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In protection of whose 'wellbeing'? Considerations of 'clauses and a/effects' in athlete contracts

## **Abstract**

Contractual agreements have become an accepted part of participation processes for athletes in a variety of sport contexts. Closer readings of these contracts, however, pose several questions regarding organizational intentions and motivations, the conceptualization of athletes as ‘workers’, and, representation parity. In this paper, we draw on four types of athlete contractual documents from both ‘amateur’ and ‘professional’ sport settings across the globe. Our key considerations include: athletes’ ownership over their image and identities; medical and health disclosures; lifestyle, behavioral and body choices and restrictions beyond sport; adherence to organizational philosophy and commitments, and social media and publicity constraints. Our exegesis here encourages sport researchers to deliberate whose ‘wellbeing’ matters most when signing that seductive dotted line.

## **Key words**

Athletes, contracts, sports workers, legal clauses

## Introduction

For aspiring amateurs, new professional recruits or established elite athletes, contractual agreements are an accepted (legal) part of the participatory process. The prospect of high-level competition, potential corporate sponsorship opportunities, media representation, equipment and clothing, training support, insurance and health care coverage, travel and performance bonuses hold tempting promises for aspiring and/or successful athletes. The presence (and approval) of a written contract is often one of the nascent steps in formalising the relationship between such athletes and their local, regional, national, supra-national or international governing sport authorities. While athletes (and their entourages) may be primarily concerned with training, performance or financial resources, the possibility of competitive participation is frequently precipitated by (and often exclusively contingent upon) the acceptance of a binding pact. Although acting as a symbol of mutual understanding, the nature of contracts is to detail the terms and conditions of the athlete-sport administrator 'employment' relationship. Yet, the roles, remits, characteristics and intentions of the documents are becoming increasingly complex and nuanced as administrators attempt to amalgamate transparent and fair official participation policies in tandem with satisfying judicial duties to protect the organization, stakeholder interests and associated commercial sensitivities. Sport organizations are, too, designing contracts that encompass not only standard expectations and obligations, but also, traverse wider restrictions on athletes' personal/private lives, identities and moral character. Within agreement processes, and with the allure and prestige of competitive representation at stake, however, athlete's (unwavering) acceptance of their contracts often becomes a *fait accompli*. Though athletes (or their families and/or agents) may,

evidently, have some recourse to discuss their agreements, the ways in which sport organisations are using contracts to delimit, constrain and manufacture the relationship demonstrates that ethical and moral integrity (at the very least, the protection of sportspeople's wellbeing) may be a subsidiary concern.

Athlete contracts have received attention in recent years as scholars seek to articulate their place in athletes' sporting lives and experiences. Previous research has focused, variously, on the lives of athletes as labourers, neo-liberal ideologies and the commodification of sport-work spaces, regulation and legislation, and, concomitant power relations and ethical concerns (e.g., Connor, 2009; McLeod, Lovich, Newman & Shields, 2014; Roderick, 2006). At the forefront of this criticism have been examinations to reveal how the context, content and consequences of contracts affect athlete's relationships with their sport organisations, and, their agency and autonomy within their career trajectories writ large. Referring to the National College Athletic Association's (NCAA) tight control of the college sport system and athlete's subsequent entry into the lucrative professional leagues, for example, Wong, Zola and Deubert (2008) note that stakes for athletes are incredibly high with not just financial incentives on offer, but, popularity, prestige and recognition. Moreover, in addition to being seduced by the allure of greater opportunities, during the amateur to professional transition athletes may be also confounded by an array of information from a variety of poor and conflicting sources (e.g., parents and family, peers, agents, coaches, teachers, marketing representatives and sponsors) that make navigating contractual terrain difficult and confusing. In conjunction, the process can also place young athletes under considerable pressure as they are forced to make decisions influencing their long term careers. Such is the state, Wong et al. (2008) lament, that

athletes (and their families) “are woefully unsophisticated and unprepared to navigate the process” (p.554-555). Noting the development of athlete contracts in the United States, Baker, Grady and Rappole (2012) add that the sport organisations (such as the NCAA) now yield considerable power over the lives and fate of athletes to the extent that latter have become marginalised in negotiation processes, and, lack any substantive ‘bargaining power’ or political voice to exercise their free will. As Eckert (2006) echoes, an illusion of choice and voice, contoured by the complexities of the bureaucratic process, essentially masks legitimate and meaningful contractual representation.

For the most part, contracts formalise an exclusive relationship between sport organisations and their athletes. However, the increasing demands of commercialised professional sport have necessitated that sport organisations establish ever-closer corporate partnerships as they seek to adequately resource their athletes, fulfil sporting commitments and (in some cases) generate revenue to ensure their economic sustainability (Carlson & O’Cass, 2012; Chappelet & Bayle, 2005; Ferrand & Pages, 1999). National Olympic Committees, international and national sport federations, and even local and regional bodies, for instance, often offset limited public funding by seeking corporate endorsements and sponsorship arrangements with domestic, transnational or international domestic partners. While such arrangements may seem commonsensical, they also have had implications for athlete contracts, and overall athlete management, as sport organisations become particularly sensitive toward the protection of their commercial enterprises and companies’ all-important brand identity and image. There has, Eckert (2006) attests, been a Hippocratic shift if the focus of sport organisations and their contractual approaches; namely, from doing no harm to the athlete, to doing no harm to their

commercial interests. Sport organisations' corporate fears have, in this regard, led to the introduction (and increasing predominance) of moral and/or character clauses within contracts that while levied at athlete behaviour are, essentially, designed to protect the sport organisation and mitigate any risk (real or perceived) that the athlete might present to their enduring corporate relations.

