

# *The International Sports* **Law** *Journal*



2005/3-4

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Recently, European sports judgments have proliferated, which may serve to illustrate the still growing importance of the European Union and with it of Community law for professional sports. The *Meca-Medina and Majcen* Case of 30 September 2004 deals with the anti-doping rules of the IOC and the freedom of athletes from a competition law perspective. The case of *The British Horseracing Board Ltd and others v. William Hill Organisation Ltd* of 9 November 2004 - and related cases in the field of football - concerns the legal protection of databases on these matters. In the *Laurent Piau* Case of 26 January 2005, the European Court of Justice tested the FIFA Players' Agents Regulations against European competition law. Finally, the European Court delivered a judgment in the *Simutenkov* Case on 12 April 2005 concerning the status of a Russian professional football player in Spain which followed up *Kolpak*. A critical analysis of the FIFA mandatory players' release system for international matches is to be found in Professor Stephen Weatherill's leading contribution on the pyramid structure in European professional football. This issue also considers the new UEFA rules concerning the number of locally trained players in the European club competitions in the light of Community law.

In this context, it is worth mentioning that the Asser Institute has recently implemented a research assignment from the European Parliament concerning professional sports (and football in Europe in particular) and the rules of the Internal Market. The study was conducted in cooperation with Dr Richard Parrish, Edge Hill College, United Kingdom, and Sport2B in The Netherlands. It was presented at a press-conference in Strassbourg on 28 September this year.

In the first half of this year the ASSER International Sports Law Centre held seminars concerning "Sports Image Rights" in Lisbon, Amsterdam, Munich and London following the publication of the book by the same title by T.M.C. Asser Press. In February last in Lisbon, Abreu, Cardigos & Associados Law Firm and the Portuguese Ministry of Sport were closely involved. In Amsterdam, cooperation took place with the Hugo Sinzheimer Institute for labour law of Amsterdam University and with CMS Derks Star Busmann Law Firm. In Munich, this role was fulfilled by TaylorWessing Law Firm and in London by Couchmann & Harrington Associates. On 25 April last a seminar concerning "Good Governance and Integrity in Sport" featured on the Asser Institute agenda, during which among other things the NOC\*NSF Recommendations on this point were explained by John Jaakke, Partner at Van Doorne Advocaten, Chairman of Ajax Amsterdam and a member of the NOC\*NSF Committee for this topic, and the results were presented of the study "Preventive screening of professional football as a branch of industry" by KPMG Integrity & Investigation Services, as assigned by the Dutch Ministry of Justice.

Finally, we extend a heartfelt welcome to the ISLJ Advisory Board's new members: Prof. Alex Voicu, Faculty of Physical Education and Sport, University of Cluj-Napoca and Dan Visoiu, both Members of the Ethics Commission of the Romanian Olympic and Sports Committee.

*The Editors*

## ASSER/SENSE SEMINAR

in cooperation with Abreu, Cardigos & Associados, Lisbon, and  
the Ministry of Sport of Portugal

**Monday 14 February 2005**  
**Venue: Museu Vieira da Silva, Lisbon**  
**Opening: 15.00 hours**

*"The European Union and Sport: Sports Image Rights  
and Other Current Developments"*

**Speakers:** Alexandre Miguel Mestre, Adjunct to the Secretary of State for Sport

Roberto Branco Martins, Research Fellow, ASSER International Sports Law Centre and  
Lecturer in Labour Law and Sport, University of Amsterdam

Prof. Ian Blackshaw, International Centre for Sports Studies (CIES), University  
of Neuchâtel, Switzerland, and Member of CAS

César Bessa Monteiro, Partner, Abreu, Cardigos & Associados

The meeting was chaired by Dr Robert Siekmann, Director, ASSER International Sports  
Law Centre and Dr Pedro Cardigos dos Reis, Partner, Abreu, Cardigos & Associados.

# Is the Pyramid Compatible with EC Law?

by Stephen Weatherill\*

## 1. Introduction

The European Commission's Helsinki Report, which was published in 1999, includes the assertion that 'the pyramid structure of the organisation of sport in Europe gives sporting federations a practical monopoly. The existence of several federations in one discipline would risk causing major conflicts ...'.<sup>1</sup> Indeed it would create such a risk. It is not the purpose of this short paper to argue a case in favour of an injection of competition into the job of fixing the rules of the game. This contribution is instead driven by a concern that the pyramid structure, and its consequent attribution of monopoly power to sports federations, goes beyond what is required for the proper organization of European sport (in particular, football). A considerable degree of the monopoly power enjoyed by sports federations has profound commercial implications, and it is submitted that the currently constituted pyramid structure is inadequate to allow proper representation of and participation by all affected interests. Litigation is pending, and its potential impact is summarised. In particular, this paper makes a case in favour of allowing a more direct involvement in some aspects of decision-making by the major clubs than is permitted by the pyramid structure; and EC competition law is identified as a lever for achieving a re-shaping of the organisation of the game.

## 2. EU sports law and policy - the constitutional background

A brief inspection of the constitutional background is helpful in establishing an appreciation of the delicacy of the matter. According to Article 5(1) EC the European Community 'shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein'. This principle of attribution or conferral insists that the EC may act only according to the limited mandate crafted for it by the Member States under the Treaty. Moreover, it is not open to the EC to extend the scope of that authorization from within the system. The Member States, acting at times of Treaty revision, are the constitutionally proper source of change.

Article 5(1) might initially seem to promise sport an immunity from the application of the rules of the EC Treaty. The EC has no explicit *legislative* competence in the field of sport provided by its Treaty. But sport as an economic activity is subject to the basic principles of EC law, including most prominently the Treaty provisions concerning free movement of labour and competition policy. This centrally important finding lies at the heart of the European Court's celebrated pair of sports law rulings of the 1970s. In *Walrave and Koch v UCI*<sup>2</sup> and in *Dona v Mantero*<sup>3</sup> the Court established that the functionally broad reach of the EC Treaty provisions governing the free movement of persons guarantees their application to sport in so far as it constitutes an economic activity - despite the absence of any explicit recognition in the Treaty of the subjection of sporting practices to the demands of EC trade law.

It took until the 1990s before the development of EC sports law became more than an esoteric backwater. *URBSFA v Bosman*<sup>4</sup> was important as an expression of the European Court's persisting view that sport falls within the scope of the EC Treaty in so far as it constitutes an economic activity. The judgment was also significant for the Court's concern to grapple with the peculiar characteristics of sport, which in some respects is not an industry like any other. But most of all *Bosman* was a landmark in shaping EC law as a regime with capacity in practice to force significant change in the sporting status quo. *Walrave and Koch* and *Dona v Mantero* mattered on paper. *Bosman*

mattered on turf. The transfer system was radically amended and the system of intra-EU nationality discrimination in club football was abandoned as the direct and unavoidable consequence of the judgment.

## 3. EU sports law and practice

Since *Bosman* the body of 'EC sports law' has grown fat. One may readily cite important judgments of the Community judicature such as *Deliege v Ligue de Judo*<sup>5</sup>, *Lehtonen et al v FRFSB*<sup>6</sup>, *Deutscher Handballbund eV v Maros Kolpak*<sup>7</sup>, *David Meca-Medina and Igor Majcen v Commission*<sup>8</sup>, and *Igor Simutenkow*<sup>9</sup>. The Commission too has been actively engaged in assessing how EC law affects the autonomy of decision-makers in sport. One may readily cite richly illustrative decisions such as *UEFA/Mouscron*<sup>10</sup>, *FIA (Formula One)*<sup>11</sup>, and the formal Commission Decision published as *UEFA Champions League* giving a green light to collective selling arrangements<sup>12</sup> - and this is very far from an exhaustive list. The Commission's explorations have largely concerned Articles 81 and 82, the EC Treaty provisions governing competition law, rather than the free movement provisions which provided the cutting-edge for the Court's initial incursions into sporting autonomy. But, taken in the round, the basic approach to which both the rules on competition and those on free movement are wedded is the same - to what extent is sport able to show that it has distinctive characteristics and concerns which must be taken into account in the application of the rules of the EC Treaty?<sup>13</sup>

And this, in short, is the nature of the challenge facing the EC as it crafts a 'policy on sport'. Sport is an economic activity, as the Court has always insisted, but it is not simply an economic activity like all others. The institutions of the EC need to shape their approach to sport with due regard for its special characteristics, but the Treaty provides no explicit guidance on what these might be. And Article 5(1) EC looms large in denying the institutions of the EC an unlimited competence in regulating sport.

Visible points of thematic concern emerge from the case law. They represent threads that are gradually being woven into an EC sports law and policy. *URBSFA v Bosman* was the launchpad for this intellectual quest. The European Court accepted that sport is, in short, special. It declared that:

\* Jacques Delors Professor of EC Law, Oxford University, United Kingdom.  
 1 COM (1999) 644 and/2. For comment see S. Weatherill, 'The Helsinki Report on Sport' (2000) 25 *ELRev* 282.  
 2 Case 36/74 *Walrave and Koch v UCI* [1974] *ECR* 1405.  
 3 Case 13/76 *Dona v Mantero* [1976] *ECR* 1333.  
 4 Case C-415/93 *URBSFA v Bosman* [1995] *ECR* I-4921.  
 5 Cases C-51/96 & C-191/97 *Deliege v Ligue de Judo* [2000] *ECR* I-2549.  
 6 Case C-176/96 *Lehtonen et al v FRFSB* [2000] *ECR* I-2681.  
 7 Case C-438/00 *Deutscher Handballbund eV v Maros Kolpak* [2003] *ECR* I-4135.  
 8 Case T-313/02 *David Meca-Medina and Igor Majcen v Commission* judgment of 30 September 2004.

9 Case C-265/03 *Igor Simutenkow* judgment of 12 April 2005.  
 10 *IP/99/965*, 9 December 1999, *IP* 99/956, 9 June 1999.  
 11 *IP/01/1523*, 30 October 2001.  
 12 Decision 2003/778 *UEFA Champions League* OJ 2003 L291/25.  
 13 On this 'convergence' see K. Mortelmans, 'Towards Convergence in the application of the rules on Free Movement and on Competition' (2001) 38 *CMLRev* 613 (2001); S. Weatherill, 'Fair Play Please!': Recent Developments in the Application of EC Law to Sport' (2003) 40 *CMLRev* 51, 80-86. Cf also *David Meca-Medina and Igor Majcen v Commission* note 00 above para 42 of the judgment.

'In view of the considerable social importance of sporting activities and in particular football in the Community, the aims of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results and of encouraging the recruitment and training of young players must be accepted as legitimate.'

So there are (at least) two features which in the view of the Court mark out sport as special - maintaining a balance between clubs and encouraging youth training. In a 'normal' industry a firm has no wish to see its rival prosper - quite the reverse. But in a football league each participant not only wants but needs credible rivals. Take away the competition and there is nothing left. So Bosman did not dismiss the special character of sport, despite frequent accusations in that vein - quite the reverse. The Court was simply unpersuaded that the practices that were challenged in the litigation were apt to achieve the objectives to which they were ostensibly dedicated. In particular the Court was disdainful of the argument that the transfer system of which Bosman himself had fallen foul was necessary to preserve the essential features of the game.

A decade of decisions of the Court and the Commission since Bosman have begun to piece together what is at stake in the notion that EC law applies to sporting practices but with due recognition of their peculiar characteristics. For example, preserving uncertainty of result is essential in sport, so rules preventing multiple ownership of clubs have been accepted as necessary to suppress suspicion of match-fixing.<sup>14</sup> Such restrictions on commercial freedom would not be found in a 'normal' industry - short of the threshold for merger control motivated by anxiety about acquisition of high levels of market power. Other instances - where sport is structured in a manner that would not ordinarily be encountered elsewhere - might include rules forbidding the relocation of clubs, transfer windows<sup>15</sup> and rules governing the selection of players for international representative competition. Occasionally of course practices in sport are condemned as anti-competitive in circumstances where there is no sport-specific context - consider the blatant discrimination in the distribution of 1998 football World Cup tickets.<sup>16</sup> And the CFI recently found that FIFA's rules governing agents concerned economic activity that was merely peripheral to the sporting context in which they applied - although the rules were not considered unlawful.<sup>17</sup>

More generally still, the Member States chose to add Declarations on Sport to the Treaties of Amsterdam and Nice. These (non-binding) texts assert the broader social, educational and cultural value of sport. The Commission too has engaged with the perceived need to set sport in a context that is broader than the merely economic. In its Helsinki Report on Sport, published in 1999<sup>18</sup>, the Commission sketched its view of a 'European Sports Model' which possesses a number of features, most prominently grouped around the contrasts drawn with North American sports practice.<sup>19</sup> For the Commission, European sport is characterised by, among other features, the notion of solidarity, stretching from the apex of the sport to the 'grass roots'. And the Commission lauds sport's role as 'an instrument of social cohesion and education'. One may readily entertain anxiety that these ambitious claims, albeit couched in a 'soft law' context, strain the bounds of the principle of attribution contained in Article 5(1) EC. Moreover I am suspicious that a discourse about a 'European policy on sport' suggests the imposition of an unsustainable homogeneity on a set of activities that carry very different motivations and implications in their amateur/ recreational and in their professional manifestations.<sup>20</sup> Sport may have deep cultural resonance and it may also be 'big business' - but is a single stream of policy apt to accommodate this breadth of aspiration?

So EC sports law and policy amounts to a rather oddly shaped package. It has emerged out of the accidents of litigation and it is influenced by the constitutional constraints imposed on the EC by Article 5(1)'s principle of attribution and the absence of any expression of the sporting interest in the Treaty proper. But it is today entirely convinc-

ing to analyse the incremental growth of law and policy as something a good deal more systematic than a random collection of fact-specific resolutions of disputes set against a background of loose political expressions of support for sporting values. There is today something recognisable as EU sports law and policy.<sup>21</sup> But it does not provide ready answers to the many questions that surround the debate about the future shaping of European sport. That is the intellectual fascination of EU sports law and policy - it is rich and open-textured. Much has changed in recent years; much will change in the years to come, under the pressure of potential or actual litigation. This paper reflects on one phenomenon that (it is submitted) is unlikely to endure in its current form - the pyramid.

#### 4. The autonomy of governing bodies in sport

Within this evolving pattern of EU sports governance there can be no doubt that sporting organisations have the authority to set genuine sporting rules - that is, they may fix 'the rules of the game' or rules necessary for its organisation - and these escape control under EC law. Equally there can be no doubt that it is fiendishly difficult to identify what really are such rules that belong to the autonomy of sports federations and what are instead rules of a sufficiently commercial character to fall for inspection under the rules of the EC Treaty. This is what the Court in *URBSFA v Bosman* described as 'the difficulty of severing the economic aspects from the sporting aspects of football'. Difficult indeed. One may go further. Is it even possible? Of course one may accept that in the abstract there must be a category of sporting rules which are essential for the very existence of the game - shape of the ball, size of the team, and so on. Such rules define the sport. And their fixing is not accompanied by any economic *motivation*. But they have economic *effects*. They are restrictive in the sense that they place some practices beyond the limits of what is permitted. It is frankly extremely difficult to imagine any 'sporting rule' which does not also have a commercial implication as a result of this restrictive effect. So there is a dividing line between sporting autonomy and the incursion of grubby commerce, but it will not be found by imagining the absence of an economic context, at least in so far as the debate is directed at the phenomenon of modern professional sport. Economic implications are everywhere.

The existing EC competition law *acquis* already accommodates the notion that a 'restriction' must be assessed in its proper context. In *J.C.J. Wouters, J.W. Savelbergh, Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten*<sup>22</sup> the Court observed that 'account must first of all be taken of the overall

14 CAS 98/200 AEK Athens and Slavia Prague v UEFA 20 August 1999; COMP/37.806, ENIC/ UEFA, IP/02/942, 27 June 2002.

15 C-176/96 Lehtonen et al v FRSB [2000] ECR I-2681.

16 Dec. 2000/12 1998 Football World Cup OJ 2000 L5/55. For comment see S. Weatherill, '0033149875354: Fining the Organisers of the 1998 Football World Cup', [2000] European Competition Law Review 275 - 282.

17 Case T-193/02 Laurent Piau v Commission judgment of 26 January 2005.

18 Note 00 above.  
19 Cf S. Weatherill, 'Resisting the Pressures of Americanization: the influence of European Community Law on the 'European Sport Model'', pp.155-181, in S. Greenfield and G. Osborn (eds), *Law and Sport in Contemporary Society* (Frank Cass Publishing, London, 2000).

20 This is developed in S. Weatherill, 'Sport as Culture in European Community Law', Ch. 4 in R. Craufurd Smith (ed), *Culture in European Union Law* (Oxford University Press, 2004). Cf. R. Parrish,

'Reconciling Conflicting Approaches to Sport in the European Union', pp.21-42, and K. Foster, 'Can Sport be Regulated by Europe? An Analysis of Alternative Models', pp.43-64, both in A. Caiger and S. Gardiner (eds), *Professional Sport in the EU: Regulation and Re-Regulation* (TMC Asser Press, 2000).

21 Cf. L. Halgreen, *European Sports Law: a Comparative Analysis of the European and American Models of Sport* (Copenhagen, Forlaget Thomson, 2004); R. Parrish, *Sports law and policy in the European Union* (Manchester University Press, 2003). For a useful collection of materials see R. Siekmann and J. Soek (eds), *The European Union and Sport: Legal and Policy Documents* (The Hague, T.M.C. Asser Press, 2005).

22 Case C-309/99 *J.C.J. Wouters, J.W. Savelbergh, Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577. See similarly e.g. Case T-112/99 *M6 v TFi* [2001] ECR II-2159, para. 76.

context in which the decision of the association of undertakings was taken or produces its effects. More particularly, account must be taken of its objectives .... It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives'. The litigation concerned Dutch rules prohibiting multi-disciplinary partnerships between members of the Bar and accountants which were defended as necessary to achieve the sound administration of justice, but the Court's appreciation of the need to analyse an agreement's effects that are restrictive of competition in the light of the objectives pursued can readily be transplanted to demand that the law's assessment of sports regulation must embrace fully the purpose of such rules in promoting a free and fair sporting event. So - for example - the suspension of a participant who has been found to have taken a banned substance is undeniably a restriction on that individual's commercial freedom. It may have a devastating impact on his or her career. It is clearly a matter with profound economic implications. But provided the rule is applied in a transparent, procedurally fair and proportionate manner it is submitted that it would not fall foul of EC law - *not* because it is a 'purely sporting rule' but instead, more precisely, because it is a rule that is essential to preserve the integrity of sporting competition.<sup>23</sup> Seen in that context, its economic implications do not deprive it of its character as an expression of the autonomy of federations to act in a transparent and proportionate manner in defence of the integrity of their sport. Wouters, applied to sport, should be taken to mean that the rules of the Treaty governing competition and free movement apply only where, after assessment of the overall context in which the decision was taken or produces its effects and after account is taken of its objectives, the consequential restrictive effects go beyond those inherent in the pursuit of those objectives. Or, seen from the other side of the coin, consequential restrictive effects of a sporting decision which cause economic hardship are not treated as restrictions for the purposes of application of Articles 39, 49 and 81 EC provided they are inherent in the pursuit of those objectives.

In this sense EC law admits that sporting bodies enjoy a *conditional* autonomy from its requirements. Provided the rules are shown to be necessary for the organisation of the sport, they escape control. But the border is patrolled with vigilance. In *URBSFA v Bosman* the Court commented that 'a restriction on the scope of the [EC Treaty] provisions in question must remain limited to its proper objective. It cannot, therefore, be relied upon to exclude the whole of a sporting activity from the scope of the Treaty'.<sup>24</sup> So although it was pressed on the Court that the nationality of players *matters* in club football, the Court, led by Advocate General Lenz, refused to accept this at face value - and rejected the assertions of the sports bodies. In similar vein, though the judgment in *David Meca-Medina and Igor Majcen v Commission* is in some respects flawed<sup>25</sup>, the assertion that 'regulations, which relate to the particular nature and context of sporting events, are inherent in the organisation and proper conduct of sporting competition and cannot be regarded as constituting a restriction on the Community rules on the freedom of movement of workers and the freedom to provide services' holds good - as, of particular present pertinence, does the supplementary admonition that 'That restriction on the scope of the above provisions of the Treaty must however remain *limited to its proper objective*' (emphasis added). And, in tune with *Bosman*, the Commission decision in *FIA (Formula One)*<sup>26</sup>, which required a separation of regulatory and commercial functions previously bundled together in the grip of the sports governing body, demonstrates that this is not just rhetoric. EC law has been used to enforce significant change within the governance of European sports. Though it is well known that it is intimidatingly difficult to challenge powerful sports bodies, individuals have (*Bosman*) and so has the Commission, and it is not at all the case that sports structures which have endured for a great many years can confidently predict a long life into the future.

## 5. The pyramid - its nature and purpose

So what of the pyramid? Is it simply an expression of the necessary organisational structure of sport? Or does it cross the line, and

become a set of practices that are vulnerable to challenge under EC law?

The argument that is advanced in this paper holds that the pyramid represents an exaggerated view of what is necessary for the proper organisation of the sport of football in Europe. In particular, the exclusion of the major football clubs from formal participation in the taking of decisions that directly affect their commercial interests is not necessary in the governance of the sport, and is vulnerable to challenge under Article 82 EC.

### But what is the pyramid?

In football the pyramid places FIFA, the world governing body, at the apex. Beneath FIFA lie the continental associations - in Europe, UEFA. On the next level down the national associations are found. And then come the professional clubs, along with other interested actors within individual countries, the 'grass roots' which include regional associations and amateur bodies. The pyramid structure is based on the assumption that decisions about the game are taken after a more-or-less intense process of consultation, but the dialogue is formally limited to actors who are adjacent in the pyramid. So clubs have a voice via their national associations. Most famously of all, the 'G-14' group of leading clubs, established as a European Economic Interest Grouping and based in Belgium and comprising (18, not 14) members from seven EU Member States<sup>27</sup>, has been refused any formal recognised status by FIFA. Indeed Sepp Blatter, President of FIFA, has curtly dismissed G-14 as lacking any official status.<sup>28</sup> As far as the governing bodies are concerned, the clubs are free to express views, and a degree of informal dialogue naturally occurs - rule-makers cannot be deaf to clubs as powerful as Milan or Real Madrid. But the major clubs' *formal* channel for influencing decisions is routed through their national associations, and then on up through the pyramid structure. And decisions taken about the running of the sport percolate downwards in the pyramid to continental and to national associations, and are then applied to the clubs participating in the several national and international competitions. Clubs that refuse to comply can be penalised - ultimately, they can be excluded from competition, an effective sanction which is not easily resisted, not least given that club football competitions typically operate on an annual basis whereas legal proceedings are rather less speedy.

It is no part of my argument that this structure is inappropriate for setting the rules of the game. I accept that the pyramid structure operates well as a basis for shaping the basic pattern of the sport. For example, I do not propose that clubs should have a greater input into deliberations about whether to change the offside rule. But a number of matters that are dealt with under the pyramid structure of sports organisation are much less obviously necessary elements in sports governance. Instead they contain a much more prominent commercial dimension. This leads one to question whether the exclusive grip of sports federations on the decision-making structure is truly justified in law.

Consider rules governing the release of players by clubs for international representative matches. These are contained in Articles 36 - 41 of the FIFA Regulations for the Status and Transfer of Players. Clubs must release players - their employees - for a defined period of time and for a defined group of matches so they can play for their country. Sanctions are envisaged in a case of non-compliance, which may

<sup>23</sup> It is submitted that the CFI in *David Meca-Medina and Igor Majcen v Commission* note 00 above has not helped the smooth development of the law by claiming to identify 'rules concerning questions of purely sporting interest ... having nothing to do with economic activity' (para. 41). For criticism of flaws in that judgment see S. Weatherill, 'Anti-Doping Rules and EC

Law' [2005] *European Competition Law Review* 000

<sup>24</sup> Para. 76 of the judgment.

<sup>25</sup> Note 00 above.

<sup>26</sup> Note 00 above.

<sup>27</sup> <http://www.g14.com/G14accueil/index.asp>.

<sup>28</sup> A search against 'Sepp Blatter G-14' on [www.google.co.uk](http://www.google.co.uk) will generate many references.

include suspension of the club. The clubs receive no payment. They are explicitly stated to be responsible for the purchase of insurance to cover the risk that the player will be injured. Even if the player is not injured, he will arrive back at his club tired. Again - there is no question of compensation for the club. Remember too that there is an element of market competition at stake in these situations. International football tournaments are to some extent in the same market as club competitions when one considers potential interest from broadcasters and sponsors. So clubs are required to provide a free resource, the players, to an undertaking that is at least in part seeking to make profits from exactly the same sources on which the clubs would wish to draw. One would certainly not find this in a normal industry. Sport truly is special. But is this system lawful? In particular, from the perspective of EC law, is this an abuse of a dominant position within the meaning of Article 82 perpetrated by the governing bodies in football?

## 6. The pyramid under challenge

Litigation is underway. The 'G-14' group of leading clubs has lodged a challenge before the Competition Commission in Switzerland arguing that the mandatory player release system is unlawful. In separate proceedings in Belgium, Charleroi found that a highly promising young player, Oulmers, returned seriously injured in November 2004 from international duty with his home country, Morocco. Charleroi's fortunes on the field slumped without their young star. They were entitled to no compensation at all, despite the advantages enjoyed by Morocco in acquiring access to Oulmers on a mandatory basis. Here too litigation rooted in alleged violation of EC competition law is underway.<sup>29</sup>

To stand back, what are the pre-conditions for reliance by governing bodies on the notion that rules necessary for the organisation of the game may escape the scope of application of the EC Treaty? My summary of the criteria which shape the conditional grant of autonomy to governing bodies holds that the rules must be:

Transparent - Objectively justified - necessary - proportionate - and must allow appropriate levels of participation by those affected.

As explained above (and for the purposes of this short article here eschewing an extended exploration of the relevant material), I believe the case law of the Court (and, of a less authoritative legal nature, the practice of the Commission) can be distilled to these requirements. But I would support this view by supplementary reference to the soft law material pertaining to sport at EU level which has been a feature of the last few years. As the Court has made clear in *Deliege* and in *Lehtonen*<sup>30</sup>, this material is apt for citation in exploring the nature and scope of the relevant EC rules, and it is here submitted that despite the rather anodyne style of these texts, they operate in favour of the case that EC law forbids the current structuring of the player release rules.

The Declaration attached to the Amsterdam Treaty asserts that 'The Conference emphasises the social significance of sport, in particular its role in forging identity and bringing people together. The Conference therefore calls on the bodies of the European Union to listen to sports associations when important questions affecting sport are at issue. In this connection, special consideration should be given to the particular characteristics of amateur sport.'

The Declaration attached to the Nice Treaty includes consideration of the *Role of sports federations*. 'The European Council stresses its support for the independence of sports organisations and their right to organise themselves through appropriate associative structures. It recognises that, with due regard for national and Community legislation and on the basis of a democratic and transparent method of operation, it is the task of sporting organisations to organise and promote their particular sports, particularly as regards the specifically sporting rules applicable and the make-up of national teams, in the way which they think best reflects their objectives. It notes that sports federa-

tions have a central role in ensuring the essential solidarity between the various levels of sporting practice, from recreational to top-level sport... While taking account of developments in the world of sport, federations must continue to be the key feature of a form of organisation providing a guarantee of sporting cohesion and participatory democracy'.

In line with the thesis advanced above, these Declarations asserts a *conditional* recognition of the virtues of governing bodies, and the space allowed to their regulatory autonomy. In particular, sports federations are expected to operate 'on the basis of a democratic and transparent method of operation'; and they 'must continue to be the key feature of a form of organisation providing a guarantee of sporting cohesion and participatory democracy'. Insistence on the virtues of participation chimes with the broader agenda mapped by the Commission in its 2001 White Paper on European Governance.<sup>31</sup> It is perfectly possible to take these broad recommendations of good, transparent and participatory governance and to deploy them in a concrete legal setting. In this vein I would argue that the absence of such necessary levels of participation is a powerful reason for arguing that practices imposed on football clubs fall within the sphere of application of EC law, for it is not necessary for the federations to maintain such an exclusion of input from directly affected interests. The rule-maker occupies a dominant position within the meaning of Article 82 by virtue of the power conferred by the pyramid.<sup>32</sup> And the rules are abusive within the meaning of Article 82 EC.

The European Commission's 1999 Helsinki Report similarly expresses the view that ... the basic freedoms guaranteed by the Treaty do not generally conflict with the regulatory measures of sports associations, provided that these measures are objectively justified, non-discriminatory, necessary and proportional'.<sup>33</sup> I think the pyramid as currently constituted is not entitled to be regarded in this positive light.

Moreover, were the Treaty establishing a Constitution for Europe, signed in October 2004, to enter into force (which is admittedly currently improbable) Article III-282(1)(g) would provide that Union action shall be aimed at 'developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially young sportsmen and sportswomen.' Here is yet more rich material apt to nourish the argument that an absence of the cited 'cooperation between bodies responsible for sports' drives one to a finding that rule-making which shuts out the (directly affected) clubs is inconsistent with EC law.

My argument is not that clubs should be permitted to enjoy unfettered rights to decide whether or not to help the health of international representative football by releasing players. It is doubtless necessary that a system of players release to which clubs are bound be put in place, or else international representative football could not survive. I do not make a case designed to exterminate the World Cup. International representative football is part of the very structure of the sport - it is a distinctive feature of sport not found in other industries. But it does not follow that *these* rules, as currently constituted, are necessary elements of sports governance. Nor does it follow that the manner in which these rules are determined, within the pyramid and to the formal exclusion of the affected clubs, is necessary. Just as in *Bosman* one might have been able to defend a more sophisticated transfer system (perhaps of the type that has been subsequently intro-

29 'La Fifa assignée!: La blessure de Majid Oulmers suscite réflexion et surtout réaction chez Abbas Bayat' *La Dernière Heure* Jeudi 12 Mai 2005, Sports p.7. 30 Cases C-51/96 & 191/97 note 00 above, paras 41-42 of the judgment; Case C-176/96 note 00 above, paras 32-33 of the judgment.

31 COM (2001) 428.

32 Cf Case T-193/02 *Laurent Piau v Commission* judgment of 26 January 2005 (concerning FIFA's rules governing agents - no abuse was found in the case).

33 Note 00, page 9.



duced<sup>34</sup> but could not defend *that* transfer system, so too here my submission is that a modified player release system could withstand challenge rooted in EC law - but the current system cannot. It may be perfectly true that exposure to a wider audience watching international representative football raises the value of the player to the club - but that is no reason for arguing for a system of mandatory and uncompensated release of the extreme type that currently prevails. The central legal point is that it is not *necessary* for the operation of international football to deny clubs compensation for the players they make available to national associations. Large profits are made through international football, and it is abusive for federations to enforce rules which allow them to take the benefit while imposing the burden of supplying players on the clubs. One could readily imagine an adjusted and potentially lawful system involving an obligation to release players imposed on clubs with corresponding obligations imposed on the governing bodies to provide compensation (*inter alia* to take account of the element of market competition for broadcasting and sponsorship money which is also at stake in this matter of regulation). Some national associations are doubtless too poor to compensate clubs. But federations could cope with this by establishing a revenue pool into which a slice of profits from international competitions could be paid before distribution to individual countries, and from which clubs could be compensated. Rich countries would subsidise poor countries from profits made through international football - at present clubs subsidise all countries despite taking no profits from international football.

Moreover there is a procedural dimension to the submission that the current arrangements violate Article 82 EC. It is not *necessary* to establish these arrangements to the formal exclusion of the participation of clubs. A committee representing a wider range of affected interests could readily be set up to determine the balance of rights and obligations in this matter. By formalising dialogue between transnational governing bodies and clubs this, of course, would challenge the pure lines of the pyramid, but this paper makes the case that the current pyramid structure is unsustainable. As explained, EC law admits that sporting bodies enjoy a *conditional* autonomy in setting rules to govern the game and ultimately, as the Court declared in *Bosman*, 'a restriction on the scope of the [EC Treaty] provisions in question must remain limited to its proper objective. It cannot, therefore, be relied upon to exclude the whole of a sporting activity from the scope of the Treaty'. The rules governing player release go too far, both in substance and in the exclusionary way they are agreed and administered. And their reform would be instrumental *not* in demolishing the pyramid according to which football is regulated *but instead* in confining the pyramid's scope of application to matters which are necessarily required for the organization of the game and in respect of which the clubs cannot reasonably expect to enjoy a right of direct participation - such as the offside rule!

The player release system is by no means the only set of practices that are vulnerable to challenge. Consider the setting of the international match calendar. It might seem that this is part of 'the rules of the game'. But at present the continental championships - in Africa, in Europe, in South America, in Asia - are scattered across the year, which maximises disruption for clubs forced to release players. There are naturally some reasons of climate for the selected dates, but this is not a total explanation. Part of the story is a desire to avoid competition between continental championships in order to maximise revenues from sale of broadcasting rights and luring of sponsors. So, as with the player release system, the planning of the match calendar has embedded within it an identifiable commercial dimension. And it is the clubs that suffer from staggered obligatory release of players. It is my argument that this economic context brings EC law into play, and that Article 82 controls the practices of sporting federations. The cur-

rent pattern could readily be adjusted - in particular by aligning as many international tournaments as the weather will allow in the European summer - in order to re-balance a system currently loaded heavily against the clubs. Again, the establishment of a joint committee, in which the clubs have a direct voice, would be the obvious way forward. Another matter in which the common interests of the participants - clubs and governing bodies - could be represented in a manner that is more faithful to the economic context than is currently allowed by the pyramid is the management of the Champions League, the premier club competition in European football. The question of property rights in the League is a complex one. Article 295 EC provides that the Treaty shall not prejudice rules governing the system of property ownership in the Member States. However, this does not mean that issue of allocation of property rights can be kept off the agenda of the EC institutions. In its Champions League Decision concerning collective selling of television rights the Commission was forced to address such questions in the context of its examination of the application of Article 81 EC to the arrangements underpinning the organisation of the competition. UEFA argued it had set up the League and that it owned it - so, for the purposes of legal assessment, it was simply selling its own property to purchasing broadcasters and therefore Article 81 was not in issue. The Commission did not accept this. It observed that questions of ownership fall for determination under national law, and will not yield a uniform conclusion across the territory of the EU. However, it asserted that UEFA can 'at best be considered as a co-owner of the rights, but never the sole owner.'<sup>35</sup> Article 81 applied. Given that ownership patterns directly involve the clubs, it is accordingly arguable that they should be permitted a correspondingly more direct involvement in planning and managing the competition than they are currently allowed. In line with the theme on which this paper has touched on several occasions, the issue is that sports governing bodies currently claim a wider role in the name of regulation of the sport than is justified - they go beyond setting the rules, and occupy a monopoly position in determining matters of significant commercial impact.

## 7. Conclusion

What is at stake here is re-balancing authority within the game. There will always be arguments about where the margin lies between rules necessary for the running of a sport and more intrusive rules which are the subject of legal scrutiny. Patterns of litigation reveal that typically sports bodies claim a much wider sphere of necessary organisational autonomy than is judged appropriate by individual sportsmen and -women and by the Commission. The Court may ultimately be forced to adjudicate, as in celebrated cases cited in this paper such as *Walrave*, *Bosman*, *Deliège* and *Lehtonen*, and the proceedings involving the *G-14* and *Oulmers/Charleroi* mentioned in this paper are potential new highlights. It is crucial that as a matter of EC law the international federations do not have autonomy to decide for themselves what is the nature of the sport and the rules necessary to protect and promote it. This paper does not seek to demolish the pyramid as an organisational paradigm for football. But it makes the case that the pyramid is currently too big - that too many decisions with direct and substantial commercial implications are taken by sports federations who disallow input from the clubs who are intimately affected by those decisions. Litigation is an unpredictable art, and there are plenty of subtle tactics that may be employed by both federations and clubs to get what they want without formal change or challenge, but there is in principle rich potential for EC law to be used to provoke a fresh process of change if not revolution in European sport and, in particular, to reduce the size of the pyramid.

<sup>34</sup> Cf. B. Dabscheck, 'The Globe at their Feet: FIFA's New Employment Rules' (2004) 7 *Culture, Sport and Society* 69.

<sup>35</sup> Para 122 of the Decision, note 00 above.

# The Laurent Piau Case of the ECJ on the Status of Players' Agents

by Roberto Branco Martins\*

## Introduction

On 26 January last, the European Court of First Instance decided an appeal against a decision of the European Commission in the Laurent Piau Case. Laurent Piau is a players' agent who issued a complaint to the European Commission related to the FIFA Players' Agents Regulations.

Piau's initial complaint - and the starting point for further litigation - of 23 March 1998 focused on the content and objectives of the FIFA Players' Agents Regulations and their incompatibility with Articles 49 and following of the EC Treaty. Piau objected to the fact that in order to carry out the profession of players' agent a licence is compulsory. He particularly addressed the requirement of passing a written exam before being eligible for a licence. In addition, his complaint concerned the required sum that a (starting) players' agent needed to deposit as a kind of insurance, and the FIFA's power to impose sanctions coupled with the fact that the FIFA Players' Agents Regulations did not provide for any possibility of appealing against such sanctions in court.

The European Commission received the complaint and intervened. The European Commission made the abovementioned grievances clear to FIFA in a statement of objections. FIFA then changed its regulations in such a way that the European Commission authorized the use of the revised FIFA Players' Agents Regulations now that they were once more compatible with European Union law. FIFA abolished the compulsory deposit of a serious amount of money and introduced an obligation to conclude insurance instead. In addition, FIFA introduced a code of conduct; a model contract for players' agents and a method for calculating the fee that agents are due.

Piau, however, persisted in his complaint and sought a decision from the European Commission on 28 September 2001. To his initial complaint he added objections against the restrictive aspects of the code of conduct, the model contract and the method of fee calculation.

The EC, however, responded to this complaint as if it exclusively concerned an action based on Resolution no. 17, which only allows the complaint to be examined from a competition law perspective, more in particular, from the perspective of Article 81 of the EC Treaty.

The European Commission subsequently decided upon the legitimacy of the FIFA Players' Agents Regulations. Contrary to Piau's contentions, the European Commission did not find that the revised FIFA Players' Agents Regulations were contrary to Article 81 of the Treaty.

Piau appealed to the European Court of First instance (CFI). The CFI in most respects upheld the decision of the European Commission. In its judgment, the CFI pronounced upon the rule-making action of FIFA and the compatibility of the FIFA Players' Agents Regulations with competition law. In conclusion, it held that:

*"Thus the need to introduce professionalism and morality to the occupation of players' agent in order to protect players whose careers are short, the fact that competition is not eliminated by the licence system, the almost general absence (except in France) of national rules, and the lack of a collective organisation of players' agents are circumstances which justify the rule-making action on the part of FIFA.*

## Possible abuse of a dominant position by FIFA

*The Court of First Instance disagrees with the Commission and considers that FIFA, which constitutes an emanation of the clubs, thereby holds a dominant position in the market of services of players' agents. Nevertheless, the FIFA regulations do not impose quantitative restric-*

*tions on access to the occupation of players' agent which harm competition, but qualitative restrictions which may be justified, and do not therefore constitute an abuse of FIFA's dominant position in that market."*

## Focus of the present article

This article elaborates on the arguments of the CFI in relation to the "almost general absence of national rules". The main aspect that will be discussed is the existence of a legal basis for FIFA to draw up regulations that have a major impact on the profession of a players' agent. In fact, this question has also been raised by the Court of First Instance in the Piau judgment, more specifically in considerations 74-79: regulations governing a particular profession are in principle only legitimate when drawn up by a public authority.

## Exemption

An exception to this rule may arise when an organization receives a formal mandate, based upon public law. Apart from this, associations are free to draw up rules and regulations for their internal organization. One final aspect that could lead to an exception to the rule that a public authority should regulate a profession is that such regulations could fall under the specificity of sport.

## The existence of a formal mandate based upon public law

FIFA has designed and issued the Players' Agents Regulations unilaterally. FIFA is not a body of public authority. FIFA is an association of associations, with the national football associations as its members, and as a result, its regulations concerning the profession of players' agent in football geographically speaking cover the entire world. To regulate the profession of agent, FIFA should thus have been given a formal mandate by an international organization composed of representatives from national public authorities, through their official and formal channels. Such a mandate does not at present exist.

## Internal organization of FIFA

The regulations of FIFA are binding upon its members and must be compatible with national and international law. It has been mentioned above that the members of FIFA are the national football associations, therefore the regulations of FIFA are binding upon these national associations and they "drip down" to clubs and players which have compulsory membership of their national associations.

Players' agents are not members of FIFA, nor are they members of national football associations. Therefore, there is no formal legal basis which binds players' agents to the regulations issued by FIFA.

## Specificity of sport

The notion of the "Specificity of Sport" has developed in ECJ case law, and has also been laid down and recognized in official documents originating from official European Union authorities. Based on the principle of the specificity of sport, exemptions from the applicability of European law to the sports sector may, in certain specific situations which are to be assessed on a case-by-case basis, be justified. However, in Piau the Court of First Instance held that the profession of a players' agent does not come within the scope of the specificity of sport.

The profession of players' agent must therefore be characterized as

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an economic activity consisting of the provision of services on the employment market and hence as falling under the free movement of services as referred to in Article 49 of the EC Treaty. This means that European Union law is fully applicable to the profession of players' agent. FIFA, in principle, lacks the public authority to impose regulations governing this profession.

### Interim conclusion

It has become clear from the above that, in principle, FIFA lacks the public authority to regulate the profession of players' agent. The second part of this article focuses on the reasoning of the Court of First Instance where it allowed FIFA to regulate the profession, even when it clearly lacks the public authority to do so.

The Court of First Instance argued that the rule-making action of FIFA was justified due to the fact that:

- There was a need to introduce professionalism and morality to the occupation of players' agent in order to protect players whose careers are short;
- The almost general absence (except in France) of national rules;
- The lack of a collective organization of players' agents.

It must be added here that the Court of First Instance probably intended to say that there is a lack of legislation that is issued by a body with public authority at the national or international level.

After all, if there was national legislation to regulate the profession and if these regulations included requirements that ensure professionalism and morality, then the FIFA regulations would be null and void due to the fact that there would not be any legal basis for FIFA to regulate an economic activity, in this case the provision of services on the employment market.

FIFA would then be in breach of Article 49 EC (which regulates the free movement of services) for limiting, as a private organization, the free movement of services without the authority to do so. In other words: if there were national legislation governing the activities of players' agents, this would completely remove the basis for the application and enforceability of the FIFA Players' Agents Regulations.

Below, it will be examined whether any legislation governing the activities of players' agents exist.

*Is there any legislation in place governing the profession of players' agent?* First of all, the starting point of this examination must be made clear. This means that a definition of the activities performed by players' agents is needed. I will use the definition which was formulated by the Court of First Instance in the Piau judgment.

The object of the profession of players' agent is, for a fee and on a regular basis, to introduce a player to a club with a view to the conclusion of a contract of employment, or to introduce two clubs to one another with a view to the conclusion of a transfer contract. It is therefore an economic activity for the provision of services, which does not fall within the special nature of sport as defined by case law.

In addition, when assessing law from an international perspective, one should always take the hierarchy of laws into consideration. International treaties and EU law prevail over national law; national law prevails over rules made by associations. A characteristic of both international law and EU law is direct applicability.

The questions to be answered are therefore:

1. Is there any international law applicable to the profession of players' agent?
2. Is there any existing national law in the EU Member States applicable to the profession of players' agent?
3. Is there a collective organization of players' agents and what is its use?

### 1 Is there any international law applicable to the profession of players' agent?

At the international level, one ILO Convention is applicable to the profession of players' agent. The International Labour Organization is the UN specialized agency which seeks the promotion of social justice

and internationally recognized human and labour rights. It was founded in 1919 and is the only surviving major creation of the Treaty of Versailles which brought the League of Nations into being and it became the first specialized agency of the UN in 1946.

The ILO formulates international labour standards in the form of Conventions and Recommendations setting minimum standards of basic labour rights: freedom of association, the right to organize, collective bargaining, abolition of forced labour, equality of opportunity and treatment, and other standards regulating conditions across the entire spectrum of work-related issues.

In 1997, the ILO issued Convention 181, the Private Employment Agencies Convention. Article 1 determines the scope of the Convention as applying to private employment agencies, which means any natural or legal person, independent of the public authorities, which provides one or more of the following labour market services: services for matching offers of and applications for employment, without the private employment agency becoming a party to the employment relationships which may arise therefrom.

Given the definition of a FIFA players' agent, it is clear that this profession falls under the scope of ILO Convention 181. I will now reflect on the relevant content of this Convention in the light of this article.

The Convention is applicable to every economic activity and all categories of workers, except seafarers. The purpose of the Convention is to allow the operation of private employment agencies as well as to protect the workers using their services. Restrictions on the freedom of acting as a private employment agency can only be introduced by the Members and after consulting the relevant and most representative organizations of workers and employers.

The Conventions lists the following possible restrictions: prohibition of operating in a certain branch of economic activity and exclusion of certain workers or part of workers from the scope of the Convention. These restrictions need to be reported to the ILO stating the reasons for the restriction.

If a system of licensing or certification is introduced to govern the operation of private employment agencies, the only authority which is able to do so is a Member, again after first consulting the relevant most representative organizations of workers and employers. Exceptions can be made if based on national law and practice.

The Convention safeguards the protection of workers by ordering respect for their right to privacy, freedom of association and collective bargaining and by ordering prevention of abuses deriving from international recruitment and placement and prevention of child labour.

An interesting aspect of the Convention is the fact that private employment agencies are not permitted to charge any fees to the workers, either directly or indirectly, again with the proviso that this rule may be deviated from after consultation of the relevant most representative organizations of employers and workers.

It may be concluded that countries which have ratified Convention 181 thus have rules in place to safeguard the quality of the profession of private employment agencies and the protection of the workers. Where there is a lack of national regulations concerning private employment agencies, the ratification of the Convention may serve as a "safety net".

An additional conclusion in the light of Piau is that there is a source of legislation in certain countries, which actually takes the promotion of quality and professionalism and the protection of the worker and the prevention of child labour much further than the FIFA Players' Agents Regulations.

In addition, it can be concluded that the FIFA Players' Agents Regulations are contrary to international law now that the Regulations only allow payment to the agent which is made by the worker.

### *Countries that have ratified Convention 181*

I will focus on European Union Member States. The countries which have ratified are: Belgium, Czech Republic, Finland, Hungary, Italy, Lithuania, Netherlands, Portugal and Spain.


This would mean that, including France, there are ten countries

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which have a legal basis for regulating the profession of players' agents. However, considering that the majority of Member States is not a party to the Convention, I will go on to examine whether any legislation regulating the profession of players' agent exists at the national level.

## **2 Is there any existing national law in the EU Member States applicable to the profession of players' agent?**

The regulation of the profession of players' agent in the various Member States is best displayed in a table using the following criteria.

*A: Has the EU Member State in question ratified ILO Convention 181?*  
If this is the case, then there is a directly applicable legal basis for the profession of players' agent in this Member State.

### *B: Interventionist legal system*

With the term interventionist legal system I refer to Member States which have created a basis for regulating their sports sector by introducing one or more Sports Acts. The sport-governing bodies are autonomous in these countries, but their autonomy is based on these Acts. Therefore, the rules and regulations of the sport-governing bodies, such as associations, are binding due to a "dripped-down" mandate from the legislator. The associations' regulations can therefore also be characterized as deriving from an Act of Parliament.

There are several degrees of interventionism in interventionist systems, based on the type of jurisdiction and its usages, which I will not go into detail about here.

By contrast, non-interventionist systems are characterized by a high degree of self-regulation by sports NGOs - in football, the governing bodies are the football associations, which are responsible for the overall organisation of the game of football - and a lack of legislation in the field of sport. In non-interventionist systems, the regulations of associations are characterized as "association law" and national legislation (Acts of Parliament and other instruments) prevails over these rules. In other words, if national law and association law both regulate the same situation in sport, the association regulations do not formally bind those at whom they are directed.

### *C: A specific Sports Act as the basis of regulation of the profession of players' agent*

This criterion is used to display that a specific Sports Act is in force in the country in question, which serves as a legal basis for the regulation of the profession of players' agent. Such a Sports Act will only be present in Member States that have some kind of interventionist system.

### *D: Other legislation regulating Intermediary Services on the Employment Market*

It has been explained above that the profession of players' agent falls within the definition of ILO Convention 181 and agents in fact provide services in seeking and concluding employment contracts. It is possible that legislation exists at the national level which safeguards the integrity of the profession of agents in general which may serve as a legal basis for regulation.

### *E: Number of FIFA-Licensed Players' Agents in the Member State in question*

See table at page 11.

### *Results based on the table*

The table shows that of the 25 Member States, 16 have in some way established some type of legislation or legally structured framework for regulating the profession of players' agent. This type of regulation prevails over the rules of national football associations, which have to be in accordance with FIFA regulations due to the national associations' membership of FIFA.

The same conclusion applies in case of relevant regulations by national football associations at the national level, as the difference with regulation at the international level by FIFA is that national football associations are usually authorised to issue these regulations due to a delegated mandate based on national legislation, as mentioned above when describing the interventionist system.

### *Percentage of FIFA-Licensed Players' Agents covered by prevailing legislation*

Currently, there are a total of 1470 FIFA-licensed players' agents. Some 1402 of them operate in an economic market where they are bound by some form of legislation, and thus, conversely, they are not bound by the FIFA regulations.

This means that 95% of all FIFA-licensed players' agents in the European Union are not bound by the FIFA regulations.

## **3) Is there a collective organization of players' agents and what is its use?**

A collective organization of players' agents does exist: the International Association of FIFA Agents (IAFA). This organization is in fact not very active. One of the reasons for its inactivity is that the regulations are simply imposed on the agents and that so far no party has stepped forward to enter into negotiations concerning the rules and regulations of the profession: these are drawn up unilaterally by FIFA.

### **Conclusion**

The Court of First Instance has erred when it found a lack of national legislation governing the profession of players' agent. A total of 95% of all FIFA players' agents are regulated by prevailing (national) legislation. The FIFA regulations do not prevail over these rules due to the fact that the FIFA regulations are based on association law. Natural persons carrying out the profession of players' agent are thus not bound by the regulations of FIFA, which are therefore in essence redundant.

At the international level, an ILO Convention offers a framework of rules for private employment agencies. The FIFA regulations on players' agents go against this Convention on a crucial point, namely the payment of a fee to the agent by the worker, which the (prevailing) Convention strictly prohibits, while the FIFA regulations prohibit the payment of the fee by the employer.

The main conclusion is that a legal basis is lacking for FIFA to issue a set of rules that creates a barrier to carrying out the profession of players' agent in the territory of the European Union. In the vast majority of cases, (national) legislation is in place regulating the profession of agent to safeguard professionalism and moral standards, which even goes beyond the safeguards contained in the FIFA regulations. The FIFA regulations create an artificial barrier for parties wishing to enter the services market of players' agents. They are incompatible with public international law and with Article 49 of the EC Treaty concerning the free movement of services.

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Countries	ILO Convention	Interventionist legal system	Specific Sports Act	Other legislation	Numbers of agents
Austria				1	19
Belgium				2	52
Cyprus					14
Czech Rep.					14
Denmark					17
England				3	273
Estonia		4			1
Finland					7
France		5	6		149
Germany				7	119
Greece		8	9		46
Hungary					10
Ireland					
Italy		10		11	311
Latvia		12			4
Lithuania		13			1
Luxemburg					8
Malta					3
Netherlands				14	57
Poland		15			19
Portugal		16	17		33
Slovakia					6
Slovenia					15
Spain		18			276
Sweden				19	16

- 1 Gewerbeordnung jo. Arbeitsmarktförderungsgesetz.
- 2 Vlaams Decreet van 19 april 1999 met betrekking tot de Private Arbeidsbemiddeling en KB van 28 November 1975.
- 3 England has a common law system which is constantly shaped by case law. There is no specific law governing the profession of players' agent. The integrity and morality of the agent may be safeguarded based on various duties which are implied in the contract between agent and player, such as in provisions concerning good faith, trust and conflicts of interest. These special provisions prevail over association regulations.
- 4 Eesti Spordiseadusest 15 June 1998 .

