

Understanding ESG's Litigation Risk with Sports Law Expert Stephen Townley



Sports law authority Stephen Townley, FCI Arb offers his insights into why environmental, social and corporate governance (ESG) is such a significant emerging litigation risk for sport – and what industry stakeholders can do about it.

It is thought that the term 'ESG' (environmental, social and corporate governance) was first used in a high-profile setting by the **United Nations** less than two decades ago.

However, despite its relatively recent arrival into modern language, the acronym now represents one of the most important litigation issues facing sports rights-holders, event operators, teams, athletes and organisations.

Indeed, widely respected sports law authority Stephen Townley pinpointed ESG as one of the top three emerging litigation risks in the sector in a recent edition of **Lawyer Monthly**.

Elaborating on this to Global Sustainable Sport, Townley points out that, as outlined by the **Corporate Finance Institute**, ESG helps stakeholders to understand how an organisation is managing risks and opportunities related to environmental, social and governance practices.

Furthermore, all three topics referenced by the acronym have become increasingly prominent issues in sport and the wider entertainment industry in recent years.

"Sport over recent years has been subject to criticism over its accountability and governance structures," says Townley, who references the infamous example of the 'FIFA Gate' episode that blew up surrounding the governance of world football in 2015.

"Also, events such as the Olympic Games have a huge environmental impact with, for example, construction and travel. Some impacts may be positive with regeneration as their purpose, but is there consistency in the measurement of environmental impact in the initial decision making at all levels? Finally, the social impact of sport is huge. Some people's lives are focused on which football team or tennis player wins or loses."

Track record

Townley's track record ensures he is well placed to make such a judgement on the growing importance of ESG in sports law. He works through law firm Stobbs in relation to intangible asset management as Special Counsel for Sport and Entertainment Brands, and is a conflict resolver and neutral at JAMS, CAS, CI Arb and WIPO in technology, sport and entertainment.

In 1984, he established Townleys and served as its senior partner for 18 years, helping it to become recognised as the largest international sports law and media boutique outside the United States.

Over the past decade, he has been involved in complex cross-border litigation and reputational issues in India and the Middle East and has handled a number of ESG issues, particularly in the area of environmental protection.

Townley's interests in the environment and sustainability extend beyond his legal work though. His family farm hospitality and pub business, **Wild by Nature LLP**, was an early investor in a community social engineering project, and he subsequently became an adviser on environmental licensing to the first Welsh community seaweed farm, Câr-y-Môr.

"Sport over recent years has been subject to criticism over its accountability and governance structures."

Understanding ESG's Litigation Risk CONTINUED

Brand reputations

According to Townley, sport's ties to ESG are strengthened by the sector's reliance on intangible assets such as intellectual property, goodwill, data and relationships, rather than physical objects.

"It is these species of assets that currently dominate the intrinsic value of sport and entertainment brands," he says.

This is part of a broader shift. According to **Ocean Tomo** research, in 2020, 90% of the cumulative value of US companies on the Standard and Poor 500 Index was accounted for by intangible assets. In 1985, the figure was just 32%.

However, in this respect, sports industry stakeholders are often hamstrung by a lack of self-awareness, with Townley highlighting Abraham Lincoln's famous quote: "Character is like a tree, and reputation is like a shadow. The shadow is what you think of it; the tree is the real thing."

Townley adds: "From research undertaken by my colleagues at Valuation Consulting very few organisations within the sport sector understand that they are brands and then appreciate that their value largely comprises intangible assets and therefore how that value is now linked to ESG."

"In relation to such values, sports brands are frequently disconnected from pure revenue-based valuation models and are impacted by scarcity in supply and so-called 'trophy' factors, because of prestige effected by ownership. It follows however that when a shadow is cast over a reputation related to those intangible assets then the value can be quickly lost."

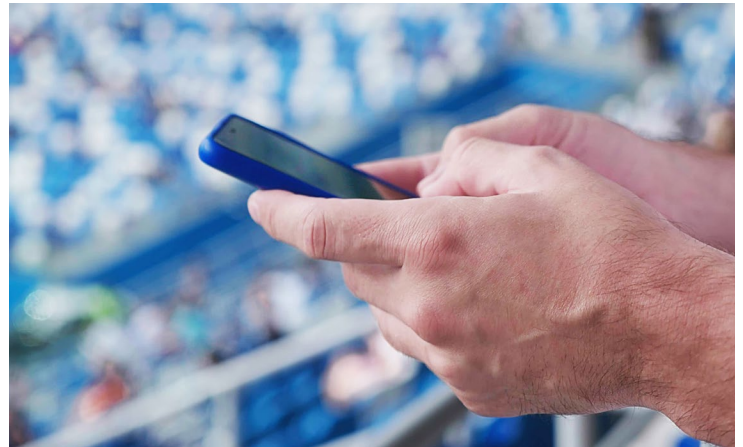
"The extent of the reputational shadow will follow from a series of interactions in sport with, for example, media, fans, followers, volunteers, influencers, participants, users, customers, partners, suppliers, staff, investors or shareholders and regulators."

