own employees. Furthermore, there may be other factors that contribute to the manufacture of the product that are not on the list and may be taken into account for purposes of satisfying the substantial contribution test.

A key focus of the new definition is the activities of the CFC's employees. There is, however, no indication of a required minimum number of employees, and the number of employees necessary to satisfy the test should be based on the particular business circumstances of the CFC. Activities of independent contractors apparently are not taken into account. In addition, contractual ownership of materials and intellectual property, assumption of risk of loss and contractual rights to exercise powers of direction and control (without the regular exercise of those powers) are not sufficient to satisfy the substantial contribution test.

Substantial Contribution and Contract Manufacturing

The new definition of manufacturing applies to contract manufacturing structures involving related parties. For example, assume that SwissCo hires a

related German manufacturer (GermanCo) to manufacture products on a consignment basis. SwissCo and GermanCo are both owned by a U.S. parent. SwissCo sells the finished products to a related distributor.

Under the proposed regulations, SwissCo potentially qualifies for the manufacturing exception. If GermanCo satisfies the definitions of physical manufacturing and SwissCo's employees meet enough of the substantial contribution factors, SwissCo will be treated as manufacturing the property and its income will not be Subpart F income. However, SwissCo should ensure that its substantial contribution activities do not constitute a permanent establishment in Germany.

Before the proposed regulations were issued, taxpayers could take the position under current tax authorities that SwissCo should qualify for the manufacturing exception because the activities of GermanCo should be attributed to SwissCo. However, the IRS disagrees with this position, giving it some risk. With the proposed regulations in place, taxpayers can be certain that CFCs can qualify for the manufacturing exception without physically manufacturing the property.

Conclusion

Multinational companies can avoid Subpart F sales income by avoiding a related party transaction or qualifying for the manufacturing exception. The proposed regulations expand the definition of manufacturing for purposes of the manufacturing exception. This allows companies to satisfy this definition by substantially contributing to the contract manufacturer's physical manufacturing.



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CDO Trustees Access the Courts

By Steven Black

As mentioned in *International News*, Issue 3, 2007, collateralized debt obligations (CDO) trustees are facing challenges as losses relating to subprime mortgages escalate. Trustees often hold collateral in respect of notes issued by structured investment vehicles (SIVs). The first cases relating to downgrades on the vehicles have now been heard.

Cheyne Finance

One example of a recent case relating to downgrades involved SIV Cheyne Finance. Before an administrator could be appointed in respect of SIV Cheyne Finance, the trustee sought the court's guidance on an insolvency test. The applicable test was whether the SIV was unable to pay its debts "as they fall due". The court decided that this phrase involves an examination of the ability to pay current and future debts. It was decided that if a borrower is unable to pay debts falling due in the future, it would be considered insolvent. Previously, only current debts were taken into consideration; this wider interpretation could lead to greater instances of insolvency.

“Previously, only current debts were taken into consideration; this wider interpretation could lead to greater instances of insolvency.”

Orion Finance Corporation

The downgrade suffered by Orion, another SIV, led to an acceleration of issued notes. The notes were divided into Senior and Subordinated Notes. Further to the acceleration, the security trustee took exclusive control over the collateral of the SIV that secured the notes.

It was soon apparent that because of a deteriorating market, the realisation value of the collateral would not cover all the secured obligations of the SIV, and hence some of the noteholders would suffer a loss. The Subordinated Noteholders directed the security trustee to defer sale of the collateral until the market improved. However, the Senior Noteholders, knowing that the Subordinated Noteholders would suffer the loss, directed the security trustee to proceed immediately with the realisation. The security trustee sought direction from a court.

The court was asked to provide guidance on three issues:

- Whether the secured creditors have the right to dictate to the security trustee the time, place and manner of the realisation of the collateral
- If such a right exists, whether the security trustee's obligation to comply with the direction is subject to its discretionary powers and general fiduciary duties
- Whether the documentation mandates any specific time for the realisation of the collateral where there are insufficient funds available to meet the secured obligations

For the first issue, the court found that, without express wording in the security documentation, the security trustee should act under its general duty to realise the collateral subject only to the following principles:

- The security must be enforced.
- Such enforcement should ensure the prompt payment of the Notes.
- Such enforcement must be consistent with the full subordination of the Subordinated Noteholders' rights.

However, as long as these principles were followed, the security trustee did not need to abide by the directions of the Senior Noteholders. As a result, the second issue fell away.

In relation to the third issue, the court pointed out that security provisions provided for no specific timing, but could be read against the background that the security has been granted in order to secure the prompt payment and performance of the secured obligations. In addition, there was an overall duty that the security trustee must act in a commercially reasonable manner. Accordingly, no specific timescale was put on the security trustee other than a duty to be commercial.

The court's reliance on the documentation illustrates the need to focus on the enforcement and realisation provisions in security documents and consider what you, as the client, would want in this situation.

Interestingly, this case was brought before an English court even though the security agreement and other transaction documents were governed by New York law. The case was brought in England as this was perceived to be the faster jurisdiction, highlighting the importance of speed as a consideration when choosing a venue.



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Disclosure in the ABS Market

By Kate Lamburn

The financial crisis has brought into focus the efficacy of information flows in the securitisation industry—and found them wanting. The pleas from various quarters that they did not know they had U.S. subprime exposure make that point.

