Sports contracts in Italy

by Mario Serio

DEFINING THE SCOPE OF THE EXPRESSION

Contract is the instrument through which agreements can be made on how to regulate all relationships relating around athletes' performances in regard to the expectations of those (individuals, clubs, national federations, etc) who employ them. This is the strict, and perhaps most traditional, interpretation of the expression "sports contracts" that over the course of time has acquired a new, more encompassing meaning – ie to include all stipulations related to the manifold aspects of sport, whether they touch upon the proper athletic activities and ensuing obligations on the part of the performers and organisers, or deal with the exploitation of rights stemming from their broadcast, circulation, publication, etc. The latter is typical of the discipline that connects sport to its representation by the media; an entirely novel field of legal knowledge and analysis is developing with reference to this phenomenon and the difficult issues it poses in terms of, for example, the determination of the applicable law, the identification of the holder of those rights, and the weight to be attributed to the public interest to have free and live access to sport events as they take place.

The aim of this article is to focus upon the classical notion of sports contracts, and consequently to take account of the way relationships between athletes and their employers may be governed in particular legal systems. Particular attention is given to understanding the nature of such contracts, the protection they are able to give to the weakest party to them, and their implementation within sports bodies. The Italian experience of sports contracts – both their legislative origin and the way they have grown within specialised organisations – is central to the following analysis.

A VIEW OF THE ITALIAN EXPERIENCE

The first issue that has given rise to mounting controversy over the years is the nature of the bond originating from the commitment between the parties (the performer and the employer) to the contract in question. The specific questions that the Italian legal system was called upon to answer were as follows: is there sufficient significant and tangible contractual freedom in the organisation of the performance on the part of the athlete to allow him/her the legal status that accrues to self-employment, or should he/she be treated as an employee depending on the other party's power to direct his/her work and making him/her liable to the latter's discipline and all the other features of an employer/employee relationship? The significance of the consequences deriving from acceptance of either thesis was self evident, as they would reflect on the liberty of the performer to lend independently (or sell, some could say) his/her sporting abilities to whomever he/she would select for a chosen period of time and without any other obligation to the other party other than to perform at his/her best in order to give due value for the agreed fee.

On one side of the coin was the athlete's deprivation of the essential forms of protection enjoyed by employees in terms of stability, medical care, insurance, etc. On the other, the price to be paid was the recognition of the employer's right to negotiate his/her performances with third parties within a sphere of established guarantees as to the termination of the contract, the maintenance of previous salaries, expression of satisfaction at the proposed transfer, etc.

The extent of the expectations and alarms which arose as a consequence of the dilemma was so palpable that it took an Act of Parliament to erase all doubts and provide clear and unequivocal guidance to this heated issue.

GENERAL PRINCIPLES

The law of 23 March 1981 no 91, which governs the relationship between clubs and professionals operating in this particular field, sets out the general framework which addresses the key legal implications arising from the sporting activities in question. This law has delivered reasonable stability, and the main aspects are summarised below.

The first fundamental affirmation of principle provides that the exercise of sport, both in an individual or collective form and whether professional or not, must be free – that is not only unconditionally discharged, but (according to the best statutory interpretation) open and accessible to all citizens.

The other boundary characterising the legal governance of sport consists of the clear definition of those subjected to its discipline under the head of sports professionals – athletes, trainers, managers, etc – provided each of them acts for economic purposes and in a continuous way inside the appropriate national federation, and abides by its rules.

Before turning to the provisions affecting sports contracts and their consequences, it must be made clear

that the regulations emanating from the Italian National Olympic Committee (Comitato Olimpico Nazionale Italiano - CONI) and applicable to its affiliated federations are central to the debate. This demonstrates that even if sports contracts fall within the dogmatic domain of private law, they operate within a public law scenery.

A further consequence of this relationship between law and sport is that in order to issue a valid contract all clubs must belong to a national federation affiliated to CONI. Any activity by clubs in violation of CONI rules could lead to them being disaffiliated or facing some other form of severe disciplinary sanctions. If clubs responsible for severe infringements were expelled by their federations all their contracts with professional athletes would automatically be severed. The latter would see their contractual freedom immediately restored, and could negotiate with other clubs.

THE SPIRIT OF SPORTS CONTRACTS AND ITALIAN LEGISLATION

As explained earlier in this article, the essential problem the Italian legislation was faced with resolving following a prolonged and heated debate was to choose between a contractual configuration echoing self-employment, with the consequent risk incumbent on athletes in terms of the lack of a stable and protected relationship with the other party, or the adoption of contracts of service (as opposed to those for the rendering of a service).

In theory, neither option should have been precluded as both were capable of conforming to the general principles governing the law of contract; in particular, it was felt that sports performers could, in an ideal world, benefit from all liberties accruing to them from the free exercise of their activity, starting with the selection of the counterparty and the length of time of his/her obligation. But no-one was in any doubt over the intrinsically political nature of the question –and political it unequivocally was.