- 5 Loi n.º 84-610 du 16 juillet 1984 relative à l'organisation et à la promotion des activités physiques et sportives.
- 6 Loi n.º 84-610 du 16 juillet 1984 relative à l'organisation et à la promotion des activités physiques et sportives, Art. 15-2.
- 7 The following legislation is applicable: Sozialsgebungsbuch III; Rechtsberatungsgesetz; Bürgerliches Gesetzbuch.
- 8 Law 2725 / 1999 Art. 90 par. 9.
- 9 Ministerial Decision No. 23788/2002.
- 10 Various Sports Acts, most relevant: L. marzo 1981, n. 91 - Norme in materia di rapporti tra società e sportivi professionisti and the Decreto Legislativo 23 luglio 1999, n. 242 Riordino del Comitato olimpico nazionale italiano - CONI, a

- norma dell'articolo 11 della legge 15 marzo 1997, n.59.
- 11 Various general laws are applicable to the activities of agents, such as Libro IV, Titolo II, Capo VI Codice Civile articles 1387-1400; Libro IV, Titolo III, Capo IX Codice Civile Arts. 1703-1730 and Arts. 2229-2238. These provisions create a basis for regulation under civil law.
- 12 Sporta Likuma 13 November 2002.
- 13 Lietuvos Respublikos Kūno Kultūros ir Sporto Ástatymas 1995.
- 14 WAADI (Wet Allocatie Arbeidskrachten door Intermediairs).
- 15 Constitution of Republic of Poland, Art. 65 (Journal of Laws No. 97.88.553) Arts. 95-109 of the Civil Code of 17.11.1964 (Journal of Laws No. 64.43.296). These

- provision bar organisations without public authority from regulating a profession that falls under the freedom of the provision of services.
- 16 Lei N.º 1/90 Lei de Bases do Sistema Desportivo de 13 de janeiro.
- 17 Lei N.º 28/98 Regime jurídico de contrato de trabalho do praticante desportivo e do contrato de formação desportiva, especialmente capítulo IV, Arts. 22-25.
- 18 Ley 10/1990, de 15 de octubre, del Deporte.
- 19 Lag (1993:440) om privat arbetsförmedling och uthyrning av arbetskraft.

## ASSER INTERNATIONAL SPORTS LAW SEMINAR

### "Good Governance and Integrity in Sport"

Monday 25 April 2005

Venue: T.M.C. Asser Instituut, The Hague

Opening: 16.00 hours

Chairman: Dick Weiss, SENSE, Amsterdam/Brussels

Speakers: John Jaakke, Chairman of Ajax Amsterdam; Rens Rozekrans and René Boekel, KPMG Integrity & Investigation Services; Prof. Steve Cornelius, University of Johannesburg, South Africa; Prof. Alexandru Voicu, University of Cluj-Napoca, Romania.

The seminar was sponsored by SENSE, Sports & Entertainment Networks of Excellence, Amsterdam/Brussels.

# The Simutenkov Case: Russian Players are Equal to European Union Players

by Frank Hendrickx\*

## 1. Introduction

In the well-known *Kolpak* case<sup>1</sup> of the European Court of Justice (ECJ), a Slovak handball keeper caused the abolishment of a rule limiting the number of licensed Slovak players per club in the German handball competition. The Court concluded that Article 38 of the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Slovak Republic, of the other part, signed in Luxembourg on 4 October 1993, must be construed as precluding the application to a professional sportsman of Slovak nationality, who is lawfully employed by a club established in a Member State, of a rule drawn up by a sports federation in that State under which clubs are authorised to field, during league or cup matches, only a limited number of players from non-member countries that are not parties to the Agreement on the European Economic Area. The judgment implied that the application of the principles elaborated by the Court in the *Bosman* Case<sup>2</sup> were extended to include such “third countries”.

Following this case, a great deal of speculation arose with regard to the impact of the judgment to other European association agreements, concluded with countries from outside the EU. Would the Court be willing to extend its case law to agreements with, for example, Russia, or even to those concluded between the EU and the ACP countries? For more clarity in this respect new case law of the ECJ had to be awaited. The Court's recent judgment in the *Simutenkov* Case<sup>3</sup> delivered on 12 April 2005 provides some answers.

## 2. Legal Context

The legal basis for EU relations with Russia is based on the Partnership and Cooperation Agreement (PCA), which came into force in December 1997 for an initial period of ten years. It establishes the institutional framework for bilateral relations, sets the principal common objectives, and calls for activities and dialogue in a number of policy areas. It covers issues such as trade, economic cooperation, political dialogue, justice and home affairs.

Article 23(1) of the PCA (regarding labour conditions) provides:

“Subject to the laws, conditions and procedures applicable in each Member State, the Community and its Member States shall ensure that the treatment accorded to Russian nationals, legally employed in the territory of a Member State shall be free from any discrimination based on nationality, as regards working conditions, remuneration or dismissal, as compared to its own nationals.”

This provision is comparable to Article 38 of the Europe Agreement between the Community and Slovakia,<sup>4</sup> on which Mr Kolpak relied before the ECJ:

“Subject to the conditions and modalities applicable in each Member State: treatment accorded to workers of Slovak Republic nationality legally employed in the territory of a Member State shall be free from any discrimination based on nationality, as regards working conditions, remuneration or dismissal, as compared to its own nationals”.<sup>5</sup>

However, it may be argued that there is a difference in the legal construction of the respective guarantees. While the Slovak Agreement uses the phrase “treatment (...) shall be free from any discrimination”, the Russia Agreement refers to “Member States shall ensure that the treatment “shall be free from any discrimination based on nationali-

ty”. The question therefore is whether this different wording has legal consequences.

Moreover, it may also be questioned whether both association agreements (Slovakia and Russia) are comparable in terms of their respective purposes and the context in which they have been concluded.

## 3. The facts of the Simutenkov case

Mr Simutenkov is a Russian national who, at the time of the facts of the dispute in the main proceedings, was living in Spain, where he had a residence permit and a work permit. Employed as a professional football player under an employment contract entered into with Club Deportivo Tenerife, he held a federation licence as a non-Community player.

In January 2001, Mr Simutenkov submitted, through that club, an application to the RFEF for it to replace the federation licence which he held with a licence that was identical to that held by Community players. In support of that application, he relied on the Communities-Russia Partnership Agreement.

By a decision of 19 January 2001, the RFEF rejected this application on the basis of its General Regulations and the agreement which it had concluded on 28 May 1999 with the national professional football league.

Under Article 129 of the General Regulations of the RFEF, a professional football player's licence is a document issued by the RFEF which entitles a player to practise that sport as a member of that federation and to be fielded in matches and official competitions as a player belonging to a specific club.

Article 173 of the General Regulations provides:

“Without prejudice to the exceptions laid down herein, in order to register as a professional and obtain a professional licence, a footballer must meet the general requirement of holding Spanish nationality or the nationality of one of the countries of the European Union or the European Economic Area.”

Article 176(1) of the General Regulations provides:

“Clubs entered for official professional competitions at national level shall be entitled to register foreign non-Community players in the number stipulated in the relevant agreements concluded between the RFEF, the Liga Nacional de Fútbol Profesional (National Professional Football League) and the Asociación de Futbolistas Españoles (Association of Spanish Footballers). Those agreements also govern the number of such footballers who may take part simultaneously in a game.”

Under the agreement of 28 March 1999, the number of players not having the nationality of a Member State who were allowed to participate at any time in the Spanish First Division was limited to three for

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<sup>1</sup> Case C-438/00, *Deutscher Handballbund eV vs. Maros Kolpak*, [2003] ECR I-4135, discussed in the *International Sports Law Journal*, 2003/2: F. Hendrickx, “The European non-EU player and the Kolpak-case”, 12-15.

<sup>2</sup> Case C-415/93, *URBSEA ASBL vs. Bosman*, [1995] ECR I-4921.

<sup>3</sup> Case 265/03, *Igor Simutenkov vs. Ministerio de Educación y Cultura and Real Federación Española de Fútbol*.

<sup>4</sup> Decision 94/909 of 19 December 1994, *O.J.* 1994, L 359, 1.

<sup>5</sup> Article 38 (1) of the Association Agreement with Slovakia.

the 2000/01 to 2004/05 seasons and, in the case of the Second Division, to three for the 2000/01 and 2001/02 seasons and to two for the following three seasons.

As he took the view that the distinction which those Regulations draw between nationals of a Member State of the European Union or of the European Economic Area (“the EEA”), on the one hand, and nationals of non-member countries, on the other, is incompatible, as far as Russian players are concerned, with Article 23(1) of the Communities-Russia Partnership Agreement and limits the exercise of his profession, Mr Simutenkov brought an action before the *Juzgado Central de lo Contencioso Administrativo* (Central Court for Contentious Administrative Proceedings) against the decision of 19 January 2001 rejecting his application for a new licence.

#### 4. The question before the ECJ

Following the dismissal of that application by a judgment of the Central Court for Contentious Administrative Proceedings of 22 October 2002, Mr Simutenkov appealed to the *Audiencia Nacional* (National High Court), which decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

“Is it contrary to Article 23 of the [Communities-Russia Partnership Agreement] ... for a sports federation to apply to a professional sportsman of Russian nationality who is lawfully employed by a Spanish football club, as in the main proceedings, a rule which provides that clubs may use in competitions at national level only a limited number of players from countries outside the European Economic Area?”

#### 5. The reasoning of the ECJ

In order to provide a useful reply to the question posed, the Court considered it necessary to first examine whether Article 23(1) of the Communities-Russia Partnership Agreement can be relied on by an individual before the courts of a Member State and, subsequently, if the answer to this question is in the affirmative, to determine the scope of the principle of non-discrimination which that provision lays down.

##### 5.1. Direct effect of Article 23(1) PCA

With regard to the direct effect of the non-discrimination provision in the PCA, the Court states the following. According to well-established case-law, a provision in an agreement concluded by the Communities with a non-member country must be regarded as being directly applicable when, regard being taken to its wording and to the purpose and nature of the agreement, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure.<sup>6</sup>

This means that two elements have to be examined:

- the wording, and
- the purpose and nature of the agreement.

##### 5.1.1. Wording

The Court argues that it follows from the wording of Article 23(1) of the Communities-Russia Partnership Agreement that that provision lays down, in clear, precise and unconditional terms, a prohibition precluding any Member State from discriminating, on grounds of nationality, against Russian workers vis-à-vis their own nationals as far as their conditions of employment, remuneration and dismissal are concerned. Workers who are entitled to the benefit of that provision are those who hold Russian nationality and who are lawfully employed in the territory of a Member State.

Such a rule of equal treatment, the Court continues, lays down a precise obligation as to results and, by its nature, can be relied on by an individual before a national court as a basis for requesting that court to disapply discriminatory provisions without any further implementing measures being required to that end.<sup>7</sup>

According to the ECJ, that interpretation cannot be called into question by the words “subject to the laws, conditions and procedures applicable in each Member State”, which feature at the beginning of Article 23(1) of the Communities-Russia Partnership Agreement.

Such a provision cannot be construed as allowing the Member States to subject the application of the principle of non-discrimination as set out in Article 23(1) of that agreement to discretionary limitations, which would have the effect of rendering that provision meaningless and thus depriving it of any practical effect.<sup>8</sup>

##### 5.1.2. Purpose and nature

In its further reasoning, the Court finds that Article 1 of the PCA states that the purpose of the Agreement is to establish a partnership between the parties with a view to promoting, inter alia, the development between them of close political relations, trade and harmonious economic relations, political and economic freedoms, and the achievement of gradual integration between the Russian Federation and a wider area of cooperation in Europe.

The fact that the Agreement is thus limited to establishing a partnership between the parties, without providing for an association or future accession of the Russian Federation to the Communities, is not such as to prevent certain of its provisions from having direct effect. It is clear from the Court’s case-law that when an agreement establishes cooperation between the parties, some of the provisions of that agreement may, under the conditions set out in paragraph 21 of the present judgment, directly govern the legal position of individuals.

In the light of all of the foregoing, it must be concluded that Article 23(1) of the Communities-Russia Partnership Agreement has direct effect, with the result that individuals to whom that provision applies are entitled to rely on it before the courts of the Member States.

##### 5.2. The scope of the non-discrimination principle

The question which has been referred by the national court is similar to that referred to the Court in the case which led to the judgment in *Kolpak*. In that judgment the Court ruled that the first indent of Article 38(1) of the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Slovak Republic, of the other part, had to be construed as precluding the application to a professional sportsman of Slovak nationality, who was lawfully employed by a club established in a Member State, of a rule drawn up by a sports federation in that State under which clubs were authorised to field, during league or cup matches, only a limited number of players from non-member countries that are not parties to the EEA Agreement.

The first indent of Article 38(1) of the Communities-Slovakia Association Agreement was worded as follows:

“Subject to the conditions and modalities applicable in each Member State: treatment accorded to workers of Slovak Republic nationality legally employed in the territory of a Member State shall be free from any discrimination based on nationality, as regards working conditions, remuneration or dismissal, as compared to its own nationals”.

In the *Kolpak* Case, the Court held that a rule which limits the number of professional players, who are nationals of the non-member country in question, who might be fielded in national competitions did relate to working conditions within the meaning of the first indent of Article 38(1) of the Communities-Slovakia Association Agreement inasmuch as it directly affected participation in league and cup matches of a Slovak professional player who was already lawfully employed in the host Member State. The Court also ruled in *Kolpak* that the interpretation of Article 39(2) of the EC Treaty (on free movement of workers and non-discrimination) dealt with in the *Bosman*-case and having the effect that the prohibition of discrimination on grounds of nationality applies to rules laid down by sporting associations which determine the conditions under which professional

6 With reference to judgments in Case C-63/99 *Gloszczuk* [2001] ECR I-6369, paragraph 30, and in Case C-171/01 *Wahlergruppe Gemeinsam* [2003] ECR I-4301, paragraph 54.

7 Cf. Judgment in Case C-162/00 *Pokrzepowicz-Meyer* [2002] ECR I-1049, paragraph 22.  
8 Cf. Case C-438/00, *Kolpak* [2003] ECR I-4135, paragraph 29.



sportsmen can engage in gainful employment and precludes a limitation, based on nationality, on the number of players who may be fielded at the same time, could be transposed to the first indent of Article 38(1) of the Communities-Slovakia Association Agreement.

The Court then goes on to state that the wording of Article 23(1) of the Communities-Russia Partnership Agreement is very similar to that of the first indent of Article 38(1) of the Communities-Slovakia Association Agreement. The only significant difference between the respective wording of those two provisions is the following.

Where the Russia Agreement reads that “the Community and its Member States *shall ensure* that the treatment accorded to Russian nationals (...) shall be free from any discrimination based on nationality”, the Slovakia Agreement states that “treatment accorded to workers of Slovak Republic nationality (...) shall be free from any discrimination based on nationality”.

One may argue that there is a significant difference in wording between the two association agreements. The Court nevertheless argues that the difference in drafting, as highlighted above, is not a bar to the transposition to Article 23(1) of the Communities-Russia Partnership Agreement, of the interpretation upheld by the Court in *Kolpak*.

The Court further reasons that, unlike the Communities-Slovakia Association Agreement, the Communities-Russia Partnership Agreement is not intended to establish an association with a view to the gradual integration of that non-member country into the European Communities, but is designed rather to bring about “the gradual integration between Russia and a wider area of cooperation in Europe”. However, it does not in any way follow from the context or purpose of that Partnership Agreement that it intended to give to the prohibition of “discrimination based on nationality” as regards working conditions any meaning other than that which follows from the ordinary sense of those words. Consequently, in a manner similar to the first indent of article 38(1) of the Communities-Slovakia Association Agreement, Article 23(1) of the Communities-Russia Partnership Agreement establishes, for the benefit of Russian workers lawfully employed in the territory of a Member State, a right to equal treatment in working conditions of the same scope as that which, in similar terms, nationals of Member States are recognised as having under the EC Treaty, which precludes any limitation based on nationality, such as that in issue in the main proceedings, as the Court established in similar circumstances in the above judgments in *Bosman* and *Kolpak*.

#### 5.2.1. Application to the case

The Court finds that, in the case at hand, the limitation based on nationality does not relate to specific matches between teams representing their respective countries but applies to official matches between clubs and thus to the essence of the activity performed by professional players. As the Court also ruled in *Bosman* and *Kolpak*, such a limitation cannot be justified on sporting grounds.

Moreover, no other argument has been put forward in the observations submitted to the Court that is capable of providing objective justification for the difference in treatment between, on the one hand, professional players who are nationals of a Member State or of a State which is a party to the EEA Agreement and, on the other hand, professional players who are Russian nationals.

## 6. Conclusion of the Court

The ECJ rules that the answer to the question referred must be that Article 23(1) of the Communities-Russia Partnership Agreement is to be construed as precluding the application to a professional sportsman of Russian nationality, who is lawfully employed by a club established in a Member State, of a rule drawn up by a sports federation of that State which provides that clubs may field in competitions organised at national level only a limited number of players from countries which are not parties to the EEA Agreement.

## 7. Comments

The *Simutenkov* judgment does not come as a great surprise. In its case-law, the European Court of Justice has always given a very broad

interpretation of the non-discrimination provision of Article 39(2) of the EC Treaty. It is evident that this provision is one of the cornerstones of European integration. In this respect, the Court has already held that it follows from the fact that the EC Treaty prohibits all discrimination based on nationality that persons who are situated in a Community legal context must be treated equally to nationals of a Member State.<sup>9</sup>

It may be considered less evident to extend the equal treatment principle to situations that do not strictly fall under EC Treaty provisions, but are based on association and cooperation agreements with “third” countries outside the EU instead. Nevertheless, as the *Kolpak* Case - and other cases - has rightly shown, third-country nationals are no less equal than EU nationals if a non-discrimination provision in an association or cooperation agreement can be relied upon.

Still, this judgment does not mark the end of the discussions. The European Union has concluded many association and cooperation agreements with various countries, mostly on the basis of Article 310 of the EC Treaty. The first purpose of these agreements - particularly of those with Greece and Turkey - was to prepare the countries in question for possible EU accession. However, other agreements have been concluded over time for many other and varying purposes.

The so-called PCAs or Partnership and Cooperation Agreements were concluded with Eastern European countries such as Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyz Republic, Moldova, Mongolia, Russia, Turkmenistan, Ukraine and Uzbekistan. It is clear that the enlargement has brought the EU much closer to these Eastern European countries. European policy in this respect is aimed at reinforcing ties with those neighbouring and partner countries through an array of new forms of cooperation and assistance.

The *Simutenkov* Case concerned the PCA with Russia. However, it is likely that the principles put forward in *Simutenkov* can be extended to other countries in the same geographical and political area to the extent that their PCAs include a similar non-discrimination provision. For example, the PCA with Georgia, which entered into force on 1 July 1999, contains an identical provision with regard to non-discrimination based on nationality. Article 20 of the PCA with Georgia, like Article 23 of the PCA with Russia, provides:

“Subject to the laws, conditions and procedures applicable in each Member State, the Community and its Member States *shall ensure* that the treatment accorded to Georgian [in the Russia PCA: Russian] nationals, legally employed in the territory of a Member State shall be free from any discrimination based on nationality, as regards working conditions, remuneration or dismissal, as compared to its own nationals.”

It is clear from the *Simutenkov* Case that the words “*shall ensure*”, although differently and less strongly formulated as compared to the wording at stake in *Kolpak*, does not bar this provision from having direct effect. The non-discrimination clauses contained in PCAs concluded with Armenia, Azerbaijan, Kazakhstan, Uzbekistan, Kyrgyz Republic, Moldova and the Ukraine have, however, been worded slightly differently. Those agreements provide that:

“Subject to the laws, conditions and procedures applicable in each Member State, the Community and the Member States *shall endeavour to ensure* that the treatment accorded to [e.g.] Armenian nationals legally employed in the territory of a Member State shall be free from any discrimination based on nationality, as regards working conditions, remuneration or dismissal, as compared to its own nationals.”

Here, the difference in wording might become relevant, as the terms “*shall endeavour to ensure*” cannot be read as “*shall ensure*”. However, it is up to the Court to decide whether this wording can lead to the conclusion that the provision has direct effect.

<sup>9</sup> *Cowan*, Case C-186/87, 2 February 1989, [1989] ECR I-195.

Much stronger is the wording used in the so-called Cotonou agreement, which is a Partnership Agreement concluded between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000. The idea behind this Partnership Agreement is a common commitment to work together towards the achievement of the objectives of poverty eradication, sustainable development and the gradual integration of the ACP countries into the world economy. The Union's policy is to make, through cooperation, a significant contribution to the economic, social and cultural development of the ACP States and to the greater well-being of their population.

The Cotonou Agreement also contains a non-discrimination clause with regard to nationality. Article 13(3) of the Cotonou Agreement provides:

“The treatment accorded by each Member State to workers of ACP countries legally employed in its territory, shall be free from any discrimination based on nationality, as regards working conditions, remuneration and dismissal.”

This formula “*shall be free from any discrimination*” is very strong and quite comparable to the wording used in the agreement applied in the *Kolpak* Case and as used in Article 39(2) of the EC Treaty. The provision furthermore has quite a large impact, given the sheer number of countries addressed by the Cotonou Agreement. These so-called ACP countries are:

African countries: Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Comoros, Congo (Brazzaville), Congo (Kinshasa), Cote d’Ivoire, Djibouti,

Equatorial Guinea, Eritrea, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea Bissau, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mauritius, Mozambique, Namibia, Niger, Nigeria, Rwanda, Sao Tome & Principe, Senegal, Seychelles, Sierra Leone, Somalia, South Africa, Sudan, Swaziland, Tanzania, Togo, Uganda, Zambia, Zimbabwe;

Caribbean countries: Antigua, Bahamas, Barbados, Belize, Cuba, Dominica, Dominican Republic, Grenada, Guyana, Haiti, Jamaica, St.-Kitts & Nevis, St.-Lucia, St.-Vincent, Suriname, Trinidad & Tobago;

Pacific countries: Cook Islands, East Timor, Federated State of Micronesia, Fiji, Kiribati, Marshall Islands, Nauru, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu, Vanuatu.

This brings us to a final remark with regard to the limits of the discussion. The clauses of the association and cooperation agreements mentioned above which were used in *Kolpak* and *Simutenkov* provide protection against discrimination on the basis of nationality in the context of employment, working conditions and remuneration. The agreements generally do not provide for labour market access. The application of the non-discrimination clause is mostly conditional upon whether the person concerned is legally employed in the territory of the EU Member State concerned. Determining whether to grant labour market access and issue a residence or work permit is still the prerogative of the national - Member State - authorities. In other words, it can still be Member State policy to control the entry of workers, including professional football players. However, once legally entered and employed in the Member State concerned, the player has the rights conferred upon him by the non-discrimination clause contained in the association and cooperation agreement with his country of origin.

The International Sports Law Journal



## The IAAF Arbitration Panel

# The Heritage of Two Decades of Arbitration in Doping-Related Disputes

by Christoph Vedder\*

### 1. Introduction

In summer 2001, the 43rd Congress of the International Association of Athletics Federations (IAAF) during its Edmonton session decided to discontinue its Arbitration Panel and to join the arbitral dispute settlement system provided by the Court of Arbitration for Sport (CAS). However, according to a transitory provision several cases still came before the Arbitration Panel in 2002 and 2003 while the very last dispute to be decided by it was referred to the Panel as late as in 2004.<sup>1</sup> Having been established in 1982, the Arbitration Panel operated since 1984 when the first list of arbitrators was composed. Now, we are able to look back on two decades of settlement of sport-related disputes by arbitration, in particular in doping matters, within the framework of a major International Federation. In August 2003 as a next step the 44th IAAF Congress in Paris amended the IAAF's constitutional rules on doping to bring them into line with the WADA Code. The overall result was a streamlining of the IAAF's anti-doping policy both in substance and procedure, in accordance with the general trend of international and inter-sports harmonisation.

Some 30 years ago, international sports and in particular major events such as the Olympic Games began to be confronted with legal issues. For example, disputes arose concerning admittance of partici-

pants into host countries, as was the case with the IOC-accredited representatives of Taiwan in the Olympic Games in Montreal in 1976. At that time, disputes mainly arose between sports-governing bodies and public authorities,<sup>2</sup> and individual athletes did not yet fight for their rights, as the case of Karl Schranz, the Austrian skier who was excluded from the Sapporo Winter Games in 1972, clearly demonstrates. Furthermore, doping was not yet a legal issue. However, in a legal opinion delivered in May 1977 it was strongly recommended that the IOC should establish a form of arbitration for the settlement of disputes arising from the running of Olympic Games.<sup>3</sup> The idea

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<sup>1</sup> See below under IV.

<sup>2</sup> Vedder, *The International Olympic Committee: An Advanced Non-Governmental Organization and the International Law*, German Yearbook of International Law, vol. 27 (1984), p. 233, 234, *et. seq.*

<sup>3</sup> Rudolf/Seidl-Hohenveldern/Simma, *Pilot Study on the Improvement of the Juridical Status of the International Olympic Committee*, submitted May 1977, p. 48, 62; not published.

behind this proposal was to have a group of personalities of the highest international reputation, e.g. Nobel Peace Prize winners, available for dispute resolution on location. Since the Olympic Games in Atlanta in 1996, the CAS provides an ad hoc Division for the resolution of disputes arising under the Olympic Charter during and ten days before each Olympic Games and Winter Games.

Today, national and international arbitration are an inseparable part of the institutional machinery which governs national and international sports. During its existence, the Arbitration Panel of the IAAF developed a considerable body of case law in doping-related disputes.

## 2. The Legal Basis

The Arbitration Panel was based on the IAAF Rules. The statute of IAAF, or "the Rules", consists of the "IAAF Constitution",<sup>4</sup> the anti-doping rules<sup>5</sup> and the technical rules.<sup>6</sup> Until 2001, the jurisdiction, the composition, the procedure and the powers of the Arbitration Panel were regulated in Rules 21 to 23 of the "Constitution", while substantive anti-doping rules could be found in Rules 55 to 61. However, the Panel also had jurisdiction to resolve any other disputes arising within the IAAF, including non-doping-related disciplinary matters.<sup>7</sup>

Apart from an amendment adopted in 1991, by which the legal basis of the Arbitration Panel and its jurisdiction were changed considerably, further amendments merely reflected factual developments or were intended as legal improvements. Except where indicated otherwise, the following refers to the IAAF Rules as they were in force in 2000.<sup>8</sup> The relevant Rules were implemented in more detail in the annually revised Procedural Guidelines for Doping Control (PGDC), both as regards substance and procedure.<sup>9</sup> The PGDC were adopted by the IAAF Doping Commission subject to the approval of the IAAF Council.<sup>10</sup>

### 2.1. The Formation and Composition of the Arbitration Panel

In 1982 the IAAF Congress during its session in Athens decided to establish an Arbitration Panel for the final resolution of disputes of any kind which might arise within the IAAF family. The members of the Arbitration Panel were first elected by the IAAF Congress in Los Angeles in 1984. The Panel began its judicial activity in 1985 with the case of *Renaldo Nehemiah and Willie Gault*. The timely coincidence with the formation of the CAS was not by chance.

Originally, the Arbitration Panel consisted of a list of 6 persons, which was expanded to 9 persons in 1999. All persons on the list were well-renowned lawyers who were committed to international sports law.<sup>11</sup> The first Chairman of the Panel, who held the position until 1997, was Judge Lauri Tarasti from Finland. As of 1997 until the cessation of the Panel the author of the present article served as Chairman. The members were elected for a four-year term of office and could be re-elected. The Chairman was elected and re-elected for a two-year term of office from among the Panel members.<sup>12</sup>

Candidates were proposed by the continental associations of national athletic federations and, after approval by the Council, elected by the Congress.<sup>13</sup> The Congress is the bi-annual convention of the national athletic federations which are members of the IAAF. The Congress has full powers and is the main organ of the IAAF. The Panel's overall composition thus reflected the worldwide membership of the IAAF. A few of the panel members were also CAS members.

The specific panels to hear cases were composed of two arbitrators who were appointed by rotation and the Chairman of the Arbitration

Panel who presided over every panel, except when he was excluded based on the fact that he was a citizen of a country whose national federation was involved in the case before the Panel.<sup>14</sup> In such cases, the Chairman appointed a Senior Arbitrator to chair the panel.<sup>15</sup>

### 2.2. The Independence of the Arbitration Panel

As the members of the Arbitration Panel were elected by the Congress, which is a governing body of the IAAF, the Panel could not be said to be legally independent from the IAAF. The Panel was listed among the Committees established according to the IAAF Constitution, but it maintained a special status. However, it could not be considered as a truly independent arbitral body in relation to the IAAF, as may be concluded from the lessons learned with respect to the former position of the CAS in relation to the IOC.<sup>16</sup>

However, in practice the Arbitration Panel acted completely independently from the IAAF. After a case had been referred to arbitration, in a broad interpretation of Rule 23, paragraph 6, the Chairman alone handled the proceedings, including the appointment of the arbitrators, with only minor technical support from an officer of the IAAF headquarters especially assigned to him. In order to make use of the technical and logistical facilities the hearings took place at the premises of the IAAF in London and later in Monaco.<sup>17</sup> Experience has shown that the arbitrators themselves and thus the entire Panel not only considered itself completely independent vis-à-vis the IAAF, but that it also acted in complete independence and impartiality vis-à-vis the parties.

One possible negative point is that the athletes concerned were not given the right to appoint one arbitrator. This is explained by the fact that originally and basically, the Arbitration Panel was designed for dispute resolution amongst the member federations and the IAAF. Even doping-related disputes, according to the Rules, are conceived as disputes between the IAAF and a member federation. Thus, the arbitrators elected by the Congress, which is a body actually composed of representatives of the member federations, were really elected by the potential parties to disputes which might come before the Panel. However, the fact that the athletes concerned could not appoint an arbitrator was an inherent imperfection.

### 2.3. Jurisdiction of the Arbitration Panel

The Arbitration Panel's jurisdiction was regulated according to Rule 21. The Panel had original jurisdiction to hear all disputes between national athletic federations affiliated to the IAAF, or between national member federations and the IAAF Council or Congress.<sup>18</sup> Each national federation had to provide in its statutes that all disputes between the federation and an athlete,<sup>19</sup> or between an athlete under its jurisdiction and the IAAF would be submitted to arbitration. In the case of a dispute between an athlete and the IAAF, the IAAF Council could choose whether it would be submitted to the Arbitration Panel.<sup>20</sup> Cases could be referred to the Panel provided that the internal remedies available under the statutes of the national federation were exhausted.<sup>21</sup>

For doping-related matters, the jurisdiction of the Panel was specified in more detail in Rule 21, paragraph 3. Chiefly, the Arbitration Panel was competent to hear cases in two situations:

- if an athlete, despite the finding of a national federation's disciplinary tribunal that a prohibited substance was present, considered that the "doping control had been carried out in material breach" of the IAAF anti-doping rules,<sup>22</sup> or

4 Rules 1 to 54 of the IAAF Constitution, IAAF Official Handbook 2002/2003, Monaco 2002.

5 "Control of Drug Abuse", Rules 55 to 61.

6 Rules 101 to 299.

7 Rule 54.

8 IAAF Official Handbook 1998/1999, Monaco 1998.

9 Procedural Guidelines for Doping Control, 2000 Edition, Monaco 2000.

10 Rule 55, paragraph 10.

11 Rule 22, paragraph 3.

12 Rule 22, paragraph 5 subsection 2.

13 Rule 22, paragraph 2 and 3.

14 Rule 22, paragraph 7.

15 Rule 23, paragraph 6 (iii).

16 Swiss Federal Court, decision of 15 March 1993, *Gundel*, BGE 119, p. 271 *et seq.*; in this decision the Swiss Federal Court concluded that the CAS, in a case between an athlete and an International Federation, was to be regarded as an independent arbitral tribunal in the sense of the New York Convention (see foot-

note 41). However, the Court also noted that the CAS might not be sufficiently independent to be regarded as a true arbitral tribunal vis-à-vis the IOC; Vedder, The development of arbitration in sports law, in: Stinson (ed.), Supplement to the Proceedings of the International Athletic Foundation Symposium on Sports and Law, 1995, p. 33, 38 *et seq.*

17 One exception being the *Baumann* case where the hearing was held in Sydney on

the eve of the Olympic Games because Baumann's participation in the Games was at stake.

18 Rule 21, paragraph 1.

19 For the resolution of these disputes an arbitration panel is to be established by the national federation, Rule 21, paragraph 2.

20 Rule 21, paragraph 2.

21 Rule 21, paragraph 5 (i).

22 Rule 21, paragraph 3 (i).

- if the IAAF believed that any national doping proceedings against an athlete had “reached an erroneous conclusion”.<sup>23</sup>

In addition, there were four more grounds for submitting a dispute to the Arbitration Panel which are of less relevance here.<sup>24</sup>

The second ground mentioned above chiefly and typically arose if the competent body of a member federation exonerated an athlete from the charge of doping and the IAAF was of the opinion that according to IAAF Rules a doping offence had actually taken place, or if a doping offence was found, but a lesser sanction had been imposed than provided for under the IAAF Rules. The first ground arose when an athlete had been sanctioned by the competent body of a member federation, but the athlete believed that no doping offence had taken place. In both instances the Arbitration Panel had appellate jurisdiction and would hear the case *de novo*.<sup>25</sup>

The vast majority of cases were referred to the Arbitration Panel by the IAAF from the grounds of a Council decision for the purpose of reviewing decisions of member federations. Rule 21, paragraph 3 (ii), provided that such referrals constituted an appeal by the IAAF against decisions of a disciplinary tribunal or commission of a national federation acquitting an athlete, while the IAAF believed that a doping offence had actually taken place. There were only a few cases under Rule 21, paragraph 3 (i), where athletes appealed against national decisions, which declared them ineligible for a doping offence.

#### 2.4. The Procedure before the Arbitration Panel

The IAAF Rules in Rule 23 and both the PGDC and the Arbitration Guidelines (AG)<sup>26</sup> did not contain many provisions concerning procedure. A case had to be referred to arbitration in a particular form accompanied by a statement in support of the referral. Upon receipt of the referral, the arbitrators were appointed and the dates for the statement in response as well as for reply and rejoinder and, if appropriate at that early stage, for the hearing were determined by the Chairman.

The hearings were scheduled for one day or, as of 1999, in many cases for two days. In some cases the hearings were suspended and later resumed. After the presentation of the opening statements ample opportunity was given for the examination and cross-examination of witnesses and expert witnesses and the bringing of legal and factual, mostly scientific, arguments. After the closing statements of the parties and the closing of the hearing the Panel started its deliberation. In the early days, the award which the Panel had reached would be drafted overnight and pronounced to the parties, who were still present, the next morning. This policy was changed as of 1999 when the cases became more complex. From then on the awards would be deliberated and drafted by the arbitrators present at the venue within the two or three days following the hearing. In very rare cases the arbitrators would leave the venue after having decided on a possible draft of the decision to continue their deliberations and finally agree by communication. In such cases, the Chairman communicated the awards to the parties in writing. According to Rule 23, paragraph 8, a two-week period was allowed for the pronouncement of the award. The Arbitration Panel never made use of the possibility not to reason its decision.<sup>27</sup>

The decisions of the Arbitration Panel were taken by majority and no dissenting or concurring opinions could be delivered.<sup>28</sup> As the hearings were conducted “in private”<sup>29</sup> the awards were not officially published.

Over time, the proceedings before the Arbitration Panel became highly extensive. In some cases, files of more than 2000 pages were submitted to the Panel, and hearings of two or three days were necessary. Lawyers and expert witnesses would contradict each other. Awards would take up to ten densely-lined pages, although this is still brief compared to many awards delivered by CAS panels.<sup>30</sup> This was simply a reflection of the growing complexity of international doping-related disputes. It also shows that in this respect there is no difference between proceedings in international sports arbitration and proceedings before regular courts.

#### 2.5. The Effects of the Awards

As the proceedings before the Arbitration Panel were hearings *de novo*,<sup>31</sup> the awards contained a statement of facts and of the relevant rules which were applied, the statement of the reasons on which the decision was based, the findings of the Panel and the operative provisions of the judgment including an order for the payment of the costs.<sup>32</sup> The operative provisions first determined whether or not a doping offence was committed and, if so, the exact period of non-eligibility.

The awards of the Arbitration Panel had immediate effect which was understood to mean that the awards were final and binding.<sup>33</sup> The awards delivered by the Panel were generally accepted by the parties involved. In rare instances, however, decisions were challenged, for example, before American,<sup>34</sup> German<sup>35</sup> and Swiss courts.<sup>36</sup> Only in one of these cases was the decision of the Arbitration Panel not upheld in the last instance.<sup>37</sup> Surprisingly, American<sup>38</sup> and German Courts<sup>39</sup> have held that awards delivered by the Arbitration Panel fell within the scope of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.<sup>40</sup>

### 3. The Doping Offence

#### 3.1. The Elements of Doping

Rules 55, paragraph 2, and 56, paragraph 1, and again Rule 60, paragraph 2, defined what constituted a “doping offence” under the IAAF’s authority:

- “a prohibited substance is found to be present within an athlete’s body tissues or fluids; or
- an athlete uses or takes advantage of a prohibited technique, or
- an athlete admits having used or taken advantage of a prohibited substance or a prohibited technique.” (...)
- “the failure or refusal of an athlete to submit to doping control.”

The term “prohibited substance” refers to substances listed in Schedule 1 to the PGDC.<sup>41</sup> In 2000, Part I of this schedule listed anabolic agents, in particular, anabolic steroids, amphetamines, cocaine, peptide hormones, and glucocorticosteroids and Part II listed stimulants and narcotic analgesics. “Chemically or pharmacologically related compounds and precursors” of anabolic steroids and some other classes of substances are also included, as are all metabolites of prohib-

<sup>23</sup> Rule 21, paragraph 3 (ii).

<sup>24</sup> Rule 21, paragraph 3 (iii) - (vi):

- where a national federation refused to allow the athlete a hearing in a doping case,
- where testing by another sporting body indicated the presence of a prohibited substance and the athlete considered that the decision of the body in question was “unsatisfactory”,
- where a national federation or IAAF had determined that a doping offence other than the presence of a prohibited substance or the use of a prohibited technique took place and the athlete concerned considered that “an erroneous

conclusion” had been reached,

- where an athlete had been found by the IAAF to have admitted a doping offence and the athlete denied having made such an admission.

<sup>25</sup> See below under IV. 6.

<sup>26</sup> IAAF Arbitration Guidelines, adopted by the Council in accordance with Rule 23, paragraph 1.

<sup>27</sup> Rule 23, paragraph 8, subsection 2.

<sup>28</sup> Rule 7, 1 AG: “minority opinion”.

<sup>29</sup> Rule 6, 3 AG.

<sup>30</sup> The relative brevity of the awards was due to the fact that the decisions were deliberated and drafted immediately after the hearings at the location where they

had taken place.

<sup>31</sup> See below under IV. 6.

<sup>32</sup> Generally the costs followed the event. The IAAF bore the costs of the arbitrators, Rule 8, 1. AG.

<sup>33</sup> Rule 23, paragraph 8, subsection 3, and Rule 7. Guideline 3 AG: “shall have immediate effect”.

<sup>34</sup> *Reynolds*, see footnote 52, *Decker-Slaney*, see footnote 63.

<sup>35</sup> *Krabbe*, see footnote 54, *Baumann*, see footnote 79.

<sup>36</sup> *Gasser*, see footnote 51.

<sup>37</sup> The Munich Regional Court awarded damages to *Katrin Krabbe* in the summer of 2001.

<sup>38</sup> US District Court, Southern District of Indiana, Indianapolis Division, Decision of 5 November 1999, case no. IP-99-0502-C-D/E, *Mary Decker-Slaney v. IAAF and USOC*.

<sup>39</sup> Stuttgart Regional Court, 17th Civil Chamber, Decision of 2 April 2002, case no. 17 O 611/00, *Dieter Baumann v. IAAF*.

<sup>40</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed in New York on 10 June 1958, German Federal Law Gazette 1961 II p. 121.

<sup>41</sup> Rule 53, paragraph 3.

ited substances.<sup>42</sup> Prohibited techniques are listed non-exhaustively in Rule 55, paragraph 7 and Schedule 2 of the PGDC, including *inter alia* blood doping including EPO, blood plasma, expanding products and artificial oxygen carriers, as well as generally the use of substances or methods which alter the integrity and validity of urine samples.

For prohibited substances which can be produced by the body naturally, the distinction between endogenous production and exogenous administration, of which only the latter constitutes a doping offence, is made according to a rebuttable presumption based on the concentration or the ratio of the substance.<sup>43</sup> Originally, this rule exclusively applied to testosterone, but was later re-drafted for general application, thus codifying the case law of the Arbitration Panel.<sup>44</sup>

### 3.2. The Burden of Proof

According to Rule 55, paragraph 4, full responsibility is placed on the athletes that no prohibited substance enters the athlete's body tissues or fluids. However, in the course of the proceedings and in particular before the Arbitration Panel, the IAAF or the national federation concerned had the burden to prove "beyond reasonable doubt" that a doping offence had been committed.<sup>45</sup> With regard to the complex procedural requirements set out in the PGDC a special rule of evidence applies which provides that procedural departures shall not invalidate the finding that a prohibited substance was present in a sample or that a prohibited technique had been used "unless this departure was such as to cast real doubt on the reliability of such finding".<sup>46</sup>

### 4. Major Achievements

Some 39 cases were referred to arbitration by the Panel, four of which were later withdrawn. Only two cases were non-doping-related disputes. One of them concerned re-instatement as an amateur athlete after an interlude as a professional football player.<sup>47</sup> The other was a typical intra-federation statutory dispute concerning the validity of Council elections.<sup>48</sup> Illustrative of the Panel's evolving caseload is that

in the first 15 years of its existence (until 1999) the Panel heard 15 cases (*Nehemiah and Gault*,<sup>49</sup> *Gasser*,<sup>50</sup> *Reynolds*,<sup>51</sup> *Breuer/Krabbe/Möller (Krabbe I)*,<sup>52</sup> *Breuer /Derr/Krabbe (Krabbe II)*,<sup>53</sup> *Ngugi*,<sup>54</sup> *Akpan*,<sup>55</sup> *de Bruin*,<sup>56</sup> *Braunskill*,<sup>57</sup> *Bevilacqua*,<sup>58</sup> *Capobianco*,<sup>59</sup> *lagar*,<sup>60</sup> *Hirsbro*,<sup>61</sup> *Decker-Slaney*,<sup>62</sup> and *Mitchell*<sup>63</sup>) while it heard or otherwise solved as many as 19 cases in only two years, namely in 2000, in the run-up to the Sydney Olympic Games, and in 2001 (*Jayasinghe*,<sup>64</sup> *Varela*,<sup>65</sup> *Sanchez Cruz*,<sup>66</sup> *Election Case*,<sup>67</sup> *Sotomayor*,<sup>68</sup> *Ramos*,<sup>69</sup> *Adriano*,<sup>70</sup> *Ottey*,<sup>71</sup> *Melinte*,<sup>72</sup> *Walker*,<sup>73</sup> *Christie*,<sup>74</sup> *Cadogan*,<sup>75</sup> *Szekeres*,<sup>76</sup> *Dobos*,<sup>77</sup> *Baumann*,<sup>78</sup> *Mateescu*,<sup>79</sup> *Prandjeva*,<sup>80</sup> *Douglas*,<sup>81</sup> and *Soboll*<sup>82</sup>).

Four more cases (*Lyons*,<sup>83</sup> *Menc*,<sup>84</sup> *de Jesus*,<sup>85</sup> and *Théodore*<sup>86</sup>) were decided in 2002 and 2003, under the transitory rule,<sup>87</sup> as by then it had been decided to dissolve the Arbitration Panel. The very last case was referred to the Arbitration Panel as late as in 2004 concerning *Jerome Young*,<sup>88</sup> an athlete who was allegedly involved in the *Balco* affair. The parties, however, later agreed to transfer the case to the CAS.<sup>89</sup>

Over the years, the IAAF Arbitration Panel accumulated a vast amount of legal and scientific expertise in doping cases. Due to the small number of IAAF arbitrators, each of them has thus had an opportunity to gain highly qualified expert knowledge. The Arbitration Panel established a consistent body of case law and clearly and coherently interpreted the doping-related rules in the IAAF Constitution and other relevant provisions, such as the anti-doping rules, the PGDC and the AG. The case law of the Arbitration Panel has been analysed in great detail, including the 15 cases which were decided until early 1999 by the first chairman of the Panel.<sup>90</sup>

In general, the Panel placed much emphasis both on the athlete's responsibility as to what entered his or her body, on the one hand, and on the rights of the athletes, such as fair trial and procedural justice, on the other. The Panel confirmed the definition of the doping offence as the presence of a prohibited substance. The Panel strictly upheld the two-year period of ineligibility; a subject on which certain

42 Rule 55, paragraph 6.

43 Introductory note to Schedule 1 to the PGDC, 2002 Edition: "Where a Prohibited Substance (...) is capable of being produced by the body naturally, a sample will be deemed to be positive for that substance, where the concentration of that substance or its metabolites and/or their ratios in the athlete's tissues or fluids so exceeds the range of values normally found in humans so as not to be consistent with normal endogenous production.

A sample may not be regarded as positive for a Prohibited Substance in any such case where the athlete proves by clear and convincing evidence that the concentration of the substance or its metabolites and/or their ratios in the athlete's body tissues or fluids is attributable to a pathological or physiological condition. (...)"

44 See below under IV. 4.

45 Rule 59, paragraph 5.

46 Rule 55, paragraph 11.

47 *Nehemiah and Gault*, see footnote 50.

48 *Election Case*, see footnote 68.

49 Decision of 25 June 1985, The Athletics Congress of the USA v. IAAF in the matter of *Renaldo Nehemiah* and *Willie Gault*.

50 Decision of 18 January 1988, Swiss Athletic Federation and *Gasser* v. IAAF in the matter of *Sandra Gasser*.

51 Decision of 11 May 1992, IAAF v. The Athletics Congress of the USA in the matter of *Harry Reynolds*.

52 Decision of 28 June 1992, IAAF v. German Athletic Federation in the matter of *Gritt Breuer*, *Katrin Krabbe*, *Silke Möller*.

53 Decision of 20 November 1993, IAAF v. German Athletic Federation in the matter of *Gritt Breuer*, *Manuela Derr*, *Katrin Krabbe*.

54 Decision of 5 November 1994, *John Ngugi* v. Kenian Amateur Athletic Association.

55 Decision of 10 April 1995, IAAF v. Athletic Federation of Nigeria in the matter of *Ime Akpan*.

56 Decision of 9 June 1995, IAAF v. Royal Dutch Athletic Federation in the matter of *Erik de Bruin*.

57 Decision of 25 May 1996, IAAF v. USA Track and Field in the matter of *Kevin Braunskill*.

58 Decision of 25 November 1996, IAAF v. Italian Athletic Federation in the matter of *Antonella Bevilacqua*.

59 Decision of 17 March 1997, IAAF v. Athletics Australia in the matter of *Dean Capobianco*.

60 Decision of June 1998, IAAF v. Romanian Athletic Federation in the matter of *Monika Iagar*.

61 Decision of 28 January 1999, *Claus Hirsbro* v. Danish Athletic Federation.

62 Decision of 25 June 1999, IAAF v. USA Track and Field in the matter of *Mary Decker-Slaney*.

63 Decision of 3 August 1999, IAAF v. USA Track and Field in the matter of *Dennis Mitchell*.

64 IAAF v. Amateur Athletic Association of Sri Lanka in the matter of *Susanbika Jayasinghe*, withdrawn after the hearing of 22 April 1999.

65 IAAF v. Royal Spanish Athletic Federation in the matter of *David Varela*, withdrawn before hearing on 14

December 1999.

66 Decision of 20 February 2000, *German Sanchez Cruz* v. Mexican Athletic Federation.

67 Decision of 21 February 2000, Kuwait Amateur Athletic Federation v. IAAF Congress.

68 Decision of 26 July 2000, IAAF v. Cuban Athletic Federation in the matter of *Xavier Sotomayor*.

69 Decision of 6 April 2001, a dispute referred to arbitration by virtue of a special Arbitration Agreement agreed between the IAAF, *Andre Luiz Ramos* and the Athletic Confederation of Brazil.

70 Decision of 1 August 2000, a dispute referred to arbitration by virtue of a special Arbitration Agreement between the IAAF, *Elisangela Adriano* and the Athletic Confederation of Brazil.

71 Decision of 3 July 2000, IAAF v. Jamaica Amateur Athletic Association in the matter of *Merlene Ottey*.

72 Decision of 15 July 2000, IAAF v. Romanian Athletic Federation in the matter of *Mihaela Melinte*.

73 Decision of 20 August 2000, IAAF v. UK Athletics in the matter of *Douglas Walker*.

74 Decision of 20 August 2000, IAAF v. UK Athletics in the matter of *Linford Christie*.

75 Decision of 20 August 2000, IAAF v. UK Athletics in the matter of *Gary Cadogan*.

76 Decision of 7 September 2000, IAAF v. Hungarian Athletic Federation in the matter of *Judit Szekeres*.

77 Decision of 7 September 2000, IAAF v. Hungarian Athletic Federation in the matter of *Gabor Dobos*.

78 Decision of 18 September 2000, IAAF v.

German Athletic Federation in the matter of *Dieter Baumann*.

79 IAAF v. Bulgarian Athletic Federation in the matter of *Rodina Mateescu*, withdrawn 18 June 2001.

80 IAAF v. Bulgarian Athletic Federation in the matter of *Iva Prandjeva*, withdrawn 18 June 2001.

81 Decision of 26 September 2001, IAAF v. Royal Dutch Athletic Union in the matter of *Troy Douglas*.

82 Decision of 26 September 2001, IAAF v. German Athletic Federation in the matter of *Carolin Soboll*.

83 Decision of 17 August 2002, *Robin Lyons* v. Athletic Canada.

84 Decision of 15 August 2002, *Miraslav Menc* v. Czech Athletic Federation.

85 Decision of 22 September 2002, *Luis Filipe de Jesus* v. Portuguese Athletic Federation.

86 Decision of 23 July 2003, IAAF v. French Athletic Federation in the matter of *Olivier-Jean Théodore*.

87 Note 2 of the Transitional Provisions attached to Rule 21, Handbook 2002/2003.

88 IAAF v. USA Track and Field in the matter of *Jerome Young*, referral to arbitration of 18 February 2004.

89 According to Note 3 of the Transitional Provisions, attached to Rule 21, Handbook 2002/2003.

90 Tarasti, *Legal Solutions in International Doping Cases*. Awards by the IAAF Arbitration Panel 1985 - 1999, Cernusco 2000; a brief account of the Arbitration Panel's activity and of some of the major cases is given by Vedder (see footnote 17), p. 34 *et seq.*



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CAS panels have held a different view. Interpretations given by the Arbitration Panel in relation to naturally produced substances were occasionally even codified into the Rules.<sup>91</sup>

This essay cannot give a full account of the jurisprudence of the Arbitration Panel. Furthermore, it is not the role of an arbitrator to comment on awards rendered by a panel of which he was member. For this reason, only some general thoughts will be set out concerning the main results achieved in the case law, which might have an impact on future arbitral activities in doping-related disputes.

#### 4.1. Doping Offence

The Arbitration Panel has always persistently adhered to the definition of the doping offence as provided in Rules 55, 56 and 60:<sup>92</sup> the mere presence of a prohibited substance in the body tissues or fluids of an athlete. According to this clear determination of what constitutes doping within the area of authority of the IAAF it is irrelevant whether or not the substance was ingested willingly, deliberately or negligently. This rule and its interpretation, however, do not make for strict liability.<sup>93</sup>

#### 4.2. Prohibited Substances, Food Supplements

The Rules and the PGDC clearly defined what the term “prohibited substances” included,<sup>94</sup> namely the substances listed in the PGDC and their metabolites as well as - with regard to anabolic steroids and some other classes of substances - all chemically or pharmacologically related compounds. By virtue of this general clause a potentially wide range of substances which were not expressly listed at the time when the doping control was applied or which were not listed at all were still prohibited. The same was true for prohibited techniques as a result of the general clause of Rule 55, paragraph 7. The conclusion therefore has to be that the lists contained in the bye-laws are not exhaustive and that they could not be considered ‘negative lists’ in the sense that products or techniques which were not expressly listed were allowed.

This interpretation which was constantly upheld by the Arbitration Panel also applied to so-called food supplements or even food in general. Here, the definition of doping as the mere presence of a prohibited substance operates together with the responsibility of the athlete for what enters into his or her body. As will be further explained below,<sup>95</sup> the athletes have a responsibility to keep their bodies clean and free of prohibited substances. This means that athletes cannot simply eat and drink any food or beverage in the same way that non-athletes can. This is true in particular in regard to food supplements which may contain non-declared traces of prohibited substances, either deliberately or by contamination as it is known amongst the sports community.