Moral clauses, and/or clauses that impose restrictions upon the character, attitudes or athlete 'conduct' (in particular outside of sport), are, Auerbach (2005) notes, essentially a response to the paradigm shift sport-athlete-corporate relationship and the prevalent market-place climate of risk aversion. Such clauses (which examine shortly) provide the sport organisation and/or the corporate affiliate with the rights to rescind the contract, or, impose financial punishments or participation restrictions on athletes they deem to have brought the body or its business partners into disrepute. With the financial deals between sport organisations and companies often receiving exorbitant figures, the use of such clauses has, Auerbach (2005) adds, become a normalised part of industry practice and a consequence of ideologies in which youth are perceived as morally unstable, immature, potentially/inadvertently disruptive, malleable, contractually naïve, and, thus prone to present considerable commercial risk. To this end sport organisations (in association with the affiliated commercial partners), Auerbach (2005) highlights, are employing every more lengthier and articulate clauses to counter a wider variety of infringements and risky scenarios. Such broad brush strokes may afford the organisation legal scope to deal various athlete infractions, however, the extensive nature of clauses can also serve to obfuscate the athlete-organisation relationship and leave the athlete uncertain about the extent of their freedoms, abilities and responsibilities. The concomitant danger is that with the possibility

of lucrative deals on the line athletes appear willing to embrace whatever contractual conditions are laid out for them; moral and corporate image protection clauses included.

Therefore, the purpose of this paper is to re-energise debates that continue to problematise athletes as commodities. While this has been a topic of discussion in the literature for several decades (e.g., Ingham, Blissmer & Davidson, 1999; Roderick, 2006; Stewart, 1989; Vinnai, 1976), it appears from a contractual and organisational perspective, little has changed. Although appearing to act in athletes' best interest (as evidenced to by the establishment of athlete commissions, ethics committees and the Court of Arbitration for Sport), sport organisations have still maintained a dominant hand in contract construction and negotiation processes. Such support, however, is predicted on dealing with athletes and their concerns once they are already in the elite sport system (or at least competing under the auspices of a national organization or professional body). The significance of our approach here is that we focus on the earlier stages of athletes' careers, and, attend to specific role contracts play within transitional periods that might potentially change athletes' sporting trajectories. Athletes, even with the potential assistance of agents, family members and/or coaches, appear to have little influence over the terms and conditions of their employment without necessarily jeopardizing their contractual acceptance, high performance participation, individual reputation and rapport with the organization. For us, what shapes athletes' interactions and employment relations with their parent organization *before* they are officially 'signed-on' warrants much closer contemplation and critique. Our aim is to present a series of contract clauses that exemplify some of the issues regarding how sport organisations have continued to operationalise their institutional power and exert considerable (and questionable) authority over athletes'



autonomy, lives, identities, freedoms and behaviours. In doing so, we encourage a reconsideration of athletes' representation and participation in contractual processes and we advocate sport organisations to better account for athletes agency in their work.

### **Conceptual Framework**

Our critique is guided by Baker et al.'s (2012) articulations of consent theory, and, Auerbach's (2005) examinations of organisational morality and corporate protection. Regarding the former, Baker et al. (2012) attend to the fairness of the bargaining process, and, the inequities of representation. They argue contracts comprise implicit bias that privileges sport organisations and the power they yield in the contractual negotiation process. This is referred to as the doctrine of unconscionability. The doctrine of unconscionability (also referred to as unconscionability, unconscionable bargaining [power], or inequality of bargaining power) has emerged as a prominent theoretical framework within contemporary contract law (Baker et al. 2012; Brown & Bicksacky, 2013; Hesselink, 2013; Hillman, 2012; McKendrick, 2014; Posner, 1995; Priestley, 1986). Whereby classical contract theory presumes perfect conditions for contractual formation and implementation, that all parties have equitable resources, and, that all parties enter into contracts freely and partake in the bargaining process equally, unconscionability accounts for issues of inequity, representation and consent. Unconscionability, essentially, refers to instances where contractual terms, clauses and conditions are particularly unjust, and, inherently biased toward one particular party. "Unconscionability is not intended to erase freedom of contract," Brown and Bicksacky (2013) remind us, "but to assure that the agreement has

resulted from real bargaining between parties who had freedom of choice and understanding” (p.214).

In understanding how we might advance practices of negotiation and consent, unconscionability is a useful tool. Namely, because it acknowledges that signees are to a degree fallible; that is, in this case not necessarily rational or informed. Moreover, it provides courts with the legal parameters to intervene in contractual disputes. To note, however, unconscionability is concerned primarily with contract construction, negotiation, acceptance and the initial consent processes rather than proceeding cases caused when terms, conditions or party expectations change or are infringed upon. Typically unconscionability becomes a concern when one of the party may be larger, better resourced, have superior or priori knowledge and thus be more informed, and/or have the power and jurisdiction to set contractual conditions (Baker et al., 2012; Brown & Bicksacky, 2013; Hesselink, 2013). The emphasis within unconscionability, and indeed what matters in legally determining the grounds of the doctrine, is essentially on evidencing the exploitation of weakness (e.g., as a result of the age or limited experience of the lesser party, absence of priori knowledge, diminished mental capacity, and inability/limited opportunities for negotiation, inequitable resources and/or severe external pressures). Such a situation creates an imbalanced relationship that runs contrary to good conscience and faith, mutual understanding and reasonable expectation (Possner, 1995; Yee, 2001). As such, to enforce the contract could be considered unfair.