So, how is the transparency issue being addressed? The asset-backed securities (ABS) markets are different from the vanilla securities markets on which traditional disclosure regimes are based. Traditional regimes require disclosure of such information on the issuer, its assets and business as may be material to an investor's decision whether to invest in the securities. In addition, in relation to listed securities, there are obligations throughout the life of those securities to disclose inside information (*i.e.*, non-public information relating to an issuer and its business that would likely affect the price of its listed securities). These are thorny but relatively simple concepts for the traditional corporate issuer.

The trouble is that the “issuer” of ABS is simply a “look-through” special purpose vehicle (SPV) that issues the securities and holds the assets backing them. It is often not a requirement that even the most basic set of accounts be published. To assess their true risk, investors must look through the structure to the underlying assets beyond, and to any originator and/or manager of those assets. Before 2007 there was little attempt to translate the traditional disclosure requirements into those actually relevant to an SPV, where the risk is not at the issuer level at all, but is at least one step removed.

Market practice is that ABS disclosure occurs by way of periodic reporting on the composition and performance of the underlying asset pool. Inherently, the information provided (which, depending on the types of assets involved, may be generic and not specific) is historic. To the extent it does not actually include disclosure as to specific assets and obligors, it is impossible for interested investors to do their own analysis—hence the reliance on the much-criticised credit rating agencies. Market distortions will also occur where, as is common practice, like information is not available to existing investors of all classes of securities in the capital structure, and is not available to both actual and potential investors. It is a principle of an orderly market that participants have access to equal information relating to the securities.

“To assess their true risk, investors must look through the structure to the underlying assets beyond.”

Added difficulties relate to securities backed by assets which are not traded on organised markets. Where assets are loans or funds, or where risk transfer is synthetic, market participants can find themselves between a rock and a hard place. Disclosure principles applicable in the securities markets that lean towards general disclosure of all relevant information conflict with confidentiality principles applicable to some classes of underlying assets.

In the absence of sophisticated judicial and regulatory interpretation of disclosure laws specific to the ABS markets, self regulation is the way to restore confidence. Even before the recent crisis, in December 2006 the European Securitisation Forum (ESF) and the Commercial Mortgage Securities Association (CMSA) issued “Market Guidelines in Relation to the Market Abuse Directive for European ABS and CMBS Transactions”. The industry's response to the call from the European Council of Finance Ministers (ECOFIN) to “enhance transparency for investors, markets and regulators” by mid-2008 has been a commitment to deliver on further initiatives. These include the “Code of Conduct on Disclosure in the ABCP Market” issued by the ESF and the International Capital Market Association in June 2008. Work continues on a number of other guideline initiatives.



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Unsporting Anticompetitive Behaviour

By Alasdair Bell

The application of antitrust or competition law to professional sport has come increasingly to the fore in recent years. In the United States, disputes have often concerned matters such as franchise ownership and relocation, pooling of broadcast rights and restraints on players' freedom of movement. In Europe, the application of antitrust to sport was more of a late starter—basically beginning in the 1990s—but has continued at pace ever since.

The antitrust “big bang” in Europe came with the seminal ruling of the European Court of Justice (ECJ) in *Union Royal Belges des Sociétés de Football Association ASBL & others v Jean-Marc Bosman* (C-415/93) in

1995. This was the case that abolished the restrictions that had previously been imposed by football bodies limiting the number of “foreign” players that could be in the starting line-up of a football team (the so-called three plus two rule). The rule was held to be incompatible with the principles of free movement of workers in the European Union, which outlaw any restrictions on employment that are based on nationality. At the same time, the Advocate-General (who advises the ECJ) held that these restrictions also constituted an illegal restriction of competition in the market for player services.

Bosman coincided with the advent of pay-TV in Europe, and it is no secret that pay-TV has itself largely developed on the

back of obtaining exclusive rights to broadcasting top sporting events. In Europe this essentially means football (soccer). A further consequence is that clubs in the European countries with the largest and most lucrative domestic TV markets (such as the United Kingdom, Spain and Italy) are in a position to use their new-found wealth to acquire all the best talent, largely because the market for player services was liberalised by the *Bosman* ruling. This has, in turn, meant that traditionally strong clubs from smaller TV markets (such as Ajax of Amsterdam, which won the European Cup many times in the 1970s, 1980s and early 1990s) have found that all their players have been bought by the richer clubs in larger TV markets. This leads to an imbalance in European football that many influential bodies, not least the



Union of European Football Associations (UEFA), the governing body for European football, feel must be addressed.

“It does seem that professional sport in the United States comes with a rather more regulated approach.”

Interestingly enough, and notwithstanding the closer affinity to free market principles commonly found in the United States, it does seem that professional sport in the United States comes with a rather more regulated approach, which arguably contributes to the competitive balance in the league and therefore to the excitement and unpredictability of the sporting spectacle on offer. Thus, there is a draft system for certain professional team sports in the United States and a salary cap system in both the National Football League (NFL) and the National Basketball Association (NBA). Because these matters have been sanctified in collective bargaining agreements between the league owners and the players' unions, they cannot be attacked under U.S. antitrust laws. In Europe, no such pan-European collective bargaining structures exist, and there is also no general “labour exemption” to the application of European antitrust law. Nevertheless, what we can expect to see are further attempts by the European team sport bodies to rectify the unfettered operation of the free market, in particular where the free market ends up producing a less evenly balanced competition, which is less interesting to consumers.

