



# ‘Cheating as a breach of employment contract obligations’

**Prof. Dr Martin Maties, Head of the Research Centre for eSports Law at the University of Augsburg**

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venue: Beihang University, Beijing (China)  
duration: approximately 90 minutes, incl. time for discussion

*Prof. Dr Martin Maties*





# Agenda

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- 1 The concept of cheating
- 2 Cheating as a breach of duty
- 3 Employment law consequences of cheating
- 4 Civil law consequences of cheating
- 5 Conclusion

**Maties** [Hrsg.]

StichwortKommentar

# eSport-Recht

Beratungs- und Anwendungswissen

Alphabetische Gesamtdarstellung



**Nomos**

Most of the findings come from

Keyword commentary on e-sports law

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# Cheating the term





# Well-known instances of cheating

## Two examples

When: November 2018

Who: CS:GO player 'Forsaken'

Where: Offline tournament

How: Aimbot detected by referee (admin)

Consequences:

- Clan OpTic India was disqualified
- Forsaken was dismissed from the clan
- Five-year ban imposed by the Esports Integrity Commission (ESIC)
- VAC ban imposed by publisher Valve



# Well-known instances of cheating

## Two examples

When: 2012

Who: Team „Azubu Frost“

Where: League of Legends World Championships

How: Ghosting (take a look over your shoulder for further information)

Consequences : 30.000 \$ Penalty from Riot Games

→ Forms of cheating vary, but the legal consequences also differed



# Definition

## Cheating

Cheating, along with toxic behaviour (which is sometimes understood as an umbrella term), is one of the most disruptive factors and poses the greatest threat to the integrity of esports!

Premise: Combating cheating is one of the most pressing tasks for the development of esports.

- '(P): The term 'cheating' is **not a legal term and does not constitute an offence.**
- The term is used very **inconsistently** .
- There is **no established consensus.**
- Cheating is a real phenomenon.



# Cheating

## Linguistically

When defining the term, a distinction must be made between three linguistic meanings:

1. Colloquial usage
2. Technical usage (unless law is the technical discipline)
3. Legal usage

Often identical, but may differ (cf. e.g. 'possession' and 'magic mushrooms')

'Cheating' → English: to cheat, 'to skimp' or 'to deceive'



# The concept of cheating

## Methodological conceptualisation

Definitions are normally to be formulated teleologically (teleological concept formation)

→ contextual embedding within esports and, in the case of legal texts, also within the law (guided by the purposes of the relevant legal provision)

BUT: as long as and to the extent that no law exists, the aim is to describe a phenomenon descriptively as it actually occurs and to distinguish it from other phenomena

→ **ontological or phenomenological conceptualisation**

That is to say, the manifestations of behaviours that are, according to current understanding, covered by the concept are examined; the characteristics are then abstracted to form the definition.



# Distinction

## My own definition

Def.: Cheating is the gaining of an advantage through the commission of conduct prohibited by the relevant contract.

Characteristics: relative concept (not absolute)

- Key characteristics:
1. Prohibition
  2. Breach
  3. Advantage

The purpose of any definition is to distinguish the concept from other situations in life; therefore, one should examine its relationship to other terms.



# Definition

## Cheating – Exploiting – Toxic Behaviour

According to the understanding adopted here, three terms must be distinguished from one another:

Cheating: as explained

Exploiting: from the English 'to exploit' – to take advantage of = the deliberate exploitation of a bug to gain an advantage in the game (synonyms: 'glitching' or 'bug abusing')

Toxic behaviour = anti-social behaviour, often due to anonymity on the internet (but also openly and directly)

