
# 体育法律资讯

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# 速览

# 【热点体育动态】

## 聚焦2014巴西世界杯　大幕即将拉开

2014年巴西世界杯揭幕战——巴西队与克罗地亚队的比赛将于北京时间6月13日凌晨4点在圣保罗打响。电视转播中枢IBC开张营业，国际足联宣布再投放18万张门票，32支参赛球队的大名单已基本尘埃落定。巴西时间，即将到来。


然而，此前巴西国内爆发了多次针对世界杯的罢工、游行，多座球场的观众座椅和周边设施至今尚未竣工，有些以世界杯名义兴建的基础建设甚至要到2017年才能完成。种种迹象表明，这个“足球王国”并不是非常期待万众瞩目的世界杯。

嗜球如命的巴西人，真的那么不喜欢世界杯吗？

**爱恨交织**

巴西被称作“足球王国”，这不仅是因为这个国家的足球竞技水平和成绩居世界之首，更因为全国上下对足球的狂热。几年前，当国际足联将2014年世界杯主办权授予巴西时，人们涌上街头拥抱庆祝，大家普遍相信这届世界杯将会非常精彩。

不过，在筹备世界杯的过程中，巴西国内出现了很多反对的声音。去年，巴西举办联合会杯期间，因为政府要提高公交价格，出现了近20年来规模最大的民众示威活动。由此外界才开始注意到，原来巴西国内对举办足球赛事也有很强烈的反对声音。

然而，随着世界杯的日益临近，巴西人对足球的狂热似乎正在驱散对世界杯的抵触情绪。近半个月，抗议游行的规模有所缩减。

**纠结的巴西人**

对于世界杯，巴西民众的正反感情并存，正如在社交网络上流传的一则笑话所说：“我看到你了！你在FACEBOOK上说这里不会有世界杯 ，但与此同时，你已经计划好在世界杯比赛日与朋友相约烤肉看球。”

巴西政府实际投资数百亿美元用于筹办联合会杯、世界杯和里约奥运会这三大赛事，令不少巴西人深感不满，因此从去年联合会杯开始，为了迫使政府把更多资金投入医疗教育等民生领域，巴西爆发了大规模的抗议游行。然而随着世界杯的日益临近，“足球王国”对于足球的狂热似乎正在驱散对世界杯的抵触情绪。近半个月，抗议游行的规模有所缩减，在许多世界杯相关场合，记者、球迷和街头摊贩的人数都远超现场抗议者的人数。从“五星巴西”在里约城外９０公里的训练基地依然吸引无数球迷和记者，便可见一斑。

**调转枪口的罗纳尔多**

作为本届世界杯组委会董事会成员兼“吉祥物”，巴西球星罗纳尔多此前很少在公开场合批评巴西世界杯的筹办工作，然而随着世界杯的临近，他终于忍不住开炮。几天之内，他先说筹办工作中的拖沓让人十分尴尬后，之后又认为办赛投入巨大却没有惠及百姓，让他感到羞耻。


备受关注的揭幕战举办地、圣保罗伊塔盖拉球场，因为首场正式测试赛没有达标，不得不于６月１日再进行一场测试赛，令人欣慰的是，这匆忙的“补测”显示，该球场的运转正进入正轨。然而值得注意的是，该球场的唯一两场正式测试赛都未在“满员”的条件下进行，国际足联要求世界杯球场在赛前进行至少３场正式测试赛，并且最好能在“满员”的条件下进行，这两个要求在揭幕战前已经不可能实现。

比起那些延迟交付的球场，罗纳尔多更担心为世界杯而建的基础设施。据报道，巴西各级政府于2010年1月联合公布了为世界杯

新建、改造的包括体育场、机场、港口及城市基础设施建设等工程名单，并承诺于世界杯开赛前全部交工。但最新消息称，这些承诺的工程项目预计2017年下半年才可能全部完工，而目前已完工的只占工程总数的约40%。

**舆论标杆**

不少巴西球星的反对言论也加剧了民众反对世界杯的情绪。巴西夺得2002年韩日世界杯的功臣里瓦尔多就明确反对巴西举办世界杯，“巴西是个穷国家，耗费巨资举办世界杯其实是一种自取其辱。”

