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EDITORIAL

The balance of power between Players and Football Clubs is a critical issue.

The issue of this balance of power is particularly visible in contractual relationships between clubs and players, even more so regarding the early termination of players' employment contracts.

Following last summer's very active transfer window, which included several high-profile transfers, and the adoption by FIFA of a new version of the Regulations on the Status and Transfer of Players (RSTP) that came into force on 1 June 2018, this issue's Special Report focuses on the termination of players' and coaches' contracts.

Additionally, Football Legal is excited to announce that a new website www.football-legal.com will be launched in September 2018. With it will come new contents and services on a digital platform, including a daily newsletter, an original and exclusive database containing more than thousands of articles on football law, key regulations and cases...

On this occasion, Football Legal has changed its graphical charter, including a new logo that you can discover in this edition.

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Legal framework

Article 2(3) KNVB RI prescribes that intermediaries are obliged to sign an Intermediaries Declaration in order to be able to act as a KNVB-registered intermediary. According to Article 3 of the Intermediaries Declaration, an intermediary agrees that a player is at all times allowed to represent himself.

Furthermore, the representation agreement must be in writing.²⁵ The KNVB made a template of a representation agreement available on its website.²⁶ The terms set out in this template must be adopted in the representation agreement.²⁷ The representation contract is to be submitted, as an annex to the player contract, for registration to the KNVB.²⁸

The term of the representation agreement may not be longer than two years and any extension may also not be longer than two years. An extension must be made in writing, and implicit extensions are not permitted.²⁹ In addition, the representation agreement may not contain any terms that are contrary to the law, Statutes or Regulations of the KNVB, UEFA and/or FIFA, and/or decisions of one of their bodies.³⁰ The representation agreement is registered by the KNVB if all prerequisites are complied with.³¹

The intermediary is informed of the registration of a representation agreement.³²

Finally, Article 408(1) of Book 7 of the Dutch Civil Code stipulates that a "contract of assignment" (i.e. "overeenkomst van opdracht") can be terminated by the assignor at all times.³³

The decision

Concerning *KONGOLO*'s termination of the first representation contract, the KNVB Arbitration Tribunal held that *KONGOLO* indeed rightly terminated the contract on the basis of Article 408(1) of Book 7 Dutch Civil Code, according to which *KONGOLO* could terminate the representation contract at any time. The Arbitration Tribunal held that the right of early termination could have been excluded in the contract, yet the parties had not done so. Insofar as *ALKAN*'s claims were based on the first representation contract, the claims, also those against *JANSEN* and *Feyenoord*, were therefore dismissed.³⁴

As to the second representation contract, the Arbitration Tribunal held that an exclusion of the player's possibility to represent himself is contradictory to Article 3 of the Intermediaries Declaration which intermediaries have to sign before one is admitted to act as a KNVB-registered intermediary in accordance with Article 2(3) KNVB RI. In addition, such exclusion of self-representation is also in violation of Article 6(3) KNVB RI, since this paragraph intends to prescribe a player's right to represent himself in concluding player contracts and/or transfers to other clubs at any time.³⁵

The Arbitration Tribunal further held that by submitting only the first representation contract to *Feyenoord*, which *Feyenoord* subsequently forwarded to the KNVB as an addendum to the player contract, for registration, *ALKAN* did not comply with the obligation to have the representation agreement concluded between the player and the intermediary registered at the KNVB to observe transparency with a view to ensuring that representation contracts do not contain provisions that are in conflict with the applicable legislation, the Statutes and/or Regulations of the KNVB, UEFA and/or FIFA and/or decisions of one or more of their bodies as is the purpose and meaning of Article 6 KNVB RI.³⁶

By including certain provisions in the second representation contract which significantly differ from what was provided for in the first representation contract and which differences were also contrary to the Regulations of the KNVB and what *ALKAN* had committed himself to with his registration as an intermediary, and by only submitting the first representation contract to *Feyenoord* and to let *Feyenoord* register only the first representation contract together with the player contract with the KNVB, *ALKAN* had withheld the provisions that were included only in the second representation contract from the sight of the KNVB in violation with Article 6(1) KNVB RI.³⁷

ALKAN could have prevented the lack of clarity that had arisen as to whether or not the agreements could be cancelled, as to the matter of exclusivity, and as to the matter of the reimbursements, by submitting one representation contract which contained all the relevant agreements in conformity