Making the Rules and a Profit

Another interesting area where antitrust is coming to the fore in professional sport is where the rule maker (or governing body) also acts in some capacity on the market, for example by selling TV or other commercial rights to the events that the governing body organises and owns. Occasionally, it has been argued that there is an inherent conflict of interest in being both a rule maker and a market participant. The issue came up, for example, in a case concerning Formula One in Europe, where it was alleged that the Fédération Internationale de l'Automobile (FIA), the governing body for motor sport, had acted in an anticompetitive manner by

applying rules that prohibited teams and drivers licensed by the FIA from participating in non-FIA events that might rival Formula One Motor Racing. Following a lengthy investigation by the European Commission, it was eventually decided that the FIA would split its regulatory and commercial functions to eliminate any risk of conflicts of interest.

In a similar case, it was alleged that a Fédération Internationale de Football Association (FIFA) rule that required clubs to release players for the national team (e.g., for the World Cup) was anticompetitive and an abuse of FIFA's regulatory power. Effectively, the FIFA rule means that a club such as Manchester United has to release Wayne Rooney to play for the English national team, but the club, which pays the player's salary, is not entitled to any compensation for doing so.

“It was eventually decided that the FIA would split its regulatory and commercial functions to eliminate any risk of conflicts of interest.”

FIFA itself acts on the market when it sells the commercial rights for the World Cup, so the question is whether FIFA has, in this case, used (or abused) its regulatory power for commercial ends. Although this competition law question was sent off for an answer to the ECJ, we will not find out the answer to it because the matter has now been settled in the context of a new overarching agreement between the governing bodies of football and the clubs.

This cross-over between regulatory and commercial functions has also come up in tennis in the context of the ATP/Hamburg and Monte Carlo Masters case. This is an antitrust dispute currently being litigated in a Delaware Court between the Association of Tennis Professionals (ATP), the governing body for tennis, and the owners of the Hamburg and Monte Carlo Masters tennis tournaments. In this case, ATP decided to “de-classify” both Hamburg and Monte Carlo so they lost their Masters status, meaning they were effectively less prestigious tournaments less likely to attract the best players. Instead, ATP decided to

designate a new Masters event in Shanghai. The claimants argue that this “regulatory” decision was improperly influenced by ATP's own commercial agenda and, as such, constitutes a violation of U.S. antitrust laws. The dispute has already involved ATP in extremely costly litigation and, if ATP loses it, could have far-reaching and damaging consequences for the organisation.

Finally, the genteel sport of cricket is currently undergoing something of a revolution on account of the new 20:20 version of the game, which many think is considerably more exciting than the traditional format — nowhere more so than in India, where cricket is the number one sport in the vast domestic market. Historically, the main economic relationship in cricket was between a player and his or her country (unlike in football, where the club pays the wage bill). Now, however, the newly created Indian Premier League is challenging that historic economic relationship, and a question that arises is whether the governing body in England will release top English players to participate in the lucrative and exciting Indian Premier League. If it does not, and insists that player loyalty must at all times be to England, then it is not too difficult to see a further antitrust or restraint of trade complaint coming up. Indeed, the Indian domestic competition authority and courts have already warned the Indian governing body for cricket, which runs the Indian Premier League, not to penalise players who elect to ply their trade in the rival Indian Cricket League.



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Cristiano Ronaldo of Manchester United

The Rules of the Game: European Employment Law Issues in Football

By Graham Green

The relationship between a football (soccer) player and his or her club is, on the face of it, no different from that of any other employee and his or her employer. The “specificity of sport” is a significant consideration, and it is possible, at least in principle, for players and clubs to seek resolution of their disputes in both their national employment tribunal and through the Court of Arbitration for Sport (CAS).

The forum in which disputes are heard may have a significant impact on the outcome. Recent developments in football highlight this point.

Annual Transfer Speculation

During the summer of 2008 there was, as usual, much speculation concerning the futures of top-level professional football players. The greatest speculation surrounded Cristiano Ronaldo and his future at Manchester United. Ronaldo has an agreed term contract with a significant unexpired term, but, according to the press, he was considering a move to Real Madrid before its expiry. If Ronaldo (or any other player with an unexpired term) was insistent on leaving and his current club did not want him to go, or a price could not be agreed, what are his options? Could he simply leave, and in so doing, breach the terms of his contract?

The answer is yes, but the financial consequences for him and his new club could be significant, especially if Manchester United were to pursue him for breach of contract (and/or Real Madrid for inducing the breach) in the English High Court. Perhaps even more significant are the sanctions that may be imposed by the Fédération Internationale de Football Association (FIFA), football’s governing body, under Article 17 of its Regulations for Transfers.

If a player leaves during the protected period (ordinarily three seasons into the contract), the sanctions include a four month ban for the player from the start of the next season and a prohibition on the player’s new club

from signing any new players for the best part of the season. These sanctions have not yet been tested by European or local civil courts and may create employment law issues of their own. They were, however, the subject of a very lengthy negotiation and subsequent approval by the European Commission.

“These sanctions have not yet been tested by European or local civil courts and may create employment law issues of their own.”

Scenarios such as the one involving Ronaldo are not uncommon. In August 2006, Andy Webster, a player at the Scottish club Heart of Midlothian, acted in breach of his employment contract by signing for Wigan Football Club whilst part of his agreed term contract remained unexpired. As a consequence, Hearts filed a claim, and CAS considered Article 17 of the FIFA Regulations. The outcome was that CAS ordered compensation of £150,000 to be paid to Hearts. This figure represented the value of salary left on Webster's contract. The decision is significant and has been widely criticised. The consequences, however, are unclear. There is no doctrine of *stare decisis* (decisions forming binding precedents) in the CAS at the moment, so it is conceivable that a panel faced with a similar set of circumstances might come to a different conclusion.