“独狼”罗马里奥则炮轰国际足联，认为国际足联才是巴西真正的“总统”，他们把钱都掳走了。

作为本届世界杯组委会董事会成员，巴西球星罗纳尔多此前很少在公开场合批评世界杯的筹备工作，但最近他也忍不住开炮了。他先说筹备工作中的拖沓让人十分尴尬，之后又认为办赛投入巨大却没有惠及百姓。不过，罗纳尔多也承认，“巴西人民并非反对世界杯，人们只是希望政府能杜绝贪污、挪用资金等腐败行为。”


**安全至上**

巴西该不该举办世界杯和奥运会这样的大赛，并不是一笔容易算的账。人们说场馆的建设费用可以用来大量建设学校、购买校车、修建住房，话是不假，但也忽略了交通、安保和基础设施方面投入的持久价值，以及举办大赛对旅游业和国民经济的潜在提振作用。

其实，巴西举办世界杯还是很节约的。巴西世界杯12座球场中，只有5座是新建的，其余皆是翻修。而且，3年内连续举办世界杯和奥运会，可以将相关投入的利用最大化，亦变相节约了成本。民众之所以有如此大的反应，可能是因为投入集中在很短的时期内，又碰巧遇到世界经济不景气。

虽然抗议游行势头有所减退，但过去的教训和警察近期的罢工还是提醒组织者要在安保方面下大功夫。据悉，巴西在赛事期间将投入包括警察和军人在内的约15．7万名安保人员，这是巴西有史以来最大规模的安保联动计划。以里约热内卢为例，将有约2万人协同作战，力保比赛安全进行。

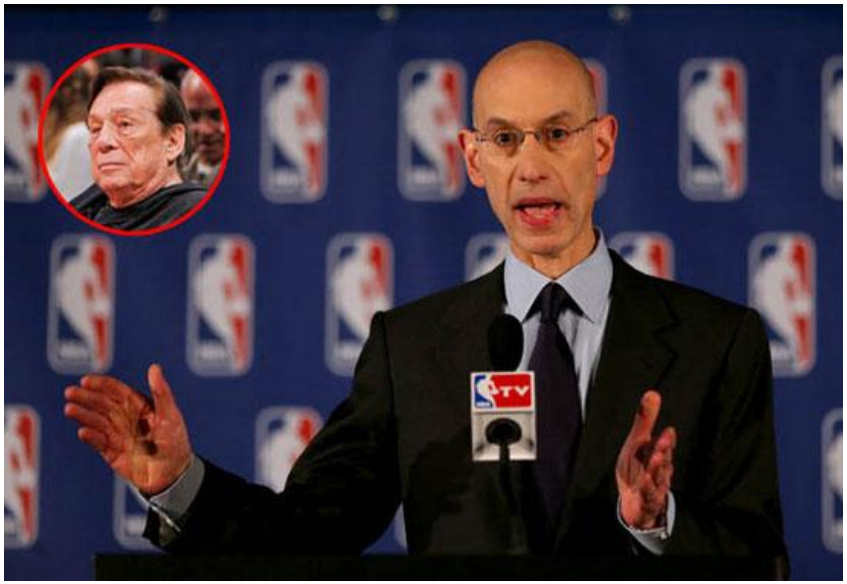
# 快船老板斯特林正式起诉NBA　索赔10亿美元

NBA 官方发布声明，宣布通过前微软 CEO 史蒂夫-鲍尔默收购快船的协议，快船也正式易主。此消息一出，快船老板唐纳德-斯特林正式对 NBA 联盟提起诉讼，他欲阻收购快船并拒绝支付联盟此前开出的罚单，并且认为终身禁赛和罚款对他造成了损失，向联盟索赔 10 亿美元。

早在斯特林种族歧视的录音被曝光之后，NBA 联盟迅速做出调查，并且在随后宣布了对他的处罚结果：罚款 240 万美元和终身禁赛，并且总裁亚当-萧华表示会尽量逼迫斯特林出售球队。

事态进一步发展，联盟取消了将在 6 月 4 日召开的股东大会，不再对驱逐斯特林进行投票。斯特林的妻子谢莉-斯特林与前微软 CEO 史蒂夫-鲍尔默达成了总计 20 亿美元的快船收购协议，这份协议目前已经报送 NBA 联盟审批。身价超过 200 亿的前微软 CEO 鲍尔默轻易赢下快船竞价的原因不只是出价最高，他还提出了一次付清全款的条件。这样的慷慨也让负责出售快船的谢莉-斯特林欣然接受，双方很快就达成了协议。如今眼看自己的球队即将易主，斯特林当然不答应，这才向联盟提出诉讼。