#### 4.3. Endogenously Produced Substances

On several occasions it was submitted to the Panel that dehydration, stress and other physical factors in combination or on their own were able to raise the concentrations of substances which are also or can also be produced naturally by the body to above the thresholds determined for these substances. This argument was mainly based on what is known as the Aberdeen Study by Professor Maugham and was intended to undermine the validity of the thresholds fixed for substances like testosterone.

Based on broad scientific evidence in literature and as presented by numerous expert witnesses in hearings before it, the Arbitration Panel came to the conclusion that the thresholds were scientifically reliable. They mirror the average concentrations of such substances found in large populations including a broad margin of safety. However, here again, it was not an application of strict liability but a shift of the burden of proof. If a prohibited substance was found in a concentration exceeding the threshold it was then a matter for the athlete to show by clear and convincing evidence that the concentration of the substance in question was attributable to a pathological or physiological condition<sup>96</sup> which would include situations of stress, dehydration, etc. None of the arguments submitted, including the Aberdeen Study, met this requirement.

#### 4.4. Strict Liability, Burden of Proof

The Arbitration Panel was criticised in the media and by the parties’ legal counsel for applying a “strict liability” rule which would deny the athletes the chance of raising a proper defence. It was suggested that, according to the Arbitration Panel, the simple finding of a prohibited substance was sufficient to determine that a doping offence had been committed without leaving any opportunity to rebut. However, this perception of the Arbitration Panel’s approach is not correct, as the Panel in its consistent case law clearly followed a different line of reasoning.

It is true that in one of its earlier awards the Panel used the term “strict liability.”<sup>97</sup> In the context of this decision the term is employed as a summary label for a sequence of arguments which follows the line of the Panel’s general approach. In the given context, the use of the term “strict liability” expressly intended to convey that no willingness or negligence was necessary in order to establish a doping offence. The use of this term, however, could indeed lead to misunderstandings now that “strict liability” does not have the exact same meaning in different jurisdictions. When the term was used - as it only very seldom was - in later awards, the Panel intended by it to summarise a certain allocation of the burden of proof.<sup>98</sup>

According to IAAF Rules and bye-laws the Arbitration Panel applied a differentiated allocation of the burden of proof. As the doping offence is defined as the presence of a prohibited substance it is the obligation of the member federation and/or the IAAF which is charging an athlete with a doping offence to prove “beyond reasonable doubt” that a doping offence has been committed.<sup>99</sup> That means that the federation had to prove that a prohibited substance was found in the body tissues or fluids of the athlete concerned. This included proof concerning the reliability of the doping control, the chain of custody, the analysis in IOC-accredited laboratories and the results. Doubts concerning the readings of the analysis or the calculation of concentrations taking into account scientific factors such as specific density were assessed *in dubio pro reo*.<sup>100</sup>

The whole procedure, from the request to submit to a doping control to the management of the results, is regulated in detail by the PGDC and, as far as the analysis of the sample is concerned, by protocols agreed upon by the heads of IOC-accredited laboratories. Concerning these procedural requirements, which provide a very high standard, a special provision can be found concerning the burden of proof which establishes that any deviations from the procedural rules invalidate the finding, provided that this departure from the procedure set out in the PGDC is of such a nature as “to cast real doubts on the reliability” of the results.<sup>101</sup> The athlete and/or, in proceedings according to Rule 21, paragraph 3 (ii), the national federation must either prove this or, at least, cast sufficient doubt. Thus an opportunity exists to rebut the reliability of the findings of the sample, but here the burden of proof shifted to the respondent.

If the IAAF, in accordance with the requirements mentioned above, including the opportunity to rebut, proved the presence of a prohibited substance, this constituted *prima facie* evidence that a doping offence had actually taken place. The IAAF had at that point discharged its onus of proof. If the IAAF Rules had established strict liability in the sense that the presence of a prohibited substance by definition resulted in the finding of a doping offence, the dispute would have been settled at this point. However, IAAF Rules and bye-laws did not preclude the possibility to rebut the *prima facie* evidence.<sup>102</sup> The burden of proof was reversed and it was subsequently up to the

91 See below under IV. 4.

92 See above under III. 1

93 See below under IV. 4.

94 See above III. 1.

95 See below under IV. 4.

96 See footnote 44 and accompanying text.

97 *Capobianco* (1997), see footnote 60,

recital 9; Tarasti (see footnote 91) analysed the term “strict liability” in the case law of the Arbitration Panel, p. 87.

98 *Walker* (2000), see footnote 74, recital 9 *et seq.*, 33; Tarasti (see footnote 91), p. 90, shares this view with regard to the early awards.

99 Rule 59, paragraph 5.

100 *Ottey* (2000), see footnote 72.

101 Rule 55, paragraph 11.

102 Tarasti (see footnote 91), p. 88.

athlete or the respondent national federation to show that, despite the *prima facie* evidence, a doping offence had not occurred.

The athlete had to meet different standards of evidence. With respect to procedural deficiencies, according to Rule 55, paragraph 11, the athlete only had to raise “real doubts”. In cases where the threshold fixed for an endogenously produced substance had been exceeded the PGDC set forth that proof had to be provided “by clear and convincing evidence” that the measured concentration was above the threshold due to a pathological or physiological condition.<sup>103</sup> This is a clear example of a *prima facie* evidence situation. The finding that substance levels were above the threshold *prima facie* testifies to the presence of a prohibited substance. However, it is still possible to rebut this presumption under a reversed onus of proof.

Originally this opportunity to rebut in cases concerning above-threshold levels of substances was exclusively given in the case of the substance of testosterone.<sup>104</sup> Once in a case concerning nandrolone a sample was found to be above the generally recognised threshold, but the IAAF anti-doping rules at that time did not consider the possibility of the natural production of nandrolone. The Arbitration Panel in this case did not hesitate to apply the testosterone rule by analogy, arguing that the IAAF rules simply showed a gap with respect to substances other than testosterone which may be endogenously produced.<sup>105</sup> For the sake of legal certainty, this statement of the Arbitration Panel was later codified in the rules through an amendment to the PGDC. As of 2002, therefore, the rule allowing rebuttal applies generally to all substances which may be endogenously produced.<sup>106</sup>

The initial allocation of the burden of proof to the IAAF to provide evidence *prima facie* followed by an opportunity to rebut also served as a model to the Arbitration Panel in other situations which were not expressly considered by the applicable rules, such as the administration of a prohibited substance without the knowledge or against the will of the athlete, or sabotage. The Arbitration Panel tended to construe the Rules and PGDC in their entirety as allowing the rebuttal of the *prima facie* evidence of a doping offence. However, it was not sufficient if the rebuttal simply suggested that something out of the ordinary had occurred which would exclude a doping offence. Deviations from the normal course of events had to be proven by the athlete or the defending member federation. This was best done by “clear and convincing evidence” as laid down in Schedule 1 PGDC or at least by raising “real doubts” as laid down in Rule 55, paragraph 11. The Arbitration Panel did not consider it necessary to indicate which standard of proof had to be met.

In its judgments the Arbitration Panel advanced a particular interpretation of the IAAF anti-doping rules by stating that the Rules and bye-laws established a specific professional obligation and corresponding liability for athletes. The Rules reflect the IAAF’s strict anti-doping policy as part of the ethics of sport. Compliance with these rules is a condition which athletes have to fulfil in order to practise their sport, as an amateur or a professional in the sphere of track and field. This high professional standard was converted into a clear legal obligation which is most obviously expressed by Rule 55, paragraph 4, which establishes that it is the

“Athlete’s duty to ensure that no substance enters his body tissues or fluids which is prohibited under these Rules. Athletes are warned that they are responsible for all or any substances detected in samples given by them.”

The anti-doping rules, including those on sanctions, exclusively apply to a specific group of persons in limited circumstances and by voluntary agreement. This fundamentally distinguishes these rules from

criminal law rules. But even under criminal law, the high professional standard described above would result in a high degree of care that athletes under the jurisdiction of the IAAF have to exercise. Non-compliance with this standard would qualify as negligence. Ultimately, however, the Arbitration Panel and some of the CAS panels, even though they applied a different approach, would in most if not all cases reach the same conclusion concerning the question of whether a doping offence had actually been committed.

#### 4.5. Sanctions, Length of the Period of Ineligibility

As of 1991, a sanction of 4 years’ ineligibility could be imposed for a first doping offence and a life ban for a second offence, with no margin of discretion.<sup>107</sup> In 1997, the relevant provision was amended and the sanctions from then on were a minimum of 2 years for a first offence and a life ban for a second offence. Under these Rules, the Arbitration Panel first generally imposed 4 years’ and later 2 years’ ineligibility. It should be mentioned, however, that the rules dealing with the commencement of the period and the calculation of the actual length of the period, which required taking into account periods of suspension undergone by the athlete, changed considerably over the years.

IAAF Rules did not allow the Panel to consider exceptional or mitigating circumstances which could reduce the period of ineligibility. However, the Arbitration Panel saw no reason to question this, as it was in line with the interpretation of the Rules as professional standards. In its judgments, however, the Panel consistently imposed the minimum sanction and made no use of the possibility of determining a longer period. In one case which the IAAF referred to the Arbitration Panel, the national federation had established a doping offence, but, having considered the circumstances of the case, had imposed only a few months’ ineligibility.<sup>108</sup> The Arbitration Panel in this case also imposed the minimum two years.

However, according to IAAF Rules the Council has the power to consider “exceptional circumstances”.<sup>109</sup> Upon application by the athlete and on the conditions laid down both in Rule 60, paragraph 8, and the PGDC, the Council may allow the athlete’s re-instatement before the expiry of the period of ineligibility imposed by the Arbitration Panel. This was an exclusive competence of the Council and the Panel could only bring it to the parties’ attention.

#### 4.6. Procedural Issues

The Arbitration Panel attached the utmost importance to due process and fair trial during both the written and oral stages of the proceedings. As the Rules and PGDC were brief with respect to procedural issues, the Arbitration Panel let itself be guided by the general procedural principles applicable before courts and arbitral bodies as codified in the AAA Guidelines<sup>110</sup> or the principles applied in international commercial arbitration. At all stages of the proceedings ample opportunity was given to the parties, including the athlete, to submit their views and to present their witnesses and expert witnesses. On several occasions the Arbitration Panel summoned expert witnesses on its own behalf.<sup>111</sup>

Probably the most important procedural achievement to result from the Arbitration Panel’s case law is that, from the mid-nineties, athletes began to be formally treated as independent parties to the dispute with full rights, even where under Rule 21, paragraph 3 (ii) in the majority of cases the member federation, not the athlete, was the respondent.

On several occasions it was suggested that in disputes under Rule 21, paragraph 3 (ii), where the IAAF appealed a decision of a body of a member federation, the Arbitration Panel was only competent to review the legality of the contested decision on the basis of the facts and evidence available before that body. The Panel has consistently rejected this argument. Instead, the Panel interpreted the Rules as providing for proceedings *de novo*. Thus, whenever the IAAF appealed against a national decision, the case would be heard taking into account all legal, factual and scientific aspects available at the time of the hearing.

<sup>103</sup> Schedule 1 PGDC, see footnote 42.

<sup>104</sup> Note to Schedule 1 Part I under (a) (I) PGDC, 2000 Edition.

<sup>105</sup> *Ottey* (2000), see footnote 72, recital 15 and 16.

<sup>106</sup> See footnote 44.

<sup>107</sup> Rule 60, paragraph 2 (a).

<sup>108</sup> *Thédore* (2003), see footnote 88.

<sup>109</sup> Rule 60, paragraph 8 and PGDC.

<sup>110</sup> International Arbitration Guidelines of the American Arbitration Association, <http://www.adr.org/rules/international/international-rules/html>

<sup>111</sup> Rule 5 and 1 (b), (h) AG.



## 5. At the End: an Outlook

After 20 years of operation, the Arbitration Panel has become history. Amongst the International Federations, the IAAF, governing a core Olympic sport, was a forerunner in sports arbitration, in particular where doping-related matters were concerned. The IAAF has now, by virtue of Rule 15,<sup>112</sup> established the CAS as its appellate jurisdiction,<sup>113</sup> both in non-doping and in doping-related disputes which may arise in the field of operation of the IAAF. According to Rule 15, paragraph 2, CAS panels shall apply IAAF rules and bye-laws.<sup>114</sup> The IAAF is also a member of the WADA, but maintains its own anti-doping law and pro-

cedure within the framework of the WADA Code. Thus, the interpretation of the relevant Rules and Guidelines as developed by the Arbitration Panel will continue to be valid *mutatis mutandis*.

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<sup>112</sup> IAAF Constitution as in force from November 2003, IAAF (ed.), Constitution, Monaco 2003.

<sup>113</sup> Rule S 12 (b) and Rules R 47 et seq. of the CAS Code of Sports-Related Arbitration.

<sup>114</sup> The reference to “the Articles of this Constitution” is to be interpreted as including the whole of relevant IAAF law.

# The Ad Hoc Division of the Court of Arbitration for Sport at the Athens 2004 Olympic Games - An Overview

by Domenico Di Pietro\*

## 1. Introduction

An increasing number of disputes between athletes, sports clubs and sport federations, at both domestic and international level, is settled through the dispute resolution mechanism provided by the Court of Arbitration for Sport (CAS) in Lausanne which has just celebrated its 20th anniversary.<sup>1</sup>

As is well known, CAS operates a so-called ad hoc division during the Olympic Games which is in charge of any disputes arising out of or connected to the Games. The ad hoc division was first set up on the occasion of the Olympic Games in Atlanta. The jurisdiction of the ad hoc division over the disputes arising out of or in connection to the Olympic Games is grounded on Rule 74 of the Olympic Charter.

Even though hearings are normally held at the place of the Olympic Games, the legal seat of the ad hoc division and its arbitration panels remains Lausanne, Switzerland. As a result, the arbitrations administered by the ad hoc division are subject to Chapter 12 of the Swiss Act on Private International Law. As far as the governing law of the disputes administered by the ad hoc division is concerned, Article 17 of the CAS ad hoc Rules states that the relevant arbitration panels must decide the dispute “pursuant to the Olympic Charter, the applicable regulations, general principles of law and the rules of law, the application of which it deems appropriate.”<sup>2</sup>

The nature of the disputes entertained by the ad hoc division is much broader than commonly thought. It ranges from issues of athletes eligibility to the violation of anti-doping regulations. Contrary to popular belief, the doping disputes are not the majority of the cases administered by the ad hoc division. Indeed, an increasing number of arbitrations are commenced to challenge the selection of athletes or to reverse the ruling of referees. This is perhaps the consequence of the changing nature of sport. Many athletes these days spend most of their life training to achieve a result - which may or may not arrive - in an increasingly competitive environment. Winning a major international sport competition, furthermore, has also achieved some economic significance which was simply unthinkable a few years ago. The result of these combined factors is that an increasing number of competitors and sport bodies sometimes view the ad hoc division of CAS as an opportunity to revive their chances to play a role at the Olympic Games. The actual number of cases entertained by CAS at the Olympics is misleading in this respect. The complaints that eventually become an action before the ad hoc division of CAS are simply the tip of the iceberg. Arguably, if it were not for the increasing number of sports law specialist lawyers assisting athletes and federations at the Olympic Games - who carefully advise against bringing groundless actions - the number of complaints before the ad hoc division would be much higher. The ad hoc division in Athens, on its part, did not fail to firmly remind litigants that there are some areas and aspects

of sport - such as field of play decisions - which should be kept within the field of play sphere and should not become the object of legal analysis before an arbitration panel.

Some of the cases entertained by the ad hoc division in Athens during the 2004 Olympic Games are briefly summarised below.

## 2. The Cases

### CAS OG 04/001

#### Russian Olympic Committee v. Fédération Equestre Internationale (FEI)

Pursuant to the waiver by the National Olympic Committees of Finland and Israel of their places in the Olympic Dressage Competitions, the riders from those two countries were replaced by the FEI with second riders from Australia and France. On 9 August 2004, the Russian Equestrian Federation applied to the FEI to reserve a position in the Olympic Dressage Individual Competitions for the Russian rider Alexandra Korelova. The FEI replied to the Russian Equestrian Federation rejecting the request. The Russian Olympic Committee appealed against that decision. The CAS Panel in charge of the dispute had to go through a lengthy and complicated analysis of the relevant FEI Regulations for Equestrian Events at the Athens 2004 Olympic Games.

Of interest on a general point of law the Panel’s dictum according to which:

*...the interpretation of the FEI Regulations, as indeed of the rules of any sporting body, is a question of law.*

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<sup>1</sup> See in general on the history, jurisdiction and case law of CAS: Reeb, *Digest of*

*CAS Awards 1986-1998*, 1998; Reeb, *Digest of CAS Awards 1998-2000*, 2000; Reeb, *Digest of CAS Awards 2001-2003*, 2004; McLaren, *Doping Sanctions: What Penalty?*, ISLR 2002 (2); Kaufmann-Kohler, *Arbitration at the Olympics*, 2001; Paulsson, *Arbitration of International Sports Disputes*, *Arbitration International*, Vol. 9 No. 4 (1993), p. 359; Samuel and Gearhart, *Sporting Arbitration and the International Olympic Committee’s Court of Arbitration for Sport*, *Journal of International Arbitration*, Vol. 6 No. 4 (1989), p. 39.

<sup>2</sup> On the application of international law in sport disputes see Di Pietro, *Principles of International Law in the Case Law of CAS*, ISLR, 2004.

With specific reference to the implementation of the FEI Rules the Panel observed:

*While it is always necessary to seek a purposive and contextual construction of such rules so as to discern their true intent and effect, a body cannot impose by discussion or decision after the coming into force of the rules, a meaning which they do not otherwise bear. The Panel must add that while in practice the FEI (or any other body in similar circumstances) must form an initial view as to the meaning of its rules, it is the Panel which is vested with the function of finally determining that meaning, subject only to any recourse (if any) to the Swiss Federal Tribunal.*

In the Panel's view the FEI had made an error, albeit in good faith, in allocating second places to Australia and France in that order rather than to Russia. The Panel required FEI to provide it with a new order of merit of eligible athletes re-drafted on the basis of the interpretation of the FEI Rules ruled by the Panel itself. Such list included the Russian rider that had been excluded at first. For these reasons the Panel ordered that the Russian Olympic Committee be allocated the disputed second place.

#### CAS OG 04/003

##### **Torri Edwards v. International Association of Athletics Federations (IAAF) and USA Track and Field (USATF)**

On 24 April 2004, Ms Edwards produced a urine sample for doping control at an IAAF event in Martinique. The sample contained nikethamide which is a stimulant included in section 1 of the IAAF List of Prohibited Substances and Methods. The nikethamide had been ingested through two glucose tablets given to Ms Edwards by her physical therapist. The tablets were labelled "coramine glucose". Of interest in the case was the fact that glucose is normally sold without addition of any other elements. Only in a few countries, namely France and former French colonies, it appears to be sold in a composition containing nikethamide. The label on the package purchased by the therapist, however, clearly indicated, even though in French, that the product contained nikethamide.

The US Anti-Doping Agency ("USADA") charged Ms Edwards with an anti-doping violation and asked that she be suspended for two years. Ms Edwards requested that her case be arbitrated by the American Arbitration Association Panel ("AAA"). Ms Edwards admitted that she had committed a doping offence but argued that the existence of exceptional circumstances pursuant to the IAAF Rules (Rule 38.12 et seq) should lead to the elimination or, at least, the reduction of the sanction. The AAA Panel rendered a final award imposing a two-year ban. Ms Edwards appealed such decision before the ad hoc division of CAS on, inter alia, the following grounds:

- i the sanction imposed on Ms Edwards was overtly wrong and violated every principle of fairness in sport. It was indeed argued that the same sanction had been applied in the past to athletes who had openly admitted to have deliberately taken illegal substances for several years and with the clear intention to cheat;
- ii the IAAF's new fixed sanction ran counter to CAS precedents holding that punishment should be a function of the athlete's culpability;
- iii the application of the newly promulgated IAAF rules was inequitable given that not all Olympic athletes were currently subject to the same sanction for the same type of doping offence.

The CAS Panel observed that the IAAF Rules set out that exceptional circumstances provisions apply where there is (a) no fault or no negligence or (b) no significant fault of significant negligence. In the first instance the exceptional circumstances would justify an elimination of the period of ineligibility while in the second instance they would justify a reduction of that period. The Panel expressly commented on Ms Edwards' honesty, integrity and character and recognised that she had not sought to "cheat" in any way. The Panel, however, had to find that there was a clear case of negligence on the part of the athlete. In this respect the Panel observed that the leaflet con-

tained in the package purchased by the therapist even went so far as to include a warning to athletes that the product can result in a positive test in the case of anti-doping control. Therefore Ms Edwards and her physical therapist were clearly negligent as they failed to inquire or ascertain if the product contained a prohibited substance. The negligence of the athlete could not amount to the extraordinary circumstances referred by the IAAF Rules and therefore the appeal had to fail.

The Panel furthermore disagreed with Ms Edwards's argument that the appealed decision was significantly inconsistent with the previous body of cases concerning the non-culpable assumptions of banned substances.

With regard to the length of the sanction imposed on MS Edwards, the CAS Panel found that the two-year sanction had to be imposed as a result of the IAAF's adoption of the WADA Code. With specific reference to uniformity in the application of sanctions among different sports, the Panel observed that, in the fight against doping in sport, such inequity was justified and that federations should be supported in their adoption of the WADA Code.

No matter how regrettable it must have been to reach that conclusion, the relevant rules did not leave much leeway to the Panel. There is no argument which can justify a lenient approach to doping offences. However, it may be possible to argue whether different sanctions should be applied where it is clearly established that the athlete did not intend to cheat and that the assumption of banned substances was the result of a genuine and isolated negligent conduct.

#### CAS OG 04/004

##### **David Munyasia v. International Olympic Committee (IOC)**

On 6 August 2004 Mr Munyasia, a member of the Kenyan Olympic Boxing Team provided a urine sample for a doping control. The World Anti-Doping Agency ("WADA") reported that there were adverse analytical findings. The IOC set up a Disciplinary Commission which found that Munyasia had a concentration of cathine that exceeded the permitted threshold and, therefore, there was a doping offence pursuant to Article 2.1 of IOC Anti-Doping Rules. The Disciplinary Committee recommended that the Executive Board exclude Mr Munyasia from the Olympics and withdraw accreditation. The decision of the IOC made by its Executive Board on 10 August 2004 to exclude Munyasia from the Olympic Games and withdraw his Olympic accreditation was appealed.

Mr Munyasia grounded his appeal on the argument that the banned substance was present in his system either by mistake or unknowingly. A possible explanation for the presence of such substance in his body might have been the antibiotics that he had taken as a result of a boil on his left thigh. Mr Munyasia also requested that the sample be subject to an independent analysis and a deferral of the decision until such analysis had been completed.

The Panel upheld the decision of the IOC Executive Board to exclude Mr Munyasia from the Olympic Games and remove his accreditation. The Panel found that a doping offence had been clearly established and, in the absence of circumstances which could excuse such violation, the appeal should fail. With regard to Mr Munyasia's request for justification of the doping offence, the Panel observed that, in accordance with the relevant rules, it is the personal duty of the athlete to ensure that no prohibited substances enter his or her body.

The Panel also refused the request for deferral explaining that its role was to confirm or reverse the decision of the IOC Executive Board and such a request regarding further analysis as well as its implications was outside the scope of the Panel's jurisdiction.

#### CAS OG 04/005

##### **David Calder and Christopher Jarvis v. Federation Internationale des Societes d'Aviron (FISA)**

The two Canadian rowers Mr Calder and Mr Jarvis came unintentionally into contact with a rival team's (South African) oar blades during the Olympics' semi final race. As a result they were excluded from the race by the Umpire. The Umpire's decision was then upheld

by the FISA Board of Jury. The FISA Executive Committee - in order to alleviate the disappointment of the two rowers who had been tipped as one of the most likely teams to reach the final and considering that the unfortunate incident had taken place only a few meters from the finishing line - overturned this decision and allowed Mr Calder and Mr Jarvis to participate in the B Final. The two rowers appealed this decision before CAS. They observed that the situation was an extreme case presenting special circumstances such as the fact that (i) the incident had taken place very close to the finishing line, (ii) the South African team had sent a letter stating that they would raise no objections if the two Canadian rowers were allowed to participate to the A Final, and (iii) that it was technically and physically possible - and indeed not unheard of - to add an extra team to those already qualified to the A Final. They pointed out that such special circumstances had been indeed ascertained by the Committee which, as a result, entered them into the B Final. What they contested of the Committee's decision was that the special circumstances should have led to their entry into the A final and not merely into the B final.

It is worth pointing out that Mr Calder and Mr Jarvis did not contest any field of play decision as the existence of a racing infraction was not challenged. They instead challenged the use of discretion exercised by an administrative body such as the Committee. This point seems to have led the Panel to accept jurisdiction on the case even though the award was silent on the issue.

The CAS Panel observed that the Committee had overturned the Board of the Jury's decision to exclude the Applicants by declaring that they were eligible to participate in the B Final in the exercise of their discretion. The Panel, however, found that the exercise by the Committee of the discretionary power was not objectionable. The Committee's decision had both corrected the sporting disadvantage caused by the infraction to the South African pair and adopted a lenient approach when imposing a penalty to take into account its unintentional nature. The appeal was, as a result, dismissed.

#### CAS OG 04/006

##### **Australian Olympic Committee ("AOC") v. International Olympic Committee ("IOC") and International Canoe Federation ("ICF")**

On 8 July 2004, the AOC lodged entry forms with the Organising Committee of the Olympic Games for Chantal Meek, Amanda Rankin, Kate Barclay and Lisa Odenhof into the Women's K4 500m.

Following the erroneous reallocation of unused quota places by the ICF in respect of the Women's Kayak Flatwater racing event, the AOC appealed to CAS.

In the meanwhile, the AOC submitted entry forms to ATHOC for Chantal Meek and Amanda Rankin in the Women's K2 500m. It also conditionally entered Lyndsay Fogarty and Paula Harvey in that same event. Their accreditation was confirmed by the IOC.

Later, the ICF conceded that it "erroneously did not allocate the K2 quota Women places to the NOC of Australia." After negotiations with the IOC, the NOC of Australia was allocated two more quota places in K2 Women Flatwater Racing competition to the places which add already been allocated. As a result of this settlement, the AOC withdrew its appeal to CAS and nominated Susan Tegg and Paula Harvey to compete in the Women's K2 500m. It also nominated Amanda Rankin to compete in the Women's K1 500m.

At a later stage, the AOC submitted an entry form providing for Amanda Rankin to compete in the Women's K1 500m and Paula Harvey and Susan Tegg to compete in the Women's K2 500m. It also withdrew the entry for Amanda Rankin and Chantal Meek for the Women's K2 500m.

The ICF rejected the entry form regarding Amanda Rankin's right to compete in the Women's K1 500m because it had been submitted after the entry deadline. The AOC appealed the ICF's decision before CAS on the following grounds.

- i The IOC alone has the decision on entries. Amanda Rankin was entered as an athlete participant in the Games in the Women's K4 500m. She was so entered prior to the deadline.
- ii Under the Participation Criteria the AOC has the right to enter Amanda Rankin in the Women's K1 500m as, inter alia:

- a) the K1 500m was in the same Women's kayak Flatwater racing category as the K4 500m;
  - b) Amanda Rankin's participation in the K1 500m was within the total number of qualified women's athletes.
- iii The IOC and the ICF were precluded from rejecting the entry form on the basis that it was out of time with respect with Amanda Rankin whilst at the same time accepting and acting on that same entry form in respect of Paula Harvey and Susan Tegg.

The IOC and the ICF's entered similar defensive counter-arguments according to which they had acted properly because (i) it was important that athletes and national federations know the entries in each racing competition so that they may plan accordingly; (ii) after each national federation submitted its entries on or before 21 July 2004, the number of entrants for each race was known by all competitors; (iii) neither the main entry form nor the conditional entry form submitted by the AOC indicated an intention to have a competitor in the Women's K1 500m event; (iv) the AOC did not indicate on the conditional form that, if the two additional athletes were accepted for the Women's K2 500m event, Amanda Rankin would instead compete in the Women's K1 500m event.

The CAS Panel after a thorough analysis of the relevant provisions noted that under the circumstances:

*...we would have been inclined to dismiss the appeal in the light of the considerations emphasised by both IOC and ICF as to the importance of respecting clear and well publicized entry time limits. Nothing we say should be interpreted as undervaluing the role that such limits play in international sport.*

However, there was an additional complicating factor which the Panel had to take account of. This was the legitimate inference from the sequence of events that - had the ICF, as it admitted, not erroneously refused two additional K2 quota places to the AOC prior to their change of mind - Amanda Rankin would have been entered for the K4 and K1 events. She was only contingently entered for the K2 event on the basis that two additional K2 quota places continued not to be allocated to AOC. Once the two K2 quota places were allocated, she was withdrawn from the K2, and entered in the K1.

In the Panel's view the ICF was estopped by its own original admitted error from relying on the late entry for K1 as a ground for rejecting it, since the entry which the ICF had rejected was the necessary consequence of that error. Accordingly, the Panel allowed the appeal and directed that the IOC and the ICF accept the entry of the AOC to enable Amanda Rankin to participate in the women's K1 500m.

#### CAS OG 04/007

##### **Comite' National Olympique et Sportif Francais (CNOF), British Olympic Association (BOA) and United States Olympic Committee (USOC) v Federation Equestre Internationale (FEI) and National Olympic Committee for Germany**

This arbitration was an appeal against the decision taken by the Appeal Committee of the FEI which had set aside the Ground Jury ruling on 18 August 2004 that a time penalty be imposed on the German equestrian athlete, Bettina Hoy, for failing to complete a jumping event within the required time limit. According to Article 551 of the FEI's Rules for Eventing the Ground Jury "is ultimately responsible for the jumping of the event and for settling all problems that may arise during its jurisdiction."

In the competition which gave rise to this dispute each rider had 90 seconds to complete the jumping course. The time was recorded using both a computerised timing device and a stadium clock. A bell was rung to signal the round and the rider then had 45 seconds to cross the start line. The computerised timing device started from the earlier of (i) 45 seconds coming to an end or (ii) the rider crossing the start line. A stadium clock was simultaneously started by a member of the Ground Jury but this clock could be stopped and re-started as and when this was needed.

In the present matter, Ms Hoy was engaged in competing in the

first round of show jumping. The bell rang and the 45-second count-down commenced. She increased the pace of her horse to a canter and crossed the start line, thereby automatically triggering the computerised timing device. As she approached the first jump she turned her horse away and made a wide circle which brought her once again behind the start line. She then proceeded to cross the start line a second time. Immediately before she did so, the stadium clock was apparently reset to zero and indicated her time from the moment of her second crossing of the start line. The computerised timing device, however, continued to measure her time from the moment of the first crossing. This had the effect that, although the stadium clock indicated that she had completed the course in less than the allotted 90 seconds, her actual time as recorded by the computerised timing device was some 12,61 seconds slower, namely 102,61 seconds. After lengthy deliberations, the Ground Jury ruled that Ms Hoy should be penalised with 13 time penalties.

The effect of the Ground Jury ruling was that, in the individual competition, Leslie Law of Great Britain won the gold medal, Kimberly Severson of the United States won the silver and Ms Funnell of Great Britain won the bronze. In the team competition France won the gold medal, Great Britain won the silver and the United States won the bronze. This prompted Ms Hoy and the NOCG to appeal to the FEI's Appeal Committee. The Appeal Committee found to have jurisdiction on the complaint since, in its view, this case was one of interpretation of the FEI Rules and not an attempt to second guess the Ground Jury's decision which would have been in breach of the so-called field of play rule. The Committee concluded that the count-down had been restarted resulting in a clear injustice to the rider concerned. The Committee therefore removed the time penalties. As a result of the Appeal Committee's decision, Ms Hoy was awarded the gold medal in the individual competition while the German team received the gold medal in the team competition. Leslie Law and Kimberly Severson were downgraded to silver and bronze in the individual competition and France and Great Britain to silver and bronze in the team competition. Ms Funnell and the United States lost their bronze medals.

The decision of the Committee was appealed before the ad hoc division of CAS before which the Appellants argued that the Appeal Committee had erred in holding that the appeal brought before it by Ms Hoy and the NOCG involved a question of interpretation of rules. No rule had been cited in their report and no interpretation took place. The issue was clearly one of fact and was therefore not appealable. The FEI, on the other hand, submitted that the Appeal Committee had correctly held that the issue was one of interpretation rather than fact. It was not in issue that Ms Hoy had crossed the start line twice. What was in issue was whether the time measured by the computerised timing device should be accepted or not. Accordingly, the FEI concluded that the Appeal Committee had correctly upheld the appeal on the grounds of fairness to Ms Hoy, who had clearly been misled by the resetting of the stadium clock at the time of her second crossing of the start line.

According to the CAS Panel it was clear that the Ground Jury ruling was of a purely factual nature and therefore fell within the exclusive jurisdiction of the Ground Jury itself. The arguments of the FEI and the NOCG to the contrary were therefore dismissed. Although the Appeal Committee had been unanimous that it was a matter of interpretation, the CAS Panel objected that this assumption alone (in the absence of any explicit reference to rules) could not be accepted. As the Ground Jury decision could not be challenged, the Appeal Committee's decision had to be annulled. The Ground Jury's decision fell clearly within the so-called "field of play", an area on which neither the Appeal Committee nor the CAS should affirm jurisdiction except in cases of bad faith or malice.

CAS OG 04/008

**Comité National Olympique et Sportif Français ("CNOSF") v. International Canoe Federation ("ICF") and International Olympic Committee ("IOC")**

This arbitration arose out of the refusal of the ICF to reallocate two

quota places to the CNOSF, on the eve of the competition in the Men's C2 1000.

As early as 26 May 2004 the CNOSF advised the ICF that if it was the recipient of reallocated quota places it would use them all in the light of the competitiveness of the French boats. Between 13 July and 21 July 2004, the ICF re-allocated approximately 20 unused quota places and, by that means, filled all 246 places available. The ICF however carried out this activity without following its own re-allocation rules set out in its Participation Criteria. The reallocated positions included two French male paddlers who were subsequently entered in both the Men's C2 500m and C2 1000m races.

On 26 July 2004, The French Canoe Kayak Federation ("FFCK") - which was not entitled to any places via the route of qualification - wrote to the ICF raising some questions about ICF's reallocations. Neither the FFCK nor the CNOSF, however, formally challenged the ICF's allocations.

On 10 August 2004, the FFCK again wrote to the ICF and stated that the ICF had not followed its own qualification system for Athens Olympic Games. The ICF and the FFCK subsequently agreed on the allocation of a newly opened quota position for a French woman kayak competitor.

At a later stage, the FFCK learned that three Chinese paddlers and one Romanian paddler would not be competing. As a result, four quota slots would not be used. The FFCK therefore asked that Messrs Leleuch and Barbey be added and that they be substituted for the French male paddlers then entered in the Men's C2 1000m event. However, no action was taken by the ICF in response to that request. Later, the FFCK wrote to ICF asking that Messrs Leleuch and Barbey be allocated two of the unused quota places and placed in the Men's C2 1000m event. On 22 August 2004, a Jury of the ICF considered the FFCK's request to add Messrs Leleuch and Barbey and rejected it. Later that day, that decision was appealed before the ad hoc division of CAS.

The CNOSF's main ground for appeal was that ICF was obliged to fill the four unused quota if the number of athletes position allocated did not reach 246 places. The ICF Olympic Qualification Rule on the point required that "Every accredited athlete must compete in an event at the Olympic Games, unless in exceptional circumstances approved by ICF. It is not possible to enter an athlete in the Olympic Games only as a substitute." The ICF, according to the CNOSF's argument, had not strictly followed the reallocation rule, and the French team of Messrs Leleuch and Barbey should have been considered during the third round of quota distribution for additional places.

The ICF replied to the appeal submitting - amongst other things - that (i) only the IOC could authorise the addition of the two late entries, (ii) there was no obligation on the ICF to allocate the four places that had become available and (iii) even if places were available France would not have been the automatic beneficiary of them since it would not be equitable to favour France just because CNOSF had two competitors in Athens available to take advantage of the two unused places.

In the Panel's view and contrary to the position of the ICF, it was compulsory for the ICF to reallocate such positions if the number of 246 had not been reached.

The Panel, however, also questioned the timing of the complaint filed by the CNOSF with regard to the ICF's allocation activity. The Panel noted that the CNOSF had the option of pressing its cause by appeal to the appropriate authorities, including ultimately CAS, in order to enforce its asserted rights but did not do so until very late. The Panel refrained from saying anything to deter sensible negotiation of sporting disputes. However, it did not fail to observe that there comes a time when a choice has to be made by the aggrieved party as to how that grievance should be redressed. In the Panel's view it was in all the circumstances of the case far too late for CNOSF to retrace its steps and to take the path of litigation at that stage.

With regard to the CNOSF's reliance on the unused quota places, the Panel stated that CNOSF's claim in that respect was no better than that of any other country. The mere fact that the CNOSF had

been astute enough to give advance warning of its desire to make use of any places that might become available, and had paddlers ready to perform, should not gain it an advantage..

CAS OG 04/009

**Hellenic Olympic Committee (“HOC”) and Nikolaos Kaklamanakis v. International Sailing Federation (“ISAF”)**

This arbitration dealt with an appeal against three decisions of the Protest Committee to abandon Race 1 of the Men’s Windsurfer Mistral held on 15 August 2004 as well as against one decision of the Protest Committee to deny the request of Mr Kaklamanakis for redress in respect of the hearing of the protests.

At the beginning of the above mentioned race, instructions for the number of times to sail the course were posted on the bow of the committee boat. An electronic display also showed the wind direction. At the team leaders’ meeting, on the morning of 15 August 2004, the organizing committee made an announcement that the finishing flags would only be raised when the race leader was rounding the last mark and was then heading for the finish. Thirty-five minutes into the race, Mr Kaklamanakis was leading the race and rounded mark 3, the last mark. He saw the flags raised and headed for what he assumed to be the finish line. When Mr Kaklamanakis crossed this finish line, the Race Committee boat made the finishing sound signal and the spectators and press cheered. His finishing time was forty-one minutes. Mr Kaklamanakis was then immediately intercepted by a press boat, forcing him to tack and stop and the press started to ask him questions. After finishing the race, three sailors protested about what had happened and requested the race be abandoned. After a three hour protest hearing, the Protest Committee ruled that the race be abandoned and be re-sailed on a later date. On the following day, 16 August 2004, Mr Kaklamanakis presented a protest for redress but the Protest Committee concluded that such request was in fact a request to reopen the hearing of cases already discussed and therefore was dismissed. The re-race of the Men’s Windsurf Mistral was held on 17 August 2004.

The CAS Panel after asserting its jurisdiction on the case noted that Rule 70.4 of the Racing Rules provided that a decision of an international jury properly constituted as the Protest Committee could not be appealed. According to the Panel, this provision must be read in conjunction with Rule 70.1, according to which, if the right of appeal has not been denied under Rule 70.4 (which the Panel found to be the case), then only appeals of rules interpretation should be permitted. Consequently, appeals of fact should not be allowed. As a result, the Panel found that Protest Committee decision could not be appealed.

Of interest in this case, amongst other things, was the obiter rendered by the Panel according to which CAS has full jurisdiction to overrule the Rules of any sport federation if its decision making bodies conduct themselves with a lack of good faith or not in accordance with due process.

The Panel also entertained the question as to the right of the parties to attend and be allowed to be accompanied at hearings of Protest Committees. On this issue the Panel concluded that any decision to deny the attendance of third parties or consultants was within the exclusive jurisdiction of the Chair of the Protest Committee.

CAS OG 04/010

**Mr Yang Tae Young v International Gymnastics Federation (FIG) and United States Olympic Committee (USOC)**

On the penultimate day of the Games Mr Yang, a gymnast for the Republic of Korea, lodged an application with the ad hoc division of CAS complaining about a marking error made on 18 August 2004 during the Men’s Individual Gymnastics Artistic All-round Event Final. While the ad hoc Panel was ready to hear the application, most of the parties were not in a position to proceed. Accordingly, and in compliance with Article 20 of the CAS ad hoc Rules, the Panel referred the dispute to arbitration under the ordinary CAS Rules. As a result, this dispute was not finally settled in Athens by an ad hoc division Panel.

As mentioned above, the dispute arose out of a marking error which took place during a gymnastics competition and specifically in relation to Mr Yang’s performance on the parallel bars. The scoring in this competition was a combination of start values - based on the degree of difficulty - and execution. There were two teams of judges. One determined the start value while the other dealt with the execution scores (these are called A Jury and B Jury respectively). The scores were posted on electronic score boards immediately after the routine had finished.

Mr Yang was given a start value of 9.9 instead of 10. The reason for the error was that the A Jury misidentified a movement in the performance. Mr Yang asserted (and the FIG originally concurred) that in the absence of that misidentification Yang would have received the gold medal and not the bronze. Mr Yang’s complaint, however, was not raised until after the competition had ended since Mr Yang’s coach had not seen the results board due to both poor visibility of the scoring board from his position and because he was busy preparing for the next round. Nonetheless, Mr Yang challenged, with no success, the results through the internal routes and eventually filed an appeal with CAS.

The CAS Panel observed in its decision that there was a mechanism in place for dealing with judging errors. But there seemed to be a lack of familiarity with how it actually worked in practice. In any event, the Panel said that it was clear that any appeal must be dealt with during and not after a competition. This interpretation was consistent with a natural expectation that the identity of the winner should be known at the end of a competition (even though exceptions to this principle do exist).

The Panel entertained in details the issue as to what extent courts (including CAS) could interfere with field of play decisions. An absolute policy to refuse to interfere was argued as having a defensible purpose and policy. However, the Panel went on to point out that sports law does not have a policy of abstention if there is fraud, bad faith or corruption. With specific reference to the case at hand, however, the Panel’s view was that (i) the subject matter of the appeal was not justifiable and (ii) the protest was made too late and not in conformity with the relevant rules. The Panel considered that an error identified with the benefit of hindsight should not be a ground for reversing the competition. Indeed, the Panel stressed in this regard the importance of finality and said that rough justice may be all that sport can tolerate. The appeal was therefore dismissed.

### 3. Conclusions

As we have observed above the cases administered by the ad hoc division of CAS at the Athens 2004 Olympic Games showed an increase in the challenges to refereeing decisions which were either wrong or perceived to be unfair. Even though only a few complaints were eventually formalised into actual CAS proceedings many more were about to reach that stage. A regrettable element of the Olympic Games was obviously the presence of doping violations. The stringent regulations aimed at eradicating this terrible plague as well as the diligent enforcement of such regulations by CAS are to be praised and supported. It has been observed in this respect that, perhaps, the fight against doping should differentiate between sanctions to be imposed on deliberate cheating and sanctions to be imposed where the violation is the result of mere and genuine negligence. The objective difficulty in ascertaining the nature of the offence that such differentiation would be likely to give rise to is however a problem that may stop any future policy in that direction at least as long as doping remains such a malicious and unfortunately widespread enemy of sport and health.

Despite the presence of such difficult issues that the Olympic Movement will have to tackle in the future, one of the many positive notes in Athens, together with the excellent organisation of the Games, was that - once again since the creation of the ad hoc division - the Court of Arbitration for Sport has not failed to provide the Olympic Games with highly professional and perfectly organised service for the fast and effective protection of the rule of law in sport disputes.

# An "Irish Court of Arbitration for Sport"?

by Michelle de Bruin\*

## 1. Introduction

The President of the GAA recently commented that two things were threatening the association at present. One of those was litigation. Several players had taken judicial review proceedings against the GAA, and the association had had enough. The GAA felt that there had to be another way and enlisted the help of Mr. Justice Hugh O'Flaherty, a former judge of the Irish Supreme Court. It was reported that solicitors worked around the clock in an effort to draw up a procedure that will deal with such disputes without either party having to set foot in the Four Courts. Our national sports are becoming more professional. Commercial contracts, broadcasting rights and transfer agreements can lead to disputes that may involve millions of euro. Isn't it the perfect time to set up Ireland's first sports dispute resolution panel?

It is suggested that the 'Irish Court of Arbitration for Sport' could be set up and provide services to athletes, players, managers and federations through the Sports Council.<sup>1</sup> The author proposes to outline briefly how such a body could work.

## 2. Arbitration

Arbitration is a form of dispute resolution whereby a dispute between parties is adjudicated upon by an independent third party or parties. There is no statutory definition of arbitration under Irish law, but it is settled that decisions of an arbitrator are final, binding and enforceable in the courts.<sup>2</sup> There are several advantages to having an Irish Court of Arbitration for Sport. Firstly, it would help develop a unitary system of dispute resolution<sup>3</sup> and a consistent body of sports law.<sup>4</sup> Secondly, disputes could be heard and determined speedily by an expert or a panel of experts. Thirdly, the dispute could be settled at possibly a significantly lower cost than trying to resolve the issue through the courts. There is also a better chance of preserving the relationship between the parties in a frequently small sporting world.<sup>5</sup>

## 3. Forum

It is suggested that the Sports Council could establish the Court of Arbitration for Sport (an Irish CAS) and would provide facilities for the arbitration to take place. Funds should be provided by the Minister for Sport to subsidise the body. It could be made a condition that any sporting body applying for public funds recognise the body and agree to refer disputes to arbitration or mediation before they can have access to those funds.<sup>6</sup>

## 4. Jurisdiction

Jurisdiction usually arises out of the contract between the parties. In a sporting context, athletes or players usually agree to be bound by the rules, regulations or constitution of the relevant body when they become a member of that body in order to compete.<sup>7</sup> Any athlete/player, therefore, would be entitled to avail of the services offered by the Irish CAS if the federation has signed up to the body. Absence of a contractual link need not be fatal. It could still be left open to parties not falling into the first category to use the Irish CAS under an ad hoc agreement.<sup>8</sup> An example of this is the Woodhall/Warren dispute which related to a disagreement between a boxer and his manager. Having agreed to ad hoc mediation, a split was prevented and the boxer actually signed a new contract with his manager.

The rules governing the arbitration procedure and the decision should be governed by the laws of the Republic of Ireland.<sup>9</sup> It should be clear which law governs the parties' procedural rights.<sup>10</sup> This would help to prevent disputes in relation to the jurisdictional issue. It took twelve different hearings before the courts and arbitration panels to resolve the jurisdictional issue in the case of athletics star Harry "Butch" Reynolds.<sup>11</sup>

## 5. Services

The Irish CAS could deal with the following issues.

1. The resolution of disputes at first instance through arbitration.<sup>12</sup>
2. An arbitration hearing by way of appeal on foot of the decision of a disciplinary panel or other such committee of a governing body or federation.<sup>13</sup>
3. Mediation.<sup>14</sup>
4. An advisory opinion from the body.<sup>15</sup>
5. An ad hoc division which could be convened at large sporting events to deal with disputes which by their very nature, need to be decided quickly.<sup>16</sup>

## 6. Arbitrators

Parties should have the choice between having the dispute decided by either one arbitrator, or in other more suitable cases, by a panel of three arbitrators. A single arbitrator should be sufficient in most cases. This would mean that the costs of the arbitration could be kept to a minimum. It is important that the arbitrators be seen to be independent.<sup>17</sup> Arbitrators could be drawn from a list of those currently regis-

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1 The Canadian Government have enacted legislation to govern the work of the Canadian Dispute Resolution Centre. The 'Act' (An Act to promote physical activity and sport, S.C. 2003 C-2) received royal assent in March 2003. It sets out the policy of the Government in relation to the fair, equitable, transparent and timely resolution of disputes in sport. It provides for the creation of the Centre and stipulates that the Centre shall include a Dispute Resolution Secretariat and a Resource Centre.

2 Ercus Stewart S.C., *Arbitration, Commentary and Sources*, 1.

3 Adam Lewis and Jonathon Taylor, *Sport: Law and Practice*, A5.18.

4 Nafziger states that a fully developed lex sportiva would help to develop the three principles of stare decisis; the efficiency of the legal process, the predictability or stability of expectations and the equal treatment of similarly situated parties. See *The International Sports Law Journal*, 2004/1-2 at pg 3.

See also Oschutz, *Institutional arbitration in sport, in Sport et Garanties Fondamentales: Violence-Dopage* 507,516 (Korcha & Pettiti eds.2003).

5 N.2 above, A5.31.

6 This condition is set out in the UK's Sports Statement of Anti-Doping Policy.

7 N.2 above, A2.12

8 The Hon. Michael J. Beloff QC. Tim Kerr, Marie Demetriou, *Sports Law*, 255.

9 This would prevent a situation akin to the procedure in relation to decisions of the International Olympic Committee's arbitration body, CAS, whereby appeals to those decisions are governed by the laws of Switzerland. This means that if an ad hoc court is sitting at an international event, any appeal to a decision of the tribunal would be to the Swiss Supreme Court.

The Asser Institute in the Netherlands (which has studied the way the body works) has said that the CAS should take applicable state law provisions into account. See <http://www.sportslaw.nl/>

10 The CAS has been criticised by The

Asser Institute as having no clear statement as to the procedural rights of the athletes.

11 N.6, 260 and *Reynolds v. IAAF* 23 F 3d 1110 (1994); 115 S. Ct. 423 (1994); 968 F 2d 1216 (1992); 112 S Ct. 2512 (1992); No. C-2-91-003, 1991 WL 179760 (1991); 935 F 2d 270 (1991); and other unreported court and arbitration proceedings.

12 Prospective users could include athletes, sporting leagues, sports associations or federations, clubs, sponsors, televisions companies in relation to broadcasting contracts, other companies involved in sporting events.

13 Many governing bodies have their own disciplinary committees which decide whether sanctions should be imposed for breaches of the rules. The GAA is currently setting up their own disciplinary panel to deal with disputes which are otherwise ending up in the courts.

It may be necessary for the Olympic Council of Ireland (OCI) to give permission to all sporting bodies affiliated to the OCI, to refer disputes to the Irish

CAS. This would avoid disputes in relation to jurisdiction where the parties are obliged to recognize CAS as the final court of appeal. This would not take away from the ability of the CAS to decide disputes at an Olympic Games or an Ad Hoc division to decide disputes at international events.

An Irish CAS would also help to enhance the credibility of sporting federations whose decisions may sometimes be criticized on the basis that they may seem to have been made for political reasons.

See also N. 4 above, 4 and 8.

14 The confines of this paper do not allow for an in-depth analysis of the services which could be provided in this area.

15 As is done with the CAS, advisory opinions would not be given in situations where the issue in question is likely to come before the Irish CAS for arbitration.

16 This is also used by the CAS at major sporting events such as the Olympic Games.

tered with the Bar Council of Ireland, The Law Society of Ireland and The Chartered Institute of Arbitrators, who agree to place their names on a dispute resolution panel.<sup>18</sup> Arbitrators should be independent of, and not hold any position in any federation or governing body.<sup>19</sup> They should also agree not to accept a position in any governing body/federation for two years after they cease to be a member of the dispute resolution panel. Arbitrators should not hold any position in the Sports Council.<sup>20</sup> In cases where the parties decide on a panel of three to decide the dispute, one arbitrator can be nominated by the player/athlete, one by the federation and the chairperson could be nominated by the Chairman of the dispute resolution panel. This mechanism can also be used in a situation where both parties cannot agree on a single arbitrator.

## 7. The procedure

Briefly, the arbitrator will decide how the dispute should proceed in relation to the exchange of pleadings, time schedules for the exchange of same and other relevant documentation, written submissions and the hearing of oral evidence. This must be left to the discretion of the arbitrator as some matters may be dealt with expeditiously, while other more complicated disputes will take more time to resolve. Disputes that are heard by way of appeal from a decision of a governing body/federation may need to have a time limit (eg. 21 days from the date of the decision in question) within which the player/athlete or the governing body/federation must register their intention to appeal with the Sports Council. The arbitrator could conduct a hearing *de novo*, or simply review part of an agreement that may be in dispute. This could mean that in a contractual dispute, for example, only part of a contract may be struck down while the main body of the contract need not fall.

## 8. The decision

The arbitrator should give a written decision upon coming to his/her conclusions.<sup>21</sup> One of the criticisms of the CAS in its early years was the lack of transparency and not publishing a full list of decisions.<sup>22</sup>

Hearings would normally be held in private. They could, however, be held in public if both parties agree. It would be of great benefit if the decisions of the arbitrators were published in full. This would assist greatly in the transparency of the process and build a body of law (or *lex sportiva*) which would act as a reference and guide to all in the Irish sporting world. This may indeed encourage the settlement of disputes at an earlier stage as there would eventually be uniformity and consistency in the decisions handed down.<sup>23</sup> The arbitrator should have the power to declare a decision or a contract void and order stays of litigation pending the arbitration.