Under Article 17, compensation will be payable in all cases by the party in breach, with both the club and player being jointly liable. Compensation is calculated “with due consideration for the law of the country concerned, the specificity of sport, and any other objective criteria”. Although reference is made to the law of the country concerned, the weight to be attributed to such law is unclear. One might assume that in the Webster case due consideration would have been given to Scottish law, but little, if any, weight was, in fact, attributed. It appears there was, however, no clear choice of law in the Webster contract. One result of the case therefore may be that express choice of law clauses will be included in players' contracts in the future.

Most disputes of this kind have been handled through FIFA. However, in October 2007, a Spanish civil court ordered the former Barcelona youth player Fran Merida to pay £2.1 million in damages for breaching his contract by signing for Arsenal in 2006. This award represents a significant contrast to the approach to compensation taken in the Webster case.

If a claim for breach of contract was brought by a club against a player (and possibly the player's new club) in the English High Court, the damages would be assessed with reference to the usual principles of contract law. The level of financial loss caused by a player's unilateral breach of contract (*i.e.*, early departure without agreement) would be difficult to quantify, but this would not stop the High Court from making a calculation based in part on relevant expert evidence. It is clearly arguable that the starting point in assessing damages should be the cost of finding a replacement. This could run into many millions of pounds, although any transfer fee paid would have to be taken into account. Other factors to be taken into account may include a combination of training costs, opportunity loss, loss of promotional and marketing benefits associated with the player, and performance loss in future competitions.

Six Plus Five

The proposed “six plus five” rule would require football clubs to have at least six “home-grown” players and, at most, five “foreign” players in their starting line-up in every game. It appears to be an attempt, amongst other things, to improve national teams and to address a concern that success in football at the highest level may be monopolised by the richest clubs.

Article 39 of the EC Treaty provides for the free movement of workers. It is considered one of the fundamental freedoms guaranteed by European law and an essential element of European citizenship. It gives all persons in the European Union the right to work, reside and remain in another Member State, and it provides for equal treatment in respect of access to employment in all Member States.

If implemented, the “six plus five” proposal would, on the face of it, lead to numerous breaches of Article 39. It is difficult to see how it would fall within any of the limited exceptions of public security, public policy

or public health. In fact, Michel Platini, president of European football's governing body, the Union of European Football Associations (UEFA), has said that Hans Gert-Pottering, the president of the European Parliament, has “told us that we would have to observe what the European Parliament had decided ... ‘six plus five’ will not be applied, it will not be enforced”. Nevertheless, the proposal is still being debated.

Race discrimination legislation in the European Union makes it unlawful to discriminate against persons on the grounds of nationality, colour, ethnicity or race. Protection against such discrimination is given specifically to employees and prospective employees. In the United Kingdom, the protection exists in the form of a statutory duty on employers not to discriminate directly or indirectly. Only indirect discrimination is capable of being justified.

If “six plus five” was implemented in any of the various football leagues operating in the United Kingdom, players may not be offered jobs where there is a foreign player quota. It appears inevitable, therefore, that claims of direct race discrimination would arise. For these reasons, there appears little doubt that “six plus five” as it is currently understood would result quite quickly in a successful legal challenge and is unlikely to be introduced.



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New IRS Initiatives in Taxing International Athletes

By John Lutz and Kumar Paul

In January 2008, the U.S. Internal Revenue Service (IRS) confirmed that it is targeting professional athletes and that 60 examinations involving international golf and tennis players had been initiated over “significant tax issues”. This heightened IRS scrutiny, assisted by improved information exchanges with foreign taxing authorities, is motivated by a desire to tax not only a foreign athlete’s U.S. tournament winnings (which are usually accomplished through withholding tax at source) but also to reach other U.S. income, such as income from endorsements.

This is a change in the traditional IRS attitude towards non-U.S. athletes and has resulted in attempts to collect additional taxes from the inception of an athlete’s participation in U.S. events. In the case of a non-filer, this may be significantly longer than the traditional six year examination period that the IRS uses absent fraud. Further, where no timely U.S. tax return has been filed, deductions and credits that could usually be used to offset tax liability may be denied.

Foreign athletes who assumed that the U.S. taxes withheld from their U.S. winnings absolved them from the obligation to file a U.S. tax return and pay any further U.S. taxes, are experiencing an unwelcome awakening as to their potential “additional” U.S. tax obligations.

The Basis for Collecting U.S. Taxes

Generally, whether a non-U.S. person is considered to be engaged in a U.S. trade or business depends on facts and circumstances and envisages continuous, regular and sustainable activity as opposed to the performance of a single disconnected business act. Net income effectively connected with such trade or business (ECI) is generally subject to federal income tax at graduated rates which top out at 35 per cent.

In the case of a foreign athlete, however, winnings from participating in a single tournament could be characterised as income earned from the performance of personal services in the United States, the performance of which constitutes a U.S. trade or business. IRS rulings have separately

concluded that entering a horse in a single race in the United States, and a single performance by a visiting athlete, could trigger U.S. trade or business characterisation.

While many U.S. tax treaties provide relief to non-U.S. residents performing services within the United States, where such services cannot be attributed to a fixed base of the non-resident within the United States, athletes and entertainers are typically treated separately. Many U.S. tax treaties permit the United States to tax income of artists and athletes. This is despite the requirement in the business profits article of such treaties that such income cannot be taxed unless attributable to a fixed place of business.