Brown and Bicksacky (2013) identify two types of unconscionability, substantive and procedural. Substantive unconscionability focuses specifically on the unfair terms and consequences that might arise from their imposition. Procedural unconscionability,

however, “examines how each term became part of the contract and the actual process of bargaining” (Brown & Bicksacky, 2013, p.221). Procedural unconscionability is particularly relevant in the context of examining athlete contracts and the ethical presumptions and (administrative, economic, political) contextual conditions that precipitate their formation and influence athlete power when consenting. “Procedural unconscionability”, Brown and Bicksacky (2013) further, “can result from any of the following elements: (1) absence of meaningful choice; (2) superiority of bargaining power; (3) the fact that the contract is an adhesion contract; (4) unfair surprise; or (5) sharp practices and deception” (p.222). Unconscionability of this type often occurs in negotiations between larger parties (e.g., for our purposes, national governing bodies) and individual signees (e.g., athletes). Although inequitable terms and bargaining bias may be evident in other legal processes, unconscionability often occurs in the use of standardised contracts where ‘boilerplate’/generic terminologies and clauses are employed, or, in contracts of adhesion (based on ‘take it or leave it’ principles). The issue with the formation of such contracts is that they do not adequately account for the aforementioned relationship inequities between the parties, appropriately allow the signee to exercise freewill, or provide opportunities for fairly negotiate the terms and conditions of acceptance (Brown & Bicksacky, 2013; McKendrick, 2014; Posner, 1995; Priestley, 1986).

In sport, the unconscionability doctrine has received only limited attention; primarily from sport law scholars working in the United States investigating inequalities of negotiation and representation between the National College Athletic Association (NCAA) and its constituents (e.g, Baker et al., 2012; Hanlon, 2006; Johnson, 2012; Stippich & Kadence, 2010). Such scholars argue that athlete contracts, as a distinct form of contract, require

closer scrutiny; largely due to the immense and increasingly substantive power large sport organisations (e.g., the NCAA) have been able to yield over athletes and the evidently limited opportunities athletes have available to participate in fair and just contractual construction and bargaining. Recognising the utility of the doctrine as both a theoretical framework and legal device, Baker et al. (2012) foreground unconscionability within their (sport-related) theory of consent. For Baker et al., the conditions of contemporary sport which hold lucrative participation, association and commercial appeal for athletes, have created a problematic contractual environment in which fairness, equity, trust, 'good faith', reason and 'informed consent' cannot be guaranteed (Hanlon, 2006; Johnson, 2012). This may lead to athlete passive acceptance of the contracts, lack of understanding of the implications of clauses and e/affects, and, potential employment tensions. In response, Baker et al. (2012) advocate changes including semantic improvements, legal representation, athlete engagement in negotiation, education, and, 'opt-out' possibilities (to which we will return later in our discussion).

To add to this framework of unconscionability and consent, it is useful also to draw on Auerbach's (2005) related contractual work on athletes and corporate protection. The prevailing concern for Auerbach (2005) is that sport organisations presuppose a duty of care to athletes, but, that this moral responsibility is a subsidiary of their predominant obligation to protect their corporate image. In the interests of safeguarding the organisation against perceived commercial threats, moral clauses that dictate athletes' behaviours, ideals and values have become increasingly central to the contractual process. Auerbach (2005, p.3) states,

Morals clauses, also called public image, good conduct or morality clauses are provisions included in an endorsement contract granting the endorsee the right to cancel the agreement in the event the athlete does something to tarnish his or her image and, consequently, the image of the endorsee or its products.

Whereas moral clauses of the past were deemed relatively inconsequential aspects of contractual processes, as professional stakes are raised (vis-à-vis endorsements, branding and revenue generation) moral clauses have become characteristic features of many sport contracts. Against the prevailing neo-liberal context in which protecting corporate partnerships matter, sport organisations are becoming particularly proactive in imposing moral clauses to preserve their lucrative economic relationships.

The issue with this mentality is that it presents athletes as potentially problematic entities. As a result, within contracts, organisations tread a fine line between 'clarifying' acceptable behaviour that conforms to the institution's professional ethos, versus preventing actions that are could have potentially damaging consequences on the endorsees. Tougher contractual provisions, Auerbach (2005) suggests, may be the supreme safeguard for corporate endorsees; however, such clauses (which we analyse below), evidence an institutionalised/normalised industry attitude in which athletes are conceptualised as young, morally unstable, potentially problematic, malleable, contractually naïve and compliant. We are, obviously, mindful here of the ground work done on docent 'active' bodies, and, that within critical legal studies that scrutinises sport organisations' regulatory powers and the consequence for protecting and advancing athlete's interests and wellbeing (e.g., Connor, 2009; McLeod et al., 2014; Roderick, 2006; Stippich & Kadence, 2010). While respecting this scholarship, we find that when used in conjunction with

unconscionability and consent scholars such as Baker et al. (2012), Auerbach (2005) helps articulate the inherent issues of morality and ethical concern and care that lay (or at least should lay) at the heart of the contractual process. Irrespective of the corporate and organisational demands that now characterise some individual's sporting lives, Auerbach (2005) (and rehearsing unconscionability scholars here too) essentially remind us that athletes do not deserve to be marginalised and stigmatised by moral clauses that effectively most serve the interests of the sport organisation and its inequitable relationship power. Contract construction and negotiation should, thus, do better at evidencing a genuine concern for the athlete first and foremost.