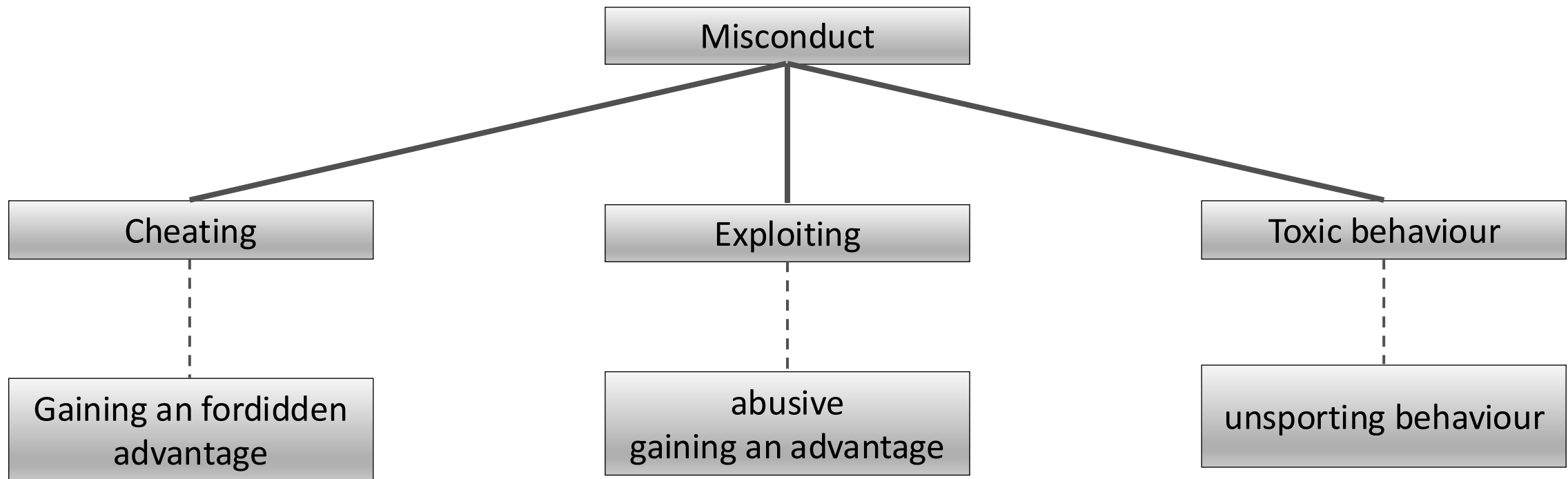
Why is this important? → because of the different legal consequences at stake

*Note:* In some cases, 'toxic behaviour' is also understood as an umbrella term for cheating, exploiting and flaming. Presumably, the 'toxicity' is understood in terms of the game atmosphere, whereas here I am focusing on behaviour towards individual esports players.



# Distinction

## Graphical



Cheating  
as  
breach of  
duty





# breach of duty

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## Prerequisites

For a duty to exist, there must be a contractual relationship, cf. Section 311(1) of the German Civil Code (BGB).

