

Sports Law 2016

Brazil

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Labour and Employment

- 1 In the case of sportspersons who play for a team participating in a league or professional competition, what type of relationship links the player to the team? Is it an employment relationship or is the sportsperson an independent contractor?

As a general rule, professional sportspersons are linked to the team by means of an employment relationship governed by the Brazilian Labour Code and specific provisions of Law No. 9,615, dated 24 March 1998 (also known as the Pelé Law), which sets forth general provisions on sports in Brazil, with certain sections applicable only to football teams and players.

Football players and teams shall execute a written special employment contract) establishing, among other conditions, the compensation to be granted to the sportsperson and penalty clauses in connection to their transfer to other teams and to the termination of the contract before the agreed term (article 28 of the Pelé Law). Such provisions are not mandatory for employment contracts of athletes engaged in other sports modalities (article 94 of the Pelé Law).

The sports bond between the sportsperson and the team, which is ancillary to the employment bond and is called “federative rights”, derives from the registry of the special employment contract before the entity responsible for managing of the sports activity (federations).

Also, sports entities may contract, as independent contractors, sportspersons who practise individual sports on an independent basis and who takes the risk of their own activities. In this case there will be a relationship governed by the Brazilian Civil Code, instead of an employment relationship. The sports bond between the sports entity and the sportsperson will result from the application to participate in a certain competition (article 28-A of the Pelé Law).

- 2 If it is an employment relationship, what social security obligations apply to the team and to the player?

Both players and the team shall contribute to the Brazilian social security system. Such contributions are paid monthly and tax rates may vary substantially.

As employees, players have to pay social security contributions at a rate of 8 per cent, 9 per cent or 11 per cent over the compensation they earn (article 20 of Law No. 8,212, dated 24 July 1991). Such rates vary according to the total amount of their compensation and the contribution is current limited to a cap of 570,88 reais. The contribution is withheld by the employer.

As a general rule, team’s contributions are charged at a rate of 20 per cent over payments made through their payroll, including all benefits paid or credited, on any account, to individuals that provide services to them, whether or not under an employment relationship (article 22, item I, of Law No. 8,212). Such rate is added by a percentage of up to 6 per cent with respect to the labour accident insurance (article 22, item II, of Law No. 8,212, combined with article 10 of Law No. 10,666, dated 8 May 2003).

Exception is made to football entities, which are subject to a different rule. Instead of paying a percentage calculated over the amounts due to the players of the football team, such entities shall contribute to the Brazilian social security system at a rate of 5 per cent over its gross revenue in connection to sports events, sponsorships, brands and symbols licensing, publicity and transmission of sports events.

In any case, teams must also afford contributions to the entities constituting the “S System”, which are responsible for promoting social and educational services in order to prepare people for the world of business and labour, usually at a rate of up to 5.8 per cent over payments made through their payroll.

- 3 Can the player be dismissed or terminated? If so, is there an obligation for the team to indemnify the player?

Yes, the player can be dismissed by the team before the originally agreed period of duration of the contract.

As to football, besides the regular severance payment granted by the Labour Law, in case of termination by the team the player will be entitled to the payment of an indemnity to be established in the employment agreement. This indemnity cannot be lower than the total remaining amount that would be due to the player until the term of the contract neither higher than the amount corresponding to 400 times the monthly compensation paid by the team.

The indemnification rule is quite different for employment contracts having a defined term lower than 12 months. In this case, besides the regular severance payment granted by the Labour Law, the player whose contract has been terminated by the team will be entitled to receive an indemnification equivalent to as many twelfths of the monthly compensation paid by the team as the number of months of the total term of the contract.

As a consequence of the termination, the team loses its federative rights over the dismissed athlete, or, in other words, those rights are extinct.

For sports other than football, termination is ruled by provisions of the Labour Law that are applicable to employment relations in general.

4 Can the player freely terminate the relationship with the team before the end of the contract? If so, must the player pay a withdrawal settlement or any other kind of indemnification?

Yes, the player can freely terminate the employment relationship with the team.

As regards football, the team will be entitled to an indemnification that must be provided for by the employment contract in the event of termination of the contract by the player (i) so as he/she can sign with another team; or (ii) if he or she quits playing and then gets back to football within 30 months after the termination. In the first hypothesis, if the player signs with a national team the indemnification is limited to 2,000 times the monthly compensation paid by the team. In case of international transfers, there is no limit for this contractual indemnity. (Article 28 of Pelé Law.)

Both the player and the new team are jointly liable for the payment of the indemnity. In practice, such payment is usually made by the new team.