25 Art. 6, par. 1 KNVB RI.

26 In accordance with Art. 6, par. 1 KNVB RI, www.knvb.nl

27 Art. 6, par. 1 KNVB RI.

28 Art. 6, par. 1 KNVB RI.

29 Art. 6, par. 2 KNVB RI.

30 Art. 6, par. 3 KNVB RI.

31 Art. 6, par. 4 KNVB RI.

32 Art. 6, par. 5 KNVB RI.

33 It does not appear to be controversial that a representation agreement must be qualified as a contract of assignment.

34 Decision of the KNVB Arbitration Tribunal of 7 March 2018, case no. 1455 (*Alkan v. Kongolo, Jansen & Feyenoord Rotterdam*), par. 54.

35 *Ibid.*, par. 55-57.

36 *Ibid.*, par. 59.

37 *Ibid.*, par. 60.



with the KNVB Regulations, to *Feyenoord* in order to register it with the KNVB.³⁸ Consequently, *ALKAN* could not rely on the second representation contract.³⁹

Moreover, *KONGOLO* acted in his own name when concluding the player contracts with *Feyenoord* on 26 April 2016 and with *AS Monaco* on 2 July 2017. The Arbitration Tribunal argued that, even if it would be established that *KONGOLO* agreed to the second representation contract, he was free to conclude a player contract without using the services of *ALKAN*.⁴⁰

Consequently, *ALKAN*'s claims against *KONGOLO* were dismissed.⁴¹ *ALKAN*'s claim against *Feyenoord* was dismissed based on the contract between *ALKAN* and *Feyenoord*, according to which *Feyenoord* had no obligation to hire the services of *ALKAN* for the negotiation and conclusion of the transfer agreement with *AS Monaco* due to the fact that *KONGOLO*'s player contract with *Feyenoord* had been extended without the involvement of *ALKAN*.⁴²

Since the claims against *JANSEN* are derived from the claims *ALKAN* filed against *KONGOLO* and *Feyenoord*, *ALKAN*'s claims against *JANSEN* were also dismissed.⁴³

Comment

The decision is interesting on various points, namely on the interpretation of contractual terms in representation contracts in the light of applicable laws and regulations, as well as on the monitoring function of the KNVB on the validity of (the terms of) representation contracts.

38 *Ibid.*, par. 61.

39 *Ibid.*, par. 62.

40 *Ibid.*, par. 63.

41 *Ibid.*, par. 54, 62.

42 *Ibid.*, par. 64.

43 *Ibid.*, par. 65.

In line with the KNVB RI, it must be understood that the template KNVB representation contract contains certain minimum requirements to a representation contract.

However, the parties to the representation contract may deviate from the template in accordance with the applicable law and regulations. As regards to the possibility for the parties to include an exclusivity clause, it appears from the reasoning of the Arbitration Tribunal that contractual parties may exclude the representation of another intermediary other than the contracted party of the relevant agreement, but that a football player is at all times free to represent himself in concluding player contracts and/ or transfers to other clubs.

Furthermore, in relation to the possibility for the assignor - the football player - to terminate the representation contract during the term of the contract, the Arbitration Tribunal held that such possibility can be excluded in the contract but has to be excluded explicitly. Without the explicit contractual exclusion of an early termination, a fixed term representation contract must not be understood to imply an exclusion of the right of early termination by the client.⁴⁴

44 In accordance with Article 413(2) in conjunction with Article 408(3) of Book 7 Dutch Civil Code, it is not possible to derogate from Article 408(1) of Book 7 Dutch Civil Code if this is done to the disadvantage of a client who is a natural person not acting in the exercise of his profession or business. However, it is plausible that the expression "in the exercise of a profession or business" must be interpreted broadly (see in this regard *Tekst & Commentaar Burgerlijk Wetboek*, commentary to Article 408 Book 7 of the Dutch Civil Code, section 5). Therefore, if the client acts on behalf of or for the benefit of a profession or business, he is not protected by Article 408(1) in conjunction with Article 413(2) Book 7 Dutch Civil Code in the event of a clause expressing the exclusion of the player's right to terminate the contract within the term of the representation contract. It is the author's opinion that a football player who contracts an intermediary for representation purposes acts for the benefit of his profession and must thus be understood to be a professional party. As such, the Arbitration Tribunal rightly put that a player's right to terminate the representation contract can be excluded in the representation contract.

