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Restraint of Trade in Professional Tennis

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1 Introduction

As will be shown, restraint of trade effectively prohibits a person from exercising their chosen profession or trade and hence of making a livelihood. Such restraint is achieved by means of a contract entered into by the restricted person and which while freely entered into achieves this undesirable outcome. In the field of sport, young athletes often enter into contracts that bind them to work for a particular team, agent or other entity in a manner that is unconscionable and where the athlete is unable to break free, lest he or she is in breach of its contractual obligations. This chapter will focus more on agency contracts and at the end it will consider whether bans or penalties imposed by the International Tennis Federation (ITF), Association of Tennis Professionals (ATP) and Women's Tennis Association (WTA) equally constitute unconscionable restraints of trade.

There is good reason why this chapter sets out to examine restraint of trade for professional tennis players from the lens of English common law. Article 33(d) of the ITF Constitution stipulates that where the ITF is a party to a dispute it is agreed in advance that the governing law of the pertinent agreement is English law and unless otherwise agreed by the ITF the dispute will be entertained in London. This is consistent with transnational practice which suggests that parties typically subject transnational commercial disputes to English law.[1] Moreover, the ATP headquarters are in London and by extension all pertinent contracts are chiefly governed by English law. In addition, a good number of tennis representation agencies are premised in England, and it is only natural that their agency agreements be governed by English law. English law is equally central to the ITF's Independent

[1] See Ilias Bantekas, 'The Globalization of English Contract Law: Three Salient Illustrations' (2021) 137 LQR 130 (exemplifying the dominance of English contract law in sovereign finance agreements, Islamic finance contracts, as the substantive law of special economic zones, among others).

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Tribunal. Under the ITF's Internal Adjudication Panel Rules, the Independent Tribunal is an arbitral tribunal, whose proceedings are governed by English law and subject to the English Arbitration Act.[2] This is equally reiterated by Article 1.3 of the Tribunal's own Procedural Rules. Finally, unless stated otherwise in the ITF's procedural rules or its Constitution, English courts possess exclusive jurisdiction over disputes arising out of proceedings before the ITF Independent Tribunal.[3] For all these reasons, English contract law, which is quintessentially the product of the common law (with little codification), is central to restraint of trade claims by professional tennis players.

2 Restraint of Trade in the English Common Law

The concept of restraint of trade originally developed in the English common law.[4] It is quintessentially a contractual remedy, which naturally requires the existence of a contractual relationship. Even so, the effects of the underlying restraint suggest that there is no reason why the remedy may not be invoked in circumstances lacking a clear contractual relationship. In such cases, it must be clearly shown that the restraint is effectively imposed, as is the case with the decisions of sports governing bodies, such as the ITF, on the capacity of athletes to pursue a professional career. The remedy emerged in relation to professions predicated on contract and was subsequently applied to the field of sport. To a large decree, this and associated remedies have been justified on the basis of public policy.[5] In the common law scholarship and English case law, restraint of trade has been classified within the remit of illegality.[6]

Its underlying rationale is that any action, whether contractual or not, that restricts a person's trade is unenforceable and hence void, unless

[2] ITF Constitution 2022, Arts 7.3 and 7.4; this is also reiterated in Art. I.E.5 of the Men's World Tour Regulations, which emphasises that any dispute arising 'out of or in connection' with the Regulations, including also non-contractual claims, shall be governed and construed in accordance with English law, to the exclusion of English private international law.

[3] Procedural Rules Governing Proceedings before an Independent Tribunal Convened under ITF Rules (2019), Arts 1.3 and 7.5; International Tennis Integrity Agency (ITIA), Procedural Rules Governing TADP Proceedings Before an Independent Tribunal (2022), Art. 1.3.

[4] See Stephen A. Smith, 'Reconstructing Restraint of Trade' (1995) 15 Oxford J Leg Stud 566; equally, the classic treatise by Michal Jefferson, *Restraint of Trade* (John Wiley & Sons, 1996).

[5] *Enderby Town FC Ltd* v. *Football Association Ltd* [1971] Ch 591, at 606.

[6] See Jack Beatson, Andrew Burrows and John Cartwright, *Anson's Law of Contract*, 30th edn (Oxford University Press, 2016), ch. 11.

such restriction may otherwise be justified.[7] The concept of 'trade' is broad, encompassing any activity or opportunity to earn a living. It has been defined as an agreement 'in which a party agrees with any other party to restrict his liberty in the future to carry on trade with other persons not parties to the contract in such manner as he chooses'.[8] No doubt, not all agreements that exhibit some restraint fall under the remit of this remedy. Two types of agreements have been recognised as giving rise to restraint of trade, namely: those between employer and employee; and seller (of a business) and buyer, whereby the employee and buyer are prevented from any action that competes with that of the employer or seller. The question, however, remains that since some restraint is permissible, how does one definitively conclude which restrains are unenforceable? English courts have made it clear that the boundaries are fluid,[9] and that in any event the restraint cannot violate competition rules in force,[10] and in principle courts will seek to protect the weaker party against oppression and abusive terms.[11]