Social media

The growth of social media has added a new dimension to the issue, Townley says.

"This revolution in the growth of social media has given a three-dimensional impression to a sports performance whereas it probably used to only have two dimensions – namely the visualisation of an event on a screen plus verbal commentary," he adds.

"Sports and entertainment personalities can now gather communities around them who are vociferous and opinionated. It is not that people expressing opinions is new; it is the amplification and speed of distribution of those opinions that has changed and the immediate impact this can have on reputations. To some extent, legal remedies are probably less effective these days because of the time lag."



As an example, Townley underlines the speed at which news of a high-profile incident at the FIFA Women's World Cup final was shared worldwide, when Spanish national team star Jenni Hermoso was kissed on the lips – allegedly without her consent – by Royal Spanish Football Federation President Luis Rubiales, who eventually resigned.

"Brands within sport and entertainment therefore have heightened litigation vulnerabilities, particularly from ESG reputational issues," Townley adds. "They drive curiosity, debate and public opinion. Reputations underpin brand value. With success, sport and entertainment personalities become social influencers."

Recent developments

Townley also says that some recent developments within the legal industry are impacting litigation – and cites two examples outside sport to make the point.

"Litigation costs have been increasing fast and many sports organisations are seeing that litigation needs to be avoided because of costs impact on the bottom line," Townley explains. "Nevertheless, third-party funders see litigation as assets to monetise. A recent example quoted in the Financial Times vividly illustrates this development. A New York court recently awarded

Understanding ESG's Litigation Risk CONTINUED



a record **\$16bn damages** to two expropriated shareholders in an oil resources claim. The claim was largely financed by litigation funding by Burford Capital, which was reported to make a potential \$6bn return on this investment.

“Class actions have also expanded in the financial, medical and energy sectors, giving access to a new range of claimants. Last year, the **BBC** reported that Volkswagen was to pay £193m to more than 90,000 drivers in England and Wales after it settled a High Court claim over the installation of emissions-cheating devices in its vehicles.”

According to recent research by Townley’s colleagues at Stobbs, there has been growth in environmental litigation, particularly around pollution incidents. “I have been involved in a number of recent sports environmental claims and challenges and can affirm this recent trend,” he says.

Understanding risks

So, how can sports and entertainment brands prepare for and mitigate ESG litigation risks?

As a starting point, Townley says they should “focus more time and effort on allocating internal resources on knowledge gathering, measurement techniques, and early warning systems to understanding contemporary risks”.

He adds: “Risks are always evolving and changing. Tech is greatly advancing efficiencies in this process in using algorithms to aid risk prediction.

“General counsels within organisations in my view have a particularly valuable role where they exist in mobilising management and other internal and external resources to flag litigation risks early. Bear in mind that the legal industry that may assist when litigation arises might be less focused on avoidance, so it may well be worth engaging external advisors around the avoidance agenda.”

Mitigation strategy

In a complex landscape, it also pays to consider the full range of potential litigation scenarios.

“Always start any mitigation strategy from the position that litigation is unpredictable,” Townley adds. “A decision to litigate usually relies upon an assessment of who is going to win or lose.

Avoid emotions creeping into the analysis. I have seen the best cases on their merits lost. There is frequently a discounting of the cost and disruption within an organisation of pursuing the litigation route at early stages. Once litigation starts, it can be very difficult to stop, particularly after large funds have already been spent. Attitudes harden and control of the settlement agenda is lost.

“Having spent 40 years-plus now in this sector in roles ranging from in house to external to tech investor and entrepreneur and arbitrator, mediator and conflict resolver, and given the intrinsic value of intangible assets, internal readiness and preparation are vital in my view. Improve governance and information sharing, and distribution. Take steps to measure performance and outcome to explain decisions. Of course, insure risks when you can, but as Covid has taught us not everything will ever be covered.”

This article was originally published in the October 19, 2023 issue of [Global Sustainable Sport](#) and is reprinted with their permission.

JAMS neutral [Stephen Townley, FCI Arb](#), is a lawyer, businessman and seasoned ADR professional with extensive expertise resolving high-value legal and business disputes in Asia, the Middle East and North America. His diverse litigation and transactional background includes the founding of Townleys, the first and largest international sports law and media boutique outside the United States, in 1983. Mr. Townley is an arbitrator and mediator for the Court of Arbitration for Sport and a mediator for the World Intellectual Property Organization.