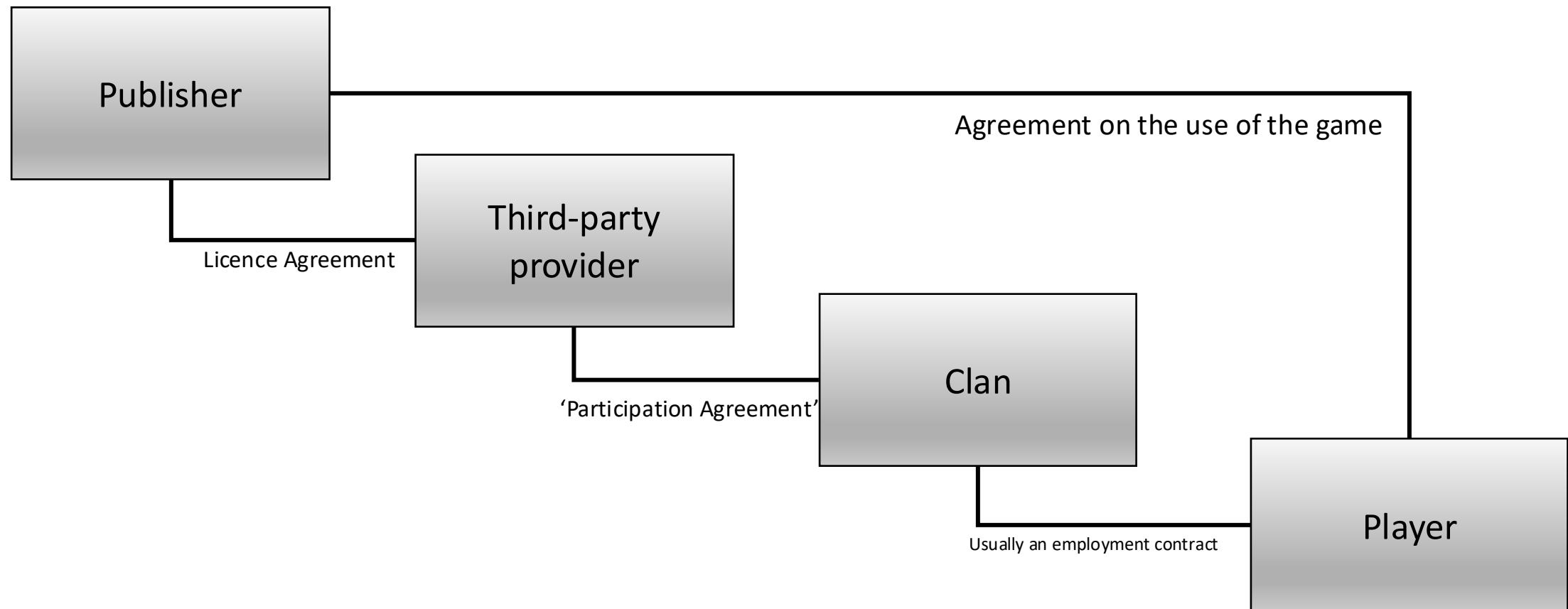
- by operation of law (Var. 2) or
- by contract (Var. 1)

Here, the legal relationships must be distinguished from one another. In the absence of statutory provisions, contractual relationships are particularly relevant.



