

SPORTS ASSOCIATIONS AND CLUBS ON THE SUBJECT OF SKIING AND WINTER SPORTS

1. General observations.

Various legislative provisions regulate sports clubs and associations; it must also be considered that in our regulations, performance of agonistic sports activity is basically a monopoly of the Italian National Olympic Committee (Comitato Olimpico Nazionale Italiano - C.O.N.I.), therefore when talking about sports clubs, exclusive reference is made to clubs organized within C.O.N.I. It must also be pointed out that by the term “sports clubs”, it is generally intended all organizations of the associative type having as object the performance and the purpose of diffusing and developing sports, as derived from institutive law No. 426 dated 6 February, 1942, by C.O.N.I., by P. R. Decree No. 157 dated 28 March, 1986, and by the by-laws of the sports federations (1).

The differences in technical-juridical terms between sports clubs and sports associations are nevertheless considerable.

2. Legislative regulation of sports clubs.

The first law that regulated the relations between sports clubs and the professional sportsmen and sportswomen, as well as the sports clubs, is dated back to 23 March, 1981, by law No. 91, repeatedly modified, even substantially, by rules that I will consider later on. With these latter rules, it was possible to solve various problems of juridical organisational nature which arose as consequence of the first law, with provisions established not so much to solve juridical issues, but for different purposes.

Law No. 91/1981 begins with a principle of a general character, compliant with the constitutional principles for which the performance of the sports activities, be these performed individually or collectively, whether at professional or amateur level, is free. There follow various provisions that do not concern the objective of the present notes.

Article 10 of this law is of fundamental importance and by which only sports clubs, constituted as joint-stock or limited liability companies could stipulate agreements with professional athletes; the second paragraph of this article envisaged that the articles of association should have provided that profits were entirely re-invested in the club for the exclusive pursuance of the sports activities.

Interpretative difficulties are not due to the limitation of the faculty to stipulate agreements with professional athletes only for joint-stock or limited liability companies, but due to the principle according to which profits were to be entirely re-invested in the company for the exclusive pursuance of the sports activities.

It was observed that, whilst the collective exercise of company activity for purposes of profit is typical of the company aspect, it cannot also be stated that the organizational model of the company should necessarily and only be used to share profits among shareholders. In fact, there are cooperative and consortial companies, which pursue different purposes; and the legislator approved more than once special laws or regulated the company form for non profit activities, even objectively, or to prohibit profit sharing when performing certain company activities; various public held companies are reminded,

constituted for purposes of general interest, whose action mainly aims at the performance of an activity having as purpose, objective cost effectiveness (2).

Sports clubs were within such categories on the basis of art. 10, 2nd paragraph, law No. 91 dated 23 March, 1981, calling for the obligation to re-invest profits for the exclusive pursuance of the sports activities; in addition, during company liquidation, once the shareholders were guaranteed the refund of the nominal value of shares or stocks, the residual assets was to be assigned to C.O.N.I., in accordance with the second paragraph of the original text of art. 13, law No. 91/1981.

This law was substantially modified by law No. 586 dated 18 November, 1996, by index book “Urgent provisions for professional sports clubs”. Regarding the present report, the changes brought to the concerned first and second paragraph of art. 10 must be considered: to the first paragraph it was added that, making an exception to art. 2488 of the civil code, it is in any case compulsory, for the professional sports clubs, the appointment of the board of auditors, whilst the second paragraph of art. 10, was modified as follows: “the articles of association must foresee that the company may perform exclusively sports activities and activities related or instrumental thereof. The articles of association shall foresee that part of the profits, not lower than 10%, is assigned to technical-sports education and training schools for youngsters”.