In general, a restraint is deemed enforceable unless: (1) it is unreasonable in the interests of the parties; (2) it is unreasonable in the interests of the public. As regards (1), several factors are relevant in assessing reasonableness. Contracts that restrict one's economic freedom over a long period of time, especially where the employee's professional career is relatively short, have been held to be unnecessary and oppressive.[12] Even so, a contract that otherwise restricts a party's economic freedom, but which is counterbalanced by other benefits that would adequately address the shortfall from the restriction, is enforceable because of the special

[7] See Prince Saprai, *Contract Law without Foundations: Toward a Republican Theory of Contract Law* (Oxford University Press, 2019), 214, arguing that in the republican worldview of contract law, freedom resides not in the absence of interference per se, but in the absence of arbitrary interference or dominium by others. This situates restraint of trade in the republican camp.

[8] *Petrofina (Great Britain) Ltd* v. *Martin* [1966] Ch 146, at 180 as per Diplock LJ.

[9] *Proactive Sports Management Ltd* v. *Rooney* [2011] EWCA Civ 1444.

[10] *Texaco Ltd* v. *Mulberry Filling Station Ltd* [1972] 1 WLR 814, at 827. In the sports law context, anti-competitive practices, particularly monopolies by domestic and international sports federations, are not necessarily addressed as restraint of trade, although there is no good reason why they cannot. See Katarina Pijetlovic, 'EU Competition Law and Organisational Rules in Sports' in Antoine Duval and Ben Van Rompuy (eds), *The Legacy of Bosman: Re-visiting the Relationship between EU Law and Sport* (Asser Press, 2016), 117.

[11] *Schroeder Music Publishing Co. Ltd* v. *Macaulay* [1974] 1 WLR 1308, at 1315 as per Diplock LJ.

[12] *Instone* v. *Schroeder Music Publishing Co. Ltd* [1974] 1 WLR 1308, per Reid LJ, holding that a ten-year exclusive recording contract was an unreasonable restraint of trade.

justifying circumstances.[13] Hence, the context, including the factual circumstances, the aim sought to be achieved, as well as any counterbalances to the restraint are crucial to judicial determination of the enforceability of the contract or the particular provision thereto.[14] In employer–employee relationships, apart from oppressive long-duration contracts lacking counterbalances, the legitimate interests of the parties are fewer as compared to contractual restraints among businesses.[15] As a result, save for restraints concerned with imparting trade secrets and influence over existing customers and clients,[16] it is generally unreasonable for the parties to be restrained from using skills acquired in their previous employment, or from competing in any way with their previous employer.

The second criterion that justifies the non-enforcement of a contract is its lack of reasonableness 'in the interests of the public'. In *Proactive Sports Management* v. *Rooney*, Arden LJ explained the public's interest as follows: 'Public policy is concerned with the manner in which a person may properly realize his potential, not only for the good of that individual but for the economic benefit of society generally.'[17] Although in the early part of the twentieth century, the likelihood of restraints deemed unreasonable in the public interest were viewed as extremely rare occurrences,[18] this view is no longer accepted. The case law has paid particular attention to agreements between experienced commercial actors who, while capable of deciding what restraints are reasonable in their own interests, pay scant attention to the detrimental effect of the restraint on the public interest as such.[19] This is not to say that the courts have not taken a cautious approach to the public interest test when assessing restraints between parties with similar bargaining power.[20] In a recent UK Supreme Court case, a nine-judge panel majority ruled that 'the public interest is best served by a principled and transparent assessment of the considerations identified, rather [than by] the

[13] *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co. Ltd* [1894] AC 535; for 'special justifying circumstances', see also *Mason* v. *Provident Clothing & Supply Co. Ltd* [1913] AC 724.

[14] *Clarke* v. *Newland* [1991] 1 All ER 397.

[15] *Herbert Morris Ltd* v. *Saxelby* [1916] 1 AC 688, at 713. See also the UK Supreme Court in *Peninsula Securities Ltd* v. *Dunnes Stores (Bangor) Ltd* [2020] 3 WLR 521, discussed in more detail below.

[16] *Faccenda Chicken Ltd* v. *Fowler* [1987] Ch 117, at 137.

[17] At para. 93.

[18] *A-G of Commonwealth of Australia* v. *Adelaide Steamship Co.* [1913] AC 781, at 795.

[19] *Dickson* v. *Pharmaceutical Society of Great Britain* [1970] AC 403; *Alec Lobb (Garages) Ltd* v. *Total Oil (Great Britain) Ltd* [1985] 1 WLR 173, at 191.

[20] Especially, *Texaco Ltd* v. *Mulberry Filling Station Ltd* [1972] 1 WLR 814, at 826–9, per Ungoed-Thomas J.

application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate'.[21] This test has been applied in other contractual situations and represents good law.[22]

3 Restraint of Trade in the Sports Context

The following sub-sections endeavour to contextualise the application of the common law doctrine of restraint of trade to sporting activities more generally.[23] This analysis will set the stage for the final section, where the application of the doctrine to professional tennis will become more apparent, despite the existence of a small amount of past precedent.

