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THE IMPACT OF COVID-19 ON SPORTS: A MID-WAY ASSESSMENT

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Introduction

The year 2020 will forever be remembered for the arrival of the novel corona virus, SARS-CoV-2, and the Covid-19 pandemic that followed. It is not hyperbole to claim that Covid-19 has affected and is affecting pretty much everyone and every part of society. The pandemic and actions taken in response to the pandemic have brought with them severe trials and high-lighted pre-existing systemic weaknesses. In many parts of the world, the situation appears to be improving as governments, organizations, and individuals are finding and implementing increasingly effective strategies. However this is far from true everywhere, the remaining uncertainty is substantial, and in the coming months many challenges will persist while new challenges will arise. It is thus too early to write a history of sports and Covid-19. With this co-authored, extended editorial the Editorial Board of the International Sports Law Journal seeks instead to take stock of what has happened thus far, as we now hopefully find ourselves, to echo Churchill, if not at the beginning of the end, at least at the end of the beginning. In doing so, we seek to address consequences in both the short-term and the long-term.

Testing the Limits of the Autonomy of Sports

Covid-19 has exposed some of the complexities and the frailties of sports governance. The consequences of Covid-19 and the widely predicted economic crisis have exposed even more some of the critical junctures of sports governance systems, with stakeholders having diverging

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interests and policy solutions. Nowhere has this been more evident than in debates about how to conclude football seasons across Europe. With the information we have at this moment, there are probably two areas in which changes could be forthcoming as a result of the coronavirus crisis. These are the relationships between sport organizations and public authorities (mostly national governments) and the so-called autonomy of sports.

The autonomy of sports is a widely challenged policy and legal concept, but it is undeniably championed by sports governing bodies in their “disputes” with public authorities. Sports organizations are conscious of the limits of that approach, though, and the International Olympic Committee (IOC) for instance has adopted a less dogmatic and much more practical, flexible, and realistic approach to autonomy lately.

Almost twenty years ago, Ken Foster challenged the concept of sports autonomy and proposed alternative frameworks to look at it, coining the widely used (at least academically) concept of “supervised autonomy.” Covid-19 is likely to accentuate the supervision, rather than the autonomy, as the crisis has exposed even more the limitations of sports governing bodies. When governments around the world started to decide how to control the disease, organized mass sport activities were among the first casualties. Even if some federations or clubs protested those early decisions, they had of course no other option than to abide by them. Similarly, the decisions of the Dutch and French governments not to allow sporting events until (at least) the autumn was an extreme reminder of the limitations that public and legal regulations impose on sports organizations.

Even as we in Europe move away from the peak of the pandemic, sports can only put together plans to resume activity in the short to medium term under severe control from governments and public health authorities. For many, this naturally would be the logical thing to do given the public health situation, but the argument here is that these dynamics (as unavoidable as they might be) enhance the supervisory powers of public authorities over sports organizations, which in turn will have consequences worth anticipating now.

The bargaining power of governments has increased with Covid-19, extracting compromises for more and wider redistribution of commercial income from La Liga (and, according to reporting, even from the Premier League) in return for a favorable look at the return of competitive football

as soon as it is safe to do so. But even with those agreements, such as the one reached in Spain between La Liga and the government, the latter always had the upper hand, forcing the football authorities to modify their protocols and delay the restart date at least twice.

Finally, the impending economic crisis is likely to increase the dependency of medium to small size sports organizations on public funding, especially national governing bodies. This is of course not new, but Covid-19 has the potential to increase that dependence. We are living in an era in which much more attention is paid to sports governance, with Codes for Good Governance for sports being designed in many countries and the EU also involved in that area. Governments now will have a diversity of objectives to support societal recovery post-Covid-19, hence they can be even more demanding with their conditions to fund sports. In our view, whereas there might be no appetite for direct regulation under the new circumstances, it seems clear that Covid-19 might have shifted the relative bargaining power in favor of public authorities in this complex network.

Balancing Health and the Integrity of Sports

One early consequence of the Covid-19 outbreak for global sports was the suspension of anti-doping testing. The first, major measure in this field was taken on 3 February 2020 when the China Anti-Doping Agency (CHINADA) suspended its testing in mainland China. Although CHINADA was able to resume testing relatively soon after, the suspension of doping testing quickly spread across the globe along with the virus. In many areas it has yet to resume.