Denial of Deductions and Credits

U.S. Treasury regulations issued in December 1990 provide that a foreign person may not claim deductions and credits against ECI unless a true and accurate tax return is filed in the prescribed manner within specific filing deadlines. For individuals, the regulations provide for a filing deadline that is generally either: i) the earlier of the date that is 16 months after the due date for



the return; or ii) or the date the IRS mails a notice to a non-resident individual, advising him or her that the current year tax return has not been filed and that (with some limited exceptions), no deductions or credits can be claimed. The IRS may waive the filing deadline in certain limited circumstances but the burden of invoking the “concession” can be high.

“Many U.S. tax treaties permit the United States to tax income of artistes and athletes.”

Consequently, a professional tournament golfer or tennis player participating in the U.S. circuit, who has never filed a U.S. tax return but has had U.S. taxes withheld from his or her winnings, could be denied deductions and credits against such winnings and other U.S. income. In addition, that denial can extend for as many years as the athlete had been engaged in U.S. events. Since no tax return had ever been filed, no statute of limitations protection is available and the IRS could accelerate the filing deadline for tax years that are within the filing deadline, by simply mailing a notice.

Corresponding regulations applicable to non-resident corporate taxpayers, which were declared invalid by the U.S. Tax Court in 2006 on the basis that the statute underlying the regulations did not contain a timely filing requirement, were reinstated upon appeal earlier this year on the basis that timely filing was an implicit feature of the statute.

Potential exists for an argument that the timely filing regulations violate the non-discrimination article of many U.S. tax treaties on the basis that the regulations impose a requirement that results in a more burdensome tax to a non-U.S. athlete. This is because there is no comparable section in the U.S. federal tax law that denies deductions and credits to a U.S. taxpayer who files delinquent federal income tax returns. The argument was advanced with respect to an individual taxpayer in a case decided in 1996 and the Tax Court, while acknowledging that there could be a question as to whether the regulations are inconsistent with the non-discrimination article, dismissed the argument on the basis that the applicable treaty did not apply to the tax years under review.

Endorsement Income

In the current sports environment, a considerable portion of an athlete’s income can also be attributed to worldwide endorsement contracts.

In a situation where a non-U.S. athlete would qualify for benefits under an applicable U.S. tax treaty, this endorsement income may generally be characterized as one of, or a combination of, several of the following:

- Compensation for personal services that are tax free in the United States unless the athlete has a “fixed base” available to him or her in the United States (which is generally unlikely)
- Royalty income that is generally subject to withholding at treaty rates on the portion of the payment that is for use of the player’s name and likeness within the United States
- Taxable as “Artistes and Athletes” income (at ordinary income rates) to the extent the endorsement is closely associated with the athlete’s actual competition (*e.g.*, endorsing the tournament and possibly using the endorsed equipment or wearing logo patches in tournament play)

“It is prudent when negotiating endorsement agreements to ensure that remuneration is structured so that U.S. and non-U.S. income can be distinguished clearly.”

Current Treasury regulations, while reserving on the subject of artistes and athletes, indicate that apportionment of an individual’s services income between services performed within and outside the United States on a time basis is permissible.

The IRS, intent on reaching athletes who limit their days spent in the United States to a minimum by preparing for U.S. events outside of the United States, has proposed regulations that would generally provide for an additional/alternative method of apportioning income on an event basis. The IRS “takes the position that if you compete 10 times around the world and you competed twice in the United States . . . one-fifth of that endorsement income source is from the United States”.

Many endorsement contracts do not provide for payment on a per event basis. Therefore, this approach can result in a disproportionate amount of an athlete’s worldwide endorsement income being unreasonably and inappropriately allocated to the United States. This could be the case when a golfer does not make the cut, or a tennis player is eliminated in the early stages of a tournament.

Conclusions

To paraphrase an old proverb, “one tournament can a U.S. taxable presence make”. Foreign athletes should seek qualified U.S. tax advice on federal and state return filing obligations and when in doubt, timely file a protective return. A non-resident individual has the option of filing a protective return on which no income, deductions or credits need be reported but which preserves the individual’s right to allocable deductions and credits. Finally, it is prudent when negotiating endorsement agreements to ensure that remuneration is structured so that U.S. and non-U.S. income can be distinguished clearly.



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Exclusivity in Sports Sponsorship—a U.S. and UK Perspective

By Jennifer Mikulina and Cheng Tan

Licensing agreements involving trade marks for sports teams can be very lucrative, but cross-border team ownership and competing practices in the United States and the United Kingdom create a potential tension. In particular, the league-driven licensing systems used in the United States may not always be compatible with the club-driven practice of the United Kingdom and Europe.

UK Club versus U.S. League

In the United Kingdom and Europe, individual clubs own the rights in names, logos and trade marks and can negotiate their own commercial deals. Whilst the sponsorship

of the league is controlled by the relevant sporting authority, at club level, sponsorship is not centralised. For example, in the United Kingdom the FA Premier League (FAPL) and the Football Association (FA) do not negotiate kit or sponsorship deals for the clubs in the Premier League or Football League, but may obtain sponsorship for the relevant league itself and for the games played in their league competitions.

“At club level, UK football clubs license their marks for use on kit and merchandise.”

At club level, UK football clubs license their marks for use on kit and merchandise. It goes without saying that the more popular or successful the sport and the club, the more likely they are to have the leverage to negotiate a good deal. Kit manufacturers and sponsors, which are major sources of revenue, are drawn by the size of the club's fan base and potential print, television and online exposure. Potential kit suppliers will want the global rights to put the club's logos on replica shirts; sponsors pay to advertise on both the official and replica kits. The biggest exclusive European shirt sponsorship, signed in 2005 and including a renewal option for five years from 2010, is worth £240 million. This is equivalent to £15 million per season.