## **Methodology**

Due to the difficulties in acquiring these contracts and the sensitive nature of these documents (i.e. several included confidentiality clauses), we sourced four contracts from national sport settings and a professional club; three from the national sport level in three countries and one from a professional club). Professional contracts, in this instance, referred to employment documents between athletes and professional clubs that are not publically funded. National level contracts mostly related to domestic team responsibilities and reflected funding and support coming primarily from the government via national administrative bodies. Due to the sensitive nature of the data, we have censored identifying elements.

In keeping with the interpretive nature of this work, and the data, an inductive document analysis was undertaken (Bowen, 2009; Fereday & Muir-Cochrane, 2006; Stake, 1995). Initially, data were coded (i.e. assigned a descriptive label) in light of meaningful

words, clauses and incidents (i.e. meaning units). Both researchers separately coded the contracts. The 'meaning units' were then discussed and the related clauses were compared and contrasted. The coded segments were aggregated in light of commonalities and/or distinctiveness (e.g., media, social media, physicality, health risk, corporate expectations). The resultant topics were collapsed into wider themes of which the discussion section is structured: athletes' ownership over their image and identities; medical and health disclosures; lifestyle, behavioural and body choices and restrictions beyond sport; adherence to organisational philosophy and commitments, and social media and publicity constraints.

## **Data and Discussion**

### *Athletes' ownership over their image and identities*

Elite athletes' bodies undergo regular scrutiny as part of the spectacle of modern sport performance. This said, increased exposure via conventional and new media forms, *and*, the rampant commercialisation of sports practices writ large have exponentially increased surveillance and critique of athletic bodies and the meanings ascribed to, and inscribed upon, their flesh. The preservation and promotion of an athlete's physicality and image, therefore, is of utmost importance. Thus it is unsurprising, perhaps, that contractual clauses have emerged that address, and in some cases dictate, athletes' bodily forms in addition to merely their function. One of the most significant groups of clauses in this regard relate to athletes' ownership over their image and identities. Clauses that stipulate that the athlete

must transfer the ownership of their image and identity to the organisation were common.

For example:

*National Contract 1. The [athlete] agrees to allow [the organization] to use the [athlete's] name, image, likeness, voice, performance and appearance in events or activities (including photographs, film and recordings of the [athlete's] training, performance and appearance). No use is permitted under this clause whatsoever by any party if such use would be detrimental to the reputation of the [athlete] or otherwise derogatory or offensive.*

*National Contract 2. not to allow Your Identity to be used by any party, including your own personal sponsors, for advertising, sponsorship, endorsement, fundraising, or promotional purposes, including on their websites and blogs, without the prior written approval of the [National Sporting Committee] Commercial Director.*

Here we find that any opportunities for athletes to have a say over their image and its presentation have been largely removed and any notion of consent has essentially been taken for granted as given. Thus, the assumption here is that the athlete agrees to passively comply and essentially forfeit their person. The athletes' acceptance of such clauses could be considered a normalizing practice in the elite sport context in which sport organizations yield uncompromising authority which allows them to dictate the terms of participation as they desire. Such clauses imply that all aspects of the athlete relating to their person are parts of the 'product' to be acquired by the organization. Accepting this logic, aspects of the person that might be considered private, personal or sacred (e.g., in keeping with some



indigenous cultures this would refer to names, likenesses and photographic images) are no longer treated as such, rather are crafted as 'property' with substantial economic value to the organization; in doing so significantly undervaluing the symbolic value to the athlete and his/her cultural and belief systems. Thus, reiterating Baker et al.'s (2012) concerns regarding the unconscionability and fairness of the bargaining process, and, the inherent power imbalance.

Organizations' contractual controls of the body are even more pronounced when it comes to clauses relating to athlete's corporal choices and lifestyle behaviors. This is particularly evident with regards to tattoos.

*National Contract 1. The [athlete] agrees not to display tattoos that may cause offence or conflict with the Commercial Partners whilst carrying out [sport]-related activities (including any activity required of the [athlete] under this agreement) at [competitions] and other events connected in any way with the squad or team.*

*Guidance notes: Athletes using tattoos to bypass advertising rules relating to the [sporting organisation] and the Commercial Partners will be in breach of this contract. It is recommended that the [athlete] consult with the Performance Director if he/she has any tattoos that may be displayed which may be offensive and before getting any tattoos that may be displayed and may be offensive.*

The concerns here are not merely regarding the nature and visibility of existing ink, but also extend to 'potential' consequences, brand damage and offence that might be caused by tattoos the athlete may acquire in the future. It is not enough here that the organization mitigate the effects of existing tattoos, thus implying that they are willing to partially accept

this form of identity expression, but that ultimately the organization, having already assumed 'ownership' of the athlete, have the right to intervene if and when a tattoo may conflict with their brand identity or commercial agendas. Interestingly, these clauses are not a discernable feature of the professional contract we examined.

With clauses such as those above, the issues are twofold: firstly, tattoos may infringe upon or have the potential to disrupt the organization's commercial relationships; secondly, that possibly offensive tattoos are problematic to the ethos of organization and the corporate image it wishes to protect. Tattoos are a normative way for people to personalize and communicate *the self*; giving it a positive distinction (Atkinson, 2003; Dickson, Dukes, Smith & Strapko, 2015; Hawkes, Senn & Thorn, 2004). However, the clauses here suggest that the right to tattoo acquisition is no longer solely an athlete's choice beyond the sport context, but rather, a potential behavior to be controlled, monitored and approved as part the organization's commercial strategies and surveillance measures. Rehearsing Auerbach, tattoos, thus, present a risk to the organization that necessitates contractual mediation. Such opportunities might exist as part of broader negotiation discussions, nevertheless, the point here is that with the contracts we examined is that organizations have assumed that a) the athlete's skin is merely an additional entity to be owned and risk to mitigate and b) that the athlete's identity expression and wishes remain subsidiary to their intentions.