## 9. Reviews and appeals

The decision of the arbitrator should be final, binding and enforceable in the courts.<sup>24</sup> The courts still have a supervisory jurisdiction over an arbitration in the Republic of Ireland, however, and the decision should be open to judicial review in limited circumstances.<sup>25</sup> These circumstances include where there are breaches of natural justice or constitutional justice. A decision could also be appealed if the arbitrator exceeded his or her functions, was not impartial, not independent or misconducted himself.<sup>26</sup> Whilst certain sporting bodies do not allow players/athletes to appeal to the courts under any circumstances,<sup>27</sup> there is a compelling argument that decisions of sporting bodies and tribunals should be open to judicial review.<sup>28</sup> This is particularly important in situations where the player/athlete is bound to adhere to a process simply because they are a member of a body or federation.<sup>29</sup> A player/athlete may be bound to the arbitration process under their contract with the federation, if the relevant body/federation has incorporated this into their rules or constitution. Full and final should mean that there is only a limited right of appeal<sup>30</sup> and therefore the decision of the arbitrator should be reviewed in terms of the decision-making process more than the decision itself.<sup>31</sup> This is unless the decision was unreasonable and could not be supported in any way based on the facts.<sup>32</sup> A judge could also have the power to remit cases to the arbitrator, similar to the process provided for under the Arbitration Act of 1954.<sup>33</sup>

17 The CAS was reformed in 1994 following the decision of the Swiss Supreme Court in the case of *Gundel v. The International Equestrian Federation*. The court noted the close ties between the IOC and CAS. The Paris Agreement, signed in 1994 made provision for ICAS, a body that would oversee the running of the CAS.

The Swiss Federal Tribunal held in the case of *A. & B. v. IOC, 1st Civil Chamber, Judgment of 27 May 2003*, (at para. 3.3-4) that the CAS was sufficiently independent of the IOC and the FIS (the governing body of the two athletes) for its decisions to be considered 'true awards, equivalent to the judgements of State courts.'

18 Of the 150 arbitrators in the CAS, 90 are chosen by the IOC, National Federations and National Olympic Committees. A further 30 are chosen to represent the interests of the athletes and 30 more are chosen from those regarded as independent arbitrators.

19 This avoids a situation that can occur in CAS proceedings where an arbitrator can represent a governing body/federation in a particular dispute and can also act as an arbitrator in any other case.

This practice is also criticized in E.U. Project No. C 116-15; *Legal Comparison and Harmonization of the Doping Rules*. The report suggested that the CAS would then avoid the appearance of bias that may result in the interchange of personnel.

See also N.2 above, A5.40.

20 In accordance with the principles of natural justice. *audi alteram partem*, in particular.

The CAS does not consider that issues in relation to public law, human rights and natural justice come within its jurisdiction.

See N.4 above, 4.

21 One of the recommendations of E.U. Project No. C 116-15; *Legal Comparison and Harmonization of the Doping Rules* was in relation to the decisions of the CAS. The report recommended that the CAS should make its jurisprudence more freely available for reasons of transparency. This could include transcripts or recordings of the proceedings.

See also James A.R. Nafziger, *The International Sports Law Journal*, 2004/1-2, 8

22 The CAS are now publishing decisions in full, but not all decisions are published. Decisions are published when both parties agree that this can be done. See also Janwillem Soek, *The Legal Nature of Doping Law*, *International Sports Law Journal*, Vol. 2, 2002.

23 It may be an advantage in the procedure that the panel of lawyers in this case would all come from the same jurisdiction. This is in comparison with the CAS, where some arbitrators come from common law and some from civil jurisdictions. It should also be noted that CAS is not bound by precedent, which means that each case can be decided on its particular facts or merits.

24 This would also help to avoid a situation

like the Harry 'Butch' Reynolds, where a lack of clarity in relation to procedure led to many appeals of the initial decision. See Tackaberry and Marriot, *Bernstein's Handbook of Arbitration and Dispute Resolution Practice Volume 1*, 15-112

25 The English courts intervene where there has been a breach of the rules of natural justice, or where there is restraint of trade, or where livelihoods are at stake. *Revie v. Football Association* [1979] *The Times*, 19 December.

There is also an argument that athletes/players are entitled to expect that decisions made against them are open to challenge in the civil courts if the certainty and fairness of the process has been abused.

See N. 24 above, 15-112

26 *Doyle v. Kildare County Council and John Shackleton*, *The Supreme Court* (The Chief Justice, Mr Justice Hamilton Mr Justice O'Flaherty and Mrs Justice Denham) judgments delivered 31 October 1995.

27 UEFA purports to oust the jurisdiction of the courts completely.

28 The Secretary General of the CAS has stated that the arbitrability of disputes, the validity of the agreement between the parties and judicial remedies against awards do not come within the jurisdiction of the CAS. See Reeb, *The role of the Court of Arbitration for Sport, in International Law and The Hague's 750th Anniversary* 233,236 (Heere ed.1999)

29 Chitty on Contracts, (28th Edn. 1999,

Sweet and Maxwell), para. 12-045

30 It has been argued that if CAS did not exist, it is difficult to believe that the systems of strict liability would survive legal challenge in the domestic courts. See E.U. Project No. C 116-15; *Legal Comparison and Harmonization of the Doping Rules*, 9.

31 E.U. Project No. C 116-15 also suggests that the CAS should have a set of fundamental procedural rights that it will guarantee.

32 Similar to the O'Keefe principles. These principles arose from the Irish planning law case of *O'Keefe v. An Bord Pleanála* [1993] 1 I.R. 39. The court held that a finding of a decision maker involved in an administrative function could be quashed if the decision was 'unreasonable' or 'irrational'. The court stated that an 'applicant would have to establish to the satisfaction of the court that the decision-making authority had before it no relevant material which would support its decision.'

See pp. 71-72

33 Section 36 of the Arbitration Act 1954 states that "in all cases of reference to arbitration, the Court may from time to time remit the matters referred to or any of them to the reconsideration of the arbitrator or umpire." Order 56, rule 4, Rules of the Superior Courts, provides that an application by any party to set aside the award or to remit the award to an arbitrator may be made by special summons.

## 10. Costs

As previously stated, the facilities for the arbitration should be provided by the Sports Council. This would include administrative facilities. The arbitrator, however, should have discretion in relation to costs of each arbitration and awards. It is envisaged that most situations will involve disputes between player/athletes and their governing bodies. In such cases the body will usually have sufficient funds to cover the cost of the arbitration. This may not always be so in the case of the player/athlete. It is suggested that any party shall have the option of making an application to the arbitrator, at the beginning of the procedure, for a form of legal aid. It is suggested that the Sports Council have a fund specially designated for this purpose. It would be for the individual arbitrator or the panel of arbitrators to decide whether the party should be granted legal aid. It is important that the application be made promptly. The arbitrator should have the power to award costs or penalise parties as he/she deems fit.<sup>34</sup> In other words, legal aid could be granted in principal, but a player/athlete who frustrated the proceedings could be penalised in any final award as to costs.

## 11. Conclusion

Like it or loathe it, the sporting world has become increasingly commercialised and sophisticated.

The Irish sporting world is no exception. The public want to see more goals, more gold medals, more titles. This means that there is a greater amount of pressure on teams and athletes to perform. It can seem that the competition has never been tougher, and the potential rewards have never been greater. This is the reality of sport in the 21<sup>st</sup>

century. The fight against doping is seen by many to be the greatest threat to amateur sport, and federations and governing bodies struggle to keep up with the changing times. Some officials would probably admit that their sport would be great, if it wasn't for all those athletes!

Using rules, sanctions and disciplinary procedures in a repressive way is not the best way forward for anybody involved in the business of sport. People involved in running sport should think about service rather than control.<sup>35</sup> Rules and sanctions will always be needed but parties need to consider alternative ways to deal with disputes that will inevitably arise from time to time.

It is not possible within the scope of this paper to sketch more than a skeleton of the procedure that could and should be implemented in Irish sport. The Irish CAS would not be the answer to all of sports problems and it would not deal with breaches of discipline that will cross the line into breaches of the criminal law.<sup>36</sup> A dedicated dispute resolution service will, however, go a long way towards possibly resolving disputes in an amicable way rather than marching straight to the Four Courts.

<sup>34</sup> Parties could be penalized for delay or non-cooperation etc.

<sup>35</sup> 'Aren't We All Positive?' - A (socio)economic analysis of doping in elite sport; commissioned by the European Commission, Directorate-General for Education and Culture, to KPMG BE,

T.M.C. Asser Institute and Lamsma Veldstra & Lobe Lawyers, pp. 88 (January 2002)

<sup>36</sup> An example of this is the recent case of James McCartan who was convicted for an assault committed on the playing field.

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# Professional Sport in Poland: The Role of Legal Regulations\*

by Marian Rudnik\*\*

## 1. Introduction

As a result of processes of institutionalisation, commercialisation and media focus of sport which have continued for a number of years (discussed in more detail in Dr Andrzej Wach's paper), more and more new manifestations of activity in this field are becoming visible. Basically, at present the following types of activity relating to professional sport can be distinguished:

1. Activity by professional competitors involving paid participation in sporting competitions (tennis players, boxers, track and field athletes);
2. Activity conducted on a commercial basis by entities grouping together professional sports competitors (professional groups, cycling stables);
3. Activity by entities organising professional sporting events on a commercial basis (athletics meetings, boxing galas, tennis tournaments);
4. Activity of Polish sporting unions organising professional competition;
5. Activity of professional leagues as entities organising professional sporting competition on the basis of an agreement with a Polish sporting union;
6. Activity of firms conducting sport-related marketing.

There are many factors influencing the shape of professional sport in Poland and its growth rate and development. One of these important factors is undoubtedly the relevant legal provisions. It is legal regulations relating to professional sport and an assessment of how they function in practice which will be the main topic of this paper.

## 2. The present legal status of professional sport

Until 1995 there were no legal regulations governing professional sport in Poland, even though by then certain manifestations of professional activity in sport had already existed for a number of years. It was only the Physical Culture Act of 18 January 1996 which finally addressed issues relating to professional sport, with the whole of Chapter 5 and several articles elsewhere in the Act being devoted to these matters.

- In Article 3.5 professional sport is defined as a type of competitive sport practised for profit.
- Article 6 includes sporting companies (SSAs) among the sports clubs which are the basic entities carrying out physical cultural activity and which can take part in sporting competition, while Articles 31-36 set out their tasks and specific requirements distinguishing them from other companies (capital, privileged shares, dividends, etc.).
- In Article 22.2 a professional competitor is defined as a person who practises sport based on an employment or other contract and receives remuneration for doing so, while Article 25.2 gives the relevant Polish sporting union the power to specify the detailed rights and obligations of a competitor, including the status of a professional competitor.
- Although the concept of operations in the field of professional sport is not defined, Article 29.1 states that such operations may be conducted only by two types of entity: Polish sporting unions and SSAs.
- Polish sporting unions have been given the exclusive right to organise professional competition, to delegate that right to other entities, to create professional leagues and to conclude relevant agreements with such leagues (Articles 29.2 and 29.3).

Of importance for the organisation of professional competitions in team sports is Article 36, which states that a Polish sporting union which has received approval for activity in the field of professional sport may set up a professional league. The legal and organisational form of such an entity was not specified, in order to ensure a wide degree of freedom for possible activity and to allow the matter to be regulated in the future.

The members of a professional league in principle include *only* SSAs. In quite exceptional cases, on a proposal of a Polish sporting union, the Chairman of the Polish Sports Confederation may give consent for "physical culture associations" to participate in a professional league. This regulation was intended to guarantee the professionalism of the entities participating in a league. Company status gives certain financial guarantees and security, for example in case of loss of financial liquidity or in other circumstances where for various reasons the entity's going-concern status is endangered. As is the case in Western European countries, the rules according to which a professional league functions are laid down *in the form of a contract* between the relevant Polish sporting union and the SSAs belonging to the league. This contract should contain provisions guaranteeing that the relevant Polish sporting union will be able to meet its domestic and foreign obligations and exercise its disciplinary powers.

Some important fields of activity in professional sport were previously placed by law under the supervision of the Chairman of the Office of Physical Culture and Sport, and now the Chairman of the Polish Sports Confederation, who gives approval to Polish sporting unions for the organising of professional sporting competition, for the assignation to other entities of the right to do so and for the participation of physical culture associations in professional leagues, and also monitors the activities of individual SSAs, being informed about important changes taking place in those companies.

As can be seen from the above survey of the regulations in force, current legislation does not include regulations relating to the organisation and conduct of professional sport in those disciplines which are based on individual competition.

## 3. Professional sport in practice

We will now consider the practical functioning of the legal regulations relating, in particular, to professional sporting competitors, sporting companies (SSAs), Polish sporting unions as organisers of professional sporting competitions, and professional leagues.

### 3.1. Professional competitors

The activity of a professional competitor is based on paid participation in sporting competitions on the basis of a sporting contract. The contract is an agreed definition of a certain legal relationship which binds the competitor and an entity organising competition (club, athletics group, professional cycling group). There are major discrepancies between specifications of what should be contained in a professional contract, who should be a party, and what, if any, should be the role of a Polish sporting union in supervising the performance of the

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contract. In part, regulation is based on the rules of international federations which specify the form and principal elements of a contract.

Quite precise regulations in this form have been laid down, for example, by the Polish Football Association (PZPN), which states that professional competitors include non-amateur competitors who have signed with a club an employment contract or other contract drawn up in accordance with a form approved by the PZPN (a professional footballing contract). It is also laid down that such a contract is subject to special protection from the PZPN as regards disputes relating to its validity, existence and termination. Besides the standard specimen contract (in the form of an employment or other contract), there are also rules concerning the relationship between a sports club and a professional competitor, which constitute an annex to the contract concluded between the competitor and the club. These rules set out in detail the competitor's rights and obligations, the union's supervision of the conclusion of the contract and issues relating to the competitor's remuneration and insurance.

The situation is similar with regard to professional contracts in cycling groups, except that in that sport the domestic rules are based almost entirely on documents drawn up by the International Cycling Union. Professional contracts are concluded according to a set form and cover obligations resulting from appointment to a national squad as well as the powers of the Polish Cycling Union (PZKol) relating to mediation in disputes.

In professional boxing, contracts are concluded between a professional boxer and a promoter (owner of a promotion group). Contracts are not normally contracts of employment, and they are not subject to any detailed rules. A boxer signing a contract must have a professional boxer's licence, issued by the Professional Boxing Section (WBZ) for a period of one calendar year.

It can therefore be concluded that, in spite of the absence of a statutory definition of a professional contract, such documents do function to control legal relations, often based partly on standards laid down by international federations and on the specific features of a particular sport. Nonetheless, it can be considered whether there is a need to define, at least in outline, the components of a contract, including for example the parties' rights and obligations, guarantees of participation in national squads, or insurance issues.

Special rules also apply in cases where a sporting competitor provides services to a given club on the basis of a business operation. This situation occurs, for example, in competitions organised by the Polish Motor Union. Professional competitors themselves, as registered business enterprises, pay all the costs of preparing for and taking part in races. They also have a contract with a club, on the basis of which they bill the club for their participation in events.

### 3.2. Sporting companies (SSAs)

The joint stock company (*spółka akcyjna*) is a tested form for entities taking part in professional team competition. From both organisational and financial standpoints, such a unit is able to fulfil the requirements imposed not only by the system of competition itself, but also by the economic conditions in which competition takes place. Besides this, company status provides a guarantee of proper conduct of operations and a precisely defined system of individual responsibility for the functioning of the entity.

The fairly strict requirements imposed by company law in relation to the creation of companies of the *spółka akcyjna* type undoubtedly complicate the process of formation of entities which might engage their capital in the organisation of professional competition. Practice also shows that the range of entities entitled to engage in competition does not correspond to actual needs or financial capabilities. As Polish sporting unions point out, it would undoubtedly make things significantly easier if the law were changed to allow SSAs to be formed with a smaller amount of capital than other companies of *spółka akcyjna* type, but it would also appear necessary to create conditions whereby other types of entity could participate in professional sporting competition.

There are currently 33 SSAs operating in five team sports:

- 16 in football (in league divisions 1 and 2);
- 14 in basketball (in league divisions 1 and 2);
- 2 in volleyball;
- 2 in ice hockey;
- 1 in handball.

### 3.3. Polish sporting unions as organisers of professional competition

At present there are three sporting unions which can be said to implement the provisions of the Physical Culture Act by organising professional sporting competition. These are:

- the Polish Volleyball Union (PZPS);
- the Polish Basketball Union (PZKosz);
- the Polish Boxing Union (PZB).

These unions have the relevant authorisations, and moreover the PZKosz and PZPS have delegated the organising of professional competition by means of agreements with companies responsible for the running of their respective leagues, called Polska Liga Koszykówki SA and Profesjonalna Liga Siatkówki SA.

Within the Polish Boxing Union professional competition is organised by the Professional Boxing Section. Work is also currently underway on the organisation of professional competition by the Polish Football Association and the Polish Ice Hockey Union.

### 3.4. Professional leagues

The functioning and (partially) the organisation of professional leagues are regulated by the Physical Culture Act. The activity of such leagues is based on an agreement with a Polish sporting union, and it is these unions which create professional leagues. Regardless of the lack of regulations specifying the legal status of such leagues, they remain a popular form of organised competition, common in Europe and throughout the world. Polish law, however, limits participation in such leagues to SSAs and, in exceptional circumstances and with the approval of the Chairman of the Polish Sports Confederation, physical culture associations.

An important element of the functioning of a professional league is the agreement between the Polish sporting union and a league participating entity, providing for the fulfilment of domestic and international obligations and the exercise of disciplinary powers.

As mentioned earlier, there are two professional leagues currently operating: the Polish Basketball League (Polska Liga Koszykówki SA) and the Professional Volleyball League (Profesjonalna Liga Siatkówki SA). Practice shows this model to be successful in the case of team sports, assisting the dynamic development of the disciplines in question. Of course success derives not only from appropriate legal regulations, but above all from the finding of suitable economic solutions, without which professional sport would not be able to function.

The system for the functioning of leagues in professional competition appears to be clear and transparent. Nonetheless, it should be recognised that sport can be attractive as a medium for advertising only given a high level of media-based popularity. This is the case with football, volleyball and basketball. Where television revenue makes up a significant part of the league's income, it is not a problem to ensure that it takes on a fully professional character. The situation is different for less popular sporting events, whose broadcasting is unprofitable from a marketing standpoint.

### 3.5. Professional groups

As mentioned earlier, there is great variety among the entities participating in professional competition, particularly in sports based on individual competition. This is a consequence of the absence of regulations relating to professional activity in these sports. Regardless of the number of entities engaged in this type of activity, the question of their legal status remains extremely important. Entities such as professional athletics groups and cycling stables often appear only as sponsorship names, grouping together competitors who are bound by individual contracts.

Examples of professional groups can be found in cycling, boxing

and athletics. Some of them function as clubs (associations), but it may also happen that competitors perform within the framework of a commercial entity, which is the "owner" of the group. A characteristic of a sporting group is the fact that it functions with the help of sponsorship, and there is therefore a high risk of instability depending on the general financial position of the sponsor.

For this reason sporting groups, such as those in cycling, are subject to annual registration, in order to ensure their continuous participation in competition and certainty of financial solvency through bank guarantees. An important factor relating to the interests of the national squad is the fact that a competitor undergoes training within the group, which provides him or her with all the conditions needed to practise the sport of cycling.

### 3.6. Sporting events

Among the entities playing a role in professional competition in individual disciplines are those which earn profits by organising races, meetings, galas or other forms of competition. The basing of business operations on sport as an effective advertising medium means that a new branch is appearing, undoubtedly closely connected with business, interested in promoting sport to a high standard. Unfortunately, the absence of any regulations in this field sometimes has an impact on the standard of such spectacles, as well as giving rise to conflicts with Polish sporting unions and causing a lack of clear rules setting out precisely who can apply to organise particular sporting events and on what basis.

A fairly typical example is that of tennis tournaments, the vast majority of which take place outside the auspices of the International Tennis Federation (ITF) and Polish Tennis Union. The organisations dealing with professional tennis are the ATP (men's tennis) and WTA (women's tennis). This means that professional tournaments organised under the auspices of the ATP or WTA do not require any approval from the national federation, and theoretically anyone may apply to organise such events.

In relation to the organisation of athletics meetings, in principle the Polish Athletics Union (PZLA) has full control over who organises competitions and how. Moreover announced events are included in the calendar of the PZLA, EAA or IAAF. There is therefore no danger that the schedule of domestic and international meetings will have a negative impact on competitors' training and preparation for championship events. The rules governing the organisation of meetings are based on detailed international regulations accepted by the PZLA.

In boxing, the Professional Boxing Section (WBZ) of the Polish Boxing Union is entitled, by a procedure specified in the Physical Culture Act, to delegate the organisation of professional boxing competitions, under its auspices, to a promoter licensed by the WBZ. Competitors may be Polish boxers having a current WBZ licence and a current medical certificate accepted by the Medical Committee of the WBZ, as well as foreign boxers licensed by other national federations.

### 4. Directions of legislative change

From what has been stated above it can be seen that there is already a need for a number of modifications to the provisions of the Physical Culture Act. This applies in particular to regulations relating to professional competition in individual sports.

Practice has shown that the regulations relating to professional competitors need to be changed. In particular, it has proved not fully justified to limit the status of professional competitor only to those signing an employment or other contract under civil law, since in individual and mixed sports many competitors are entrepreneurs in the sense of the law on commercial activity, earning financial benefits from their sporting performances despite not having signed such a contract with anyone.

More precise regulations are required in relation to sporting contracts, the rights and obligations of a competitor, the process of

becoming professional, the question of equivalent compensation for training a competitor who becomes professional, and the issue of competitors' insurance.

Statutory regulation is needed in relation to the rights and obligations of national representatives with a view to their marketing obligations, particularly in the context of sponsorship at federation level, club level and individual level. It is also necessary, in

Article 27, to specify penalties for breaches of the obligation to enable national representatives to prepare for and take part in international competitions, as Polish sporting unions and the competitors themselves are experiencing increasingly frequent problems relating to the fulfilment of this statutory duty when it conflicts with their contractual obligations.

It would seem that Article 6 of the Act ought to be modified so as not to create barriers to the practice of professional and other competitive sport in forms other than sports clubs, particularly clubs which are required to be either associations or SSAs. The provision as it stands gives rise to many practical problems, particularly in those disciplines where the creation of or membership of a sports club is not essential. This applies to individual sports such as tennis, cycling and athletics, in which there is practically no competition between clubs, unless such competition is maintained artificially.

It would also seem appropriate to introduce more regulations concerning matters relating to professional leagues. In particular there is a need for precise rules governing the formation of leagues, their legal form and the relations between a league and its founding body.

Consideration should also be given to the role played by Polish sporting unions in the process of organising professional competition. Are they in fact in a position to run professional leagues? Assuming that the running of such a league is to a large extent a business operation, the question arises whether sporting unions are able to balance their duties relating to the organisation of sporting competition and national squads with the commercial operations of a professional league (promotion and marketing activity, management of television, radio and Internet broadcasting rights, control of advertising rights, etc.).

From a practical point of view, then, it is an important question whether Polish sporting unions should be obliged to transfer their power to organise professional competition to other entities better prepared to take on that role.

A new approach to the regulations relating to professional sporting activity will be required when those regulations are brought into line with the law on commercial freedom. It will be necessary to specify the various types of such activity and to determine which of them should be given the status of regulated activity.

The question naturally arises as to which types of activity should be so regulated and what criteria to adopt. Recognising the partially commercial nature of professional sport, it should be clearly stated to what extent the activity of entities engaged in professional sport should be subject to regulation. Undoubtedly, a factor influencing future regulations in this area will be the interests of national teams, which is a higher good which should be assured of special legal protection. It is also important that the organisation of professional competition and participation in it be based on clear criteria in a way which secures the interests of all parties, particularly the competitors. In this context, then, the definition of certain spheres subject to the rules of regulated activity will ensure, with a minimum of state interference in professional sport, that the relevant rights and obligations are respected.

We conclude with the observation that professional sport in Poland, as in other countries, will develop on market principles, and that there should be as much legal regulation in this area as is essential for the protection of important interests, in particular those of the national teams, of the competitors themselves, and of the clubs and the Polish sporting unions.

# Current Issues in Polish Professional Football\*

by Andrzej Wach\*\*

The rapid expansion of professional sport in the second half of the 20th century at the expense of amateur competition, as well as the development of sport as an attraction for spectators, has led to the occurrence of phenomena often described in such terms as the institutionalisation, professionalisation, commercialisation and media focus of modern sport. While accepting the possible blurring of boundaries between these concepts, we must assume that they constitute both a driving force for the development of particular disciplines and types of sport, and also - unfortunately - a source of various types of deformation and perversion of sporting activity. They also lead to an ever increasing number of legally complex conflicts and disputes connected with sporting relations.

The institutionalisation of sport means the replacement of free and relatively informal sporting activity, conducted according to the liberal rules contained in the law on associations, with highly programmed activity regulated not only by the detailed provisions of the law on sport, but also by an ever increasing number of general legal provisions, particularly in the areas of civil, commercial and administrative law.

One of the symptoms of this transformation has been the conversion of many sporting associations into commercial companies, whose shares can now (though only in certain countries) be traded on stock markets. A number of objective reasons, particularly economic ones, mean that sporting companies (SSAs), which have been formed in Poland since 1996, participate in championship competitions to a significant extent only in the sports of basketball, football and volleyball.

The process of institutionalisation of sport has developed in parallel with its professionalisation, a term used by some authors solely to denote a situation where sporting activity becomes the principal or sole source of income for a sporting competitor. This view also seems to have influenced the wording of Article 3.5 of the Physical Culture Act of 18 January 1996, henceforth abbreviated as PCA. According to that clause, professional sport is a type of competitive sport practised for profit. *Prima facie* this approach may be justified. It is related to the widely-held view that regular sporting activity on a competitive level may make it difficult or even impossible to carry on other professional activity. This applies in particular to competitors in sports which require year-round training or preparation for competition.

In my view, however, the professionalisation of Polish sport cannot be identified solely with the processes of its realisation merely for profit. On the one hand, the gratifying results achieved at international level by our canoeists, rowers, shooters or even track-and-field athletes are not always rewarded by commensurable benefits for those competitors. For many sportsmen and women and their families it is still the case that the basic source of income is another profession, practised alongside sporting activity.

This need not always mean *a priori* that such persons do not have the status of professional competitors. It can be argued that the possession of this status in modern sport is dependent on many factors, not limited to the fact of a competitor's having a specific financial contract.

It would seem, then, that the process of professionalisation of sport in a given country, being a logical consequence of its technological advancement and its degree of specialisation, should be shaped both by regulations specifying the legal status of competitors in particular disciplines, and by other regulations on the organisation and running of sporting competition, including those relating to financing, sporting infrastructure, sporting requirements, etc. The phenomenon under discussion should therefore be linked not only to the sporting activity of a competitor given professional status, but also to the asso-

ciated activity of clubs and sporting unions (related by a licensing system), managers, equipment firms, television and marketing firms, and other entities operating in the field of organisation and popularisation of sport. While it is the functioning of these entities, which means that sport is now subject to the processes of commercialisation and media-isation, their participation in modern sporting activity remains an inseparable and essential factor for the development of this sphere of social and commercial life.

The conditions described are fully applicable to Polish football, which has recently been undergoing a process of accelerated professionalisation, to be discussed below.

Bearing in mind the implications discussed above, it can be argued that the league player remains the central character in Polish professional football. The status of such a player in our country is subject to FIFA's transfer rules dating from 2001, the provisions of the PCA, as well as two resolutions of the Management Board of the Polish Football Association (PZPN) dated 19 May 2002: Resolution II/11 on the status of Polish footballers and transfers (introducing the so-called Bosman Law into Poland's football regulations) and Resolution II/12 on the "Principles" regulating the relationship between a sports club and a professional player. A professional footballer may play in Poland on the basis of an employment or other contract and receive remuneration for doing so. Although the feature of subordinated work is most visible in the case of employment contracts, in the field of sport it is also present in the performance of obligations under agreements not formally classed as employment contracts.

However, bearing in mind that the activities performed by a professional footballer should not be the subject of either of the two types of commissioned work contract defined in Polish law (*umowa zlecenia*, whose subject consists of legal actions, or *umowa o dzieło*, which provides for the achievement of a agreed result, which is undoubtedly difficult in the case of team sports), it must be concluded that the most appropriate form of contract for a footballer is a contract for services, as regulated in

Article 750 of the Civil Code. According to this clause, contracts of this type are subject to the relevant regulations on the first type of commissioned work contract, the method and scope of application of these regulations in each particular case being dependent on the actions to be performed. Since there are no separate provisions in Polish law for a typical sporting contract, and in the conditions of Polish football the measure of performance of a sporting obligation cannot yet be (cf. other sports) the achievement of a precisely defined result (e.g. qualification for the Champions League or UEFA Cup, winning of the Polish Championship or Cup), but is normally diligent action enabling the achievement of a specified league position, a victory or a draw against a higher ranked opponent, it would thus seem right to recommend the appropriate application of the rules on the *umowa zlecenia* to the services provided by league players.

On the other hand, one cannot help noticing that the introduction, several years ago, of compulsory national insurance contributions on earnings from commissioned work contracts in Poland, together with relatively high rates of income tax, are persuading an

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increasing number of players and their clubs to consider the possibility of treating the practice of the sport of football as an independent business activity on the part of the player. The same question arises in relation to the job of football coach and (though this seems dubious) to that of sporting referee.

Detailed rulings on the essential features of business activity have been made on many occasions by the Supreme Court. These features normally include the professional (and hence permanent) nature of the business conducted, the related repeatability of the actions taken, respect for the principles of rational management or those of profitability, and also participation in business transactions. An additional factor referred to in the legal literature is the significant condition that an entrepreneur act on his own account and at his own risk.

This being the case, the stronger view would seem to be that the practice of sport by a professional player cannot be regarded as business activity (and this is even more clearly so in the case of an amateur). However, the fact that it has been proposed in practice to give a professional footballer the status of an entrepreneur makes it necessary to consider the issue further. From this point of view it can certainly be maintained that the actual and legal actions performed by professional competitors (footballers) are of a constant and repeatable nature, are performed as business transactions and are pursued for profit, which *de jure* constitutes the essence of professional sport, in spite of our negative assessment of the wording of Article 3.5 of the PCA.

Significant doubts must nevertheless be expressed as to whether the actions of such players are undertaken on their own account and at their own risk. The same objection applies to football coaches, who by offering clubs their services in the form of business operations aim, for example, to make their period of employment independent of a running assessment of the effects of their work based on the results obtained by the teams they manage.

In both of the situations described, however, it is necessary to remember that the legal relations established between clubs and their professional players and coaches are determined also by the need to provide continuous sporting competition which is stable from a sporting and organisational perspective. Such competition is also shaped to a significant degree by the corporate and membership structure of the federations overseeing it and the associated licensing system. Because of such factors as television, advertising and sponsorship deals, championships must be continued throughout the league system, regardless of the current financial situation of the participating SSAs (which account for the majority of teams in Poland's top league division) and "physical culture associations". Those controlling these entities will withdraw football teams from league competition only as a last resort. They also strive to ensure that the high contractual obligations towards their players are met.

At the same time, in the conditions of modern sport (including football) it is rare to find players deciding to take on the risk associated with the club's activity and to accept a share in the losses which may result from it. For that reason the professional contracts (whether or not these are formally contracts of employment) do not assume that a sportsman acts on his own account, but rather that he performs subordinated work for the club being his employer. Of relevance in the case of employment contracts is the view expressed by the Supreme Court in a resolution of 19 June 1991, that activity performed by an employee under an employment relationship does not constitute business activity.

The provision of services by a competitor on the basis of a general contract under civil law (e.g. a contract for services as defined in Article 750 of the Civil Code) also takes place in favour of the club, as the income (profit) from sporting events goes to the organisers, and not to the competitors, who on the other hand do not usually wish to accept the risk of possible loss which might result from a lack of interest on the part of spectators, marketers and television channels. Regardless of the financial situation and income of the club, players expect those in control of the club to pay the often high contractual remuneration, and if this is not done then, legal action is taken under general laws or the law relating to trade unions.

Although current law does not provide a formal and legal basis for

the practice of the sport of football by a professional player to be treated as a business activity, it should be expected that in the near future there will be a legislative proposal to change the present state of the law in this area.

Since the year 2000, the Polish Football Association (PZPN) has provided legal protection for the contracts of Polish professional footballers. Copies of such contracts are kept by the PZPN's Matches Department, and in case of disputes are disclosed to the body settling the disputes. If a contract has not been duly performed for a period of three months, a player may apply to the Games Section of the PZPN for termination of the contract at the fault of the club, and this happens quite often in practice. The Supreme Appeals Commission, which hears appeals against such decisions, rarely overturns the original judgments. This gives players the opportunity to change clubs outside the "transfer window" and to take legal action or seek arbitration in order to reclaim their outstanding wages. Judgment panels of the Football Arbitration Tribunal have already established the principle, however, that a claim for a formally uncompleted contract period with a previous club cannot be accepted if the player is already being paid by a new employer in that time.

Bearing in mind the difficult financial situation of Polish clubs (which also have significant obligations under public law), the PZPN has acted to moderate the legal consequences of failure to honour footballers' contracts. On 27 September 2003 the PZPN's Management Board passed Resolution IV/33, which followed a change in the terms of the television contract concluded with the Canal+ station, whereby the media partner's payments to clubs for the broadcasting of their league matches in 2003-2005 were significantly reduced. The resolution in question authorised clubs to renegotiate their contracts with players and coaches so as to reduce their values up to the amounts lost as a result of the changes in the agreement with Canal+. At the same time the legal protection provided by the PZPN for amounts owing under employment or other contracts deposited with the PZPN was suspended for the 2003/2004 season in respect of players' remuneration other than their basic pay due without dispute under the contracts concluded. The Games Section of the PZPN would not terminate contracts at the fault of the club on the grounds of failure to pay such benefits.

On 27 September 2003 the Management Board of PZPN also passed Resolution IV/31, which amended the wording of the previously mentioned Resolution I/12 of 19 May 2002 on the "Principles" regulating relations between a sports club and a professional player. This amendment again enabled the renegotiation of footballers' contracts not only in connection with the performance of the current agreement with Canal+, but also in case of extraordinary changes in economic relations within Polish sport and Polish football resulting from reasons not being the fault of the club which make it impossible to adhere to the financial conditions of the contract. In this case the club may propose renegotiation of the contract, subject to the condition that the players' basic and additional remuneration may not be reduced by more than 50%. If agreement is not reached in such a situation, either party may apply to the PZPN's Football Arbitration Tribunal for determination of new contractual terms. The Tribunal may take into account the opinion of the PZPN's Training Section or Council of Coaches.

The fact of the renegotiation referred to above may also be taken into account by the Football Arbitration Tribunal when ruling on the payment of outstanding contractual sums by the club.

Naturally, the passing of these resolutions by the Management Board of PZPN met with an unfavourable reaction from the Polish Professional and Non-Amateur Footballers' Union and from the players themselves, who carried out a limited protest in the final autumn rounds of the league in the 2003/2004 season, although this was headed off by the clubs. During the winter break some clubs conducted renegotiation of footballers' contracts. The fact that in recent months many players, including internationals, have returned to Polish clubs from abroad is evidence that there has been a certain financial stabilisation in Polish professional football, largely due to the introduction of the licensing system.

In football circles the passing of the above-mentioned resolutions by the Management Board of the PZPN is sometimes seen, unjustly, as an attempt to balance the actions of the PZPN's Football Arbitration Tribunal in ordering football clubs to make contractual payments to players. It should be remembered, though, that the tribunal was set up, in late 1992, mainly in order to settle transfer disputes between clubs. The resolution of disputes between clubs and players serves to implement, within the Polish regulatory system, the procedural side of the so-called Bosman Law, as was accepted by FIFA.

In the period of more than ten years since it was founded, the Football Arbitration Tribunal has received more than 330 complaints. In 60 cases the complaints were rejected on account of failure to pay the tribunal fees. It can be assumed that in many cases this resulted from voluntary settlement of the claim by the defendant on learning that it had been submitted to the tribunal. In a further 55 disputes an amicable settlement was reached (15 of these being disputes between clubs, and 40 between clubs and players). This indicates that there is a good degree of will on the part of these PZPN members to resolve disputes amicably. Indeed, in another 22 cases the complaint was withdrawn voluntarily by the complainant (usually a player), which again implies that payment was made voluntarily by the defendant.

In a significant number of cases among the 112 so far giving rise to first instance judgments, football clubs have been ordered to pay transfer or contractual sums (to other clubs or to players), although in many cases the award was less than 20,000 zloty and was not disputed. In 47 cases a dissatisfied party submitted an application for the case to be reconsidered. In most second-instance cases, the tribunal's Judgment Panels have upheld the original verdicts. However, recently there have been more frequent cases where players' claims against clubs have been wholly or partially rejected (in both the first and second instances), which is probably down to the use by league clubs of contracts which are better constructed legally as regards provisions relating to their termination.

Parties who are not satisfied with the arbitration judgments of first and second instance may, in accordance with Article 712 of the Code of Civil Procedure, submit an application to a common court for the arbitration tribunal's judgment to be overturned. This has so far been done in seven cases. In four such court cases so far completed, common courts in Warsaw, Lodz, Radom and Poznan have rejected the applications. This seems to indicate that the PZPN's Football Arbitration Tribunal is operating as it should, its legal status having no doubt been strengthened by the new Article 60 of FIFA's statutes, which explicitly sanctions the activity of national associations' arbitration bodies, taking cases considered by them outside the aegis of FIFA's own dispute settlement body and the Court of Arbitration for Sport in Lausanne.

The solution described above undoubtedly makes life easier for Polish football clubs, which have recently been undergoing an important transformation, resulting from the introduction on 1 July 2003 of a licensing system based on principles adopted by UEFA. The current professionalisation of Polish football must therefore also be examined from the standpoint of the introduction of this licensing system. In this system, Division I clubs, and to a lesser extent Division II clubs, must fulfil numerous criteria relating to finances, infrastructure, legal status, training and staff. These are conditions for participation by league teams in competition at national level, whereas implementation of the licensing system as a whole enables Polish teams to take part in European cup competitions.

The principal benefits of this solution undoubtedly include the existence of Division I stadiums with artificial lighting, monitoring, fixed seating and covered media positions. There is also a guarantee that league teams will be managed by coaches who have been awarded first or championship class or a PRO licence. Moreover, this solution provides an opportunity to ensure that clubs taking part in league competition have a stable financial position.

As already mentioned, a significant proportion of Division I clubs already have the status of sporting company (SSA), and this applies also to some Division II teams. This organisational form certainly enables the club to be run in a more effective and flexible way,

enabling company owners to take quick decisions in a way which was often impossible within the structures of associations.

However, this model for the functioning of a football club also has its negative sides. The move away from collegial management, which occurs in some cases, often means that the management of the sporting organisation becomes the responsibility of a small group of persons, who - given the still relatively poor development of sports sponsorship in Poland and the slump in the electronic media (television) market - are not able to shoulder the burden of keeping the club functioning.

The high national and local taxes and national insurance contributions which have to be paid by licensed clubs, as well as the need to ensure a proper club infrastructure, mean that some league clubs are still teetering on the edge of bankruptcy. Given the small amount of help available from state and local authorities, who by law are not permitted to finance the activities of sporting companies, some such clubs have difficulty maintaining financial liquidity. With increasing levels of debt to third parties, court enforcement officers or tax and national insurance offices have sometimes attempted to recover outstanding debts by taking possession of amounts due from Cyfra+ for media rights. PZPN has attempted to explain to creditors that these funds have a very specific purpose, relating to the licensing system and the provision of appropriate club infrastructure. However, even when they relate to the implementation of restructuring principles adopted in 2002 in order to reduce the debts of businesses, the arguments of football institutions are not generally favourably received by creditors.

Division II clubs receive much smaller sums from PZPN's media partner. Some of them have nevertheless found sponsors, making the race for promotion in the 2003/2004 season the most interesting for many years. However not all Division II clubs can afford to form SSAs with a starting capital of 500,000 zloty. The lowering of this amount by means of an exceptional clause in the Commercial Companies Code (as was provided for in the original version of the PCA) would appear to be one of the most urgent legislative needs.

The PZPN also experiences practical problems caused by the wording of Article 36a of the PCA. This states that, when an SSA becomes a member of a professional league in place of a section of a physical culture association, the SSA takes over all material and non-material rights and obligations of that section. It must be accepted that in Polish sport there does not yet exist any professional league in the sense in which the term is used in the cited regulation, i.e. one formed by means of an agreement between the relevant Polish sporting union and the SSAs belonging to the league. For that reason the rule of legal succession, which under Article 36a applies only when a company enters such a league, is insufficient. The rule ought to apply regardless of whether or not professional competition already exists in the sport in question. The PZPN has resolved this question by means of Management Board Resolution V/37 of 29 September 2000 on membership, which provides for legal succession in all transformations of football clubs.

A related problem, but one which is much more difficult to resolve in practice, is the issue of "transferring" clubs or football sections (the same issue may also arise in other sports, as in the case of the basketball clubs Unia Tarnow and Wisla Krakow) to other towns, sometimes outside the territory of the parent sporting union. In the 2003/2004 football season this question arose in connection with the club Pogon Ptak SSA, which gained promotion to Division I playing in Szczecin, after moving the headquarters of the club Piotrcovia-Ptak SSA, in spite of the clearly expressed opposition of the Lodz Football Union and sporting circles in the town of Piotrkow Trybunalski. Attempts have been made to consider this question in a more general legal context. Attention has been drawn to the differences between the American and European systems of team competition. The first of these is a "closed" system without promotion and relegation, where clubs can move freely to other towns without giving rise to legal or ethical doubts, even in cases where a place in a professional league is bought up by another club which has not previously been represented in that league.

The European system, on the other hand, is an “open” system, based on promotion and relegation, where it is assumed that different teams will take part in competition in successive seasons. In this system any deviations from the principle that promotion takes place only by way of sporting competition will always give rise to ethical and legal doubts [16]. Is it necessary, however, to exclude *a priori* the right of a club, being an SSA, to move its headquarters? In the first half of 2004 the controlling bodies of the PZPN began to analyse the question of permissibility of changes in football clubs’ venues for league matches when such changes are justified by economic factors.

There is no doubt, however, that the problems described above remain overshadowed by the issue of resolution of legal disputes to which the PZPN is a party, which has unexpectedly become the most explosive problem relating to the activities of the association. In a judgment of 19 December 2003 the Polish Olympic Committee’s Sport Arbitration Tribunal overturned the following decisions of the PZPN’s disciplinary bodies:

- a the award of a 3:0 walkover to Swit Nowy Dwor Mazowiecki in a Division I relegation match against Garbarnia Szczakowianka Jaworzno (won 3:0 on the pitch by the latter team);
- b the imposition of a two-year disqualification on seven Swit Nowy Dwor Mazowiecki players.

Not accepting the return of the case for reconsideration by its disciplinary bodies, the PZPN applied to Warsaw Regional Court for the arbitration tribunal’s verdict to be overturned. However, on 3 March 2004 the application was rejected by that court, which expressed the view that disputes connected with disciplinary liability of sports clubs, players and officials are not matters of civil law. The Regional Court also stated that disciplinary proceedings involving sports players and officials are regulated in the statutes of unions or in sporting regulations, and the final decision in such matters is left with the statutorily appointed Sports Arbitration Tribunal. This is the second task of that body (after the settlement of material disputes relating to sporting activity), regulated separately in Article 41 of the PCA. For this reason there is no right, in the view of the Warsaw Regional Court, to appeal to the common courts against a judgment of the Polish Olympic Committee’s Arbitration Tribunal relating to disciplinary penalties. Such a right would exist if a judgment of that tribunal related to events which might constitute a source of relations in civil law.

It would seem that this last assertion by Warsaw Regional Court indicates the weak and indeed faulty basis of its position. It does not take account of the fact that modern sport, with all of the features and defects already described, is a significant economic phenomenon, being the source of various events chiefly evaluated as matters of civil law. These arise also, or maybe especially, in relation to impositions of disciplinary penalties on clubs and competitors which significantly restrict the ability to perform sporting activity, and thus to obtain the financial benefits arising from the practice of sport by a competitor or the running of sporting activity by a football club. In the opinion of those so penalised, losses resulting from disciplinary penalties can be the subject of claims for compensation. For that reason, without waiting for a decision on the PZPN’s appeal against the decision of the Regional Court, the Garbarnia Szczakowianka Jaworzno club has made a demand to the PZPN for payment of a sum of

7,089,568 zloty or, if that demand is not accepted, for a material dispute to be submitted to the Polish Olympic Committee’s Arbitration Tribunal, subject this time to the tribunal’s original procedure.

Regardless of the further development of events in the case under discussion, attention should be drawn to another basic error in the reasoning adopted by Warsaw Regional Court. This relates to what I believe to be an erroneous assumption, namely that a legal dispute already exists, within the framework of the disciplinary process, between the sports disciplinary body and the party found guilty. In fact, however, that dispute arises only after an appeal is made against the final disciplinary decision of a Polish sporting union. Until then, that organisation’s internal bodies may enforce organisational meas-

ures against its members or parties bound by way of licence. A party which is dissatisfied with the final decision of a union body may appeal to a neutral third party (including to a common court or arbitration tribunal), and thus - in accordance with Article 41 of the PCA - may take the matter to the Polish Olympic Committee’s Arbitration Tribunal.

The latter, in considering the appeal, does not in any sense “continue” the disciplinary process, but is an arbitration tribunal in the full sense of that term, settling a dispute in civil law between the appellant and the authorities of the Polish sporting union whose bodies issued the disciplinary or regulative decision which is the subject of the appeal. In view of the imperative of rapid settlement of sporting disputes, the Olympic Committee’s tribunal should, it seems, make a final resolution of the appeal, either by rejecting it or by altering the contested decision of the union body. It should not simply overturn the decision and return the matter for reconsideration by the Polish sporting union, which as a party to the dispute should not be ruling *in re sua*.

Final decisions are made by the IOC’s Court of Arbitration in Lausanne, which hears appeals against decisions of international and national sporting federations. On the basis of Article 190.1 of the Swiss Act on international private law, appeals against judgments of the Lausanne Court may be made to the Federal Tribunal as the highest court authority. This issue does not present any doubts, for ever since the case of the German rider E. Gundel in 1993 was opened, Swiss judges have always taken the line that the IOC Arbitration Tribunal, in considering appeals against disciplinary and regulative decisions of sporting federations, constitutes an arbitration tribunal in the full sense of the term, its judgments being subject to review by a state court. In the same way decisions of the Belgian and Luxembourg sporting arbitration committee can be appealed to a civil judge.

It should be maintained that a judgment of the Polish Olympic Committee’s Arbitration Tribunal settling a dispute arising from an appeal against a Polish sporting union’s decision again constitutes a settlement of a civil dispute. Contrary to the view taken by Warsaw Regional Court, this should entitle a party dissatisfied with the arbitration tribunal’s decision to apply to a common court to have that decision overturned.

In relation to the settlement of disputes arising from the appealing of final disciplinary and regulative decisions of the national federation, the Polish Football Association will shortly have another important problem to resolve. In the light of Article 60.1 of FIFA’s statutes (approved in October 2003 in Doha), cases of this type should be submitted to the Court of Arbitration in Lausanne. There is no doubt that this measure is in conflict with Article 41 of the PCA. The next general meeting of the PZPN in December will have to resolve this difficult issue of inconsistency between national law and the regulations of international sporting federations.

## ASSER INTERNATIONAL SPORTS LAW SEMINAR

in cooperation with Hugo Sinzheimer Institute  
University of Amsterdam

*“Sports Image Rights: United States, United Kingdom  
and The Netherlands”*

**Tuesday 3 May 2005**

**Venue: Law Faculty, University of Amsterdam**

**Opening: 15.30 hours**

Chairman: Dolf Segaar, CMS Derks Star Busmann Law Firm  
Speakers: Prof. Ian Blackshaw, University of Neuchâtel, Switzerland; Prof. John Wolohan, Ithaca College, New York, United States, Bert-Jan van den Akker, CMS Derks Star Busmann, The Netherlands; Wiebe Brink, Ernst & Young, The Netherlands.

The seminar was sponsored by SENSE, Sports & Entertainment Networks of Excellence, Amsterdam/Brussels.

# The Legal Dimension of Ethics in Sports\*

by Alexandru Virgil Voicu\*\*

## Introduction

Social norms, whose observance shape the dimensions of ethics in sports, entail the interplay between freedom and conduct prescribed by law. Law, as part of the social norms, does not aim to describe the surrounding reality, but rather to impose or authorise certain behaviour.

In a state governed by the rule of law, in an authentic democracy, freedom requires a certain degree of control, a level of anticipation, guidelines and regulations. Understood from this perspective and embodied in certain patterns of conduct, freedom corresponds to the significance and content of the legal conscience (i.e. a form of social conscience). When social conscience ceases to exist, individuals are liable on all possible grounds under law. This in brief describes the content of ethics in relation to freedom.

Currently, Romania is taking concrete steps towards becoming a member of the EU. With this objective in mind, Romanian legislative and executive bodies have initiated the process of harmonising national legislation with Community legislation. Within this context, Romanian authorities place great emphasis on the reform of the judiciary.

In the harmonisation of sports legislation, the drafters encounter three major problems:

- 1 insufficient understanding of the fact that any assessment of democracy is closely linked with the relationship between the declaratory character of law and its efficiency;
- 2 the old mentality concerning the efficiency of the law and the duty to observe it;
- 3 ignorance as to the priority of Community law over domestic legislation.

For these reasons, I consider it necessary that in the process of legislative reform, ethics in sport should be treated within a legal framework.

“Legal” ethics have to apply to all active and passive participants in sporting activities. The merely declaratory character of ethics in sports, which was shaped by socialist values, must be replaced by ethics which are effectively governed by law. Nowadays, sport has many diverse functions. Sports activities must continue to be a socialising factor. All institutions are based on a set of norms to define what is legitimate and what is illegal in a given social system. Family, educational establishments, and indeed the law as such are such institutions. The institutionalisation of norms is brought about by complex processes of inner-thinking, of socialisation, and through the implementation of a system of sanctions. The relationship between “must” and “is” acquires a certain degree of specificity in law, because the “must” aspect derives from an external authority.<sup>1</sup>

Ethics in sport have lost their initial meaning. In order to regain significance and worth, they have to be embedded in a legal framework. Before we are able to do this, we must first briefly define the notions of deontology, morals and ethics.

## Fundamental Concepts in Ethics

The notion of deontology (*deontos* = duty, obligation and *logos* = word, science) was used for the first time by the English jurist and philosopher Jeremy Bentham (1742-1832) in *Deontology or the science of morals* (1834). Bentham defines deontology as the “science of things that one must do under any circumstance”. The English moralists in their writings used the term deontologism. This term relates to the principle of acting in conformity with one’s duties.<sup>2</sup> There are three

concepts illustrating the connection between the individual and morals: a. morality, whereby the individual is aware of and observes the moral requirements; b. immorality, in case of which the individual is aware of the moral requirements, but ignores them, and c. amorality, whereby the individual lacks knowledge of moral requirements and consequently does not observe them.

The deontology of coaching and training in sports is based on a set of norms, rules, requirements and moral professional obligations, and additionally on legal, administrative and technical-professional regulations setting the standards of efficiency and honesty. In fact, besides the moral professional duties, the deontology as currently understood consists of various technical norms, elementary professional requirements, administrative rules and legal norms, which, within their own special structures, determine deontological conduct. Deontological conduct is defined as a “set of attitudes and acts required under professional and technical-professional norms, without which a profession could not be properly exercised”.<sup>3</sup>

## The Classical Components of the Deontological Analysis

Any deontological analysis employs notions specific to morals and ethics.<sup>4</sup>

*Morals* are, on the one hand, a form of social conscience. On the other hand, they consist of the totality of norms, rules, requirements, principles, duties and ideas regulating social relations. Morals govern human behaviour in all social fields, including the interaction occurring in the area of professional activity. The morals of labour prescribe a certain type of conduct during working hours and govern the behaviour of each individual in relation to his or her profession. The morals of a certain profession focus upon relations among professionals and the relationship between the professional and his/her profession. The relationship between the morals of the profession, the morals of labour and morals in general is illustrated in Figure 1.