In contrast to the European structure, U.S. professional sports team trade marks are typically part of a league-based common property system. Under this system, a central league holds the trade marks of all its member teams. Most of the major professional U.S. sports leagues follow this model, including the National Football League (NFL), Major League Baseball, the National Hockey League (NHL), the National Basketball Association (NBA) and Major League Soccer (MLS). Respectively, the licensing entities for each of these leagues are NFL Properties LLC; Major League Baseball Properties, Inc; NHL Enterprises, L.P.; NBA Properties, Inc; and Soccer United Marketing, LLC.

“The July 2005 deal, including a renewal option for five years from 2010, is worth £240 million.”

The NFL was the first professional sports league in the United States to allocate team trade mark licensing/merchandising rights through the use of a collective trust. Currently, NFL Properties LLC represents the NFL and its member professional football teams for the licensing of their trade marks. Each team in the league transfers exclusive rights in its team marks to the league trust and enters into agency agreements with the trust. The rights in the marks are then licensed to NFL Properties to exploit them as the exclusive worldwide negotiating agent for the league's clubs. Potential licensees do not negotiate or obtain licences directly from individual teams in the league. This arrangement is similar for the other U.S. professional sports leagues, although some exceptions exist for local licensing agreements.

Any commercial entity seeking to use an NFL team trade mark anywhere in the world must license the rights collectively from NFL Properties and must meet the league's requirements. For example, the league may require that each licensee have the capability and resources to manufacture licensed goods for all the teams in the league.

Under the U.S. system, proceeds from trade mark licensing agreements negotiated by the league are shared by all teams equally. The league receives the first cut of the proceeds and then manages distributions of royalties to teams. The theory behind

this sharing arrangement is to ensure equal distribution of revenues—regardless of whether a particular team exists in a large market or a small market.

In 2004, MLS signed a 10-year sponsorship agreement with sportswear manufacturer Adidas worth an estimated U.S. \$150 million. This agreement is the biggest sponsorship deal in MLS history. It allows Adidas to be the only sportswear brand to have advertising rights at all MLS games and the sole sponsor and licensed product supplier to all MLS clubs.

Tension and Possible Resolution

The global accessibility and popularity of sport as well as its increasing commercialisation have led to increased revenue generation in the sports sector. In the United Kingdom, since 2006, 11 of the current 20 teams in the EAPL have changed ownership, pointing to an understanding that this is a highly profitable business. Many organisations that invest in the sports sector are building international portfolios of clubs across different sports. The growth in the percentage of club revenue that is generated by off-field activities, including advertising and merchandising, is focusing these investors on the use of the clubs' trade mark rights.

“The global accessibility and popularity of sport as well as its increasing commercialisation have led to increased revenue generation in the sports sector.”

As clubs chase the big value kit and sponsorship deals, they should be aware that, in granting global exclusivity to one entity, they may be prevented from benefiting from other commercial opportunities. This is particularly true where clubs are looking to exploit links with other clubs held by the same owners. For example, a European club may want to co-brand with an MLS club in the same investment portfolio. This would not be possible if the European club has granted global kit rights to a single entity, unless that entity is also the official supplier of the MLS. The provider to the European club will not allow the club to use its logos on kit manufactured by a third party.

On the other hand, exclusivity could work in favour of the clubs and leagues. Potentially, sponsors could become more than willing to negotiate these agreements, on the condition that there is exclusivity in the club and league games. It could be mutually beneficial; sponsors may reach a wider audience, and the club and the league would only have to negotiate with one party. The possibility for parties on either side of the Atlantic to co-brand certainly exists. Exclusivity on sponsorship deals will undoubtedly evolve, and potential tensions may indeed turn out to be opportunities.



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The Protection of Sports Broadcasting Rights

By Rohan Massey

Sports broadcasting rights in Europe are sold by the rights holders on a platform and territory basis. Broadcasters in each territory bid for exclusive packages, such as the right to show live games on TV or highlights on mobile phones. The English FA Premier League (FAPL) reportedly raised EUR4.1 billion from the sale of its latest three-year international broadcasting rights packages. A three-year package to the broadcasting rights in Spain for Champions' League football reportedly cost more than £120 million. The rights to broadcast Formula One in the United Kingdom for the next five years sold for £200 million. With such huge sums of money at stake, broadcasters and rights owners alike want to ensure that the value of the rights is protected by exclusivity.

The value of exclusivity is eroded by third parties allowing unlawful access to the broadcast, a practice known as digital piracy. The two most common forms of digital piracy in relation to broadcasting are: i) an encrypted broadcast signal being decoded outside the territory for which the broadcaster is licensed, and ii) the unauthorised capture of a lawful broadcast signal for onward distribution, usually in a video format over the internet.

“The value of exclusivity is eroded by third parties allowing unlawful access to the broadcast, a practice known as digital piracy.”

Sports Broadcasting in Europe

FAPL grants its broadcasters exclusivity, and, to ensure the protection of the rights of other broadcasters, its licence agreement prohibits the broadcaster from broadcasting outside its granted territory. Territorial boundaries are maintained contractually by prohibitions preventing the broadcaster from supplying decoder cards and equipment to customers outside its territory.