Note that article 18 of FIFA's Regulations on the Status and Transfer of Players (RSTP), establishes that "a club intending to conclude a contract with a professional must inform the player's current club in writing before entering into negotiations with him. A professional shall only be free to conclude a contract with another club if his contract with his present club has expired or is due to expire within six months. Any breach of this provision shall be subject to appropriate sanctions". The same article prohibits third parties from acquiring the ability to influence in employment and transfer-related matters its independence, its policies or the performance of its teams

Following the RSTP rule, article 25 of the National Regulation of Registers and Transfers of Football Players of the Brazilian Football Confederation (sets forth that during the last six months of the employment contract in force, a player may sign a pre-contract with another team, provided that his team notifies the current team in advance so as to report the negotiation. The new contract will be effective upon the expiration of the term of the current contract. If the new team fails to comply with the notice requirement it will be subject to an administrative fine of 50,000 reais without prejudice to sanctions imposed by Sports Justice.

For sports other than football, termination is ruled by provisions of the Labour Law that are applicable to employment relations in general.

5 When the contract is executed between the player and the team, is the player obliged to assign his or her rights of publicity?

No, by virtue of law the players only assign to the team their rights over images captured during the sports event, as explained in question 10.

The use of players' individual images for advertisement, or any other commercial activity, depends on a previous agreement to be entered into between the player and the third party willing to exploit their images.

For the sake of clarification, players can assign to the teams their rights of image for publicity purposes, but this is not provided for by statutory law. In this case, the amount corresponding to the image rights cannot surpass 40 per cent of the total compensation to be paid to the player, ie, the aggregate of salaries and image rights (sole paragraph of article 87-A of Pelé Law).

6 Is there a players' labour union? Does it intervene in the determination of players' wages?

There are several players' labour unions in Brazil. They do not intervene in the wages individually negotiated with the teams. However, such unions may set forth minimum wages to be paid to players by means of collective agreements negotiated with the union representing the teams or directly with the teams.

7 If a team intends to hire a player under contract to another team, does the acquiring team have to pay the transfer rights or does the player have to do so under the withdrawal clause?

As mentioned in question 4, as regards football both the player and the new team are jointly liable for the payment of the indemnity. In practice, this payment is usually made by the new team.

Commercial and Regulatory

8 Can teams hire minors? If so, on what conditions and with what protection for the minor?

The Brazilian Federal Constitution prohibits any work to individuals younger than 16 years old, except as apprentices as from 14 years old.

In view of that, 16 is the minimum hiring age with respect to sports employment agreements. However, non-professional athletes with 14 to 20 years old and teams intending to invest in their training may execute formal contracts by means of which the minor will be entitled to a financial allowance (section § 4 of Article 29 of Pelé Law). Such contract does not characterise an employment relationship.

9 What legal form must teams have to participate in professional competitions?

Currently, almost all Brazilian teams are structured as associations, which are non-profit entities regulated by articles 53 to 61 of the Brazilian Civil Code. §9 of article 27 of Pelé Law sets forth that teams may be set up as companies (eg, limited liability companies or corporations). Section 11 of article 27 of Pelé Law states that managers of football teams shall be jointly and

unlimitedly liable for reckless misconduct in the management of for performance of acts against the by-laws pursuant to the same rules applicable to managers of corporate entities.

10 Who holds title to the audiovisual rights on matches, the competition organisers or the teams that participate in it?

Pursuant to article 42 of Pelé Law, the teams own exclusive rights to generate, exploit or broadcast images of a match or event in which they participate (*direito de arena*). The regulation grants the *direito de arena* to the teams as a way to enable the exploitation of the referred images, otherwise it would be very difficult to do it since most of the times the images include more than one individual.

Except in case of a different percentage set forth in collective conventions, 5 per cent of the amount raised by the exploitation of these rights shall be destined to professional athletes' unions and then redistributed to the players that took part in the related sports event.

An exception to the *direito de arena* is the exhibition of highlights of sports events for exclusive journalistic, sportive or educational purposes, provided that (i) the images are captured in places of the venues reserved to non-rights holders or, if such places are not available, the images are provided by the relevant rights holder; (ii) the exhibition does not exceed 3 per cent of the total duration of the sports event; and (iii) the exhibition of the images is not associated with any kind of sponsorship, publicity or merchandising.

11 Are there regulations on the possibility of setting up investment funds to invest in the economic content of player registration?

No, there are not specific rules on this issue.