The above considerations are interesting and appear partially contradictory, as this reasoning appears to grant football players a right to always bypass their intermediary, regardless of whether a valid representation contract was concluded, as they are always entitled to represent themselves. If this were to be followed, the possibility afforded by law that parties to a contract of assignment may exclude the possibility for the assignor to prematurely terminate the agreement is overruled by the intermediary's declaration towards the KNVB that a player may represent himself by signing the Intermediaries Declaration. Indeed, if a player is not bound to involve the intermediary in negotiations, the only benefit of a right to terminate a representation contract would be if a player wishes to hire the services of another intermediary and the representation contract that the player wishes to terminate contains a clause for exclusivity. It is submitted that such situation could be a mere theoretical one since the player and the 'new' intermediary might find other ways to circumvent a representation contract, such as to not have the 'new' intermediary co-sign the newly negotiated contract and arrange their professional relationship otherwise. However, in a situation where a player terminates a representation agreement or bypasses the intermediary in bad faith, the intermediary should in principle be entitled to compensation, in particular if his services contributed to the conclusion of a contract by the player.

Moreover, with this decision, the importance of the monitoring function of the KNVB, as laid down in Article 6(4) KNVB RI, is underlined, as the non-registration of the second representation contract *vis-à-vis* the registration of the first representation contract



and therewith the possibility for the KNVB to evaluate and approve the terms of the representation contract was critical in the Arbitration Tribunal's decision to apply the first representation contract and refrain from applying the second representation contract. As such, in accordance with the Arbitration Tribunal's decision, it must be understood that the registration of the representation contract with the KNVB is a vital requirement in order for the representation contract to be valid under applicable KNVB Regulations. One may however wonder whether the non-registration of a representation contract with the KNVB per se means that such agreement is invalid.

Overall, this decision is in fact the first real interpretation of certain aspects of the KNVB RI. More jurisprudence will undoubtedly follow that provides more guidance under factual circumstances that may well be different from the case at hand and certain issues may well be explained in a more nuanced fashion, or even revisited entirely.

Criminal and Civil Liability of Football Players



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→ Violence - National Law - National Courts - Personal data - General Data Protection Regulation (GDPR)

North Netherlands District Court,
12 May 2017, ECLI:NL:RBNNE:2016:1502;
The Hague Court of Appeal,
21 July 2017, ECLI:NL:GHDHA:2017:2324

In sports, more specifically in contact sports like football, players can get physical. Especially between strikers and defenders, things can get heated. Sometimes players cross the line of what is permissible and tackle another player instead of the ball. Besides the disciplinary punishment by the referee (like a yellow or red card) and the competent disciplinary bodies of sports federations, the question arises whether a player could in such case be held liable under civil law or criminal law. Decisions of the North Netherlands District Court and The Hague Court of Appeal, concerning liability of an amateur player for the injury of an opponent, have caused quite a stir. In this article, the author explains when a player could be held liable under civil law or criminal law in the Netherlands. If an injured player wants to hold the other player liable, he requires the personal data of such player. If the injured player asks the football club for those personal data, would the football club be obliged to hand over this information?

Civil liability

Civil liability in sport situations is more complex than "regular" civil liability cases. The threshold for liability in football cases under Dutch Law is very high. After all, football is a contact sport and during the game there is a real chance of getting an injury and by participating in a football match, players to a certain extent accept such risk. Only when a player's behaviour exceeds the threshold of what is permissible - i.e. behaviour becomes abnormal and is in clear violation of the rules of the game - can a player be held liable.

Some examples of behaviour that can be considered as abnormal and do not comply with the rules of the game are (a) a tackle from behind when the ball is long gone; (b) head-butting, like *Zinedine ZIDANE* did to *Marco MATERAZZI*, or (c) tackle with one or both legs stretched.

One could think that the nature and severity of the injury is decisive for civil liability, but this is not the case. The action of the player and the damage is however leading for the determination of criminal liability, as will be explored in more detail below. Hereafter follows an outline of two cases that were settled in court.