The reasons for this are obvious. The global anti-doping regime involves relatively close physical contact with anti-doping officers who unexpectedly—and, at least for some athletes, frequently—go to homes, gyms, and other places where athletes are to administer tests. This requires anti-doping officers moving around and being in close proximity to the athlete. The testing protocol is clearly problematic during the Covid-19 outbreak as it involves significant risks of transferring the virus between athlete and anti-doping officer and, by extension, a risk to their health. If infected, anti-doping officers may act as carriers spreading the virus to other athletes that they visit. As our knowledge of the novel corona virus has improved, the World Anti-Doping Agency (WADA) has issued guidance to the national anti-doping agencies

(NADOs) on how to conduct at least some testing in a safe manner. Experiments have been made with such things as dried-blood-spot testing and virtual doping testing. It has nonetheless simply not been possible to safely continue the previous levels of testing. In many jurisdictions and for long stretches of time, the ability to carry out testing has been out of the anti-doping organizations' control as governments have forbidden anti-doping officers and athletes from moving about to the extent required to conduct effective testing.

In all of this, WADA and the NADOs have struck a reasonable and proportional balance between, on the one hand, upholding the integrity of the anti-doping system (and by extension the integrity of sports) and, on the other, protecting health and lives. Nevertheless, there are obvious consequences that follow from these choices. There are good reasons to fear that some athletes will unfortunately take advantage of the pandemic-induced gaps in the anti-doping system. Even if this is not actually the case—and we will never fully know the extent as some of these would-be violations will certainly go undetected—Covid-19 will unavoidably harm the perceived integrity of sporting competition, a very real negative consequence in its own right.

A distinct but related consequence of Covid-19 is the unexpected windfall for some doping-suspended athletes. In the wake of the pandemic, most major sporting competitions that were to take place in the summer of 2020 have been postponed, chief among them the Tokyo Summer Olympic and Paralympic Games. Consequently many athletes are now at the end of their doping suspensions and will be able, because of the postponement, to compete in those competitions. The ability of doping-suspended athletes to return to competition after their suspensions has been a difficult and controversial issue for some time, but the returns of these particular athletes in these particular competitions are exceptionally contentious.

Both of these situations raise questions regarding whether there should be some sort of response and, if so, what the response should be. There is no formal basis for taking actions: doping violations require more than a suspicion and athletes that have served their suspension have a right to return. However, will that line be adhered to even if, for example, a would-be suspended athlete wins an Olympic event or beats a world record by a significant margin? In this regard, the Covid-19 pandemic poses a challenge to the integrity of sporting competitions reminiscent of the recent Russian doping scandal.

Filling the Sports Betting Vacuum

When top-level international sporting events were first suspended or cancelled in March 2020, sports betting operators had few wagering options to offer consumers. Indeed, many sportsbooks reported at least a 90 percent drop in amounts wagered in the subsequent months.

The sports betting market did not completely evaporate, however. Within two months, there was an increasing number of pop-up sporting events. In late May, ESPN reported that gambling on table tennis was “blowing up.” At the same time, multiple media outlets reported that certain data dissemination firms were helping start up short-duration tennis tours to create content for betting markets. Regulators reacted to such reports by questioning the legitimacy of certain made-for-betting events.

Having companies in the sports betting industry organize and/or fund sporting events could represent the “new normal” for how certain sports function. The symbiotic relationship between betting and sports—a textbook example of a dual market—will undoubtedly result in a litany of legal issues. Most notably, some jurisdiction will likely tackle the dispositive issue of whether a sporting event organizer can own or control the news and information emanating from the event and, in turn, monetize data that fuels the global sports betting industry.

Keeping Costs Under Control

The widespread deployment of unprecedented lockdowns and social distancing measures effectively closed down sports across the globe. Despite the existence of governmental job retention and employment benefit schemes and the gradual unlocking of sport, much of the sector has been plunged into a financial crisis that could threaten the survival of clubs, leagues, tournaments, and even sports governing bodies. The crisis has brought into sharp relief pre-existing anxieties over the organization and sustainability of the sector and has heightened calls for sports to rethink its future. Whether the crisis demands change or not, there are some who will not allow the opportunities following an upheaval of such magnitude to go to waste. Change will come.