3.1 Restraints Arising from National Federations and State Regulation

Sports governing bodies (SGBs) have developed internal rules that govern their relationship with their corporate members, namely, clubs that are parties to a national league/federation, as well as with tournament organisers. In some instances, as is the case with professional tennis, these internal rules govern the relationship between the federation and players. It is not rare for such internal rules to impose restraints on what their members/signatories can and cannot do. Many of these restraints, although otherwise incompatible with competition law, are justified under national and regional anti-competition rules for a number of public interest objectives, namely: in order to maintain the integrity and stability of national and international sporting competitions; to reinforce the sport's commercial and cultural viability; to encourage youth development and promote the sport's competitive balance; and to protect national teams. Even so, drawing a sensible balance is not always easy and restraint of trade claims have been raised by players in an

[21] *Patel* v. *Mirza* [2016] UKSC 42, per Lord Toulson, at para. 120.

[22] See *Cavendish Square Holding BV* v. *Makdessi* [2016] AC 1172, especially para. 7 as per Lords Neuberger, Sumption and Carnwath, concerning an equitable approach to contractual penalties.

[23] There is little doubt that the bargaining disparity in sports contracts between athletes and federations/clubs/managers is also a human rights issue and claims of this nature have reached the European Court of Human Rights. This dimension is beyond the narrow purview of this chapter. See Katarina Pijetlovic, 'Fundamental Rights of Athletes in the EU Post-Lisbon' in Tanel Kerikmäe (ed.), *Protecting Human Rights in the EU: Controversies and Challenges of the Charter of Fundamental Rights* (Springer, 2013).

individual capacity and by clubs.[24] Often, the internal rule posited by a federation against its members is the result of domestic law. This notwithstanding, the interplay of interests involved in such rules, irrespective of their origin, may well motivate the club, the national team or other entity to impose an unnecessary, unfair and undue restraint of trade on athletes.

The leading case in English sports law is *Eastham* v. *Newcastle United Football Club Ltd*. During the 1960s, according to the rules of the Football Association (FA) which were framed in a contract with FA-registered clubs, a player could be 'retained' by his club at the end of the season, even without a new contract. During such retention the player was not allowed to sign for any other club willing to offer him a contract. Clearly, this rule was in the interest of clubs and could be applied in a manner that effectively prevented a player from earning a living from the sport. The player moved for a declaration against the club and the Association that the system of retention was invalid because it restrained players' freedom of employment. The Chancery Division of the High Court and Wilberforce J in particular accepted that while some restriction was essential for the proper administration of professional football in England, the restriction imposed by the rules was far too disproportionate on liberty of employment.[25] In *Greig* v. *Insole*, the International Cricket Conference and the English Test and Country Cricket Board had issued resolutions disqualifying players from test and country matches if they had competed in games or tournaments organised by a private promoter. Greig was banned after signing a contract to play in the World Cricket series, which was at the time a lucrative event for cricket players who earn their living during the English summertime. The Chancery Division of the High Court and Slade J, in particular, held that such a restriction constituted an unreasonable restraint of trade.[26] English courts have generally taken the position that restraints unjustified by any professional or public interest

[24] In *Stevenage Borough Football Club* v. *Football League Ltd* (1996) 9 Admin LR 109, a club that had won its respective league and was thus entitled to promotion to a higher league was refused because among others its ground did not satisfy the requirements for that higher league (6,000-seat stadium). The club argued that the timeframe to augment size capacity was far too short. The Court held that although the timeframe was indeed short, all clubs had knowledge of the criteria from the beginning of the season and had time to make the necessary adjustments.

[25] *Eastham* v. *Newcastle United Football Club Ltd* [1964] Ch 413, at 432; equally *Buckley* v. *Tutty* (1971) 45 ALJR 23.

[26] *Greig* v. *Insole* [1978] 1 WLR 302.

imposed by sporting entities are unenforceable, as was the case with the Jockey Club's prohibition of trainer licences to women.[27]

In a similar manner, the International Skating Union (ISU) foresaw the danger to its own financial interests from rival skating organisers trying to 'poach' its athletes by offering them more lucrative participation deals. It subsequently proceeded to issue Communication No. 1974, titled 'Open International Competitions',[28] which demanded advance authorisation for the organisation of a competing event, as well as participation therein (so-called 'prior authorisation rules'). The EU Commission had no problem seeing the obvious incompatibility of the ISU Communication with fundamental tenets of EU competition law, chiefly Article 101 of the Treaty on the Functioning of the European Union (TFEU).[29] This was followed suit by the General Court, which came to the same conclusion regarding the ISU's eligibility rules.[30] Although the General Court did not rely on restraint of trade, it emphasised that SGBs are free to safeguard their legitimate interests, but any rule they promulgate must not deprive members or non-members from access to the same market, especially where the market in question generates profit.[31]

3.2 *Restraints Arising from Players' Contracts with Agents*

Restraints arising from agreements between agents and players are not uncommon.[32] Depending on the subject matter of the agreement, they concern two issues. The first relates to royalties from direct sports earnings, while the second revolves around royalties from image rights.