### *Medical and health disclosures*

Further to concerns about the athletes' images and inked exteriors, organisations have extended this interest into the overall quality of the 'product' in which they wish to invest,

that is, the state of the athlete's body, health and wellbeing. For the organisation, the emphasis here appears to be ensuring the athlete in which they are investing, arrives to the organisation and maintains themselves in optimum condition throughout the duration of their employment. Medical and health clauses, to this end, serve as effective ways to evaluate and monitor athletes' bodies while adding a useful safety mechanism for the organisation particularly in cases where the quality of an athlete's physique and wellbeing might deteriorate and mayn potentially jeopardise their performance. The clauses below demonstrate the extent to which the organisations expect athletes to disclose medical and health-related concerns.

*National Contract 2. It is an essential requirement of this Agreement that the [Committee] is kept fully informed if you are suffering any physical or mental injury, illness, condition or impairment that might prevent you from preparing or competing in the [event] to the highest possible standard. As such, you agree:*

- a) to disclose to the [organisation] any illness, injury or condition that may prevent you preparing for, or competing in, the [event] to the highest possible standard as soon as you are aware of it.*

*National Contract 3. Any information obtained about you, that relates to your fitness or otherwise ability to compete in the [event] to the highest possible standard in the [competition] shall also be made available to the [Team Manager] or their nominee. The [Team Manager] also reserves the right to disclose this information to other relevant [Committee] personnel where [the Team Manager] considers this genuinely necessary.*

As the clauses indicate, the athletes must comply with the full disclosure of their medical histories. However, there appears to be some scope for the athlete to judge and determine what they choose to reveal or conceal. This may seem in the athlete's best interests by enabling the disclosure of information to remain at their discretion while concomitantly demonstrating the organisation's interests in the protection of their wellbeing and health. The concern here, as articulated in the National Contract 3 clause, is that the contracts and organisation's intentions transcend the conventional privacy of the doctor-patient privilege. No longer are athletes' health privacies protected by medical convention, instead the ownership of health and wellbeing information becomes the preserve of the organisation who may utilise and freely disseminate it as and when they deem appropriate.

In addition to the acquisition and use of medical and health information, in some cases organisations have extended their power within contracts to include the ability to sanction athletes whose bodies and behaviours do not conform to expectation. In the clause below, the organisation has the capacity to admonish athletes in writing (and thus be on record) for their weight gains (note: no reference here to weight loss). Moreover, the consequences of body infractions extend to monetary fines.

*Professional Contract. The [athlete] agrees that if at any time the [athlete's] weight is more than xx kilograms, each time [the club] shall have the right to admonish in writing the [athlete] and after 15 days, if the weight is not reduced below said limit, to impose on [the athlete] a fine of up to 5% of [the athlete's] annual compensation without bonuses.*

Our point here is to highlight that sensitivities and subjectivities surrounding athletes' health no longer are exclusively theirs alone. Not unlike with their image or inking, health

knowledge in this case has become divorced from the individual and subsumed as another facet of the organisation's authority and becomes a tool in maintaining the inherent power bias in their athlete relations (Auerbach, 2005).

*Lifestyle, behavioural and body choices and restrictions beyond sport*

The clauses regarding body control and organisation intervention do not stop here. Rather, the clauses extend to manage athlete's lives and behaviours outside of sport. While the intention of the clauses might be performance orientated (e.g., by ensuring the athletes' peak performance), they raise concerns about where the remit of the organisation ends and the athlete may be separated from their sporting obligations and work.

*Professional Contract. The club shall grant the player a minimum of 35 calendar days of holidays per year of duration of this contract. Given the particular characteristic of the activity, said period of holidays should be spent entirely from 1 [month] until 4 [subsequent month] of each year of duration of this contract.*

*National Contract 1. The [athlete] understands and accepts that [the sport] and other training activities carry a risk of physical injury and the [athlete] agrees to take all reasonable care to avoid causing harm to [the athlete] and others and agrees not to undertake any hazardous or dangerous activities without the prior consent of the Performance Director (a 'hazardous or dangerous activity' is one that requires special insurance).*

Here we see a shift in the contracts from athletes considered as potential liabilities to athletes considered as 'investments' needing to be protected. What appears to matter is how organisations use contracts to insure/ensure the quality and commercial viability of their product. Such clauses might also serve as a test of athlete's loyalty and commitment to the 'cause'. Recalling Auerbach (2005), our examination reiterates organisations' presumptions about the alleged necessity of regulating athletes' possibly wayward lives, and, the real or perceived threats to the institution's image, identity and success.

#### *Adherence to organisational philosophy and commitments*

An additional part of the organisation's ways of protecting its image, and maintaining their influence over athletes' non-sporting lives, has been the development of clauses relating to institutional philosophies (often alternatively couched as 'moral codes', 'values', 'ideals', 'mission', 'culture' and 'ethos'). Within the organisations examined in this paper, their philosophies generally emphasised the exceptional environment set by high performance/elite participation. Such settings necessitate behavioural, moral, ethical and principled standards of the highest order. Moreover, they assume athlete's adherence to codes of practice, performance *and existence* that align with the organisation's aims and ambitions.