*Ethics* is the science concerning morals. This notion was initially introduced in philosophy, but soon became an autonomous concept. Derived from this notion, scientists developed the science of meta-ethics, the study of the science of morals. The ethics of labour focus on the issue of the morals of labour, while the ethics of the profession deal with the aspects of the morals of the profession. The relationship between ethics in general, the ethics of labour and the ethics of the profession is identical with the relationship between the objects of their research, i.e. morals (see Figure 2). The ethics of the profession concentrate on the morals connected with the exercise of a profession, while the deontology of the profession adds other imperatives: legal norms, administrative rules and technical-professional norms specific to each profession, the observance of all of which, together with the morals of the profession, is strictly necessary for achieving the profes-

\* This paper was presented at an Asser International Sports Law Seminar on ‘Good Governance and Integrity in Sport’, which took place in The Hague on 25 April 2005.

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1 Biris I, *The Values of Law and International Logics*, Servo-Sat Arad (1996), p. 150.

2 Marcu, V., Maroti, St, Voicu A.V., *Introductory Comments concerning the Deontology of the Pedagogic Profession*, Inter-Tonic (Cluj-Napoca) (1995).

3 Lascu, V. *Social Pedagogue’s Deontology*, Gewald (Cluj-Napoca) (2002) referring to Dutescu, B., *The Ethics of the Medical Profession*, The Didactic and Pedagogic Publishing House (Bucharest) (1980).

4 *Ibidem*, at pp. 6-8.





figure 1



figure 2

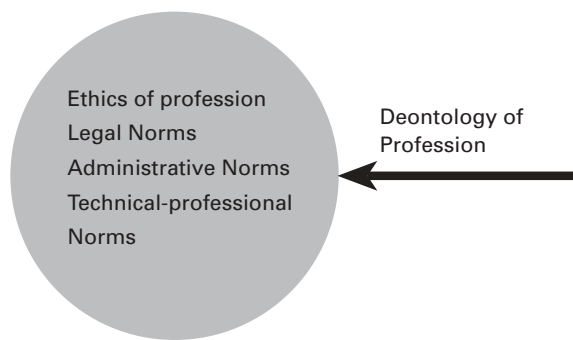


figure 3

sional's work objectives (See Figure 3). Obviously, the sphere of professional deontology includes the sphere of the ethics of the profession.

### Liability and Responsibility

Liability is incurred upon displaying socially condemned behaviour. The effects of an act which is classified as infringing social norms are defined through two concepts: liability and responsibility. Dictionaries and doctrine do not always distinguish between the two. In fact, in Romanian the terms are phonetically almost identical, i.e. *raspundere - responsabilitate*. Responsibility and liability generally refer to: (i) the duty to act or to abstain from acting according to the norms in force in a given society, and (ii) to the duty to remedy the damages caused by the act or omission. The notions of liability and responsibility thus refer to acts or omissions as assessed by an external system of coercion irrespective of the attitudes of the individual or society. The main difference between *liability* and *responsibility* derives from their social function: while liability mainly refers to the preservation of a given social system, responsibility concerns the improvement and development of the social system. Liability manifests itself through the recognition of a social relationship and is unconnected with the efficient completion of the act. Responsibility does not exclude, but at the same time is not limited to liability. In turn, liability does not exclude, but at the same time does not necessarily imply, accountability.<sup>5</sup> Society strives towards a state where its members have overcome liability and have reached the more mature and more efficient phase of responsibility.<sup>6</sup> This desired goal has to be acknowledged, observed and promoted by all participants in physical education and sports activities as well.

Liability consists of a "set of rights and their corresponding obligations which arise - pursuant to the law - upon committing an illegal act and which determine the exercise of social coercion through legal sanctions with a view to ensuring the stability of social relations and to provide adequate guidance for observing the legal order"<sup>7</sup> The exclusive source of rule making in law is authority: only the authority can determine a scale of legal values, even if the legal values do not always correspond to the legal reality.<sup>8</sup> In reference to Kant, Petre Andrei notes that "the law aims to establish a moral principle, purports to set minimal ethical standards, and for this reason, legal values aim to grow into moral values".<sup>9</sup> Giorgio del Vecchio considers that "where there is a lack of coercion, there is a lack of law. From a real and logical standpoint, the two concepts - coercion and law - are inseparable".<sup>10</sup> From the time of the Arab communities, the distinction between morals and the law for a long time has been difficult to make. Starting with the modern era, jurists began to be increasingly concerned with this distinction. Today, when we discuss the values of law, we refer to coercion through sanctions, to norms and laws providing for mandatory sanctions when they are infringed.<sup>11</sup> The application of legal sanctions is no more than the effect of liability; the precondition of liability is the infringement of imperative rules. Legal sanctions apply when a well-defined and clearly determined obligation is infringed, resulting in damage or in a risk of damage to one individual or to a community.<sup>12</sup> Legal coercion represents the "idea

generating the notion of justice".<sup>13</sup> Justice cannot become operational unless the authority issuing legal norms is able to punish those disobeying it; thus, it is crucial to maintain the balance between the declaratory character of law and the efficiency of law.

Turning to the active participants in sports (athletes), we note that achieving excellence in sports - in other ways than by any means - requires scientifically organised and scientifically carried out training. It requires the observance of discipline, it depends on the quality of the training programme and the result of the eventual manifestation of excellence (i.e. the competition), as well as on the recovery period. It requires all of these things in the spirit of fair play, non-violence and the rejection of doping. One might define the achievement of a high ranking in professional sports as the science of shaping the personality and character of the individual to the extent that it uses the data provided by anthropology, genetics, physiology, psychology, pedagogy, biomechanics and mathematics. Absent such data, we would no longer have science, but rather a mere practice that, under the present conditions, would not be able to meet the requirements of high performance. In this context, it should be mentioned that the main role of any science is that of acknowledging the reality "as it is", and not placing it outside the order of things or denying the importance of human needs or even going against them. We cannot justify the accountability of those seeking excellence solely under the science that seeks truth and strives to eliminate error. As Rabelais has said: "science without conscience does not mean anything but the ruin of the soul". Besides science, morality and ethics can serve as guidelines for human behaviour.

### Conclusions and Suggestions

Bearing in mind that individuals are at the heart of sporting activities, we must agree upon and let ourselves be guided by the idea that when dealing with individuals, we cannot make compromises and accept mistakes. In sports, just as in any other activity, no person's rights must be allowed to be infringed. Deontology also comprises mandatory legal norms. When we discuss liberty in connection with the goal of sports, one has to understand the meaning of the freedom to have and achieve such a goal in accordance with social desires. Ethics should not deal solely with "what is, what exists", but more importantly with "what should be". Morality needs postulates of reason, because democracy can only be accomplished within a legal, norma-

5 Bobos, Gh., Vladica Ratiu, G., *Liability, Accountability and Coercion in Law*, Argonaut (Cluj-Napoca) (1996), 6-15, referring to Florea, M., *The Responsibility of Social Action*; Farkas, E., *The Ethics of Accountability - The Accountability of Ethics*, *Philosophy Law Review* no 2 (1975).  
6 Florea, M., *The Determination and Motivation of Social Action*, the Publishing House of the Romanian Academy (Bucharest) (1981).  
7 Costin, N.M., *Liability under Romanian Law*, Dacia (Cluj-Napoca) (1974), p. 20.

8 Andrei, P. *The Philosophy of the Value*, Polirom (Iasi) (1997), p. 131.  
9 Ciuca, M.V., *Lesson of Legal Sociology*, Polirom (Iasi) (1998), p. 295.  
10 Del Vecchio, G., *Lessons of Legal Philosophy*, Europa Nova (1997), p. 224.  
11 Biris, *See supra* at p. 118 et seq.  
12 John Stuart Mill, *About Freedom*, Humanitas (Bucharest) (1994), P. 102-103.  
13 Biris, *See supra* at 149 referring to John Stuart Mill, *The Utilitarianism*.



T · M · C · A S S E R P R E S S

THE HAGUE — THE NETHERLANDS

## The European Union and Sport Legal and Policy Documents

*Editors:*

Robert C.R. Siekmann and Janwillem Soek

*With a Foreword by*

Viviane Reding, EU Commissioner for Education and Culture

*The European Union and Sport: Legal and Policy Documents* is the first volume in the T.M.C. Asser Institute series of collections of documents on international sports law containing material on the intergovernmental (interstate) element of international sports law. Previous volumes have dealt with the Statutes and Constitutions of universal sports organizations, their Doping as well as their Arbitral and Disciplinary Rules. The legal and policy texts in the present book are arranged in thematic, alphabetical order and are chronologically subordinated per theme. They cover the period since the *Walrave* judgement in 1974 when the European Court of Justice established that sport is subject to Community law to the extent that it constitutes an economic activity. The book in fact gives a detailed insight into what could be called the 'EU Sport Acquis' for the present and future (candidate) Member States. This *acquis* has been developed over the years in numerous decisions and policy documents by, in particular, the Council, Commission, European Parliament and Court of Justice.

The contents of this book are divided into three parts totaling twenty chapters and covering all themes which the EC/EU has dealt with so far. The *General* part contains general policy documents such as, for example, the European Model of Sport and the so-called Helsinki Report on Sport. *Specific Subjects* concern Boycott, Broadcasting (in particular the Television without Frontiers Directive), Community Aid and Sport Funding (for example, the Eurathlon Programme), Competition (central selling of tv rights re-

garding the UEFA Champions League, the German Bundesliga, the English Premier League, etc., Formula One, World Cup ticketing arrangements, players' agents), Customs, Diplomas (Heylens), Discrimination (Walrave, Dona, Kolpak, and including Women in sport), Doping (Community Support Plan and Pilot Project for Campaigns to Combat Doping in Sport), Education / Youth (European Year of Education through Sport 2004, and documents concerning child protection in sport and trafficking in young footballers), the freedom of establishment to provide services (Deliege) and of movement of workers (Bosman, Lehtonen), the Olympic Games, State Aid, Tax, Tobacco Advertising, Trade Marks (Arsenal/Reed), Vandalism and Violence (football hooliganism) and Miscellanea (Fishing, Horses, Hunting, etc.).

*The European Union and Sport: Legal and Policy Documents* provides an invaluable source of reference for governmental and sports officials, legal practitioners and the academic world. With the increasing public interest in the legal aspects of sports, this collection of documents is a timely and welcome contribution to enhancing the accessibility of basic texts on international sports law and policy.

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THE HAGUE — THE NETHERLANDS

# Sports Image Rights in Europe

*Editors:*

Ian S. Blackshaw and Robert C.R. Siekmann

*With a Foreword by Sam Rush, Chief Operating Officer,  
SFX Sports Group (Europe) Ltd., London, United Kingdom.*

As sport has developed into a global business, the importance of sports image rights as a marketing tool to promote individual sports persons and sports teams and clubs – and, incidentally, major sports events themselves – has also evolved and become a significant player in the multi-billion dollar sports industry around the world – not least in Europe, a powerhouse in world sport and the focus of this book.

This book provides a concise legal and practical overview of the creation, protection and enforcement of sports image rights in the pre-May 1, 2004 Member States of the European Union as well as Norway and Switzerland. It also covers sports image rights in the United States of America for comparative purposes. A separate chapter deals with some of the fiscal aspects of the subject. Each chapter is devoted to a review of the applicable legal rules on sports image rights in an individual country. In addition, where appropriate, practical mat-

ters, such as the contents of contracts, are also examined and explained.

The contributors to *Sports Image Rights in Europe* are from major European law firms and are experienced in sports law in general and the field of sports image rights in particular. The book's editors are Professor IAN S. BLACKSHAW, international sports lawyer and a member of the Court of Arbitration for Sport (CAS), Lausanne, Switzerland, and Dr ROBERT C.R. SIEKMANN, Director of the ASSER International Sports Law Centre, The Hague, The Netherlands.

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Figure 4

tive framework. We must accept therefore that legal relations in sports combine both order in sports as such and order at state level, and that their balance varies according to the political regime.<sup>14</sup> If we consider the definition of ideology as a theory which has been put into operation for political purposes, we find that in Romania this has yielded the principle that no individual, no activity or domain is above the law, or in accordance with Article 16, paragraphs 1 and 2, of the Romanian Constitution on equality of rights: “Citizens of Romania are equal in law and before public authorities without any privileges and discrimination. Nobody is above the law.” This leads me to propose Figure 4, a graphical representation of the necessity to subject to ethical norms all conduct related to sports. Or, more specifically, taking into account that (1) “practising physical education and sports is a right of the individual, enjoyed without any discrimination and guaranteed by the State, (2) the exercise of such a right is free and voluntary and is carried out independently or within sporting structures (Art. 295 of Law no. 69/2000 concerning Physical education and sports, (3) the rights and obligations of sportsmen are generally fundamental human rights and obligations, and that (4) “The constitutional provisions relating to the rights and freedoms of citizens will be

interpreted and applied in accordance with the Universal Declaration of Human Rights and with international pacts and treaties to which Romania is a party” and further considering the fact that (5) “in case of discrepancies between the international pacts and treaties on fundamental human rights to which Romania is a party and the domestic legislation, priority will be given to the international instruments, except where the Constitution or the internal laws provide for more favourable terms (Art. 20 of the Romanian Constitution) and that “the Romanian state undertakes to fulfil entirely and in good faith the duties under the treaties to which it is a party” and that “the treaties ratified by the Parliament are, according to the law, part of the internal legal system (Art. 11 (1) and (2) of the Romanian Constitution), I propose the following graphical representation to illustrate the need of subjecting all social norms (including ethical norms) to the legal order (figure 4).

<sup>14</sup> Alaphilpe, F., Sports...the third...millennium, Chapter *The Legitimacy and Legality of the International Sporting*

*Structures*, Sante-Foy (Laval University, Canada) (1991), p. 505-512.

The International Sports Law Journal

# Protecting and Exploiting Sports Image Rights\*

by Ian Blackshaw\*\*

## Introductory Remarks

We live in an age in which image rules and perception is paramount. And this is not limited to celebrities, who are anxious to project their *persona*, and thus maintain their celebrity status and popularity and, in turn, their marketability. But the phenomenon also extends to companies and their products, which, if they are to be successful in our consuming and materialistic society, also need to convey a positive image in order to command the attention of customers and increase sales. This is all down to branding, whose importance nowadays cannot be over emphasised and has been likened by Peter York, the style guru, to a kind of new religion:

*“The fastest-growing, most profitable, cleverest global corporations are organised around a new philosophy, a new religion and a new way of working. For these companies their brand is their central asset - physical products are secondary - and most of their quality time is spent making and reworking the brand - its meaning, attitude and social role, its values - because it's the brand that people buy, not the products. Products, so*

*the thinking goes, are generic, copyable, discountable, vulnerable, but brands are unique magic.”<sup>1</sup>*

This philosophy has been successfully transferred and applied by clever marketers to sport, sports events and sports persons as products competing for consumer attention.

\* This paper was presented at the Asser/SENSE Seminars on “Sports Image Rights in Europe: Law and Practice”, which took place in Lisbon, 14 February, Amsterdam, 3 May, Munich, 1 June and London, 13 June 2005.

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1 Article entitled “Branded”, *The Times*, February 10, 2001.

Again, according to York:

*"Nike isn't a maker of high-priced trainers but a world voice for sport as an agency of personal growth and achievement ... The Nike swoosh logo means precisely what the crucifix meant to an earlier generation in ghettos - it promises redemption, vindication and a way out."*<sup>2</sup>

In a nutshell, a 'brand' is a badge of identification and, as such, a powerful and valuable marketing tool! A brand is also a valuable asset and as a leading international licensing guru has rightly remarked:

*"Businesses are no longer being valued on their manufacturing ability but on the new and frequently used basis of 'intellectual capital'."*<sup>3</sup>

Sport is now a global business worth more than 3% of world trade and getting on for 2% of the combined GNP of the enlarged European Union, since 1 May, 2004, comprising 25 Member States and a total population of some 450 million. Branding has played a significant part in this process - often referred to as the 'commodification' of sport.

Sports events, teams and individual sports persons are now seen and treated as 'commodities' to be commercialised, bought, sold and traded.<sup>4</sup> Sport is now firmly part of the worldwide entertainment industry. This is particularly true of football - the world's favourite game and most lucrative sport!<sup>5</sup>

For example, Manchester United Football Club and Team have been developed and marketed as a brand around the world. This brand is worth millions of dollars and a significant contributor to the value of the Club, in terms of earnings, shareholder dividends and capital appreciation. Manchester United is also a publicly quoted company on the London Stock Exchange and became the first football club in the world in 2000 to achieve a market capitalisation of £1 billion.<sup>6</sup> The club is heavily involved in several lucrative 'affinity marketing' schemes, including a branded credit card, designed to increase its customer base - it is reported to have 50 million fans around the world, but only 1 million customers. And Manchester United is also reported to be actively exploring a commercial opportunity to go into the casino business!<sup>7</sup>

Power brands, like Manchester United, according to Tim Heberden, UK Managing Director of Brand Finance plc, reputed to be the leading brand valuation company in Europe, "have the power to influence consumer demand, trade distribution, staff loyalty, supplier terms, and investor sentiment, transforming business performance and financial returns." And adds: "...return on brand investment

is becoming a critical issue for the board and the finance director."<sup>8</sup> Brands are featuring more and more on company balance sheets as an asset and sophisticated methods are being developed to value brands, especially sporting brands. However, Weston Anston, chairman of Trademark & Licensing Associates of New York sounds a timely warning:

*"The process of valuing brands on the balance sheet is becoming standard practice and it's interesting to see how many marketing executives overestimate the value of their brands which could lead to some bad marketing decisions."*<sup>9</sup>

Likewise, sports persons have become celebrities in their own right - with salaries to match those of Hollywood film stars - and, as such, marketing icons<sup>10</sup>. The image rights of leading sports personalities, especially footballers, are increasingly being used and exploited to promote the sale of consumer products<sup>11</sup> - especially new ones<sup>12</sup>. As Anne M. Wall has pointed out:

*"One of the best uses of sports celebrities' right of publicity is product endorsements. Athletes can be ambassadors for the products and services they use. Their endorsement and positive publicity can lift consumer brand awareness, enhance brand image and stimulate sales volume. Upon introduction, licensed products that carry a celebrity's name can establish instant credibility for the brand in the market place"*<sup>13</sup>

For a striking example of this sports marketing phenomenon, take the case of Manchester United's former striker, David Beckham. He earns many more millions more off the field of play than on it through the commercialisation of his image and name, both of which are instantly recognisable, well known and marketable throughout the world<sup>14</sup>. In this sense, therefore, it can be said that his face is worth more than his feet - not only to himself but also to his club. He has become a brand in his own right<sup>15</sup>.

Chris Britcher, editor of the SportBusiness International website<sup>16</sup>, has described Beckham as a "marketing man's dream" in an article entitled "The Beckham Brand".<sup>17</sup> In it he posed the question whether Beckham really warrants all the media attention and hype. And goes on to explain the reasons for his success as a sports brand.<sup>18</sup>

In this Conference Paper, we will consider the protection and exploitation of sports image rights in Europe.

## What are Sports Image Rights?

These rights are known in different jurisdictions by a variety of names, including 'rights of privacy' (UK), 'rights of publicity' (USA)

2 Ibid.

3 Angela Farrugia, co-founder and joint managing director of The Licensing Company.

4 On the phenomenon and effects of 'commodification' in sport, see 'Sports Law' by Simon Gardiner, Mark James, John O'Leary, Roger Welch, Ian Blackshaw, Simon Boyes and Andrew Caiger Second Edition Cavendish Publishing London October 2001 at pp 57-59. And on the related topic of the 'globalisation' of sport, see Paper of Professor Paul De Knop of Brussels University presented at the TMC Asser Instituut/CMS Derks Star Busmann Round Table Conference held in Utrecht on 9 March, 2001.

5 In Europe, football is reputed to be worth £10 billion according to the Annual Deloitte and Touche Soccer Finance Report published on 30 July, 2003.

6 See Ian Blackshaw 'BSkyB and sport on the net' The Times, 25 April, 2000.

7 See 'The Times' Sport 30 July, 2003.

8 See 'Maximising Revenue from Licensing and Merchandising' by Ardi Kolah

SportBusiness Group London 2002 at p 252.

9 For an interesting account of the various methodologies and formulae used for valuing sports brands, see *ibid.* at pp 264 - 270.

10 Indeed, according to a Survey undertaken by 'AsiaBUS' in March 2001, the cult of the 'sports star' is now much stronger than the cult of the 'pop star' in marketing terms. For example, just less than 5% voted for Michael Jackson; whereas almost 13% voted for Michael Jordan. Over 1,000 people - between the ages of 15 and 64 years old - in Hong Kong, Singapore, Indonesia, Korea, Thailand, Malaysia, Philippines, Taiwan and in three major Chinese Cities took part in the Survey. If the same Survey were conducted today, the gap between the popularity of 'sports stars' and 'pop stars' would, it is submitted, be even wider.

11 According to John Barton, Arnaud Le Mintier and Michael Tattersall: "Image rights are any rights that a player has vested in him as an individual person. These rights have value because they can

be licensed to a third party for commercial exploitation in the market place.

This may take form in a variety of methods of marketing, from the player helping to advertise non-football products such as bottled water, cars or soap, to the player appearing at a corporate hospitality event." See 'International Studies in Sport Selected Essays 2000/2001' published by Editions CIES, Neuchatel Suisse - 2003, at pp 73-79.

12 For a general overview of the commercial value and legal significance of sports image rights, see 'Cashing in on the right image' and 'Getting the image right' by Ian Blackshaw of 9 & 10 December, 2002 on the SportBusiness web site ([www.sportbusiness.com](http://www.sportbusiness.com)).

13 See 'Sports marketing and the law: Protecting proprietary interests in sports entertainment events' 7 Marquette Sports Law Journal 1996 at p 154.

14 Not only do football 'stars' earn mega sums from the commercial exploitation of their image and personality rights, but so also do golfers, like 'Tiger' Woods, tennis players, like Anna Kournikova,

and Formula 1 drivers, like Michael Schumacher, to mention but a few!

15 Worth around £40 m a year in terms of sponsorship and licensing deals - slightly more than Tiger Woods at around £38 m a year!

16 [www.sportbusiness.com](http://www.sportbusiness.com).

17 [www.sportbusiness.com](http://www.sportbusiness.com) 18 June 2003.

18 According to Tony Gadsby Peet of IMG, who manage many leading sports personalities, including Tiger Woods, but not David Beckham (until recently he was managed by SFX), sports brands, generally speaking, are more enduring and less ephemeral and opportunistic than entertainment brands and, therefore, require a different approach for maximisation of them: "With sports brands, you are working with a property that in most cases has been around a comparatively long time. The time frame and perspective is completely different. In this case it is much more important to understand brand strategy and long term development."

and 'rights of personality' (Continental Europe), but, for the purposes of this discussion, we will refer to them collectively as 'image rights' using the expression 'image' not in its narrowest sense of 'likeness' but in its wider sense of 'persona' or, *a fortiori*, 'brand' to use a marketing term. Irrespective of the term used, we are concerned with the extent to which sports persons, as human beings, have the legal right to control the commercial use of their identity.

A typical 'grant of rights' clause in a sports image licensing agreement defines image rights in rather broad terms as follows:

*"Access to the services of the personality for the purpose of filming, television (both live and recorded), broadcasting (both live and recorded), audio recording; motion pictures, video and electronic pictures (including but not limited to the production of computer-generated images; still photographs; personal appearances; product endorsement and advertising in all media; as well as the right to use the personality's name, likeness, autograph, story and accomplishments (including copyright and other intellectual property rights), for promotional or commercial purposes including, but without limitation, the personality's actual or simulated likeness, voice, photograph, performances, personal characteristics and other personal identification."*

Of course, in practice, these rights need to be customised to each individual sports celebrity and each particular deal as part of a predetermined licensed strategy.

It may be noted, *en passant*, that, although, in most of the States of the US, 'publicity rights' - as image rights are generally known - are also generally regarded as being all embracing<sup>19</sup>, there are certain limitations as a recent US case involving Tiger Woods has demonstrated<sup>20</sup>.

#### Who Owns Them?

One common concern is not only what image rights are but also who owns them. This is particularly important in the case of sports persons when they participate in organised sports events or as members of a team. This issue has recently been the subject of a poll - not apparently a very scientific one! - conducted by 'SportBusiness International' through their web site ('[www.sportbusiness.com](http://www.sportbusiness.com)').<sup>21</sup>

The major finding of this survey shows that the majority - almost 55% - of sports industry executives polled consider that sports persons themselves should have control over their image rights and their commercial exploitation.

21.6% thought that the rights should be jointly held by "all interested parties"; whilst 16.5% considered that the club or team whom the sports persons represent should control them.

Only 3.7% were in favour of the national sports governing body holding the rights; and only 3.4% thought that the league in which the sports person plays should have control.

A further interesting finding of this survey is the widespread lack of clarity in commercial sports marketing contracts regarding the ownership of sports image rights. The need for precise express provisions dealing with the exploitation of such valuable rights cannot be overstated. Take, for example, the detailed provisions of clause 4 of the new English Premier League Player Contract which are quite comprehensive and state as follows:

#### *"4. Community public relations and marketing*

*4.1 For the purposes of the promotional community and public relations activities of the Club and/or (at the request of the Club) of any sponsors or commercial partners of the Club and/or of the League and/or of any main sponsors of the League the Player shall attend at and participate in such events as may reasonably be required by the Club including but not limited to appearances and the granting of interviews and photographic opportunities as authorised by the Club. The Club shall give reasonable notice to the Player of the Club's requirements and the Player shall make himself available for up to six hours per week of which approximately half shall be devoted to the community and public relations activities of the Club. No photograph of the Player taken pursuant to the provisions of this clause 4.1 shall be used by the Club*

*or any other person to imply any brand or product endorsement by the Player.*

*4.2 Whilst he is providing or performing the services set out in this contract (including travelling on Club business) the Player shall:*

*4.2.1 wear only such clothing as is approved by an authorised official of the Club; and*

*4.2.2 not display any badge mark logo trading name or message on any item of clothing without the written consent of an authorised official of the Club Provided that nothing in this clause shall prevent the Player wearing and/or promoting football boots and in the case of a goalkeeper gloves of his choice.*

*4.3 Subject in any event to clause 4.4 and except to the extent of any commitments already entered into by the Player as at the date hereof or when on international duty in relation to the Players' national football association UEFA or FIFA he shall not (without the written consent of the Club) at any time during the term of this contract do anything to promote endorse or provide promotional marketing or advertising services or exploit the Player's Image either (a) in relation to any person in respect of such person's products brand or services which conflict or compete with any of the Club's club branded or football related products (including the Strip) or any products brand or services of the Club's two main sponsors/commercial partners or of the League's one principal sponsor or (b) for the League*

*4.4 The Player agrees that he will not either on his own behalf or with or through any third party undertake promotional activities in a Club Context<sup>22</sup> nor exploit the Player's Image in a Club Context in any manner and/or in any Media nor grant the right to do so to any third party.*

*4.5 Except to the extent specifically herein provided or otherwise specifically agreed with the Player nothing in this contract shall prevent the Player from undertaking promotional activities or from exploiting the Player's Image so long as:*

*4.5.1 the said promotional activities or exploitation do not interfere or conflict with the Player's obligations under this contract; and*

*4.5.2 the Player gives reasonable advance notice to the Club of any intended promotional activities or exploitation.*

*4.6 The Player hereby grants to the Club the right to photograph the Player both individually and as a member of a squad and to use such photographs and the Player's Image in a Club Context in connection with the promotion of the Club and its playing activities and the promotion of the League and the manufacture sale distribution licensing advertising marketing and promotion of the Club's club branded and football related products (including the Strip) or services (including such products or services which are endorsed by or produced under licence from the Club) and in relation to the League's licensed products services and sponsors in such manner as the Club may reasonably think fit so long as:*

*4.6.1 the use of the Player's photograph and/or Player's Image either alone or with not more than two other players at the Club shall be limited to no greater usage than the average for all players regularly in the Club's first team;*

*4.6.2 the Player's photograph and/or Player's Image shall not be used to imply any brand or product endorsement by the Player; and*

*4.6.3 PROVIDED that all rights shall cease on termination of this contract save for the use and/or sale of any promotional materials or products as aforesaid as shall then already be manufac-*

<sup>19</sup> "First, the right to publicity recognises the economic value of an individual's identity. Second, the publicity right is an incentive for creativity, encouraging the production of entertaining and intellectual works. Finally, the right prevents unjust enrichment of those who usurp the identity of another." See the case of *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 838 F. Supp 1501 (N.D. Okla. 1993).

<sup>20</sup> See the case of *ETW Corporation v. Jireh Publishing, Inc.* (2003 U.S. App. LEXIS

12488, 20 June 2003) discussed in the August 2003 issue of 'SportBusiness International' Magazine at p. 54, in which a painting entitled 'The Masters of Augusta' commemorating Tiger Woods' 1997 victory, produced and sold by Jireh without Woods' consent, was held by the Court not to infringe his 'right of publicity'.

<sup>21</sup> See 'Looking After Their Image' in the July 2003 issue of 'SportBusiness International' Magazine at p. 17.

tured or in the process of manufacture or required to satisfy any outstanding orders.

- 4.7 In its dealings with any person permitted by the Club to take photographs of the Player the Club shall use reasonable endeavours to ensure that the copyright of the photographs so taken is vested in the Club and/or that no use is made of the said photographs without the Club's consent and in accordance with the provisions of this contract.
- 4.8 The Player shall be entitled to make a responsible and reasonable reply or response to any media comment or published statements likely to adversely affect the Player's standing or reputation and subject as provided for in clause 3.2.5 to make contributions to the public media in a responsible manner.
- 4.9 In this clause 4 where the context so admits the expression "the Club" includes any Associated Company of the Club but only to the extent and in the context that such company directly or indirectly provides facilities to or undertakes commercial marketing or public relations activities for the Club and not so as to require the consent of any Associated Company when consent of the Club is required.
- 4.10 For the purposes of the Contracts (Rights of Third Parties) Act 1999 nothing in this clause 4 is intended to nor does it give to the League any right to enforce any of its provisions against the Club or the Player.
- 4.11 Nothing in this clause 4 shall prevent the Club from entering into other arrangements additional or supplemental hereto or in variance hereof in relation to advertising marketing and/or promotional services with the Player or with or for all or some of the Club's players (including the Player) from time to time. Any other such arrangements which have been agreed as at the date of the signing of this contract and any image contract or similar contract required to be set out in this contract by the League Rules are set out in Schedule 2 paragraph 13."

In Norway, for example, such a potential conflict between sports persons exploiting their individual image rights by endorsing one particular brand of sports clothing and the team, to which they belong, being sponsored by a rival sports clothing manufacturer is dealt with in a particular way. Several national sports federations, including the Norwegian Football Federation, in their agreements with players, have accepted that the players can enter into 3 personal sponsorship agreements, provided that such agreements do not conflict with the federation's sponsorship programme. Under this arrangement, the federation must accept the personal sponsor prior to the individual player entering into the corresponding agreement. Alternatively, a practice has grown up whereby the federation co-signs any such agreement. Either way, potential sponsorship conflicts can be identified and nipped in the bud! And potential law suits avoided.

In The Netherlands, there are also specific arrangements for resolving cases of so-called 'conflict sponsorship'.

This is particularly important when planning and implementing sports image rights licensing programmes and agreements, which nowadays tend to transcend national boundaries. As will be seen, whilst there are a number of similarities in each of the countries covered, there are also some important differences in concept and principle, as well as particular nuances in terms of interpretation and application of the applicable rules, reflecting differences in culture and temperament and also in the nature of the legal systems and their historical development and evolution.

The sports image rights market is more developed in some countries than others. Take the Nordic countries (Denmark, Norway, Sweden and Finland) for example. Johan Thoren has analysed the situation in these countries in a recent article<sup>23</sup> as follows:

*"If the international sport industry can be compared to a teenager on the verge of becoming an adult, the Nordic markets are the younger siblings who don't always get to hang around and play. But with some years' delay, international developments will penetrate the Nordic countries as well."*

The Nordic countries host relatively few large-scale international sports events. And in Finland, the law is probably the least developed

even though Helsinki will host the World Athletics Championships in 2005. Throughout the region, however, football is extremely popular and well established - indeed the Scandinavian countries (the Nordic countries minus Finland) has a scaled-down version of the UEFA Champions League, known as the 'Royal League' - and attracts sponsors and broadcasters alike.

Luxembourg is a relatively small and undeveloped sports rights market too. In the rest of Europe, the sports market is relatively well developed and established.

Thus, when planning and devising international sports image rights marketing programmes, the state of development of the individual markets needs to be taken into consideration.

### Protecting Sports Image Rights

The situation in Europe varies from country to country. Generally speaking, image rights are legally better protected in Continental Europe. In the UK, it is more difficult, as there is no specific law protecting image rights *per se*. A personality can only take legal action "if the reproduction or use of [his/her] likeness results in the infringement of some recognised legal right which he/she does own."<sup>24</sup> Famous persons, therefore, have to rely on a 'rag bag' of laws, such as Trade Mark and Copyright Law and the Common Law doctrine of 'Passing Off' and/or vague notions of breach of commercial confidentiality. As, for example, in the Catherine Zeta Jones and Michael Douglas spat with 'Hello' Magazine and their unauthorised publication of their wedding photographs.<sup>25</sup> But it may be added that, even though successful, only modest damages were awarded by the Court to the celebrity pair. However, earlier, in what was seen as a softening of the previous law, the FI racing driver, Eddie Irvine, successfully sued 'TalkRadio' under the Common Law doctrine of 'Passing Off' for using, around the time of the British Grand Prix, a doctored photograph of him holding and apparently listening to a radio (in the original photograph he was holding a mobile phone!), which implied that he was promoting or endorsing their radio station. For this breach, Irvine was finally awarded £25,000 in damages after appealing against a previous award of £2,000 made by the trial judge.<sup>26</sup> Again, not exactly a mega sum! Despite these cases, most commentators consider they were decided on their own particular facts and circumstances and do not herald the establishment of privacy and personality rights in the UK.

A number of sports personalities have registered their names and likenesses as trade marks under the UK Trade Marks Act 1994, for example, Damon Hill, the former Formula 1 driver, has registered the image of his eyes looking out from the visor of his racing helmet as a trade mark. And other sports personalities have taken other measures to protect their images. For example, the British athlete, David Bedford, a former 10,000 metres world record holder, recently won a ruling against a phone directory company, 'The Number', over its advertising of its service ('118-118') featuring two runners in 1970's running kit. The UK Communications Regulator 'OfCom' held that 'The Number' had caricatured Bedford's image - drooping moustache, shoulder length hair and running kit - without his consent contrary to rule 6.5 of the UK Advertising Standards Code.<sup>27</sup>

However, in Continental Europe, a legal right of personality, often combined with a right to protection of one's private and family life and honour and expressly safeguarded under the Constitution of the country concerned, generally exists. Thus making it much easier to protect and enforce image rights, which are considered to be an inher-

22 "Club Context" shall mean in relation to any representation of the Player and/or the Player's Image a representation in connection or combination with the name colours Strip trademarks logos or other identifying characteristics of the Club (including trademarks and logos relating to the Club and its activities which trademarks and logos are registered in the name of and/or exploited by any Associated Company) or in any manner referring to or taking advantage of any of the same."

23 'Cracking The Norse Code', SportBusiness International, February 2004, at pp. 38-42.

24 Per Mr. Justice Laddie in *Elvis Presley Trade Marks* [1997] RPC 543 at p. 548.

25 *Douglas & Others v Hello Limited* [2001] 2 WLR 992.

26 *Irvine v Talksport Ltd* [2003] EWCA Civ 423.

27 *Bedford against The Number Ltd.* OfCom, February 2004.

# Striking the right note in sport law



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ent and fundamental right of every human being to control the commercial use of their identity. A few examples follow to illustrate and contrast the legal position on the Continent with that in the UK.

In Germany, articles 1 and 2 of the Constitution protect image rights. And last year, Oliver Khan, the German national team goalie, successfully sued Electronic Arts, the electronic games manufacturer, for using his image and name in an official FIFA computer football game. EA claimed that collective consent had been obtained from the national (VdV) and international (FIFPro) football players' unions. But not, in fact, from individual players, including Khan himself! This the Hamburg District Court ruled off side!<sup>28</sup>

Likewise, in France, article 9 of the Civil Code confers a general right of privacy as part of a package of rights protecting the person. Thus, several years ago, the infamous football player Eric Cantona was able to successfully sue the publishing company, 'Foot Edition', and obtain substantial damages for their unauthorised commercial exploitation of his name and image in a special number of their magazine 'BUT' entitled 'Special Cantona'. The French Court held that the use of the footballer's name and image was not for general news purposes, which would not have been unlawful, but purely for the commercial benefit and financial gain of the publishing company, and thus against the law.

Again, articles 2 and 3 of the Italian Constitution also provide protection to sports persons. The general legal principle is that if an image is displayed or published except when allowed by law (the exceptional circumstances are set out in Article 97 of the Italian Law on Copyright No. 633/41), or its display causes prejudice to the dignity and the reputation of the person concerned, the Courts may order the abuse to cease and award compensation. The Italian Supreme Civil Court (*Corte di Cassazione*) has established that the reproduction of the image of a famous person, created for advertising purposes without the latter's consent, constitutes an injury to an individual's exclusive rights over their own likeness (*Cassazione Civile Sez. I*, 2<sup>ND</sup> May 1991 No. 4785). Exceptionally, paragraph 1 of article 97 of the Law on Copyright provides that the consent of the image holder is not required when reproduction is "justified by the fame or by the public office covered by the latter, for justice and police requirements, for scientific, educational or cultural purposes, when the reproduction is connected to facts, happenings and ceremonies of public interest or, in any case, conducted in public". However, paragraph 2 of the same article provides that "the likeness cannot be displayed or put on sale, when its display or sale might cause prejudice to the honour, reputation or dignity of the person represented".

In Sweden, unauthorised use of an individual's name or picture to promote goods and services is a civil wrong - and also a criminal offence where the use is intentional or grossly negligent - under the Act on Names and Pictures in Advertising of 1979.

In Switzerland, well-known sports persons are legally protected against unfair exploitation of their persons by article 28 of the Civil Code, which provides as follows:

*"When anyone is injured in his person by an illegal act, he can apply to the judge for his protection from any person who takes an active part in effecting the injury.*

*An injury is illegal where it is not justified by the injured person's consent, by a predominantly private or public interest or by the law."*

And finally, article 18.1 of the Spanish Constitution (supplemented by Organic Law 1/1982 of 5 May) guarantees - in equal measure - the right to honour, to personal and family privacy and to self-image.

The increasing phenomenon of exploitation of sports image rights through new media platforms, including the Internet and (eventually) 'third generation' mobile 'phones'<sup>29</sup>, which are now coming on stream, and the commercial opportunities they present for the creative use of sports programming and information content,<sup>30</sup> also raise important issues of the protection of sports persons' image rights against the unauthorised use of their names, images and likenesses. Computer, electronic and video sports games similarly pose threats to image rights in cyberspace space and the realm of virtual reality.

Particular reference should be made to the recent landmark Court decision in Germany in the Oliver Khan case mentioned above.

Another issue that arises in relation to the legal protection of image rights is the impact of the European Convention on Human Rights (ECHR). In the United Kingdom, for example, the possibility of protecting a sports person's personality rights by invoking the right to privacy under article 8 and the right to property under article 1 of the First Protocol of the ECHR has arisen in a number of high profile cases. However, to date, there have been no Court decisions on these matters. Indeed, the general view amongst UK media and sports lawyers is that the interest protected by image rights is not the same as the interest, which the right to privacy is designed to protect. In the former case, the right to be protected is the right of sports personalities to commercially exploit their own names and likenesses for their own benefit and the failure to do so causes them financial loss. Whereas a person's right to privacy protects that person's personal integrity and autonomy from unwanted surveillance and intrusive behaviour. Further, the right to privacy may indeed protect

celebrities - including sports stars - against invasions of their privacy, but this does not constitute *per se* a separate personality right. So far, no underlying property right in the *persona* of an individual has been legally recognised in the UK. And, indeed, any legal extension of the right of privacy to a right of personality would have to be balanced against the right of freedom of expression safeguarded under article 12 of the ECHR. This point was noted in the celebrated case of *Douglas & Others v Hello Limited*.<sup>31</sup> The lack of a separate personality right based on the right to privacy is discussed by Sara Whalley-Coombes and Elizabeth May in their article entitled, 'Getting 'personal' in the UK - to what extent does the law offer celebrities protection?'<sup>32</sup> However, recently the super model, Naomi Campbell, won her breach of privacy case against the 'Daily Mirror' newspaper in the House of Lords.<sup>33</sup>

### Fiscal Aspects

As with any kind of business, the commercialisation of sports image rights also has a fiscal dimension that needs to be considered. However, tax is a field in which the old adage that '*circumstances alter cases*' is particularly pertinent. In other words, tax advice very much depends upon the particular facts and circumstances of each individual case - as well as the aims to be achieved through any tax mitigation scheme. Equally, a cost-benefit analysis needs to be made in each case.

Particular mention should be made of the UK case of *Sports Club plc v Inspector of Taxes* [2000] STC (SCD) 443, in which Arsenal Football Club succeeded in having payments made to off-shore companies in respect of the Club's commercial exploitation of the image rights of their players, David Platt and Dennis Bergkamp, classified, for tax purposes, as capital sums and, therefore, non-taxable as income. This case is not only interesting from a fiscal point of view, but also from a jurisprudential point of view, in that, for tax purposes, image rights are considered to be capital assets even though image rights *per se* are not recognised as a separate species of property under the general law in the United Kingdom.

Opportunities exist in other parts of Europe for tax sheltering the financial returns from the commercial exploitation of sports image

<sup>28</sup> *Kahn v Electronic Arts GmbH* unreported 25 April, 2003 (Germany).

<sup>29</sup> These 'phones will permit one to view live or near-live clips of moving sports action.

<sup>30</sup> As to their value and commercial exploitation as a sports marketing tool, see 'Download Now!' by Jean-Paul de la Fuente in 'Football Business International' Magazine of 9 August 2003 at p. 19.

<sup>31</sup> [2001] 2 WLR 992.

<sup>32</sup> April 2002, Copyright World, at pp. 16-

18. See further on this subject generally, 'The Right of a Sportsperson to Exploit

His/Her Own Image and Success in the United Kingdom' by Dalton Odendaal, a Paper presented at a Conference on 'Sport: The Right to Participate' held at the Law Faculty at the University of Cape Town, South Africa, on 6 & 7 February, 2003, organised by Steve Cornelius and Rochelle le Roux of the Centre for Sports Law of the Rand Afrikaanse Universiteit, Johannesburg and the Institute of Development and Labour Law of the University of Cape Town respectively.

<sup>33</sup> [2004] UKHL 22.

rights - not least in The Netherlands, which has a fairly comprehensive network of double taxation treaties around the world, which can be creatively used to save tax.

Again, in Switzerland, for example, tax mitigation structures can be constructed founded on tax-exempt not-for-profit foundations.

### Legal Remedies for Infringing Sports Image Rights

A variety of legal remedies are available to those whose sports image rights have been infringed, ranging from damages to interim and final injunctions. Where trade marks are involved, under sections 14 - 16 of the UK Trade Marks Act 1994, the following specific civil remedies are available: damages; an account of profits; injunctions; and orders for delivery up of infringing articles.

In assessing damages generally, in a number of Continental European jurisdictions, a 'lost licence fee' is applied. In other words, what would the offending party have to have paid had that party been granted a licence to commercially use and exploit the sports image rights concerned.<sup>34</sup> However, generally speaking, damages awards on the Continent tend to be lower than in Common Law jurisdictions generally and certainly in the United States. For example, in Switzerland, Courts will rarely award more than between 10,000 and 20,000 Sw.Frs. for infringement of rights.

As for injunctions, being an equitable remedy under English law, such measures are granted by the Courts on a discretionary basis and only where damages would not be an adequate remedy. It may be possible, according to the particular circumstances of the case, to obtain specialised injunctions, such as '*Quia Timeo*', which aims to prevent an anticipated breach of a legal right. In Spain, for example, under Article 9.2 of the Basic law ('Ley Organica'), a Judge can adopt all required measures in order to achieve the following results:

- to stop illegal interference by third parties;
- to restore the owner's full enjoyment of their image rights; and
- to prevent future interferences.

Where copyright infringements occur, amongst other remedies, the UK Copyright Designs and Patents Act 1988 gives the aggrieved party the right, subject to complying with certain procedures, to seize and detain infringing copies.<sup>35</sup>

In the European Union, under Regulation No. 3295 of 1994, copyright holders can ask their Customs Authorities to stop counterfeit or 'pirated' goods from entering their country. This is a very valuable and practical tool for fighting counterfeiting on a trans national scale.

However, apart from civil remedies, criminal sanctions may result from the infringement of sports image rights. For example, under section 92 of the UK Trade Marks Act 1994, fraudulent application or use of a trade mark constitutes a criminal offence; and the offender can be fined and/or imprisoned, if the required criminal intent ('*mens rea*') is proved. In other words, the application or use of the mark must be either with the intention of the infringer gaining, or causing loss to someone else; and, in either case, must be without the consent of the trade mark owner.

Likewise, under section 107(1) of the UK Copyright, Designs and Patents Act 1988, there are similar criminal consequences where the copyright infringer knows, or has reason to believe, that an infringement is taking place.

Before resorting to legal proceedings, however, 'cease and desist letters' are often sent to infringers. But beware: to claim trade mark rights falsely and threaten legal action can, under section 21 of the 1994 Act, produce a counterclaim for a declaration that the threats are unjustified; and, in turn, this can lead to claims for damages and/or injunctions.

See further on this subject generally: 'Sports Merchandising: Fighting the Fakes' by Ian Blackshaw.<sup>36</sup>

### Alternative Ways of Settling Disputes

Alternative Dispute Resolution (ADR) has grown in popularity especially for settling commercial disputes outside the courts system, where speed, confidentiality, flexibility and inexpensiveness are the name of the game. ADR is also being used more and more by the

sporting world, where there is a general need to settle sports disputes 'within the family of sport', having regard to the special characteristics and dynamics of sport. Generally speaking, sports bodies and persons do not wish '*to wash their dirty sports linen in public*'.<sup>37</sup>

One of the bodies that has established itself as an effective and fair forum for settling sports-related disputes is the Court of Arbitration for Sport (CAS). In June of this year, the CAS celebrates its twenty-first birthday.

The CAS not only offers arbitration and mediation of purely sporting issues, such as eligibility, sports governance and doping, for which it is the ultimate appeal court within the world of international sports federations under the World Anti Doping Code, but has gained a reputation for the settlement of sports-related business disputes as well, of which there are an ever increasing number.

The CAS also offers Advisory Opinions, similar to Expert Determination in the commercial world, with one very important difference - Advisory Opinions are not legally binding.

Many sports image rights disputes can be suitably settled by resort to CAS. This can be done on an express basis - that is, by incorporating appropriate reference clauses in sports image rights contracts - or on an 'ad hoc' basis by referring disputes to CAS when they actually arise.

The standard CAS express clause for a commercial dispute runs as follows:

*"Any dispute arising from or related to the present contract will be submitted exclusively to the Court of Arbitration for Sport in Lausanne, Switzerland, and resolved definitively in accordance with the Code of Sports-related Arbitration."*

The parties may also - and often do - include in this clause additional provisions regarding the number of CAS arbitrators (from one to three) and the language in which the CAS proceedings will be conducted (for example, English).

If the parties, however, prefer mediation - and many do because of the special characteristics and dynamics of sport - for the settlement of their sports disputes, the CAS model mediation clause is as follows:

*"Any dispute, any controversy or claim arising under, out of or relating to this contract and any subsequent amendments of or in relation to this contract, including, but not limited to, its formation, validity, binding effect, interpretation, breach or termination, as well as non-contractual claims shall be submitted to mediation in accordance with the CAS Mediation Rules."*

Mediation is usually successful in the majority of cases - success rates of 85% are generally claimed by mediation providers - but in case it is not, the following additional CAS clause may be included in the contract:

*"If, and to the extent that, any such dispute has not been settled within 90 days of the commencement of the mediation, or if, before the expiration of the said period, either party fails to participate or continue to participate in the mediation, the dispute shall, upon filing of a Request for Arbitration by either party, be referred to and finally settled by CAS arbitration pursuant to the Code of Sports-related Arbitration. When the circumstances so require, the mediator may, at his own discretion or at the request of a party, seek an extension of the time limited from the CAS President."*

<sup>34</sup> See the discussion in Germany regarding damages in the *Oliver Khan* case and also in the *Caroline of Monaco* case in the Book 'Sports Image Rights in Europe' edited by Ian S. Blackshaw & Robert C.R. Siekmann, 2005, TheTMC Asser Press, The Hague (ISBN 90-6704-195-5) at pp. 126-128.

<sup>35</sup> See sections 96 - 100 of the Copyright Designs and Patents Act 1988.

<sup>36</sup> The International Sports Law Journal, 2004/3-4, at p. 76.

<sup>37</sup> See generally 'Mediating Sports Disputes: National and International Perspectives' by Ian S. Blackshaw, 2002 The TMC Asser Press, The Hague, The Netherlands (ISBN 90-6704-146-7).

'Med-Arb' (to use the jargon) can be an effective way, in practice, of settling disputes - mediation to determine the legal issues between the parties and arbitration to settle them! However, it should be noted that mediation is not suitable in those cases where injunctive relief is needed.

Mention should also be made of the UK Sports Dispute Resolution Panel, which also offers arbitration, mediation and advisory opinions similar to CAS for the settlement of sports disputes in the UK.

### Concluding Remarks

Sports Image Rights is a vast and developing subject and one, I am sure, which will continue to challenge the ingenuity and creativity of sports administrators, marketers and their legal advisers alike for many years to come!

Sports teams, such as Ferrari, clubs, such as Manchester United, and individual sports personalities, such as Tiger Woods, Michael Jordan, Michael Schumacher and David Beckham, amongst the men and Serena Williams and Venus Williams, Anna Kournikova and Annika Sorenstam, amongst the women, have all become brands in their own right. And, as such, they are very valuable 'properties' and widely exploited commercially.<sup>38</sup>

However, as we have seen, their treatment legally is not uniform throughout Europe. And this makes European-wide promotional campaigns more difficult to organise and execute in practice.

In the UK, as has been pointed out, there is no specific image right as such; whereas in Continental Europe, a legal right of personality - often combined with a right to protection of private and family life - is expressly safeguarded by special provisions in the Constitution of the country concerned. In other words, these rights are regarded as fundamental ones and, therefore, 'entrenched' in law.

Perhaps this is a field in which the EU Commission may consider that some degree of harmonisation is required so as to provide a 'level playing field' for the legal treatment of sports image rights, especially now in an expanded European Union of 25 member countries comprising some 450 million people.

Again, perhaps a new kind of fundamental human right - a personality right - should be recognised by and brought within the purview of the European Convention on Human Rights (ECHR). Such a right could apply to anyone, famous or not, and would constitute a standard/norm to be followed and enforced by the signatory countries to the ECHR, with rights of appeal to the European Commission on Human Rights and, in the final instance, to the European Court on Human Rights in Strasbourg. Without a legal right of personality *per se*, the protection provided to individual athletes is uncertain and often weak when measured against the strength, position and bargaining power of large corporate players within professional sport - for example, multinational sponsors and global broadcasters - and within the structure of sport itself - major international sports bodies, such as the IOC and FIFA - through which the individual player is required to practise their profession.

New media, such as the internet and 3G mobile phones, which are now beginning to come on stream and provide new platforms for sports content, have opened up new marketing possibilities and opportunities for the commercial exploitation of sports image rights, but have also given rise to new legal problems and challenges - not least in respect of the protection and enforcement of intellectual property rights. Perhaps another reason for standardisation on a global level at which sport now operates.

One thing, however, is clear: in the future, sports image rights will continue to form an important part of the sports marketing mix and present challenges, particularly legal ones, to all those involved in promoting, leveraging and exploiting commercially the value of sport, sports events and sports personalities - at the national and international levels.

The International Sports Law Journal

<sup>38</sup> See 'In Pursuit of the Golden Few' by Chris Britcher in 'SportBusiness International' Magazine April 2004, at pp 28 & 29, in which he describes the

growing divide between the endorsement value of a small elite of celebrity sporting icons and the rest - however good they may be in their individual sports.