[27] *Nagle* v. *Feilden* [1966] 2 QB 633.

[28] Communication No. 1974 is available at: https://insightplus.bakermckenzie.com/bm/attachment_dw.action?attkey=FRbANEucS95NMLRN47z%2BeeOgEFCt8EGQJsWJiCH2WAWuU9AaVDeFgq9gxTxSJepG&nav=FRbANEucS95NMLRN47z%2BeeOgEFCt8EGQbuwypnpZjc4%3D&attdocparam=pB7HEsg%2FZ312Bk8OIuOIH1c%2BY4beLEAeOus5uxTYXe0%3D&fromContentView=1.

[29] EU Commission, *International Skating Union's Eligibility Rules*, Case AT-40208, available at: https://ec.europa.eu/competition/antitrust/cases/dec_docs/40208/40208_1579_5.pdf.

[30] *International Skating Union* v. *European Commission (ISU)*, Case T-93/18, ECLI:EU:T:2020:610, Judgment of 16 December 2020.

[31] Ibid., at para. 67. Iterated again in *International Skating Union* v. *European Commission*, Case C-124/21 P, EU:C:2023:1012, Judgment of 21 December 2023, available at: https://curia.europa.eu/juris/document/document.jsf?text=&docid=280763&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=8144980.

[32] See Robert Siekmann, Janwillem Soek, Richard Parrish et al., *Players' Agents Worldwide: Legal Aspects* (Asser Press, 2007).

English courts have drawn a further distinction between restraints imposed during the ordinary life cycle of the contract, which are subject to the criteria identified above, and those imposed post-termination of the contracts, which have been found to be unlawful.

In *Proactive Sports Management Ltd* v. *Rooney*, the 17-year-old football star had entered into an image rights representation agency agreement with a company called Stoneygate. The latter agreed to pay a 20 per cent commission to Proactive for the duration of its agreement with Rooney. When a few years later Rooney terminated its contract, the agent sued for breach of contract. The Court of Appeal found the particular terms of the agency agreement unenforceable on two grounds, namely: (1) Rooney at the time was a minor without the benefit of legal advice; (2) the duration of the contract was unduly long and certainly far beyond what was customary at the time. What is more interesting is the fact that the restraint was held to be questionable even though Rooney's image rights were not his primary trade; at the time he was a highly paid footballer and top of his game. Moreover, the Court of Appeal, while invalidating the image rights clause in Rooney's contract with Proactive, had no issue retaining the contract as a whole. It was never in doubt that Proactive provided significant services to Rooney, all of which led to lucrative deals.[33]

The most serious manifestation of restraint of trade concerns restrictions to the competitive life of professional athletes in a manner that not only prevents them from making a living from their 'trade', but most importantly because such restrictions negatively impact athletes' competitive edge and drive away their self-confidence. Athletes lacking these two qualities find it hard to get back to top form and ultimately this produces negative consequences on their game and their earnings. In this light, any agreement with an agent that effectively causes an athlete to forego significant part of his or her income without reasonable effort on behalf of an agent, or any action by which the agent can sideline an athlete because the latter refuses to honour an unreasonable commission, may constitute unnecessary and abusive restraints. In *Watson* v. *Praeger*, a professional boxer and his manager had entered a contract whose form was prescribed by the British Boxing Board of Control. The agency contract was subject to a term of three years, but was extendable for a further three-year term at the option of the agent, without the consent of the athlete. When the agent/manager exercised this option, the boxer

[33] *Proactive Sports Management Ltd* v. *Rooney* [2011] EWCA Civ 1444.

refused to concede that it was enforceable. Scott J agreed on the grounds that the contract was not the result of free negotiation by the parties, but had been proscribed by the governing body. He further considered that this restraint of trade could not be justified on the basis of the interests of the parties and the public.[34]

In the next section, we will examine the outcome in the *Zverev* case as a particular manifestation of contractual player–agent restraints in the field of professional tennis.

4 Trade Restraints in Professional Tennis

The types of trade restraints examined in the previous sections set out the groundwork for assessing whether they apply in the same or similar ways in the field of professional tennis. The application of the general principle is beyond doubt and common law courts would have little problem applying it. No doubt, the particularities of professional tennis and in fact the entire rationale of the concept of 'professional' play a significant role in ascertaining whether a restraint is justified and reasonable. Moreover, while the game is individual in nature, getting on the court in the first place is based on a complex contractual interplay between the ITF, players' associations, national tennis federations and tournament organisers. Even within this framework, the role of agents/managers is critical, because the vast majority of players will have progressed through the ranks of the game with the assistance of an agent or agent/manager. The following sub-sections explore the variety of contractual and regulatory contexts whereby restraints of trade can and usually do arise.