Should a reset be pressed, who will have their finger on the button, and will we see an explosion of altruism or an implosion of self-interest? Many governing bodies will attempt to steer sports out of the crisis by defaulting to one of their key functions—that of promoting solidarity. But governing bodies have been weakened as key revenues from event organization, broadcasting and sponsorship have been reduced. Business as normal is unlikely post-Covid-19 and this means governing bodies will have to rethink their relations with the sports stakeholders, public authorities, and commercial undertakings. Old assumptions about the autonomy of sports might give way to new realities.

In some sports, particularly football, the reset button is likely to be pressed, not by governing bodies, but by powerful clubs and leagues. Will this usher in a new era of altruism, cross-subsidy, and solidarity—the strong helping the weak—or will the strong, who have themselves been weakened by Covid-19, default to self-preservation? Perhaps this is a false juxtaposition as self-interest might determine that helping the weak makes good sporting and financial sense. This has long been accepted in US sports. But this help will come at a price—and that will be a rethink about how sport organizes itself and who calls the shots.

This “bigger picture” contemplation is giving way to more immediate preoccupations. Of obvious concern in any financial crisis is cost control. In the short term, pay deductions and salary deferrals have been negotiated across a number of sports, and some football leagues and federations have established emergency solidarity funds for members. In the longer term, labor market interventions, such as the wider adoption of salary caps, are attractive but will require the involvement of unions to minimize the chance of subsequent litigation. Potential product market strategies, such as licensing and financial fair play regulations, are already on the books and could be strengthened, but the impact on competitive balance in sport must be considered, for without it interest will diminish and the financial crisis will be prolonged.

The crisis will also put pressure on existing sporting regulations. In football, for example, clubs are likely to want to secure greater inward investment and so club ownership regulations, third-party ownership (TPO) prohibitions, and restrictions on the individual selling of broadcasting rights might come under review. Clubs are also likely to support FIFA plans to impose a fee cap on agent remuneration and support efforts to break the practice of allowing players to discharge

their liabilities to agents through clubs. More radically, at the top of the competitive pyramid some clubs might agitate for the development of alternative structures such as cross-border or breakaway leagues, whereas further down the pyramid, cost cutting might necessitate the fragmentation of national leagues into regional entities.

Resolving Disputes From Afar

The Covid-19 pandemic had an impact on Alternative Dispute Resolution (ADR) in sports, and in particular sports arbitration. The effect was twofold. First, the entire process had to be remodeled in order to allow for a fully online, paperless procedure that included more flexible time limits and a shift towards electronic submissions filing, online hearings, and remote deliberations. Second, the pandemic has created an even greater need for flexible solutions to legal problems, and this will likely lead to an increased use of negotiations, conciliation, and mediation in sports disputes.

With respect to the conduct of the proceedings, the single overarching principle is, as always, to ensure due process, even in times when the essential structures of an ADR system need to be rapidly modified. Numerous sports tribunals and arbitral tribunals have already issued guidelines and protocols in order to adapt to this new reality. This included the use of already-existing but previously under-utilized software to establish new methods for filing submissions, as well as the use of electronic hearing bundles or pre-hearing protocols and online hearings.

Sports tribunals such as the Court of Arbitration for Sport (CAS) issued guidelines providing that hearings would be conducted exclusively online during the pandemic, allowing for the electronic filing of submissions, and providing increased flexibility with respect to time limits. Conducting online hearings carries some risks and poses some challenges that are inherently linked to the remote character of the procedure, including issues relating to confidentiality, data security, connectivity, and caucus with the client or among arbitrators. The sporting world nevertheless seems to have adapted rapidly to this new way of resolving disputes.

On the plus side, remote hearings carry with them increased flexibility and speed with regard to scheduling. This will hopefully also bring increased diversity in the choice of arbitrators with the removal of the geographical limitations that have long acted as an obstacle to their appointments.

What does the future hold? With the rate of adaptation and the convenience of software versus actual travel, it appears likely that remote hearings are here to stay. This will necessitate concrete directions by both the panel/tribunal and thorough preparation of the hearing schedule (including a pre-hearing meeting) in order to increase the chances of the smooth conduct of the hearing and, indirectly, to protect the parties' due process rights.