There is not enough space in this document to discuss in-depth the problem of non-profit companies; but some observations must be made. The previous text of the second paragraph of art. 10, which sanctioned the impossibility for sports clubs to pursue profit purposes, determined the difficulty in terms of company constitution and by-laws certification due to the exclusive

destination of eventual profits for sports purposes and the devolution of residual assets to C.O.N.I.'s assistance fund after the company's dissolution. Nevertheless, the explicit legislative provision, which sanctioned the company form to pursue sports aims even if excluding profit purposes, imposed the overcoming of the reasons for which it was possible to oppose the admissibility of companies constituted as non profit joint-stock companies.

The second and third paragraph of art. 10, law No. 91 of 1981, introduced by law No. 586/1996, expressly establish that the sports club can perform "exclusively sports activities and activities related or instrumental thereof", and that the articles of association shall foresee that part of the profits, not less than ten percent, must be assigned to technical-sports education and training schools for youngsters. With these modifications, it was expressly foreseen on one hand the faculty to "exclusively" perform sports activities, for which the company objective was determined within stricter limits; nevertheless on the other hand, the activities allowed to sports clubs were extended by foreseeing the possibility to also perform activities "related or instrumental" to sports activities. It does not appear that the expression activities "related or instrumental" to the sports activities was examined thoroughly; nevertheless, considering also other cases in which the legislator uses the related activities – consider only art. 2135 of the civil code, text in force, which defines the activities related with agricultural activities – it is realised that that the companies which can have, as exclusive purpose, the performance of a sports activity, basically have the faculty to perform also activities considerably different, provided that these are considered instrumental or related to performing a sports activity.

Regarding the modifications introduced with law 586/1996, sports clubs cannot any longer be defined as non profit since paragraph three of art. 10 now in force establishes that the articles of association foresees that part of the profits, not less than 10%, is assigned to technical-sports education and training schools for youngsters. It is obvious to deduce that once such 10% limit is met, profits can be assigned differently, a principle by which the possibility of performing an activity for obtaining profits is deduced.

In this way, all issues that were debated about the possibility of performing a non profit activity in the form of joint-stock and limited liability Company are overcome, even if by 1981, the contrary could have been asserted; non-profit companies developed further during the following years. To this effect, I recall the recent legislative decree No. 155 dated 24 March, 2006, on the company activity, pursuant to law No. 118, dated 13 June, 2005, that, as stated in art. 2 – “Company use” – the assets and services of company use, in art. 3, from index – “absence of a profit purpose” –, establishes – 1st paragraph – that the organization performed by a social company assigns the profits and the management stocks to the performance of the statutory activity or to increasing assets, by adding – 2nd paragraph - that "to this end, the distribution, even in an indirect manner, of profits and management stocks under any form is forbidden, however referred to, as well as funds and reserves in favour of directors, shareholders, sharers, employees or collaborators" (indirect distribution of profits are then defined).

Even after the 1996 reform, the agreements with professional athletes can be stipulated only by joint-stock or limited liability companies. This is confirmed by the provisions of the second part of the first paragraph of art. 10,

amended for which, as an exception to art. 2488 of the civil code, it is in any case compulsory, for the professional sports clubs, to appoint a Board of Auditors. Despite the imprecise expression, it must be taken for granted that the reference concerns, besides the joint-stock company, only the limited liability company, in view also of the relation with the first part of the same paragraph.

The performance of sports activities and related activities or instrumental, can also take place with any other type of company, which nevertheless cannot stipulate agreements with professional athletes as established by paragraph 1 of art. 10.

Since it is allowed to constitute sports clubs for the performance also of profit activities (art. 10, 3rd paragraph), as I have previously observed –the problems linked to non-profit joint-stock companies not only are not fulfilled, but also, all the more so, common rules on the subject of joint-stock companies must be deemed applicable, with the exception only of rules which are inconsistent with the specific discipline of the sports clubs.

I have previously mentioned the requirement that sports clubs follow the obligations derived from the C.O.N.I. regulation.