# Contractual relationships

## Who with whom?



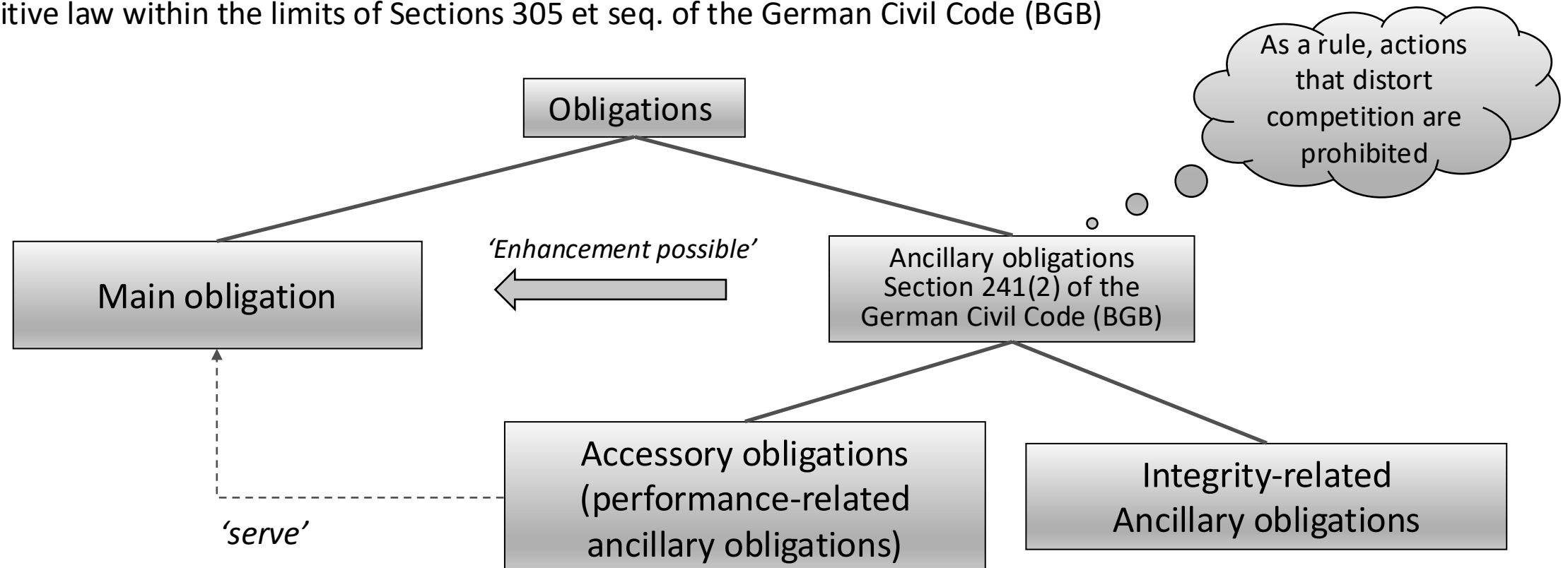


# Freedom of contract

## Discretionary nature

Article 2(1), Article 1(1) of the Basic Law → Freedom to determine the content of the contract

Obligations may be stipulated up to the limits of mandatory law; in the case of general terms and conditions, for dispositive law within the limits of Sections 305 et seq. of the German Civil Code (BGB)





# Relativity of contractual obligations

## One for all, all for one?

Cheating = cheating?

Example: The publisher does not specify any requirements regarding the use of programmable keyboards in the game, whereas the tournament organiser does. The clan has no such requirements in its employment contract and does not issue any instructions not to use macro keyboards.

*(Even if no advantage is gained, it is still cheating, as it depends on the action itself.)*

If the esports player uses such a keyboard in the tournament, then:

- The esports player is not cheating vis-à-vis the publisher (in the absence of a ban)
- The clan is cheating against the organiser (due to the contractual prohibition)
- The esports player is cheating against the clan (due to the obligation under Section 241(2) of the German Civil Code (BGB))

As a rule, a contractual prohibition is extended 'downwards' in one's own interest.

# Labour law implications of cheating





## Subject of investigation here

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### Clan – Player

Cheating by an esports player in their capacity as an employee constitutes a breach of their employment contract.

Consequently, the following consequences may arise:

- Possible indirect impossibility of performing the work
- A written warning
- Termination
- Compensation
- Contractual penalty



# Bans and Consequences

## Clan – Player

A ban may prevent a player from using the esports title (ban imposed by the publisher).

In addition, the organiser may ban the player (prohibit them from taking part in tournaments or refuse to enter into further participation agreements).

Depending on the terms of the employment contract (if the obligations extend beyond merely playing and training), this may constitute a partial or total impossibility of performing the work.

- Section 275(1) of the German Civil Code (BGB) regarding the principal obligation
- Section 326(1) of the German Civil Code (BGB) regarding the consideration (note: paragraph 2, if the clan has given instructions)



# A written warning

## Clan – Player

A warning letter, as the mildest sanction (apart from a verbal warning), merely paves the way for dismissal on grounds of conduct.

### **complaint,**

- The employer must specify the precise facts of the case in which the employee is alleged to have breached the employment contract.

### **note,**

- they must also make it clear that they will not tolerate such misconduct in future.

### **and announcement.**

- and must specify the specific action they will take if the employee repeats the same or similar misconduct.



# Termination

## Clan – Player

A distinction must be made regarding dismissal (within and outside the scope of the KSchG)

If within → Section 1(1) of the KSchG

Conduct-related → breach of duty and continuation of the employment relationship being unreasonable (as a rule (+))

Personal grounds → where there is no possibility of continued employment due to lack of suitability (a ban may (potentially temporarily) remove the lack of suitability)

Exception: The clan instructed the player to cheat

→ No breach of duty; therefore, no dismissal on grounds of conduct

→ It is questionable whether dismissal on personal grounds may be issued or whether § 242 BGB precludes this

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Cheating – where committed intentionally – will generally also constitute good cause within the meaning of Section 626 of the German Civil Code (BGB)



# Compensation

## Clan – Player

The following may be considered as grounds for an obligation to pay damages:

- Section 280(1) of the German Civil Code (BGB) on breach of integrity (e.g. loss of a sponsor due to negative image transfer)
- Sections 280(1), (3) and 281 of the German Civil Code (BGB) on the grounds of poor performance (due to a breach of the principle of equivalence (P): difficult or impossible to prove)

(P): In most cases, employees are of legal age (due to compulsory schooling and their vocational training or university studies) (Section 2 of the German Civil Code (BGB)).