The cost of acquiring satellite equipment and decoder cards varies across Europe. For a commercial user in the United Kingdom, it is significantly cheaper to purchase a package from NOVA, a Greek broadcaster, than it is to take a subscription with a licensed UK broadcaster. An additional attraction of the NOVA package is that it includes live Premier League match coverage between 2.45 and 5.15 pm on Saturdays



when the UK broadcaster is prevented from screening live football under Football Association regulations.

Extra-Territorial Reception

In the United Kingdom, FAPL and Sky, the licensed broadcaster, have sought to protect their rights aggressively. The cases that have been heard so far have included arguments relating to copyright infringement (*Karen Murphy v Media Protection Services Limited* [2007] EWHC 3091 Admin), use of illicit decoding devices and freedom of movement of goods and services (*FAPL v QC Leisure and others* [2008] EWHC 1411 (Ch)).

A second key issue is whether the terms of FAPL's licences with broadcasters are enforceable under European law.

The English High Court has found that, although each broadcaster adapts the signal it receives from the party filming the match by adding its own commentary and logos, it is the party filming the match that creates the core content of the "broadcast" (pictures and ambient sound). This led to the conviction in the United Kingdom of Karen Murphy, who was found guilty of using the Greek NOVA satellite service to screen Premier League games in her pub. Her conviction was based on the fact that her choice of the NOVA package was made with the "intent to avoid payment of any charge applicable to the reception of the programme," *i.e.*, the payment to Sky for its commercial package that included the exclusive rights to broadcast Premier League games in the United Kingdom.

QC Leisure concerned the import and supply of foreign satellite equipment and decoder cards to the United Kingdom. FAPL claimed that the defendants supplied pubs with equipment that enabled access to Greek and Arabic transmissions of live Premier League matches. A number of issues arising from the case have been referred to the European Court of Justice (ECJ).

One fundamental issue referred to the ECJ is whether satellite receiving equipment that is legal in one European territory becomes an "illicit device" under the Conditional Access Directive 98/84/EC simply by

being moved outside that territory. The Conditional Access Directive requires Member States to prohibit the use of equipment designed to intercept and decrypt protected services, such as satellite television signals. Notably, in referring the issue to the ECJ, the judge hearing the case opined that he did not consider that movement of the equipment created an "illicit device" as the Directive was intended to prevent the creation of devices that were illegitimate wherever they were used.

A second key issue is whether the terms of FAPL's licences with broadcasters are enforceable under European law. FAPL contractually prevents its licensees from providing services to customers outside their territory on both an active and passive basis. Although this has been accepted by the European Commission, an adverse ruling from the ECJ will have a significant impact on the FAPL's ability to grant rights on a strictly territorial basis, as the "leakage" of services by broadcasters between territories will make it more difficult to determine the true value of such rights in a particular territory.

Internet Re-Casting

Sports broadcasts may also be pirated over the internet, for example by a legitimate broadcast signal being captured, converted, and distributed or streamed over the internet.

UEFA, Formula One and the Premier League have engaged the services of internet "cyber police".

Rights holders are increasingly taking action through the courts to tackle this form of piracy. In 2007, the English High Court found that the operators of websites streaming live broadcasts of UEFA Champions League matches infringed UEFA's copyright in the licensed broadcasts. In Scotland, proceedings commenced by Cricket Australia (formerly the Australian Cricket Board) against operators streaming live broadcasts of cricket matches, including the Ashes Series, are currently ongoing.

Clip Issues

The value of packages of highlight sporting moments is being threatened by broadcast clips being uploaded, without authorisation, to globally accessible video websites, such as

YouTube. It is becoming increasingly common for rights owners and their licensees to retain the services of internet "cyber police" to monitor illegal live videos and highlights clips, and act to have them blocked and removed. The video website providers complain, however, that definitive removal of content is difficult to enforce as files can be posted multiple times or with different file names.

FAPL claims copyright in all Premier League football matches played, including match clips that have been uploaded and broadcast on YouTube. In May 2007 in New York, FAPL filed a class action for copyright infringement against YouTube and its parent, Google Inc. FAPL asserts that YouTube and Google are pursuing a deliberate strategy of engaging in and facilitating copyright infringement on YouTube and have refused to take meaningful steps to prevent copyright infringement, despite having the facilities to do so. It remains to be seen which way the U.S. courts will decide on this matter.

The professional sport industry is facing up to the issue of piracy and, where possible, taking action to protect the value of rights and exclusivity. It remains to be seen if the outcome of the cases brought by FAPL in Europe and the United States will strengthen or weaken the industry's position. This legal match is one that is going to the wire.



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“Listing” Events for Free-to-Air TV in Europe—Time for Fair Play?

By Benoît Keane

The EU Television Without Frontiers Directive allows EU Member States to draw up a list of “events of major importance to society” in that country which must be shown on free-to-air television. As can be expected, each country prioritises different sports.

Once a country has drawn up a list, it must be vetted by the European Commission. The role of the Commission is to ensure that the list is compatible with European law, in particular as regards the free movement of services and the Treaty rules on competition. Of course, it is inevitable that the listing of an event will involve some curtailment on rights as pay-TV channels are effectively eliminated from buying the rights. However, the role of the Commission is essentially to ensure that a national list is not disproportionate.

In 2007, the European Commission issued a number of formal decisions approving the lists of major events in Austria, Belgium, France, Finland, Germany, Italy and Ireland. This followed the ruling by the European Court of First Instance (CFI) in *Infront WM v Commission* [2005] T-33/01 that the Commission cannot merely issue an administrative letter approving the national lists. Instead, it must carry out a detailed assessment of each Member State’s list and issue a formal decision approving the lists as a matter of Community law.