According with the original text of art. 11, law No. 91 of 1981, sports clubs, within 30 days from the Court decree foreseen by the fourth paragraph of art. 2330 of the civil code, namely since its coming into effect, had to deposit the articles of association at the national sports federation to which they were affiliated, furthermore notifying the national sports federation, within 20 days from the deliberation, of any occurred variation of the Company by-laws concerning the directors and the auditors. In this way, the national sports

federation was informed about the constitution of the company and of the variations foreseen by art. 11. Following the reform of joint-stock companies and cooperatives, the certification of the articles of association by the Court is no longer required; therefore, the articles of association that must be deposited at the national sports federation to which the company is registered, thirty days from registration in the business registry, as established by art. 2330 of the civil code (in fact, see art. 8 legislative decree No. 37/2004).

With the 1996 law, a new article - 12 - was introduced "- guarantee for the regular performance of sports championships - "with which it is established that, with the only purpose of guaranteeing the regular performance of sports championships, companies under art. 10 are subject, for the purpose of verifying their financial balance, to controls and consequent provisions established by the sports federations, with the delegation of C.O.N.I., according to the methods and principles approved by the latter. Therefore, it is further established the relation between sports clubs and specific regulation of sports federations.

Art. 13 - "right of notification to court" - of law No. 91/1981, as modified by law No. 586/1996, it established that national sports federations could proceed with the notification, in accordance with art. 2409 of the civil code, against companies subject to art. 10. Sports clubs, joint-stock and limited liability companies could therefore be subjected to judicial control as established by art. 2409 of the civil code.

Art. 8 of the above mentioned legislative decree No. 37/2004, by adapting the discipline of sports clubs to the company reform, established that in the second sentence of the first paragraph of art. 10, law No. 91/1981,

reference to art. 2488 of the civil code is substituted by referring to art. 2477 of the civil code, for which also for limited liabilities sports clubs, the regulation in force on the legal control of accounts for this type of companies applies, so that the appointment of the Board of Auditors is compulsory.

With art. 8 of legislative decree No. 37/2004, art. 13, law on sports clubs is substituted by the following: “judicial control”. “The procedure subject to art. 2409 of the civil code applies to companies subject to article 10, including those with a status of limited liability companies; the denouncing power is the right also of the national sports federations”.

3. Follows. The by-laws of sports clubs.

I cannot pause here to consider the requirements needed so that the sports authority can regulate the affiliation; nevertheless, it must be considered that the affiliation can be revoked by the national sports federation due to serious violations to the sports order and that the affiliation revocation determines the prohibition to perform the sports activity, for which is of essential importance for the activity of sports clubs. Such is the legitimate interested of these companies to the affiliation, that the last paragraph of art. 10 of the special law establishes that it is possible to appeal against decisions of the national sports federations to the C.O.N.I. executive committee, which will deliver its decision within sixty days from receiving the appeal (3).

In formulating the company’s business purpose, the second paragraph of art. 10 must be taken into consideration, according to which the articles of association shall foresee that the company can exclusively perform sports activities and activities related or instrumental thereof, since these are

companies the object of which are skiing activities, and in any case winter sports, the activity that will be performed must be specified, always within the limits of sports activities, and it must be taken into consideration that the company business purpose must be possible, lawful, specific or that can be determined. The notary cannot approve the by-law of a company which is too generic in indicating the company business purpose. Similar observations also concern the indication of activities related or instrumental to the foreseen sports activity, and further clarifications are essential since a mere indication of related or instrumental activity is not enough. These may be activities the nature of which may be profitable and also non profitable activities, which allow sports clubs to pursue profits.

To this effect, the third paragraph of the text of art. 10, now in force, law No. 91/1981 must also be considered, according to which an amount not less than 10% of the profits, to be considered as net profits, shall be assigned to technical-sports education and training schools for youngsters; even non compliance with this provision does not allow registration of the club in the registry of companies.

Being confirmed that even the sports clubs – joint stock and limited liability - and other types of companies, provided the impossibility of the latter to stipulate agreements with professional athletes, are subjected to the common regulation for whatever not established otherwise by special laws on the subject of sports, I only add some considerations on the peculiarities of these laws.