The starting point of the legislative construction was the express definition of a contract of sporting services as an employment contract subject to the treatment contained in the legislation. But this principled choice did not prevent the development of sports agreements which qualified their content to take account of model contracts for the rendering of a service. The circumstances that surround such a qualification of sports contracts may involve a number of peculiarities, such as the sporadic, or one-off, nature of the performance and the lack of any subordinating power of the club towards the athlete.

So the root to this exception lies deep in the fact that performances are occasional and, as such, do not require a substantial and constant subjection of the performer to the organising and directing faculties of the other party. That being said, the typically distinct nature of a sports contract reflects the political and protective attitude towards who is thought of as the weaker party of the relationship, ie the performing athlete whose position has been judged as being worthy of the specific remedies normally associated with contractual services. However, it should be emphasised that all contracts of this kind are basically onerous in nature.

Another characteristic of the protective attitude supporting the legislation is apparent in the compulsory written form that is required for the contract to be valid. As for the content, the parties to the contract have to make recourse to the standard form that is drafted by the federations for general use, subject to a renewal process every three years. No derogatory clause – that is a clause making the performer's position worse or, at least, less favourable – is allowed with respect to the corresponding stipulation contained in the standard form; in the event of a contract containing such a derogatory clause being signed, the original clause will be automatically inserted.

The only area where significant latitude is given to the employer is that which entitles him/her to give technical instructions to be followed by the athlete in the course of their training.

An arbitration clause may be agreed between the parties: in practice, the tool is regarded as being binding on both parties by the federations' regulations, forbidding any recourse to state justice before all disputes have been ruled on by sports justice bodies instituted by the federations or CONI. No passing off clause is tolerated, nor one which unduly purports to restrain an athlete's freedom to select a new employer once the original contract is terminated.

The contract may be assigned from one club to another before it expires, on condition that the performer is willing to do so and all dispositions emanating from the relevant federations are complied with. Special measures are applied for the benefit of young athletes' clubs in whose favour a bonus (or premium) is guaranteed to be paid – in accordance with the federations' rules – by the club to whom the former is transferred. The bonus is required to be re-invested by its beneficiary for the pursuance and enhancement of its sports purposes.

At the same time, the clubs that have originally trained young athletes are empowered to draft their first professional contract at the end of the trial period in accordance with the rules laid out by the relevant federation, taking into account varying factors such as age and the specific features of each individual sport. Sports contracts as framed by Italian law reflect the main characteristics of labour law when building an effective framework to protect the worker's position with respect to the employer. All forms of treatment, benefits and guarantees are conferred upon professional and amateur performers as regards medical care and pensions, along with insurance covering any risk incurred in the course of employment which could jeopardize their careers.

It cannot be doubted that full equivalence has, at the end of the day, been established between typical contracts

of employment and sports contracts, notwithstanding the different level of earnings that may derive from either of them and the generally better and more comfortable conditions that go with the latter. This may explain why public sentiment towards the category of sportsmen falling within the contemplation of the statute law under discussion is not particularly benevolent or generous, as they are perceived as receivers of perks inside a golden world very far apart from the real world where their fellow workers live.

SPORTS CONTRACTS AND SPORTS LAW

The picture that has emerged thus far through this short analysis of the legislative provision is by itself far from being faithfully representative of the athletes' actual legal position. One overall premise has to be made so that a satisfactory understanding of the functioning of the sports legal system in Italy can be gained.

It is a well established and deeply rooted principle that sport can give rise to a complex and widespread system, composed of human resources as well as financial means and material support, that badly needs a coherent set of rules to be applied in everyday life to govern the numerous and often complicated relationships operating within its parameter and affecting so many individuals' and legal entities' lives and interests. In consequence, over a long time span an autonomous and characteristic body of dispositions, regulations and rules has evolved – some of which effectively amount through the broadness of their true content to general principles – confined to people and institutions operating in sport. Thus the novel and substantive branch of law that is sports law was born.

The problem is, and has always been, to try and erect a safe and clearly recognisable dividing line between this branch and the general law, particularly private and administrative law. Disputes have repeatedly arisen over which areas sports law may be deemed legitimately to operate without inadmissibly interfering with the general prerogative of the common state law.

The other side of this problematic area is to ascertain what general law norms could and should not be set aside within the legal management of sport: the question may be viewed from the opposite perspective and one may also wonder what, if any, kind of enforcement the general legal system is ready to provide in respect to rules, decisions, and sanctions belonging to the sport legal system. This has been particularly true of judgments passed by sports' courts that from time to time have become the object of further litigation by some of those subjected to the legal rules of sports federations who have sought to have them overturned by ordinary state courts. The very validity of the binding clause obliging all those operating in the sports world strictly to observe its rules and not to opt out in favour of the general state jurisdiction has been questioned.