Magnifying the Problems with Collegiate Sports

The global pandemic has had an enormous impact on all forms of sport. From Olympic and professional to grassroots youth sport, the need to socially distance and stop the spread of disease meant cancellation of events and practices, then the significant downstream effects of lost revenue, lost opportunities, and disappointed fans.

College sports are no exception. Embedding competitive sports teams within universities is known as the “American Model,” under which “student-athletes”—who receive, at most, a scholarship for the cost of attending the university—balance academics and athletics. This model is wildly popular, with sports such as men’s basketball and football generating billions in revenue and enjoying a passionate fan base.

The model is not without significant critiques. Players do not share in the revenue generated by their teams. They do not have the same rights to market their name, image, and likeness as non-athlete students. Multi-million-dollar coaches’ salaries, bloated budgets in the so-called “revenue sports” of football and men’s basketball, and issues of player health and wellbeing all contribute to the perception that college sports exploits, more than educates, athletes. To many, intercollegiate sports are a broken enterprise.

The global pandemic has amplified these concerns. Two issues in particular have emerged. The first is that colleges and universities are citing the pandemic as reason to cut so-called “non-revenue” teams, such as track and field and volleyball. Schools may seek waivers from the National Collegiate Athletic Association (NCAA) rules that require at least sixteen teams, with additional requirements for schedules and tournaments. Cutting women’s teams can have

significant implications under Title IX,⁷ the law prohibiting discrimination on the basis of sex in most college sports programs. It also raises important questions about continuing to fund men's basketball and football programs at unsustainably high levels while eliminating other, relatively inexpensive, sports.

The second issue raised by the pandemic is whether, and when, to resume college sports. The current focus is on football, which would have a fall start. Plans to bring back non-athlete students are still taking shape, with many colleges opting to hold at least some portion of their classes online. Training for and playing football, with large numbers of players and staff in close proximity, poses significant public health concerns, even if games are played in empty stadiums. Questions about testing, athletes' ability to withhold themselves from practices and games to avoid exposure to the virus, and potential liability if players and staff become ill present a host of legal questions if there is a premature return to normal activity.

While ultimately universities may be able to avoid liability because of issues of causation, sovereign immunity (for public universities) and the use of liability waivers, public opinion may not be forgiving. Harm to athletes forced to return to play earlier than they should—especially while their non-athlete peers take classes online and away from campus—will only further erode the image of the NCAA and universities who are often accused of putting profits before athlete wellbeing.

Finding a Way Back

As sports around the world begins its journey back to normality, national governing bodies and international federations have published a range of return-to-training, return-to-play, and return-to-competition protocols. The aim of these protocols and the accompanying risk assessments is to ensure, as much as is possible, that the risk of spreading the virus that causes Covid-19 is reduced as much as is possible. Alongside clear directions on personal hygiene and the use of personal protective equipment, the protocols include directions on managing the spread of infection in playing arenas and on shared equipment, reducing interpersonal closeness and contact to a necessary minimum, and playing games in the absence of spectators. Despite these

⁷ Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*

games being played behind closed doors, the English Premier League estimates that around 300 people will still be required at each game. Although these protocols seek to limit the potential for the virus to spread, none can prevent it altogether. As the Bundesliga's guidance states, its aim is not to guarantee the 100 percent safety of all participants, as this is likely to be impossible, but instead to take a medically justified and managed risk in restarting.

The return to training, play, and competition of elite athletes has the potential to raise a wide range of legal issues. In particular, these will arise from situations in which an athlete contracts the virus, or where they have been injured during a truncated "pre-season" period, or by playing the remaining games in too short a period of time. Although each jurisdiction will differ in the specifics, in general these can be broken down into four main areas. First, health and safety-at-work laws will require an athlete's workplace to be safe from known dangers and diseases. Such laws usually place a duty on the employer to ensure the safety of their workers while they are at work, the breach of which can lead to civil or criminal liability. Secondly, employer's liability claims, usually based in negligence, will require the provision of safe places and systems of work, appropriate equipment, and suitably trained co-workers. This will require the full implementation of the various protocols governing the return of sport. Thirdly, the availability of workers compensation, which in some jurisdictions is barred to professional and student athletes. Finally, the difficulty in securing insurance coverage for employed athletes. Any litigation arising from the resumption of play is likely to be highly complex and focus in particular on issues related to causation and the difficulty in proving where the athlete became infected.