也是在同时，斯特林被报道称精神上无行为能力，不久前，更有 TMZ 的报道称，他已经患有老年痴呆。



但是这些都没有妨碍斯特林对联盟提出诉讼，据悉，斯特林此次请到了美国职业体育届著名的律师马克斯韦尔-布莱彻，“NBA 对斯特林终身禁赛的做法侵犯了他的宪法权利，违反了反垄断法，违背了信托义务，同时也违反了合同，”斯特林的律师马克斯-布莱彻表示，“诉讼将在当地时间周五中午正式提交，”并指出这一做法和早些时候快船队的出售没有任何关系。律师称，联盟对斯特林罚款和禁赛的处罚已经对他的代理人斯特林造成了损失，他们拒绝支付罚款，同时要求联盟进行赔偿，

索赔金额高达 10 亿美元。

谢莉-斯特林的律师团给出了一份斯特林在 5 月 22 日的信件，里面斯特林同意授权谢莉进行快船的出售工作，但现在，斯特林和他的律师团表示，斯特林本人已经改变主意，他们也正在寻求合法的手段与程序来终止快船的出售程序。

# 美国职业体育仲裁制度研究

## 之全美职业篮球联合会（NBA）争议仲裁解决之道


随着职业体育运动的发展日益复杂化，仲裁已经成为当事人避免花费昂贵的诉讼的一种最有效的解决争议的方式，尽管仍有一些争议要到法院去裁决。职业体育运动当事人之间的关系主要是以合同尤其是雇佣合同的形式存在的，并且在合同中通常规定解决争议的仲裁条款。而仲裁在美国的司法体系中占据着很大的作用，尤其是强制性的、有约束力的仲裁对仲裁当事人特别是雇佣关系中的当事人提出了某些宪法上的挑战。

国会通过了联邦仲裁法以鼓励在劳动合同和其他涉及商事的合同中使用解决争议的仲裁方法，而联邦仲裁法则被形容为是雇主滥用雇员权利的一个工具，因为通过把仲裁作为他们的唯一和专有的救济手段，雇员被要求放弃他们向法院寻求其他司法救济的方法。

尽管如此，但是目前在雇佣合同中规定强制性的、有约束力的仲裁条款不再是罕见的情况。对雇佣合同中的强制性的、有约束力的仲裁条款的关注使人们更加意识到类似合同中的仲裁条款对雇员来讲可能会是极大的不公平。

本文由最近备受关注的斯特林种族歧视事件引发，为大家介绍 NBA 相关仲裁规则。上月初 NBA 官方正式宣布对斯特林种族歧视言论事件的处罚结果，联盟决定向快船队现任老板开出终身禁赛并罚款 250 万美元的重磅罚单。值得一提的是，罚款 250 万美元不仅创下 NBA 历史之最，更是联盟宪章规定的最大罚款额度。

根据联盟规定，只要超过四分之三的球队老板同意快船队易主，那么斯特林将被强迫出售自己所持有的球队股权。此事件也再度引发大众对 NBA 联盟相关规定的关注。

据 ESPN 报道，快船在季后赛上为斯特林带来了 1050 万美元的收入。得益于跟勇士的七场大战，跟雷霆也杀到了六场，快船主场总共进行了 7 场季后赛的比赛。根据联盟的收入分配方案，快船光门票收入每场季后赛就能达到 100 万美元，每场的周边收入，包括兜售纪念品和小吃，就达到 50 万美元。


尽管赞助商在斯特林事件曝光之后，取消了对快船的赞助，不过联盟的内部人士透露，赞助商大部分赞助费都已经付给了快船。这就意味着，单单就这次季后赛，快船的盈利就 4 倍于联盟给斯特林开出的罚单。然而，吝啬鬼老板并不想缴纳 250 万美元的罚单，他也将成为联盟的大麻烦。