4.1 Restraints in Agency Agreements

The tennis-specific case that stands out is *Zverev* v. *Ace International Group Ltd*, despite the fact that the parties ultimately settled.[35] At the age of 15, Alexander Zverev entered into a representation agreement with the sports agency Ace. The term of the agreed representation was for a period of eleven years, albeit commission was payable for sixteen years, which meant that Zverev would effectively be shackled to his contract from the very beginning of his playing career until close to its end. It is crucial to note that Zverev's parents were fully engaged in the negotiations and

[34] *Watson* v. *Praeger* [1991] 1 WLR 726.
[35] *Zverev* v. *Ace Group International Ltd* [2020] EWHC 3513 (Ch).

agreed to act as guarantors thereof. Seven years into his contract, Zverev decided to leave Ace, which sued for breach of contract and made a claim against the player's parents. Zverev's legal team argued that the duration of the contract, coupled with its exclusive nature, was unreasonable and constituted a restraint of trade.[36] It is interesting to highlight here that like other sports-related trade restraint cases, Zverev did not argue that he suffered financial harm or that he could make more money through another agency; quite the contrary, Ace had worked hard to bring lucrative endorsements for Zverev. This is important to note because it provides a non-financial dimension to the restraint of trade doctrine, which in theory, at least, should invalidate any pertinent claim. If this non-financial dimension is viewed by the common law courts as an integral part of the doctrine, then the very concept of 'trade' is not only about making a living from one's sporting endeavours, but also about the right to choose those partners that instil confidence and trust in an athlete.

It is no wonder, therefore, that Ace centred its arguments not only on *pacta sunt servanta* (i.e. that contracts are enforceable), but that the agency had amassed a fortune for Zverev. In fact, Ace called in an expert who produced a comparative report of players' earnings and contract durations in order to demonstrate that Zverev's contract duration was hardly unusual in professional tennis and his earnings comparatively higher as compared to other players. The expert report was crucial in the progression of the trial, but parts of it were redacted, namely, players' names. The report was confidential and obviously unavailable, and when Zverev's legal team sought to lift the redacted parts,[37] Ace decided to drop its entire case and settle. The settlement suggests that Zverev's

[36] In *Instone* v. *Schroeder Music Publishing Co. Ltd* [1974] 1 WLR 1308, which involved a recording contract, the House of Lords made it clear that an exclusive contract over a long period of time is not in and by itself a restraint of trade. Lord Reid emphasised, however, that a ten-year exclusive contract was an unreasonable restraint of trade. He went on to note that: 'If contractual restrictions appear to be unnecessary or to be reasonably capable of enforcement in an oppressive manner, then they must be justified before they can be enforced.'

[37] For a large part of the professional legal community, the case stands out because of the order made by the Court to reveal the names of the players in the expert report. The application relied on Rules and Practice Direction, which are tantamount to the English Civil Procedure Rules, and particularly Practice Directive 51U.21.1(5), which allows a party at any time to request a copy of a document that was not disclosed in a party's original bundle, but which is nonetheless mentioned in an expert's report. Ace's legal team argued that the Court lacked authority under PD 51U.21.1(5) to force its expert to provide evidence in breach of confidentiality given to the players whose contracts were mentioned in the report.

contractual duration, as well as perhaps the age at which he entered into the contract, made it crystal clear to all the parties witnessing the expert report that the High Court could only come to the conclusion that the particular terms constituted a restraint of trade. This in turn demonstrates that there is a consensus in the sporting legal community that a contract of this duration, especially when entered into by a 15-year-old player, fails to provide the right to seek alternative choices. Moreover, it confirms what was suggested elsewhere in this section, that for athletes earning significant sums of money from tournament prizes and image rights, restraint of trade gives rise to altogether different issues as compared to professional athletes simply making a living from their sport. For top-earning tennis players such as Zverev, the prospect of a non-acrimonious relationship with an agent, the proximity of the agent to tennis rather than all sports and the availability of more choices (e.g. in branding) are perhaps more important than earning additional income.

While the Zverev proceedings were progressing, the UK Supreme Court had the opportunity to reshape the restraint of trade doctrine in *Peninsula Securities Ltd* v. *Dunnes Stores (Bangor) Ltd*.[38] A developer of a shopping centre granted a long (exclusive) lease encompassing part of the property to an anchor tenant. Under the terms of the lease, the tenant undertook not to set up a retail unit of a particular size that was commercially active in the trade of textiles or groceries. Several decades after the adoption of the lease, the tenant sought a declaration that the exclusion was unenforceable on the ground that it was an unjustified restraint of trade. In parting with the House of Lords' judgment in *Esso Petroleum Co. Ltd*,[39] the Supreme Court adopted the so-called 'trading society' test. According to this test, a term in an exclusive agreement will not engage the restraint of trade doctrine if the term in question 'passed into the accepted and normal currency of commercial or contractual or conveyancing relations' and which may therefore be taken to have 'assumed a form which satisfies the test of public policy'.[40] Although the judgment in *Peninsula Securities* is seemingly unrelated to professional sport, this is not the case. It will be recalled that the turning point in Zverev's claim was the comparator in the expert's report. If it were determined that it was 'normal currency' in tennis representation agreements for young athletes to sign long-term contracts in return for lucrative agreements, it is doubtful that the parties or the courts could reach an