The negotiation of the broadcasting rights of football championships has been raising some concern to the Brazilian antitrust authorities. The Administrative Council of Economic Defence (CADE), which is the Brazilian antitrust authority, has already addressed a ruling about distribution of the audiovisual rights in Brazil. In 2010, within the scope of the Administrative Proceeding No. 08012.006504/1997-11, CADE executed a Settlement Agreement with the major Brazilian broadcasting company, eliminating its pre-emptive rights for the acquisition of broadcasting rights of national football competitions. The same ruling established a separate negotiation for broadcasting rights by internet, free-to-air television, "pay-per-view" and streaming.

In 2016, CADE started a new investigation about the negotiations involving combined sales of broadcasting rights for free-to-air television and "pay-per-view" channels.

12 In national competitions, are there any restrictions on the investment in the economic content of player registration or transfer rights?

Only teams can hold federative rights, as such rights are ancillary to the employment agreement.

Over the years the teams have been assigning to third parties (eg, investors, funds, agents, etc) a portion of their rights to receive an indemnification in case of termination of the employment contract by the player (i) so he or she can sign with another team; or (ii) if he/she quits playing and then gets back

to football within 30 months after the termination (as explained in question 4 above). These rights, ie, the rights to receive the indemnification abovementioned, are commonly referred to as "economic rights".

Brazilian law does not specifically addresses economic rights, in such a way that they are covered by the ordinary rules of the Brazilian Civil Code.

However, FIFA recently banned third-party investments in the economic rights of professional football player with the inclusion of article 18ter in the RSTP, with the following wording:

No club or player shall enter into an agreement with a third party whereby a third party is being entitled to participate, either in full or in part, in compensation payable in relation to the future transfer of a player from one club to another, or is being assigned any rights in relation to a future transfer or transfer compensation.

Following this, the Brazilian Football Confederation adopted FIFA's new rules on the matter and approved a similar banning on third-party investments in the economic rights of professional football players by amending article 10 of the National Regulation on Register and Transfer of Football Athletes of the Brazilian Football Confederation

This ban took effect on 1 May 2015. Both regulations established a transition rule, according to which agreements regulating investments on football players executed before 31 December 2014, were not affected. Additionally, agreements executed between 1 January and 30 April 2015 should have a maximum term of one year.

13 Are there any legislative restrictions on sports betting?

Yes. According to article 50 of Decree-Law No. 3,688, dated 3 October 1941, which is the Brazilian Criminal Offences Code, sports bets, even if held online, are considered games of chance and thus not allowed.

Whoever exploits games of chance is subject to up to one year of imprisonment (increased by one third if minors are involved) and seizure under legal process of the goods related to this illegal activity. Gamblers are subject to fines ranging from 2,000 reais to 200,000 reais.

14 Are there any restrictions on publicity in stadiums or on team shirts?

According to section 5 of article 27-A of the Pelé Law, free-to-air or pay TV broadcasters may not advertise their own brands in the uniforms of the teams.

15 Is arbitration established as a method for resolving conflicts in the area of sports?

Brazil adopted two different dispute resolution methods with relation to football disputes and to other Olympic modalities.

The Brazilian Olympic Committee (COB) determined the creation of its own court of arbitration (TAD) on 14 December 2005, complying with a resolution issued by the International Olympic Committee.

Pursuant to article 45 of the Statutes of COB, last amended on 18 February 2014, TAD judges matters related to the Olympic Games, Pan American Games or other competitions involving Olympic sports disciplines. It also rules conflicts

among national entities, local federations, managers and athletes, and also between any of them and the COB. The members of the TAD should be nominated by the president of the COB.

However, despite having been regulated more than ten years ago, TAD has never been effectively established. So far, COB has not issued specific regulations for the proceedings held before TAD, and no arbitrators were nominated.

Concerning football, the Brazilian Federal Constitution establishes, in its article 217 and paragraphs “Sports Justice”. Proceedings held before the sports courts, should be regulated by a special norm such as the administrative, infra-legal, regulation issued by the Brazilian National Sports Council known as the Brazilian Sports Code. The Sports Code applies to violations strictly linked to sports practice or management, which demand a more specific regulation than that provided for by regular civil or criminal laws. In accordance with the Brazilian Federal Constitution the Judiciary Power may only judge claims related to sports matters if already assessed by this administrative court, which is allowed to issue bidding rulings, impose fines and even exclude teams and athletes from national competitions.