全美职业篮球联合会的章程规定了该联盟如何运作以及委

员会的权力。委员会的权力之一就是解决全美职业篮球联合会球队之间的任何争议。

在全美职业篮球联合会中，更加普遍的几乎每天都有的争议是涉及全美职业篮球联合会与球员工会之间的集体谈判协议的冲突。该集体谈判协议是一个非常长的文件，并且规定了全美职业篮球联合会与球员之间的所有关系。它包括在全美职业篮球联合会内部非常详细的最高薪金制度、自由球员规范、最高薪金如何操作、最高薪水如何计算以及很多经过艰难谈判和不断修改而产生的规范。一个那么长和那么复杂的文件简单地讲是很容易产生争议的，而这些争议则需要大量的律师来协助解决。

**裁决者一：委员会**

与球员工会之间的集体谈判协议规定有三个不同层次的裁决者：第一个层次是委员会。根据集体谈判协议委员会有权对有关球场内的行为进行裁定。


譬如，当丹尼斯·罗德曼在球场内殴打一摄影者或者当雷夫在演奏国歌时拒绝起立时，委员会对这些问题进行裁决，因为它们涉及到球场内的行为。委员会有权对这些不友好行为进行适当的纪律惩罚，并且根据集体谈判协议唯一的申诉请求也是向委员会自己提出的。委员会推翻自己的裁决是很

罕见的，不过有时委员会会对争议进行重新审查并作出裁决。

根据集体谈判协议，一些非常重要的问题都有委员会来行使管辖权。而法院也认为集体谈判协议是经过友好谈判后缔结的，并且该协议明确授权委员会对球场内的行为实施处罚，因此除了向委员会提出申诉外不能向其他机构提出申诉。其结果是，全美职业篮球联合会委员会是唯一的有权针对球场内的行为实施纪律惩罚的组织目前已得到了司法上的确认。

**裁决者二：中立仲裁员**

第二个层次的裁决者是中立的仲裁员。集体谈判协议的一个普遍特点是由集体谈判协议或者作为集体谈判协议一部分的统一球员合同而产生的任何争议都要提交中立的仲裁员裁定。

但是并不是所有的因为全美职业篮球联合会的集体谈判协议而产生的任何争议都要提交中立的仲裁员裁定，仲裁员处理的通常是程序复杂的争议，譬如根据球员合同或奖金条款没有履行付款义务的争议，或者要求球员保持一定体重的条款而产生的争议等等。

然而，中立的仲裁员解决的也有相对重要的争议，譬如根据球员合同某球员是否能够被适当地解聘而产生的争议。

**裁决者三：系统仲裁员**

根据集体谈判协议解决争议的第三个层次是所谓的系统仲裁，这是那些处理重要争议的仲裁员。之所以称其为系统仲裁员是因为他所解决的争议事关集体谈判协议所规定的整个经济体系，包括最高薪金的操作以及运算等。


关于最高薪金的计算方式有很大的争议，最高薪金的计算起源于所谓的“与篮球有关的收入”的概念。与篮球有关的收入是全美职业篮球联合会及其各球队的所有收入，与篮球有关的收入的百分比构成最高工资的基础，但是与篮球相关的收入应包括哪些和排除哪些在任何特定的年度都可能会对最高工资到底有多高产生巨大的影响。譬如因命名权而产生的争议在集体谈判协议中就没有专门指出其解决方法。它们是否是与篮球有关的收入？这是有系统仲裁员所解决的争议。另外系统仲裁员也解决是否应停止最高薪金以及根据最高薪金的规定球队、球员以及其经纪人是否作弊的争议。

**外部争议的解决**

除了全美职业篮球联合会与球员之间的集体合同外，全美篮协也是国际市场的组成部分之一。在某种程度上讲全美职业篮球联合会是为了球员的服务与世界范围内的篮球联盟与球队进行竞争。


许多国家的职业篮球水平发展得很好，譬如意大利、西班牙、希腊、南斯拉夫、德国和其他许多国家。这些国家培养了许多优秀的球员。有时其球员会被全美职业篮球联合会的球队所吸引以至于全美职业篮球联合会愿意购买该球员。但是问题是大多数这类球员都在一些职业球队打球，并且已经有合同的约束。因此全美职业篮球联合会要面对的通常都是这些球员与这些国家之一的球队之间的合同。