Nothing being established on the matter of the right of vote, thereby applies the common regulation established by the code (4).

Pursuant to the 6th paragraph of art. 10, the articles of association may subject the disposal of shares or quotes at “special conditions”. Firstly, it must be pointed out that the “special conditions” are not mandatory, but they can be introduced in the by-laws of joint-stock and limited liability companies, therefore the rule shall be intended as concerning the disposal of "shares". Nothing is specified in the mentioned rule, about the principles that can be applied by introducing the above mentioned restriction. Due to the lack of any particular criterion and limits about the “special conditions”, any condition can be established regarding to the disposal of shares and stocks; the provisions of articles 2355 *bis* and 2469 of the civil code are certainly applicable, concerning respectively limits to shares circulation and transfer of holdings in the limited liability company. However, it may not be deemed allowed that further and more severe limitations be introduced compared to those established by articles 2355 *bis* and 2469 of the civil code

Another consequence of the applicability of the common regulation, unless otherwise established, is the right of also the sports clubs to perform transactions on capital and to negotiate their shares on primary markets. There are some examples of sports clubs listed in the stock exchange. This statement must be intended in a general manner, however specifying that the problem appears to mainly affect soccer clubs (5).

4. Judicial and administrative controls.

Judicial and administrative controls are foreseen for sports clubs.

The original text of the first paragraph of art. 13, law No. 91 of 1981 established that the national sports federation, for serious management

irregularities, could request the Court, with justified claim, to put into liquidation the company and appoint a liquidator. The regulation was later modified.

For the text of art. 13 now in force and as previously described law No. 91/1981, as modified by art. 8 of legislative decree No. 37/2004, the applicability of the proceedings *ex art. 2409* of the civil code is envisaged for companies subject to art. 10, including those having the status of a limited liability; the power to claim is the right also of national sports federations.

In particular, compared to the regulation established by art. 2409 of the civil code, it is possible to observe the standing to sue as established *ex art. 2409* of the national sports federations (6).

The applicability of art. 2409 of the civil code to sports clubs, also constituted under the status of the limited liability type, is established by the recalled art. 8 of legislative decree No. 37/2004, therefore emitted subsequently to the new regulation for the joint-stock companies and cooperatives; nevertheless, it cannot be overlooked that judicial control, as established *ex art. 2409* of the civil code cannot be any longer applied to limited liability companies for various reasons that cannot be described here due to lengthy explanations, even to the extent in which this control is allowed after the reform was introduced. In favour of the applicability of such regulation, the second principle according to which the special law prevails over the general can be introduced; nevertheless, the new regulation concerning the limited liability companies following the reform is so different compared to the previous that it seems incompatible with art. 13 which regulates the control system in force for limited liability companies (7).

Regarding the controls carried out by sports bodies, art. 12 now in force – “guarantee for the regular performance of sports championships” - reduced previous possibilities of interventions of sports bodies, by limiting into establishing that, with the exclusive purpose of guaranteeing the regular performance of sports championships, the companies subject to art. 10 - joint stock and limited liability companies – are subjected, with the purpose of verifying their financial balance, to controls and resulting provisions established by sports federations, with delegation by C.O.N.I., according to the methods and principles approved by the latter (8). Other general provisions on sports activities performed according to the C.O.N.I. regulation are also applicable.

Regarding the regulations in force, it is not difficult to find the qualification of commercial entrepreneur to sports clubs that also carry out business activities, also considering the possibility to attain profits within certain limits. As a consequence, if a sports club that carries out business activities is insolvent, it can be declared bankrupt (9).

The principles that I briefly outlined in the previous pages apply to all sports clubs, and therefore also to sports clubs concerning skiing and winter sports. I can only mention the regulations on safety on the subject of safety in the performance of slope and cross-country winter sports, since this is not the subject of my observations, introduced by law No. 363 dated 24 December, 2003, which establishes various provisions on the subject of the management of equipped ski areas, and users conduct regulations of ski areas, provisions that cannot be overlooked when discussing civil liability problems regarding the sports clubs, under all possible implications on which doctrine and jurisprudence are not lacking.