North Netherlands District Court

Facts

In a football match between two amateur teams, a striker was in a very good position to score a goal. Two defenders - including the defendant - tried to keep the striker from scoring a goal. The action of the defendants was unsuccessful and the striker scored a goal. Unfortunately, the defendant made physical contact

with the striker. Because of that physical contact, the striker got seriously injured. The striker held the defendant liable under civil law for the damages caused by the tackle. The incident was recorded on video by a spectator. The video footage was subsequently used as evidence during the proceedings.

Decision of the Court

First the Court ruled that the injury was caused by the tackle (causality).⁴⁵

Then the Court proceeded to investigate whether the tackle was unlawful. The Court explained the circumstances that are relevant in assessing whether a tackle is unlawful:⁴⁶

- The common rule regarding civil liability in sport situation is that an action of a football player will not easily be considered as unlawful. Participants of a football match may expect that potential dangerous (meaning: actions that can lead to injuries) behaviour will be provoked and could take place;
- Since football is a contact sport, players have to expect that contact - like pulling and pushing - is made during the game;
- If a player gets injured by a tackle, this does not automatically mean that the player is liable under civil law, even if the tackle does not comply with the rules of the game;
- If the action of a player is beyond what is considered reasonable and expected within the rules of the game, then civil liability could be the case.

Taking in consideration the aforementioned and the video footage of the incident, the Court ruled as follows:⁴⁷

- The tackle was made when the striker still had the ball;
- The tackle was made towards the ball;
- The defendant intended to stop the striker from scoring and had no intention to injure the striker;
- Although the striker had serious injuries because of the tackle, this does not result in civil liability of the defendant.

Analysis

In my opinion, the decision could have been different if the defendant had tackled the striker when he already scored and - for instance - the tackle was from behind. In such situation, it is submitted that the actions of the defendant were to be considered as unreasonable and could not be expected within the rules of the game.

The burden of proving that the other party caused the injury and the damages resulting therefore lies with the injured party. He will need to prove - by video footage and/or statements of teammates or spectators - that the actions of the other player were unlawful and that the action was causal to the injury. This is not as easy as it seems.

Even if the referee had given a red card to the defendant, this is not in itself sufficient to prove that the action was unlawful.

However, if disciplinary sanctions are imposed on the other player by the sports federation - for instance by suspending the player for several matches - this could be evidence corroborating the allegation that the action was unlawful. Clearly, not every action resulting in a disciplinary sanction from the disciplinary bodies of the sports federation will be qualified as unlawful. The circumstances of each situation have to be taken into consideration in order to prove an action is unlawful.

Criminal liability

Like civil liability, criminal liability will not be accepted easily under Dutch Law. Only in case of serious violations - such as tackling from behind or tackling when the ball is long gone - can be qualified as conditional intent (accepting the chance that the other player can be seriously injured).

Conditional intent

- Conditional intent under Dutch Law can be defined as follows:⁴⁸
- When a player willingly and knowingly accepts the significant change that the other player will get injured;
- Besides the fact that the player has knowledge that the other player could get injured by his action, it is also required that the player during the actions willingly accepted that chance;
- If a player has knowledge of the significant chance the other player can get injured by his actions but not expected that the injury could take place by his actions, no conditional

⁴⁵ Decision of the North Netherlands District Court of 12 May 2017, ECLI:NL:RBNNE:2016:1502, ruling 6.2-6.11.

⁴⁶ *Ibid.*, ruling 6.12-6.13.

⁴⁷ *Ibid.*, ruling 6.14-6.15.

⁴⁸ Decision of the Netherlands Supreme Court of 25 March 2003, NJ 2003, 552.



intent can be determined (in that case, negligence can possibly be established, but conditional intent not);

- ➔ Some actions are to be considered so dangerous that the player could expect that an injury would be caused by that action.

One of the most shocking injuries in the Netherlands was the injury of *Niels KOKMEIJER*.⁴⁹ The injury was inflicted by a player called *Rachid BOUAOUZAN*. *Niels KOKMEIJER* broke his right leg in several places and could never play (professional) football again.⁵⁰

Criminal actions were taken against *Rachid BOUAOUZAN*. The judge ruled:⁵¹

"The victim, who was passed the ball to by a fellow player, had the ability to pass the ball towards Sparta's penalty area. The suspect, who was running towards the victim at high speed immediately set an action at the same speed, which meant that he curved his leg first and then stretched his leg forward at an altitude of about half a meter above the ground. At the same time, the victim swung his leg forward to pass the ball. Just at the time the ball left the victim's right foot, the suspect hit the right leg of the victim just below the knee. The court rules that the suspect himself carried out this action in the sense that he was exposed to the significant chance that he would not hit the ball but the victim and that he would seriously injure the victim. In addition, the court takes into account that, according to general experience of the suspect, which

may also have assumed, because he is a professional football player, that it was possible that at such a high speed and power with a stretched leg hitting someone else's lower leg leads to severe bodily injury."