针对这类问题全美职业篮球联合会在十余年前与国际篮球联合会签订了一个协议并且设立了一个仲裁体制，因此目前如果一个全美职业篮球联合会的球队想与一个最后在美国以外的国际篮联所属的国家打球的球员签订合同的话，它必须请求国际篮联予以帮助。该球员不受合同的约束吗？他能在全美职业篮球联合会的球队打球吗？如果国际篮联认为“不，他不能，”那么全美职业篮球联合会就有权对该裁定提出质疑并且提起国际仲裁。

在过去几年这类问题发生的频率是越来越多。只是仲裁地点的选择是一个比较敏感的问题，已有的争议表明全美职业篮球联合会倾向于到英国伦敦进行仲裁，国际仲裁地点位于伦敦，全美职业篮球联合会同意在伦敦进行仲裁，是因为英国几乎没有职业篮球运动并且全美职业篮球联合会的律师在语言上也没有障碍。

# 【体育法律业务组介绍】

## ○ 体育法服务范围

1、为各类体育俱乐部的组成和结构提供法律咨询服务；

2、起草赞助协议、商品化协议和许可协议；

3、就传统和新兴的传播、数字和数据的商业化利用提供法律咨询服务；

4、就赛事和体育活动的组织和管理提供法律咨询服务；

5、就体育品牌特别是有关体育用品和服饰的品牌的知识产权保护提供法律服务；

6、就运动员的签约、入会和转会提供法律意见；

7、就体育场馆的建设、融资、开发和相关事项提供法律咨询服务；

8、代表职业运动员、教练员、体育俱乐部、体育经纪人、体育行业主管部门、体育用品和服装制造商参加相关的争议纠纷的解决；

9、代表体育用品和服装制作商处理产品责任纠纷和知识产权纠纷；

10、为体育运动队和体育活动的主办方、承办方和赞助商协商和起草各类相关合同。

## ○ 服务方式

. 1、担任专项法律顾问：就各项业务提供全过程、全面、深入的专项服务，办理相关具体事务。

. 2、担任常年法律顾问：就各项业务提供日常法律咨询，处理日常法律事务。

## ○ 微信平台

2013年5月，上海大成体育法业务组正式创建了“体育法”微信公众账号。

微信号：sportslaw

历经三个月的发展，“体育法”微信公众账号已经成长为一个具有广泛影响力的体育法资讯平台，我们致力于体育法律理论研究、体育热点新闻共享、体育合作信息交流三大领域，力图通过微信公共平台的影响力，为大家提供专业、高效的服务。欢迎大家支持并关注 “体育法”！

非常感谢您的阅读，

本资讯由上海大成体育法业务组编辑，仅供参考。

如有任何问题，请通过电邮 zhang.bing@dachenglaw.com 联系我们。

内部文件，仅供交流。


# Sports Law Periodical

**13th, 2014 Editor: Zhang Bing Jenny Wang**

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# Hotspot in Sports News

## Sex discrimination in Sport: Richard Scudamore

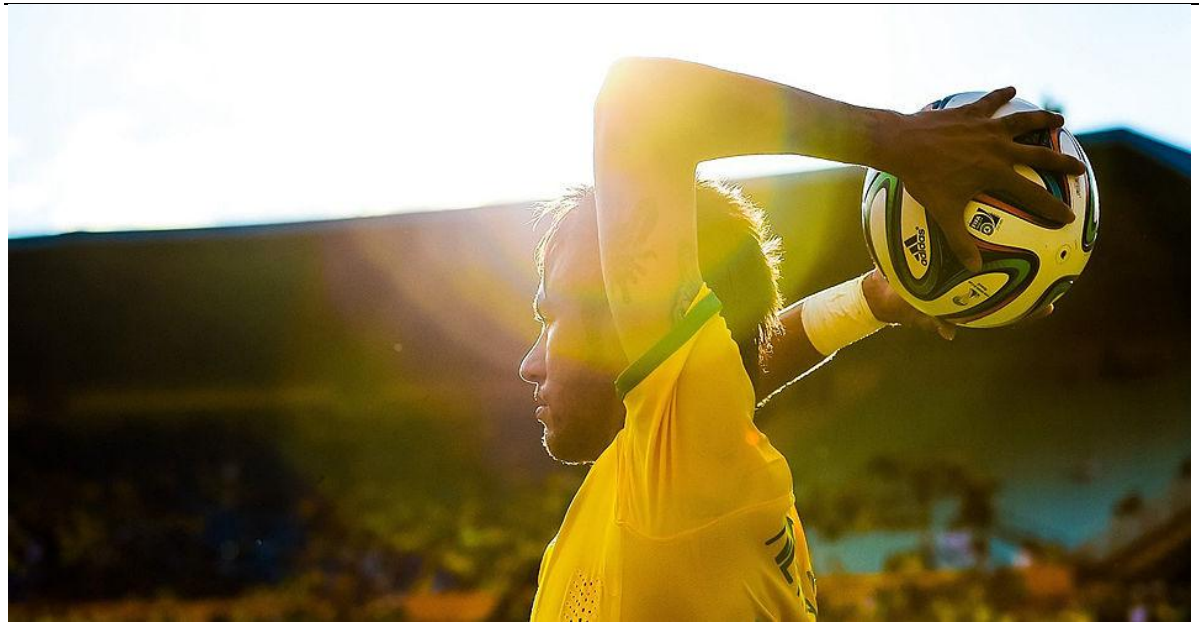
Sport forms an incredibly important part of society. It teaches the importance of values such as teamwork, support and friendship when it is played, but fundamentally the supporting of sports teams brings people together in a way which is quite unparalleled.

