

**159 - DEFRAUD AND IMAGE RIGHT OF THE PROFESSIONAL FOOTBALL PLAYER**

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**1) HISTORICAL**

The football player was almost never considered by the society and the world of Law as an employee or capable to contract for work, i.e., it was not possible to consider the athlete and the sports association, as an employee and employer, respectively.

Alice Monteiro de Barros teach us that several factors contributed to this thinking, such as, the slow transition from amateur to professional football and the athlete work, in general, as well the football player, in particular, is seen as a playful activity. It was difficult to dissociate the practice of sport from the notion of pleasure and fun, considering it as an object of the Labor Law and of the employment contracts

Another peculiar circumstance, in which the athlete was hardly seen as an employee, consisted in his full identification as part of the sports association for which he worked. The professional football player was often considered as a myth, a hero and an idol to legions of fans. Sometimes, the athlete was transformed into a villain and was pursued by the fans with the same passion, with which they were adored, being often condemned, even unfairly, to ostracism and to eternal failure within the sports activity.

Likewise, the eminent reputation and exorbitant financial earnings of the most popular professional athletes in the football world, especially nowadays, led to the misconception that the professional football player wouldn't need any protection and support of the Labor Law, being completely unaware of the employment relationship, since their activities had no character of service, but only of leisure and fun.

Unfortunately, this narrow vision of the football universe disregarded the harsh reality of most athletes, who live with derisory wages and struggle daily to their livelihood, with meager and degrading working conditions.

"In this context, a first doctrinal study understood that the legal relationship between the athlete and the club embodies a "mandate sports", governed by the civil law and unaware of the Labor Law", as pontificates the author, while others understood it is an autonomous sports contract.

Moreover, given the differences between the typical subordination of the employment contract and the subordination characteristic of the sports activity, without which its accomplishment would be unfeasible, part of the doctrine, maintained that the pact between the athlete and the sports organization would constitute a kind of innominate contract, and designated as a sport contract.

Finally, the most accepted thesis was the one that considers the professional sport as a work, and argues that the legal relationship of the professional football player with the organization of sport is an employment relationship, which is regulated by a special contract of employment.

Therefore, the legal relationship established between the athlete and the sports organization is characterized as a very special form of employment contract, taking into consideration all the peculiarities that were not found or even prohibited in employment contracts in general.

The special nature of the employment relationship established between the athlete and the professional sports organization requires that its legal discipline must separate itself from the general labor law.

In Brazil, the legislation on the sport was created in the Vargas Era, through the Act 1056/1939, the creator of the Sports National commission, whereas the Act 3199/1941 established the National Council of Sports, nationwide, and the Regional Councils of Sports, statewide. These standards were strongly influenced by the Italian Fascist model.

Subsequently, the Law 6251/1975 revoked the Act of 1939 and established the Sports Justice, in its article 42, III. However, the first legislation of major relevance would come a year later, with the promulgation of the Law 6354/1976, which regulates the labor relations of the professional football player.

This Law is still valid and applied nowadays, although some parts have been repealed by the subsequent piece of legislation.

We also should highlight the Law 8672/1993, regulated by the Act 981/1993, which became known as "Zico Law" and established general rules for sports.

However, it was in 1998 that the most important legal regulation emerged regarding the professional athlete, both in scope of sports and labor, the Law 9615/1998 (Pelé Law).

Currently, this piece of legislation, along with the Law 6354/1976, forms the specific legal basis that regulates the legal relationships established between the professional athlete and the sports association.

**2) LEGAL NATURE OF THE IMAGE RIGHT AND THE RIGHT OF ARENA**

The art. 28 of Law 9615/1998 establishes that "the activity of the professional athlete in any sport, is characterized by remuneration agreed upon in a formal job contract signed with the sports authority, legal entity of private law, in which the penal clause has to be compulsorily included for cases of non-compliance, denouncement or unilateral contract rescision".

Thus, concerning the athlete remuneration, there are many peculiar aspects to be considered, besides the specific institutes of football, such as the funds denominated fee, bonus, the Right of Arena and the Image Rights. The latter two are the main objects of this work and will be examined and situated within the legal system and sports, later on.

The sports world is more sensitive to the image marketing due to the explosion of media. The sport, especially football, has turned into a show.

This way, "the attraction that the sports exert on the audience is responsible for the importance of the sports spectacle on the audiovisual world, turning it into a strategic product in the media programming, as Alice Monteiro de Barros points out.

Consequently, the economic exploitation of the athlete's image and of the sports in general, changed significantly the legal relationships established between the player, the club and the media. The sportsman is the main actor of the show, as well

as his image is essential.

Therefore, owing to the facts that has already been mentioned, the athlete has the right to participate in the price, in the authorization, in the setting, transmission or retransmission of public sporting event, which is called the Right of Arena.

The Right of Arena is considered by the law as a related right connected to copyrights and to Image Right, and is provided for in Article 42, § 1 of Law 9615/1998 (Pelé Law) and Article 5, XXVIII, of the Federal Constitution of 1988.