[38] (2020) UKSC 36.
[39] *Esso Petroleum Co. Ltd* v. *Harper's Garage (Stoutport) Ltd* [1968] AC 269.
[40] *Peninsula Securities*, at paras 45–8.

outcome that the contract in question restrained Zverev's ability to apply his trade. It remains to be seen how in practice English courts will come to reconcile the trading society test with the non-financial interests inherent in restraint of trade claims brought by tennis players against their agents. The balance is a delicate one, but the *Zverev* outcome clearly demonstrates that it is 'normal currency of commercial or contractual' tennis relations for parties to value the player–agent relationship on grounds that are not exclusively financial.

4.2 Disciplinary Bans as Restraint of Trade?

English courts have not yet encountered claims whereby disciplinary bans imposed by clubs or sporting federations may amount to a restraint of trade. Indeed, the likelihood of such claims being upheld are slim, particularly since the grounds for disciplinary bans are limited and the steep sentences involved are justified in the public interest, as is the case with doping and illegal gambling.[41] Even so, the Appellate Chamber of the Court of Arbitration for Sport (CAS) in *Luis Suarez and Others* v. *FIFA* considered that the four-month ban from all football activities imposed on the FC Barcelona (at the time) star, although correct on merit, was disproportionate as to its outcome on the athlete. It held that 'the stadium ban and the prohibition to engage in "any football-related activity" was excessive in this case given the fact that such measures are not appropriate to sanction the fault committed by the player and that they would still have an impact on his activity beyond the end of the suspension'.[42] The rationale here is that a four-month ban from all football activities (including training with his team, playing in friendly games, etc.) imposed against a player at the top of his form meant that he could not be conditioned into his club once the ban expired and there was the danger that the player's overall form would deteriorate beyond repair.

In the tennis context, disciplinary bans are related to discreet offences set out in the ITF's Rules. The most common among these are corruption and doping offences. Article 6.1 of the Independent Tribunal's Procedural

[41] Several bans are for life, as in the case of Franco Feitt; see LTIA, 'Franco Feitt Banned from Tennis for Life' (13 April 2021), available at: https://itia.tennis/news/sanctions/franco-feitt-banned-from-tennis-for-life/; see equally lifetime bans for two Russian female players found guilty of match fixing; see LTIA, 'Two Russian Tennis Players Given Lifetime Bans' (27 January 2021), available at: www.itia.tennis/news/sanctions/two-russian-tennis-players-given-lifetime-bans/.

[42] *Luis Suarez* v. *FIFA*, CAS Appeals Award (14 August 2014), available at: www.tas-cas.org/fileadmin/user_upload/communique20medias2036652020_FR_1420082014.pdf.

Rules stipulates that 'facts may be established by any reliable means'.[43] The consistent practice of the CAS and other specialised sports tribunals, especially as regards doping and corruption, has created an elaborate body of evidentiary rules that have attained precedential value and which the ITF Independent Tribunal cannot depart from. By way of illustration, the ITF Tribunal has accepted the CAS approach in *WADA* v. *Abdelrahman*,[44] whereby it was held that the standard of evidence tendered has to be persuasive, specific, objective and concrete.[45] As to the burden of proof in doping cases, in following CAS jurisprudence, the ITF Tribunal has held that the literal reading of Article 10.2.3 of the Tennis Anti-Doping Program (TADP) 2020 requires the player to disprove engaging in conduct that he or she 'knew constituted an Anti-Doping Rule Violation' or 'knew that there was a significant risk that the conduct might constitute or result in an Anti-Doping Rule Violation and manifestly disregarded that risk'. This means that the player must not only be unaware that the action constituted an anti-doping rule violation (ADRV), she or he must also have not known that there was a significant risk.[46] Moreover, other instruments already set out evidentiary rules[47] to which the ITF Tribunal must turn to when deciding pertinent cases.[48]

The CAS Appeals Chamber has not reversed on merit any bans imposed by the ITF Independent Tribunal,[49] although in practice the CAS will assess

[43] This is very close to the language in ICC Arbitration Rules, Art. 25(1), which refers to 'all appropriate means'.

[44] *WADA* v. *Abdelrahman*, CAS 2017/A/5036.

[45] *ITF and Anti-Doping Organization* v. *Shoshkyna*, SR/262/2020, at para. 78.

[46] Ibid., at para. 124; equally, in agreeing with *Dylan Scott* v. *ITF*, CAS 2018/A/5768, the ITF Tribunal held that should there be a gap in scientific knowledge and that it is not known whether or not a particular proposition is true, and therefore the hypothesis as to source remains unverified, the benefit of the doubt goes against the player, because it is the player who bears the burden of proof on this point.

[47] Pursuant to TADP, Art. 3.1.1, the burden is on the ITF to establish each of the elements of the ADRVs charged 'to the comfortable satisfaction of the hearing panel, bearing in mind the seriousness of the allegation that is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt.'