It would seem a natural progression of such a statement to say that sport all but eliminates discrimination on any ground seeing as it draws people t ogether with commonality however recently it has been seen that discrimina tion on the grounds of sex has not been eliminated from all sports.

Richard Scudamore, Chief Executive of the Premier League, was recently e xposed for having sent allegedly sexist emails about female colleagues to a friend in private emails. The Premier League Chief Executive is recognis ed as a champion of equality in the game of football and has, in the past two years, invested £2.4 million in the Football Association's (FA's) Wome n and Girls programme.

The emails containing derogatory comments about women were exposed by a former personal assistant of Scudamore's, Rani Abraham.

Although Mr Scudamore has apologized for sending the emails, admitted that to do so was a lapse of jud gment and is genuinely contrite, a leading FA officer for women and girl's football has opined that remar



ks such as these made by a suppose d champion for equality could be da maging in the long-term for the equa lity of the sport and could discourag e women from football.

Scudamore could have potentially fac ed disciplinary actions in one of thre e capacities; firstly as a director of F ootball Association Premier League L imited, secondly as an employee of t he Premier League and thirdly as part of his wider responsibilities to the FA.

However it has since been decided that Scudamore will not be disciplined in any of these capacities.

The decision as to why Scudamore faces no disciplinary action from the FA is relatively straightforward- he is not an employee. Furthermore the FA recognised Mr Scudamore's argument that the emails were int ended as private emails and were not meant to have been accessed by his personal assistant.

The FA released a statement defending their reasons for not disciplining Scudamore;

*In terms of wider FA disciplinary action, it was advised that The FA does not as a matter of policy consider private communications sent with a legitimate expectation of privacy to amount to professional misconduct. The FA has applied this policy on an ongoing basis and in relation to numerous other cases.*

According to the equality policy contained in the Rules and Regulations of the FA 2013/2014, the FA intends on tacking discrimination within the association regardless of whether it occurs in private or public communications. A private communication may be equally as discriminatory as one which is public and it ought not to have been the case that no investigation was launched by the FA merely due to the fact the alleged discriminatory comments were contained in a private email.

As the boss of the premier league, are any emails about football private?

# Michael Schumacher remains in medically induced coma for 150 days amid speculation of his permanent vegetative state

Formula One racing driver Michael Schumacher has spent his 150th day in a medically induced coma foll owing a skiing accident in the French Alps on December 29th 2013 which left him with severe brain dam

age and has sparked concern that his current state may be permanent.

Schumacher in 1995 held the record for being (at that time) the youngest double Formula One (F1) champion having won the title in both 1994 and 1995. Since then he has gone on to win the title another five times bringing his total number of wins of the championship to an astonishing 7.

Schumacher additionally holds several other F1 records, including for the most career wins (91) and most wins in a season (148) amongst others. His second retirement from the sport was announced in 2012, having sensationally returned from his 2006 retirement in 2009 where he signed a three year deal with Mercedes.