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The main clause of the Article 42 of Law 9615/1998 establishes that "The sports organization has the right to negotiate, authorize and prohibit the image fixation, transmission or retransmission of shows or sporting events in which they take part", as well as its first paragraph explicitly states that: "Unless otherwise agreed, twenty percent of the authorization's total price, as a minimum, will be equally distributed to the professional athletes who participate in the show or event."

The Right of Arena ensures to the athletes participating in a sports event that their image will not be used and released for free. This way, all athletes who got in the field and participated in the show, including those who remained on the bench, have the right to the acquired resources with the transmission of the games.

It should be noted that the right of arena belongs to the clubs that produce the sporting spectacle. The clubs, however, have a legal obligation to pass on to the athletes attending the event, at least 20% of the total authorization of transmission. This minimum percentage of 20% is equally distributed to the players participating in competitions, i.e., it doesn't depend on the prestige, on projection, on the time of career, and it remunerates the collective image of the athletes while they are part of these sports associations.

The right of arena has legal remuneration, as it happens with tips, considering that it is also paid by a third party, usually the owners of media outlets that broadcast the games, affecting the allowance's calculation, such as, FGTS, 13<sup>o</sup> salary, vacations and security contributions.

According to what was mentioned above, one realizes that the right of arena tries to remunerate the collective image of the athletes, i.e., the spectacle sporting as a whole.

However, in this context of increasing appreciation of the athlete's image and the sports spectacle, clubs will also seek to remunerate the individual image of the players according to the performance and commercial appeal of each one.

This way, it was created the funds denominated "image right", which is paid through a license agreement and use of the athlete's image, i.e., it is a contract to the part, regardless of the employment contract originally signed between the athlete and the club.

Thus, the Image Right is the exclusive right, personal and private to each athlete of exposing publicly his own image, supported by art. 5, X and XXVIII, of the Federal Constitution. This law, as stated, can be transferred via an authorization signed by contract to third parties to use the image of football player, the same way as it occurs in the sports.

It's unquestionable the amount paid to the athlete considering his exposure as the protagonist in the football spectacle. Moreover, the image right, in contrast to the right of arena, takes into consideration the individuals qualities of each sportsman, varying according to the talent, the professional trajectory and the fame of each one.

Traditionally, the license agreement of the use of the professional athlete's image has legal civil law nature, usually used for commercial purposes. In this sense, the athlete may make an agreement not only with the club for which he works, but also with whoever wants to use his image in some way.

However, in practice, there is a growing tendency of the sporting organization in order to try to defraud their working relationship with the athletes through a distortion of the Image Right, a problem that will be discussed below.

### **3) EMPLOYMENT RELATIONSHIP FRAUD THROUGH THE IMAGE RIGHT**

Presently, there is a very regular practice realized by clubs that consist in paying most of the athletes' remunerations by way the Image Rights, in other words, by pact of license agreement and use of the image.

For this, clubs are a legal entity on behalf of the athlete, whose sole purpose is to pass most of the arranged earnings. However, the legal intermediary is created and is used solely with the intention of altering the employment relationship between the athlete and the employer club, and also of distorting the enforcement of labor laws

The said funds paid by way of image right, are often intended for the athlete regardless of the exploitation, actual or potential, of his image by the club, which features fraud and contradict the provisions of art. 9 of CLT, and the summary 331, item I, C. TST, in the sense that the hiring of workers by an intermediate enterprise is illegal.

This practice that tries to defraud the employment relationship, is also a tax evasion and social security fraud, since the athlete collects the income taxes as if he were a legal person instead of collect it as a natural person.

Then, on several occasions, the perpetrated fraud gives benefits to the athletes that become real accomplices of the clubs, which is not characterized as an illicit act. According to the issue mentioned, there is often certain neglect to the most famous athletes because of the astronomical sums they receive.

However, the big problem arises when athletes with derisory salaries have much of their labor rights suppressed, due to the improper transfer of most of its funds for a legal person created solely for this purpose

At this moment, the illegal act goes beyond the level of attacks against the legality and morality and becomes a real social problem, since it makes difficult and disqualifies the professional class of the soccer players that is already devastated, and whose players have to face serious challenges to sustain themselves and their families. It is clear that the football scenery of the rich and famous players, accessible to most fans, is unrealistic and doesn't reveal accurately the reality that happens on the football field, as noted previously in this article.

Moreover it is odd to think that the image right has been greatly popularized, so that any athlete has the right to receive it in substantial amounts although not all of them have an individual image, good or bad, to "sell", i.e., an image to be used by the third parties.

Analyzing the reality unemotionally, despite the football popularity, there are few athletes in each association that, in fact, are entitled to receive the voluminous values for image right, for its commercial appeal, reputation and value as marketing and advertising product. In general, most of the athletes only sees their collective image exploited by the club, as athlete of the sports organization in action during the games. In such situation the athlete is already fully paid by the right of the arena.