The conditional intent was accepted in this case. The nature and severity of the injury can be decisive for criminal liability.

The Hague Court of Appeal

Facts

During a football match between two amateur teams, a striker and defender run towards the ball. While sprinting behind the striker, the defender tackled the striker - only hitting the legs of the striker and not hitting the ball - resulting in a serious injury of the striker.

Decision of the Court of Appeal

The Court of Appeal ruled that the defender had no intention to injure the other player (severely). It is not common in a football game that a tackle automatically leads to a serious injury. The Court of Appeal then investigated whether conditional intent should be accepted. The Court ruled the following:

- ➔ The defender could reasonably realize that the striker could get injured by the tackle;
- ➔ The fact that the defender was positioned close to the striker enhanced the chance of an injury;
- ➔ The intention of the defender was to obtain the ball. However, by tackling the striker close by and from behind, the defender willingly and knowingly accepted the significant chance that the striker would get

injured by his action; in other words: he took for granted that the other player would be severely injured;

- ➔ Therefore, the Court of Appeal ruled that the defender had the conditional intent to injure the striker;
- ➔ The actions of the defender cannot be considered as what the striker usually can expect in a football game.

The defender was held criminally liable for his action. The defender was sentenced to community services for 100 hours and was ordered to pay damages to the defender in an amount of EUR 9,000 (for a large part immaterial damages). There is much criticism on this last verdict, as it is not in line with the previous statements in which the threshold for conviction is high.

Summary

Football is a contact sport. Inherent to this sport is that there will be pulling, pushing and tackling. Players can get hit by opponents during duels, which could lead to injuries.

Civil liability

Only when a player's behaviour exceeds the permissible in the sense that the behaviour becomes abnormal and does not fit within the rules of the game, the player could be liable under civil law. The nature and severity of the injury are not decisive for civil liability.

Criminal liability

In case of criminal liability there has to be a serious violation

⁴⁹ A video of the horrible tackle can be accessed here: www.youtube.com

⁵⁰ Decision of the Netherlands Supreme Court of 24 April 2008, ECLI:NL:HR:2008:BB7087.

⁵¹ Freely translated from the decision of the District Court of Rotterdam of 10 August 2005, ECLI:NL:RBROT:2005:AU0860.



- such as tackling from behind or tackling when the ball is long gone. In addition, at least conditional intention (i.e. accepting the chance that the other player can be seriously injured) is required. As opposed to civil liability, the nature and severity of the injury can be decisive for criminal liability. As such, criminal liability is easier to prove than civil liability, whereas victims can also claim damages in criminal proceedings.

Is a football club obliged to hand over personal data of the member who caused the injury?

In most occasions, the injured player does not know the other player. The injured player does not have the personal data of the other player and therefore cannot hold the other player liable for the damages. The only way to obtain the personal data of the other player is to consult the football club. Is a football club obliged by law to hand over personal data of the member who caused the injury?

It is most likely that a football club is not willing to hand over the personal data of the player. The reason therefore will most likely be that there will be a claim by the player that his privacy has been breached.

On 25 May 2018, the General Data Protection Regulation (GDPR) was introduced. Article 23 states as follows:

“Union or Member State law to which the data controller or processor is subject may restrict by way of a legislative measure the scope of the obligations and rights provided for in Articles 12 to 22 and Article 34, as well as Article 5 in so far as its provisions correspond to

the rights and obligations provided for in Articles 12 to 22, when such a restriction respects the essence of the fundamental rights and freedoms and is a necessary and proportionate measure in a democratic society to safeguard: (...)

the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security; (...)

the enforcement of civil law claims.”

Due to Article 23 GDPR, football clubs are (eventually) obliged to hand over the personal data of the player who injured the other player, when the injured player is not able to start legal proceedings against the other player without such data.