Following his skiing accident in December 2013 Schumacher has undergone two successful operations to relieve the bleeding and pressure on his brain and was placed in a medically induced coma to assist with the recovery process. In January 2014 his doctors at the University Hospital of Grenoble, where Schumacher is being treated, began awakening him from the deep medically induced sleep however almost six months later he is yet to respond.

Doctors have voiced concerns of Schumacher's slow recovery- Dr. Andreas Zieger, chief physician of the clinic for neuro-rehabilitation at the Evangel

ical Hospital in Oldenburg, Germany, said:

*"You can never tell how quickly a patient with a brain injury is going to wake up. But the longer the r ecovery phase, one must conclude, means that the brain damage suffered must have been very serious."*
Concern has also been raised by the former F1 doctor Gary Harstein who several weeks ago wrote, *"the longer that he is in the coma, the more improbable it is that he will recover from it."*

45 year old Schumacher continues to receive round the clock care in the intensive care unit of the University Hospital of Grenoble where his wife Corinna and children Gina Marie, 17, and son Mick, 14, have been a constant presence. No recove ry update has been released by Schumacher's management tea m in the past six weeks and the prognosis of medical experts shows that they fear the worst- that Schumacher having mad e little progress to recovery in the six months he has been in a coma will not regain full consciousness.

# International Sportslaw Practice

## Breach of Confidence:

## Skill, knowledge and experience or a trade secret?

## Introduction

Formula One (F1) races can be won or lost by the narrowest of margins and companies compete year in and year out to develop the fastest car, shaving seconds from a lap time. The aerodynamics of the car is a key aspect of the car's design and performance and for a racing car is incredibly complex.

The designs influencing the areodynamism of an F1 car are closely guarded during its development phase and those employed in the process of refining the aerodynamics of the racing car are subject to strict confidentiality clauses during their course of employment and in some cases for a period after the contract of employment has been terminated.


The recent case of *Force India Formula One Team Limited v Aerolab SRL and others* [2013] EWCA Civ 780 decided in the Court of Appeal of England and Wales has produced an insightful and helpful judgement providing guidance on

some of the aspects to be considered in a breach of confidence action.

## Background to the case of *Force India Formula One Team Limited v Aerolab SRL and others*

The claimant in this action- Force India- entered into a development contract with the defendant- Aerolab- for development of their Formula One (F1) racing car in April 2008 which was to run until December 2009. The contract included express confidentiality and exclusivity terms and extended to Aerolab and its employees. The term of the contract stated that the confidentiality covered the duration of the contract and for a period of two years after either the end date of the contract, or the date on which the contract was terminated.


Early in 2009 the defendant began experiencing difficulties receiving payment from Force India and by July 2009 the defendant was owed €846,230. At this point in time certain CAD file designs for parts of the F1 racing car had been

sent from Force India to Aerolab and were held by them.

Upon Force India's failure to pay and subsequent failure to adhere to an agreed plan, Aerolab purported to terminate the contract, however the date upon which the contract was terminated was disputed and finally settled in the Court of Appeal as the 19th August 2009- the date upon which Force India informed Aerolab that they no longer required their services.


By this time Aerolab had begun working for a competing manufacturer of F1 racing cars, Team Lotus, and it was the principle claim of Force India in this action that the defendants had misused confidential information relating to the design of the Force India F1 racing car, namely 57 CAD designs and precursor designs and 14 designs of individual parts, during their subsequent employment by Team Lotus.

## Breach of Confidence

A breach of confidence can be defined as occurring where the

*"defendant is proved to have used confidential information directly or indirectly obtained from the plaintiff without the consent, express or implied, of the plaintiff he will be guilty of an infringement of the plaintiff's right"* Lord Greene[1].

It is therefore required that for a successful breach of confidence action there must be present three factors:

I. Information which is confidential in nature
II. Information has been imparted under an obligation of confidence
III. Breach of the confidence has occurred

## Confidential Information

Aerolab disputed that the information which they acknowledged they had used was confidential in nature. It was their submission that the information was available in the public domain and therefore was not protectable under the

confidentiality agreement. It was accepted by both parties to the action that by the Summer of 2009 the Force India car had raced in 10 grand prix and the general design was available in the public domain.

However Lewison LJ disagreed with Aerolab basing his decision on the premise that where the information was available elsewhere, but this source was not used in obtaining the information it could not be a defense that the information was available to the public. The information which the defendants used had come from a confidential source. It is widely acknowledged that having the information available confidentially is not the same as obtaining it with difficultly and piecing together fragments which are available in the public domain.