## ASSER INTERNATIONAL SPORTS LAW CENTRE

in cooperation with Taylor Wessing, Munich, Germany

*"Sports Image Rights in Europe / Persönlichkeitsrechte im Sport in Europa"*

**Wednesday, 1 June 2005**

**Venue: TaylorWessing, Isartorplatz 8, Munich**

**Opening: 16.00 hours**

**Co-chairmen: Dr Robert Siekmann, ASSER International Sports Law Centre**

**and Dr Michael Sommer, TaylorWessing**

**Speakers: Prof. Ian Blackshaw, University of Neuchâtel, Switzerland, Dr Michael Gerlinger, TaylorWessing, Katja Nakhai, Deloitte & Touche, Munich, EU Topic of the Day:**

**Roberto Branco Martins, ASSER International Sports Law Centre, on the Lauren Piau ECJ Case (players' agents)**



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# UEFA's Declaration on "Homegrown Players"

by Michael Gerlinger\*

UEFA intends to impose specific quotas on top clubs for locally trained players in Champions League and UEFA Cup matches. This is one of the results from UEFA's Ordinary Congress on 21 April 2005 in Tallinn, Estonia.

The declaration agreed upon in Tallin is part of UEFA's plans to enhance training and development of young talents. "The training and development of young players is of crucial importance to the future of football. Every football club in every national football association should play a part in this process," UEFA stated.

From next season on four "homegrown players" must be included in squads for European club games - at least two trained by a club's own academy with a further two developed by other clubs within the same association. Until the season 2008/2009 the minimum number of homegrown players will be raised up to eight.

As the term "homegrown" does not refer to the player's nationality, but means ALL talents trained and educated between the age of 15 and 21, UEFA believes to avoid any conflict with EU law, in particular the freedom of movement.

Several associations, however, pointed out that there are not only legal but also practical concerns with respect to such regulations. The German Football League, for example, fears that a „hunt“ for talents will break off in Europe. As the clubs will have to secure enough talents at an early age, most of the big clubs will start to attract many young talents.

But also the legal assessment of UEFA's proposal is more difficult than one might think at first glance. The ECJ in standing jurisdiction holds that nationality clauses of sports organisations are a restriction of the freedom of movement guaranteed under Art. 39 of the EC-Treaty, which is only justified in case there are specific non-commercial needs, e.g. with respect to national team matches (see: ECJ judgement of 8 May 2003, C-438/00 - "Maros Kolpak").

UEFA believes that there would not be a restriction of the freedom

of movement within the meaning of Art. 39 of the EC-Treaty, since "homegrown" players may be players of any nationality.

However, Art. 39 of the EC-Treaty does not only prohibit a "direct" discrimination on grounds of nationality, but also an "indirect" or "hidden" discrimination, i.e. when a discrimination is based on other criteria than nationality - here: training in the club and/or national association - and indirectly leads to a discrimination of foreigners (standing jurisdiction since ECJ C-152/73 [1974] ECR 153 - "Sotgiu vs Deutsche Bundespost"). The ECJ holds that applying geographic criteria for a restriction, particularly, bears the risk of indirect or hidden discrimination (ECJ judgement of 5 March 1998 [1998] ECR I-843 - "Molenaar"; judgement of 12 May 1998 [1998] ECR I-2691 - "Martínez Sala").

Although a regulation restricting the number of players in a squad that were not trained and educated in the club and/or association would not directly discriminate foreign players, it is quite obvious that most of the "homegrown" players would be nationals and not foreigners. Therefore, such regulation would discriminate foreigners indirectly, making it more difficult for foreign players to transfer to a country where they were not trained and educated.

This speaks for the assumption that such regulations would have to be considered as a restriction within the meaning of Art 39 of the EC-Treaty, thus requiring a justification. One might doubt that the ECJ would accept a justification based on the need of enhanced training and education of young players in football, having in mind the previous cases in *Kolpak* and *Bosman* when it denied a general justification on these grounds.

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\* Dr Michael Gerlinger, TaylorWessing, Munich, Germany. The author presently

is the Legal Director of FC Bayern Munich, Germany.

## Doping Is a Sporting, Not an Economic Matter

by Ian Blackshaw\*

So the European Court of Justice ruled in the recent and important case of *David Meca-Medina and Igor Majcen v Commission of the European Communities* (Case T-313/02; Judgement 30 September 2004).

This was an appeal brought by two professional swimmers, who had tested positive for nandrolone and banned from competition, against a decision of the Commission (Case COMP/38158 - Meca-medina and Majcen/IOC) rejecting their claim for a declaration that certain rules adopted by the International Olympic Committee (IOC) and implemented by the Federation Internationale de Natation (FINA) - the World Governing Body of Swimming - as well as certain doping control practices were incompatible with the Community Competition Rules and the Freedom to provide Services in the European Union (Articles 81, 82 & 49 of the EC Treaty).

The case was brought by the swashbuckling and pioneering Belgian lawyer, Jean-Louis Dupont, of *Bosman* fame. However, on this occasion, he failed to persuade the Court, which upheld the Commission's decision of 1 August, 2002.

It has been settled law for over thirty years that sport is only subject to EU law "in so far as it constitutes an economic activity" (*Walrave and Koch v Association Union Cycliste Internationale*: 36/74 [1974] ECR 1405, [1974] 1 CMLR 320, ECJ). A distinction has been drawn between rules or actions of a sporting nature, which are not subject, and those of an economic nature, which are subject to EU law. In

\* Ian Blackshaw is an International Sports Lawyer and may be contacted on 'blackshaw@aol.com'.

practice, it is often difficult to make this distinction - take *Bosman*, for example, which concerned football transfer rules, which have both a sporting and economic purpose. In that case, the rules in question were held to be outside the purely sporting exception and, therefore, in breach of rules on freedom of movement - one of the fundamental freedoms of the single EU market. On the other hand, in the earlier leading case of *Dona v Mantero* [1976] ECR 1333, [1976] 2 CMLR 578, ECJ, the Court held that a rule restricting places in a national team to nationals of the country concerned was imposed for purely sporting reasons and did not, therefore, breach EU law. In borderline cases, a proportionality rule applies - in other words, the restriction must not go beyond what is reasonably necessary to achieve the particular sporting objective.

Back now to the *Meca-Medina* Case. The appellants' claim that, just because the anti-doping rules at issue have economic repercussions for elite athletes, did not, in the view of the Court, prevent the rules from being purely sporting ones. That proposition was, the Court said, "...at odds with the Court's case-law." Indeed, it may be noted, *en passant*, that in the earlier English case of *Edwards v BAF and IAAF* [1998] 2 CMLR 363, the Judge held that a rule prohibiting athletes from taking drugs was a rule of a purely sporting nature and did not cease to be so simply because it had economic consequences.

Furthermore, the appellants' claim that the anti-doping rules at issue had been imposed not only for "altruistic and health considerations" but also to protect the economic interests of the IOC in having 'clean' Games, not tainted by scandals linked to doping which tend to devalue them (a particular concern of the multi national commercial companies who sponsor of the Games and who pay millions of US\$ for the privilege of doing so!), did not cut any ice either with the Court. "The fact that the IOC might possibly have had in mind when adopting the anti-doping legislation at issue the concern, legitimate according to the applicants themselves, of safeguarding the economic potential of the Olympic Games is not sufficient to alter the purely sporting nature of the legislation." Another IOC myth exploded!

The Court also made the further point: "...even were it proved, *quod non*, that the IOC acted exclusively on the basis of its purely economic interests, there is every reason to believe that it fixed the limit at the level best supported by the scientific evidence. The IOC's economic interest is to have the most scientifically exact anti-doping regulations, in order both to ensure the highest level of sporting competition, and therefore of media interest, and to avoid the scandals which the systematic exclusion of innocent athletes can provoke."

Not only did the IOC come in for praise, but so also did the Court of Arbitration for Sport (CAS), to which the athletes' doping bans had previously been appealed, but without success. The European Court recognised the CAS as being financially and administratively "independent of the IOC." And also supported the efforts of the IOC and the members of the Olympic movement to stamp out doping in sport: "...the Court... cannot uphold this action without weakening the international system of the campaign against doping, which will, in turn, weaken the values which the organisation of sport is intended to promote."

The Court also rejected the appellants' plea that the Commission wrongly applied the criteria established in paragraph 97 of the judgment in Case C-309/99 *Wouters and Others* [2002] ECR I 1577 holding: "It must be pointed out that this case differs from that which gave rise to the *Wouters* judgment. The legislation at issue in *Wouters* concerned market conduct - the establishment of networks between lawyers and accountants - and applied to an essentially economic activity, that of lawyers. By contrast, the legislation at issue in this case concerns conduct - doping - which cannot, without distorting the nature of sport, be likened to market conduct..." And the Court added: "The Court considers thus that the reference to the method of analysis in *Wouters* cannot, in any event, bring into question the conclusion adopted by the Commission in the disputed decision that the anti-doping legislation at issue falls outside the scope of Articles 81 EC and 82 EC, since that conclusion is based, ultimately, on the finding that the legislation is purely sporting legislation."

The Court also had something very interesting to say on the mat-

ter of the application of Articles 81 & 82 of the EC Treaty to sporting cases. It is well known that *Bosman*,

Although the point was pleaded and discussed, was not explicitly decided on EU Competition law, but purely on the basis of freedom of movement of persons. But, in the *Meca-Medina* Case, the Court had this to say: "It must be observed that the Court has not, in the abovementioned judgments, had to rule on whether the sporting rules in question are subject to the Treaty provisions on competition (see, in that regard, *Bosman*, paragraph 138). However, the principles extracted from the case-law, as regards the application to sporting regulations of the Community provisions in respect of the freedom of movement of persons and services, are equally valid as regards the Treaty provisions relating to competition. The fact that purely sporting legislation may have nothing to do with economic activity, with the result, according to the Court, that it does not fall within the scope of Articles 39 EC and 49 EC, means, also, that it has nothing to do with the economic relationships of competition, with the result that it also does not fall within the scope of Articles 81 EC and 82 EC. Conversely, legislation which, although adopted in the field of sport, is not purely sporting but concerns the economic activity which sport may represent falls within the scope of the provisions both of Articles 39 EC and 49 EC and of Articles 81 EC and 82 EC and is capable, in an appropriate case, of constituting an infringement of the liberties guaranteed by those provisions (see, in that regard, the Opinion of Advocate General Lenz in *Bosman* at I-4930, paragraphs 253 to 286, and particularly paragraphs 262, 277 and 278) and of being the subject of a proceeding pursuant to Articles 81 EC and 82 EC."

In other words, *Bosman* was also decided on EU Competition law grounds, because, if freedom of movement of persons rules apply, so also to do anti competition rules.

In *Meca-Medina*, anti-doping rules were held to be purely sporting rules with no economic purpose and, therefore, outside the scope of Articles 49 EC, 81 EC and 82 EC. And also held not to be discriminatory - applying a 'level playing field' to all athletes subject to them. As far as the Court was concerned, anti-doping regulations fulfilled two important social functions: fair play in sport and safeguarding the health of athletes and these were worth upholding. All will say 'amen' to that. Furthermore, these regulations did not restrict the economic freedoms of athletes, as claimed by the appellants.

A nice try, Jean-Louis, but one that did not come off! Which sporting windmill, I wonder, will he be tilting at next?

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## SECOND ASSER/SENSE SEMINAR

in cooperation with Ernst & Young, London, United Kingdom

*"Sports Image Rights: Law and Practice"*

**Monday, 13 June 2005**

**Venue: Ernst & Young, 1 More London Place, London**

**Opening: 14.30 hours**

**Co-chairmen:** Dr Robert Siekmann, ASSER International Sports Law Centre and Alan Flitcroft, Ernst & Young, London

**Speakers:** Prof. Ian Blackshaw, University of Neuchâtel, Switzerland and CAS Member; Dan Harrington, Couchman Harrington Associates, London; Sam Rush, Chief Operating Officer, SFX Sports Group (Europe) Ltd., London; Kevin Roberts, Editorial Director, SportBusiness International, London; Wiebe Brink, Partner, Ernst & Young, Utrecht, The Netherlands.

# The Database Right and The Spin-Off Theory

by Nick White\*

Commentators in many quarters, especially in the UK, were surprised by the ECJ's decision in *British Horseracing Board & Others v William Hill* in November last year - which was handed down in conjunction with a number of other European cases also concerning the scope of the database right.

Under the Database Directive, the database right may arise where the database maker can show that he has made "a substantial investment in ... the obtaining ... of the contents" of a database. The ECJ found that the BHB's database of runner, rider and race information did not fulfil this test. Their reason for making this finding was essentially as follows:

"The expression 'investment in ... the obtaining ... of the contents' of a database must, as *William Hill* and the Belgian, German and Portuguese Governments point out, be understood to refer to the resources used to seek out existing independent materials and collect them in the database, and not to the resources used for the creation as such of independent materials."

So, the database right will arise where investment has been made in *seeking out* and *collecting* materials but not where the investment has been made in the *creation* of materials. Although it was not stated in such clear, bald, terms, the ECJ's view was that the efforts made by the BHB in creating the data, i.e. in the process of receiving, ordering and entering into the database detailed information on horses, jockeys, owners, colours, trainers, meets etc, were not efforts from which a database right could arise. The creation of such data was, in essence,

a spin-off of the BHB's actual purpose, viz. the management, planning and organization of racing and the racing calendar.

The ECJ's endorsement of this so-called "spin-off" doctrine - the idea that a database right will not arise in respect of a database which is a mere spin-off of another endeavour - should probably not have come as such a surprise as it did. It is a principle fairly well established in Dutch law (see for example P. Bernt Hugenholtz' excellent but unsnappily titled paper "Program Schedules, Event Data and Telephone Subscriber Listings under the Database Directive"). Moreover, the Belgian, German and Portuguese Governments all submitted observations in the BHB case encouraging the ECJ to endorse the doctrine.

The BHB may well feel aggrieved at having this ECJ decision go against them. Before the judgment, the Advocate General had delivered an opinion in the BHB's favour and most commentators believed the ECJ would follow suit - as it usually does. Undoubtedly, things now look fairly bleak for the Board although the Court of Appeal still has to rule on the case. A hearing is set for 28 and 29 June and the BHB will be hoping for another surprise. The Board must have had its reasons for not pursuing a claim under copyright but, in the light of subsequent events, it is probably now wishing it had.

\* Couchman Harrington Associates, London, United Kingdom.

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## 'What a Waste of Money'. The English High Court Dips Its Toe in the Murky Waters of Transfer Valuations and Negotiations

by John O'Leary\*

As the vast majority of the readers of this Opinion will be football fans, and football fans are, by and large, an opinionated bunch, it would be my guess that most readers have at some time expressed doubts about the true value of some of their club's players. As a Chelsea supporter I have had ample opportunity to express my doubts and then delight at the relatively paltry sum 'we' paid for Frank Lampard - although the jury is still out as far as Didier Drogba is concerned. There are many reasons why players exceed or fail to meet the expectations (and therefore transfer value) of the purchasing club and its supporters. One such reason might be that the transfer fee paid for the player was simply an overvaluation: an error of judgment as to ability or potential. Such an overvaluation, one may be inclined to believe, would or should not be the subject of litigation. In the English High Court<sup>1</sup> however, Mr Al Fayed, Chairman and benefactor of Fulham Football Club had other ideas.

When Mr Al Fayed purchased Fulham the club was languishing in the lower echelons of the football league and there is no doubt that his energy, financial acumen and, perhaps most importantly, his chequebook, were responsible for the club's meteoric rise to the English Premier League. Another reason was that the manager, the former French international Jean Tigana, imbued the team with an exciting and winning football philosophy.

Both Al Fayed and Tigana were ambitious for further success and, to that end, the club signed Edwin van der Sar, a Dutch international goalkeeper from Juventus for £7m and Steve Marlet a French forward from Olympique Lyonnais for £12m. If Fulham had continued to develop as a club and if the players signed had met Mr Al Fayed's expectations then it is unlikely any more would have been heard about these events. Unfortunately the relationship between Al Fayed and Tigana soured and Al Fayed came to the conclusion that Tigana was responsible *inter alia* for what he, Al Fayed, thought were overvaluations of the players' true worth. Al Fayed argued that Tigana had both contractual and fiduciary duties to act in the best interests of Fulham Football Club at all times and that his overvaluations of the transfer value and the salaries of van der Sar and Marlet were a breach of those duties.

Elias J's judgment in the High Court was lengthy and thorough. He confirmed that Tigana did owe both contractual and fiduciary duties to Fulham and that those duties did encompass a requirement

\* Senior Lecturer in Law and Head of the Sports Law Unit, Anglia Polytechnic University, Chelmsford, United Kingdom. 1 Fulham Football Club (1987) Ltd v Tigana [2004] EWHC 2585 2004 WL 2652644.

to act in the best interests of Fulham in transfer dealings but that, on the facts, Tigana had not breached those duties. It is debatable, however, the degree to which those involved in transfer negotiations can breathe a sigh of relief.

On the facts it is difficult to see what other conclusion Elias J could have reached. Al Fayed's view of the van der Sar transfer was that the player had been overvalued by (a mere?) £1m. He had perhaps greater cause for complaint regarding Marlet's £12m valuation. The real concern for those involved in transfer negotiations must be that that Al Fayed's action is an attempt to apply objective standards to an inherently subjective process. The transfer fee represents not only the worth of the player at the time of transfer but also his potential, his intellectual property value, his attitude and other factors related to his contribution to the team e.g. how desperate is the club for, say, a 20 goal-a-season centre forward? Additionally a player's transfer value is as much a reflection of the buoyancy or otherwise of the transfer market at the time of the transfer as it is the true 'value' of the player. Equally, a player's inability to perform up to his value could be due to a host of other factors, some of which may be personal such as his inability to come to terms with another culture and some due to the vicissitudes of life.

Perhaps the most important and illuminating feature of the case is the examination by Elias J of the mechanisms and actors involved in transfer negotiation and it is here that professional football can learn important lessons that will prevent any recurrence of actions such as

this. One issue of fact that Elias J decided was that Tigana did not have, nor did he purport to exercise, any authority to agree transfer fees and player wages. Fulham had argued that Tigana had effectively negotiated the transfers. Very little has been written about this important aspect of contractual dynamics. The lines of authority between those negotiating and those approving transfer fees are blurred. To what degree does the average manager involve himself with the various stages of transfer negotiation? Most likely all managers have a say in the initial identification and subsequent valuation of the player in question - after all, the manager is usually the person at the club most steeped in an understanding of the factors described above - but there is enormous variation in the involvement of the manager/coach beyond this point in the process. A football club can circumvent most of the suspicion and recrimination of the Fulham case by clearly defining roles and lines of authority.

Finally, one issue of the case will come as no surprise to sports lawyers. In the middle of the negotiating process were the agents (one of whom was a FIFA licensed agent). Commissioned by Fulham but appearing to represent at various times the player and the selling club, their position was described by Elias J as a 'sham'<sup>2</sup>. Many more cases such as this and the clamour will begin for proper regulation of football agents. And not before time.

The International Sports Law Journal

<sup>2</sup> At 114.

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# Should Sports Disciplinary Proceedings Be Held in Public?

by Ian Blackshaw\*

The Jockey Club, which regulates - and has done so for more than 250 years - British Horseracing, often referred to, not without significance, as 'the Sport of Kings', is no stranger to controversy or the courts when it comes to defending its interests or reputation. It is also a rather hidebound and traditional organisation - not least because of its high society members, who rejoice under the rather medieval title of 'stewards'. And not, therefore, one that might be expected to break with tradition. However, it has not been enjoying a good press in recent times. In October 2003, it was branded as being 'institutionally corrupt' in a BBC TV 'Panorama' programme. And, in April 2004, the Office of Fair Trading (the UK Anti-Trust Authority) published a Report alleging that it engaged in certain restrictive practices contrary to the provisions of the UK Competition Act of 1998.

But, on 3 February, 2005, the Jockey Club acted completely out of character and held its first Disciplinary Hearing in Public. Well - not exactly. As members of the public were not admitted, but members of the press were allowed in to witness the proceedings and also to report on them without any restrictions. It seems that the rationale behind this move was to make the Jockey Club less opaque and more open and transparent in an attempt to shake off its rather tarnished and secretive image. The proceedings were well and truly reported in the British Press and on radio and television.

The actual case was not *per se* important - it involved a female apprentice jockey who was alleged to have infringed the rules of racing, but was, in fact, acquitted and left the hearing without any blemish on her character and presumably her future career. However, the principle is important. And raises the vexed question whether Sports Disciplinary Proceedings should be held in public.

In trying to answer this question, as a British lawyer, I am reminded of the former Lord Chief Justice Hewart's famous dictum: 'Justice

should not only be done, but be seen to be done.' In other words, justice should not be dispensed in secret. In general, proceedings should be held in public. Otherwise, public confidence - which is not that high anyway in the UK following some high profile miscarriages of justice - in the justice system may well be undermined or eroded. Of course, there are occasions when proceedings should be held in private - '*in camera*'. For instance, which is highly topical in these times when we are waging war on terror, when national security is threatened or may be compromised.

But we are dealing here with sports disputes and sports disciplinary proceedings. And, as the European Union has recognised in several Declarations on Sport and now enshrined in a Sport Article in the new European Constitution Treaty, recently signed in Rome, like the first one in 1957, but not yet ratified by all the Member States, sport is special - it has its own peculiar characteristics and dynamics. Furthermore, sports bodies and persons prefer to have their disputes settled in private and within the 'family of sport'. And not in the full glare of publicity. In other words, to adapt a well-known phrase in English, they prefer not 'to wash their dirty sport's linen in public'.

Although the rationale for the Jockey Club holding its first public Disciplinary Proceedings is a worthy one - more openness and transparency - this development, if repeated by the Jockey Club and adopted by other Sports Bodies, could turn out, in my opinion, to be a big mistake. And also counter productive. To hold such Proceedings in public can inhibit the parties from taking their disputes to such dispute resolution bodies and discourage witnesses and others with an

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interest from intervening in them. Other sports lawyers, who views I have privately canvassed and respect, are of the same opinion and, like me, view with horror and trepidation sports disciplinary and dispute proceedings being generally open to the general public and/or to the press.

Confidentiality has always been the hallmark and basis of success of sports disputes resolution bodies, such as the Swiss-based Court of Arbitration for Sport, of which I am a member. Under CAS rules of procedure, decisions can be published if the parties agree or, without such agreement, if the Court considers publication to be appropriate.

For example, in a recent case that I handled, the decision was directed to be published by the Court, in view of the nature of the case and its wider importance and interest to other sports bodies and the sporting community in general. Furthermore, any need for publicity can also be dealt with by the issue of suitably worded press releases in appropriate circumstances and situations.

And, in all such instances, justice will not only be done but seen to be done without there being any need whatever for holding a public hearing.

The International Sports Law Journal

# Football Broadcasting Rights - The Situation In Bulgaria

by Boris Kolev\*

In this article I shall discuss how the UEFA Regulations governing the implementation of Article 48 of the UEFA Statutes (in short: the Broadcasting Regulations) are incorrectly enforced in Bulgaria. The Broadcasting Regulations were introduced in Bulgaria on the basis of Article 3 (1), which leaves it to each member association to decide whether to set aside two and a half hours on a Saturday or on a Sunday, during which *any* transmission of football may be prohibited within the territory of the member association in question, in this case the territory of the Republic of Bulgaria.<sup>1</sup> These two and a half hours are usually called blocked hours and this is how I shall refer to them hereinafter.

The problem with the blocked hours in Bulgaria stems from the fact that the Bulgarian Football Union (BFU) made a fundamental mistake in the translation of the Regulations into the Bulgarian language. Pursuant to the second sentence of the abovementioned Article “this prohibition shall apply only to *intentional* Transmissions”, but according to the Bulgarian translation it shall apply only to “*international* Transmissions”.<sup>2</sup> Due to this incorrect translation, the BFU prepared a totally mistaken schedule for the second part of the current Bulgarian championship, according to which the most interesting domestic match shown by the Bulgarian National Television (BNT) very often falls exactly within the blocked hours and coincides or overlaps with the rest of the matches in the first two Bulgarian football leagues. Obviously the BNT relied on the erroneously translated Article and interpreted it as an exemption for broadcasts of domestic football.

However, according to the definition in the Decision of the European Commission of 19 April 2001 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement, intentional transmission means transmission in a local language.<sup>3</sup> UEFA defines the notion of “intentional broadcasts” as broadcasts which are specifically produced for a given territory, e.g. in terms of language and/or content.<sup>4</sup> This means that the broadcasting of any foreign football footage accompanied by a commentary in Bulgarian and a discussion and analysis of the match also in Bulgarian is intentional for the territory of the Republic of Bulgaria. The transmission of Bulgarian domestic matches can therefore also be said to be intentional. Broadcasts of domestic matches therefore also fall within the scope of the prohibition, which was intended to cover any transmission of football, meaning that the blocked hours are actually blocked for any kind of match, not just for foreign matches.

As a result of the incorrect translation, the BNT broadcasts of football matches during the blocked hours is contrary to the Regulations and affects stadium attendance and amateur participation in football, which is the main principle and purpose of the Regulations, as stated

in Article 2 (1): “The present Regulations are designed to ensure that spectators are not deterred from attending local football matches of any kind and/or participating in matches at amateur and/or youth level, on account of Transmissions of football matches which may create competition with these matches”.<sup>5</sup> This means that this principle contained in the Regulations has been violated. Furthermore, Article 2 (2) leaves no room for doubt as to how the Regulations should be construed. It provides that “The member association shall not discriminate against football from other countries, and these Regulations apply equally to Transmissions of domestic and foreign matches.”<sup>6</sup> Therefore, by allowing the BNT to broadcast domestic matches during the blocked hours, the BFU quite certainly goes against the Regulations.

To complicate matters further, the BFU, as the controlling body for ensuring that all parties involved in the process adhere strictly to the provisions contained in the Regulations,<sup>7</sup> notified UEFA that Balkan Bulgarian Television (BBT) had broadcasted English Premiership football during the blocked hours. Such notifications trigger the liability of the foreign association in question, in this case the English Football Association, which is under an obligation to ensure that “no transmissions of matches played within its territory take place within the territory of any other member association during its ‘blocked hours’, unless the latter has permitted the transmission of a match as described in Article 4” (Article 5 (2) (b)).<sup>8</sup> At the same time, the BFU failed to mention that they themselves had allowed broadcasting of football events during the blocked hours and had thereby waived their right to object to the broadcasting of any other football event, as may be concluded from Article 4 (1) concerning the possible exemptions from transmission-free periods. This Article provides that “should a member association decide to transmit a match in accordance with this Article 4, then it must also accept the transmission of any other match in its territory during the same period”.<sup>9</sup> It is true that we are not dealing with an official exemption in this particular case, because

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and Article 53 of the EEA Agreement (Case 37.576 UEFA’s broadcasting regulations ) OJ L 171, 26/06/2001 P. 0012 - 0028 (hereinafter the Decision), at 11.

1 Art. 3 (1) of the Broadcasting Regulations.

2 Id.

3 2001/478/EC: Commission Decision of 19 April 2001 relating to a proceeding pursuant to Article 81 of the EC Treaty

4 Id. at 13.

5 Art. 2 (1) of the Broadcasting Regulations.

6 Art. 2 (2) of the Broadcasting Regulations.

7 Art. 5 (1) of the Broadcasting Regulations.

8 Art.5 (2) (b) of the Broadcasting Regulations.

UEFA was not notified of the dates of the matches whose broadcasting was sought to be exempted, as the Regulations require. Also, a national association cannot make use of the exemptions with such frequency as to apply to almost every round of the domestic championship, because this would result in no blocked hours at all and would turn the exemption into the rule.

Nevertheless, to my understanding, BBT has the right to broadcast in parallel to the BNT broadcasts of domestic matches and this also follows from the Decision of the European Commission referred to above. According to point 14 of the Decision, "if a Member Association allows the broadcast of a match, including those falling within the above categories (the possible exemptions), it cannot object to the incoming transmission of any other match played in the territory of another football association".<sup>10</sup> This conclusion is once again confirmed in point 52, under f, of the Decision: "If national football associations allow the broadcasting of football events during the blocked hours within their territories, they can not object to the broadcasting of any other football event."<sup>11</sup> Therefore, BBT is at all times entitled to broadcast English football during the blocked hours, without needing to raise the matter with UEFA or any other institution that might be competent in this case, such as, for instance, the Bulgarian competition authority.

However, BBT was unaware of its rights and after the BFU notification to UEFA it was threatened with severe sanctions if it continued to broadcast during the blocked hours. BBT as a result stopped broadcasting football during the blocked hours, although BNT is continuing to do so almost every weekend. Unfortunately, all other television stations that hold broadcasting rights for foreign championships duly respect the blocked hours and blindly adhere to the incorrect Bulgarian translation of the Regulations, while the BFU is aware of their actual meaning.

The situation is absurd - the stadiums continue to stand empty, much the same as they did before the adoption of the blocked hours, now that the most interesting Bulgarian match in the A group is often played at the exact same time as the majority of other matches in the first two professional leagues and is shown on TV. This means that football fans are likely to stay at home to watch this match instead of attending a match from the B group, for instance. However, the purpose of the Regulations is actually to ensure attendance in stadiums, which is easily affected by TV broadcasts of football. This is certainly true for attendance of matches that, as a rule, do not attract a large number of spectators - especially matches from the second league and the amateur groups. Thus, the purpose of the Regulations cannot be achieved. Their only effect has been that a certain number of football fans are forced to switch to BNT if they wish to watch football during the blocked hours.

The situation is best described by making a comparison with the smoking of cigarettes. Whether someone smokes Bulgarian cigarettes or a foreign brand makes no difference, as both will work to the detriment of his/her health. The same is true of watching football on TV - whether someone watches a Bulgarian or a foreign match is irrelevant, as in both cases he/she stays at home and does not go to the stadium or participate in the competition as an amateur. On top of that, he/she is deprived of the right to choose what kind of football to watch on TV. Therefore, in this case, there is no legitimate purpose to justify an exception to the rules of competition, even if certain agreements are allowed, which is not the case here. Moreover, permitting only one television station to broadcast during the blocked hours is illegal, as it clearly restricts free competition among the stations for viewers, advertisers and broadcasting rights.

At the same time, the television stations are suffering financial losses. This must be particularly true for the station that broadcasts the German Bundesliga. Due to the fact that the matches from the German championship are held only on two days and during two time periods, unlike the other major European championships with foreign markets, almost every weekend there is one German match which cannot be shown live. This means that close to 50% of these matches cannot be broadcast live.

Although the interested parties have already been made aware of

the incorrect translation and the true rationale behind the Regulations due to the efforts of our organization (the Bulgarian Legal Association; *Eds*), no reaction on the side of the BFU followed and is expected to follow, because the status quo is favourable to it. On the other hand, the television stations seem afraid to confront the BFU and are unwilling to take actual legal action to defend their rights. Of course, such legal action is in fact unnecessary, as the stations are already entitled to broadcast under the current circumstances. However, this fact has to be somehow attested to by a competent institution, in this case UEFA, so that any doubts may be removed.

The current situation inevitably poses the question of the available remedies. One remedy might be starting proceedings before the UEFA Control and Disciplinary Body based on Article 6 of the Regulations: "If a member association violates the provisions of these Regulations, any member association which has incurred damage as a result of the violation may lodge a complaint with the UEFA Control & Disciplinary Body".<sup>12</sup> In the case involving BBT this member association would probably be the English Football Association. However, absent an express provision that allows other interested parties, such as television stations and football clubs, to lodge complaints, it is uncertain how this procedure could be realized in practice.

If it is possible for the interested parties to start such proceedings before UEFA, the imposition of disciplinary sanctions on the BFU does not seem an appropriate measure, as most probably the incorrect translation was not made culpably. What seems appropriate is that a directive be issued to the BFU clarifying the real meaning of the Regulations and how they are to be applied. Due to the undoubted misunderstanding, all parties concerned, including the television stations and the football clubs, have to be directed to negotiations on whether to introduce the prohibition in the next season and if so, on the precise hours which should be blocked so as to avoid any restriction of competition.

In any case, the participation of all broadcasters is needed. This conclusion follows from the Decision of the European Commission, for which the Commission assessed the risks for broadcasters stemming from the fact that football associations could switch their main fixtures and relevant blackout periods from one period to another, thus effecting competition between the stations, which are often required to contract ahead for broadcasting rights by several years. The Commission stressed the fact that once the blocked hours have been fixed, the national football associations have no further influence on their application through any authorization procedures. This should mean that the national associations and broadcasters are able to schedule football events well in advance to take place at hours not conflicting with broadcast games.<sup>13</sup> This definitely did not happen in Bulgaria, where absolutely no discussion or negotiations took place among the parties involved. On the contrary, the blocked hours were imposed illegally and even conflicted with the Regulations themselves. This may be illustrated by the case of the German Bundesliga referred to above. It simply cannot have been the case that television stations with TV rights for the Bundesliga agreed to lose money, viewers and advertisers, unless there was an agreement contrary to the rules of free competition which is therefore void.

The easiest solution to the problem of the blocked hours seems to be a written confirmation issued by UEFA certifying that all television stations are entitled to broadcast foreign football during the blocked hours if the BFU allows the BNT to broadcast football events, thus waiving its right to object to the parallel broadcasting of foreign matches. Such a statement will inevitably demonstrate that the current situation is not right and will open the way for further discussion and dialogue on this matter - something which for the time being seems to be impossible.

Finally, it is important to recall the social function of football as a reason for the introduction of blocked hours. Stadiums are outlets

9 Art. 4 (1) of the Broadcasting Regulations.

10 The Decision, at 3.

11 Id. at 10.

12 Art. 6 of the Broadcasting Regulations.

13 The Decision, at 10.

capable of absorbing social tensions. The mass practice and frequent practice of football indirectly reflect the state of public health. Amateur football ensures the flow of talented young players to the professional clubs. Professional clubs need amateur football.<sup>14</sup> Such positive effects are likely to be neutralized or at least reduced due to the broadcasting of football, although this is an assumption which cannot as yet be definitively proven. Still, it makes the idea of having blocked hours far from pointless, especially if these do not restrict free competition among the television stations, as the final conclusion of the Commission confirmed. It is especially relevant in a country like Bulgaria, whose championship still lacks the attractiveness and quality of its English, Italian, Spanish, German and French counterparts.

The fact that these foreign championships are shown on TV could affect attendance of local matches. Moreover, the mechanism cannot be said to work the other way around, i.e. that football broadcasts from Bulgaria or other countries with a similar quality of the domestic championship could affect attendance in stadiums in England, Italy, Spain, Germany or France. Of the countries mentioned, England is the only one which has blocked hours, but this is probably due to a desire to maintain some balance between playing football

and watching football, rather than to boost attendance of local matches, which is high enough. Another reason could be a desire to maintain attendance of matches in the lower leagues of the competition, which might be reduced by transmissions of the Premiership and other top European championships. However, one thing is certain - during the blocked hours in England not one local television station, like for example the Sky Sports Channel, broadcasts football in the territory of England. After all, the real purpose of the Regulations is to bring people to go to the stadiums and participate in the matches on amateur level, instead of sitting at home and switching from one TV channel to another - something which Bulgarian fans have been doing quite often during the blocked hours in the current season.

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<sup>14</sup> See: *The Balance between the Game and the Money* - a study on sport, media and European competition law; commissioned by the Netherlands Ministry of Health, Welfare and Sport to KPMGE BE, T.M.C Asser Institute and CMS Derks Star Busmann Hanotiau Law

Firm (Final Report, 16 March 2000), in: Andrew Caiger, Simon Gardiner (Eds), *Professional Sport in the European Union: Regulation and Re-regulation*, T.M.C. Asser Press, The Hague 2000, Appendix, pp. 305-356.

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# Asser Seminar on Sports Image Rights, Amsterdam, 3 May 2005

*In Amsterdam, on 3 May 2005 a seminar on Sports Image Rights: United States, United Kingdom and The Netherlands took place which was organised by the ASSER International Sports Law Centre in cooperation with the Hugo Sinzheimer Institute for labour law of the University of Amsterdam. Prof. Ian Blackshaw presented the first copy of "Sports Image Rights in Europe" (T.M.C. Asser Press, The Hague 2005) in The Netherlands to Ms Frédérique Winia, Manager of FIFPro. Her speech of thanks reads as follows:*

Dear professors, ladies and gentlemen,

First I want to thank the Asser Institute for giving FIFPro the honour for the presentation of the first copy of their new book about sports image rights.

As football is the largest spectator sport in the world, it is also of concern for FIFPro to monitor the developments in this field.

FIFPro is an international organization that pursues the interests of professional football players around the world representing over 50.000 players.

In our special branche FIFPro Enterprises we try to safeguard the image rights of our players, which often is not easy.

Players are often forced to waive their image rights on signing their professional football contract. Only the big players sometimes succeed in preserving their own image rights.

In most countries there is no recognition of the collective image rights for players. The best example of a union that succeeded in gaining a part of the television rights for players, is the English PFA. In most other countries this right for the players is denied, although plain common sense tells us that it should be otherwise.

Players are the ones to perform; to entertain; to score and also run the risk for getting injured and all its consequences.

At FIFPro we say to our players: "You are only one tackle away from oblivion". And in fact, that says it all.

Players are entitled to a fair share of the revenues from the image rights in their sport.

Off course clubs, federations and leagues organize the right environment for the competitions in which the performance takes place. This should not lead to use an abuse power and money, which is detrimental for the players.

A former speaker in one of the Asser Institute sessions, Andrew Jennings, demonstrated the unbalance of power in the sports world in a very clear way.<sup>1</sup>

For players it seems still a long way to go before they really will be accepted as a full participant in image rights.

The book you just presented will enhance the knowledge of this complicated field. This knowledge we will use in our struggle for players rights and therefore we were gladly willing to support this project.

I am sure this book will contribute to the good of the game in general, but what is even more important for us, it will help us to support our players.

*Thank you*

<sup>1</sup> Lecture on 'Corruption in Sport', The Hague, 30 September 2003.

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# Romania: Code of Ethics and Ethics Commission

## CODE OF ETHICS

### PREAMBLE

The Romanian Olympic and Sports Committee (the "COSR") and each of Romania's sports federations (the "Federations"), the COSR's and Federations' officials, athletes, coaches and any persons or organization belonging or associated in any capacity whatsoever to the COSR and the Federations (the "Participants"), restate their commitment to the currently applicable COSR's *Statutes*, all agreements concluded between the Federations with the COSR, as well as any policies, guidelines or such related documents issued by the COSR.

It is hereby noted that the COSR is a member of the International Olympic Committee (the "IOC") and thus subject to the IOC's *Code of Ethics*, and Romania is a member of the Council of Europe and consequently subject to its *Code of Sports Ethics*. Consequently, the present *Code of Ethics* shall be based on both the IOC's *Code of Ethics* as well as the Council of Europe's *Code of Sports Ethics*.

Consequently, within the framework of the COSR's and the Federations' activities, the COSR, the Federations and all Participants directly and indirectly associated with these entities undertake to respect and ensure respect of the following rules at all times:

### A DIGNITY

- 1 Safeguarding the *dignity* of the individual is a fundamental requirement of the Romanian Olympic and Sports Committee and the Federations.
- 2 There shall be no discrimination on the basis of race, sex, ethnic origin, religion, philosophical or political opinion, marital status or other grounds.
- 3 No practice constituting any form of physical or mental injury to the Participants will be tolerated. All doping practices at all levels are strictly prohibited. The provisions against doping in the currently applicable *Olympic Charter*, Council of Europe's *Anti-Doping Convention*, and the *World Anti-Doping Code*, as well as local and international legislation shall be scrupulously observed.
- 4 All forms of exploitation against Participants with respect to physical education and sports activities are forbidden. The applicable legal rules regarding the protection and promotion of the rights of children vis-a-vis physical education and sports activities shall be adhered to strictly.
- 5 The COSR and the Federations shall guarantee the athletes conditions of safety, well-being and medical care favorable to their physical and mental equilibrium.

### B INTEGRITY

- 1 The COSR, the Federations, or their representatives shall not, directly or indirectly, solicit, accept or offer any concealed remuneration, commission, benefit or service of any nature connected with the organization of the COSR's and the Federations' activities, competitions or any other events.
- 2 Only gifts of nominal value (which nominal value shall be determined by the COSR from time to time), may be given or accepted by any Participants, as a mark of respect or friendship. Any other gift must be passed on to the organization (the COSR or the respective federation) of which the Participant is a member.
- 3 As the case may be, any hospitality shown to the Participants, and the persons accompanying them, shall not exceed the prevailing local standards.
- 4 The Participants shall avoid any conflict of interest between the organization to which they belong and any other organization

within the COSR and the Federations. If a conflict of interest arises, or if there is a danger of this happening, the parties concerned must promptly in writing inform the COSR's Executive Committee, which will take appropriate measures.

- 5 The Participants shall at all times use due care and diligence in fulfilling their duties and obligations. They must not act in a manner likely to tarnish the reputation of the COSR and the Federations.
- 6 The Participants must not be involved with firms or persons whose activity is inconsistent with: the principles set out in the IOC's *Olympic Charter*, the COSR's *Statutes*, policies and guidelines issued from time to time, as well as the present *Code of Ethics*.
- 7 The Participants shall not influence nor accept instructions to vote or intervene in any given manner within the organs of the COSR and the Federations. Breach of this material obligation by any Participant may be punishable by immediate expulsion of any Participant from the respective organization.

### C FAIR PLAY

- 1 *Fair Play* incorporates the concepts of friendship, respect for others and always playing within the right spirit, and it incorporates issues concerned with the elimination of cheating, gamesmanship, doping, violence (both physical and verbal), the sexual harassment and abuse of children, young people and women, exploitation, unequal opportunities, excessive commercialization and corruption.
- 2 The COSR, the Federations and the Participants shall at all times give *Fair Play* the highest priority - directly and/or indirectly - in order to influence and promote sporting experiences.
- 3 The COSR, the Federations and Participants shall use their best efforts to raise the awareness of *Fair Play* within their sphere of influence through the use of campaigns (press campaigns, etc.), awards, educational material and through the organization of training opportunities.
- 4 The COSR, the Federations and the Participants shall use their best efforts to behave in a way which sets a good example and presents a positive role model for all persons participating in sport; not in any way to reward, to demonstrate personally, nor to condone in others unfair play and to take appropriate sanctions against poor behavior.

### D RESOURCES

- 1 The resources of the COSR and the Federations may be used only for COSR and Federations-related purposes.
- 2 The income and expenditure of the COSR, the Federations and the Participants shall be recorded in their respective accounts and books, which must be maintained in accordance with the legally applicable accounting rules and commonly-accepted principles. From time to time, an independent auditor designated by the COSR's Executive Board will check these accounts.
- 3 The COSR, the Federations and the Participants recognize the significant contribution that broadcasters, sponsors, partners and other supporters of sports events make to the development and prestige of sport in Romania. However, such support must be in a form consistent with the rules of sport and the principles defined in the IOC's *Olympic Charter*, the COSR's *Statutes*, the *Sponsorship Law*, as well as the present *Code of Ethics*. They must not interfere in the running of sports institutions nor any related organizations.

### E CONFIDENTIALITY

The COSR, the Federations and the Participants shall not disclose information entrusted to them in confidence. Disclosure of informa-

tion must not be for personal gain or benefit, nor be undertaken maliciously to damage the reputation of any person or organization.

## F IMPLEMENTATION

- 1 The COSR, the Federations and the Participants shall ensure that the principles and rules of the IOC's *Olympic Charter*, the COSR's *Statutes*, the present *Code of Ethics* as well as all relevant legal rules are applied.
- 2 Any parties and/or persons directly or indirectly subject to those mentioned in Section F(1) above shall promptly in writing notify the COSR's Ethics Commission of any breach of the present *Code*

## STATUTES

### A. Creation, Composition and Organization

- 1 Pursuant to the Romanian Olympic and Sports Committee's (the "COSR") *Statutes* and its Article 7.1, an independent Ethics Commission (the "Commission") is created and shall be composed of seven members, as follows:
  - one President, who shall be a member of the COSR's Executive Committee - as nominated by the COSR's President;
  - two attorneys with professional experience in sports law;
  - four sports personalities who have participated at Olympic Games.The Executive Board of the Ethics Commission, comprised of three members, shall include the Commission's President and the two attorneys.
- 2 Members of the Ethics Commission shall be nominated by the Ethics Commission's President and approved by the COSR's Executive Committee.
- 3 The duration of the Commission's mandate shall correspond to the relevant mandate of the COSR's Executive committee which approved the members.
- 4 The Commission shall provide information, through its Chairman, to the COSR's President - upon her/his request - with respect to its activities.
- 5 Commission meetings shall be convened by the Commission's President, at least once every month. The Commission shall have quorum if at least six members of the Commission are physically present at the meeting. Decisions shall be made on the basis of the votes of the entire Commission and it is permitted that those members, who for *force majeure* reasons or reasons beyond their control cannot be present at the meeting, may submit their respective votes with respect to a meeting's agenda through fax or by email, as many times as necessary. Only in those circumstances set forth above as well as in Point (B)(8)(b) of the Regulations will it be considered that the Commission has the necessary quorum and consequently may make decisions pursuant to a simple majority.
- 6 The Commission shall be assisted by a Secretary, as nominated by the Commission's President. The nomination must be approved by the Commission, by a simple majority.
- 7 Any decision rendered by the Commission may be challenged exclusively pursuant to an appeal filed with the *Court of Arbitration for Sport* (Lausanne, Switzerland), which shall render a definitive decision on the dispute in conformity with its *Code of Sports-related Arbitration*. An appeal must be filed within 21 calendar days from the receipt of the decision.

### B Competence of the Commission

The competence of the Commission are:

- 1 to periodically prepare and update a framework of ethical principles - including a *Code of Ethics*, based upon the values and principles enshrined in the IOC's *Olympic Charter* (ethical principles), the Council of Europe's *Code of Sports Ethics* and the COSR's *Statutes*;
- 2 to set forth and promote best practices regarding sports activities in

*of Ethics* as well as any violations of the legal rules regarding the subjective rights of those participating in sports activities.

- 3 The COSR's Ethics Commission will submit to the COSR's President a report which will indicate those who were found to have violated the applicable rules. The Ethics Commission will propose to the COSR's Executive Committee - for its approval - sanctions which might be taken against those responsible.
- 4 The COSR's Ethics Commission shall set out the provisions for the implementation of the present *Code of Ethics* in a set of implementing provisions.

accordance with the ethical principles and to propose concrete measures to this end;

- 3 to provide assistance, upon the COSR's request, the Federations and the PARTICIPANTS (as defined in the *Code of Ethics*) in order that the ethical principles are applied in practice;
- 4 to help, upon the COSR President's request, ensure compliance with the ethical principles of the activities of the COSR, the COSR's Executive Committee, any Federations or any Participants;
- 5 to assess the extent to which the ethical principles are being reflected in practice;
- 6 to investigate complaints and acts relating to the violation of the ethical principles stipulated in the present *Code of Ethics*, which have been submitted with the Executive Committee, and if such would be the case, to recommend adequate sanctions. Any particular case will be analyzed by the Ethics Commission's Executive Board, and the conclusions of its analysis shall be made known to the entire Commission;
- 7 at the request of the COSR's Executive Committee, to review all documents elaborated by the COSR and the Federations to verify their conformity with the applicable legislation and ethical principles, and to make comments and/or recommendations related thereto;
- 8 to prepare and submit an Annual Report on the Commission's activities to the COSR's Executive Committee;
- 9 to prepare and submit for approval by the COSR's Executive COMMITTEE, an annual budget, indicating the funding required in order for the Commission to carry out its activities for the following financial year;
10. to carry out any other task relating to the promoting, following and guaranteeing of the ethical principles in sports and related activities; and
11. In application of the provisions of Points 4 and 5 above, the Commission may act at its own discretion.

### C Competence of Members of the Commission

Members of the Commission do not have the right to exercise their rights if an actual or possible conflict of interest exists or may exist.

### D Appointment of Members of the Commission

- 1 As indicated in Point A.(3) above, the duration of a Commission member's term shall correspond to the mandate of the COSR Executive Committee which appointed them. A Commission member's term may be renewed for at most eight years; there shall be no exceptions to this rule. Any member who reaches the end of eight (8) years of her/his mandate shall resign. The resignation shall come into effect at the subsequent Commission meeting, during which another member will be appointed (in accordance with the rules set forth herein).
- 2 Members who are also members of the COSR must resign from the Commission upon ceasing to be members of the COSR. Likewise, the Commission's President shall also resign from her/his position in the event that she/he is no longer a member of the COSR's Executive Committee.

- 3 In the event of death, resignation, incompatibility or inability of a member to perform her/his functions, the member shall be replaced. The new appointment to take effect starting from the next subsequent Commission meeting.
- 4 A member of the Commission may only be removed from office by a decision of the Commission, pursuant to the approval of a simple majority of the Commission's members (the member in question - in such a case - not having the right to vote). In any event, the member in question has the right to be heard by the Commission prior to any such vote.

#### E Indemnification

- 1 Commission Members shall be indemnified for serving on the Commission, twice per year on the basis of a decision made by the COSR's Executive Committee.
- 2 Commission members shall be indemnified by the COSR for

### *Implementing Provisions relating to the Romanian Olympic Committee's Rules of the Ethics Commission*

#### A. Appointments

- 1 The members of the Romanian Olympic and Sports Committee's (the "COSR") Ethics Commission (the "Commission") shall accept their appointment in writing.
- 2 The term of office of a member of the Commission takes effect on the day her/his appointment is approved by the COSR's Executive Committee. The Commission shall only make decisions with respect to cases and situations arising after the Commission's validation.
- 3 Any member of the Commission who is to be replaced shall remain in office until the Commission holds its next subsequent official meeting (see the relevant section of Point D of the Commission's *Statutes*).

#### B Procedures

- 1 All cases shall be submitted to the Commission by means of a letter submitted to its President.
- 2 The various organs of the COSR and the Federations (as defined in the *Code of Ethics*) may request an advisory opinion from the Commission. Such requests shall be forwarded to the Commission's President by the COSR's PRESIDENT and shall be registered by the Commission's Secretary.
- 3 Any complaints or denunciations relating to a breach of ethical principles and rules, as well as the legal rules regarding physical education and sports activities must be addressed to Commission.
- 4 In general, the Commission shall have the right to adjudicate only those matters within its own area of competence as specified in the COSR's *Code of Ethics*.
- 5 When conducting an inquiry as a result of a written complaint or written denunciation, the Commission may:
  - 5.1 request written information or documents from the parties concerned;
  - 5.2 hear the parties concerned, with specific mention that athletes who are minors shall be assisted by their legal representatives - the legal representative shall provide a legalized copy of the written instrument giving rise to her/his authority;
  - 5.3 decide whether or not to hear witnesses;
  - 5.4 conduct its own investigations or delegate a person to conduct any investigations, which person shall at all times be acting on behalf of the Commission, if the Commission shall be deemed competent with respect to the case in question;
  - 5.5 designate one or several experts to assist the Commission with one or several matters, and establish the mandate and remuneration of such expert.

expenses incurred (travel, accommodation, per diem, etc.) relating to the carrying out of their Commission duties.

#### F Commission Meetings

The Commission's Secretary shall prepare minutes of all official Commission meetings and their deliberations, the latest by the time the next meeting is held, and which minutes must be signed by all members who were or were considered present at said meeting.

#### G Final Provisions

The Commission - in discharging its duties - shall cooperate with all organs/authorities which are responsible for physical education and sports activities, as well as with all organs/authorities which have the obligation to protect, guarantee and promote the subjective rights of those participating in physical education and sports activities.

- 6 At the end of every inquiry, the conclusions and recommendations of the Commission shall first be submitted by its President to the COSR's Executive Committee, or to the COSR's President.

Any inquiry involving a natural person and/or a legal entity shall remain confidential until such time as the COSR's Executive Committee renders a decision on the conclusions and recommendations submitted by the Commission.

Before the rendering of a decision, the COSR's PRESIDENT may refer to the Commission new elements/facts or considerations in relation to the particular case.

- 7 With a view to evaluating the conformity of any ethical principles and guidelines as well as the legal rules regarding physical education and sports activities, as set forth in the present *Code of Ethics* and other evaluation criteria elaborated by the COSR (which must also be discussed from time to time) the COSR's President may submit the draft of all such guidelines to the Commission, and the Commission shall provide its official viewpoint within a reasonable amount of time.
- 8 (a) Subject to the application of the provisions of Point D(5) of the Commission's *Statutes*, in the event that no majority is achieved, its President shall have an additional vote which she/he shall cast as desired.  
(b) In the situation in which, for justified reasons (force majeure or events beyond their control), duly communicated to the Commission's President, a member will not be able to attend a Commission meeting, such member may cast her/his vote by fax or email; in such a situation this member shall be considered as present and shall be counted for quorum (necessary for a valid vote) purposes. It is necessary that the member who cannot attend be timely informed about the meeting's agenda and the issues relating to the case at hand. In certain cases, members of the Commission may be consulted prior to the meeting date, putting at their disposal the documents at issue.
- 9 The annual report of the Commission on its objectives and activities must be approved by a simple majority of seven of its members.
- 10 Members of the Commission must immediately disclose to the Commission's President, prior to the commencement of any investigation, about any situation or fact that involves or relates to a connection between themselves and the case under investigation, as well as if such would arise during the relevant procedure.