With regard to general infringements of FIFA rules, the regulation applicable is FIFA’s Disciplinary Code, dated 30 May 2011. FIFA “dispute resolution structure” is composed of three bodies: the Disciplinary Committee, the Ethics Committee and the Appeal Committee. As detailed below, the decisions of these committees are subject to further review by the Tribunal Arbitral du Sport / Court of Arbitration for Sport (TAS or CAS), based in Lausanne, Switzerland.

16 Is domestic anti-doping legislation adapted to the WADA (AMA) Code?

Brazil adopts the WADA (AMA) Code. The body in charge of handling doping matters in the country is the Brazilian Authority on Doping Control (ABCD). Pursuant to a requirement from WADA Brazil is establishing this year (2016) a specialised court, under the responsibility of ABCD, in order to increase the compliance with the World Anti-Doping Code and be able to carry out doping control during the 2016 Rio de Janeiro Olympic Games.

Intellectual Property

17 Are there any regulations on image rights? What is their level of protection and what nature do they have?

According to the Brazilian Federal Constitution and to the Brazilian civil code, image rights are personality rights, which are considered fundamental rights of the individuals.

Pursuant to items V and X of article 5 of the Brazilian Federal Constitution, the image right is inviolable and individuals are entitled to a compensation for property or moral damages caused by occasional violations. Accordingly, articles 12 and 20 of the Brazilian Civil Code set forth that anyone may demand that a threat or violation of personality rights cease, as well as claim for indemnity for damages.

As a general rule, personality rights cannot be assigned nor waived. However, the exploitation of an individual’s image for specific purposes can be granted to third parties by means of license agreements.

Article 5, item XXVIII, subparagraph “a”, of the Brazilian Federal Constitution also provides for the protection of the

reproduction of human voices and images, including in sports activities, which shall be regulated by law (see *direito de arena* explained in question 10).

18 Is there an industrial or intellectual property register where rights relating to image, brand, voice, name, etc, can be registered?

Rights related to image, voice, names, nicknames, physical characteristics, appearance, etc., are personality rights already protected by the Brazilian Federal Constitution, the Brazilian Civil Code and Pelé Law. They do not need any kind of register to be enforced.

Trademarks and other industrial property rights must be registered with the National Institute of Industrial Property (INPI), which according to Law No. 9,279, dated 14 May 1996 (the Brazilian IP Law), is the official agency responsible for granting registration of trademarks, patents, industrial designs, etc.

In exceptional cases when a certain name has become a brand to identify certain products or services, such name can be registered as a trademark with INPI.

19 Do leagues or sports federations have their own intellectual and industrial property rights? Do they hold the image rights of the players?

Leagues, federations and other sports entities usually have their own symbols, insignias and hold intellectual and industrial property rights related to them.

Even if they are not registered with INPI, symbols owned by sports events organisers are protected in the Brazilian territory by virtue of article 87 of Pelé Law. The Olympic Symbol is also protected by the Nairobi Treaty 1981, to which Brazil is a signatory.

Regarding image rights, please refer to questions 5, 10 and 17.

20 To what extent can sports-related trademarks or information be used to organise sports bets?

Sports-related trademarks or information cannot be used to organise sports bets because such activities are not allowed, as explained in question 13.

21 Are gaming establishments required to pay any remuneration to the organisers of sporting events?

Not applicable because sports bets are not allowed.

22 What measures are taken in your country to guarantee the rights of the sponsors of sporting events? Is there any protection against ambush marketing and, if so, what are its main characteristics?

In Brazil, pursuant to the Brazilian IP Law (article 195), using fraudulent means to divert, for one’s benefit, another’s clientele, or using another’s advertising expression or sign in a manner to cause confusion between the products or establishments is considered crime of unfair competition, subject to imprisonment from three months to one year, or a fine.

Major sports events usually give rise to special regulations against ambush marketing. During the 2014 FIFA World Cup,

Law No. 12,663, dated 5 June 2012 (World Cup General Law), a statute enacted in order to regulate different aspects of the 2014 FIFA World Cup, criminalised certain conducts related to misuse of symbols owned by FIFA (until 31 December 2014), such as ambush marketing by means of direct or indirect unauthorised association with FIFA's official events or symbols. Moreover, the World Cup General Law allowed the creation of exclusivity areas around the venues where the games took place, up to a maximum of 2 kilometres. Within these exclusivity areas third parties could not carry out any commercial activity that may be associated with the 2014 FIFA World Cup.

The World Cup General Law also established as a crime: to import, export, sell, distribute, offer or expose for sale, to conceal or stock Official Symbols (any symbols held by FIFA) or products resulting from unauthorised reproduction, imitation, counterfeiting or modification of Official Symbols, with commercial or advertising purposes.