*National Contract 1. The [athlete] recognises that, as an elite competitor within the HPP, [the athlete's] behaviour will reflect on [Organisation] and the sport. Accordingly, the [athlete] agrees to conduct himself in a fit and proper manner at all*

*times during the Membership Period. Further, the [athlete] agrees that, at all times during the Membership period, he will:*

- a. make a positive commitment to supporting and achieving the aims and objectives of the [High performance programme] and as and when reasonably requested by [Organisation], use all due skill and ability in promoting the Commercial partners.*
- b. project a favourable and positive image of the sport and the [Organisation's] programmes and the Commercial Partners by adopting high standards of behaviour and sensible appropriate dress standards when appearing in public or carrying out duties in relation to the HPP; this includes showing consideration to other travellers and guests when travelling or staying away with [Organisation's] squads or teams.*

As identified here, 'acceptable behaviour', 'conduct yourself in a fit and proper manner', demonstrate 'appropriate respect and understanding', making a 'positive contribution', 'behaving reasonably' and with 'restraint', projecting a 'favourable and positive image', 'maintaining a positive attitude' have become the standard contractual nomenclature to this effect. Imbedded in these clauses is a lofty idealistic sporting altruism that restricts individualism and expression.

By complying with the organisation's philosophy, athletes are also accepting their roles in the maintenance and development of the business and its brand. As such, contracts (which essentially frame athletes as corporate employees) have been put to use to ensure individuals' commitment and loyalties extend beyond the performative and service the greater needs and agendas of the organisation as a commercial entity (Baker et al. 2012). In

the contracts we examined, athletes are routinely obligated to satisfy the organisation (and help fulfill corporate relations) by agreeing to give their non-training time, energy and participation to support ‘the cause’.

*National Contract 1. The athlete agrees to engage in a maximum of eight full days of Appearances in any year of the Membership Period, to include three days in support of [xx] Funded Programmes. Attendance at an Appearance shall be calculated in half days units of not more than four hours each. The [athlete] shall make these attendances where reasonably requested to do so by [Organisation] or the [Sports Organisation], save that the [athlete] shall not be obliged to adhere to any such requests if to do so would clearly conflict with or otherwise impair the performance of his other obligations under this Agreement, in particular as to training and competition.*

Such a clause echoes our earlier point regarding the extended influence of the organisation in being able to shape athletes’ lives outside of sport. Here, it appears that participation at the elite level asks more of athletes and their lives than merely performative perfection, rather they expect athletes to fulfill organisational obligations. Clauses that specify athletes undertake organisational ‘work’ require that they ‘buy into’ the organisational philosophies, become smiling advocates and willingly accept the institution’s ways (while silencing any potential opinions they may have to the contrary).

*Social media and publicity constraints*



The aforementioned clauses appear designed to ensure athletes appropriately serve the best interests of the organisations they represent. Athletes, whose image and value is built upon their sporting success and public popularity are a key part in how the organisation projects itself at the national and international level and engages with external stakeholders. Within this imperative, impression management matters. In terms of operating a successful business enterprise that has a reputable public image it thus might make sense for sport organizations to exert tight controls over athletes; specifically in terms of *what* they say and *how* they might represent the brand. In this regard, sport bodies, not unlike those elsewhere, are paying particularly close attention to their internet presence as their prominent brand interface and the consequences for public relations (Christ, 2015). However, given the rapid growth in social media, in which new technology modes have presented athletes with fresh opportunities for interaction and exposure, sport organizations seem ill equipped to effectively mitigate athletes' actions online. What results, as evidenced by the clauses, is a generic approach that attempts to dictate the terms of e-participation *and* police both real and *perceived* incursions that might disrupt commercial agendas, effect stakeholder relations and generate public criticism. Sites and applications such Facebook, Twitter, Snapchat and Instagram have precipitated the need for organizations to carefully consider how they balance athletes' desires for identity expression, fan interaction and self-promotion, and, protecting their own reputation and commercial interests (Frederick, Clavio, Pedersen, & Burch, 2014; Lebel & Danylchuk, 2014).

*National Contract 1. The athlete agrees not to make any public statement which is derogatory to [the organisation], the HPP, any Commercial Partner or any of the bodies working to promote high performance sport..., nor to make any public*

*statement which constitutes a 'personal' attack upon another sporting competitor. Fair comment upon a fellow competitor made without the use of offensive language where the substance of the comment is known (or can be shown) to be true will not constitute a 'personal attack'...*

*National Contract 3. Are entitled to make public comment or communicate with the media relating to your personal preparation for the [event], providing those comments or communications comply with the remainder of this clause; not to make or endorse any public statements that may have a negative effect on any member of the actual or potential Team either at or in the build-up to the [event].*

*a. Are not to create an actual or implied connection between any personal sponsors and the [national] Team, [organisation], its Commercial Partners...in any forum including Social Media, blog or internet platform.*

As evidenced by these clauses, the potential for athletes to 'misuse' social media represents a considerable liability that warrants proactive mitigation. Such clauses aim to circumvent infringements and legal/economic damage to the organisation. Thus we fall back into an institutionalised mentality whereby athletes are considered volatile, problematic, 'risky', unpredictable entities whose lives (in and beyond the performative sport context) necessitate manipulation and control.