Even the highest courts of justice in Italy have been called upon to resolve these intricacies, and the legislator has had to intervene in recent times (2003) to put an end to long-running controversies between members of the sports system, and possibly give some fruitful and easily accessible guidelines in order to determine where the jurisdiction of sports bodies ceases and state law takes over.

Controversial as the question may sound, a certain proportion of shared consent has been agreed for the purpose of distinguishing the boundaries of sports law not to be trespassed on by state law as they constitute the most sophisticated and coveted frontier of the free exercise of the power of those who belong to the sports world to give it the legal structure they please – provided that no fundamental or general principle of state law (starting from the Constitution) is put into peril or weakened or abandoned. In particular, practitioners and commentators agree on the issue of the independent handling by sporting subjects of all technical evaluations, conducted through legal instruments available in sports law, regarding sports events and individual and collective behaviour at such occasions, with the obvious exception of the matter of public order and criminal offences.

The topic of sports contracts is further developed and defined by the integration of legislative measures with rules made by the competent bodies acting in the sports world, particularly the national federations. Their regulations tend to give a more specific and detailed character to provisions contained in Parliamentary legislation, and they regulate certain vital aspects concerning the relationships between the performer and the employer as they are typically built in some sectors of sport, football being one example.

The national federations' regulations are often the product of the adoption of general principles and provisions laid down by CONI in the performance of its role of supervising the activity and organisation of all federations. Some dispositions may vary from one federation to another as far as particular aspects of sports contracts (technical rules, procedural aspects, organising methods, etc) are concerned, but there is a common core of fundamental principles put forward by CONI that cannot be overlooked, let alone misapplied or ignored. Examples of this include the provision of adequate measures to secure a reasonable chance for all performers to have all disputes with employers concerning their contractual rights fairly settled within their federation's jurisdiction, and to be entitled to a final appeal before the newly instituted Tribunal for the Arbitration of Sports Disputes, acting under the auspices of the Italian Olympic Committee.

A notable example of the attention paid by a single federation to sports contract matters is provided by the regulations of the Italian Football Federations regarding the settlement of economic disputes. They are discussed before different specialised committees, depending on

whether players and clubs are involved or only clubs, whose decisions and awards are self-executing and directly binding on the parties: in the event that they are not observed, varying sanctions are applied within the federations which may result, if a very serious offence has taken place and the player's economic right has been severely infringed, in the club responsible being deducted points in its league table or even banned. That is an illustration of the importance that is attached to the protection and enforcement of contractual rights by Italian sports authorities at all levels.

The proactive nature of the Italian system for the administration of sports justice has been further illustrated by recent developments in the procedure for the final settlement of economic disputes. A new weapon has recently been granted by CONI for dissatisfied parties, who may ask for their case to be reheard before the National Arbitration Tribunal after all possible avenues have been pursued within the competent federation.

It is still uncertain if the proceedings should have the power to rescind previous judgments by the courts in the manner of an appellate court, or be classified as an award containing a new adjudication induced by the parties' fresh representations and submissions rather than errors made by the courts acting within the relevant federations. It must also be taken into consideration that these proceedings can only be put in motion if all parties have previously agreed to take their disputes to an arbitration tribunal acting outside the ambit of the national sports federations (but well inside the general area covered by CONI). It could not be ruled out that, in theory at least, a federation may be reluctant to make recourse to this kind of arbitration (but in practice one cannot see many, if any, such instances as CONI cannot give its prior approval to such a refusal).

But at the end of the day, in the event of the party's request to have a new judgment passed by the National Tribunal for Sports Arbitration being upheld, a different distribution of rights would eventually occur and a reshaping of the sports legal system would be perceived as the inevitable outcome of the enlargement of remedies for the protection of (inter alia) sports contractual rights. Providing all parties operating in the sports world with another instrument to help them defend their contractual rights would surely lessen the chances of their seeking state justice rather then the system offered by the organisation to which they belong.

Furthermore, all judicial proceedings before courts operating on behalf of all the federations should take into account a number of essential principles that CONI has borrowed from the general state law, such as the right to a fair and speedy trial, the due process clause, the double jeopardy rule, no hearsay rules etc. An analogy can be drawn with the corresponding rules coming from international sports governing bodies such as CIO, FIFA, UEFA, etc.

CONCLUSION

One final remark leads us to a tentative conclusion in an area where dynamic adjustments and changes usually happen at such a pace that their implications are hard to grasp. The sports legal systems have made some valuable, though not always satisfactory or conducive, efforts with a view to preventing or eliminating any possible conflict with state law over their respective jurisdictions. In this reciprocal respect for each other's domain, and the undeniable prevalence of the fundamental, general principles of the law applicable to all citizens, paradoxically lies the strongest barrier for defending the lasting autonomy of sports law as a branch of law relying on its own principles and structures and addressing all the people whose jobs and interests are linked to sport.

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