[48] See *ITF and Anti-Doping Organization* v. *Lepchenko*, SR/254/2021, at para. 38, where the ITF Tribunal accepted that where an athlete is unable to identify how a prohibited substance entered his or her body, it is very difficult for the athlete to discharge the burden of proof that his or her conduct that led to the positive test was not intentional.

[49] In *X* v. *ATP Tour*, decided by the CAS Appellate Chamber, the duration of the suspension was reduced. More significantly, the tennis player had signed waiver of the right to bring setting-aside proceedings against future arbitral awards against the ITF. The CAS was unambiguous in its decision that such waiver agreements are not valid, even if express among the parties, in accordance with Art. 192 of the Swiss (Federal) Private International Law Act (PILA).

whether the ban is proportionate by reference to whether a clear departure from the text of a rule would violate public policy.[50] The same approach has been adopted also by the ITF's Independent Tribunal.[51] Fairness is paramount in the ITF Independent Tribunal's practice, as well as sports tribunals more generally[52] concerning fines and penalties imposed on athletes.[53] Given that the offences and their attendant sanctions are known in advance and the ITF Independent Tribunal, as well as the CAS, apply these sanctions proportionally and fairly, it is natural that no claims of restraint of trade have been raised in respect of disciplinary sanctions in tennis, and sports more generally. Even the *Suarez* appeal did not specifically refer to this doctrine or other equivalents. There are several reasons for this. First, the doctrine has been developed and enforced by common law courts. All disciplinary bans have been imposed by specialised tribunals, which need not rely on English law, since their own internal rules suffice for the imposition of sanctions. Second, a restraint of trade claim, even if applicable, would be pointless, particularly since bans for serious offences such as doping and cheating/illegal gambling are part and parcel of the commercial and contractual currency of tennis and all athletes are aware of the severe consequences.

The same cannot be said, however, for infractions of rules of conduct other than doping and illegal activities. Penalties for rage,[54] walking off the court without being injured, and insulting umpires and the audience are subject to misconduct fines under the ITF's Welfare Rules, as well as tournament organisers and national tennis federations.[55] No doubt, if

[50] *Cilic* v. *ITF*, CAS 2013/A/3335, Award (11 April 2014).

[51] In *Ilie Nastase* v. *ITF*, Independent Tribunal Decision, SR/913/2017, at para. 101, the Independent Tribunal held that the applicable principle concerning sanctions is that of 'correctness trumps consistency', as referred to in previous sports decisions. Hence, 'if a sanction granted in another similar matter – although, as was just said, there is no such case that the Tribunal is aware of – is greater or smaller than the one imposed by the [Panel or Tribunal], this should not bind the Tribunal and prevent it from electing the sanction which it determines to be the fairest in light of all the circumstances of the case'.

[52] *Squizzato* v. *FINA*, CAS 2005/A/830; *FINA* v. *Mellouli*, CAS 2010/A/2268; *Klein* v. *ASDA*, CAS A4/2016; *Walilko* v. *FIA*, CAS 2010/A/2268; and *Puerta* v. *ITF*, CAS 2006/A/1025.

[53] See *ITF and Anti-Doping Organization* v. *Stephane Houdet*, SR/005/2022, at para. 132, where the ITF Tribunal stated that 'it enjoys a broad discretion in how it defines "fairness" in the particular case'.

[54] ITF Pro-Circuit Code of Conduct, available at: www.itftennis.com/media/7285/09-2022-wtt-code-of-conduct-v2.pdf.

[55] For fines imposed by tournament organisers, see Jimmy Hascup, 'Australian Tennis Player Gets Fined $56,100 for Failing to Meet "Professional Standard" in Wimbledon Loss', *USA Today* (5 July 2019), available at: www.usatoday.com/story/sports/tennis/wimb/2019/07/05/wimbledon-2019-bernard-tomic-fined-prize-money-lackluster-effort/1655166001/. In practice, national tennis federations promulgate their own rules,

a minor disciplinary offence were to receive a ban that was so disproportionate that it prevented an athlete from retaining his or her form, it would rightly be subjected to a reversal on grounds similar to or with the same effect as restraint of trade.[56] Some commentators have argued that even if the sanction imposed by the ITF is not oppressive, the lack of procedural fairness is nonetheless disturbing[57] and may (in the opinion of this author) justify claims concerning restraint of trade if the appropriate threshold is met.[58]

In some instances, a disciplinary sanction may not culminate in significant financial loss for a tennis athlete, yet it may cause high levels of distress and exacerbate an existing condition. When US star Naomi Osaka felt compelled to withdraw from the French Open, subsequently facing fines because she did not want to make media appearances, she was poorly portrayed in the press and no accommodation was made available even though she was undergoing mental health issues.[59] Although the fine was insignificant for the athlete, it exacerbated her mental health issues and the distress caused prevented her from competing for some time.

which include conduct obligations and the imposition of fines. See US Tennis Association (USTA) Handbook of Rules and Regulations (2022), available at: www.usta.com/content/dam/usta/2022-pdfs/2022%20Friend%20at%20Court.pdf, Chapter IV.C(1), which stipulates that: 'The Chair of any tournament may withhold all or part of any prize money or expenses payable to any player charged by the Chair or by the Referee of the tournament with conduct inconsistent with the principles in USTA Regulation IV.C., provided a written grievance is filed in accordance with USTA Regulation V.B. and Bylaw 43. Any prize money or expenses so withheld shall be withheld until a final determination of the charges in the grievance has been made. Immediately after the final determination, the funds withheld, less the amount of any fine, shall be promptly paid to the player.'