# Case Digest\*

October 2003

**United States: IP Rights in Sports Databases - Morris Communications Corporation v. PGA, Tour, Inc., 235 F. Supp. 2d 1269 (M.D. Fla. 2002)**

Dispute concerned the online publication of 'real-time' golf scores. The PGA Tour argued that it enjoys a property right in its real-time scoring system and that its regulations restricting the syndication of real-time golf scoring information gathered and generated by its real-time scoring system constituted a reasonable safeguard against would-be free riders seeking to unfairly capitalise on its product.

The court found that Morris wanted to commercially exploit golf scoring information that the PGA Tour had expended money in gathering and had not yet reaped the full benefit possible from its investment. As the near instantaneous scores are not in the public domain, and as the PGA Tour maintains an interest in the scores until they are in the public domain, the court held that the scores are not externalities until the PGA Tour has either reaped its reward or forgone that possibility.

**Australia: End of Super League litigation - News Limited v South Sydney District Rugby League Football Club Limited [2003] HCA 45**

On August 13, 2003, the High Court ruled in favour of News Limited and overturned the decision of the Full Federal Court. It was held that News Limited had not breached Trade Practices Act 1974 (Cth) s. 45, when it excluded South Sydney from the Super League competition in 2000.

The majority found that the '14-team term' did not have as a purpose the (singling out) or targeting of South Sydney, or any particular club or clubs. There was not sufficient particularity as to make the persons who were to be excluded identifiable at the time the provision was agreed. An agreement between competitors which may have an unintended effect of restricting the supply to, or acquisition of, goods or services from a third party will not, in itself, result in there being an illegal exclusionary provision.

This ends the long-running Super League saga that commenced with the 1997 agreement to merge ten News Limited Super League clubs with 12 Australian Rugby League clubs.

**United Kingdom: Unfair Trading in Replica Football Shirts- Decision of The Office of Fair Trading No. CA98/06/2003**

Th. OFT decided in early August 2003 that a number of sportswear retailers, Manchester United plc, the Football Association Ltd. and Umbro Holdings Ltd. have all entered into price-fixing agreements in relation to replica football kits, infringing the Chapter I prohibition contained in Section Two of the Competition Act 1998. This involved agreements or concerted practices which fixed the prices of the top-selling adult and junior short-sleeved replica football shirts manufactured by Umbro Holdings Ltd.

These were the replica football shirts of the England team and Manchester United, Chelsea, Glasgow Celtic and Nottingham Forest football clubs. The agreements or concerted practices took effect during key selling periods after the launch of a new replica football kit.

The Office of Fair Trading considers that agreements between undertakings that fix prices to be among the most serious infringements of the Competition Act 1998. Fines totalling (18.6 million ((27m/\$29.17m) have been made against the parties - see [www.oft.gov.uk](http://www.oft.gov.uk) for a full transcript.

November 2003

**New Zealand: Sports Event Management - R. v. Andersen, District Court, Christchurch (29 August 2003)**

The organiser of the Christchurch to Akaroa cycle race was successfully prosecuted for criminal nuisance following the death of a cyclist in the 2001 event. The cyclist was killed in a head-on collision with a car after crossing over the centre line of the road on a section of the course. Many competitors were under the impression that particular section of the course was closed to traffic due to the terminology used in the pre-race instructions end briefing. The District Court held that the race organiser had failed to take reasonable care to avoid danger to human life. She had issued instructions that were ambiguous having failed to consult with her safety manager. The confusion arising from the ambiguous instructions led to the accident that caused the death of the competitor. The maximum fine of \$NZ 10,000 (\$5,700/(5,1120) was imposed. Although it was stressed that the conviction was due to the specific circumstances, the case reinforces the need for sports organisers to be fully aware of safety issues.

**Australia: Thorpe wins naming rights - Torpedoes Sportswear Pty limited v Thorpedo Enterprises Pty Limited [2003] FCA 901 (27 August 2003).**

Australian sporting company Torpedoes Sportswear lost its bid to stop Thorpedo Enterprises, a company owned by Australian swimming star Ian Thorpe's parents, from using his nickname, Thorpedo, on a range of products. The Delegate of the Register of Trade Marks rejected Torpedoes Sportswear's appeal against Thorpedoe Enterprises( application to register the trademark Thorpedo.

Where there is opposition to registration (and appeals from them), the question of onus on the applicant is important. Bennett J held that Torpedoes Sportswear had not established any of the grounds of opposition. It failed to establish that Enterprises was not the proprietor of the Thorpedo mark or that the Thorpedo mark was substantially identical to the mark 'Torpedoes'. It also failed to establish that (Torpedoes( had acquired a reputation in Australia such that, because of its reputation, the use of the Thorpedo mark would be likely to deceive or confuse consumers.

**United States: Specific Performance end Sports Contracts - Reier Broadcasting Company, Inc. v. Kramer, 316 Mont. 301 (2003)**

Reier Broadcasting had exclusive broadcast rights, until 2002, to air Montana State University athletic events. Further, Reier Broadcasting had entered into an employment contract with MSU football coach, Michael Kramer, for exclusive broadcast rights with him. Afterwards, MSU awarded its broadcast rights to Clear Channel Communications end directed Kramer to provide broadcasting services to Clear Channel, not Reier.

The issue before the Montana Supreme Court was whether Reier could receive injunctive relief so as to prevent Kramer, while under contract, from performing services for Clear Channel. In ruling against Reier, the court held that the issuance of an injunction, preventing Kramer from working for Clear Channel during the period remaining on his contract with Reier, would result in the indirect specific enforcement of the Reier-Kramer employment agreement, which was illegal under Montana law. This case is another illustration of when a sports employer could not enforce a contract via specific performance.

\* Compiled by the Teaching Faculty of the Asser-Griffith International Sports Law Program - [www.gu.edu.au/sportslaw](http://www.gu.edu.au/sportslaw) February 2004, p. 54, March 2004, p. 54, April 2004, p. 54, May 2004, p. 52, June 2004, p. 56, July 2004, p. 54, August 2004, p. 62, September 2004, p. 52, October 2004, p. 62, November 2004, December 2004/January 2005, p. 70.

Taken from SportBusiness International, October 2003, p. 41, November 2003, p. 54, December 2003/January 2004, p. 54,



December 2003/January 2004

**Europe: Trademark Law - Adidas-Salomon AG and Others v Fitnessworld Trading Ltd, European Court of Justice Case C408/01 (23 October 2003)**

Fitnessworld markets certain sports clothing bearing a motif similar to the famous Adidas trademark, but composed of two vertical stripes, not three. Adidas brought an action against Fitnessworld before the Netherlands courts, claiming a likelihood of confusion between the two motifs on the part of the public. Fitnessworld believed that the motif was viewed purely as an embellishment of the clothes by the relevant section of the public and not an infringement of the mark.

The ECJ, on a preliminary ruling, found that an infringement occurred 'if the relevant section of the public establishes a link between the sign and the mark with a reputation even though it does not confuse them'.

However, where, according to a finding of fact by the national court, the relevant section of the public views the sign purely as an embellishment, it does not necessarily establish any link with the mark with a reputation.

**Australia: Procedural Fairness in Doping Offences - Beaton and Scholes v the Equestrian Federation of Australia Limited, Court of Arbitration for Sport, (20 October 2003)**

An Australian court was asked whether Beaton and Scholes had been denied natural justice by the EFA after they received notice that they were not allowed legal representation in disciplinary hearings. A horse, owned by Beaton and Scholes, had been swabbed for the purposes of conducting a doping test after a competition organized by the EFA. A positive result had been returned.

It was held that such denial was not unknown in similar proceedings. It was also held that as a legal right of representation upon appeal existed, there was no denial of natural justice.

However, on an appeal to the CAS, it was argued that the EFA had tested the 'B' sample without Beaton's authority and without having him or his representative present contrary to clause 4.3 of the Anti-Doping By-Law. Where the EFA was seeking to impose strict liability on the applicants, lack of representation denied procedural fairness. The CAS upheld the appeal on the basis that the entire test ought to be disregarded.

**United States: Trademark Law - Pro-Football, Inc. v. Harjo, 2003 U.S. Dist. Lexis 17180 (2003)**

A group of Native Americans initiated an action to cancel federal trademark registrations owned by the Washington Redskins football team. The Native Americans claimed that the Redskins' trademarks disparaged their people or brought them into contempt or disrepute, in violation of '2(a) of the Lanham Act.

Conversely, the Redskins argued that their trademarks honoured Native Americans and that the legal (doctrine of laches) barred the requested trademark cancellation because this claim was delayed for an unreasonable amount of time - the first trademarks being registered in 1967.

The court held that the Redskins trademarks neither disparaged Native Americans nor placed them in contempt or disrepute and that the Redskins had made substantial financial investment in their marks over 25 years.

The court stressed that its 'opinion should not be read as making any statement on the appropriateness of the American imagery for teams'. Where a more complete factual record can be established, other future trademark cancellation cases may be successful regarding the ongoing Native American sports mascot and logo controversy.

February 2004

**United States: IP Rights and Result Information - Morris Comm. Corporation v. PGA, Tour, Inc. (235 F. Supp. 2d 1269 (M.D. Fla. 2002))**

The plaintiff alleged that the defendant possessed monopoly power over access to its golf tournaments and stifled competition in the separate market for syndicated real-time golf scores. The PGA Tour argued that it enjoys a property right in its real-time scoring system and the restricting of the syndication of information gathered and generated by the system constitutes a reasonable safeguard against those seeking to unfairly capitalise on its product.

The court found that Morris was unlawfully attempting to commercially exploit information that the PGA Tour had expended money in gathering and has not repeated the full benefit possible from its investment. If Morris was selling the scores after the scores were released on a website, Morris would be benefiting from PGA Tour's positive externality, i.e., the public's interest in information about championship golf. The scores are not externalities until the PGA Tour has reaped its reward of forgone, that possibility.

**South Africa: Specific Performance and Sports Contracts - Santos Professional Football Club (Pty) Ltd v Igesund & another (2003) 5 SA 73 C**

Santos Football Club concluded a contract with Godon Igesund, former head of the national soccer team, to be the head coach of Santos until the end of the 2002/2003 season. Igesund performed his duties with considerable success during the first season. However, before the start of the second season, Igesund cited personal and financial reasons as he repudiated his contract with Santos and accepted an appointment as manager of Ajax Cape Town FC. Santos FC applied to court for an order preventing him from doing so.

The court initially turned down the application, since the contract required performance of personal service. Santos FC appealed. The Western Cape High Court concluded that Igesund voluntarily concluded the contract in question in the first place and received the sum of around 60,000 as a signing fee for doing so. The court granted an order for specific performance in favour of Santos FC, compelling Igesund to serve out his term.

**United Kingdom: Enforcement of damages Panos Eliades & Panix Promotions Ltd v. Lennox Lewis (2003) EWCA Civ 1758**

The appeal court backed a High Court ruling ordering Lewis (s former managers and promoters Panos Eliades, Panix Promotions Ltd and Panix of the US Inc to pay up nearly \$6 million ((4.7m) in damages awarded in the US courts for fraud, breach of fiduciary duty, breach of contract and racketeering under the Racketeer Influenced and Corrupt Organisations Act.

The defendants claimed that damages under one of the headings of loss claimed for had been trebled, and that as a result the whole judgment could not be enforced in the UK courts. The Court ordered Lewis (s former promoters to pay up that figure.

March 2004

**United States: Anti-Trust Law end the Players Draft - Clarett v. National Football League, Inc., 03-CV-7441**

A New York federal court judge will decide whether an NFL rule saying a player cannot enter the draft until three seasons after his high school university graduation, is in violation of American antitrust law. Clarett would not be eligible for the NFL draft until 2005.

The NFL argues that its rule has been at least implicitly collectively bargained between owners and players for the benefit of professional football, so antitrust law should not be applied to the case. On the other hand, Clarett points out that this rule was not specifically bargained between the owners and players and that an anti-

competitive arrangement exists between the NFL, the NCAA and the NFL Players Association. A court decision is expected before the NFL Draft, which is scheduled for April.

**France: WIPO Arbitration and Mediation Centre Administrative Panel Decision - Ferrari S.p.A v. Ms. La Johee, Case No. D2003-M**  
The disputed domain name *fiferrari.com* was registered by the respondent on June 9, 2002. The complainant contends that this domain name is confusingly similar to the complainant's trademark Ferrari, particularly given the association of the company with the sport of Formula One racing, known as F1. The complaint was filed with the WIPO Arbitration and Mediation Centre (the Centre) on November 5, 2003.

The decision of the panel was to agree with the complainant's arguments that the respondent has no right or legitimate interests in the disputed domain name and that the respondent has registered and is using the disputed domain name in bad faith.

The case was won even though there was no active use of the disputed domain name by the other party, merely the passive holding of it. In the view of the adjudicator, this was sufficient to constitute the legal requirement of 'bad faith'.

**United Kingdom: Trademarks Dispute - In the Matter of Application No. 2248224 by Major League Baseball Properties in to register the trademark 'Mets' (2003)**

On 20 October 2000, Major League Baseball Properties Inc (MLB) applied under the Trademarks Act 1994 for registration of the word and logo of 'Mets'. In July 2002, the Metrological 'Met' Office filed oppositions to the application. The weather service contended its trademark might be confused with the Mets logo even though baseball has not got a big following in the UK. They saw a danger of a company coming in and wanting to patent the word 'Met'. The weather service argued it also competes in the 'sport business', supplying weather forecasts to Formula One teams and Wimbledon.

However, trademark registrar George Salthouse allowed the Mets to register their trademark indicating there is no likelihood of misrepresentation. The Met Office is weighing up an appeal.

April 2004

**United States: Title IX and Sexual Assault - Gillaspie v. University of Colorado, 94-B-78 (District of Colorado)**

Former Colorado student, Monique Gillaspie, alleged that she was sexually assaulted and harassed by Colorado football players. Along with two other female students, lawsuits have been filed that invoked Title IX, a civil remedy to prevent sexual discrimination in American university sports.

This is a novel approach. Title IX provides that no person should face sexual discrimination under any education program that receives American federal government funds.

The defendants will argue two points. First, Title IX should not be interpreted to include sexual assault or sexual harassment and there is not any evidence that either University of Colorado officials were involved or had knowledge of the alleged sexual assaults or sexual harassment occurring within their football program.

**Australia: Restraint of trade is alive and well in Australian Sport - Avellino v All Australia Netball Association Ltd [2004] SASC 56**

Where a sporting body wishes to incorporate a restraint clause in their constitution or rules, there is a risk it will be found to be void unless it can be shown that it is reasonably necessary for the protection of the defendant and its constituents by the defendant producing acceptable evidence that such a restraint is reasonably related to the objects of the body or its constituents, and that the restraint afforded no more than reasonable protection to their interests.

As a general rule, while there is available evidence to show the restrictive effect of a restraint such as the one in question has on suitably qualified players to participate in their sport, there is often

little evidence to show how the restrictive rule advances or protects the legitimate interests of those, administering the sport. It would appear that the odds are far more heavily weighted in favour of the plaintiff winning a restraint challenge than the defendant.

**United Kingdom: Image Rights - Appeal by The Number Ltd regarding Complaint by David Bedford (February 2004)**

Former 10,000 metres world record holder, David Bedford has won a ruling against phone directory company The Number with its 118118 service over their adverts featuring two runners in 1970s running gear.

Communications regulator Ofcom said The Number had caricatured Bedford's image - drooping moustache, shoulderlength hair and running kit - without his permission. Caricature without permission constitutes a breach of Rule 6.5 of the Advertising Standards Code.

The Number conceded that it had not sought or obtained Mr Bedford's permission to be caricatured. This process may develop as an attractive remedy in similar cases. However Ofcom ruled it would be disproportionate to direct that the advertisements not be shown in future, and that the publication of the finding of breach is a sufficient resolution of the matter.

May 2004

**Canada: National Hockey League On-ice Assault - Criminal case against Bertuzzi?**

Last March, the National Hockey League suspended Vancouver Canucks player, Todd Bertuzzi, for the remainder of the 2003-04 season, including the playoffs, after an on-ice assault that left his opponent, Steve Moore, of the Colorado Avalanche unconscious in a pool of blood with a fractured neck. He will not play this season.

Presently, the Vancouver police and prosecutors are investigating whether to charge Bertuzzi criminally. There is Canadian legal precedent for Bertuzzi's actions. In *Regina v. Maki*, 14 D.L.R. 3d 164 (Ont. P.C. 1970) the court held that NHL players are not presumed to accept malicious, unprovoked, or overtly violent attacks as part of playing sport.

A further suspension is a possibility. Bertuzzi could eventually surpass the one-year ban given to the Boston Bruins Marty McSorley in 2000 for deliberately striking Vancouver's Donald Brashear in the head with his stick. Presently, the ban has cost Bertuzzi more than \$500,000 in salary and the Canucks were fined \$250,000 for failing to control their player.

**Australia: Let Girls in Sport Decide - Taylor v Moorabbin Saints Junior Football League and Football Victoria Ltd [2004] VCAT 158**

This recent anti-discrimination test case has significant implications for sporting bodies generally that have been relying on relative strength, stamina and physique of girls as a criterion for excluding them from participation in sporting competitions with boys once they turn 12. The issue arose whether girls aged 14 and 15, who had been excluded from playing Australian Rules Football (a team contact sport) with boys, had been unlawfully excluded. It was held to be unlawful for the associations to exclude girls under 14 from the competition as the relative physical differences between that of the boys to that age was not sufficiently significant to be relevant, although they could exclude girls who had reached 15.

The court's view that the idea that females today need protection by a sporting body could be viewed as sexist. Girls play as a matter of choice and impliedly consent to risks inherent in playing the game.

**United Kingdom: Player/Agent Relationships - Adebola v Silkman and Silkman Soccer Consultancy Ltd (2004) ISLR**

Dela Adebola has won his county court action against his agent and the agents company. Adebola claimed that Silkman had negligently advised him in 1997 to terminate his previous agency agreement

with Team Sports. Silkman had counseled the claimant that the agency agreement was rubbish. He wanted to acquire Adebola as a client. In 1999, Team Sports won damages of over 18000 for breach of contract. There were in fact no grounds on which the contract with Team Sports could be terminated. Silkman did not advise the claimant to seek any third party

independent advice, a fact that helped establish his negligence.

It is not uncommon for agents to put pressure on sports men and women to consider becoming their clients. The case does however highlight the duty that agents are under not to negligently advise potential clients of their ability to break existing contractual obligations.

## June 2004

### **United States: Basketball & Anti-trust Law - Metropolitan Intercollegiate Basketball Association v. NCAA, 01-CV-00071**

The National Invitation Tournament has filed a lawsuit against the National Collegiate Athletic Association regarding its rule that requires all NCAA member basketball teams invited to its annual tournament to compete in it. The NIT claims that this NCAA rule is in violation of American antitrust laws.

The NIT depends on its preseason tournament for its financial survival. The actions of the NCAA put this tournament in jeopardy. It is reported that the NCAA men's basketball tournament made US\$270 million in 2001, which accounted for approximately 95 percent of its annual revenue. In contrast, the NIT made less than US\$4 million. Presently, the NCAA has a US\$6.2 billion, 11-year contract with CBS to televise their tournament every March. This case is scheduled for trial later this year and will provide guidance as to the position between these competing organisations.

### **United Kingdom: Potential Governing Body Liability Wattleworth v Goodwood Road Racing Ltd; RAC Motor Sports Association Ltd; and the Federation Internationale De L(automobile [2004] EWHC 140 (QB)**

The Plaintiff (W), an experienced amateur racing driver died when he crashed his car into a lorry tyre-faced earth bank during an amateur track day. It was held that the track owner, Goodwood Road Racing Ltd., owed a duty of care to the defendant as far as his safety was concerned but was not negligent in breaching that duty.

Following the decision in *Watson v British Boxing Board of Control Ltd* (2001), the court held that the MSA, the national licensing body for motor racing venues in the UK, did owe a duty to ensure safety, but did not breach it on these facts. It was held however that the FIA did not even owe W a duty of care. Its involvement was far less than that of MSA, and its safety role was restricted to international events.

### **South Africa: Defamation and Sports Chat Rooms - Tschlas and Another v Touch Line Media (Pty) Ltd 2004 (2) SA 112 (W)**

Tschlas, a South African of Greek origin had a high-profile career in South African soccer administration. Touch Line is the owner of a web site called (Kick-Off). During a session in the site's chat room (visitors) made various defamatory and racial remarks, referring to Tschlas as a (Greek prostitute); a (Greek hooker); and a (Greek bitch). It was accepted that these remarks were not made by Touch Line. Tschlas applied for an injunction to prevent Touch Line from publishing existing and future defamatory material. Kuny AJ held that its granting would have grossly curtailed Touch Line's freedom of expression guaranteed by the Constitution. There was no evidence that Tschlas would be harmed any further than she might already have been by the original publication. The more appropriate remedy was to sue for damages.

## July 2004

### **United Kingdom: Sports disciplinary Procedures - Wise v. Filbert Realisations (formerly) Leicester City Football Club) (in Administration) Employment Appeal Tribunal (EAT) (2004)**

Dennis Wise, of Leicester City, injured a team-mate by hitting him in the face and after a club disciplinary hearing, was dismissed for serious misconduct. After a series of appeals to the Football League tribunals, where his dismissal was found to be an appropriate response. Wise made a complaint of unfair dismissal. The Employment Tribunal decided that the club disciplinary hearing had been procedurally unfair but that the dismissal was a response open to a reasonable employer and was fair.

However, on further appeal to the EAT, it was held that if there are procedural irregularities at a football club disciplinary hearing and these had not been cured by a Football Disciplinary Committee decision overturning the original decision or by a subsequent Football League Disciplinary Committee review decision, the dismissal was unfair

### **United States: Anti-Trust Law and Eligibility rules - Clarett v. National Football League, 04-0943 (2004)**

American college sophomore football player, Maurice Clarett, claimed that the National Football League's eligibility rules were in violation of anti-trust law. The NFL rule prevented Clarett from entering the 2004 draft because he was not more than three football seasons removed from high school.

The NFL pointed out that the labour market for NFL players was organised around a collective bargaining relationship, pursuant to American federal labour law. As a result, the NFL clubs, as a multi-employer bargaining unit, can act jointly in setting the terms and conditions of players' employment with the NFLPA, which is the players' labour union.

The court agreed with the NFL and held that federal labour law favours and governs the collective bargaining process.

### **Australia: Sports Sponsorship Contracts - Optus Vision Pty Ltd v. Australian Rugby Football League Ltd [2004]**

Judges concurred the starting point when construing a document, in this case a sponsorship deed, must always be the text itself. In a network of contracts, the parties ought to be able to rely on the obvious meaning of the interlocking text. Only if there is an indication of ambiguity in the language, or the text could produce a meaning that would frustrate the object of the contract can the court resort to extrinsic materials.

If the agreements do not reveal ambiguity so as to displace what appears to be its plain meaning, there is no ground for departing from a literal interpretation of the primary text.

## August 2004

### **United Kingdom: insolvency and Preferential Creditors - Inland Revenue Commissioners v. Wimbledon FC Ltd, Chancery Division (2004) WL 1054954**

The Inland Revenue, preferential creditors of Wimbledon FC, applied for an order under the Insolvency Act 1986 revoking a company voluntary arrangement entered into by Wimbledon and approved by its creditors. Under the rules of the Football League, when a club went into administration it could be required to sell its share for nominal consideration to a nominee of the league.

Agreement was reached to allow the administrators to sell the share at an advantageous price provided that certain priority non-preferential creditors, "football creditors", were paid in full and the exit from administration was by means of an approved voluntary arrangement.

Held that although the Act precluded a company's assets being used to pay non-preferential creditors in priority over preferential creditors, it did not preclude payment in full of non-preferential

creditors by third parties, provided that any agreement was bona fide and not designed to defeat the claims of preferential creditors. The arrangement did not unfairly prejudice the Revenue. The payment of the football creditors was a commercial necessity if the club was to continue as a going concern.

**Australia: Alcohol Licences and Sports Clubs - Cole v South Tweed Heads Rugby League Football Club Ltd. (2004) HCA 29**

The High Court dismissed the appeal of a woman who was struck by a vehicle while grossly intoxicated after she had spent the day drinking in a rugby league club. Cole had argued that the club had supplied her with drink when a reasonable person would know she was intoxicated, and then allowed her to leave in an unsafe condition.

The High Court held (4-2 majority) that an adult in Cole's position knew the effects and risks of excessive drinking, and was at all relevant times legally responsible for her actions. The club only owed her a general duty of care and it did not extend to being an insurer of patrons who injured themselves through inebriation. The dissenting justices felt that the club should have been more proactive in preventing harm as the effects of excessive alcohol consumption were clearly foreseeable.

**South Africa: Sports Disciplinary Procedures - Delicious Rugby Football Club v Boland Rugby Union (2004)**

Delicious Rugby Football Club comprised of players whose occupations were mainly factory workers, farm workers and a few teachers, signed Reginald Nutt in mid-season. A rival club complained about Nutt playing in a league game, Boland sent a letter of complaint to the club.

Boland argued that the club failed to register Nutt with the union or get a clearance certificate from his previous club. When Delicious appealed against the disciplinary committee's decision, the appeal committee did not vote, leaving the 22-point penalty in place that would have led to almost certain relegation. The Court found that Delicious did not have the opportunity to address the disciplinary committee before the sanction was made. The disciplinary tribunal sentenced the club outside its competency.

**September 2004**

**Switzerland: Team Sports and Drug Bans- Football Association of Wales (FAW v UEFA (May 2003)**

The CAS has turned down the FAW's appeal against UEFA's decision relating to the positive doping test of the Russian player Egor Titov following the first-leg match (Titov was suspended subsequently by UEFA for a year). The FAW requested that the first and/or second legs of this play-off match be awarded to Wales 3-0 and/or that Russia be disqualified from Euro 2004 and be replaced by Wales.

Considering that this case could potentially affect the organisation of the Euro 2004, the CAS initiated an expedited procedure in order to have this case heard as early as possible. The CAS Panel decided to accept its jurisdiction to hear the FAW appeal but dismissed the appeal on the merits. Contrary to the opinion of the FAW, the Panel considered that the Football Union of Russia could not be assimilated to an accomplice or abettor of Titov under the terms of the UEFA Disciplinary Regulations and consequently could not be sanctioned.

**United States: Contract Jumping and Sport - Northeastern University v. Brown, 17 Mass. L. Rep. 443; 2004 Mass. Super. LEXIS 64 (2004)**

Brown, the head football coach at Northeastern University (Northeastern) wanted to be the head coach at the University of Massachusetts (U Mass). Brown signed a contract with Northeastern through June 2009, that included a liquidated damages clause. While under contract with Northeastern, Brown resigned and

signed a new contract with U Mass which was effective immediately. This is known as contract jumping.

The Court found that Brown willfully and intentionally breached his contract with Northeastern. He signed his contract and straight-out violated it. The Court rejected Brown's argument that the liquidated damage clause was all that Northeastern was entitled to, ruling that specific performance or an injunction may be granted to enforce a duty even though there is a provision for liquidated damages for breach of that duty. As a result, the Court ordered that Brown was to work for Northeastern only. Although such a contract may not be enforced in some jurisdictions (the UK for example), in the US a contract is a contract for the sports world, just as it is for the rest of the world.

**United Kingdom: Tax and Sports Premises - Shove (HMIT) v. Lingfield Park 1991 Ltd. Court of Appeal (2004) STC 805**

Lingfield Park Ltd claimed that an artificial track (AWT) for horse racing installed at a race course was expenditure on plant for the purposes of s.24 and that the sum was deductible under the Capital Allowances Act 1990 s.24.

The Court held that although the AWT passed the "business use" test, since it was used in T's business, the fact that the AWT was not land in its natural state did not prevent it from functioning as premises. The AWT was no more separate from the race course premises than the grass track or other parts of the premises and therefore not plant.

**October 2004**

**Australia: Procedural Unfairness - Carter v NSW Netball Association [2004] NSWSC 737**

This case involving allegations of child abuse against a coach by some malicious minded parents shows the importance of a sporting body following its own mandated procedures, as well as applying principles of procedural fairness and natural justice. The subsequent procedures followed by the defendant and its Disciplinary Tribunal found the plaintiff guilty without allowing her to argue an oral case against penalty. Palmer J was able to find numerous breaches of procedural fairness by the Defendant, its Committee and the investigator appointed (improperly appointed anyway!).

The Defendant argued that the plaintiff's complaint was not justifiable because it arose out of the internal affairs of a voluntary association and did not involve property rights. It was held that the court had jurisdiction based on the fact that the consequences of the Committee's decision could impact adversely on the plaintiff's reputation and indirectly affect her livelihood.

The Football League is suing London lawyers Hammonds who advised them over their contract with ITV Digital. The league claims the law firm was negligent in not ensuring guarantee of payment if ITV Digital stopped broadcasting.

**November 2004**

**United Kingdom: Sports Radio And Ratings Measurement- Talksport V Radio Joint Audience Research**

Radio station Talksport has launched a £66m legal action against the Radio Joint Audience Research (Rajar) arguing that it underestimates the number of its listeners. Rajar is partly owned by the BBC and the Commercial Radio Companies Association. Rajar's figures have been for many years based on the recording of listener diaries. Trial tests have been carried out with new listening technologies, including the Radiocontrol wristwatch, but they have been determined to be unreliable.

Talksport Radio argues not using an electronic measuring system costs it £1.5m a month in lost revenue by underestimating its audience by 4.7 million listeners each week. This has a clear commercial

cost with advertisers spending their money on stations which have higher ratings such as Classic FM and Virgin. If the case gets to court, the chances of success are unlikely as RAJA continues trials with the new measurement technologies

**United States: Publicity v Free Speech- Wepner v. Stallone, Superior Court, Hudson County, New Jersey**

The complaint of Chuck Wepner, a former heavyweight boxer, that Hollywood actor, Sylvester Stallone, violated his rights of publicity when he used his name and boxing career to create the movie 'Rocky' and its main character 'Rocky Balboa' is likely to be heard within the next month. According to Wepner, Stallone has many times, in the presence of others, referred to Wepner as 'my inspiration' relative to his 'Rocky' related successes and repeatedly promised compensation. Nothing happened.

Seeking damages of US\$45m, Wepner also contends that Stallone watched his 1975 fight with Muhammad Ali where during the ninth round he knocked down Ali. The bout lasted until the 15th round where Ali defeated Wepner by TKO with 19 seconds remaining. This case will help continue to define the limits of a movie's creative license, which is legally protected under the US Constitution's free speech provisions, as compared to when an individual can legally protect their sporting career achievements from unauthorized use, particularly when significant revenues are realized, pursuant to state right of publicity laws.

December 2004/January 2005

**United States: Basketball and Antitrust violation - Worldwide Basketball and Sports Tours, Inc. v. National Collegiate Athletic Association**

Is an NCAA rule limiting men(s) college basketball teams to two "certified" basketball tournaments every four years in violation of American antitrust law. Several basketball tournament promoters complained "that the application of this rule limited their ability to schedule events with top schools, which in turn hampered their ability to sell tickets and make broadcast contracts"

According to the court, in order for the promoters to establish

their antitrust claim under Section 1 of the Sherman Act they "must prove that the NCAA (1) participated in an agreement that (2) unreasonably restrained trade in the relevant market". In ruling against the promoters, the court held that they "failed to define the relevant market".

**Australia: Duty of care and the unincorporated association - Hrybnyuk v Mazur**

The NSW Court of Appeal has reaffirmed that there is no duty of care owed by a member, or a committee member, to other members of the sports association if that is the only relationship between them. If the member(s) role is "out of the ordinary", i.e. not part of the ordinary relationship of one club member to another, then a duty of care will arise but it will be in the context of personal liability rather than collective liability.

Collectively, a committee may be found to owe a duty of care if they have knowledge of, and control over, the conduct that gives rise to the risk and there is an inability on the part of the plaintiff to protect themselves.

Individually, a duty of care may arise where the committee member(s) role is "out of the ordinary" or not part of the ordinary relationship of one member to another.

**United Kingdom: The British Horseracing Board Ltd and Others v. William Hill Organization Ltd.**

The ECJ has given a preliminary ruling on copyright issues concerning the use of sports databases, in this case those of the BHB comprising lists of runners, names of jockeys, jockeys colours, the racing calendar and details of every horse licensed to race in the UK, William Hill posted this information on its web site for online betting purposes. BHB successfully argued at the UK High Court that this infringed its rights.

With reference to interpretation of Directive 96/9/EC on the legal protection of databases, the ECJ has ruled that if the sporting bodies had made an investment in their databases then they could charge for it. But just because, for example, a football fixture list contains information about who is playing where and when they could not charge for its use. The Court of Appeal will consider this ECJ ruling when it hears William Hill's appeal.

The International Sports Law Journal

## 5th ASSER / CLINGENDAEL INTERNATIONAL SPORTS LECTURE

Thursday 9 June 2005  
Venue: Instituut "Clingendael", The Hague  
Opening: 16.00 hours

### **"RELIGION AND SPORT"**

- Speakers:**
- Father Kevin Lixey**, Head of the Vatican's Office for "Church and Sport" in the Pontifical Council of the Laity
  - Bert Konterman**, representative of the Sports Witnesses Foundation and former player of Feyenoord Rotterdam, Glasgow Rangers and the Dutch national football team
  - Mohammed Allah**, Chairman of the MaroquiStars Foundation and professional football player in The Netherlands

*The meeting was chaired by Dr Robert Siekmann, Director of the ASSER International Sports Law Centre.*

# Publication of CAS Awards

## (per March 2005)

*The International Council of Arbitration for Sport (ICAS) has given its consent to the publication of summaries of major and non-confidential Court of Arbitration for Sport (CAS) awards in specialised journals like The International Sports Law Journal (ISLJ), while CAS will keep on publishing its awards in its official Digest. (eds)*

### CAS 2003/A/517 The International Association of Athletics Federations (IAAF)/Qatar Associations of Athletics Federation (QAAF) & Rashid Shafi Al-Dosari, award of 19 April 2004

Panel: Mr Peter Leaver QC (England), President; Mr Lin Kok Loh (Singapore); Mr François Carrard (Switzerland)

The CAS has decided to allow the appeal filed by the International Association of Athletics Federations (IAAF) against the decision of the Qatar Associations of Athletics Federation (QAAF) in connection with a doping offence committed by an athlete who failed or refused to submit to a doping control at the occasion of a training session on 17 June 2003.

In June 2003 Mr Al-Dosari, a Qatari athlete, was at a training camp in Szombathely, Hungary. He was selected for out-of-competition testing. The testing was to be carried out by Mr David Barsony ("Mr Barsony").

Mr Barsony approached Mr Al-Dosari. Mr Barsony says that he asked Mr Al-Dosari, in English, if he was Mr Al-Dosari. Mr Al-Dosari confirmed that he was: he also spoke in English. Mr Barsony says that he started to explain the purpose of his visit. He opened his folder, which contained his licence, the Collection Order and IAAF licence to Mr Al-Dosari, but whilst he was speaking to Mr Al-Dosari, Mr Al-Dosari started to pack up his belongings. Mr Barsony asked Mr Al-Dosari to check the identification documents that he was carrying, but Mr Al-Dosari said that he did not speak English.

By letter dated 7 August 2003 the IAAF informed the QAAF that it considered that Mr Al-Dosari had refused or failed to submit to doping control and that he was suspended, pursuant to Rule 59.2 pending a hearing before the relevant body of the QAAF in accordance with IAAF Rules.

That hearing took place on 17 September 2003. The QAAF Disciplinary Action Committee decided that the athlete should be banned for 4 (four) months from all national and international competitions, with effect from the date of offence.

The IAAF understood that the QAAF had found Mr Al-Dosari guilty of a doping offence, and asked the QAAF to reconsider the sanction that it had imposed in the light of Rule 60.2 which stipulated a minimum period of two years ineligibility from the date of the hearing at which it was decided that a doping offence had been committed.

As the QAAF maintained its position, the IAAF instituted this appeal.

In its written decision the Panel considered that:

- Mr Al-Dosari committed a doping offence. The IAAF set out the elements that it was necessary for it to prove in order for the Panel to find that Mr Al-Dosari had failed or refused to submit to doping control after having been requested to do so. The Panel has found that Mr Al-Dosari was notified that he was required to undergo doping control, and that he did know that he had to comply with that requirement. He did not do so, but left the gymnasium. He, therefore, failed or refused to provide a sample. It is not necessary for the Panel to decide whether Mr Al-Dosari failed or refused: either would be sufficient for the purposes of this appeal. If it had to do so, the Panel would hold that Mr Al-Dosari had refused to provide a sample.

- Mr Al-Dosari submission according to which he only missed one test and that he could not, and should not, have any sanction imposed upon him because under a new IAAF Rule, which only came into effect on 1 March 2004, and which had no retrospective effect, he was only to be sanctioned if he had missed three tests is rejected. A missed test is defined as a consequence of a failure by an athlete to keep the IAAF informed of his or her whereabouts. It is completely different in nature and quality to a failure or refusal to provide a test when asked to do so.
- Mr Al-Dosari was in breach of IAAF Rule 56.1. By Rule 60.1 (iv) and 60.2, the minimum sanction for such an offence is the period of two years ineligibility from the date of the hearing at which it is decided that a doping offence has been committed. A period of suspension prior to a declaration of ineligibility is to be deducted from the period of ineligibility imposed by the relevant Panel, in this case the CAS.

### Arbitration CAS 2003/A/524 Duda / Royale Ligue Velocipédique Belge (RLVB), award of 1 April 2004

Panel: Ms Carole Barbey (Switzerland), President; Mr Guido De Croock (Belgium); Mr Olivier Carrard (Switzerland)

The CAS granted the appeal filed by cyclist Gregory Duda on 5 December 2003 against the decision of 12 November 2003 of the RLVB Disciplinary Commission, suspending the rider for two years, with six months deferred, and fining him CHF 750.

Mr Gregory Duda is a licensed amateur mountain bike rider in the "Elite" category. On receiving his licence, he agreed to respect the Statutes and Rules of the RLVB and the UCI, including those related to doping controls.

Gregory Duda underwent a doping test on 6 July 2003 at the finish of the Wallonian National Mountain Bike Championships. A "no-show" report was drawn up when the rider said he was unable to produce a urine sample. Gregory Duda was tested again on 20 July 2003 at the finish of the Belgian National Mountain Bike Championships. Another "no-show" report was drawn up, stating: "rider's refusal: 7.10 pm".

In a ruling of 12 November 2003, the Disciplinary Commission found Gregory Duda guilty of doping because he had, on two occasions, been unable to provide a urine sample, which amounted to a refusal to comply.

Gregory Duda argued, in substance, that: (1) the AER did not stipulate a time-limit for a doping test, (2) the AER did not mention the case of a rider who was unable to urinate, (3) he had made no attempt to avoid taking the test since, unable to urinate, he had suggested that the doctor take a blood sample instead, (4) it was the doctor who had decided to end the test, (5) a "no-show" report in the sense of Article 73 AER should not have been drawn up, since he had attended the test, (6) therefore, Article 76 rather than Article 74 AER applied.

The respondent emphasised that: (1) someone who repeatedly claims, without any medical reason, to be unable to produce a urine sample should be considered to be refusing to be tested, (2) Mr Duda did not ask for any particular comments to be noted in the reports, even though they expressly mentioned his refusal to be tested, (3) Mr Duda's attitude had made it impossible to carry out the test, so a "no-show" report was correctly drawn up, (4) it was up to Mr Duda to produce evidence or to call witnesses to appear before the Disciplinary Commission.

In its written decision, the Panel considered that:

- Since riders were obliged to submit to compulsory tests, there was good reason to expect the officials who organised and managed

such tests to do so responsibly and rigorously. This requirement was the corollary of the obligation on the riders. In this case, the rider's situation was undeniably surprising. Without wishing to question his sporting abilities, the Panel noted that he had won the event, the Wallonian Championships, by beating not only the other amateur cyclists, but also all the professional riders who had taken part. Therefore, when the rider claimed that he could not urinate, the doctor and the inspector should have been persistent and waited for as long as necessary for an acceptable urine sample.

- Since the case of a rider unable to urinate was an unusual one which was not mentioned in Articles 72 to 77 AER, the doctor and the inspector should, in accordance with Article 12 AER, have drawn up a report explaining their decision to end the test after waiting for only 1 hour 20 mins and why the rider's conduct could be interpreted as a refusal to comply. No such explanation was provided.
- In these circumstances, and due to the lack of sufficient explanations in the sense of Article 12 AER, the Panel noted, with reference to other cases, that by ending a test after waiting for only 1 hour 20 mins, the doctor and the inspector had failed to exercise due diligence and had concluded prematurely and without good reason that the rider had refused to comply. The Panel therefore considered that, in terms of their duration, the test procedures of 6 and 20 July 2003 had not been carried out in accordance with the rules.
- In these circumstances, Article 76 AER applied, since it was the doctor who had decided unilaterally to end the test before the rider had produced a sample. The rider should therefore be considered as not having been selected for doping tests.

#### **Arbitration CAS 2003/O/527 Hamburger Sport-Vereine.V. /Odense Boldklub, award of 21 April 2004**

Panel: Mr Stephan Netzle (Switzerland), President; Mr Goetz Eilers (Germany); Mr Johan Evensen (Denmark)

The CAS has decided to dismiss the appeal filed by Hamburger Sport-Verein e.V on 15 December 2003 in connection with the decision issued on 14 November 2003 by the FIFA Dispute Resolution Chamber of the Players' Status Committee concerning the training compensation fee.

Hamburger Sport-Verein e.V. (hereinafter "the Claimant") is a German football club and a member of "die Liga-Fussballverband e.V." which is a member of the German National Football Association (Deutscher Fussball-Bund), which is affiliated to FIFA since 1904.

Odense Boldklub (hereinafter "The Respondent") is a Danish football club and a member of the Danish National Football Association (Dansk Boldspil-Union), which is also affiliated to FIFA since 1904.

The player Lars Jacobsen registered with the Respondent from 1991 to 30 June 2002. He is a Danish citizen.

On 1 October 1996, a first non-amateur contract was entered into between Lars Jacobsen and the Respondent. On 18 November 1998, a second non-amateur contract was concluded between Lars Jacobsen and the Respondent. It expired on 30 June 2002.

During season 1998-1999, the Respondent's "A"-team was relegated to the second division.

The Claimant and Lars Jacobsen signed a non-amateur contract dated 10 June 2002 which became effective as per 1 July 2002.

By fax dated 27 March 2002 addressed to FIFA, the Respondent's Counsel lodged a claim against the Claimant asking for a training compensation for the player Lars Jacobsen amounting to ( 555,000.

On 14 November 2003, the FIFA Dispute Resolution Chamber of the Players' Status Committee decided to grant the Respondent 50% of the amount.

On 15 December 2003, the Claimant filed a request for Arbitration with the Court of Arbitration for Sport (CAS). It challenged the above-mentioned decision.

In its written decision, the Panel has considered that:

- The "quoted clause" inserted in the contract concluded by the Respondent and Lars Jacobsen signed on 18 November 1998 which states that "a) *If the new club is domiciled in the EU, Norway,*

*Iceland or Liechtenstein, the club may not claim payment of an amount from the new club in connection with change of club (hereinafter referred to as "transfer fee")* was only meant to remind the parties of the implications of the Bosman-decision and that the parties to the contract signed on 18 November 1998 did not intend to go beyond the limits set by said decision, notably for the reason that the "quoted clause" refers only to transfer fee which is a distinct issue from the one discussed in the present case which concerns a training compensation issue.

- According to FIFA Circular letter No 801, in view of the scale, the characteristics and the level of games of the Respondent's club at that time, Lars Jacobsen can be considered as having completed his training period before the beginning of season 1997-1998. Based on the foregoing, the Panel finds that Lars Jacobsen's training period started in 1991 (i.e. the season 1991-1992), when he first registered with the Respondent, and lasted 6 years, that is until the end of the Season 1996 - 1997.
- It is undisputed that the Claimant is a first division club, belonging to category 1 under the terms of the FIFA Circular Letter No 826, for which the indicative amount of training compensation is 90,000 per year. Likewise, the Respondent is a first division club, belonging to category 2, for which the indicative amount of training compensation is 60,000. The average of both amounts is 75,000 for three seasons that is from season 94-95 to season 96-97. Between the ages of 12 and 15 years, the indicative training compensation for both the Claimant and the Respondent is 10,000 per year. According to FIFA Circular Letter No 769, the period "between 12 and 15 years" as set out in Art. 7 para. 2 of Art. 7 of the Regulations governing the Application of the FIFA Regulations must be understood as three seasons only. Therefore the training compensation amounts to 255,000.
- The Claimant has not proven that the effective costs incurred by the Respondent for the formation and the education of Lars Jacobsen were lower than the ones calculated on the basis of the indicative amounts mentioned in the FIFA Circular Letter No 826. On the other hand, the Respondent has not brought forward any factual arguments in support of its primary claim, namely that the trainings compensation must be augmented to 555,000.

#### **Arbitration CAS 2003/O/530 AJ Auxerre/FC Valencia and Sissoko, award of 27 August 2004**

Panel: Mr François Carrard (Switzerland), President; Mr François Klein (France); Mr José Juan Pintó (Spain)

The Court of Arbitration for Sport (CAS) declared admissible the appeal by AJ Auxerre, but rejected the claim of the claimant, AJ Auxerre, that the player Sissoko should return to the football club. The CAS also dismissed the claim of the respondents, Valencia CF and Sissoko, that a permanent international transfer certificate should be granted and that AJ Auxerre should pay the costs of the proceedings.

On 16 February 2000, Mr Sissoko, a French professional footballer, signed a contract as an "up-and-coming player" with AJ Auxerre, under which the club agreed to provide him with "a methodical and complete professional training programme for up-and-coming players", starting on 1 July 2000 "for a duration of three seasons".

Under Article 259 of the Professional Football Charter (hereinafter the "Charter") (2000/2001 edition, applicable in this case), based on Article 15-4 of the French Act of 16 July 1984, when the contract of an apprentice or up-and-coming player expires, the club is entitled to require the other party to sign a new contract as a trainee player in accordance with his age.

Prior to the expiry of the aforementioned contract, before 30 April 2003 (i.e. within the time limit laid down by the Charter), AJ Auxerre asked Mr Sissoko to sign a new contract as a "trainee professional", which he refused.

On 1 July 2003, the day after his three-year contract as an up-and-coming player expired, Mr Sissoko signed a five-year contract of employment as a professional player with Valencia CF.

The French Football Federation refused to provide Valencia CF with an international transfer certificate. At the same time, noting that “there is currently no contract of employment preventing the player from joining the club of his choice”, FIFA authorised the RFEF to register Mr Sissoko temporarily as a Valencia CF player.

In a letter of 2 September 2003, at the instigation of AJ Auxerre, the FFF requested that the case be referred to the Dispute Resolution Chamber of the FIFA Players’ Status Committee (hereinafter “the Chamber”), alleging in particular that French laws and regulations had been breached by FIFA, which should have taken them into account under the terms of Article 43 of the FIFA Regulations for the Status and Transfer of Players (hereinafter “FIFA Regulations”).

On 1 December 2003, FIFA notified the two clubs involved, as well as the FFF and the RFEF, of the decision taken by the Chamber at its meeting of 21 November 2003 (hereinafter “the decision”), in which it (i) upheld the decision of the FIFA administration of 29 August 2003, authorising the RFEF to register the player Sissoko on a temporary basis; (ii) dismissed AJ Auxerre’s claim for compensation for incitement to break a contract; (iii) dismissed AJ Auxerre’s request that the player should return to its squad, and (iv) invited AJ Auxerre to claim compensation from Valencia CF for the training and education provided to the player Sissoko.

On 18 December 2003, AJ Auxerre lodged a request for arbitration with the CAS Court Office in its dispute with FC Valencia and Mohamed Lamine Sissoko.

The hearing was held at the Villa du Centenaire in Lausanne on 24 May 2004.

In its request for arbitration and additional observations, AJ Auxerre requested (i) “the annulment of the decision of FIFA of 29 August 2003 authorising the Spanish Football Association to register the player on a temporary basis”; (ii) “the return of the player to the club which provided his football education” (AJ Auxerre); and (iii) “that the player should sign a contract as a trainee professional with the club which provided his football education”.

In their written replies, Valencia CF and Mr Sissoko argued that (i) the claimant’s demands should be rejected; (ii) a permanent international transfer certificate should be granted; and (iii) that AJ Auxerre should be obliged to pay the costs of the procedure. At the hearing of 24 May 2004, the respondents repeated the claims made in their written submissions.

In its written decision, the Panel decided as follows:

- Generally speaking, it is the responsibility of FIFA, in every international transfer, taking into account, if necessary, the national provisions mentioned in Article 43 of the FIFA Regulations, to examine the commitments entered into by all the parties involved and to draw the relevant conclusions, particularly with a view to protecting the legal security of the parties.
- Nonetheless, in the present case, even though the Dispute Resolution Chamber of the FIFA Players’ Status Committee (“the Chamber”) failed to carry out such an examination in an appropriate manner, the Panel can only take formal note of the situation and of the fact that the contract concluded between Valencia CF and Mr Sissoko has not been invalidated, even though it might have been. It is therefore impossible to go back on the temporary authorisation granted by FIFA to Valencia CF to register Mr Sissoko as a player, and on the fact that the player Sissoko was a member of the Valencia CF squad at the start of the 2003/2004 season and played a total of 1,007 minutes in 35 matches for his new club. To order Mr Sissoko to return to his previous club, AJ Auxerre, would therefore be totally unreasonable. Such a step would be outrageous and would infringe his fundamental freedoms. Similarly, Mr Sissoko should not be forced to sign a new contract as a trainee professional with his previous club. There is therefore no reason to annul the decisions taken by the FIFA administration on 29 November 2003.
- The Chamber will therefore need to consider the question of compensation for any damages suffered by AJ Auxerre as a result of violations of Mr Sissoko’s contractual undertakings towards the club. It is not for the Panel to examine in greater detail the claims that

the claimant may have against Valencia CF or Mr Sissoko. Indeed, the claimant did not draw any conclusions, even of a subsidiary nature, that it should receive such payment. The Panel cannot therefore rule *ultra petita*. The Panel is nevertheless of the opinion that, in this case, the claimant is, in principle, entitled to claim more than simple training compensation calculated according to a strict mathematical application of the rules set out in the aforementioned circular.

#### Arbitration CAS 2004/A/544 Brazilian Equestrian Confederation (CBH) / Fédération Equestre Internationale (FEI), award of 13 April 2004

Panel: Mr François Alaphilippe (France), President; Mr Jean-Pierre Morand (Switzerland); Mr Denis Oswald (Switzerland)

The Court of Arbitration for Sport (CAS) decided to annul the decision issued by the Judicial Committee of the FEI on 15 December 2003, rejecting the claims of the CBH and confirming the qualification of the Argentinian team.

The FEI published the 2004 Olympic qualification criteria for show jumping (updated on 20 November 2002). Olympic qualification groups were based on seven geographical regions, including Central and South America (E). For this region, the following teams would qualify for the team show jumping competition:

*“The 2 best placed teams from the 2003 Pan-American Games, excluding the teams qualified as above, and the best placed team from the Individual classification following the team competition at this event (addition of the results of the individual riders from the same NOC)”.*

On 26 and 27 April 2003, the FEI Bureau met in Madrid, where it clarified the qualification criteria for the third team qualifying through the Pan-American Games as follows:

*“The results of each team member will be added to the penalties of each team member in both rounds of the team competition (second competition). The team with the least penalties, if not already qualified, will qualify its NF to participate at the 2004 Olympic Games with a team”.*

The Pan-American Games were held in Santo Domingo from 5 to 16 August 2003. The show jumping competition took place from 12 to 16 August 2003. In FEI Bulletin 4/2003 of 12 September 2003, it was stated that Argentina was the 12th team to qualify for the Olympic Games, via the addition of the results of the individual riders from the same NOC at the 2003 Pan-American Games.

The CBH disputed this decision, arguing in substance that, in accordance with the rules that should have been applied at the Pan-American Games, Brazil should have qualified instead of Argentina.