### **Rethinking clauses and a/effects**

Underlying the aforementioned concern over moral clauses, and with the discontent over sport contracts in general, are significant issues regarding athlete welfare. What is important, and what we question, is the prevailing ethical high-ground organisations presume, and, the de-centring and marginalisation of the athlete in this process. Our suggestions here are guided by the encouragement, too, of Brown and Bicksacky (2013) who admit that especially where unconscionability, moral infringement and ‘informed’ consent are concerned, contract construction and negotiation is an inexact science and interpretation can be particularly subjective. “There will always be”, Brown and Bicksacky (2012) note, “some imbalance between contracting parties in terms of power, wealth, understanding, experience, and information” (p.255). As such, what is needed is for concerns over individual freedoms, liberties and agency to be fundamental to contract formation. In practice, they suggest, this means development of improved organisational guidelines that better account for the irrationality and lack of priori knowledge of the signee and allow possibilities for greater modification and negotiation.

An effective contract should, at least, be designed to protect both/all parties. As Auerbach (2005) reiterates, sports contracts, certainly with regards to the unconscionability of terms, are fundamentally flawed in this regard. With the participation stakes so high and with the means to elite participation at the discretion of the sport body, the organisation is naturally at an unfair advantage in terms of parity of representation in the negotiation process. As the clauses reveal, such a privileged position enables the organisation to preserve their best interests, first and foremost, and, to conceptualise athlete wellbeing as both an investment to be stringently protected and their behaviour a liability to be moderated.

To crystallise our concerns at this juncture, it is possible to make several recommendations that offer ways we might rethink contractual approaches and enhance athlete-organisation relations. One primary recommendation, we believe, should be for the organisation to acknowledge the inherent power imbalance that exists as a normalised part of the employment sphere, but that is fortified by the type of contracts they utilise. Towards this end, it appears that organisations have adopted contracts from the corporate world and have made slight modifications to reflect the physical nature of sports 'work', however, as evidenced in the above clauses, these contracts aren't a 'best fit' for the contemporary sport world. We recommend that organisations consider the purpose of these contracts in terms of the high performance culture and objectives and if the purpose can be achieved via an alternate forum (e.g., athlete workshop, informal discussion). Such a suggestion might go some way in recognising the athletes' agency and, consequently, build positive relations between the athlete and the organisation. Moreover, this approach might allow the organisation to still preserve its public and commercial integrity in tandem with enabling individual's greater autonomy and opportunity to exercise their own judgement and free will. Should organisations not be willing to forego contracts, it is worth encouraging athletes to negotiate the terms. This collaborative effort will allow for a mutual understanding and appreciation of each others' roles.

In the event that contracts are used, we suggest first, that athletes critically understand what they are signing up to. This may entail taking time to carefully read contracts and seek independent advice, but, we suggest might start with simply more rigorously questioning *why* contracts comprise particular inclusions and exclusions. Sport organisations may be increasingly adept at delimiting their relationships with athletes, yet

athletes' compliance and complacency should not be taken for granted. In addition we recommend then that athletes should also be supported by their representative in understanding their ability and right to object to particular clauses. This is certainly the case if they feel there are clauses that might compromise their individual identity and expression, go beyond the performative requirements of the sport, or push their basic rights, freedoms and liberties. Additionally, athletes should advocate for alternatives to contracts as a way reminding the organisation of their agency.

## **Conclusion**

Our purpose in this paper was to use contractual clauses as a means of extending previous considerations of athletes as particular forms of workers. In examining a range of clauses across several different sport organisations, it is possible to appreciate the ways in which the non-sport sector employment ethos has manifested itself in the construction of athlete contracts and inherent organisation power relations therein. As we have evidenced across five themes: *athletes' ownership over their image and identities; medical and health disclosures; lifestyle, behavioural and body choices and restrictions beyond sport; adherence to organisational philosophy and commitments, and social media and publicity constraints;* our concerns focused on whose wellbeing contracts essentially protect. Although the organisation might argue that these obligations and duties outlined in the contracts are conducive to the 'effective' management of their programmes, we argued that contracts implied adherence to the organisations' respective high performance agendas. Moreover, as these particular contracts indicate, while athlete protection is important, what is valued more is organisational safeguarding. With this in mind, contracts are riddled with

assumptions about who athletes are and what they might do. This seems to be a reactive response to risks that are with or without precedent. Building on the theoretical foundations we have outlined (i.e. Auerbach, 2005; Baker et al. 2012), we advocate a move *away* from the athlete as a passive participant in the process, and, *toward* greater acknowledgement of the athlete's interests in contractual construction, negotiation and implementation. Our more 'radical' hope would be to arrive at a point at which written contracts become superfluous to participatory requirements at the elite level. Such a paradigm shift would need to be precipitated by organisations abandoning their neo-liberal corporate agendas and advancing a more empathetic, trusting, and appreciative approach to athlete care and wellbeing.