[56] See Rosmarjin Van Kleef, 'Reviewing Disciplinary Sanctions in Sports' (2015) 4 Camb J Int & Comp L 3.

[57] See Ben Livings and Karolina Wlodarczak, 'Procedural Fairness in the International Tennis Federation's Disciplinary Regime' (2020) 18 Ent & Sports LJ 1. The authors discuss two particular tennis awards, namely: *Ilie Nastase* v. *ITF*, Independent Tribunal Decision, SR/913/2017, Award of 6 February 2018; *Federación de Tenis de Chile & Rios* v. *ITF*, Independent Tribunal Appeal, SR/48/2018, Award of 28 March 2018.

[58] See Martin Kosla, 'Disciplined for "Bringing a Sport into Disrepute" – a Framework for Judicial Review' (2001) 25 Melb UL Rev 654.

[59] Matthew Futterman, 'Naomi Osaka Quits the French Open after News Conference Dispute', *New York Times* (31 May 2021), available at: www.nytimes.com/2021/05/31/sports/tennis/naomi-osaka-quits-french-open-depression.html.

4.3 *Qualification for National Tennis Teams and Restraint of Trade*

Although the battleground for professional tennis is predicated around ITF/ATP and WTA tournaments and the ranking therefrom, selection and participation in national teams is highly sought after by players at all ranks. It is not only that national teams pay salaries to players,[60] but more importantly, national team selection brings several privileges to players who do not as a rule make a viable living from tournament prizes. A player selected in a national team may play in the Olympics, become employed in his or her country's civil service, be granted a pension or simply accumulate sufficient recognition to be given a wild card in a tournament for which he or she would not have otherwise qualified. For all of these reasons, at the very least, wrongful exclusion from a national team may give rise to a justifiable claim for restraint of trade.

In principle, each national federation recommends athletes for the Olympics, irrespective of merit, and this decision is transmitted to the federation's National Olympic Committee (NOC), which then transmits the names of those selected to the International Olympic Committee (IOC).[61] The same is true in the case of tennis. In *Oksana Kalashnikova and Ekaterine Gorgodze* v. *ITF, Georgian National Olympic Committee (GNOC) and Georgian Tennis Federation (GTF)*,[62] the applicants were the top-ranked female doubles team in Georgia. Prior to the 2020 Tokyo Olympics, they had received verbal assurances that they would be placed on Georgia's entry list. It turned out that the GNOC failed to enter them in the original and revised entry lists. The two players requested that it was unfair that they were excluded, and that the ITF intervene through a revised list. They further argued that the verbal assurances received from the GNOC and GTF estopped the latter from reneging on their promise. The CAS was forced to reject the players' application on the grounds explained above, albeit a different outcome might have transpired if the same dispute was submitted to an English court (assuming

[60] See 'Davis Cup Prize Money 2021', Perfect Tennis, available at: www.perfect-tennis.com/prize-money/davis-cup/.

[61] Appendix E to the ITF Constitution includes several rules extracted verbatim from the Olympic Charter. The By-Law to Rule 40(1) of the Charter stipulates that each international federation establishes its own rules for participation in the Olympics, albeit such criteria must be approved by the IOC Executive Board. Paragraph 2 further clarifies authority for selection by suggesting that this is done by international federations, in conjunction with their affiliated national federations and national organizing committees.

[62] CAS OG 20/05, Award (22 July 2021).

it possessed jurisdiction) pursuant to a restraint of trade claim. The application of this doctrine is not necessarily reliant on the legality of a particular rule, but whether its otherwise oppressive nature is justified and reasonable in the public interest and whether in the process it deprives an athlete of his or her livelihood. In the case at hand, the two female athletes ranked 73 and 108 in the WTA singles rankings and were in their early 30s. If one assumes that at that point in their career their best chance to make a living from the sport was through their participation in the Georgian national team (assuming that they could not expect to seriously contend for prize money), then being deprived of this opportunity on unfair and discriminatory grounds constitutes a restraint of trade. While national tennis federations possess sole authority to determine access to national teams, it is advisable and in the best interests of the ITF to amend its rules and demand that membership in national teams be achieved on a competitive basis. This could be based on ATP/WTA rankings or by competing in national rounds. This author sees no legal impediment for the ITF to suggest that any other outcome would violate an athlete's right to make a living and would be discriminatory.