→ No issues regarding liability within the meaning of Section 280(1), second sentence, of the German Civil Code (BGB) → Problem: not valid in employment contract (section 619a BGB)

→ BUT: in e-sports, it is also quite conceivable that employees may be minors

(P): Section 276(1), second sentence, of the German Civil Code (BGB) refers to Section 828 BGB (paragraph 3 [older than 7, younger than 18] could become relevant) → Capacity to understand in individual cases (commentary generally follows rules of thumb for specific behaviours/legal transactions → difficult in esports)



# Contractual penalty

## Clan – Player

Section 339, sentences 2 and 1 of the German Civil Code (BGB)

- Obligation to refrain from an act (cheating)
- (P): Contractual agreement required
  - Consent through the employment contract
  - Review of contract terms pursuant to Section 310(3)(2) of the German Civil Code (BGB)
    - Section 309(6) of the German Civil Code (BGB) does NOT preclude this, as it does not concern termination of the contract
    - Section 307(1), first sentence, of the BGB: unreasonable disadvantage  
(Balancing of interests here in favour of the employer; burden of proof regarding damage and its extent)
    - Section 307(1), second sentence, of the German Civil Code (BGB): lack of transparency due to the vague term 'cheating'?
      - probably not
    - (P): Amount? The Federal Labour Court's (BAG) rule of thumb does not apply (based on salary during the notice period)

# Civil-law consequences of cheating





# Compensation

## Players amongst themselves

Items of damage:

Disqualification from the tournament → Loss of prize money (P: provability within the meaning of Section 252 of the German Civil Code (BGB) / causation)

Ban on the entire team → Loss of the opportunity to win in future events (P: no protected right)

(P): prevailing view: no contractual relationship between employees (contrary view: Riesenhuber in JZ)



# Compensation

## Player – Organiser

Compensation for damages due to the event potentially having to be repeated

(P): Is there a contractual relationship between the organiser and the players?

→ A matter to be decided on a case-by-case basis (depending on whether only the clan becomes a contracting party [presumably the norm])

The clan is in any event liable for damages to the organiser.

The clan may then, where applicable, seek recourse (see above) from the employee (note internal compensation for damages → However, cheating is generally intentional, i.e. full liability applies; exceptions are, however, conceivable).



# Compensation

## Clan – Clan

Compensation for loss of prize money (P: provability within the meaning of Section 252 of the German Civil Code (BGB) / causality)

Basis of the claim: Section 280(1) of the German Civil Code (BGB) relating to the participation contract

(P): Is there a contractual relationship between the clans? If applicable, Section 328 of the German Civil Code (BGB) by analogy

In my view, it is entirely reasonable to regard the prohibitions on cheating as a safeguard that also benefits the other participants. Where expressly agreed, this is easier to justify than obligations arising under Section 241(2) of the German Civil Code (BGB).

# Conclusion





# Transferability

Sports law + working from home + employment law = esports employment law

- Many insights can be applied from sports law and employment law.
- Distinctive feature → There are more stakeholders than in traditional sports law, which complicates the interplay of legal relationships.
- Distinctive feature → There are no absolute rights vis-à-vis the publisher, who can therefore regulate everything by contract (licence agreement or EULA).
- If the publisher is not also the organiser, the publisher's prohibitions on cheating can often (unless otherwise agreed) be interpreted as forming part of the organiser's contract with the clan or esports player (Section 157 of the German Civil Code (BGB)).
- Special feature → It is currently difficult to manage the fact that publishers 'simply' impose bans (the legal position must be validly reserved in the contract; furthermore, it is questionable whether the selection in accordance with Section 315(3) of the German Civil Code (BGB) is verifiable and/or whether the principle of equality has an influence)



# Many thanks for your attention