Tax and Finance

23 Can image rights be operated through personal companies? If so, on what conditions or with what limitations, and what advantages does it entail?

Yes. Image rights can be operated through personal companies based on section 5 of article 980-A of the Brazilian Civil Code and article 129, of Law No. 11.196, dated 21 November 2005.

The abusive utilisation of companies by sportspersons solely to pay less tax has led tax authorities and administrative courts to, in some cases, disregard the incorporation of the company and tax the individual directly. Therefore, the company must have adequate economic substance and business purpose, in addition to not less than one hundred times the Brazilian minimum wage as capital.

The tax advantage of such alternative to sportspersons is to reduce the individual income tax levied on a progressive tax rate usually at 27.5 per cent (highest tax rate), to a corporate income tax ranging from 16.53 per cent to 19.53 per cent depending on the city and amount involved.

24 What is the tax characterisation, at a domestic level, of the income for the licensing of image rights? Are they subject to withholding tax? If so, at what rate?

Although the tax characterisation of the income for the licensing of image rights is not defined in the legislation, our interpretation is that it characterises as royalties.

According to article 22,VI, of Normative Ruling SRF 1,500, dated 29 October 2014, the withholding income tax levied on resident individuals is calculated based on the progressive tax rates. The applicable rates are 7.5, 15, 22.5 and 27.5 per cent, depending on the amount involved.

25 What is the personal income tax treatment applicable to resident sportspersons? What is the tax rate applicable to income obtained by sportspersons?

In Brazil, taxation is imposed on the basis of residency (rather than citizenship/nationality). Therefore, resident individuals are taxed on a worldwide basis, on their income and gains arising both in Brazil and abroad.

The tax rate applicable to sportspersons is the same applied to any other resident individual, which is the progressive rates between 7.5 per cent and 27.5 per cent, mentioned in the answer above, applied in accordance with the amount involved.

26 What tax rate applies to non-resident sportspersons for matches held in your jurisdiction?

Non-resident sportspersons traveling to Brazil for matches in the country should not be subject to income taxation on their salaries/compensation received abroad. Non-resident sportspersons will only be subject to Brazilian taxation when payments are made to them by Brazilian sources.

Regarding the rates, according to the income tax regulation, Decree 3,000, dated 26 March 1999, prizes earned in competitions by non-residents are subject to a 15 per cent income tax. On the other hand, remuneration from work and rendering of services are subject to a 25 per cent income tax rate.

Brazilian Tax Authorities (Receita Federal do Brasil) understand that when the remuneration for playing the matches is related to the performance of the non-resident sportsperson it is characterised as remuneration from work, therefore taxed at 25 per cent, and if there is no relation to the performance the rate is 15 per cent. When the sportsperson is resident of a favored tax jurisdiction the tax rate is 25 per cent (Ruling COSIT 9/2012).

27 Is there a special tax regime for sportspersons? What does it entail?

There is no special tax regime for sportspersons in Brazil.

28 How are the payments for the licensing of image rights made to non-resident companies classified for tax purposes? What withholding rate applies to them?

The payments for the licensing of image rights made to non-resident companies are classified as royalties. The withholding income tax rate applied is 15 per cent, but if the company is resident in a favoured tax jurisdiction the tax rate is 25 per cent.

Additionally, there is a 10 per cent taxation regarding the CIDE contribution and 0.38 per cent concerning the tax on financial transaction (IOF).

According to Ruling 11, dated 28 April 2001, there is neither PIS nor COFINS taxation. Tax on services (ISS) could be charged by cities at a maximum 5 per cent tax rate but it could be challenged in court since Complementary Law No. 116, dated 31 July 2003, does not include payments for the licensing of image rights as a taxable event of ISS.

29 Is prize money from sports competitions exempt from tax?

No. Prize money from sports competitions related to the performance of the competitors, is considered remuneration from work, regardless if paid in cash, goods or services, and therefore have salary nature subject to the progressive individual income tax rate (7.5 per cent to 27.5 per cent).

30 Is financial fair play established in national competitions?

Yes. According to article 40 of Law No. 13,155, from 4 August 2015, team sports must be fulfilled with its obligations regarding

taxes, labour, salaries and image rights. If such obligations are not fulfilled, team sports must play in a lower division of the championship.

In addition, articles 18 and 18-A of Pelé Law disposes that entities can only benefit from tax exemptions and public subsidies if they are financially healthy and transparent, as well as have no tax debts.

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