5. Amateur sports clubs and associations.

Law of 1981 and those subsequent that modified it that have discussed up to now, intended to mainly regulate sports clubs that can be defined “professional”. But it cannot be overlooked the considerable importance of the so-called amateur sports clubs and associations, that in terms of quantity, involve the majority of persons practicing sports. These sports organizations are regulated by paragraph 17 of art. 90 of law No. 289 dated 27 December, 2002 (financial law 2003), according to which amateur sports clubs and associations must indicate in their trade name, the sports purpose and the amateur reason or trade name and can assume the following forms: a) sports association free of legal personality regulated by articles 36 and subsequent of the civil code; b) sports association with legal personality regulated by private law, according to President of the Republic Decree No. 361 dated 10 February, 2000; c) joint-stock sports club (or cooperative as established by law No. 128 dated 21 May, 2004) constituted according to the provisions in force, except those that foresee purposes of profits.

Therefore, in order to perform amateur sports activities, the organization can assume the form of non recognized association as established by articles 36 and subsequent of the civil code, the juridical personality regulated by private law and also the form of joint-stock company, except those that foresee purposes ogif profits. Letter “c” of paragraph 17 is not clear, since the regulation in force, as I observed in the previous pages, allows also joint-stock and limited liability companies may not to have purposes of profits; therefore it is not clear what it is meant for joint-stock company constituted according to the regulations in force, except those that envisage purposes of profits (10).

Finally, even though the above mentioned paragraph 17 foresees actual companies, the substance of this rule appears to mainly refer to associations.

Art. 90 of financial law dated 2003, on the subject of companies and sports organizations, also contained articles 18, 20, 21 and 22; these last three paragraphs were abrogated by law No. 128 dated 21 May, 2004, which substituted paragraph 18 of the above mentioned art. 90 with the various paragraphs 18, 18 *bis* and 18 *ter*.

According to the new paragraph 18 of art. 90, the amateur sports clubs and associations are constituted with written deed, in which the legal office must also be indicated. In the by-laws, the following must be expressly envisaged: a) the name; b) the business purpose with reference to the amateur sporting activities organisation, including the instructions activity; c) the assignment of the legal representation of the association; d) the absence of the purpose of profits and the provision that the revenues of the activity may not, in no case whatsoever, be divided among the members of the association, even in indirect manners; e) the regulation on the internal order inspired by democratic and equality principles of the rights of all associates, with the possibility to elect company functions, except for amateur sports clubs that take up the form of joint-stock companies or cooperatives for which the provisions established by the civil code are applied; f) the obligation to draw up the economic-financial statement, and also the approval methods of such by statutory bodies; g) the methods for the annulment of the association; h) the obligation to devolve assets for sport purposes in case of annulment of companies and associations.

An endless number of observations are suitable with the above mentioned paragraph 18; I shall only mention a few. Trade names are foreseen, in compliance with the name of joint-stock companies, which can be used to perform amateur sports activities, as cooperatives; joint-stock companies and cooperatives for which the regulations of the civil code apply, but excluding the purpose of profits for all companies, and in any case being met the special regulation. The exclusion of the purpose of profits is deduced clearly from the provisions of letters d) and h) of the above mentioned paragraph 18; there are strange provisions concerning the internal order of the associations, not be applicable moreover to joint-stock companies and cooperatives.

Therefore, the exclusion of the purpose of profits complies with the regulation of cooperatives and associations, which even for this reason differ from companies.

Provisions of less relevant importance are contained in articles 18 *bis* and 18 *ter* added to the above mentioned law No. 128/2004.