The FEI Judicial Committee, to which the appeal was referred on 17 October 2003, issued its decision on 15 December 2003, rejecting the CBH’s claims and confirming the qualification of the Argentinian team. Its decision was based on the application of the selection criteria laid down and adopted by the FEI in relation to the Pan-American Games.

The CBH filed an appeal against the Judicial Committee’s decision with the Court of Arbitration for Sport (CAS) on 23 December 2003.

In its written decision, the Panel considered that:

- The clarification adopted by the FEI Bureau in Madrid on 26 and 27 April 2003 had no bearing on the basic rules governing the qualification of the third team for the 2004 Olympic Games via the 2003 Pan-American Games, under which only the individual riders’ best scores should count. The aim of the clarification had been to lay down rules for separating two or more teams if they scored an equal number of points. However, this clarification did not apply in the present case because the Brazilian and Argentinian teams did not have the same number of points.
- A teleological interpretation of the provision adopted by the FEI after the Sydney Olympic Games suggested that, in this case, the



FEI's aim had been to introduce a provision which differed from the customary rules in order to take more account of riders' individual results during team events. Insofar as the best results of a team's riders should be taken into account, the Panel considered that the third team to qualify through the 2003 Pan-American Games should be determined by discarding the lowest score achieved by each rider in the first two events. Using this interpretation of the basic rules, it was possible to take more account of riders' individual results, as requested by the IOC.

- The decision of the FEI Judicial Committee of 15 December 2003 should be annulled, since the CBH fulfilled the qualification criteria for participation in the team show jumping competition at the 2004 Olympic Games in Athens in accordance with the provisions of Article 627 of the FEI Regulations for Equestrian Events at the Olympic Games, 21st Edition. However, the Panel considered that, since the qualification of teams or individuals was the sole responsibility of the International Federations, it could not act on behalf of the FEI, which should formally rule on the question of the CBH's qualification in accordance with the present award.

**Arbitration CAS 2004/A/549 Deferr and Real Federacion Española de Gimnasia (RFEG)/ Fédération Internationale de Gymnastique (FIG), award of 27 May 2004**

Panel: Mr Bernard Foucher, President (France); Mr Massimo (Italy); Mr Denis Oswald (Switzerland)

The Court of Arbitration for Sport (CAS) declared admissible the appeal filed by the RFEG against the decision by the FIG Appeal Tribunal. The CAS therefore annulled the aforementioned decision, which itself quashed the decision of the FIG Disciplinary Commission of 30 June 2003 on account of procedural irregularities. The Panel also imposed a three-month suspension against the gymnast Mr Deferr for cannabis use and invalidated all the results he had achieved during the suspension period.

In doping tests carried out during three different gymnastics championships, the Spanish Championships on 12 October 2002, the World Cup event in Paris on 19 October 2002 and the World Championships in Debrecen (Hungary) on 23 November 2002, Mr Deferr tested positive with a high concentration of THC (cannabis) in his urine.

On 21 December 2002, the RFEG Sports Disciplinary Committee suspended Mr Deferr for three months and disqualified him from the Spanish Championships. On 30 June 2003, the FIG Disciplinary Commission issued a decision concerning Mr Deferr:

- suspending him from all international competitions for a three-month period backdated to 19 October 2002;
- annulling the results he achieved at the World Cup in Paris, the World Championships in Debrecen and the World Cup final in Stuttgart;
- obliging him to return the prizes he won at the competitions in question.

On 31 July 2003, Mr Deferr and the RFEG lodged an appeal against this decision with the FIG Appeal Tribunal. On account of procedural irregularities related to the failure to summons the appellants before the Disciplinary Commission, the FIG Appeal Tribunal annulled the disputed decision on 30 November 2003 and referred the case back to the Disciplinary Commission.

In a statement of appeal dated 29 December 2003, Mr Deferr and the RFEG filed an appeal against this decision with the Court of Arbitration for Sport.

In its written decision, the Panel considered that:

- Mr Deferr had been suspended at international level from 19 October 2002 to 19 January 2003 and at national level from 28 December 2002 to 28 March 2003 as a result of two independent sanctions covering international and national competitions respectively. It should be pointed out that Art. 1.4 *in fine* of the FIG Regulations made provision for a two-tier system of measures, stipulating that sanctions imposed by the FIG should in no way prejudice those issued by the IOC, NOCs or national federations.

Therefore, although the *non bis in idem* principle should be considered applicable, the appellant could not take advantage of it, since the sanctions imposed on him covered different types of event.

- The FIG could not be considered to have been late in implementing the World Anti-Doping Code, since the time-limit had not been reached. On these grounds and particularly in view of the specific conditions governing the entry into force of the Code, the Panel did not consider it to be applicable in this case. For this reason, the *lex mitior* principle did not apply.
- In view of all the evidence, the CAS considered that the appellant, in whose body the presence of prohibited substances was clearly established, who was suspected of repeated use of cannabis, and who could not rely on the argument that the FIG had merely issued warnings in cases whose similarity he had failed to prove, should be suspended for three months, starting from the date of the positive test conducted in Paris on 19 October 2002. Any results achieved during that period should also be invalidated.

**Arbitration CAS 2004/A/553 Cissé and Fédération Française de Football (FFF)/Union des Associations Européennes de Football (UEFA), award of 11 June 2004**

Panel: Mr Gérard Rasquin (Luxembourg), President ; Mr Jean-Pierre Morand (Switzerland); Mr José Juan Pintó (Spain)

The Court of Arbitration for Sport (CAS) declared admissible the appeals of French professional footballer Djibril Cissé, dated 19 February 2004, and the Fédération Française de Football (FFF), dated 23 February 2004. The CAS therefore annulled the decision of the UEFA Appeals Body of 30 January 2004, suspending Djibril Cissé for five matches for assaulting a player and insulting an official during a match. In a new ruling, the CAS suspended Cissé for four matches.

On 18 November 2003, Mr Cissé was part of the French national under-21 team which played a qualifying match for the final round of the 2004 European Under-21 Championship against Portugal in Clermont-Ferrand. In the 44th minute of the match, the English referee, Mr Robert Styles, dismissed Mr Cissé (straight red card) for striking a Portuguese player with his knee during an interruption in play. The incident followed one in which Mr Cissé himself had been fouled by two Portuguese players who were trying to win the ball. On leaving the field of play, looking directly at the fourth official, who had not been involved in the incident, Mr Cissé uttered the words "enculé, va" before walking away.

On 4 December 2003, the UEFA Control and Disciplinary Body suspended Mr Cissé for five matches.

In their appeals, Mr Cissé and the FFF argued that their appeal was admissible and concluded that the suspension should be reduced from five to two matches. They referred in particular to mitigating circumstances, i.e. provocation by opponents, which they thought justified a reduction of the punishment.

In its response, UEFA, accepting the jurisdiction of the CAS to hear the two appeals, concluded that they should be dismissed and that Mr Cissé and the FFF should pay the costs of the procedure. UEFA argued that the offences attributed to Mr Cissé were objectively established on the basis of the evidence produced.

In its written decision, the Panel considered that:

- The notion of assault in the world of sport was a broad one, covering any act likely to infringe the physical integrity of a person, even if the victim was not actually injured. The Panel considered that the act committed by Mr Cissé in the 44th minute of the match of 18 November 2003 constituted assault in the sense of Article 10 para 1 (c) of the UEFA Disciplinary Regulations (DR).
- The Panel stressed that the fact that a player had himself been fouled could and should not in itself constitute a mitigating circumstance. If a player was fouled, he should control himself and allow the referee alone to penalise the offender. The "eye for an eye" principle had no place on the football pitch, not even indirectly through an overgenerous interpretation principle of the notion of mitigating circumstances. The fact that the Disciplinary Inspector

had admitted the existence of mitigating circumstances was not binding on UEFA's internal decision-making bodies.

- The Panel considered that the appellant had directed insulting remarks towards the fourth official. The FFF had argued that the evidence was inadmissible on the grounds that the audio recording of the remarks would constitute fortuitous evidence in the sense of Swiss criminal case-law. Participants in such a match knew and accepted both implicitly and necessarily that their actions would be recorded. The fact that the insult had been picked up by a microphone that was not in a "normal" position was clearly irrelevant.
- The Panel noted that there was good reason in this case to apply Article 17 para. 3 of the DR concerning the coincidence of offences, bearing in mind the link between the two offences committed by Mr Cissé (assault and insulting an official). That being the case, according to the rules on the coincidence of offences (in contrast to the principle of accumulation, which would automatically have led to a five-match suspension) and taking all the circumstances into account, particularly the fact that one of the offences listed by the UEFA Appeals Body had not been established, the Panel considered that there was no reason to increase the minimum suspension against Mr Cissé by more than one match, bringing the total suspension to four matches.

**Arbitration CAS 2004/A/555 Hellenic Hockey Federation (HHF) /International Hockey Federation (IHF) and South African Hockey Association (SAHA), award of 6 July 2004**

Panel: Prof. Dr Michael Geistlinger (Austria), President; Dr Chris Georghiadis (Cyprus); Dr Stephan Netzle (Switzerland)

The Court of Arbitration for Sport (CAS) has decided to dismiss the appeal filed by the Hellenic Hockey Federation (HHF) on 17 February 2004 in relation to the qualification system established by the International Hockey Federation (FIH). The CAS Panel has decided to accept its jurisdiction to hear this case but has dismissed the appeal on the merits, thus confirming the qualification system established by the FIH.

During its meeting held between 4 and 6 July 2002, the Executive Board of the FIH decided the following qualification system for the Greek men's hockey team to the Olympic tournament:

*"The qualification standard to be met by the Men's and Women's Greek teams will be as follows:*

*Stage 1 : If either (or both) of the teams qualify for the finals of the European Nations Cup, qualification guaranteed for the Olympic Games*

*If either one (or both) of the teams do not qualify via European Nations Cup Qualifier, the following:*

*Stage 2 : Greece to play the 12th qualified team (from a ranking point of view) in a best of 3 play-off competition immediately prior to the Olympic Qualifier.*

*If Greece wins the play-off - qualifies for Olympic Games.*

*If Greece loses the play-off - not eligible for Olympic Games".*

By email dated 3 November 2003, the FIH required the HHF to have its men's team to qualify against Canada as Cuba had advised that it would not participate in the Qualifier.

The President of the Hellenic Olympic Committee asked the FIH by letter dated 5 November 2003 to recognize the Greek men's team either having qualified automatically or to have the team played against Cuba, even if Cuba did not participate in the Olympic Games. Forced to play against Canada would deteriorate the position of the Greek team. By fax of 19 December 2003, FIH informed the President of the Hellenic Olympic Committee and copied to HHF and IOC that its decision was and remained that the Greek men's team was required to play Canada since Cuba withdrew from the Olympic Qualifying tournament and can not be considered as the 12th qualified team for this tournament.

By fax of 26 January 2004, the HHF referring to the letter of the IOC Sports Director to the FIH of 17 December 2003 informed the

FIH that it insisted "*on respecting the FIH's decision, which was approved by I.O.C., that the Greek team must play the 12th ranked team (Cuba). In the decision, the possibility of playing with an alternative (substitute) team is not mentioned, and thus unilateral modification of the decision is not acceptable.*"

By letter dated 17 February 2004, HHF submitted an Application for Arbitration against the FIH.

Apart from the qualification issue, HHF also raised objections concerning the feasibility of the pitch in "Club de Campo" in Madrid, where the play-off between the Greek and the Canadian teams were to take place, and its compliance with FIH standards, given by FIH in its Handbook of Performance Requirements, Hockey Pitch Solutions.

On 2 March 2004, HHF filed its appeal brief.

On 29 March 2004, the FIH filed its answer.

The hearing was held in Lausanne on 19 May 2004.

In its written decision the Panel considered that:

- The Panel finds that for "*raising a dispute*" in the sense of art. 20.2 FIH Statutes a notification in writing addressed to each other side is required. Such notification should make clear for a third person reading this text that a dispute in terms of law eventually leading to a procedure before CAS has been raised. By answer dated 26 January 2004, addressed to the Hon. Secretary General of the FIH, the President and the Secretary General of the HHF declared to play Cuba, but explicitly reserved their right on behalf of HHF to appeal to CAS. Therefore, the Panel considers that HHF raised its dispute by this letter of 26 January 2004 in accordance with art. 20.2 FIH Statutes. As a consequence, the deadline to seize CAS expired on 26 February 2004. As the HHF's Application for Arbitration was lodged with CAS on 17 February 2004, the Panel finds that the arbitration procedure related to the Olympic qualification criteria was also initiated in due time.
- As to the objections raised by HHF concerning the compliance of the pitch with the FIH standards, the Panel holds that this issue is a purely technical one pertaining to the rules which are the responsibility of the federation concerned. In accordance with the consistent jurisprudence of CAS, the Panel finds that it is not for it to review these rules. In addition, as there are no mandatory rules for a specific quality of the pitch beyond those contained in art. 1 FIH Rules of Hockey, there is no legal measure for finding the decision appealed from to be arbitrary or illegal.
- The Panel applies general rules and principles of interpretation of law which state that if there is no other indication that can be derived from a legal provision it is the reading of its text in good faith in accordance with the ordinary meaning to be given to their terms in the light of their object and purpose which shall decide. At the hearing and in their submissions in writing all parties involved had agreed that it was the purpose of the host nation rule to provide for a minimum qualification of the Greek men's and women's teams. Thus, the purpose of the host nation rule could not be to provide for automatic qualification of the Greek men's team, when the concrete team holding the 12th qualified team position decided not to proceed. The Panel finds that it was logical and is considered to be in conformity with the purpose of the host nation rule that the FIH, as soon as Cuba decided not to proceed in the qualification process, applied the same system for replacing Cuba by the next qualified team that had been applied to Cuba itself. The Panel, therefore, finds that Greece had to play Canada on the basis of the Olympic qualification criteria. The HHF's appeal is thus also dismissed on this issue.

**Arbitration CAS 2004/A/557 Iverson/International Sailing Federation (ISAF) and International Star Class Yacht Racing Association, award of 13 April 2004**

Panel: Mr Peter Leaver QC (England), Sole Arbitrator

The Court of Arbitration for Sport (CAS) has decided to dismiss the appeal filed by Mr Iverson against the decision of the ISAF Review Board of 11 February 2004 rejecting his appeal. Mr Iverson appeal was

aimed at obtaining the invalidation of the rule amended by the International Star Class Yacht Racing Association ("Star Class") in order to introduce a weight limit for crews in the Star Class yacht racing.

Star Class is a member of ISAF. Star Class boats have a crew of a maximum of 2 sailors. If, as is always the case, the crew is a crew of two, one is the helm and the other is the crew. Mr Iverson has always sailed in Star Class races as the crew.

In 2001 Star Class further amended its Rules to introduce a new weight limit for crews.

Mr Iverson has always opposed the 2001 amendment. He contends that it unfairly discriminates against heavy crew members, and is not justified on any technical basis. He has started proceedings in a number of different fora. In 2003 ISAF changed its Rules to permit issues of Class Eligibility to be determined by the ISAF Review Board. Mr Iverson made use of this Rule change. On 11 February 2004 the ISAF Review Board heard Mr Iverson's appeal. In its decision, dated 17 February 2004 the ISAF Review Board unanimously rejected the appeal.

Mr Iverson now appeals to the CAS from the ISAF Review Board's decision.

Although there is no dispute that the CAS has jurisdiction to deal with this appeal, there is no agreement between the parties as to the ambit and scope of the jurisdiction given to the CAS. ISAF contends that as the Review Board can only consider matters concerning *eligibility*, any appeal to the CAS from a decision of that Board can only be concerned with that issue. Mr Iverson contends that the CAS's jurisdiction is wider: indeed, he contends that the CAS's jurisdiction is at large.

In its written decision the Panel considered that:

- Unless there are clear words expanding the jurisdiction of the CAS so as to enable it to consider any matter, it is the Panel's view that its jurisdiction is limited to a consideration of the issue which was before the Review Board, that is the issue of eligibility.
- It does not appear to be disputed that Mr Iverson was, and is, eligible to compete within the definition of eligibility provided for by ISAF's Racing Rules of Sailing: "To be eligible to compete in an event listed in 19.3, a competitor shall: (a) be governed by the regulations of ISAF; (b) be a member of his/her Member National Authority one of its affiliated organisations((c) (i) be registered as an "ISAF Sailor" on the ISAF Website; and (ii) sign the waiver from the Court for Arbitration in Sport." There is a crucial distinction between eligibility for Star Class racing, and the status of the weight rule. The weight rule is about the conditions under which the boat is to be raced. Eligibility is a matter of status. With or without the weight both racehorse and jockey are eligible to participate in races, but they may not be qualified to participate in a particular race unless they are carrying at least the specified weight. The Panel has concluded that the weight limit rule is not concerned with eligibility, as defined. Thus, there can be no question of the Panel making a declaration in respect of the Star Class, as is requested by Mr Iverson. Any complaint that Mr Iverson may have about the adoption by the Star Class of the weight rule is subsumed in the appeal to ISAF.
- In the Tribunal's opinion and contrary to Mr Iverson argument, the amended weight rule did not infringe the eight Fundamental Principle of the Olympic Charter that: "The practice of sport is a human right. Every individual must have the possibility of practising sport in accordance with his or her needs." Mr Iverson is able to practise sport in accordance with his needs. The fact that he may not be able to find a helm with whom he can race competitively in the Star Class, and is not willing to sail as a helm himself, does not involve infringement of his right to practise sport. the Tribunal concludes that there was no retroactive affect to Mr Iverson's rights as a result of the change to the weight limit rule, so as to infringe the Star Class rules.

#### Arbitration CAS 2004/A/558 Senegalese Football Association (FSF)/African Football Confederation (CAF), award of 16 September 2004

Panel: Mr Gérard Rasquin (Luxembourg), President; Prof. Jean-Pierre Karaquillo (France) ; Mr Jean Appietto (France)

The Court of Arbitration for Sport (CAS) decided it had jurisdiction to hear the cases of Mr Traoré, Mr Sarr and Mr Cissé, but not the case of Mr El Hadji Diouf. The CAS upheld the appeal lodged by the FSF against the decision issued by the Appeals Commission of the African Football Confederation on 13 February 2004. In a new decision, the CAS decided to reduce the sanction against Mr Traoré, Mr Sarr and Mr Cissé to a six-month suspension.

Mr El Hadji Diouf is a player for the Senegalese national team, whereas Mr Amara Traoré, Mr Abdoulaye Sarr and Mr Fallou Cissé are its general manager, assistant coach and doctor respectively. At the Radès stadium in Tunisia on 7 February 2004, the Senegalese national team played a match against the Tunisian national team in the quarter-finals of the 24th African Cup of Nations, held in Tunisia.

In the 65th minute of the match, the Tunisian team opened the scoring and several Senegalese players, including El Hadji Diouf, ran towards the referee to dispute the validity of the goal. As a result, members of the Senegalese team's technical staff, including Mr Traoré, Mr Sarr and Mr Cissé, entered the field of play. The match was then interrupted for approximately five minutes.

Meeting in Tunis on 9 February 2004, the African Cup of Nations Organising Committee found the player Diouf guilty of violent conduct on the pitch and insolence towards the President of the Medical Commission. It also decided that the Senegalese officials who had invaded the pitch in order to challenge the match referee were guilty of misconduct. The Committee therefore decided, in accordance with the FIFA Disciplinary Code, to suspend the player Diouf for three matches during the qualifying stages of the next African Cup of Nations/2006 World Cup and to ban Mr Traoré, Mr Sarr and Mr Cissé from the dressing rooms and substitutes' benches in all CAF competitions for one year.

Following an appeal by the FSF, the CAF Appeals Commission, meeting in Tunis on 13 February 2004, decided, "bearing in mind the repeated unacceptable conduct of the player El Hadji Diouf ((() towards the African football institutions and the general public", to increase the suspension of the player to four matches during the qualifying stages of the next African Cup of Nations/2006 World Cup. The Commission also increased the sanction imposed on Mr Sarr, in view of his "unacceptable behaviour", to an 18-month ban from the dressing rooms and substitutes' benches in all CAF competitions. In addition, the Appeals Commission upheld the decision to suspend Mr Traoré and Mr Cissé for one year.

On 24 February 2004, the FSF filed with the Court of Arbitration for Sport (CAS) an appeal against the decision of the CAF Appeals Commission.

The FSF firstly alleges that the decision violates the rights of the defence and the principle that both parties should be heard. It considers that the decision ignores the principle enshrined in Article 100 of the FIFA Disciplinary Code (FDC) of 8 March 2002, which entered into force on 1 May 2002. It then argues that the CAF's decision breaches Article 105 para. 1 FDC concerning the burden of proof. It claims that the disputed decision also violates the rules on form and content since it does not contain any of the elements described in Article 121 FDC.

The CAF, on the other hand, argues that the Appeals Commission's decision should be upheld in its entirety. It claims that the FSF is trying in vain to play down the gravity of the incidents caused by the extreme aggression of its players and officials.

In its written decision, the Panel considered that:

- The clear wording of Article 60 para. 2.b of the FIFA Statutes, under which only particularly serious sanctions may be appealed before the CAS, is such that its meaning is not open to question. Therefore, in order to apply the rule strictly, the Panel concludes



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that it has no jurisdiction to hear the case of the player Diouf, since his sanction did not exceed a four-match suspension.

- By imposing a sanction against two players without even inviting them to attend the hearing or giving them the opportunity to comment on the precise circumstances of the incidents and thus exercise the rights of the defence, the CAF clearly violated Article 100 of the FIFA Disciplinary Code (FDC) as well as international agreements and the aforementioned general principles. The principle that both parties should be heard was therefore also breached and the decision taken is consequently vitiated. Such a blatant violation of the universal and fundamental rights of the defence cannot be remedied by the present CAS procedure and can only be sanctioned through the annulment of the vitiated decision. The ground of nullity cited by the FSF must therefore be accepted.
- The referee's report does not mention any physical aggression towards the referee or his assistants and refers only to the invasion of the pitch by "the whole substitutes' bench of the Senegalese team" and the subsequent skirmishes, without giving any more detail. There is therefore no reason to conclude that violent acts were committed. However, there is an undeniable relationship of cause and effect between the referee's reaction and the interruption of the match on the one hand, and the conduct of Mr Traoré, Mr Sarr and Mr Cissé on the other. Since their conduct corresponds perfectly with the definition of force provided for in Article 57 FDC, they shall be considered guilty of this offence.
- Invading the pitch unlawfully and interrupting the match remain unacceptable acts and therefore constitute an offence. However, by failing to hear the defendants' explanations and, consequently, by upholding the 12-month suspensions against Mr Traoré and Mr Cissé, and increasing the suspension of Mr Sarr by six months, the CAF Appeals Commission, as well as ignoring fundamental procedural principles, showed excessive severity. Disciplinary bodies need to take into account the personal situation, in the broad sense, of the individuals they punish, particularly their professional or sporting career, any previous offences and their reputation within their specific field. In view of all the circumstances of the present case, the Panel believes that a six-month ban from the dressing rooms and substitutes' benches, as defined in Article 21 FDC, is appropriate for Mr Traoré, Mr Cissé and Mr Sarr, since the investigation did not provide any ground for punishing the latter more heavily than his two colleagues.

**Arbitration CAS 2004/A/561 Finnish Ski Association (FSA)/ International Ski Federation (FIS), award of 2 July 2004**  
Panel: Dr Stephan Netze (Switzerland), sole arbitrator

The Court of Arbitration for Sport (CAS) has decided to dismiss the appeal filed by the Finnish Ski Association (FSA) against the decision of the FIS Court dated 16 February 2004 whereby the FIS Court dismissed the appeal of the FSA which challenged a decision of the Appeals Commission.

The factual grounds for this arbitral proceeding were laid at the FIS World Cup Slalom in Park City (USA) on 23 November 2003. During the first run, Mr Rainer Schönfelder ("RS") of the Austrian Ski team skied out of course. Upon request of an official of the Austrian Ski team, he was granted a provisional re-run by the competition Jury (the "Jury Decision 1").

Between the first and the second run, the Jury unanimously decided to uphold the re-run as valid first run (the "Jury Decision 2").

After protests from 10 national teams (including the Appellant) but before the second run, the Jury decided to have RS' second run be provisional and to deal with the protest after the 2nd run. The Jury also decided to allow the start of the 2nd run with 31 (instead of 30) participants (the "Jury Decision 3"). After the 2nd run, the Jury discussed the protests in more detail and took a new vote. It decided unanimously that RS should be DNF (Did Not Finish) because new evidence had demonstrated that "the provisional (sic) re-run was invalid per ICR (International Competition Rules) Article 623.3.2" (the "Jury Decision 4"). As a consequence, RS was not ranked.

On 24 November 2003, the Austrian Ski team appealed from the Jury Decision 4 before the FIS Appeals Commission. It argued that the Jury did not have jurisdiction to review its own decision (i.e. the Jury Decision 2).

On 30 November 2003, the FIS Appeals Commission supported the appeal of the Austrian Ski team and held that the Jury Decision 4 "was not acceptable. This means that racer number 5 [RS] remains in the ranking" (the "Appeals Commission Decision 1").

On 2 December 2003, the Italian Winter Sport Federation (FISI) appealed against the Jury Decision 2 (by which the Jury decided that RS' re-run be valid) before the FIS Appeals Commission. By decision of 5 December 2003, the Appeals Commission dismissed the FISI appeal because of late filing (the "Appeals Commission Decision 2").

The Appeals Commission Decision 2 was challenged before the FIS Court by the Appellant on 9 December 2003 and by the FISI on 12 December 2003.

On 16 February 2004, the FIS Court joined the two appeals and issued a decision by which it dismissed the appeals of both the Appellant and the FISI ("the FIS Court Decision").

The present appeal before the CAS is directed against the FIS Court Decision.

On 5 March 2004, the Appellant submitted the Request for Arbitration. The Appellant proposed to appoint a sole arbitrator to decide upon the appeal.

In its written decision the Panel has decided that:

- Neither the FIS-Statutes nor the International Competition Rules (ICR) provide a general remedy against the decision of an Appeals Commission regarding an appeal against a Jury Decision. The list of competences of the FIS Court is conclusive and does not contain the possibility of a second appeal regarding jury decisions. The decision of the Appeals Commission must therefore be considered final, at least with respect to *internal* remedies of the federation and subject to the general right of appeal against decisions of an association with an ordinary court according to Art. 75 Swiss Civil Code (CC).
- In the absence of a specific arbitration agreement by the parties, the jurisdiction of CAS is limited to the scope as defined by the rules and regulations of the federation in question. Beyond these rules and regulations, CAS has absolutely no power to investigate and prosecute certain events in a sports organisation just upon notice of a constituent of that organisation. The respective request of the Appellant must therefore be dismissed.

**Arbitration CAS 2004/A/564 International Amateur Athletic Federation (IAAF) / French Athletics Federation (FFA) & Stéphane Desaulty, award of 14 September 2004**

Panel: Gérard Rasquin (Luxembourg), President ; Mr Yves Fortier QC (Canada) ; Mr Jean-Pierre Karaquillo (France)

Mr Stéphane Desaulty is an elite international 3,000 m steeplechase runner, licensed by the FFA.

On 23 July 2003, Mr Desaulty was arrested following a preliminary investigation and detained by the police in Creil (France) on suspicion of obtaining Eprex 4000 U, a form of EPO, using medical prescriptions which he had falsified himself. He had thus been able to obtain 34 syringes of r-EPO (recombinant EPO).

Mr Desaulty had no hesitation in admitting the allegations were true, blaming his criminal behaviour on the desire to improve his performances in the run-up to the 2003 World Athletics Championships in Paris and kick-start his waning career. On 19 November 2003, he was given a four-month suspended prison sentence for forgery by the Senlis Regional Court.

The disciplinary body of the FFA met on 10 December 2003 on the basis of Article R.59.3 of the IAAF Statutes, Article 1 of the Federal Anti-Doping Regulations and Article L3631-1 of the French Public Health Code. On the same day, it imposed a two-year suspension against Mr Desaulty, with six months suspended. This decision was notified to Mr Desaulty on 7 January 2004 and to the IAAF on 9 January 2004.

On 9 March 2004, the IAAF lodged an appeal against this decision with the CAS.

In its written decision, the Panel considered that:

- The minimum two-year suspension prescribed by the IAAF Statutes for the offence committed cannot be considered disproportionate. It corresponds to the sanction generally provided for by the World Anti-Doping Agency and its Code. The deferral of a sentence is admittedly a mode of enforcement of the sanction, making it possible for a sentenced person not to serve all or part of the penalty immediately. This contravenes the IAAF Statutes and the World Anti-Doping Code, which suggest that the two-year suspension should be served in full. The IAAF Statutes make clear that the FFA is not empowered under any circumstances to suspend the sentence of an athlete convicted of doping. This is part of an anti-doping policy that falls under the responsibility of the IAAF in particular and WADA at a more general level.
- Furthermore, the anti-doping regulations of an International Federation, provided they comply with the fundamental principles of the rights of the defence, have been recognised as pre-eminent over specific provisions of national law. The Panel therefore concludes that, since the doping offence is not disputed, the two-year suspension should be served in full with immediate effect.

#### **Arbitration CAS 2004/A/568 Club AC Perugia Spa /Club SCS Politehnica Timisoara, award of 6 August 2004**

Panel: Mr Gerhardt Bubnik (Czech Republic), President; Ms Margarita Echeverria Bermudez (Costa Rica); Mr Michele Bernasconi (Switzerland)

The Court of Arbitration for Sport (CAS) has decided to dismiss the appeal filed by Club AC Perugia against the decision of the FIFA Executive Committee dated 29 February 2004.

Until September 2001, the players Gnagne Luc Edouard Lasme, Almamy Doumbia and Moïse Kouakou Brou (hereinafter "the three Players") were registered with the club F.C. Politehnica Timisoara (the Respondent)

On September 2001, the parties signed an agreement, which provided for transfer of the three players from F.C. Politehnica Timisoara to Associazione Calcio Perugia S.p.A. It was stipulated that the transfer "has to be considered as free and consequently F.C. Politehnica Timisoara have nothing to claim from Associazione Calcio Perugia S.p.A. (The Appellant) for any title or reason."

On 25 September 2001, Mr Claudio Zambon, President of the Respondent, signed a document (hereinafter "the Addendum") which provided as follows: "Between AC Perugia Spa and gentlemen Mr. Claudio Zambon (President of Timisoara Soccer Club) and Angelo Cavoza it is drawn and agreed what follows: 1) AC Perugia Spa, register free the following players Brou, Lasme and Almami contracting them for five years at minimal federation wages, these contracts are cancellable on 30/06/2002 in reason of the unilateral agreement signed by the players. 2) In case the above mentioned players were confirmed AC Perugia Spa will grant the following amounts:

Brou L. 350.000.000

Lasme L. 450.000.000

Almami L. 350.000.000

3) AC Perugia Spa will grant to the players 20% of the total amount of an eventual transference."

Such document dated 25 September 2001 was signed by Mr Claudio Zambon, as President of the Respondent and by Mr Walter Sabatini, on behalf of the Claimant, who added at the bottom of the document a hand-written note "Valido come Pro Memoria". The amounts mentioned above are, however, inserted by hand-writing. Next to the signature of Mr Zambon there is a round seal (rubber stamp) of the Respondent and next to the signature of Mr Sabatini there is a round seal (rubber stamp) of the Appellant.

In June 2002 Respondent sent to the Appellant an invoice, requesting the payment of the amounts stated in the Addendum. The Appellant then maintained that the Addendum was a forgery in that the stamp of Club Perugia Spa was not an original one, and that, in

any event, Mr Walter Sabatini was not entitled to sign any document binding the Appellant.

The Respondent filed a complaint with the FIFA Players' Status Committee, which issued a decision on 30 October 2003, whereby the Appellant was ordered to pay the Respondent ITL 1,150,000,000 corresponding to 593,925.43.

The Appellant appealed against such decision to the FIFA Executive Committee, which issued on 29 February 2004 a decision whereby this appeal was dismissed and the decision of the FIFA Players Status Committee was confirmed

On the 11 March 2004 the Appellant lodged an appeal against the Decision with the Court of Arbitration for Sport (hereinafter the "CAS"). It applied for annulment of the Decision and also for a stay of the Decision.

A hearing was held on 29 June 2004 in Lausanne.

In its written decision the Panel has decided that:

- The Panel has no reason to doubt the conclusion of the expert and is convinced that the alleged falsified document, namely the Addendum dated 25 September 2001, both signatures and both seals attached on the document are authentic and genuine. Having taken all the evidence into consideration and according to art 18 of the Swiss Code of Obligations (CO) the heading of which reads: "Interpretation of Contracts, Simulation", a contract, both the form and the content, has to be considered under the unison true will and not under the incorrect designation or terms used by the parties as a result of an error or of the intention to hide the true character of the contract, the Panel concludes that the real and genuine will of the parties was to enter into an agreement on transfer of the players concerned for financial compensation and that the three free transfer agreements were only simulated agreements signed by the parties for other purposes.
- If a company (an association) let certain persons act in the public as their representative, without any protest, then other parties may well rely upon this fact and believe that such persons are authorized to act on behalf of the company (association) concerned. This is confirmed by art. 462 of CO. Under these circumstances, the Respondent had the right to believe that Mr Sabatini had been authorized by the Appellant to negotiate all conditions of the players transfer and to conclude the transaction. The Panel therefore concludes that Mr Sabatini was authorized to sign the Addendum of 25 September 2001 and that this document is legally valid and binding the parties.
- For all the reasons mentioned above, the Appeal of the Appellant is to be dismissed in its entirety and the appealed decision of the FIFA Executive Committee confirmed. Therefore, and taking in consideration that none of the parties has suggested another ITL/EUR exchange rate to be applicable, the Appellant shall pay to the Respondent an amount of 593,925.43.

#### **Arbitration CAS 2004/A/569 Al Kuwari /Asian Football Confederation (AFC), award of 18 June 2004**

Panel: Mr Raj Parker (England), President; Mr Goetz Eilers (Germany); Mr Abdul Rahman Lootah (Dubai)

The Court of Arbitration for Sport (CAS) has decided to partially uphold the appeal filed by Mr Al Kuwari on 14 March 2004 against the decision of the AFC Disciplinary Committee dated 25 February 2004 whereby the Appellant has been suspended for a period of 18 months and condemned to a fine of USD 10,000 following a positive doping control test underwent by the Appellant on 3 January 2004.

The analysed sample revealed the presence of performance enhancing substances, namely amphetamines and metamphetamines.

In his statement of appeal filed with the Court of Arbitration for Sport (CAS) the Appellant requested the CAS to reverse the said decision or in the event that the CAS was not minded to reverse the AFC's decision, the Appellant requested that the CAS reduce the suspension to a maximum six months and withdraw or reduce the fine of US\$10,000.

The hearing was held in Lausanne on 24 May 2004.

In its written decision the Panel considered that:

- It did not agree with the Appellant's submission that the fact that it was uncertain that the analyses of the "A" and "B" samples were carried out by the same people, contrary to the 2003 AFC Doping Control Regulations invalidated the results of the tests. Such purported violation of the procedure set out in the AFC Doping Control Regulations must be established by the party intending to rely on it, namely the Appellant. The Appellant had failed to provide any evidence in this regard. Therefore the testing procedure was accurate and the positive result was correct.
- The Panel was satisfied that the Player knowingly took amphetamines and did so in order to enhance his performance. The Panel was of the opinion that there was no other reasonable explanation for the presence of amphetamines in the Player's body. The Player was therefore guilty of a doping offence for the purposes of the 2003 AFC Doping Control Regulations and the FIFA Code.
- In reaching a decision as to the appropriate sanction, the Panel had taken into account the various mitigating factors put forward by the Appellant throughout the hearing. In particular, the Panel noted that the Player, due to his age, was only likely to be able to play professional football for a further three years and that a ban from national and international football for 18 months would all but finish his professional career. The Panel also noted that prior to this offence the Player had a clean disciplinary record. Accordingly, in the circumstances, the Panel considered that the ban imposed by the AFC should be reduced to 9 months. Besides, the Panel found that the USD 10,000 fine should be upheld.

**Arbitration CAS 2004/A/593 Football Association of Wales (FAW)/ Union des Associations Européennes de Football (UEFA), award of 6 July 2004**

Panel: Prof. Michael Geistlinger (Austria), President; Mr. Peter Leaver (England); Prof. Massimo Cocchia, (Italy)

The Court of Arbitration for Sport (CAS) has decided to dismiss the appeal filed by the FAW against the decision of the Appeals Body of UEFA made on 19 March 2004.

The case originates from the first match between Russia and Wales during the Euro 2004 qualifier on 15 November 2003, when the Russian player Titov was selected at random for a doping test. Titov was a substitute, who did not actually play in that match. The match ended in a goal-less draw. The return match took place in Cardiff on 19 November 2003. Titov played until the 59th. Russia won the match 1-0, and so qualified for the Euro 2004. Titov was not tested on 19 November 2003.

On 3 December 2003 UEFA was informed by the Seibersdorf Research Laboratory, an IOC accredited Laboratory, that Titov's A sample had tested positive for the presence of bromantane metabolites. Bromantane continues to be a prohibited substance under the WADA 2004 Prohibited List International Standard.

On 22 January 2004 the UEFA Control & Disciplinary Body decided to suspend Titov for a period of 12 months (until 21. 01. 2005) from all UEFA competition matches and to impose a fine of CHF 10,000.- on him as well as a fine of CHF 20,000.- on FC Spartak Moscow, and to order UEFA to extend this decision on a worldwide basis.

By fax and letter dated 26 January 2004 the FAW lodged a formal protest under art. 43 UEFA DR at the continued inclusion of Russia in the Euro 2004 finals.

On 3 February 2004 the Control & Disciplinary Body decided to reject the complaint of the FAW for being unfounded.

By fax and letter dated 6 February 2004 the FAW appealed against the decision of the Control & Disciplinary Body of 3 February 2004.

The FAW argues in its Appeal Brief that the Appeals Body had misinterpreted UEFA's disciplinary rules. The FAW contends that, contrary to the Appeals Body's view, the disciplinary rules impose strict liability on a national association with regard of doping offences committed by a player of the national team squad. The FAW contend that the result of the games having been secured "through illegal and cor-

rupt sporting advantage, and not fairly according to the rules of the game" should not be allowed to stand.

On 1 April 2004 the Appeals Body ruled that the appeal of the FAW was rejected inasmuch as it was admissible and confirmed the Control & Disciplinary Body's decision of 3 February 2004.

On 10 April 2004, the FAW filed its appeal against the Appeals Body's written decision.

In its written decision the Panel has decided that:

- The Panel finds that the disputed decision, following a case-by-case approach and taking into account its effects, is predominantly of a pecuniary nature (as opposed to a sporting nature). The Panel, thus, rules that according to article 62 UEFA Statutes it has jurisdiction to hear the appeal filed by the FAW. The financial repercussions of exclusion of the FUR from the final stages of the Euro 2004 would be similar to those stated by the Secretary General of the FAW for Wales if Wales did not participate in the final stages. The FUR would lose a minimum prize money of CHF 7,5 million paid by UEFA to each of the 16 finalists.
- There is no other way than to apply art. 12 UEFA DR in the present case. By art. 12.1 a suspension is to be imposed on any player "who voluntarily or negligently uses banned substances or methods." By art. 12.4 implicated associations "are called to account for being accomplices or abettors". The particular context and general logic prevent the Panel from accepting the FAW's submission at the hearing that "implicated" means no more than "involved". The Panel finds that UEFA is correct in interpreting the term like the two other terms "accomplices" and "abettors" used by art. 12.4 UEFA DR and art. 4.02 UEFA Doping Regulations taking guidance from Swiss criminal law and Swiss law on civil liability for damages. Both systems of law know the term "implication" and use it in the particular meaning of "accessory before the fact". "Implicated" is more than just being "involved". The Panel holds that, this technique, applied to art. 12 UEFA DR, leads to the legitimate conclusion that "implicated association" means participation of an association in the voluntary or negligent use of a banned substance or method by a player being aware of his doing so.
- There is no evidence at all that the FUR cooperated intentionally or negligently in the use of the banned substance by Titov. Contrary to the opinion of the FAW, the Panel has considered that the FUR could not be assimilated to an "accomplice or abettor" of Titov under the terms of the UEFA Disciplinary Regulations and consequently could not be sanctioned.

Arbitration CAS 2004/A/599 Austin/Australian Canoeing Inc (AC), award of ....., Oceania Registry

Panel: The Hon. Justice Henric Nicholas (Australia), sole arbitrator

The Court of Arbitration for Sport (CAS), Oceania Division, has decided to dismiss the appeal filed by the Applicant, Scott Austin, against the decision of the Australian Canoeing Appeal Tribunal dated 10 April 2004 whereby the selection Panel decision excluding the Applicant from the selection of the Men's 2004 Australian Flatwater Canoe Kayak Team K4 for a final place in the K4 crew has been upheld.

The Selection Panel (the Panel) for the Men's 2004 Australian Flatwater Canoe/Kayak Teams K4 selected Mr Julian Norton-Smith in preference to the Applicant for a final place in the K4 crew. The Applicant's appeal to the Tribunal was heard on 5 April 2004. The appeal was dismissed and the selectors' decision was upheld. The members of the Tribunal were Messrs John Boulton (Chairman), Paul Lynch, and Peter Heeley. The involvement of Mr Boulton and his company (SportBusiness Solution Pty Ltd (the Company)) was not disclosed prior to, or during, the Tribunal's hearing. The Applicant was ignorant of such involvement until after the Tribunal's decision was delivered.

The Applicant alleged that Mr Boulton's failure to disclose his relationship with AC to the parties was a fundamental breach of the rules of natural justice which required the Tribunal's decision to be set aside. Failure to disclose the involvement of himself and his company

in the preparation of the high performance programme for 2005-2009 was evidence that he would not bring an impartial mind to the determination of the appeal. It was further argued that the Applicant had been denied natural justice in that he had been refused representation and thereby denied the opportunity to fairly put his case to the Tribunal, alternatively that the Tribunal erred in law in refusing representation. Finally the Applicant alleged that he was denied natural justice in that he was denied the opportunity to test the evidence of the selectors.

In its written decision the Panel has decided that:

- The fact that Mr Boulton, Chairman of the Appeal Tribunal which dismissed the Applicant's appeal did not disclose the involvement of himself and of the company he chaired (SportBusiness Solutions Pty Ltd (the company)) with AC in the development of its high performance plan for 2005-2009 is not evidence that he had prejudged the appeal. The non-disclosure does not provide a reasonable basis for apprehension that he would not act impartially in the hearing and determination of the appeal. The Applicant's submissions in support of this ground should be rejected.
- The evidence did not establish the existence of a relationship within the meaning of AC By-Law cl 9.3(d) which provides: "*No person is eligible to be appointed to the Tribunal if he or she is a member of AC's Board or its selection panel or by reason of his or her relationship with: (ii) any member of the Board; would be reasonably considered to be other than impartial.*" The evidence establishes that Mr Boulton had a relationship with AC which the Board approved and acted upon. The relationship was one pursuant to which Mr Boulton and the company provided AC with advice and assistance for the development of a high performance plan for AC for 2005-2009 for a fee. The relationship would not give to the informed fair-minded observer an apprehension of bias in Mr Boulton, alternatively it does not provide a reasonable basis for considering him to be other than impartial. It follows that the Applicant has failed to show that Mr Boulton was not eligible to be appointed to the Tribunal pursuant to By-Law cl 9.3(d).
- By-Law cl 9.3(a)(iv) provides that in any hearing before the Tribunal: "*(iv) The parties will not be entitled to be represented by a barrister or solicitor save with the leave of the Tribunal, which leave will only be given in exceptional circumstances.*" In the present case there were no exceptional circumstances. No ground has been established to justify interference with the decision to refuse leave for representation. The submission that the refusal of leave suggests apprehended bias or otherwise caused the Tribunal in the subsequent conduct of the hearing to infringe the rules of natural justice is without substance.
- The Applicant has not established that the Tribunal was in error in dismissing the ground of appeal under By-Law cl 9.2 (a) that the applicable selection criteria had not been properly followed and/or implemented. The Applicant suffered no procedural unfairness contrary to the principles of natural justice. The Applicant has failed to establish that the decision of the Tribunal was so unreasonable that it should be set aside.

**Arbitration CAS 2004/A/628 International Association of Athletics Federations (IAAF)/USA Track & Field (USATF) & Young, award of 28 June 2004**

Panel: Mr Peter Leaver QC (England), President; Mr Loh Lin Kok (Singapore); Professor Martin Hunter (England)

The Court of Arbitration for Sport (CAS) has rendered its decision in the arbitration involving the International Association of Athletics Federation (IAAF), USA Track and Field (USATF) and the US Athlete Jerome Young.

On 11 March 2000, the USATF Doping Hearing Panel found that Jerome Young committed a doping violation after a positive antidoping test showed the presence of nandrolone metabolites. Mr Young was suspended from competition on 3 April 2000, but appealed the decision and was exonerated by the USATF Doping Appeals Board on 10 July 2000. Pursuant to the IAAF Regulations in force at that

time, the IAAF Arbitration Panel was competent to hear all doping cases in athletics (since August 2001, CAS is the last instance tribunal for all doping-related matters in athletics). Pursuant to its own confidentiality rules then in effect, the USATF did not notify the IAAF of the positive doping test so as to enable the IAAF to bring the matter before its Arbitration Panel. Later, in 2003, it was disclosed that Mr Young had tested positive in June 1999.

On 13 May 2004, the IAAF, the USATF and Mr Young signed an arbitration agreement in order to submit the following issues to the Court of Arbitration for Sport:

1. *Pursuant to IAAF Rule 21.1 in IAAF Handbook 2000-2001, would it be fair and reasonable for a Panel in the position of the IAAF Arbitration Panel to accept jurisdiction in this case outside the six month deadline?"*  
*and*
2. *Did the USATF Doping Appeals Board misdirect itself or otherwise reach an erroneous conclusion on 10 July 2000 when it exonerated Mr Young of a Doping Offence?*

A hearing took place on 15 June 2004 in London on the occasion of which the representatives of the IAAF, the USATF and Mr Young were heard by the Panel.

The first question was concerned with a procedural issue: according to the IAAF Rule 21.1 applicable in 2000-2001, the time limit for review by IAAF of decisions by national bodies was six months from the date on which the decision was made. Although the decision challenged was rendered on 10 July 2000, the Panel considered that the IAAF was effectively disabled from reviewing Mr Young's case until it had seen a copy of the decision challenged and also considered that the IAAF acted prudently in seeking disclosure of that decision before referring Mr Young's case to arbitration. The CAS Panel found that it was fair and reasonable for it to accept jurisdiction outside the six months time limit, given that it was not until 2 February 2004 that an unredacted copy of the decision challenged was disclosed to the IAAF, which then produced a notice of referral to arbitration on 18 February 2004.

In answer to the second question, the CAS Panel concluded that the Doping Appeals Board did misdirect itself and reached an erroneous conclusion when it exonerated Mr Young. The Panel was of the opinion that Mr Young committed a doping offence on 26 June 1999. The Panel finds that the DAB misdirected itself in law in accepting, as expert evidence, the evidence of Mr Young's expert and rejecting that of Professor Bowers.

Further to the submissions raised by the parties with respect to the appropriate sanction to be imposed on the athlete, the CAS Panel indicated that Mr Young's period of ineligibility should have been from 26 June 1999 to 25 June 2001. The consequence of this finding is that Mr Young should not have been eligible to compete in any competition during that period, including the Olympic Summer Games in Sydney in 2000 and that the other members of the United States relay team would inevitably lose their Gold Medals. The Panel could not take that possibility into account. It is, however, sufficient to say that the Panel does not necessarily accept that, in the unusual circumstances of the present case, this consequence must follow. Whether it does or not is, however, a matter for the IOC and/or the IAAF to consider, and not for this Panel.

**Arbitration CAS 2004/A/704 Yang Tae Young and Korean Olympic Committee (KOC)/ International Gymnastics Federation (FIG), award of 21 October 2004**

Panel: The Honourable Michael J. Beloff (England), President; Mr Dirk-Reiner Martens (Germany); Mr Sharad Rao (Kenya)

The Court of Arbitration for Sport (CAS) has decided to dismiss the appeal filed by Yang Tae Young and supported by its National Olympic Committee, which means that the ranking of the men's individual gymnastics all-round event of the summer Olympic Games in Athens remains unchanged and that the medals already allocated remain in possession of their owners.



On 28 August 2004 a Korean gymnast for the Republic of Korea, lodged an application with the CAS ad hoc Panel (“the ad hoc Panel”) complaining about a marking error made on 18 August 2004 in respect to the parallel bars in the context of the Men’s Individual Gymnastics Artistic All-round Event Final (“the Event”). The start value for Yang was given as 9.9 instead of 10. It is asserted by Yang and *originally accepted* by FIG that but for the error, Yang would have received the gold medal and not the bronze, and the recipient of the gold medal, Hamm, a gymnast from the United States of America, the silver medal.

On 27 September 2004 a hearing was held at the Hotel Beau Rivage at Lausanne in the presence of the parties, their representatives and their witnesses.

It is common ground that KOC protested about the Start Value attributed to Yang for the parallel bars.

The Panel had to resolve the two following main issues:

- 1) Whether a protest concerning the controversial start value had been duly made by the Korean delegation before the end of the competition;
- 2) Whether the judges’ error, publicly recognised by FIG, can justify a re-evaluation of the scores after the end of the competition.

In its written decision the CAS has decided that:

- There is no doubt that a mechanism exists for reversing judging errors. The Chair of the Apparatus Jury has the power, with the approval of the Chair of the Competition Jury, to change “*an extremely incorrect score*” (FIG Code Points [CP] Article 10.1.(f)). The Technical Regulations (TR Reg. 7.8.1 & 2) provides also for the Superior Jury, on which the same person also sits, to supervise the competition where there is a grave error of judgment on the part of one or several judges to take such action as they consider necessary ( words large enough to embrace reversing marks as well as disciplining judges) ( and continually to review the marks awarded by judges. It is, however, notable that all the provisions refer to the role of the persons/bodies vis a vis a competition; the heading to Article 10(1) CP refers expressly to “*functions during competition*”

and TR Reg. 7.8. to responsibilities “*at official competitions*”. The Panel considers that any protest to be effective within the ambit of the FIG rules had to be made before the end of the competition. The first effective protest was made after the competition ended. The first incident relied on by Yang did not constitute a protest.

- The Panel held that courts may interfere only if an official’s field of play decision is tainted by fraud or arbitrariness or corruption; otherwise although a Court may have jurisdiction it will abstain as a matter of policy from exercising it. It was argued that the Judges field of play decision was arbitrary or in breach of duty thus engaging CAS’s supervisory powers. The basis for this contention was that in truth the 3 judge decision was the decision of one. Consultation between judges is expressly provided for in CP Article 1a 2(b) III. At worst (and this is unproven) Bango’s unsightedness for the initial sequence was the cause of ( at any rate ( his error. But neither Buitrago nor Beckstead were affected or infected by it: each properly had his own view.

- The Panel considers that it should abstain from correcting the results by reliance of an admitted error by an official so that the “field of play” jurisprudence is not directly engaged.

In the award, the arbitrators have stated : “*An error identified with the benefit of hindsight, whether admitted or not, cannot be a ground for reversing a result of a competition. ( ) However, quite apart from the consideration that no one can be certain how the competition in question would have turned out had the official’s decision been different, for a Court to change the result would on this basis still involve interfering with a field of play decision. Each sport may have within it a mechanism for utilising modern technology to ensure a correct decision is made in the first place (e.g. cricket with run-outs) or for immediately subjecting a controversial decision to a process of review (e.g. gymnastics;) but the solution for error, either way, lies within the framework of the sport’s own rules; it does not licence judicial or arbitral interference thereafter. If this represents an extension of the field of play doctrine, we tolerate it with equanimity.*”

The International Sports Law Journal



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by Prof. James A.R. Nafziger

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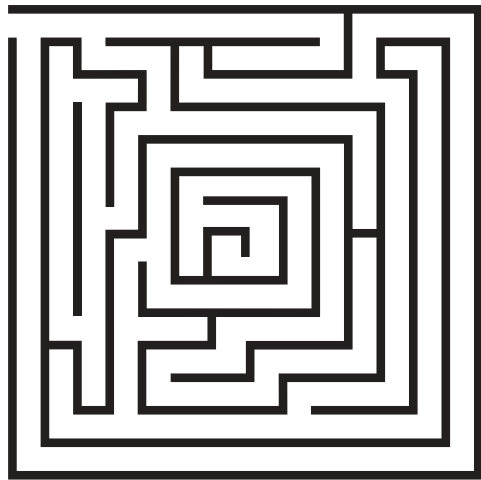
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