The rationale of this decision accounts for the current competitive commercial market. If it were upheld that using information imparted under an obligation of confidence was not an infringement

of the owners' rights, where the information was available in a fragmented and largely unspecified, the competitor would be afforded an unfair advantage in the market. They would begin not from the bottom but from an elevated position having avoided the initial outlay of work, money and research. Thus in keeping with practices of fair competition use of information obtained from a confidential source and used without the consent of the owner is an infringement of their rights.

## Obligation of Confidentiality

It was not a disputed fact that Aerolab were employed under a strict confidentiality clause contained within the development contract. However it was Aerolab's submission that Force India was not only attempting to stop their employees from using the information which was deemed to be confidential- the CAD designs and which could reasonably be recognised as trade-secrets- but was also attempting to stop the Aerolab designers from exercising their skill, expertise and knowledge

in their subsequent employment with Team Lotus.

*Faccenda Chicken v Fowler* [1987] Ch 117 provides comprehensive guidance when considering the issue of whether information is considered part of the skill, experience and knowledge of the defendant and therefore would not be subject to the confidentiality agreement, or whether it is part of the protectable confidential information.

For Aerolab to prove that the information was not confidential and was instead part of the skill, knowledge and experience of their employees they were required to demonstrate that the trade secret was entirely separate in principle from the employee's knowledge. In his judgment Lewison LJ relied on the principle from *Terrapin Limited v Builders Supply Company* [1967] RPC 375 and opined that where the source of the employee's knowledge can be traced back to confidential information it cannot be deemed to be separate in principle from the employee's knowledge, skill and experience- the knowledge emanated from a confidential source.

Certain difficulties are raised by this decision; most prominently it questions the point at which job experience of an employee cease to exist as a separate principle and is instead incorporated as elements of their knowledge. It is an essential characteristic of growth that an individual absorbs and learns from their experiences and subsequently

these contribute to their knowledge base for future enterprises. The decision of *Force India v Aerolab* is suggestive of a divide between knowledge gained from confidential sources and knowledge gained from a pubic source. The divide is justifiable on grounds of fair competition however it places employees in a vulnerable position following employment of a confidential nature.


It is likely that an ex-employee would seek subsequent work in the same field as their previous experience and to avoid breaching the confidence of their previous employer would, following the "source of information" argument from *Terrapin Ltd v Builders Supply*, be required to disregard from their knowledge base any learnt and developed knowledge acquired in their previous employment.

## Conclusion

In order to safeguard against knowledge being unfairly protected by confidentiality agreements it is necessary that

the Courts adopt a pragmatic case-by-case approach to actions purporting a claim of breach of confidence.

Whilst it is necessary for fair competition that one competitor should not benefit from information developed by another competitor and imparted to them in confidence, it is necessary that competitors should not be stopped from fairly using their skills, knowledge and experiences in subsequent employment.

# Introduction of Sports Law Group

## Sports Law Service Scope

1, Provide legal consulting service about the composition and structure of various sporting clubs;

2, Draft sponsorship agreements, commercial agreements and the license agreements;

3, Provide legal consulting service about traditional and emerging commercial cases;

4, Provide legal consulting service about events, sports organizations and management;

5, Provide legal advice of intellectual property protection in sports brands, especially for those that are related to sporting goods and clothing brands;

6, Provide legal opinions in signing contracts with athletes, their initiation and transfers;

7, Provide legal consulting service in the construction of sports venues, financing, development, and other related matters;

8, Solve disputes in the name of professional athletes, coaches and sports clubs, sports brokers, departments in

charge of sporting industries and sports goods, and apparel manufacturers;

9, Deal with product liability disputes and intellectual property disputes on behalf of sporting goods and apparel makers;

10, Draft various and inter-connected contracts for sports teams, sports organizers and sponsors.

# Service mode

1, Served as special counsel: each business will provide the whole process, comprehensive, in-depth special services, and related specific issues.

2, Served as perennial legal counsel: each business will provide daily legal consultation dealing with daily legal affairs.

Thank you very much for your reading,

Edited by Shanghai dacheng sports business group, the information is for reference only.

If you have any question, please contact us via email at zhang.bing@dachenglaw.com.

Internal documents, only for communication.