However, in early 2008, the Fédération Internationale de Football Association (FIFA) and the Union of European Football Associations (UEFA), the organisers of the

football World Cup and European Football Championship, respectively, brought an action before the CFI disputing the Commission’s approval of the United Kingdom’s list of events. The United Kingdom had claimed that every single match in the finals of the World Cup and the European Football Championships were “of major importance to UK society”. In other words, a group stage match in the European Championship between, say, Turkey and Portugal is, according to the UK Government (and the European Commission) of major importance to UK society. By contrast, the other Member States involved in the World Cup or the European Championship tended to list only those matches involving the national team.

Both UEFA and FIFA argued that the Commission’s approval of the UK list was without justification and in breach of the principles of European law. While they did not challenge the view that a national team match or the final games of these tournaments were of major importance to society, they considered the Commission’s approval of the listing of all matches unjustified. The level of interest in such matches (measured according to historical television audiences, for example) did not suggest that they could be considered as being “of major importance” to the UK public. Nevertheless, the Commission is defending its decision vigorously and the case before the European Court (doubtless involving the intervention of the UK Government) promises to be interesting. The Court’s ruling could be expected in around three years.

The case demonstrates that there must be an objective reason for the listing. Further, the actions of UEFA and FIFA show that rights holders are prepared to defend themselves against a European Commission decision that severely restricts their opportunity to market the media rights to their most important events. However, even if UEFA and FIFA are successful in their action, it will not mean the end of the listing regime. Instead, Member States will have to consider carefully whether a listed event is really of major importance to society and whether it is vital that the public has the opportunity to see it for free. Fair play in drawing up the list of events will be required from both sports organisers and national governments.



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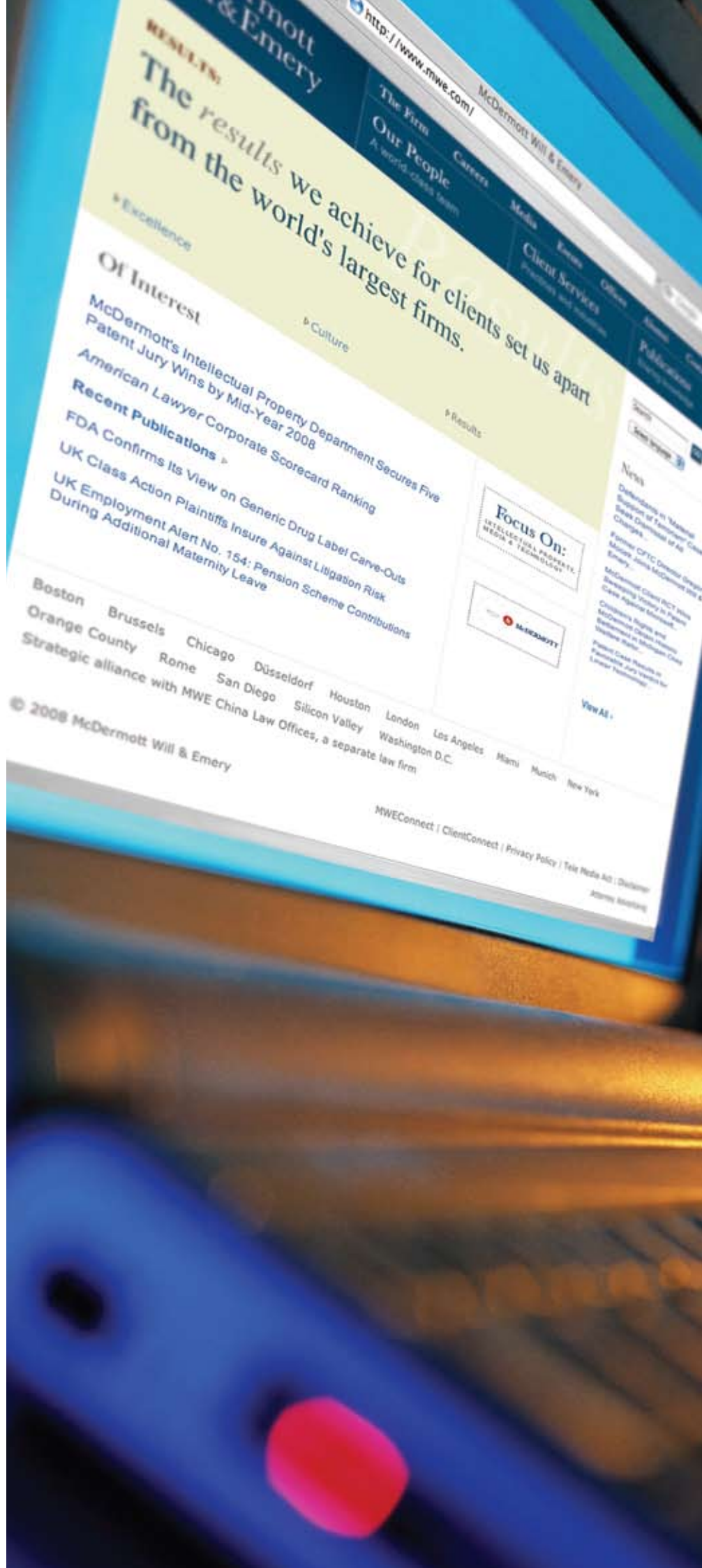
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