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## References:

- Atkinson, M. (2003). *Tattooed: The sociogenesis of a body art*. Toronto: University of Toronto Press.
- Auerbach, D. (2005). Morals clauses as corporate protection in athlete endorsement contracts. *DePaul Journal of Sport Law & Contemporary Problems*, summer, 1-18.
- Baker I, T. A., Grady, J. & Rappole, J. M. (2012). Consent theory as a possible cure for unconscionable terms in student-athlete contracts. *Marquette Sports Law Review*, 22(2), 619-650.
- British Olympic Association (2000). The British Olympic Association's position statement on athlete confidentiality, *Journal of Sport Sciences*, 18(2), 133-135.
- Browne, M.N. & Biksacky, L. (2013). Unconscionability and the contingent assumptions of contract theory. *Michigan State Law Review*, (1), 211-255.
- Butterworth, M. L. (2014). The athlete as citizen: Judgement and rhetorical invention in sport. *Sport in Society*, 17(7), 867-883.
- Carlson, J., & O'Cass, A. (2012). Optimizing the online channel in professional sport to create trusting and loyal consumers: The role of the professional sports team brand and service quality. *Journal of Sport Management*, 26(6), 463-478.
- Chappelet, J. L., & Bayle, E. (2005). *Strategic and performance management of Olympic sport organisations*. Champaign, IL, Human Kinetics.
- Christ, P. (2005). Internet technologies and trends transforming public relations. *Journal of Website Promotion: Innovations in Internet Business Research, Theory, and Practice*, 1(4), 3-14.
- Connor, J. (2009). The athlete as widget: How exploitation explains elite sport. *Sport in Society*, 12(10), 1369-1377.

- Dickson, L., Dukes, R. L., Smith, H., & Strapko, N. (2015). To ink or not to ink: The meaning of tattoos among college students, *College Student Journal*, 4(1), 106-120.
- Eckert, J. (2006). Student-athlete contract rights in the aftermath of *Bloom v. NCAA*. *Vanderbilt Law Review*, 59(3), 906-635.
- Ferrand, A. & Pages, M. (1999). Image management in sport organisations: The creation of value. *European Journal of Marketing*, 33(3/4), 387-402.
- Frederick, E., Lim, C. H., Clavio, G., Pedersen, P. M. & Burch, L. M. (2014). Choosing between the one-way or two-way street: An exploration of relationship promotion by professional athletes on Twitter. *Communication & Sport*, 2(1), 80-99.
- Hanlon, S. M. (2006). Athletic scholarships as unconscionable contracts of adhesion: Has the NCAA fouled out. *Sport Law Journal*, 13, 41-305.
- Hawkes, D., Senn, C. Y., & Thorn, C. (2004). Factors that influence attitudes toward women with tattoos. *Sex Roles: A Journal of Research*, 50, 593-604.
- Hesselink, M. W. (2013). Unconscionability, unfair exploitation and the nature of contract theory-comments on Melvin Eisenberg's 'Foundational principles of contract law'. *Centre for the Study of European Contract Law Working Paper Series*, (7).
- Hillman, R. A. (2012). *The Richness of Contract Law* (Vol. 28). New York, Springer Science & Business Media.
- Ingham, A.G., Blissmer, B.J. & Davidson, K.W. (1999). The expendable Prolympic self. *Sociology of Sport Journal*, 16(3), 236-268.
- Johnson, K. K. (2012). Enforceable fair and square: The right of publicity, unconscionability, and NCAA student-athlete contracts. *Sports Law Journal*, 19, 1.
- Kreft, L. (2011). Elite sportspersons and commodity control: Anti-doping as quality assurance. *International Journal of Sport Policy and Politics*, 3(2), 151-161.



- Lebel, K. & Danylchuk, K. (2014). Facing off on Twitter: A generation Y interpretation of professional athlete profile pictures. *International Journal of Sport Communication*, 7, 317-336.
- McKendrick, E. (2014). *Contract law: text, cases, and materials*. Oxford University Press.
- McLeod, C., Lovich, J., Newman, J.I. & Shields, R. (2014). The training camp: American football and/as spectacle of exception. *Journal of Sport and Social Issues*, 38(2), 222-244.
- Møller, V. (2011). One step too far – about WADA's whereabouts rule. *International Journal of Sport Policy & Politics*, 3(2), 177-190.
- Murphy, P. & Waddington, I. (2007). Are elite athletes exploited? *Sport in Society*, 10(2), 239-255.
- Neiman, M. (2007). Fair Game: Ethical considerations in negotiation by sports agents. *Texas Review of Entertainment & Sports Law*, 9(1), 123-140.
- Posner, E. A. (1995). Contract law in the welfare state: A defense of the unconscionability doctrine, usury laws, and related limitations on the freedom to contract. *The Journal of Legal Studies*, 283-319.
- Priestley, L.J. (1986). Unconscionability as a restriction on the exercise of contractual rights. In J.W. Carter (Ed.), *Rights and remedies for breach of contract* (pp. 80-81). Sydney: Committee for Postgraduate Studies in the Department of Law, University of Sydney.
- Roderick, M. (2006). *The work of professional football: A labour of love?* London: Routledge.
- Stewart, B. (1989). The nature of sport under capitalism and its relationship to the capitalist labor process. *Sporting Traditions*, 6, 43-61.
- Stippich, Kristal S., and Kadence A. Otto. (2010). Carrying a good joke too far: An analysis of

the enforceability of student-athlete consent to use of name & likeness, *Journal of Legal Aspects of Sport*, 20, 151.

Thibault, L., Kihl, L. & Babiak, K. (2010). Democratization and governance in international sport: Addressing issues with involvement in organizational policy. *International Journal of Sport Policy and Politics*, 2(3), 275-302.

Yee, W. P. (2001). Protecting parties' Reasonable Expectations: A general principle of good faith. *Oxford University Commonwealth Law Journal*, 1(2), 195-229.

Vinnai, G. (1976). *Football mania*. London: Ocean.

Waddington, I. (2010). Surveillance and control in sport: A sociologist looks at the WADA whereabouts system. *International Journal of Sport Policy & Politics*, 2(3), 255-274.