Finally, the sports activity with professional athletes can be performed only with reference to joint-stock and limited liability companies, bodies that can also have purposes of profits, for which these are considered as commercial entrepreneurs with all relative consequences, some of which I outlined in the previous pages. The amateur sports activity can be also performed by company bodies, but not necessarily so; any association form can be used, provided that it does not envisage purposes of profits, for which the most common structural model regarding sporting associations is that of non recognized association.

For organizers and managers, the consequences for adopting any of these forms for performing sports activities may be considerably relevant, since if these are companies or associations that have acquired legal personality and therefore patrimonial independency, creditors can only act towards the company or other body; instead, should these be non recognized associations, absence of juridical personality determines personal and joint liability of those that have acted in the name and on behalf of the association (11).

These are general principles applied to all the so-called amateur sports clubs and associations, regardless of the sports activity performed.

Prof. Attorney Guido Uberto Tedeschi

NOTES BY G.U. TEDESCHI, *Associazioni e società sportive in materia di sci e sport invernali. (Sports associations and clubs on the subject of skiing and winter sports)*

1. VOLPE PUTZOLU, *Le società sportive*, in *Trattato delle società per azioni (Sports clubs, in Treaty of the joint-stock companies)* coordinated by G.E. Colombo and G.B. Portale, 8, Turin, 1992, page 303. On the sports clubs in general, see also CIRENEI, *Società sportive (Sports clubs)*, in *Novissimo digesto italiano (Latest Italian digest)*, appendix SEGR-Z, Turin, 1987, page 388 and subsequent and FRASCAROLI, *Sport (dir. pubbl. e priv.) (Sport [public and private management])*, in *Enc. dir.*, XLIII, Milan, 1990, page 521 and subsequent
2. GRIPPO, in Annexes and others, *Diritto commerciale (Commercial Right)*, Bologna, 1993, page 145;
3. VOLPE PUTZOLU, *op. cit.*, page 313.
4. Similarly see VOLPE PUTZOLU, *op. cit.*, page 327 and subsequent
5. On the topic see COSSU, *L'evoluzione normativa delle società sportive in Riv. Not. (The evolution of regulations of sports clubs) in (Not. Review)*, 2000, page 1368 and subsequent.
6. On the topic see FICO, *Il controllo giudiziario sulle società sportive (Legal control on sports clubs)*, in *Società (Companies)*, 1997, page 100 and subsequent and MANGIONE, *Nuove norme in materia di società sportive professionistiche (New regulations on the subject of professional sports clubs)*, in *Riv. soc. (in Companies Review)*, 1996, page 1327 and subsequent
7. Against the applicability of art. 2409 of the civil code to limited liability companies after reform see G.U. TEDESCHI, *Il nuovo art. 2409 del c.c. (The new art 2409 of the civil code)*, in *Contratto e impresa (in Contract and Company)*, 2005, page 716 and subsequent. The Constitutional Court decided accordingly, 29 December, 2005, No. 481, in *Foro it. (Italian Law Court)*, 2006, I, col. 1293.
8. On the topic see MIRRA, *Vicende e particolarità delle società sportive professionistiche e dilettantistiche (Matters and peculiarities concerning professional and amateur sports clubs)*, in *Il diritto dello sport (Right of sports)*, addition to *Giur. mer. (Mer. Jurisprudence)*, 2006, No. 6, page 10 and subsequent; COSSU, *op. cit.*, in *Riv. not. (Not. Review)*, 2000, page 1372 and subsequent; VOLPE PUTZOLU, *op. cit.*, page 328 and subsequent

9. On the topic, Court of Bologna, 6 May, 1999, in *Giur. comm. (Comm. Jurisprudence)*, 2001, II, page 135, with note by N. BRICOLA.
- 10.V. MIRRA, *op. cit.*, page 12 and subsequent and MACCARONE, *L'esercizio in forma organizzata dell'attività sportiva (The Exercise in organised form of sports activity)*, in *Soc. (Companies)*, 1997, page 261 and subsequent
11. On the topic see MIRRA, *op. cit.*, page 14 and subsequent