### **4) CONCLUSION**

Therefore, we conclude that, currently, one of the biggest problems of the Brazilian soccer reality is the payment of the funds denominated image right once the club creates enterprises on behalf of their athletes, for whom more than half of their salaries are designated.

We believe that this practice constitutes fraud against the employment relationship and the employment contract, signed by the athlete and the association of professional sports, what characterize tax evasion and fraud against the social security, by both the club and player.

The problem is exacerbated as this practice also includes unknown players and unknown clubs, representing unacceptable suppression of labor rights that result in a true social blemish, when it is realized the reality of most Brazilian athletes is shortage and extreme difficulties. In fact, the amount paid by the club to the athlete, for image rights, in general, should be considered as salary, reflecting on other funds of salary nature.

Moreover, we believe that there should be a proper law that should be regulated to protect the professional image of the soccer players, both in what refers to the collective image, paid by the arena law, as the individual image paid by the right to image, through the license agreement and use of image of the athlete, in which such behaviors must be curbed and the offenders must be punished.

According to the current rules, the right of arena has a clear element of remuneration, as they are funds paid for services by third parties, like tips, on the contrary of the image rights, paid by clubs to players, which is characterized by its wage nature because of its close link with the employment contract, in addition to its clear feature of remuneration. This fact is proved when one realizes that when the contract of employment ends, the same occurs with the license contract and use of the athlete's image. In addition, there's no objective and subjective criteria from the part of the clubs at the moment of setting the perceptual and amount paid. It is also important to mention that this situation is indiscriminately applied to all athletes.

In our point of view, the only type of license agreement and use of the image of the football player, who would retain their original legal nature and major duty of civil law, which is regulated and provided by the civil piece of legislation, would be those made between professional athletes and persons other than the employing club, whether corporations specializing in marketing or natural persons interested in exploring their image.

Therefore, we believe that the measures here outlined are the only effective way to stop perpetuating such abuses committed by associations of sport, always interested in excessive profits at the expense of the rights of others, in this case, at the expense of the athletes. Finally, it should be noted that, as it refers to nonprofits entities, such maneuvers are intended merely to raise the personal gain of the leaders of our clubs, hence the deplorable state and pre-bankruptcy in which most of them are.

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#### DEFRAUD AND IMAGE RIGHT OF THE PROFESSIONAL FOOTBALL PLAYER

##### ABSTRACT:

Firstly, this paper analyzes the professional football player and his conception as an employee and liable to labor rights. It not only exposes a brief history of the development of the legal relationships between the football player and the sports practice association, but also relates the amount of money which is called "the right of arena" and "image rights". Finally, it describes the possibility of using the image right in order to defraud the employment relations by creating a legal entity on behalf of the athlete.

**KEYWORDS:** professional athlete, right image; fraud.

#### FRAUDE ET DROIT DE L'IMAGE DEATHLÈTE PROFESSIONNEL DU FOOTBALL

##### RÉSUMÉ:

Tout d'abord, le travail fait une analyse de l'athlète professionnel du football et sa conception comme employé et comme personne en droit du travail. Il expose une brève histoire de l'évolution des relations juridiques existant entre le footballeur et l'association de la pratique sportive aussi bien qu'il discute le financement du droit d'arène et le droit de l'image. Pour conclure, il décrit la possibilité d'utilisation du droit d'image pour frauder les relations de travail à travers la création d'une personne juridique au nom de l'athlète.

**PAROLES CLEF:** athlète professionnel; droit de l'image; fraude.

#### FRAUDE E DERECHO DE IMAGEN DEL ATLETA PROFESIONAL DE FÚTBOL

##### RESUMEN:

Em primer lugar, el trabajo hace un análisis del atleta profesional de fútbol además de su concepción como empleado y sujeto de los derechos del trabajo. Expone un rápido relato de la evolución de las relaciones jurídicas que hay entre el jugador de fútbol y la asociación de la práctica deportiva, y también discurre sobre los capitales ganados por esos atletas por la exhibición en la cancha y sus derechos de imagen. Por fin, describe la posibilidad de utilización del derecho de imagen para engañar las relaciones de empleo, a través de la creación de una persona jurídica con el nombre del atleta.

**PALABRAS LLAVE:** atleta profesional; derecho de imagen; fraude.

#### FRAUDE E DIREITO DE IMAGEM DO ATLETA PROFISSIONAL DE FUTEBOL

##### RESUMO:

Primeiramente, o trabalho analisa a figura do atleta profissional de futebol e a sua concepção como empregado e sujeito de direitos trabalhistas. Expõe um breve histórico da evolução das relações jurídicas existentes entre o jogador de futebol e a associação de prática desportiva, bem como discorre sobre as verbas denominadas direito de arena e direito de imagem. Por fim, descreve a possibilidade do uso do direito de imagem para fraudar as relações empregatícias, através da criação de uma pessoa jurídica em nome do atleta.

**PALAVRAS-CHAVES:** atleta profissional; direito de imagem; fraude.

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